Court File No. CV-24-00718083-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF ANTIBE THERAPEUTICS INC. (the "Applicant")

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT, ANTIBE THERAPEUTICS INC.

April 17, 2024

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TO: **THE SERVICE LIST**

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Tab 1

CITATION: Re 4519922 Canada Inc. 2015 ONSC 124
COURT FILE NO.: CV-1410791-00CL
DATE: 20150112

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 4519922 CANADA INC.

BEFORE: Newbould J.

COUNSEL:

Robert I. Thornton, John T. Porter, Lee M. Nicholson and Asim Iqbal, for the Applicant

Harry M. Fogul, for 22 former CLCA partners

Orestes Pasparakis and Evan Cobb, for the Insurers

Avram Fishman and Mark Meland, for the German and Canadian Bank Groups, the Widdrington Estate and the Trustee of Castor Holdings Limited

James H. Grout, for 22 former CLCA partners

Chris Reed, for 8 former CLCA partners

Andrew Kent, for 5 former CLCA partners

Richard B. Jones, for one former CLCA partner

John MacDonald, for Pricewaterhouse Coopers LLP

James A. Woods, Sylvain Vauclair, Bogdan Catanu and Neil Peden, for Chrysler Canada Inc. and CIBC Mellon Trust Company

Jay A. Swartz, for the proposed Monitor Ernst & Young Inc.

HEARD: December 8, 2014 and January 6, 2015

ENDORSEMENT

[1] On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

[2] The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately $220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

[3] I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

[4] Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

Structure of Coopers & Lybrand Chartered Accounts

[5] The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

[6] CLCA is a partnership governed by the *Partnerships Act (Ontario*) with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

[7] In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in

September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

[8] In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

[9] Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

[10] Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately $1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share

valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

[11] Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of $1.5 billion.

[12] Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of $2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

[13] The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

[14] The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several

share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

[15] On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

[16] The Widdrington action has resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in the amount of $15,896,297.26 plus interest, a special fee cost award in the amount of $2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

[17] There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than $1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

[18] The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is

costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

[19] The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

[20] The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of $70 million. The total spent by all parties already amounts to at least $150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

Individual partner defendants

[21] Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

[22] Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed $5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

[23] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Re Stelco Inc*. (2004), 48

C.B.R. (4th) 299 (per Farley J.) ; leave to appeal to the C of A refused 2004 CarswellOnt 2936 (C.A.).

[24] The BIA defines "insolvent person" as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[25] The applicant submits that it is insolvent under all of these tests.

[26] The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

[27] At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million (the "Pre-71 Entitlements"); (ii) $16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of $18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of $2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

[28] The only asset of the applicant 451 on its balance sheet is its investment of $100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

[29] Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.

[30] I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

[31] This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Re Stelco, supra,* Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Re Muscletech Research & Development Inc.* (2006), 19 C.B.R. (5^{th}) 54 (per Farley J.).

[32] It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining $1.5 billion in

claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately $720 million in total, and the claim of the Trustee of CLCA of approximately $108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

[33] As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of $100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately $16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

[34] For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of $1.5 billion, it is highly likely that the $100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

[35] I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

(ii) Should an Initial Order be made and if so should it extend to CLCA?

[36] The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

[37] I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Re Lehndorff General Partner Ltd*. (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Canwest Publishing Inc*. (2010) 63 C.B.R. (5th) 115 per Pepall J. (as she then was) and *Re Calpine Energy Canada Ltd*. (2006), 19 C.B.R. (5th) 187 per Romaine J.

[38] The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

[39] Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several

reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

[40] Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

[41] To cite a few, in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 54 the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Re)*, 2013 QCCS 3777 arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp. (Re)* 2011 ONSC 7701 (Comm. List) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

[42] Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs

have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

[43] Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership (Re)*, 2014 ABQB 65 in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

[44] I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

[45] I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 that it is the good faith of an applicant in the CCAA proceedings that is the issue:

> Allegations … of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

[46] There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

[47] The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

[48] OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

[49] If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the

commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

[50] After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

[51] Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

[52] Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

[53] A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

[54] The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation

of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Re Lehndorff General Partner Ltd*. (1993), 17 C.B.R. (3d) 24 per Farley J.

[55] In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Re Montreal, Maine & Atlantique Canada Co.* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

[56] In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

(a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;

(b) contributions from a significant majority of the defendant partners;

(c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;

(d) contributions from CLCA's insurers and other defendants in the outstanding litigation;

(e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and

to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and

(f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

[57] This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

[58] Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

[59] It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to

impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266, at para 38, per O'Brien J.A.

[60] The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

[61] Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

[62] What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

[63] Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

[64] Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

[65] Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

> **1** Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

[66] At the conclusion of her decision, she stated:

> **3637** Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to

> remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

[67] In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

[68] The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

[69] Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

[70] A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

[71] In *Re Montreal, Maine & Atlantique Canada Co*., Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

> En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

[72] In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

[73] The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

[74] The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

[75] CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, *"Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World"*, in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

[76] Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

[77] Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

[78] The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

[79] So far as the costs of the committee are concerned, I see this as mainly a final cri de couer from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will

work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be $220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order an deny the right of CLCA to pay the costs of the creditors' committee.

[80] Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

[81] The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Newbould J.

Date: January 12, 2015

Tab 2

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited *Appellants*

v.

Nick Soulos *Respondent*

INDEXED AS: SOULOS *v.* KORKONTZILAS

File No.: 24949.

1997: February 18; 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees — Constructive trust — Agency — Fiduciary duties — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property — Remedies — Constructive trust — Agency — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants.

Fotios Korkontzilas, Panagiota Korkontzilas et Olympia Town Real Estate Limited *Appelants*

c.

Nick Soulos *Intimé*

RÉPERTORIÉ: SOULOS *c.* KORKONTZILAS

Nº du greffe: 24949.

1997: 18 février; 1997: 22 mai.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Fiducies et fiduciaires — Fiducie par interprétation — Mandat — Obligations fiduciaires — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

Immeuble — Réparation — Fiducie par interprétation — Mandat — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

K, un courtier en immeubles, a entamé des négociations au nom de S, son client, en vue d'acheter un immeuble commercial. Le vendeur a rejeté l'offre et présenté une contre-offre. K a rejeté la contre-offre, mais il est revenu à la charge. Le vendeur a informé K du montant qu'il accepterait, mais au lieu de transmettre cette information à S, K a pris des dispositions pour que son épouse achète l'immeuble. L'immeuble a ensuite été

S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The Court of Appeal, in a majority decision, reversed the judgment and ordered that the property be conveyed to S subject to appropriate adjustments.

Held (Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin and Major JJ.: The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed: (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands; (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant

transféré à K et à son épouse, à titre de copropriétaires. Alléguant un manquement à une obligation fiduciaire donnant lieu à une fiducie par interprétation, S a intenté une action contre K afin d'obtenir que l'immeuble lui soit transféré. Il a soutenu que l'immeuble avait une valeur particulière pour lui parce que son banquier en était le locataire et que le fait d'être le bailleur de son propre banquier était une source de prestige dans sa communauté. Il a renoncé à revendiquer des dommages-intérêts parce que la valeur marchande de l'immeuble avait diminué depuis que K l'avait acheté. Le juge du procès a conclu que K avait manqué à un devoir de loyauté envers S, mais il a statué que la fiducie par interprétation n'était pas la réparation appropriée parce que K ne s'était pas «enrichi». Dans une décision rendue à la majorité, la Cour d'appel a infirmé cette décision et ordonné le transfert de l'immeuble à S sous réserve des ajustements nécessaires.

Arrêt (les juges Sopinka et Iacobucci sont dissidents): Le pourvoi est rejeté.

Les juges La Forest, Gonthier, Cory, McLachlin et Major: La fiducie par interprétation est une institution ancienne et éclectique imposée par le droit non pas seulement pour remédier à l'enrichissement sans cause, mais aussi pour obliger des personnes se trouvant dans diverses situations à se conformer à des normes élevées en matière de confiance et de probité et les empêcher de conserver des biens qu'en toute «conscience» elles ne devraient pas être autorisées à garder. Bien qu'au cours des dernières décennies les tribunaux canadiens aient utilisé la fiducie par interprétation pour remédier à l'enrichissement sans cause, cet emploi ne devrait pas être interprété comme ayant fait disparaître du droit canadien la fiducie par interprétation dans les autres cas où l'on reconnaît depuis longtemps la possibilité d'y avoir recours. Au nom de la conscience, l'application de la fiducie par interprétation est reconnue tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif.

Les conditions suivantes doivent généralement être réunies avant qu'une fiducie par interprétation fondée sur un comportement fautif puisse être imposée: 1) le défendeur doit avoir été assujetti à une obligation en *equity* relativement aux actes qui ont conduit à la possession des biens; 2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est

in breach of his equitable obligation to the plaintiff; (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

Here K's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust. First, K was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted a breach of his equitable duty of loyalty. Second, the assets in K's hands resulted from his agency activities in breach of his equitable obligation to S. Third, a constructive trust is required to remedy the deprivation S suffered because of his continuing desire to own the particular property in question. A constructive trust is also required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty. Finally, there are no factors which would make imposition of a constructive trust unjust in this case.

Per Sopinka and Iacobucci JJ. (dissenting): The ordering of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. The trial judge's decision not to order such a remedy should be overturned on appeal only if the discretion has been exercised on the basis of an erroneous principle. The trial judge committed no such error here. He considered the moral quality of K's actions and there is thus no room for appellate intervention on this ground. He was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which is a correct statement of the law. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In this case, S withdrew his claim for damages. While compensatory damages were unavailable since no pecuniary

réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur; 3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel, soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; et 4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire.

En l'espèce, le manquement par K à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation. Premièrement, K était assujetti à une obligation en *equity* relativement à l'immeuble en cause. Son omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituaient un manquement au devoir de loyauté imposé par l'*equity*. Deuxièmement, K a obtenu la possession de cet immeuble par suite des actes accomplis à titre de mandataire et du manquement à l'obligation que lui imposait l'*equity* envers S. Troisièmement, une fiducie par interprétation est nécessaire pour remédier à l'appauvrissement que S a subi en raison de son désir persistant de devenir propriétaire de l'immeuble en question. Une fiducie par interprétation est également requise dans des cas comme celui-ci pour assurer le respect du devoir de loyauté auquel sont tenus les mandataires et autres personnes occupant des postes de confiance. Enfin, il n'y a pas en l'espèce de facteurs qui rendraient inéquitable l'imposition d'une fiducie par interprétation.

Les juges Sopinka et Iacobucci (dissidents): La décision d'imposer une fiducie par interprétation est discrétionnaire, et à ce titre, elle doit être abordée avec retenue par les tribunaux d'appel. La décision du juge de première instance de ne pas imposer une telle réparation ne peut être annulée en appel que si l'exercice du pouvoir discrétionnaire a été fondé sur un principe erroné. Il n'a pas commis une telle erreur dans la présente cause. Le juge du procès a tenu compte de la valeur morale du comportement de K et, par conséquent, un tribunal d'appel ne peut intervenir en se fondant sur ce motif. Il était d'avis que lorsque rien ne justifie que le tribunal accorde une fiducie par interprétation ou une autre réparation, la seule valeur morale de l'acte ne suffira pas à fonder une telle décision; cet énoncé du droit est juste. Le juge du procès a le pouvoir discrétionnaire d'imposer ou non la fiducie par interprétation et l'exercice de ce pouvoir ne devrait pas dépendre du nombre des répara-

loss was suffered, S could have sought exemplary damages. His decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust. The trial judge also considered deterrence, but held that it alone could not justify a remedy in this case.

Even if appellate review were appropriate, the remedy of a constructive trust was not available on the facts of this case. Recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment, and there was no enrichment, and therefore no unjust enrichment, here. The unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role and supported by specific consideration of the principles set out in *Lac Minerals*. Deterrence does not suggest that a constructive trust should be available even where there is no unjust enrichment. Despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not held it to be necessary where a tort duty or a contractual duty has been breached to order remedies even where no loss resulted. There is nothing which would justify treating breaches of fiduciary duties any differently in this regard. In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not have any significant effect on deterrence. Exemplary damages are available if deterrence is deemed to be particularly important, and an unscrupulous fiduciary has to reckon with the possibility that if there were gains in value to the property, he or she would be compelled to pay damages or possibly give up the property.

Cases Cited

By McLachlin J.

Referred to: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *White v. Central Trust Co.* (1984), 17 E.T.R. 78; *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919); *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v.*

tions possibles. En l'espèce, S a renoncé à réclamer des dommages-intérêts. Même s'il ne pouvait réclamer de dommages-intérêts compensatoires puisqu'il n'a subi aucune perte pécuniaire, S aurait pu réclamer des dommages-intérêts punitifs. Sa décision de ne pas le faire ne devrait pas jouer sur l'exercice du pouvoir discrétionnaire du juge du procès relativement à la fiducie par interprétation. Le juge du procès a également tenu compte de l'élément de dissuasion, mais il a conclu que celui-ci ne pouvait en soi justifier l'octroi d'une réparation en l'espèce.

Même si l'examen en appel était justifié, la fiducie par interprétation ne s'offrait pas aux parties, vu les faits de l'espèce. Il ressort très clairement de la jurisprudence récente de la Cour qu'une fiducie par interprétation ne peut être imposée que lorsqu'il y a enrichissement sans cause. En l'espèce, il n'y a eu aucun enrichissement et, par conséquent, aucun enrichissement sans cause. L'impossibilité d'imposer une fiducie par interprétation en l'absence d'un enrichissement sans cause est compatible avec le rôle réparateur de cette fiducie, et l'analyse des principes exposés dans l'arrêt *Lac Minerals* appuie également cette règle. La dissuasion n'exige pas que l'on puisse recourir à la fiducie par interprétation même en l'absence d'un enrichissement sans cause. Malgré des considérations de dissuasion, il est vrai que le droit privé ne prévoit habituellement pas de recours en cas d'absence de perte. Les tribunaux n'ont pas jugé qu'il était nécessaire d'accorder, même en l'absence de perte, une réparation à la suite d'un manquement à une obligation en matière délictuelle ou contractuelle. Rien ne justifie que les manquements aux obligations fiduciaires reçoivent un traitement particulier à cet égard. De toute façon, l'impossibilité d'invoquer la fiducie par interprétation en l'absence d'un enrichissement sans cause n'a aucune incidence importante quant à l'élément de dissuasion. Des dommages-intérêts punitifs pourraient être imposés si l'élément de dissuasion était jugé particulièrement important, et un fiduciaire sans scrupules devra avoir à l'esprit la possibilité que, si le bien prenait de la valeur, il devrait alors payer des dommages-intérêts ou peut-être même céder le bien.

Jurisprudence

Citée par le juge McLachlin

Arrêts mentionnés: *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *White c. Central Trust Co.* (1984), 17 E.T.R. 78; *Carl Zeiss Stiftung c. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; *Beatty c. Guggenheim Exploration Co.*, 122 N.E. 378 (1919); *Neale c. Willis* (1968), 19 P. & C.R. 836; *Binions c. Evans*, [1972] Ch. 359;

Palmer, [1972] 1 W.L.R. 1286; *Neste Oy v. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658; *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.Z.L.R. 180; *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101, 783; *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Meinhard v. Salmon*, 164 N.E. 545 (1928); *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729; *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269.

By Sopinka J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, reversing a decision of the Ontario Court (General Division) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, dismissing the respondent's action against the appellants for conveyance of a property. Appeal dismissed, Sopinka and Iacobucci JJ. dissenting.

Thomas G. Heintzman, Q.C., and *Darryl A. Cruz*, for the appellants.

David T. Stockwood, Q.C., and *Susan E. Caskey*, for the respondent.

The judgment of La Forest, Gonthier, Cory, McLachlin and Major JJ. was delivered by

MCLACHLIN J. —

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client may be required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

Paciocco, David M. «The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors» (1989), 68 *R. du B. can.* 315.
Scott, Austin Wakeman. *The Law of Trusts*, vol. V, 3rd ed. Boston: Little, Brown, 1967.
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Waters, D. W. M. *The Constructive Trust*: *The Case for a New Approach in English Law*. London: University of London, Athlone Press, 1964.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, qui a infirmé une décision de la Cour de l'Ontario (Division générale) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, rejetant l'action intentée par l'intimé contre les appelants en vue d'obtenir le transfert d'un immeuble. Pourvoi rejeté, les juges Sopinka et Iacobucci sont dissidents.

Thomas G. Heintzman, c.r., et *Darryl A. Cruz*, pour les appelants.

David T. Stockwood, c.r., et *Susan E. Caskey*, pour l'intimé.

Version française du jugement des juges La Forest, Gonthier, Cory, McLachlin et Major rendu par

LE JUGE MCLACHLIN —

I

Dans le cadre du présent pourvoi, notre Cour doit déterminer si l'on peut exiger de l'agent immobilier qui a acheté pour lui-même un immeuble au sujet duquel il a entamé des pourparlers au nom d'un client, qu'il remette l'immeuble à son client même si ce dernier ne peut pas prouver qu'il a subi une perte. La question juridique à trancher est celle de savoir s'il est possible d'imposer une fiducie par interprétation à l'égard d'un immeuble en l'absence d'un enrichissement du défendeur et d'un appauvrissement correspondant du demandeur. À mon avis, cette question doit recevoir une réponse affirmative.

II

The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

II

2 L'appelant, M. Korkontzilas, est un courtier en immeubles. L'intimé, M. Soulos, était son client. En 1984, M. Korkontzilas a repéré un immeuble commercial susceptible, selon lui, d'intéresser M. Soulos. En effet, M. Soulos était intéressé à acheter l'immeuble. Monsieur Korkontzilas a entamé des négociations au nom de M. Soulos. Il a offert une somme de 250 000 $ pour l'immeuble. Le vendeur, la Dominion Life, a rejeté l'offre et a présenté une contre-offre dans laquelle il exigeait une somme de 275 000 $. Monsieur Soulos a rejeté la contre-offre, mais il est revenu à la charge en offrant 260 000 $ ou 265 000 $. La Dominion Life a informé M. Korkontzilas qu'elle accepterait de vendre l'immeuble pour 265 000 $. Au lieu de transmettre cette information à M. Soulos comme il aurait dû le faire, M. Korkontzilas a pris des dispositions pour que son épouse, Panagiota Goutsoulas, achète l'immeuble sous le nom de Panagiot Goutsoulas. Panagiot Goutsoulas a ensuite transféré l'immeuble à Panagiota et Fotios Korkontzilas à titre de copropriétaires. Monsieur Soulos a demandé ce qu'il était advenu de l'immeuble. Monsieur Korkontzilas lui a dit de [TRADUCTION] «l'oublier», que le vendeur ne voulait plus le vendre, mais qu'il lui trouverait quelque chose de mieux. Monsieur Soulos a demandé à M. Korkontzilas s'il avait quelque chose à voir avec le changement d'idée du vendeur. La réponse de M. Korkontzilas a été négative.

3 En 1987, M. Soulos a appris que M. Korkontzilas avait acheté l'immeuble pour lui-même. Alléguant un manquement à une obligation fiduciaire donnant lieu à une fiducie par interprétation, il a intenté une action contre M. Korkontzilas afin d'obtenir que l'immeuble lui soit transféré. Il a soutenu que l'immeuble avait une valeur particulière pour lui parce que son banquier en était locataire et que le fait d'être le bailleur de son propre banquier était une source de prestige dans la communauté grecque à laquelle il appartenait. Toutefois, M. Soulos a renoncé à revendiquer des dommages-intérêts parce que la valeur marchande de l'immeuble avait, en réalité, diminué depuis que M. Korkontzilas l'avait acheté.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting the vendor's response to Mr. Soulos. This relationship of agency was not terminated when the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

Le juge du procès a conclu que M. Korkontzilas avait manqué à un devoir de loyauté envers M. Soulos, mais il a statué que la fiducie par interprétation n'était pas la réparation appropriée parce que M. Korkontzilas avait acquis l'immeuble à sa valeur marchande et ne s'était donc pas «enrichi»: (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (ci-après cité au O.R.). La décision a été infirmée en appel, le juge Labrosse étant dissident: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (ci-après cité au O.R.).

Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi. Selon moi, la doctrine de la fiducie par interprétation s'applique et exige que M. Korkontzilas transfère à M. Soulos l'immeuble acquis de manière irrégulière.

III

La première question à trancher est celle de savoir quelles étaient les obligations de M. Korkontzilas à l'égard de M. Soulos en ce qui a trait à l'immeuble. Cette question nous ramène aux conclusions du juge du procès. Celui-ci a rejeté l'argument de M. Soulos selon lequel il existait une entente obligeant M. Korkontzilas à lui proposer en exclusivité tous les immeubles dans la région de Danforth avant de les offrir à d'autres acheteurs. Il a toutefois conclu que M. Korkontzilas était devenu le mandataire de M. Soulos lorsqu'il a préparé l'offre que M. Soulos a signée relativement à l'immeuble en cause. Il a en outre considéré que ce mandat comportait l'obligation de faire part à M. Soulos de la réponse du vendeur. Le mandat n'avait pas pris fin lorsque le vendeur a présenté sa contre-offre. Le juge du procès a donc conclu que M. Korkontzilas était, pendant toute la période pertinente, le mandataire de M. Soulos.

Le juge du procès a ajouté que les rapports entre le mandant et le mandataire étaient de nature fiduciaire. Il a conclu qu'en qualité de mandataire de M. Soulos, M. Korkontzilas avait un «devoir de loyauté» envers celui-ci. Il a estimé que M. Korkontzilas avait manqué à ce devoir de loyauté en n'informant pas M. Soulos de la contre-offre du vendeur.

The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that

La Cour d'appel n'a pas remis en question ces conclusions. Les juges majoritaires n'étaient toutefois pas du même avis que le juge du procès quant aux conséquences du manquement par M. Korkontzilas à son devoir de loyauté. 8

IV

Cela nous amène à la principale question en litige dans le présent pourvoi: quelle réparation, s'il en est, le droit offre-t-il à M. Soulos par suite du manquement au devoir de loyauté commis par M. Korkontzilas lorsqu'il a acquis l'immeuble en question au lieu de faire part à son mandant, M. Soulos, du prix que le vendeur accepterait? 9

Au procès, M. Soulos a seulement demandé le transfert de l'immeuble sur paiement de la somme versée par M. Korkontzilas, sous réserve des ajustements nécessaires par suite des changements de valeur intervenus et des pertes subies depuis l'achat de l'immeuble. Il s'est désisté de sa demande de dommages-intérêts au début de la poursuite, ce qui n'est pas étonnant vu que M. Korkontzilas avait acquis l'immeuble pour sa valeur marchande et qu'il avait en fait perdu de l'argent au cours de la période pendant laquelle il en avait été propriétaire. Quoiqu'il en soit, M. Soulos voulait toujours devenir propriétaire de l'immeuble. 10

Monsieur Soulos a soutenu que l'immeuble devait lui être remis en vertu de la doctrine de la fiducie par interprétation reconnue en *equity*. Le juge du procès a rejeté cette prétention pour le motif qu'il ne pouvait y avoir fiducie par interprétation que si le défendeur s'était enrichi sans cause par suite de sa conduite fautive. L'impossibilité d'indemniser M. Soulos au moyen de dommages-intérêts n'avait aucune importance: [TRADUCTION] «Il serait anormal de reconnaître l'existence d'une fiducie par interprétation parce que le recours aux dommages-intérêts n'est pas satisfaisant, le demandeur n'ayant subi aucun préjudice» (à la p. 69). De plus, [TRADUCTION] «il semble tout simplement exagéré et inapproprié d'accorder la réparation draconienne que constitue la fiducie par interprétation lorsque le demandeur n'a subi aucun préjudice» (à la p. 69). Le juge du procès a ajouté qu'il 11

Mr. Soulos had mitigated his loss by buying other properties.

n'y avait pas lieu d'accorder des dommages-intérêts symboliques étant donné qu'il y avait eu renonciation aux dommages-intérêts et que M. Soulos avait atténué sa perte en achetant d'autres immeubles.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

Les juges majoritaires de la Cour d'appel étaient d'un avis différent. Le juge Carthy a statué que la décision d'accorder une réparation en *equity* était discrétionnaire et dépendait de l'ensemble des faits invoqués devant le tribunal. Selon lui, le juge du procès avait toutefois exercé son pouvoir discrétionnaire en se fondant sur un principe erroné. Le juge Carthy a affirmé que la valeur morale de la conduite du défendeur pouvait dicter l'intervention du tribunal. Dans la plupart des opérations immobilières, une personne agit gracieusement pour l'acheteur tout en demandant une commission au vendeur. Les obligations fiduciaires de l'agent seraient dénuées de sens si celui-ci pouvait tout simplement acquérir l'immeuble à sa valeur marchande et nier ensuite qu'il est fiduciaire par interprétation parce qu'aucun préjudice n'a été subi. Dans de telles circonstances, les tribunaux d'*equity* [TRADUCTION] «accordent une réparation fondée sur la propriété pour préserver l'intégrité des règles de droit dont ils surveillent l'application» (à la p. 261). Le juge Carthy a admis que le motif pour lequel M. Soulos désirait l'immeuble pouvait sembler [TRADUCTION] «fantaisiste». Il a toutefois conclu que, si on l'examine dans le contexte général des opérations immobilières, le recours à la fiducie par interprétation dans ces circonstances vise un [TRADUCTION] «objectif salutaire». Elle permet au tribunal de veiller à ce que ne se reproduise pas un comportement immoral qui risque d'ébranler la relation de confiance sur laquelle repose la profession. Les juges majoritaires ont donc ordonné le transfert de la propriété de l'immeuble sous réserve des ajustements nécessaires.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The major-

La divergence entre le juge du procès et les juges majoritaires de la Cour d'appel peut se résumer de la manière suivante. Le juge du procès était d'avis qu'en l'absence d'une perte établie, M. Soulos n'avait aucun droit d'action. Selon lui, il serait «tout simplement exagéré et inapproprié» d'accorder, en l'absence d'une perte, la fiducie par

ity in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

interprétation. Par contre, les juges majoritaires de la Cour d'appel ont adopté une conception plus large du champ d'application de la fiducie par interprétation. Ils ont statué qu'il pouvait y avoir une fiducie par interprétation exigeant la rétrocession du bien en l'absence d'une perte établie afin de sanctionner l'acte répréhensible de l'agent et de préserver le lien de confiance sur lequel repose la profession du courtage immobilier et, par conséquent, «l'intégrité des règles de droit» dont les tribunaux d'*equity* sont chargés de surveiller l'application.

The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

14 Le pourvoi expose donc deux conceptions différentes du rôle et de la portée de la fiducie par interprétation. Les partisans de la première conception considèrent que la fiducie par interprétation ne peut être accordée que dans le cas d'une perte clairement établie. Selon eux, il ne peut y avoir de fiducie par interprétation que s'il y a «enrichissement» du défendeur et «appauvrissement» correspondant du demandeur. Même s'ils ne nient pas que la fiducie par interprétation peut s'appliquer pour empêcher l'enrichissement sans cause, les partisans de la seconde conception ne la confinent pas dans ce rôle. Selon eux, la fiducie par interprétation peut s'appliquer en l'absence d'une perte établie pour condamner une conduite fautive et préserver l'intégrité du lien de confiance qui est à la base même d'un bon nombre de nos professions et institutions.

It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

15 Je suis d'avis que cette seconde conception plus large de la fiducie par interprétation devrait l'emporter. Elle concorde davantage avec l'évolution de la doctrine de la fiducie par interprétation, la théorie sur laquelle repose la fiducie par interprétation, et les objectifs que cette fiducie vise dans notre système juridique.

V

V

The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate

16 Les appelants soutiennent que le point de vue adopté par notre Cour relativement à la fiducie par interprétation dans des arrêts tels *Pettkus c. Becker*, [1980] 2 R.C.S. 834, repose exclusivement sur l'enrichissement sans cause. Par conséquent, ils font valoir qu'une fiducie par interprétation ne

no deprivation and corresponding enrichment of the defendant.

peut pas être imposée dans les cas où, comme en l'espèce, le demandeur ne peut pas établir un appauvrissement ainsi qu'un enrichissement correspondant du défendeur.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

L'évolution des règles de droit relatives à la fiducie par interprétation n'étaye pas un tel point de vue. Elle semble plutôt indiquer que la fiducie par interprétation est une institution ancienne et éclectique imposée par le droit non pas seulement pour remédier à l'enrichissement sans cause, mais aussi pour obliger des personnes se trouvant dans diverses situations à se conformer à des normes élevées en matière de confiance et de probité et les empêcher de conserver des biens qu'en toute «conscience» elles ne devraient pas être autorisées à garder. Cette doctrine avait pour but non seulement d'assurer que justice soit rendue dans l'affaire dont le tribunal était saisi, mais aussi de protéger les liens de confiance ainsi que les institutions qui en dépendent. Il a été possible d'atteindre ces objectifs en considérant que la personne détenait le bien à titre de fiduciaire pour le bénéfice de la personne lésée, même en l'absence d'une fiducie au sens strict créée par la volonté des parties. En Angleterre, la fiducie ainsi créée était appelée fiducie réelle ou «institutionnelle». Aux États-Unis, et récemment au Canada, il est question dans la jurisprudence de la possibilité de demander la fiducie par interprétation à titre de réparation.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which . . . the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations . . . on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development

Même si elle reconnaît des cas précis où s'applique la fiducie par interprétation, la théorie générale du droit anglais ancien n'offre aucun concept limitatif ou unificateur satisfaisant pour la fiducie par interprétation. Comme l'indique D. W. M. Waters dans son ouvrage intitulé *The Constructive Trust* (1964), à la p. 39, la fiducie par interprétation [TRADUCTION] «n'a jamais été autre chose qu'une expression pratique et utile servant à décrire ou à exprimer les obligations des parties». La fiducie par interprétation était utilisée en droit anglais [TRADUCTION] «pour établir un lien entre des situations variées . . . du fait que les obligations imposées par le droit dans de tels cas pouvaient à certains égards être assimilées aux obliga-

of the Remedial Constructive Trust" (1982-84), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra.*

The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra*, at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra*, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, *supra*, at pp. 322-23.

Canadian courts have never abandoned the principles of constructive trust developed in England.

tions qui étaient imposées à un fiduciaire exprès»: J. L. Dewar, «The Development of the Remedial Constructive Trust» (1982-84), 6 *Est. & Tr. Q.* 312, à la p. 317, citant Waters, précité.

19 Parmi les cas où la fiducie par interprétation a été reconnue en Angleterre, notons ceux où la fiducie découlait d'un manquement à une obligation fiduciaire ainsi que ceux où elle était imposée pour éviter que l'absence d'un écrit ne prive une personne de ses droits de propriété, pour empêcher un acheteur ayant une connaissance préalable de retenir frauduleusement des biens en fiducie ou pour assurer l'exécution des fiducies secrètes et des testaments mutuels. Voir Dewar, précité, à la p. 334. Les rapports fiduciaires sous-tendent une bonne partie des règles de droit anglais applicables à la fiducie par interprétation. Comme l'écrit Waters, précité, à la p. 33: [TRADUCTION] «les rapports fiduciaires sont manifestement inhérents à la fiducie par interprétation pour tout ce qui touche ou presque son application». Par ailleurs, ce ne sont pas tous les manquements à des obligations fiduciaires qui donnent naissance à une fiducie par interprétation. Comme le dit L. S. Sealy dans «Fiduciary Relationships», [1962] *Camb. L.J.* 69, à la p. 73:

> [TRADUCTION] Selon nous, le terme «fiduciaire» *ne* définit *pas* une seule catégorie de rapports auxquels s'applique un ensemble de règles et de principes déterminés. Chacun des recours prévus par l'*equity* ne peut être exercé que dans un nombre limité de situations fiduciaires; le simple fait de déclarer que Jean a des rapports fiduciaires avec moi signifie simplement que sa situation est à certains égards assimilable à celle d'un fiduciaire; cela ne permet pas de conclure qu'il est possible d'appliquer un principe ou un recours fiduciaire donné. [En italique dans l'original.]

L'absence de rapports fiduciaires traditionnels n'empêche pas nécessairement non plus de conclure à l'existence d'une fiducie par interprétation; le caractère fautif de la conduite peut suffire pour constituer un manquement à une obligation assimilable à une obligation fiduciaire: voir Dewar, précité, aux pp. 322 et 323.

20 Les tribunaux canadiens n'ont jamais abandonné les principes de la fiducie par interprétation qui ont

They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, *supra*.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus v. Becker* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus v. Becker*" (1982), 16 *U.B.C. L. Rev.* 155, at p. 170, describes the ratio of *Pettkus v. Becker* as "a modest enough proposition". He goes on: "It would be wrong . . . to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989), 68 *Can. Bar Rev.* 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

été élaborés en Angleterre. Ils les ont toutefois modifiés. Plus particulièrement, au cours des dernières décennies, les tribunaux canadiens ont utilisé la fiducie par interprétation pour remédier à l'enrichissement sans cause. Il est désormais établi qu'une fiducie par interprétation peut être imposée en l'absence d'un comportement fautif, tel le manquement à une obligation fiduciaire, lorsque trois éléments sont réunis: (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de tout motif juridique à l'enrichissement: *Pettkus c. Becker*, précité.

L'affirmation par notre Cour, dans des arrêts comme *Pettkus c. Becker*, que la fiducie par interprétation peut être accordée pour prévenir l'enrichissement sans cause, ne devrait pas être interprétée comme ayant fait disparaître du droit canadien la fiducie par interprétation dans les autres cas où l'on reconnaît depuis longtemps la possibilité d'y avoir recours. Les termes utilisés ne permettent pas de faire une telle affirmation. Pour A. J. McClean, «Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus v. Becker*» (1982), 16 *U.B.C. L. Rev.* 155, le *ratio* de l'arrêt *Pettkus c. Becker* est [TRADUCTION] «un énoncé assez modéré» (à la p. 170). Il ajoute: [TRADUCTION] «Il serait erroné . . . de l'interpréter comme on interpréterait le texte d'une loi et de limiter l'évolution du droit».

D'autres auteurs reconnaissent que l'imposition de la fiducie par interprétation pour remédier à l'enrichissement sans cause n'empêche pas de conclure à l'existence d'une telle fiducie dans d'autres situations. Dans son article intitulé «The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors» (1989), 68 *R. du B. can.* 315, à la p. 318, D. M. Paciocco dit qu' [TRADUCTION] «il faut établir une distinction entre la fiducie par interprétation qui est utilisée pour remédier à l'enrichissement sans cause et les autres types de fiducies par interprétation qui existaient en droit canadien avant 1980». Paciocco affirme que l'enrichissement sans cause n'est pas une condition essentielle à l'existence d'une fiducie par interprétation (à la p. 320):

. . . in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

[TRADUCTION] . . . dans la catégorie traditionnelle la plus large, soit la fiducie par interprétation, il n'est pas nécessaire qu'il y ait appauvrissement du demandeur. La fiducie par interprétation est imposée pour relever le degré de moralité sur le marché en général, les bénéficiaires de certaines de ces fiducies recevant ce que l'on ne peut décrire que comme un profit fortuit.

Dewar, *supra*, holds a similar view (at p. 332):

23 Dewar, précité, a un point de vue analogue (à la p. 332):

While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker* will profoundly influence the future development of Canadian trust law.

[TRADUCTION] Même s'il est peu probable que les tribunaux canadiens abandonnent les notions et les classifications relatives à la fiducie par interprétation appliquée en Angleterre, nous croyons que l'adoption par la Cour suprême du Canada dans l'arrêt *Pettkus c. Becker* d'une fiducie par interprétation de style américain influencera profondément l'évolution du droit des fiducies canadien.

Dewar, *supra*, at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, though there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

Dewar, précité, ajoute aux pp. 332 et 333: [TRADUCTION] «En droit anglais et en droit canadien, il n'y a aucune unanimité sur les cas précis dans lesquels s'applique la fiducie par interprétation même s'il est admis qu'il existe certaines catégories générales de situations qui donnent lieu à une telle fiducie». L'une de ces situations est celle où l'on tente de remédier à un comportement frauduleux ou déloyal.

M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Pettkus v. Becker*, *supra*, which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B.C.A.), at p. 90, cited by Litman, *supra*, the courts "will

24 Dans «The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust» (1988), 26 *Alta. L. Rev*. 407, à la p. 414, M. M. Litman considère que l'enrichissement sans cause constitue un outil utile pour rationaliser les catégories traditionnelles de fiducies par interprétation. Il est néanmoins d'avis qu'on commettrait une [TRADUCTION] «erreur importante» en écartant tout simplement les principes traditionnels de la fiducie par interprétation. Il cite diverses décisions canadiennes, postérieures à l'arrêt *Pettkus c. Becker*, précité, qui imposent des fiducies par interprétation pour remédier à l'acquisition irrégulière de biens, même en l'absence d'un enrichissement sans cause et d'un appauvrissement correspondant, et il conclut que la fiducie par interprétation [TRADUCTION] «ne peut pas toujours s'expliquer par le modèle de la fiducie par interprétation fondée sur l'enrichissement sans cause» (p. 416). En résumé, le droit anglais ancien fait encore partie du droit canadien contemporain et oriente son évolution. Comme le dit le juge La Forest (maintenant juge

not venture far onto an uncharted sea when they can administer justice from a safe berth".

de notre Cour) dans l'arrêt *White c. Central Trust Co.* (1984), 17 E.T.R. 78 (C.A.N.-B.), à la p. 90, cité par Litman, précité, les tribunaux [TRADUCTION] «ne s'aventureront pas dans des domaines inconnus lorsqu'ils peuvent administrer la justice en s'en tenant à des principes sûrs».

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

Je conclus que les règles de droit relatives à la fiducie par interprétation dans les provinces de common law du Canada visent les cas où les tribunaux d'*equity* anglais ont traditionnellement conclu à l'existence d'une fiducie par interprétation de même que les cas d'enrichissement sans cause reconnus dans la jurisprudence canadienne récente.

VI

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, *supra*, at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust". McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee *de son tort.* A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

Divers principes ont été proposés pour donner cohésion aux cas où le droit anglais permettait de conclure à l'existence d'une fiducie par interprétation. Dans l'ouvrage intitulé *The Law of Restitution* (3e éd. 1986), à la p. 61, R. Goff et G. Jones sont d'avis que l'enrichissement sans cause est l'un de ces principes. Toutefois, à moins que le terme «enrichissement» ne soit interprété de façon très large de manière à n'être pas limité aux réclamations pécuniaires, il n'explique pas tous les cas où la fiducie par interprétation a été appliquée. Comme le dit McClean, précité, à la p. 168: [TRADUCTION] «aussi satisfaisante que soit [la théorie de l'enrichissement sans cause] pour les autres aspects du droit applicable en matière de restitution, sa portée n'est peut-être pas assez large pour englober tous les types de fiducies par interprétation». McClean aborde ensuite la situation soulevée par le présent pourvoi: [TRADUCTION] «Dans certains cas, lorsqu'une telle fiducie est imposée, il se peut que le fiduciaire n'ait obtenu aucun avantage; ce pourrait être le cas, par exemple, lorsque la personne est déclarée fiduciaire *de son tort*. Le demandeur n'a peut-être pas toujours subi une perte. McClean conclut (aux pp. 168 et 169): [TRADUCTION] «Par conséquent, l'enrichissement sans cause ne peut pas expliquer de façon satisfaisante toutes les catégories de demandes de restitution».

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at

McClean, comme d'autres, considère que le principe le plus satisfaisant pour fonder la théorie de l'enrichissement sans cause est le concept de la

"the very foundation of equitable jurisdiction" (p. 169):

"Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, *supra*, adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.), at p. 301. Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919), at p. 380:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder

«conscience» qui est à la [TRADUCTION] «base même de la compétence en *equity*» (à la p. 169):

[TRADUCTION] La «conscience tranquille» ainsi que «la justice naturelle et l'*equity*» étaient deux des critères mentionnés par lord Mansfield dans l'arrêt *Moses c. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.), dans une action en recouvrement des sommes reçues, le prototype des demandes de restitution en common law. Le concept de la «conscience» a des assises solides en *equity* et un certain fondement en common law; il est suffisamment large pour s'appliquer aux fiducies par interprétation lorsque le défendeur n'a obtenu aucun avantage ou lorsque le demandeur n'a pas subi de perte. Par conséquent, on peut dire qu'il s'agit dans le cas du droit de la restitution d'un fondement aussi solide sinon meilleur que l'enrichissement sans cause.

28 D'autres experts reconnaissent comme McClean que le concept de la conscience peut s'avérer utile pour assurer la cohésion des différentes formes de fiducie par interprétation. Litman, précité, signale la fiducie fondée sur [TRADUCTION] «la justice naturelle et l'*equity*» ou la «conscience» [TRADUCTION] «qui constitue un recours pour les préjudices débordant le cadre de l'enrichissement sans cause», et il ajoute que l'on peut considérer qu'il s'agit du fondement des diverses fiducies institutionnelles ainsi que de la fiducie par interprétation en matière de restitution pour enrichissement sans cause (aux pp. 415 et 416).

29 De nombreux juristes sont d'accord pour considérer la conscience comme le concept unificateur à la base même de la fiducie par interprétation. Selon lord juge Edmund Davies, l'idée d'un «manque de probité» chez la personne à laquelle la fiducie par interprétation est imposée constitue [TRADUCTION] «une pierre de touche utile pour déterminer les circonstances dans lesquelles il y aurait fiducie par interprétation»: *Carl Zeiss Stiftung c. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.), à la p. 301. Le juge Cardozo a approuvé en termes similaires le thème unificateur de la conscience dans la décision *Beatty c. Guggenheim Exploration Co.*, 122 N.E. 378 (1919), à la p. 380:

[TRADUCTION] La fiducie par interprétation est la formule utilisée pour exprimer la conscience de l'*equity*. Lorsque des biens ont été acquis dans des circonstances

of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286. In *Binions*, referring to the statement by Cardozo J., *supra*, Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In *Hussey*, he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in *Neste Oy v. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658.

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.Z.L.R. 180. Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in *Neste Oy*, *supra*, at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any

telles que le titulaire du titre en common law ne peut pas, en toute conscience, en retenir l'intérêt bénéficiaire, l'*equity* fait de cette personne un fiduciaire. [Je souligne.]

Lord Denning, maître des rôles, a exprimé un point de vue analogue dans une série de décisions où la fiducie par interprétation a été imposée pour remédier à un acte fautif: voir *Neale c. Willis* (1968), 19 P. & C.R. 836; *Binions c. Evans*, [1972] Ch. 359; *Hussey c. Palmer*, [1972] 1 W.L.R. 1286. Dans *Binions*, faisant référence au juge Cardozo, précité, lord Denning a dit que le tribunal imposerait une fiducie par interprétation [TRADUCTION] «pour la simple raison qu'il serait tout à fait injuste que les demandeurs expulsent le défendeur en violation de la clause aux termes de laquelle ils ont occupé les locaux» (p. 368). Dans *Hussey*, il a dit ce qui suit au sujet de la fiducie par interprétation (aux pp. 1289 et 1290): [TRADUCTION] «Quel que soit le terme employé pour la décrire, il s'agit d'une fiducie imposée en vertu du droit lorsque la justice et la conscience l'exigent».

De nombreux auteurs anglais ont remis en question les déclarations extensives de lord Denning au sujet de la fiducie par interprétation. Néanmoins, il n'est pas seul dans son camp: le juge Bingham a également indiqué dans la décision *Neste Oy c. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658, que le concept de la conscience était le fondement d'une intervention en *equity*.

Dans l'arrêt *Elders Pastoral Ltd. c. Bank of New Zealand*, [1989] 2 N.Z.L.R. 180, la Cour d'appel de la Nouvelle-Zélande semble aussi avoir accepté que la conscience pouvait justifier l'imposition d'une fiducie par interprétation. Le président Cooke, aux pp. 185 et 186, a cité le passage suivant des motifs du juge Bingham dans le jugement *Neste Oy*, précité, à la p. 666:

> [TRADUCTION] Compte tenu de la situation [des défendeurs] lorsque le dernier paiement a été reçu, tout administrateur raisonnable et honnête de cette compagnie (ou les administrateurs actuels s'ils l'avaient su) aurait, j'en suis certain, pris des dispositions, sans hésitation ni retard, pour que cette somme soit remboursée aux demandeurs. Il aurait été quasiment déloyal de la part [des défendeurs] de tirer avantage du paiement, et il

ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred. [Emphasis added.]

aurait semblé contraire à toute notion ordinaire d'équité que l'ensemble des créanciers puisse profiter du fait qu'un paiement a été fait à un moment où il n'y avait plus aucune contrepartie. Certes, l'insolvabilité entraîne toujours des pertes et il est impossible d'atteindre la perfection en matière d'équité. La banque et d'autres créanciers ont des réclamations légitimes. Il me semble néanmoins qu'au moment de la réception du paiement, [les défendeurs] ne pouvaient en toute conscience retenir cet argent et que, par conséquent, il faut conclure à l'existence d'une fiducie par interprétation. [Je souligne.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." *Elders* has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101, 783; J. Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992-95), 7 *Auck. U. L. Rev.* 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806, the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

Le président Cooke a tout simplement conclu (à la p. 186): [TRADUCTION] «Je ne pense pas qu'en toute conscience, les courtiers puissent conserver cet argent.» On a considéré que la décision *Elders* appuyait la thèse voulant que, même en l'absence de rapports fiduciaires ou d'enrichissement sans cause, le comportement contraire à la conscience pouvait entraîner l'imposition d'une fiducie par interprétation à titre de réparation: voir *Mogal Corp. c. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101, 783; J. Dixon, «The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment», (1992-95), 7 *Auck. U. L. Rev.* 147, aux pp. 157 et 158. Même si dans *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806, le Comité judiciaire du Conseil privé a rejeté la création d'une fiducie par interprétation pour satisfaire aux exigences de la conscience, il n'en demeure pas moins que la conscience est depuis le début un thème sous-jacent à la fiducie par interprétation.

Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 453: 33

La conscience concerne non seulement l'équité entre les parties devant le tribunal, mais aussi le souci plus général des tribunaux de maintenir l'intégrité d'institutions tels les rapports fiduciaires que les tribunaux d'*equity* étaient chargés de surveiller. Comme le dit le juge La Forest dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 453:

The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra*; see also *Canadian Aero*, *supra*, at pp. 607 and 610; *Canson*, *supra*, at p. 547, *per* McLachlin J. In this way the law is able to monitor a given relationship society views as socially

Le droit des obligations fiduciaires a toujours comporté un élément de dissuasion. On peut déjà le constater dans le passage susmentionné de l'arrêt *Keech*, précité; voir aussi *Canadian Aero*, précité, aux pp. 607 et 610; *Canson*, précité, à la p. 547, le juge McLachlin. Le droit est ainsi en mesure de surveiller une relation que la

useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

société considère comme utile, tout en écartant la nécessité d'une réglementation officielle qui risquerait d'en réduire l'utilité sociale.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

La fiducie par interprétation imposée pour manquement à une obligation fiduciaire permet non seulement de rendre justice aux parties comme l'exige la conscience, mais aussi d'obliger les fiduciaires et autres personnes occupant des postes de confiance à se conformer aux normes élevées en matière de confiance et de probité nécessaires pour assurer l'efficacité des institutions commerciales et autres institutions sociales.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

Il ressort qu'une fiducie par interprétation peut être imposée lorsque la conscience l'exige. L'examen portant sur les exigences de la conscience doit tenir compte des situations où des fiducies par interprétation ont été reconnues dans le passé. Il est guidé aussi par les deux raisons pour lesquelles les fiducies par interprétation ont été traditionnellement imposées: rendre justice aux parties et préserver l'intégrité d'institutions fondées sur des rapports assimilables à ceux qui existent dans le cadre des fiducies. Enfin, l'examen se fait en fonction de l'absence d'indication qu'une fiducie par interprétation aurait un effet inéquitable ou injuste sur le défendeur ou sur des tiers, ce dont l'*equity* a toujours tenu compte. Les réparations reconnues en *equity* sont souples; elles sont accordées en fonction de ce qui est juste compte tenu de toutes les circonstances de l'espèce.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The

La conscience comme élément unificateur dans les différents cas où il est possible de conclure à une fiducie par interprétation a l'inconvénient d'être très générale. Mais tout concept capable d'englober les diverses circonstances dans lesquelles une fiducie par interprétation peut être imposée doit obligatoirement l'être. Ce sont les circonstances particulières des cas où les juges ont conclu dans le passé à l'existence d'une fiducie par interprétation qui viennent préciser le concept général. Le juge à qui l'on demande d'imposer une fiducie par interprétation tiendra compte non seulement de ce qui pourrait sembler «équitable» dans un sens général, mais aussi des autres cas où les tribunaux ont conclu à l'existence d'une fiducie par interprétation. L'objectif consiste simplement à

goal is but a reasoned, incremental development of the law on a case-by-case basis.

The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, *The Law of Restitution*, *supra*, at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust

assurer l'évolution logique et progressive du droit, cas par cas.

36 On peut considérer que les cas dont le juge doit tenir compte pour déterminer si la conscience exige l'imposition d'une fiducie par interprétation entrent dans deux catégories générales. La première catégorie concerne les biens obtenus par suite de la conduite fautive du défendeur, notamment le manquement à une obligation fiduciaire ou le manquement à un devoir de loyauté. Les fiducies institutionnelles anglaises traditionnelles entrent généralement dans cette catégorie sans toutefois être les seules à en faire partie (du moins au Canada). La seconde catégorie concerne les cas où le défendeur n'a pas obtenu les biens de manière irrégulière, mais où il s'enrichirait sans cause au détriment du demandeur si on lui permettait de les conserver. Les deux catégories ne sont pas mutuellement exclusives. L'acquisition de biens d'une manière irrégulière sera souvent associée à l'enrichissement sans cause, et vice versa. Toutefois, l'un ou l'autre de ces éléments peut suffire à justifier l'imposition d'une fiducie par interprétation.

37 En Angleterre, le droit ne reconnaît pas encore formellement la fiducie par interprétation accordée à titre de réparation dans les cas d'enrichissement sans cause, même si de nombreuses déclarations de lord Denning vont dans ce sens. Toutefois, les tribunaux concluent bel et bien à l'existence de la fiducie par interprétation dans des circonstances analogues à celles dont il est question en l'espèce. L'*equity* reconnaît traditionnellement qu'il est juste d'imposer une fiducie par interprétation pour un simple manquement à un devoir de loyauté. Le droit anglais est résumé par Goff et Jones dans *The Law of Restitution*, précité, à la p. 643:

> [TRADUCTION] Il se peut que le fiduciaire abuse de sa position de confiance en utilisant à son profit un contrat, une acquisition de biens ou une autre occasion d'affaires au détriment de son bénéficiaire. S'il le fait, il est réputé détenir en fiducie pour le bénéficiaire les avantages ainsi détournés.

P. Birks est d'accord avec ce principe dans l'ouvrage intitulé *An Introduction to the Law of Restitution* (1985) (à la p. 330 et aux pp. 338 à 343). Il indique que les conflits d'intérêts sont souvent à

enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

l'origine de la fiducie par interprétation accordée en l'absence d'enrichissement sans cause. Birks fait une distinction entre les actes fautifs réprimés en vue de prévenir l'enrichissement et ceux qui sont condamnés afin de faire obstacle à un préjudice (p. 340). Un fiduciaire en conflit d'intérêts représente un risque de préjudice réel ou potentiel, même si son inconduite ne l'enrichit pas toujours. Une fiducie par interprétation peut en conséquence être ordonnée.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of *Scott on Trusts* (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others": *Meinhard v. Salmon*, 164 N.E. 545 (1928), at p. 548, cited in *Scott on Trusts*, *supra*, at p. 3412. *Scott on Trusts*, *supra*, at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

Les deux catégories de fiducie par interprétation sont reconnues aux États-Unis; même si l'enrichissement sans cause est parfois invoqué aux États-Unis pour justifier la fiducie par interprétation, en fait, les tribunaux y reconnaissent qu'il est possible d'avoir recours à la fiducie par interprétation pour obtenir la remise du bien acquis par suite d'une conduite fautive en l'absence d'un enrichissement sans cause du défendeur et d'un appauvrissement correspondant du demandeur. Ainsi, les auteurs de *Scott on Trusts* (3e éd. 1967), vol. V, à la p. 3410, affirment que la fiducie par interprétation [TRADUCTION] «peut être invoquée lorsque le bien est obtenu par erreur ou par fraude, ou à la suite d'une autre conduite fautive». Ou comme l'a dit le juge Cardozo, [TRADUCTION] «[u]ne fiducie par interprétation est donc le mécanisme de réparation en vertu duquel l'intérêt personnel s'efface devant la loyauté envers autrui»: *Meinhard c. Salmon*, 164 N.E. 545 (1928), à la p. 548, cité dans *Scott on Trusts*, précité, à la p. 3412. *Scott on Trusts*, précité, indique, à la p. 3418, qu'il y a des cas [TRADUCTION] «où une fiducie par interprétation est imposée au défendeur même si la perte du demandeur est inférieure au gain réalisé par le défendeur ou, en fait, lorsque le demandeur n'a subi aucune perte».

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust

Les tribunaux canadiens reconnaissent aussi la possibilité de recourir à la fiducie par interprétation tant dans les cas où des biens sont acquis d'une manière irrégulière que dans les cas d'enrichissement sans cause. Appliquant le droit anglais, ils concluent depuis longtemps à l'existence d'une fiducie par interprétation à la suite d'une acquisition irrégulière de biens, par exemple en raison d'une fraude ou d'un manquement à une obligation

enrichment: *Pettkus v. Becker*, *supra*. However, since *Pettkus v. Becker* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

fiduciaire. Plus récemment, les tribunaux canadiens ont reconnu qu'il était possible d'imposer une fiducie par interprétation analogue à celle qui existe aux États-Unis dans les cas d'enrichissement sans cause: *Pettkus c. Becker*, précité. Toutefois, depuis cet arrêt, les tribunaux canadiens ont continué de conclure à l'existence d'une fiducie par interprétation lorsque des biens ont été acquis de manière irrégulière, même en l'absence d'enrichissement sans cause. Bien que de tels cas ne soient pas fréquents car peu de justiciables choisissent d'intenter des poursuites en l'absence d'une perte pécuniaire, ils ne sont pas rares.

Litman, *supra*, at p. 416, notes that in "the post-*Pettkus* v. *Becker* era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

40 Litman, précité, à la p. 416, fait remarquer que [TRADUCTION] «depuis l'arrêt *Pettkus* c. *Becker*, il y a eu de nombreux cas où les tribunaux ont eu recours à la fiducie par interprétation institutionnelle sans qu'il soit question d'enrichissement sans cause». L'imposition d'une fiducie par interprétation dans de tels cas se justifie non pas par l'enrichissement sans cause, mais par le fait que la conduite fautive du défendeur l'oblige à remettre le bien ainsi obtenu au demandeur.

Thus in *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

41 Ainsi, dans l'arrêt *Ontario Wheat Producers' Marketing Board c. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (C.A. Ont.), une fiducie par interprétation a été imposée à une banque qui avait reçu de l'argent tout en sachant qu'il n'appartenait pas au déposant mais à un tiers.

Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.), a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who

42 De même, dans l'arrêt *MacMillan Bloedel Ltd. c. Binstead* (1983), 14 E.T.R. 269 (C.S.C.-B.), une fiducie par interprétation a été imposée à des personnes qui avaient participé sciemment à un manquement à une obligation fiduciaire, même si on avait conclu que l'enrichissement sans cause ne justifierait pas l'imposition d'une fiducie parce qu'il était impossible de dire que la compagnie demanderesse avait subi une perte ou un appauvrissement car sa propre politique l'empêchait de toucher les profits. Le juge Dohm (maintenant juge en chef adjoint) a dit que la fiducie par interprétation devait être accordée [TRADUCTION] «non pas en raison de ce qu'exige l'équité entre les parties, mais pour veiller à ce que les fiduciaires demeurent fidèles à la parole donnée et à ce que les per-

assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra.* Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra*, at pp. 169-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Pettkus v. Becker*, *supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., *Essays on the Law of*

sonnes qui les aident à manquer à leurs obligations soient appelées à rendre des comptes» (p. 302).

Je conclus qu'au nom de la conscience, l'application de la fiducie par interprétation est reconnue au Canada tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif: lorsqu'il y a conduite fautive mais aucun enrichissement sans cause ni appauvrissement correspondant ou lorsqu'il y a enrichissement sans cause moralement inadmissible, en l'absence de conduite fautive, comme dans l'arrêt *Pettkus c. Becker*, précité. Dans le cadre de ces deux grandes catégories les règles de droit relatives à la fiducie par interprétation pourront évoluer et se préciser au fil des ans et selon les cas qui pourront se présenter.

McClean, précité, a résumé avec habilité le processus évoqué (aux pp. 169 et 170):

> [TRADUCTION] Le droit [en matière de fiducie par interprétation] en est peut-être arrivé à une étape où il est possible de dégager certains principes généraux à partir d'exemples précis et de créer, par analogie et dans le respect de ces principes généraux, de nouveaux chefs de responsabilité. À notre avis, il ne s'agit pas de demander aux tribunaux de se lancer dans une entreprise trop risquée ni même nouvelle, en fait, puisque dans une large mesure, c'est de cette manière que la common law a toujours évolué.

VII

Dans l'arrêt *Pettkus c. Becker*, précité, notre Cour a examiné sous tous leurs angles les conditions préalables à la fiducie par interprétation fondée sur l'enrichissement sans cause. La présente espèce nous oblige à étudier minutieusement les conditions essentielles à l'existence de la fiducie par interprétation fondée sur un comportement fautif. À la lumière des décisions des tribunaux d'*equity* imposant la fiducie par interprétation par suite de comportements fautifs et des critères

Restitution (1991), I would identify four conditions which generally should be satisfied:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and

examinés dans un article de Roy Goode intitulé «Property and Unjust Enrichment», publié dans *Essays on the Law of Restitution* (1991), sous la direction d'Andrew Burrows, je conclus que quatre conditions doivent généralement être réunies:

(1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens;

(2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;

(3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;

(4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés.

VIII

46 Appliquant ce critère à l'espèce, je conclus que le manquement par M. Korkontzilas à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation pour les motifs suivants.

47 Premièrement, M. Korkontzilas était assujetti à une obligation en *equity* relativement à l'immeuble en cause. L'omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituent un manquement au devoir de loyauté imposé par l'*equity*. Il a permis que ses propres intérêts entrent en conflit avec ceux de son client. Il a acheté l'immeuble de manière irrégulière, après avoir manqué de façon flagrante et inexcusable à son devoir de

elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms*, *supra*, *per* La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpin the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate

loyauté envers M. Soulos. Voilà le genre de situation où les tribunaux d'*equity*, au Canada et ailleurs, ont traditionnellement conclu à l'existence d'une obligation en *equity* dont la violation peut donner naissance à une fiducie par interprétation, même en l'absence d'enrichissement sans cause.

Deuxièmement, M. Korkontzilas a obtenu la possession de cet immeuble par suite des actes accomplis à titre de mandataire et du manquement à l'obligation que lui imposait l'*equity* envers le demandeur. L'acquisition de l'immeuble était la conséquence directe du manquement à son devoir de loyauté envers son client, M. Soulos.

Troisièmement, même si M. Korkontzilas ne s'est pas enrichi pécuniairement par suite de l'acquisition irrégulière de l'immeuble, il existe de bonnes raisons pour que l'*equity* impose une fiducie par interprétation. Monsieur Soulos soutient qu'une fiducie par interprétation est nécessaire pour remédier à l'appauvrissement qu'il a subi en raison de son désir persistant de devenir propriétaire de l'immeuble en question, bien que pour des raisons non pécuniaires. Selon lui, cette mesure, et rien de moins, permettra de replacer les parties dans la situation où elles se seraient trouvées s'il n'y avait pas eu manquement. À mon avis, cet argument à lui seul suffirait à convaincre un tribunal d'*equity* que la réparation appropriée pour l'acquisition irrégulière de l'immeuble par M. Korkontzilas est une ordonnance portant qu'il doit, à titre de fiduciaire par interprétation, transférer l'immeuble à M. Soulos.

Mais il y a plus. Comme la Cour d'appel, j'estime qu'une fiducie par interprétation est requise dans des cas comme celui-ci pour assurer le respect du devoir de loyauté auquel sont tenus les mandataires et autres personnes occupant des postes de confiance: voir *Hodgkinson c. Simms*, précité, le juge La Forest. Si les agents immobiliers sont autorisés à garder les immeubles qu'ils ont acquis pour eux-mêmes en violation de leur devoir de loyauté envers leurs clients à condition qu'ils paient la valeur marchande de l'immeuble, la confiance sur laquelle repose l'institution qu'est le courtage immobilier sera ébranlée. Le message sera clair: les agents immobiliers peuvent manquer

agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

à leurs obligations envers leurs clients et les tribunaux n'interviendront pas à moins que le client puisse prouver que l'agent immobilier a réalisé un profit. C'est inacceptable. Les tribunaux d'*equity* se sont toujours souciés d'obliger la personne qui agit pour une autre à respecter l'éthique; notre Cour doit aller dans le même sens.

I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontzilas has sustained during the years he has held the property.

J'en viens maintenant à la question de savoir s'il existe en l'espèce des facteurs qui rendraient inéquitable l'imposition d'une fiducie par interprétation. À mon avis, il n'y en a aucun. Nul ne subira un préjudice du fait d'une ordonnance enjoignant à M. Korkontzilas de transférer l'immeuble à M. Soulos. Monsieur Korkontzilas ne sera pas non plus traité inéquitablement. Monsieur Soulos ne demande pas mieux que de faire les ajustements financiers nécessaires, y compris d'indemniser M. Korkontzilas pour la perte qu'il a subie au cours des années pendant lesquelles il a été propriétaire de l'immeuble. 51

I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

Je conclus qu'une fiducie par interprétation doit être imposée. Je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel portant que les appelants doivent transférer l'immeuble à l'intimé, sous réserve des ajustements appropriés. L'intimé a droit aux dépens dans toutes les cours. 52

The reasons of Sopinka and Iacobucci JJ. were delivered by

Version française des motifs des juges Sopinka et Iacobucci rendus par

SOPINKA J. (dissenting) — I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present

LE JUGE SOPINKA (dissident) — J'ai lu les motifs de ma collègue, le juge McLachlin. Bien que j'adhère à sa conclusion selon laquelle le manquement à une obligation fiduciaire a été établi en l'espèce, je ne souscris pas à son analyse concernant la réparation appropriée. À mon avis, elle commet une erreur en confirmant le jugement par lequel les juges majoritaires de la Cour d'appel ont infirmé la décision du juge du procès pour imposer une fiducie par interprétation à l'égard de l'immeuble en question. Ma conclusion se fonde sur deux motifs principaux. Premièrement, la décision d'imposer une fiducie par interprétation relève du pouvoir discrétionnaire du juge et, à ce titre, elle appelle à la retenue. Comme le juge du procès n'a pas commis d'erreur de principe en refusant de 53

case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

rendre une ordonnance en ce sens, les tribunaux d'appel ne devraient pas s'immiscer dans l'exercice de ce pouvoir discrétionnaire. Deuxièmement, même si l'examen en appel était justifié en l'espèce, il ne peut y avoir fiducie par interprétation en l'absence d'enrichissement sans cause. Quoique mon désaccord avec le juge McLachlin porte essentiellement sur ce dernier point, je traiterai tout de même de ces questions successivement, dans le cadre de mon analyse des motifs des juges majoritaires de la juridiction inférieure.

Standard of Review and the Exercise of Discretion

Norme de contrôle et exercice du pouvoir discrétionnaire

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85. As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257, at p. 259), the decision to order a constructive trust is a matter of discretion. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

Il est bien établi en droit que, règle générale, les tribunaux d'appel ne devraient pas modifier les ordonnances rendues dans le cadre de l'exercice du pouvoir discrétionnaire des juges de première instance. En effet, de telles ordonnances ne peuvent être infirmées en appel que si l'exercice du pouvoir discrétionnaire a été fondé sur un principe erroné: voir *Donkin c. Bugoy*, [1985] 2 R.C.S. 85. Comme l'ont reconnu les juges majoritaires de la Cour d'appel ((1995), 25 O.R. (3d) 257, à la p. 259) la décision d'accorder la fiducie par interprétation est discrétionnaire. Dans l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, la Cour a conclu à la majorité que la décision d'imposer une fiducie par interprétation à la suite d'un manquement à une obligation fiduciaire reposait sur l'examen de l'ensemble des circonstances. Le juge La Forest a dit, à la p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. . . . [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

> En l'espèce, on a démontré qu'il y avait lieu à restitution. La Cour peut accorder une réparation relative à la propriété, c'est-à-dire ordonner à Lac de rendre le bien-fonds Williams, ou accorder une indemnité, c'est-à-dire une somme d'argent. [. . .] [La fiducie par interprétation n'est qu'une] réparation parmi d'autres, et il n'y sera recouru que dans les circonstances appropriées.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 585.

Cette conception de la fiducie par interprétation axée sur l'exercice d'un pouvoir discrétionnaire est également conforme avec la manière d'aborder les réparations en *equity* de façon générale: voir *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, à la p. 585.

Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

La décision d'imposer une fiducie par interprétation étant discrétionnaire, il faut d'abord établir que le juge de première instance a commis une erreur de principe avant d'annuler sa décision de ne pas accorder une telle réparation. Selon moi, le juge du procès n'a pas commis une telle erreur. 55

The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51, at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

Les juges majoritaires de la Cour d'appel ont conclu, semble-t-il, que le juge du procès a commis une erreur en ne prenant pas en compte la nature moralement répréhensible du comportement des appelants. De la même façon, le juge McLachlin, invoquant de simples considérations de «conscience», est d'avis qu'il y avait lieu d'imposer une fiducie par interprétation en l'espèce. Selon moi, le juge du procès a effectivement tenu compte de la valeur morale du comportement des appelants et, par conséquent, un tribunal d'appel ne peut intervenir en se fondant sur ce motif. Le juge du procès a dit ((1991), 4 O.R. (3d) 51, à la p. 69) que même s'il [TRADUCTION] «[n]e fait aucun doute que le maintien de la moralité dans les affaires constitue un aspect de l'ordre public sur lequel un tribunal est fondé à se pencher», la morale ne devrait pas, de façon générale, inciter le tribunal à intervenir, sauf lorsque cela s'avère nécessaire pour faire respecter un droit quelconque en common law. Autrement dit, j'estime que le juge du procès était d'avis que lorsque rien ne justifie que le tribunal accorde une fiducie par interprétation ou une autre réparation, la seule valeur morale de l'acte ne suffira pas à fonder une telle décision. Selon moi, cet énoncé du droit est juste. 56

The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plain-

Selon les juges majoritaires de la Cour d'appel (aux pp. 259 et 260), les principes énoncés par le juge du procès pouvaient s'appliquer lorsque d'autres réparations s'offraient aux parties mais lorsqu'une seule réparation était possible, comme c'est le cas en l'espèce, leur application était contestable. Je ne souscris pas à ce raisonnement. Si la fiducie par interprétation est jugée inappropriée lorsque diverses réparations s'offrent aux parties, je ne vois pas en vertu de quel principe elle serait appropriée lorsqu'il s'agit de la seule réparation possible. Le juge du procès a le pouvoir discrétionnaire d'imposer ou non la fiducie par interprétation et l'exercice de ce pouvoir ne devrait pas dépendre 57

tiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages — his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

du nombre des réparations possibles. En l'espèce, l'intimé a renoncé à réclamer des dommages-intérêts. Même s'il ne pouvait réclamer de dommages-intérêts compensatoires puisqu'il n'a subi aucune perte pécuniaire (j'examinerai cette question plus loin en déterminant si une fiducie par interprétation aurait pu être ordonnée), l'intimé aurait pu réclamer des dommages-intérêts punitifs. Sa décision de ne pas le faire ne devrait pas jouer sur l'exercice du pouvoir discrétionnaire du juge du procès relativement à la fiducie par interprétation.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is . . . a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be consid-

Le juge du procès a beaucoup insisté sur l'absence de profit en décidant de ne pas accorder la fiducie par interprétation. Pour les motifs que j'exposerai en détail plus loin, j'estime que la décision du juge du procès à cet égard était bien fondée. Par contre, les juges majoritaires de la Cour d'appel et le juge McLachlin considèrent que le juge du procès a commis une erreur en appréciant mal le rôle dissuasif de la fiducie par interprétation dans la présente affaire. À mon avis, la prise en considération du rôle dissuasif de la fiducie par interprétation ne révèle aucune erreur de principe de la part du juge du procès. Il se peut que l'élément de dissuasion, tout comme la valeur morale des actes visés, influent sur l'exercice du pouvoir discrétionnaire de décider de la réparation à accorder en cas de manquement à une obligation fiduciaire (voir, par ex., *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, aux pp. 421 et 453). Toutefois, en l'espèce, le juge du procès n'a pas omis de tenir compte de cet élément en déterminant s'il convenait d'ordonner la fiducie par interprétation. Comme je l'ai déjà mentionné, le juge a affirmé que même si [TRADUCTION] «le maintien de la moralité dans les affaires constitue [. . .] un aspect de l'ordre public sur lequel un tribunal est fondé à se pencher» (à la p. 69), cet objectif, en soi, ne justifie pas l'octroi d'une réparation en l'espèce. À mon avis, cette mention du «maintien de la moralité dans les affaires» montre qu'après avoir tenu compte de l'élément de dissuasion, le juge a néanmoins conclu que celui-ci ne pouvait, en soi, justifier l'octroi d'une réparation en l'espèce. Par conséquent, même s'il était possible de qualifier d'erreur de principe l'omission de tenir compte de l'élément

ered an error in principle, the trial judge in the present case did not so err.

In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment. For example, passages in *Lac Minerals*, *supra*, set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada*

de dissuasion, dans la présente affaire, le juge du procès n'a pas commis une telle erreur.

59 Selon moi, le juge du procès n'a pas commis d'erreur de principe susceptible de justifier l'annulation de son jugement et l'imposition d'une fiducie par interprétation. Même s'il avait commis une erreur de principe, je suis d'avis que, vu les faits de l'espèce, la fiducie par interprétation ne s'offrait pas aux parties. Autrement dit, même s'il n'y a pas lieu de faire preuve de retenue à l'égard de la décision du juge du procès, les juges majoritaires de la Cour d'appel ont commis une erreur en imposant la fiducie par interprétation et le pourvoi devrait être accueilli. Voici les motifs sur lesquels je fonde ma conclusion.

Enrichissement sans cause et possibilité de recourir à la fiducie par interprétation

60 Selon le juge McLachlin, les cas où la fiducie par interprétation peut être accordée entrent dans deux catégories générales: lorsqu'il y a enrichissement sans cause et lorsqu'il y a atteinte à la «conscience». Même s'il peut arriver que, dans un cas particulier, il y ait à la fois enrichissement sans cause et atteinte à la «conscience», le juge McLachlin est d'avis que la présence de l'un ou l'autre élément suffit pour imposer la fiducie par interprétation. Le juge McLachlin conclut qu'en ne tenant pas compte de ce que dicte la «conscience» indépendamment de toute autre considération, le juge du procès a commis une erreur. Avec égards, je ne souscris pas à cette conclusion. Selon moi, il ressort très clairement de la jurisprudence récente de notre Cour qu'une fiducie par interprétation ne peut être imposée que lorsqu'il y a enrichissement sans cause. Par exemple, des extraits de l'arrêt *Lac Minerals*, précité, exposent les circonstances dans lesquelles il conviendrait d'imposer une fiducie par interprétation. À mon avis, il ressort clairement de cet arrêt que l'imposition d'une fiducie par interprétation ne peut être accordée à titre de réparation que lorsqu'il y a enrichissement sans cause. Le juge La Forest a dit, aux pp. 673 et 674:

Cette Cour a été appelée récemment à examiner, dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426, les circonstances motivant

Ltd., [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, *supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus*, *supra*, specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Cana-

l'imposition d'une fiducie par interprétation. Le Juge en chef y a analysé l'évolution de la fiducie par interprétation au cours d'une période de 200 ans, depuis son emploi initial dans le cadre des rapports fiduciaires jusqu'à l'arrêt *Pettkus c. Becker*, [[1980] 2 R.C.S. 834], dans lequel la Cour a donné à la fiducie par interprétation son emploi contemporain de réparation en matière d'enrichissement sans cause. Le Juge en chef a souligné que l'arrêt *Pettkus c. Becker*, précité, établissait un processus en deux temps. En premier lieu, la Cour détermine si l'enrichissement sans cause est établi et ensuite elle se demande si, dans les circonstances, la fiducie par interprétation est la réparation appropriée à l'égard de cet enrichissement. Dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, on a refusé d'appliquer la fiducie par interprétation, non pas parce qu'elle ne s'offrait pas aux parties (bien qu'à mon avis elle aurait pu ne pas être appropriée), mais plutôt parce que l'enrichissement sans cause n'ayant pas été établi, la question de la réparation ne se posait pas.

En l'espèce, on a démontré qu'il y avait lieu à restitution. La Cour peut accorder une réparation relative à la propriété, c'est-à-dire ordonner à Lac de rendre le bien-fonds Williams, ou accorder une indemnité, c'est-à-dire une somme d'argent. Même si, comme le Juge en chef le faisait observer à la p. 847 de l'arrêt *Pettkus c. Becker*, «Le principe de l'enrichissement sans cause est au coeur de la fiducie par interprétation», l'inverse n'est pas vrai. La fiducie par interprétation n'est pas au coeur du droit de la restitution. [Je souligne.]

Il a ajouté, à la p. 678:

Une grande partie de la difficulté disparaît si l'on reconnaît que, dans ce contexte, la question de la réparation appropriée se pose seulement une fois que l'on a démontré qu'il y avait lieu à restitution. La fiducie par interprétation confère un droit de propriété, mais ce droit ne peut exister que si un droit à une réparation a déjà été établi. [Je souligne.]

Dans *Brissette, Succession c. Westbury Life Insurance Co.*, [1992] 3 R.C.S. 87, les juges majoritaires ont cité et approuvé certains des passages de l'arrêt *Lac* et ils ont conclu, à la p. 96, que «[l]'enrichissement sans cause est une condition fondamentale du recours à la fiducie par interprétation».

Se référant uniquement à l'arrêt *Pettkus*, précité, le juge McLachlin dit, au par. 21, que cet arrêt et d'autres décisions, ne devraient pas être interprétés

dian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a requirement for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

comme faisant disparaître du droit canadien la fiducie par interprétation en cas d'absence d'enrichissement sans cause. Avec égards, je ne vois pas comment des déclarations telles «[l]'enrichissement sans cause est une condition fondamentale du recours à la fiducie par interprétation» pourraient ne pas faire disparaître du droit canadien le recours à la fiducie par interprétation en l'absence d'enrichissement. Il a été maintes fois répété que l'enrichissement sans cause constituait une condition préalable au recours à la fiducie par interprétation. Par conséquent, l'imposition d'une telle fiducie en l'absence d'enrichissement sans cause, irait manifestement à l'encontre d'un principe juridique établi.

Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and if damages are suffered, the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary

63 Même en faisant abstraction de la jurisprudence, j'estime que l'impossibilité d'imposer une fiducie par interprétation en l'absence d'un enrichissement sans cause est compatible avec le rôle réparateur de cette fiducie. L'intimé a soutenu que si aucune réparation ne s'offrait à lui en l'espèce, il en résulterait une situation inacceptable, car il jouirait d'un droit tout en étant privé d'un recours pour le faire respecter. Je ne suis pas d'accord. De toute évidence, le bénéficiaire a le droit d'exiger du fiduciaire qu'il remplisse son obligation et, s'il subit un préjudice, il a droit à une réparation. À mon avis, cela est conforme aux autres principes de droit privé en matière de réparation. La violation d'une obligation, dans d'autres contextes juridiques, donne lieu à une réparation uniquement en cas de perte. Ainsi, il se peut que j'aie l'obligation, envers mon voisin, de déneiger mon allée, et il se peut que j'aie manqué à cette obligation. Cependant, si cette violation ne fait subir aucune perte à mon voisin, il n'y a pas de délit civil et aucune réparation ne s'offre à lui. De la même façon, il se peut que j'aie l'obligation contractuelle de fournir des marchandises à une certaine date, à un prix déterminé. Si, après que j'ai manqué à mon obligation, mon cocontractant parvient à se procurer les mêmes marchandises au prix, à la date et au lieu prévus au contrat, il ne subira aucun préjudice et aucune réparation ne s'offrira à lui. Le principe selon lequel il n'existe aucune réparation en cas de violation d'une obligation d'un fiduciaire si celui-ci ne s'enrichit pas du fait de cette violation, est

is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *Lac Minerals*. In *Lac Minerals*, La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting

parfaitement compatible avec les règles que je viens de mentionner.

Les principes en matière de réparation étayent donc, de façon générale, la règle interdisant l'imposition d'une fiducie par interprétation en l'absence d'enrichissement sans cause. À mon avis, l'analyse des principes régissant la fiducie par interprétation, exposés dans l'arrêt *Lac Minerals*, appuie également cette règle. Dans cet arrêt, le juge La Forest a dit que, même en cas d'enrichissement sans cause, la fiducie par interprétation constituait une réparation extraordinaire, la solution normalement retenue étant les dommages-intérêts. Il a affirmé, à la p. 678:

> Dans la grande majorité des cas, la fiducie par interprétation ne sera pas la réparation appropriée. Ainsi, dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, précité, si l'on avait établi qu'il y avait lieu à restitution, il n'y aurait eu aucune raison d'imposer une fiducie par interprétation puisqu'il aurait pu être satisfait aux prétentions du demandeur par une simple indemnité; il n'y a lieu de conférer une fiducie par interprétation qu'en présence d'un motif pour accorder au demandeur les droits supplémentaires découlant de la reconnaissance d'un droit de propriété. [Je souligne.]

Le juge La Forest conclut donc que le bénéficiaire lésé ne peut généralement obtenir que des dommages-intérêts, et non le bien lui-même. C'est dire qu'en général, le bénéficiaire n'a pas droit au bien en question mais plutôt à la valeur des gains tirés de son acquisition. Il s'ensuit que si aucun gain n'a été réalisé, c'est-à-dire s'il n'y a eu aucun enrichissement sans cause, le bénéficiaire n'a pas le droit d'obtenir réparation. Par conséquent, en l'absence d'enrichissement sans cause, il n'existe aucun droit à une fiducie par interprétation ni à aucune autre réparation.

Bien que, selon moi, les arrêts récents de notre Cour et les principes qui les sous-tendent règlent la question, le juge McLachlin, citant d'autres arrêts canadiens, conclut que la fiducie par interprétation peut s'appliquer même en l'absence d'enrichissement sans cause. Elle fait référence à trois décisions de juridictions inférieures qui, selon elle, ont imposé une fiducie par interprétation en l'absence d'un enrichissement sans cause. Avec égards,

her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834, and *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

In *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

MacMillan Bloedel Ltd. v. Binstead (1983), 14 E.T.R. 269 (B.C.S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits,

j'estime qu'aucune de ces décisions n'étaye son point de vue. L'enrichissement sans cause se déduit de la présence de trois éléments, soit un enrichissement du défendeur, un appauvrissement correspondant du demandeur, et l'absence de tout motif juridique à l'enrichissement: *Pettkus c. Becker*, [1980] 2 R.C.S. 834, et *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426. Or, le juge McLachlin n'a cité aucune décision dans laquelle une fiducie par interprétation a été accordée à titre de réparation en l'absence d'un tel enrichissement.

67 Dans *Ontario Wheat Producers' Marketing Board c. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (C.A. Ont.), une fiducie par interprétation a été imposée à une banque qui a reçu, en toute connaissance de cause, des sommes d'argent qui appartenaient à une personne autre que le déposant. Dans cette affaire, la banque était créancière garantie du déposant qui éprouvait des difficultés financières au moment des dépôts. De toute évidence, il s'agissait d'un cas d'enrichissement sans cause: la banque tirait profit de la situation en obtenant des droits sur les sommes déposées tout en augmentant ses chances d'être remboursée du crédit fait au déposant; la demanderesse (une société dont le mandataire, le déposant, avait manqué à ses obligations fiduciaires) était privée du droit de recouvrer son argent; et il n'y avait aucun motif juridique justifiant l'enrichissement. L'imposition d'une fiducie par interprétation répondait donc à un enrichissement sans cause, que la cour ait fait allusion ou non à une telle doctrine.

68 *MacMillan Bloedel Ltd. c. Binstead* (1983), 14 E.T.R. 269 (C.S.C.-B.) présente, selon moi, un autre cas d'enrichissement sans cause. Dans cette affaire, le fiduciaire d'une société a manqué à son obligation en effectuant une opération intéressée, sans révéler son conflit d'intérêts. Une fiducie par interprétation a été imposée relativement aux profits secrets réalisés, même si la société demanderesse n'aurait pas pu, à cause de sa politique interne, réaliser elle-même les profits. Bien que le fiduciaire se soit manifestement enrichi, le juge du procès et le juge McLachlin ont conclu à l'absence d'un «appauvrissement correspondant» et donc

there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *Binstead*. First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. The King*, [1948] 2 All E.R. 27 (K.B.D.), aff'd [1949] 2 All E.R. 68 (C.A.), aff'd [1951] 1 All E.R. 617 (H.L.), Denning J. stated at p. 28:

> It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money. . . . [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. [Emphasis added.]

Reading and *O'Malley* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself.

d'un enrichissement sans cause, étant donné que la demanderesse n'aurait pas pu réaliser elle-même les profits.

Je n'adhère pas au point de vue du juge McLachlin selon lequel il n'y avait pas d'enrichissement sans cause dans l'arrêt *Binstead*. Tout d'abord, les tribunaux ont, de façon constante, explicitement qualifié d'enrichissement sans cause les profits réalisés par le fiduciaire, peu importe que le bénéficiaire ait pu ou non les réaliser lui-même. Par exemple, dans *Reading c. The King*, [1948] 2 All E.R. 27 (K.B.D.), conf. par [1949] 2 All E.R. 68 (C.A.), conf. par [1951] 1 All E.R. 617 (H.L.), le juge Denning a dit (à la p. 28):

> [TRADUCTION] Le fait que l'employeur n'a perdu aucun profit ni subi aucun préjudice est sans importance. Et le fait que l'employeur n'aurait pu accomplir l'acte lui-même n'a pas d'importance non plus. Si l'employé s'est enrichi de façon injuste du fait de l'exercice de ses fonctions et sans la permission de son employeur, la loi interdit qu'il soit autorisé à conserver l'argent . . . [Je souligne.]

Dans l'arrêt *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592, aux pp. 621 et 622, le juge Laskin, plus tard Juge en chef, a dit:

> Pour établir la responsabilité d'O'Malley et de Zarzycki pour violation d'obligation de fiduciaire, il n'est pas nécessaire que Canaero démontre qu'elle aurait obtenu le contrat de la Guyane, si ce n'avait été de l'intervention de ces derniers; ce n'est pas non plus une condition du recouvrement de dommages-intérêts que Canaero établisse ce qu'auraient été ses profits éventuels ou ce qu'elle a perdu en ne réalisant pas l'occasion d'affaires en question. Elle a le droit d'obliger les fiduciaires déloyaux à rendre compte de leur manquement suivant le gain qu'ils ont réalisé. Que les dommages-intérêts adjugés en l'espèce soient considérés comme compte de profits ou, ce qui équivaut à la même chose, comme basés sur un enrichissement injuste, je suis d'avis de ne pas en modifier le montant. [Je souligne.]

Il ressort clairement des arrêts *Reading* et *O'Malley* que les profits réalisés par le fiduciaire à la suite d'un manquement à ses obligations sont rattachés à l'enrichissement sans cause, que la société ait été ou non en mesure de réaliser elle-même les profits. Par conséquent, il y a bien eu

Thus, *Binstead* involved unjust enrichment, contrary to McLachlin J.'s assertion.

I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley*, and *Binstead* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (C.A.), aff'd [1966] 3 All E.R. 721 (H.L), that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired*, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable . . . for such information or knowledge is the property of his principal, just as much as an invention is . . . . [Italics in original; underlining added.]

Thus, in *Binstead*, the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *Binstead*, the self-dealing could not have resulted in any secret profits — if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there was profit in *Binstead*, however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

enrichissement sans cause dans l'arrêt *Binstead*, contrairement à ce qu'affirme le juge McLachlin.

70 J'aimerais ajouter que le fait que les profits aient été considérés comme un «enrichissement injuste» dans les arrêts *Reading*, *O'Malley*, et *Binstead* n'est pas incompatible avec les règles générales régissant l'enrichissement sans cause. Dans chaque cas, la partie demanderesse avait le droit d'obtenir le respect par le fiduciaire de son obligation. Les profits réalisés par la partie défenderesse par suite du manquement à son obligation sont considérés en *equity* comme appartenant à la société, que cette dernière ait été ou non en mesure de réaliser ces profits en l'absence du manquement visé. Pour illustrer l'analogie établie avec le droit de propriété, le maître des rôles Denning a dit, dans *Phipps c. Boardman*, [1965] 1 All E.R. 849 (C.A.), à la p. 856, conf. par [1966] 3 All E.R. 721 (H.L), que:

> [TRADUCTION] [S]'il réalise un profit personnel à l'aide des *renseignements ou connaissances* qu'il devait recueillir ou découvrir pour le compte de son mandataire *ou qu'il a par ailleurs acquis* pour ce dernier, il peut être tenu responsable [. . .], car de tels renseignements ou connaissances appartiennent à son mandataire, au même titre qu'une invention . . . [En italique dans l'original; je souligne.]

71 Par conséquent, dans l'arrêt *Binstead*, la conservation des profits par le fiduciaire aurait privé la société de son droit à ceux-ci. Les sommes que le fiduciaire a obtenues en portant atteinte aux droits de la partie demanderesse représentent l'appauvrissement. Pour qu'il n'y ait ni appauvrissement ni enrichissement sans cause dans des circonstances par ailleurs analogues à celles de l'affaire *Binstead*, il faudrait que l'opération intéressée n'engendre aucun profit secret. Si une réparation était accordée en l'absence de profit, et donc en l'absence d'enrichissement et d'appauvrissement, le juge McLachlin serait fondée à invoquer ce cas à l'appui de sa conclusion. Cependant, étant donné qu'un profit a bel et bien été réalisé dans *Binstead*, il y a eu enrichissement sans cause justifiant l'imposition d'une fiducie par interprétation, que la cour se soit fondée expressément ou non sur la doctrine de l'enrichissement sans cause.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

En résumé, le juge McLachlin n'a cité aucune décision canadienne dans laquelle une fiducie par interprétation a été imposée malgré l'absence d'enrichissement sans cause. À la lumière de cette conclusion et d'arrêts récents de notre Cour qui interdisent, de manière non équivoque, l'imposition d'une fiducie par interprétation en l'absence d'un enrichissement sans cause, j'estime que le juge McLachlin se trompe en concluant qu'une telle fiducie peut être imposée en l'absence d'enrichissement sans cause.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful in so far as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

Outre la jurisprudence canadienne, le juge McLachlin s'efforce d'étayer sa conclusion en citant divers auteurs et décisions étrangères. À cause des règles de droit claires récemment formulées par notre Cour, j'estime que la doctrine et la jurisprudence étrangère ne sont utiles que dans la mesure où il ressort des principes énoncés que le droit canadien devrait être modifié. J'analyserai donc seulement les principes sur lesquels se fonde le juge McLachlin, au lieu d'examiner chaque décision et article qu'elle cite.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience"

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. . . . The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

En un mot, le juge McLachlin conclut, à l'instar des juges majoritaires de la Cour d'appel, que le refus d'accorder la fiducie par interprétation à la suite d'un manquement à une obligation fiduciaire mais en l'absence d'un enrichissement sans cause, protégerait inadéquatement l'intégrité des rapports fiduciaires. À propos de l'imposition d'une fiducie par interprétation sur le simple fondement du concept de la «conscience», elle dit, au par. 33:

> La conscience concerne non seulement l'équité entre les parties devant le tribunal, mais aussi le souci plus général des tribunaux de maintenir l'intégrité d'institutions tels les rapports fiduciaires que les tribunaux d'*equity* étaient chargés de surveiller [. . .] La fiducie par interprétation imposée pour manquement à une obligation fiduciaire permet non seulement de rendre justice aux parties comme l'exige la conscience, mais aussi d'obliger les fiduciaires et autres personnes occupant des postes de confiance à se conformer aux normes élevées en matière de confiance et de probité nécessaires pour assurer l'efficacité des institutions commerciales et autres institutions sociales.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of

Le juge McLachlin considère donc que l'élément de dissuasion ne jouera sur les fiduciaires déloyaux

constructive trust as a remedy even where there has been no unjust enrichment.

In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there were gains in value, and therefore unjust enrichment, he or she would be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to

que s'il est possible de recourir à la fiducie par interprétation, même en l'absence d'enrichissement sans cause.

75 À mon avis, la dissuasion n'est pas un facteur qui appelle la modification du droit canadien et l'imposition de la fiducie par interprétation en l'absence d'un enrichissement sans cause. Comme je l'ai déjà souligné, malgré des considérations de dissuasion, il est vrai que le droit privé ne prévoit habituellement pas de recours en cas d'absence de perte. Les tribunaux n'ont pas jugé qu'il était nécessaire d'accorder, même en l'absence de perte, une réparation à la suite d'un manquement à une obligation en matière délictuelle ou contractuelle par souci de protection de l'intégrité de ces obligations. Je ne vois pas ce qui distingue le rôle des obligations fiduciaires du rôle social très important que jouent d'autres obligations juridiques, et qui justifierait qu'elles reçoivent un traitement particulier en matière de réparation.

76 De toute façon, l'impossibilité d'invoquer la fiducie par interprétation en l'absence d'enrichissement sans cause n'a, selon moi, aucune incidence importante sur la dissuasion des fiduciaires déloyaux ni grande influence sur la protection de l'intégrité des rapports fiduciaires. Premièrement, si dans un cas donné, l'élément de dissuasion était jugé particulièrement important, le demandeur pourrait obtenir du juge du procès des dommages-intérêts punitifs. L'imposition d'une fiducie par interprétation n'est pas nécessaire au maintien de l'intégrité du rapport, même si cette dernière constituait un aspect important d'une affaire. Le fait que des dommages-intérêts punitifs n'ont pas été revendiqués en l'espèce ne devrait pas obliger notre Cour à imposer une fiducie par interprétation à la place. Deuxièmement, même si aucune réparation ne pouvait être demandée en l'absence d'enrichissement sans cause (ce qui est faux, vu la possibilité de réclamer des dommages-intérêts punitifs), l'élément de dissuasion n'est pas exclu pour autant. Supposons une affaire semblable au présent pourvoi. Même si le fiduciaire sans scrupules sait bien qu'il ne sera pas tenu de rendre le bien qu'il a malhonnêtement acquis si celui-ci n'a pas pris de valeur, il devra tout de même avoir à l'esprit la

breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

possibilité que, si le bien prenait de la valeur, c'est-à-dire s'il s'enrichissait sans cause, il devrait alors payer des dommages-intérêts ou peut-être même céder le bien. Par conséquent, si ce fiduciaire décidait de manquer à son obligation dans l'espoir de réaliser un profit, ce qui, j'imagine, constitue le motif habituel, voire l'unique motif d'un tel comportement, le fait de ne pas imposer une fiducie par interprétation en l'absence de profit n'aurait aucune incidence sur l'élément de dissuasion. Je suis donc en désaccord avec le juge McLachlin, qui estime que la dissuasion exige que l'on puisse recourir à la fiducie par interprétation, même en l'absence d'un enrichissement sans cause.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

À l'évidence, je ne peux souscrire à l'opinion du juge McLachlin selon laquelle une fiducie par interprétation pouvait et, en fait, devait être ordonnée dans la présente affaire, même s'il n'y a eu aucun enrichissement sans cause. Pour déterminer si une telle réparation pouvait être accordée en l'espèce, à mon avis, il faut d'abord déterminer s'il y a eu enrichissement sans cause.

Was There Unjust Enrichment?

Y a-t-il eu enrichissement sans cause?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. This step involved no sacrifice because the plaintiff could not have proved any. [Emphasis added.]

À mon avis, il n'y a eu aucun enrichissement, et par conséquent, aucun enrichissement sans cause en l'espèce. Tout d'abord, les appelants n'ont manifestement pas réalisé de profits en achetant l'immeuble. En effet, le juge du procès à dit (à la p. 68):

> [TRADUCTION] Je traiterai maintenant des faits de l'espèce. La nature de l'obligation et du manquement a déjà été examinée. À l'étape interlocutoire, le demandeur a renoncé à réclamer des dommages-intérêts. Une telle décision n'entraînait aucun sacrifice puisqu'il aurait été impossible pour le demandeur d'établir l'existence d'un préjudice. [Je souligne.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

L'enrichissement provenant de l'achat de l'immeuble n'était pas de nature pécuniaire, ce qui donne à penser qu'il n'y a eu aucun enrichissement et, par conséquent, aucun enrichissement sans cause.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the

On pourrait peut-être avancer, si l'immeuble était exceptionnel ou s'il était par ailleurs difficile

defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

à évaluer, que les profits réalisés par le défendeur ne représentent ni son enrichissement ni l'appauvrissement du demandeur. Par analogie avec une ordonnance portant exécution en nature d'un contrat, lorsque la propriété qui en fait l'objet est exceptionnelle ou par ailleurs difficile à évaluer, on peut conclure que des dommages-intérêts ne sont pas satisfaisants et que l'exécution en nature du contrat doit être ordonnée pour indemniser adéquatement le demandeur. Il se peut que, dans un tel cas, des dommages-intérêts ne puissent représenter la perte subie par le demandeur ni le gain réalisé par le défendeur du fait de la violation du contrat. On pourrait donc conclure qu'il y a eu enrichissement, même en l'absence d'une fluctuation de la valeur marchande d'une propriété, si celle-ci est exceptionnelle ou, si par ailleurs, elle est difficile à évaluer.

Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. S.C.). In *Lee*, a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case.

80

Indépendamment de l'utilité de telles considérations pour déterminer s'il y a eu un enrichissement, l'immeuble en question n'a pas été jugé exceptionnel ou par ailleurs difficile à évaluer au point d'influer sur le choix de la réparation appropriée. Le juge du procès a souligné que l'intimé a soutenu que l'immeuble avait une valeur particulière pour lui parce que le locataire était une banque et que le fait d'être le bailleur d'une banque était une source de prestige dans la communauté grecque. Selon le juge du procès (à la p. 69), il ne fallait pas tenir compte d'un tel facteur, pas plus qu'il ne faut tenir compte de l'attachement d'une personne pour sa propriété dans une cause d'expropriation. Autrement dit, bien que des considérations personnelles aient pu conduire à l'achat de l'immeuble, elles n'entrent pas en ligne de compte lorsqu'il s'agit de déterminer la valeur de celui-ci. Cela montre, à mon avis, que le juge du procès n'a pas considéré que l'immeuble était exceptionnel au point d'influer sur son analyse de la réparation appropriée. Cette conclusion ressort clairement de l'analyse que le juge du procès fait de *Lee c. Chow* (1990), 12 R.P.R. (2d) 217 (C.S. Ont.). Dans cette affaire, une fiducie par interprétation a été ordonnée à l'égard d'un immeuble qu'un mandataire avait malhonnêtement acheté dans des circonstances semblables à celles qui nous occupent. En l'es-

The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, rather than a commercial property having value only as an investment; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property — the property had value "only as an investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *LAC Minerals*, *supra*, because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of

pèce, le juge du procès a établi la distinction suivante avec la décision *Lee* (à la p. 70):

> [TRADUCTION] Parmi ces circonstances [celles de l'affaire *Lee*], mentionnons les suivantes: une certaine dépendance du demandeur qui, selon moi, n'existe pas en l'espèce; le fait qu'il s'agissait d'un immeuble résidentiel répondant aux exigences particulières du demandeur, et non d'un immeuble commercial n'ayant de valeur qu'à titre d'investissement; et le fait qu'il paraissait probable que le prix d'achat en faisait une aubaine, ce qui n'est pas le cas en l'espèce. [Je souligne.]

Dans l'affaire *Lee*, des profits avaient été réalisés — d'où enrichissement — et l'immeuble avait des qualités exceptionnelles qui contribuaient à justifier l'imposition d'une fiducie par interprétation. En l'espèce, aucun profit n'a été réalisé, et le juge du procès n'a constaté aucun avantage non pécuniaire important lié à l'immeuble: celui-ci n'avait de valeur «qu'à titre d'investissement». À mon avis, comme l'immeuble ne conférait ni avantage pécuniaire ni avantage non pécuniaire, il n'y a eu aucun enrichissement, et par conséquent, aucun enrichissement sans cause.

Vu l'absence d'enrichissement sans cause, j'estime que le juge du procès a eu raison de ne pas accorder la réparation demandée, soit la fiducie par interprétation. Le juge du procès a dit (à la p. 69):

> [TRADUCTION] Dans l'arrêt *LAC Minerals*, précité, il a été jugé opportun d'imposer une fiducie par interprétation parce que les dommages-intérêts ne donnaient pas satisfaction. Il serait anormal de reconnaître l'existence d'une fiducie par interprétation parce que le recours aux dommages-intérêts n'est pas satisfaisant, le demandeur n'ayant subi aucun préjudice.

Le juge du procès, vu l'absence d'un préjudice pécuniaire dont on aurait pu déduire l'existence d'un enrichissement sans cause, a refusé d'imposer une fiducie par interprétation. Or, ni les juges majoritaires de la Cour d'appel ni le juge McLachlin n'invoquent une erreur de principe dans les motifs du juge du procès; en fait, je suis d'avis qu'ils se trompent en concluant que la fiducie par interprétation peut s'appliquer dans la présente affaire. Même si le juge du procès avait omis de tenir compte de facteurs tels la valeur morale du comportement des défendeurs et l'élément de dissuasion, ce qui n'est pas le cas, et même si une

the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Appeal dismissed with costs, SOPINKA *and* IACOBUCCI JJ. *dissenting.*

Solicitors for the appellants: McCarthy Tétrault, Toronto.

Solicitors for the respondent: Stockwood, Spies & Campbell, Toronto.

telle omission pouvait être assimilée à une erreur de principe, les facteurs à considérer pour décider s'il y a lieu d'imposer une fiducie par interprétation ne jouent qu'à la deuxième étape de l'enquête, lorsqu'il s'agit de déterminer la réparation appropriée. À moins que l'enrichissement sans cause ne soit établi à la première étape de l'examen, il n'est pas nécessaire de tenir compte de ces facteurs. Les juges majoritaires de la Cour d'appel ont commis une erreur en s'immisçant dans l'exercice du pouvoir discrétionnaire du juge du procès et en concluant qu'une fiducie par interprétation pouvait être imposée en l'absence d'enrichissement sans cause.

Conclusion

82 Étant donné que le juge du procès ne s'est pas trompé en n'imposant pas une fiducie par interprétation et que ce sont plutôt les juges majoritaires de la Cour d'appel qui ont commis une erreur en accordant cette réparation, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et de rétablir le jugement du juge du procès. Vu les circonstances, je n'adjugerais de dépens aux appelants ni dans le présent pourvoi, ni en Cour d'appel.

Pourvoi rejeté avec dépens, les juges SOPINKA *et* IACOBUCCI *sont dissidents.*

Procureurs des appelants: McCarthy Tétrault, Toronto.

Procureurs de l'intimé: Stockwood, Spies & Campbell, Toronto.

Tab 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Williams v. Oulahen | 2001 CarswellOnt 4456, 30 C.B.R. (4th) 240, 110 A.C.W.S. (3d) 564 | (Ont. S.C.J., Dec 19, 2001)

1996 CarswellOnt 4337
Ontario Court of Justice (General Division) [In Bankruptcy]

Baltman v. Coopers & Lybrand Ltd.

1996 CarswellOnt 4337, [1996] O.J. No. 3963, 15
O.T.C. 221, 43 C.B.R. (3d) 33, 67 A.C.W.S. (3d) 182

In the matter of the Bankruptcy of Julius H. Melnitzer, of the City of London, in the County of Middlesex, in the Province of Ontario; Deena Baltman (plaintiff) and Coopers & Lybrand Limited, National Bank of Canada, Canadian Imperial Bank of Commerce and Royal Bank of Canada (defendants)

Killeen J.

Heard: June 10 and 11, 1996
Judgment: October 25, 1996
Docket: 31-204361, 35-039665

Counsel: *Harvey T. Strosberg*, for plaintiff Deena Baltman.
J. Christopher Osborne and *Jennifer Badley*, for defendants Coopers & Lybrand and National Bank of Canada.
Maurice Neirinck, for defendant Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

ACTION for recovery of personal property.

***Killeen J.*:**

1 This case, brought within the four corners of the bankruptcy of Julius Melnitzer, embraces a fight over the ownership of artwork purchased by Mr. Melnitzer in the five years or so before he was put into bankruptcy on September 26, 1991.

2 Miss Baltman, the wife of Mr. Melnitzer at the relevant time, claims that she is an owner of some of the artwork by way of gift or special personal arrangement with him. The Royal Bank, which was in a banker-customer and creditor-debtor relationship with Mr. Melnitzer, claims

ownership under the combined legal weight of the unjust enrichment principle coupled with the remedial constructive trust doctrine. Coopers & Lybrand and the National Bank assert that the artwork falls into the unsecured assets of the bankruptcy pot and must be available for general creditors of Mr. Melnitzer, subject to a special charging order in favour of Coopers & Lybrand arising from its work as the court-appointed Receiver before the bankruptcy.

3 Because of the separate and conflicting nature of the claims against the artwork, I propose to deal, first, with the claim of the Royal Bank and will then move on to the claims of Ms. Baltman and the two other remaining parties, Coopers & Lybrand and the National Bank.

I The Royal Bank Claim

(a) The Background Facts

4 In the case of *Royal Bank v. Harowitz* (1994), 17 O.R. (3d) 671 (Ont. Gen. Div.), I dealt in detail with the circumstances under which the Royal Bank entered a loan agreement arrangement with Mr. Melnitzer. Here, it is only necessary to provide an abridged version of the relationship between them.

5 By letter dated August 9, 1989, the Bank offered a $3 million line of credit to Mr. Melnitzer in return for collateral security consisting of:

> (a) the hypothecation of $1.5 million cash in an interest-bearing account paying market rates;
>
> (b) a guarantee and postponement of claim in the amount of $3 million by Melfan Investments Ltd.;
>
> (c) the hypothecation of the issued shares of Melfan;
>
> (d) a letter of undertaking from the president of Melfan confirming various matters;
>
> (e) A letter of undertaking from Mr. Melnitzer confirming that the advances would be liquidated within three years of the draw-down;

6 Mr. Melnitzer accepted the offer on September 21, 1989, and the collateral security was later received by the Royal Bank. Funds were, from time to time thereafter, advanced under the line of credit up to July 31, 1991.

7 It is admitted that Mr. Melnitzer requested the Bank to offer and obtained the $3 million line of credit:

> (a) by fraudulently misrepresenting certain of his assets and liabilities to the Bank's London Private Banking Manager, Colin Liptrot; and

(b) by fraudulently (i) preparing (ii) forging and (iii) signing a number of documents to support this application for the line of credit, including financial statements, undertakings, resolutions, a guarantee and even an opinion letter form his own law firm bearing the signature of his partner, Harris W. Cohen.

8 But for Mr. Melnitzer's fraudulent misrepresentations, forgeries and other related fraudulent conduct, the Bank would clearly not have granted the large line of credit.

9 On July 29, 1991, the Bank offered to increase Melnitzer's line of credit to a startling $8 million, with interest payable at prime plus 1/2%. The Bank offered to do so following a request by Mr. Melnitzer for an increased line of credit to be secured by the hypothecation of approximately $12 million in "blue-chip" securities. Melnitzer accepted this offer in writing on July 31, 1991. The purported blue-chip securities were delivered to the Bank but later proved to be forged and valueless.

10 Mr. Cyril Watters, an officer of the Bank was examined on discovery as the Bank's representative. He admitted that the relationship of the Bank and Mr. Melnitzer was a straightforward creditor-debtor relationship with the Bank as creditor and Mr. Melnitzer as borrower.

11 At the beginning of August, 1991, Mr. Melnitzer's network of frauds was discovered and an order was issued out of the Ontario Court (General Division) on August 3 freezing his assets and appointing Coopers & Lybrand as Receiver and Manager of his assets. Further, as a result of a bankruptcy petition filed on September 3, 1991, Mr. Melnitzer was adjudged a bankrupt and a receiving order was issued against him on September 26. Additional supplementary orders were also issued on August 9, August 30 and September 26 of that year.

12 Mr. Melnitzer was indicted later in the fall of 1991 with defrauding the Bank under the $3 million and $8 million lines of credit, was convicted, after pleas of guilty and was given nine year concurrent sentences on the two counts relating to these frauds.

13 Mr. Melnitzer's indebtedness to the Bank was approximately $2,484,160.51 as of the date of his bankruptcy and is approximately the same today, less certain recoveries effected by the Bank in the interim.

14 Subsequent investigations after the bankruptcy disclosed that Mr. Melnitzer had used monies drawn on the Bank line of credit to purchase several paintings.

15 First, on February 5, 1990, Mr. Melnitzer bought the following five paintings for $25,314.10 Can. from a dealer:

(1) Wayne County, by Fred Lyman;

(2) Tres Madres Caballos, by Fred Lyman;

(3) Dun Commander, by Fred Lyman;

(4) Red Morning Rising, by Harold Larsen;

(5) Place of Plenty, by Richard Erdman.

The funds for this purchase were transferred directly to the vendor by the Bank on the line of credit at Mr. Melnitzer's instruction.

16 Second, on October 19, 1990, he purchased four paintings by the well-known American artist, Leroy Neiman, for $352,578 Can.:

(1) French Cafe;

(2) Night Football;

(3) French Hunt Scene;

(4) Downhill Skiing.

Once again, he instructed the Bank to transfer the funds for the purchase using the line of credit.

17 Finally, on March 25, 1991, Melnitzer purchased another Leroy Neiman painting, Bistro Garden, for $100,000 Can. and the Bank dutifully followed his instructions in the same manner as for the prior transactions.

18 It is admitted by all parties that the Bank has not recovered the $477,892.10 drawn on the line of credit for these paintings. Also, at the present time, the five Leroy Neiman paintings are currently in storage awaiting the outcome of this proceeding. Unfortunately, the five other paintings, purchased for $25,314.10 Can., as itemized above, are missing although, of course, it is hoped they will be found and recovered in the future.

(b) The Legal Issues and Their Resolution

19 Mr. Neirinck, for the Bank, asks for a declaratory order that it is the beneficial owner of the ten paintings in issue under the principle of unjust enrichment and its remedial tool, the constructive trust.

20 He started his argument by pointing to the elements of the unjust enrichment cause of action, namely, (1) a benefit to or enrichment of one party (2) a corresponding detriment or deprivation suffered by the other party and (3) an absence of any juristic reason for the benefit or unrichment: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p.455. The later cases in the Supreme Court showed

that the principle of unjust enrichment could be applied in commercial settings: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, at pp. 677-78.

21 With respect to the enrichment/corresponding deprivation elements of the required findings, the conclusion that a plaintiff has suffered a corresponding deprivation is virtually automatic once an enrichment has been found: *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 1012 and *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Gen. Div.), at p. 770. As to these components, Mr. Neirinck submits that it is "self- evident" that Mr. Melnitzer had (1) illegally enriched himself by acquiring these paintings with line-of-credit monies, (2) while, at the same time, illegally depriving the Bank of $477,892.10: see Bank factum at para. 21.

22 Mr. Neirinck acknowledged, as he had to, that the third component of the required findings - the absence of a juristic reason - involves an examination of the "unjustness" of the situation at hand: *Peter v. Beblow, supra*, at pp. 984,996,997 and 1018. Here, Mr. Neirinck relied on several factors or circumstances showing, or tending to show, unjustness: (1) from the outset, there never was a consensual banker-customer or creditor-debtor relationship between the Bank and Mr. Melnitzer because of his "underlying fraudulent conduct"; (2) the Bank would not have lent funds to him but for the fraud surrounding the issuance of the line of credit; (3) Mr. Melnitzer essentially "orchestrated" three thefts from the Bank to acquire the paintings; (4) there is a direct link between the paintings and the $477,892.10 which the Bank advanced for them as a consequence of his fraud and (5) it would be inequitable and unjust to allow either Mr. Melnitzer or someone standing in his shoes, such as the general creditors of the bankrupt estate, to obtain a "windfall" benefit from the paintings.

23 Mr. Neirinck's final point was that it would be strongly "appropriate" to grant a remedy by way of constructive trust over the paintings in favour of the Bank because (1) given Mr. Melnitzer's bankruptcy, a monetary award would be of little or no assistance to the Bank and (2) there is a "fundamental connecting link" between the paintings, their acquisition and the $477,892.10 loss which the Bank suffered: *LAC Minerals, supra*, at pp. 677-78; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, at p. 50.

24 Mr. Osborne, who represented the National Bank and Coopers & Lybrand in this proceeding, responded to the position asserted by Mr. Neirinck for the Royal Bank. The National Bank is an unsecured creditor whereas Coopers & Lybrand was the initial court-appointed Receiver-Manager appointed on August 3, 1991, to protect and bring in whatever assets Mr. Melnitzer had when his frauds were discovered. Coopers & Lybrand has the benefit of a court-ordered charge on assets brought into account. In his helpful argument, he made three basic points.

25 First, he argued that this was one of those cases providing a "rare exception" to the rule coming out of *Peter v. Beblow, supra*, at p. 1012, that "once enrichment has been found, the conclusion

that the plaintiff has suffered a corresponding deprivation is virtually automatic". On this point Mr. Osborne attempted to argue that the benefit or enrichment was experienced by the general creditors of Mr. Melnitzer. In his factum, at para. 14, he said this:

> The benefit or enrichment alleged in this case is experienced by the general creditors of Melnitzer. Such benefit or enrichment is not as a result of some unfair advantage taken by the general creditors of Melnitzer. Instead, the equilibrium typically present in such analysis was upset by reason of Melnitzer's fraud and ensuing bankruptcy. Accordingly, it cannot be said that the deprivation is related to the enrichment. The deprivation to the Bank which predated Melnitzer's bankruptcy arose by reason of Melnitzer's fraud and the Bank's failure to make routine enquiries with respect to his assets and credit worthiness, which enquiries would have exposed the fraud. The enrichment, if there is one, arose by reason of the bankruptcy.

26 His second point was that, even assuming the enrichment/deprivation elements were made out by the Bank, the Bank totally failed to show the absence of a juristic reason for the enrichment.

27 His third key point was that the constructive trust was not an appropriate remedy because the Bank, at no time, had a reasonable expectation that it would obtain a proprietary interest in the paintings.

28 I conclude, on the facts, that the Bank has made out the enrichment/deprivation elements of the unjust enrichment formula: Mr. Melnitzer received a benefit through the Bank advances and purchase of the paintings and it seems to me that the Bank has made out a showing that it suffered a consequential deprivation. The Supreme Court has said, in its decisions, that the enrichment/deprivation analysis should proceed on a non-technical economic approach and Mr. Osborne's approach to these elements seems to me to be excessively technical and narrow. As was said by McLachlin J. in *Peter v. Beblow, supra*, at p. 990:

> This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker, supra,; Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

29 However, I conclude, here, as I did in *Royal Bank v. Harowitz, supra*, that the Bank's claim must founder and fail on the shoals created by the third element of the unjust enrichment cause of action - the absence of a juristic reason - as well as at the remedial stage where the Bank seeks the imposition of constructive trust.

30 In his now-famous dictum in *Rathwell, supra*, at p. 459, Dickson J. described the third element of the formula somewhat delphically:

> ... for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, *and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment*. (Emphasis added.)

31 Later cases have suggested that the formula must be applied flexibly and not ritualistically, depending upon the facts of the given case. In other words, rather inevitably, a case-by-case approach must be taken to the application of the formula. As McLachlin J. explains in *Peter, supra*, at pp. 989-990:

> The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother ... These arguments raise moral and policy questions and require the court to make a value judgment.
>
> The first question is: where do these arguments belong? Are they part of the benefit - detriment analysis, or should they be considered under the third head - the absence of juristic reason for the unjust enrichment? ... It is in connection with the third element - absence of juristic reason for the enrichment - that such considerations may more properly find their place. *It is at this stage that the court must consider whether the enrichment and deprivation, morally neutral in themselves, are "unjust"*.
>
> What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? *The test is flexible, and the factors to be considered may vary with the situation before the court*. For example, different factors may be more relevant in a case like *Peel, supra*, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.
>
> *In every case, the fundamental concern is the legitimate expectation of the parties: Pettkus v. Becker, supra*. (Emphasis added.)

32 The central core of Mr. Neirinck's argument on the third element is that "there never was a consensual banker/customer or creditor/debtor relationship between Royal and Melnitzer due to Melnitzer's fundamental creditor/debtor relationship ...". In effect, he is attempting to eviscerate *ab initio* the contract Mr. Melnitzer entered with the Bank through the letter commitment of August 9, 1989, for a $3 million line of credit because of Mr. Melnitzer's undoubted fraudulent misrepresentations about his net worth, his shareholdings and his interest in Melfan Investments and so on.

33 In my view, however, Mr. Neirinck cannot so neatly and conveniently turn aside and treat as a non-event the contract for credit between the parties - even though it was undoubtedly induced by Melnitzer's ingenious and fraudulent conduct.

34 The plain fact of the matter is that the contract went into effect and stayed in effect for almost two years down to early August, 1991, when Mr. Melnitzer's fraudulent schemes were opened to the light of day.

35 One should note the following facts about the course of the contract dealings. The Bank entered the contract with its eyes open even though, as I found in the *Harowitz* case, *supra*, the Bank was negligent in doing its due diligence leading up to the grant of the credit line to Mr. Melnitzer. The loan commitment was made subject to apparently stringent terms demanded by the Bank, including the hypothecation of $1.5 million in cash by Mr. Melnitzer in an interest-bearing account along with a full-loan guarantee by Melfan Investments, the hypothecation of Melfan Investments shares and other collateral undertakings and guarantees by Mr. Melnitzer personally.

36 There were no defaults under the credit line down through 1990 and well into 1991. In the interim, Mr. Melnitzer made several draws on the line and the Bank was earning up to $38,000 per month in interest at good rates.

37 Then, in July, 1991, Mr. Melnitzer succeeded in persuading the Bank to revise the credit line upward to $8 million on the strength of new collateral security in the form of so-called blue chip securities worth $12 million.

38 It is instructive to examine the events of July 29-August 1, 1989. On July 29, Mr. Liptrot sent a new credit line commitment letter for the $8 million figure. Mr. Melnitzer approved and co-signed this letter commitment on July 31. He also signed a more formal document for the new credit line on July 31, entitled "Revolving Demand Loan Agreement". In this latter document he acknowledged, at p. 2, that as of the close of business on July 30, he owed $2,808,590.93. Mr. Liptrot wrote a sort of reporting letter to Mr. Melnitzer on August 1 summarizing the events of July 31-August 1. This letter says that the cash collateral, which then stood at $1,509,430.21, was applied to the old credit line balance of $2,808,590.93 on July 31, leaving a balance owing of $1,299,160.72. Mr. Liptrot goes on to say that "Debited to your loan account today [August 1] were the Bank drafts that you requested in the amount of $470,000; $37,626.50 and $673,357.44. These were delivered to you as arranged".

39 The Bank presented these latter three advances, totalling $1,180,993.94, as advances under the original $3 million line and accordingly claims that the balance owing under the original line was really $2,484,160.51 when the roll-over from the first loan to the second occurred.

40 I accept these figures because they are set out in the Agreed Statement of Facts, filed as ex. 5, although I note in passing that they seem inconsistent with some statements in Mr. Liptrot's August 1 letter to Mr. Melnitzer and the new Revolving Demand Loan Agreement. These latter documents seem to indicate that the roll-over occurred on July 31, not August 1, in which event the true final balance owing under the original line of credit would be about $1,299,160.72 and not $2,484,160.51.

41 In any event, all of these documents and transactions in late July and on August 1 clearly show a contract relationship is alive between the parties, regardless of whether Mr. Melnitzer has duped the Bank into granting him the credit it did. His conduct cannot make the contract of August 9, 1989, void *ab initio* and the contract provides a sound juristic reason and basis for the credit line and the advances which financed the three purchases of pictures in 1990 and 1991.

42 Mr. Neirinck conceded during argument that he had no basis, on the facts, for asking for a tracing order, at law or in equity, under traditional legal and equitable principles. He has tried to overcome these frailties in his case by resorting to the unjust enrichment principle. I am afraid that I must conclude that his position is as frail under this new and overarching principle of restitutionary law as it is under older, narrower and more technical rules of the past.

43 The final *coup de grace* for his position is, I think, found in the passage already quoted from McLachlin J.'s powerful judgment in *Peter, supra* at p. 990. There she concludes that the "fundamental" question to ask under the third component of the unjust enrichment principle is this: What were the legitimate or reasonable expectations of the parties when the deal or occurrences took place? Surely, at the time of the advances in question, the Bank had no expectation whatsoever that it would or could acquire a proprietary interest in the paintings which Mr. Melnitzer was purchasing. It was content with its credit-line arrangements and the collateral it had received, including $1.5 million in cash which was deposited to an interest-bearing account.

44 I think it is patently absurd to attempt to twist the unjust enrichment principle like a warm pretzel and employ it on these facts.

45 For the sake of completeness, I now deal with the question of whether, assuming I am wrong in my approach to the application of the unjust enrichment principle, this is a proper case for the imposition of a constructive trust. As I have said, Mr. Neirinck argues that a constructive trust should be imposed because (1) a monetary award would be ineffective and (2) there is a fundamental connecting link between the paintings, their acquisition and the Bank's advances and loss.

46 It is quite clear that, even where a cause of action for unjust enrichment has been made out, the remedy of constructive trust does not automatically issue. The court must go on to consider the

competing equitable interests to decide whether, on balance, a proprietary remedy will be imposed or whether only monetary damages will be ordered.

47 In *International Corona Resources v. LAC Minerals, supra*, at 678-79, La Forest J. delivered this principled statement of some of the considerations which should be brought to bear upon the vexed question of whether a constructive trust should be imposed:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. This situation will be more rare, since the focus of the inquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

48 On the facts of this case, I do not believe it would be appropriate to award a constructive trust. The factors which I identify telling against its application are these:

> (1) the relationship between Mr. Melnitzer and the Bank was a purely commercial and contractual relationship;
>
> (2) while the Bank took certain security interests as it saw fit, such as the $1.5 million deposit account, none of the property at issue - the artwork - was secured by the Bank;
>
> (3) the availability to the Bank of its normal contractual remedies;
>
> (4) the availability to the Bank of its claims as a creditor in the bankruptcy;

(5) the fact that the Bank is asserting a constructive trust only as a result of its own negligence, lack of investigation and breach of its own internal credit-granting rules incidental to the issuance of a credit line to Mr. Melnitzer;

(6) the fact that an otherwise unsecured creditor is seeking, in effect, to "jump the queue" over other unsecured creditors in the bankruptcy;

49 This is not a case, like *LAC Minerals, supra*, where one party effectively stole a property from another party by taking advantage of confidential information. Also, it is not a case where one party has obtained all the fruits of a property on the back of another as in *Rathwell, supra*, or *Sorochan, supra*. Rather, this is a case where a large and sophisticated commercial enterprise entered a loan contract with a person it was anxiously and almost desperately courting and chose to dictate the terms and conditions of the arrangement. Now, having been burned by the contract, the Bank is attempting to re-write that contract and, after the fact, obtain new security at the expense of other creditors who were also victims of the same fraudster. Equity, in my view, should not come to the aid of that single creditor at the expense of the other equally victimized creditors.

50 In the result, the claim of the Royal Bank is dismissed.

II The Deena Baltman Claim

(a) The Background Facts

51 I say at the outset that Ms. Baltman gave entirely credible evidence which I accept unreservedly. She was only lightly challenged in cross-examination and, if anything, the crossexamination reinforced her credit.

52 Ms. Baltman's story is this. Ms. Baltman met Mr. Melnitzer while she was a law student at the University of Western Ontario. She started living with him at twenty-two, after he had separated form his first wife. Later, he divorced and they married on July 13, 1986. She says that they entered their relationship in 1981 under a special form of oral agreement as to how their life would be ordered from an economic point of view:

(1) their personal property, including their residence and its contents, would be owned jointly;

(2) Mr. Melnitzer would be responsible for liabilities associated with their personal assets and home;

(3) they would operate a personal joint chequing account with the C.I.B.C. and each would deposit earnings into that account.

(4) Ms. Baltman would have no claim against Mr. Melnitzer's business assets, including his capital account at his law firm and any other investments;

53 There is sound circumstantial evidence for this cohabitation and later marital regime. For example, their residence on Tallwood Road was subject to a mortgage but the mortgage, by its express terms, limited her liability to her equity in the residence. Also, throughout their relationship, Ms. Baltman deposited all of her income into the joint account and, as well, deposited cashed Israeli bonds, gifts from her family, income tax refunds and other sundry revenues into the account.

54 Ms. Baltman received her call to the Bar in March, 1984. She immediately joined Mr. Melnitzer's firm as a junior lawyer and worked full-time until about January, 1991. Thereafter, she worked part-time in the law firm and was attempting to move in the direction of an acting career in Toronto.

55 From the outset of their relationship, Ms. Baltman thought that Mr. Melnitzer was a very wealthy man. She knew, of course, that he had already had a remarkably successful career as a lawyer and that he was widely respected in the legal and business communities in London. He had told her that he had investments in Ontario and elsewhere which were worth well over $20 million. She believed him, in short, when he told her that they could not spend the interest he was earning on his investments.

56 I may add, here, that Ms. Baltman was able to produce at trial some notes she had written back in the 1987-89 period (ex. 4) which demonstrated her full belief in the grandiose picture which Mr. Melnitzer painted for himself. Other persons, including several experienced bankers, also accepted this same picture as true and accurate during the same time period.

57 Ms. Baltman went on to describe their joint interest and involvement in the purchase of artwork in the 1985-1991 period.

58 They largely purchased paintings but their artwork acquisitions also included pottery, antiques and a myriad of other l'objects d'art. The evidence showed that they purchased these pieces all over the world, either on joint trips or when Mr. Melnitzer was away on business.

59 She said that, from the start, it was their common intention that the artwork which went into their London residence was either joint property, under their cohabitation agreement, or, in some rarer cases, was hers alone because Mr. Melnitzer, with her concurrence, designated particular pieces as gifts outright to her.

60 Once again, here, Mrs. Baltman was able to provide helpful circumstantial evidence concerning their common intention as to ownership of the artwork: the documentation relative to the artwork (exs. 2 and 3) showed that (a) she was handling the insurance arrangements for the artwork and the master insurance policy covering the artwork was issued in their joint names, (b) in some instances, certificates of purchase were in their joint names, (c) correspondence from

dealers was sent to both her and Mr. Melnitzer and (d) cheques in payment for most of the artwork were issued by her as well as Mr. Melnitzer on the C.I.B.C. account.

61 Exhibit 1, the detailed summary document of artwork purchases, shows that Ms. Baltman and Mr. Melnitzer purchased approximately 130 individual pieces between 1985 or so and 1991.

62 Ms. Baltman went through this document in her evidence and indicated those in which she asserted a joint interest or an absolute interest.

63 She identified the following as being pieces in which she claimed full ownership:

(1) Item 20: Lori Seaman "Tulips" oil

This was purchased by Mr. Melnitzer from a painter-friend as a birthday gift for her.

(2) Item 16: Judith Neville "Grandmother's Story"

This was purchased specially for her and was hung in her study at the residence.

(3) Items 34-35: Indian Miniatures

These were special gifts from Mr. Melnitzer to her and placed in her study.

(4) Item 43: Haida Bowl

This was a special gift from Mr. Melnitzer for her vanity;

(5) Items 110-111: Japanese Bowl and Tiffany Lamp

These were special gifts from Mr. Melnitzer to her.

(6) Item 123: Leroy Neiman, "Bistro Garden"

This was a 10th anniversary gift from Mr. Melnitzer to her.

(7) Item 125: Venice Glass Coffee Set

This was a special gift from Mr. Melnitzer to her.

64 During her evidence, she explained that items 91, 92, 94, 98, 105, 106 and 115 were either duplicates of other items or were not in issue. Also, items 107, 108 and 109 were purchased specially for a condominium in Utah in which Mr. Melnitzer had an interest with other persons and, accordingly, were not in issue.

(b) The Legal Issues and Their Resolution

65 Mr. Strosberg, for Ms. Baltman, made a simple and fact-driven submission on her behalf. He submitted that her special cohabitation agreement with Mr. Melnitzer, which was worked out before the marriage, was intended to subsist after the marriage and was binding in law on them and, in effect, the world.

66 Mr. Neirinck argued, as I have already said, that his client, the Royal Bank, had a proprietary prior interest in virtue of the alleged application of the unjust enrichment principle, supported by the constructive trust remedial instrument. I have rejected Mr. Neirinck's submissions earlier and will say no more about them here.

67 Mr. Osborne presented an ingenious argument on behalf of the National Bank and Coopers & Lybrand which requires careful review and assessment.

68 The springboard for his position was based on the general proposition that Mr. Melnitzer's fraudulent misrepresentations vis à vis his bankers, such as C.I.B.C. and the Royal Bank, must justify equitable orders preventing Ms. Baltman from being able to enforce her personal agreement with Mr. Melnitzer regarding the accumulation and ownership of chattels during their relationship.

69 His first point is put this way in para. 5 of his factum:

> It is respectfully submitted that a constructive trust will be imposed as a restitutionary remedy in circumstances where a wrongdoer fraudulently misappropriated the money of others. In such circumstances, equity converts the party who has committed the fraud into a trustee for the party who is injured by that fraud.

70 Mr. Osborne also cites in support of this argument the following passage from the English Chancery case of *Re Oatway; Hertslet v. Oatway*, [1903] 2 Ch. D. 356 where Joyce J. said this at pp. 359-60:

> Trust money may be followed into land or any other property in which it has been invested; and when a trustee has, in making any purchase or investment, applied trust money together with his own, the cestuis que trust are entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase or investment.

71 As it seems to me, the cases cited, and the proposition urged, cannot be of any assistance to Mr. Osborne's clients, or those who stand with them as unsecured creditors of the Melnitzer estate, on the facts of this case.

72 The entire line of cases, out of which the *Re Oatway* principle arises, started with the famous English case, *Re Hallett's Estate; Knatchbull v. Hallett* (1880), 13 Ch. D. 696 (C.A.), and includes such later cases as *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.), and *Re Diplock Estate; Diplock's v. Wintle*, [1948] Ch. 465 (Eng. C.A.).

73 These cases have, to a large extent, been adopted or followed in Canada but cannot, with respect, be applied here because they were all cases involving breaches by an express trustee, such as an executor (*Re Diplock's Estate*) or a fiduciary, such as a solicitor (*Re Hallett's Estate*).

74 One cannot, I believe, use these cases, and the principles undergirding them, as a roving attack-dog to assist and protect unsecured creditors in a situation like the one in the case at Bar.

75 Here, the evidence is that Mr. Melnitzer and Ms. Baltman, after establishing a perfectly legitimate personal regime in 1981, proceeded to purchase a large artwork portfolio over a period of years running from 1984 or 1985 down to 1991, when the axe fell on Mr. Melnitzer. It is conceded that they purchased about $2 million worth of artwork and that, with the exception of monies coming from the Royal Bank line of credit in 1990-91 ($477,892.10), the monies came from their joint account at the C.I.B.C., cash advances or credit cards.

76 The C.I.B.C. originally had a counterclaim in this proceeding in which it attempted to assert a tracing claim against the artwork. At the opening of this hearing, I was advised that the C.I.B.C. counterclaim had been withdrawn and that the C.I.B.C. was taking no further role in this proceeding.

77 There is no evidence supporting a tenable argument that Mr. Melnitzer was either a trustee or fiduciary when he and his wife purchased this artwork. As I have said, most of the money for the purchases came from the C.I.B.C. account although some purchases were made using credit cards, cash of unknown origin or the Royal Bank advances on its credit line. In these circumstances, Mr. Osborne's clients are not in a position to say that they had any legitimate expectation that they were going to obtain a proprietary or *in rem* interest in the artwork purchases. These transactions, and their fruits, cannot be set aside now, on a vague application of equitable principles, to give unsecured creditors a prior charge over Ms. Baltman.

78 It is to be remembered that Ms. Baltman is not asserting *total* ownership of the artwork. She only claims full ownership of nine items in which she says Mr. Melnitzer gave up his potential one-half interest by way of gift to her in specific and special circumstances. As to over 100 other items, she says she is *a one-half owner* under her agreement with Mr. Melnitzer and concedes that the other one-half interest must devolve upon Mr. Melnitzer's creditors in the bankruptcy.

79 I conclude my analysis of Mr. Osborne's first point by referring to the recent judgment of the Ontario Court of Appeal in *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477, where that court overturned a ruling by the trial judge under which a constructive trust was ordered against the property of two bankrupts. The Court said, at p. 478:

> To establish the unjust enrichment, there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding

> it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention ... This [the decision below] is contrary to clear law which requires that a constructive trust be imposed over specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest.

80 Mr. Osborne's second point is that Ms. Baltman is an "innocent volunteer" in this case and that equity must intervene to impose a constructive trust on any interest she may have in the artwork in favour of his clients and the other general creditors. This is because, he argues, the artwork was acquired with misappropriated funds and can be traced into her hands. He relies upon the following statement in *Re Diplock's Estate, supra*, at p. 539:

> In the case, however, of a volunteer who takes without notice, e.g., by way of gift from the fiduciary agent, if there is no question of mixing, he holds the money on behalf of the true owner whose equitable right to the money still persists as against him. On the other hand, if the volunteer mixes the money with money of his own, or receives it mixed from the fiduciary agent, he must admit the claim of the true owner, but is not precluded from setting up his own claim in respect of the moneys of his own which have been contributed to the mixed fund. The result is that they share pari passu. It would be inequitable for the volunteer to claim priority for the reason that he is a volunteer: it would be equally inequitable for the true owner of the money to claim priority over the volunteer for the reason that the volunteer is innocent and cannot be said to act unconscionably if he claims equal treatment for himself. The mutual recognition of one another's rights is what equity insists upon as a condition of giving relief.

81 I do not take issue with this holding of the English Court of Appeal but simply say that it is entirely distinguishable on its facts. *Re Diplock' Estate*, like its decisional forbear, *Re Hallett's Estate, supra*, involved a "fiduciary agent" within the context of an estate, and cannot be said to bear any similarity to this case where, as I have said, neither Mr. Melnitzer nor Ms. Baltman could rationally be said to play fiduciary roles towards the general creditors arising from their personal agreement and the purchases of the artwork.

82 In any event, I cannot regard Ms. Baltman's position to be that of a volunteer, as Mr. Osborne alleged. From the very start of her relationship with Mr. Melnitzer, she provided consideration for the agreement they concluded regarding personal chattels and the matrimonial residence. The quantum of the consideration matters not so long as it is more than purely nominal and I note that Ms. Baltman's uncontradicted evidence was that she earned between $30,000 to $60,000 per annum between 1984 and 1991 with all of this money, together with certain other money of hers, going into her joint pooling account with Mr. Melnitzer at the C.I.B.C.

83 Thus, I conclude that Mr. Osborne's second argument, based on tracing into the hands of a volunteer, must also be rejected.

84 In the result, the following orders are made:

(1) The claim of ownership of the Royal Bank by way of declaratory relief is dismissed.

(2) The claims of Coopers & Lybrand and the National Bank are dismissed subject to what is said in order (3) below.

(3) The claims of Deena Baltman are disposed of as follows:

(i) She is declared to be the absolute owner of the nine pieces of gifted artwork referred to at pp. 18-19 above.

(ii) She is declared to have an undivided one-half interest in the balance of the artwork in issue, as set out in ex. 1, the other one-half interest in such artwork being vested in the Trustee in Bankruptcy of the Estate of Julius Melnitzer.

85 I will defer the question of costs and any possible ancillary orders for the present. If counsel wish to address such questions, I direct that they arrange for an appointment with me within the next 30 days.

Action allowed.

Tab 4

Michelle Constance Moore *Appellant*

v.

Risa Lorraine Sweet *Respondent*

INDEXED AS: MOORE *v.* SWEET

2018 SCC 52

File No.: 37546.

2018: February 8; 2018: November 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Equity — Restitution — Unjust enrichment — Remedy — Constructive trust — Husband and wife separating and entering into contractual agreement pursuant to which wife will pay husband's life insurance policy premiums in order to remain named sole beneficiary of policy — Husband subsequently naming new common law spouse as beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death despite wife having continued to pay premiums — Whether common law spouse unjustly enriched at wife's expense — If so, whether constructive trust is appropriate remedy.

Insurance — Life insurance — Beneficiary designation — Wife designated as revocable beneficiary of husband's life insurance policy — After separation, wife agreeing to continue to pay policy premiums to maintain beneficiary designation — Husband subsequently designating new common law spouse as irrevocable beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death — Whether designation of common law spouse as irrevocable beneficiary in accordance with statute precludes recovery for wife with prior claim to benefit of policy — Insurance Act, R.S.O. 1990, c. I.8, ss. 190, 191.

During L and M's marriage, L purchased a term life insurance policy and designated M as revocable beneficiary. They later separated, and entered into an oral agreement whereby M would pay all of the policy premiums and, in

Michelle Constance Moore *Appelante*

c.

Risa Lorraine Sweet *Intimée*

RÉPERTORIÉ : MOORE *c.* SWEET

2018 CSC 52

N° du greffe : 37546.

2018 : 8 février; 2018 : 23 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Equity — Restitution — Enrichissement sans cause — Réparation — Fiducie par interprétation — Conclusion par un époux et une épouse d'une entente contractuelle à la suite de leur séparation aux termes de laquelle l'épouse paiera les primes de la police d'assurance-vie de l'époux afin de demeurer la seule bénéficiaire de la police — Désignation subséquente par l'époux de sa nouvelle conjointe de fait comme bénéficiaire à l'insu de l'épouse — Produit de l'assurance payable à la conjointe de fait au décès de l'époux même si l'épouse a continué de payer les primes — La conjointe de fait s'est-elle enrichie sans cause au détriment de l'épouse? — Dans l'affirmative, une fiducie par interprétation est-elle une réparation convenable?

Assurances — Assurance-vie — Désignation à titre de bénéficiaire — Épouse désignée à titre de bénéficiaire révocable de la police d'assurance-vie de son époux — Épouse consentant, après la séparation, à continuer de payer les primes de la police afin de maintenir son statut de bénéficiaire — Désignation subséquente par l'époux de sa nouvelle conjointe de fait comme bénéficiaire irrévocable à l'insu de l'épouse — Produit de l'assurance payable à la conjointe de fait au décès de l'époux — La désignation de la conjointe de fait comme bénéficiaire irrévocable en conformité avec la loi fait-elle obstacle au recouvrement en faveur de l'épouse ayant un droit antérieur au bénéfice de la police? — Loi sur les assurances, L.R.O. 1990, c. I.8, art. 190, 191.

Durant le mariage de L et de M, L a souscrit une police d'assurance-vie temporaire et désigné M comme bénéficiaire révocable. Ils se sont séparés par la suite, et ont conclu une entente verbale aux termes de laquelle M

exchange, L would maintain M's beneficiary designation. Unbeknownst to M, L subsequently designated his new common law spouse, R, as the irrevocable beneficiary of the policy. When L passed away, the proceeds were therefore payable to R and not to M. At the time of L's death, his estate had no significant assets. M, who had paid about $7,000 in policy premiums since separation, commenced an application regarding her entitlement to the $250,000 policy proceeds. The application judge held that R had been unjustly enriched at M's expense and impressed the proceeds with a constructive trust in M's favour. The Court of Appeal allowed R's appeal and set aside the judgment of the application judge.

Held (Gascon and Rowe JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.: R was enriched, M was correspondingly deprived, and both the enrichment and deprivation occurred in the absence of a juristic reason. Therefore, a remedial constructive trust should be imposed for M's benefit.

A constructive trust is understood primarily as an equitable remedy that may be imposed at a court's discretion. A proper equitable basis, such as a successful claim in unjust enrichment, must first be found to exist. A plaintiff will succeed on the cause of action in unjust enrichment if he or she can show three elements: (1) that the defendant was enriched; (2) that the plaintiff suffered a corresponding deprivation; and (3) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

Regarding the first element, the parties do not dispute the fact that R was enriched to the full extent of the insurance proceeds in the amount of $250,000, by virtue of her right to receive them as the designated irrevocable beneficiary of L's policy.

The second element focuses on what the plaintiff actually lost and on whether that loss corresponds to the defendant's enrichment, such that the latter was enriched at the expense of the former. The measure of deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of loss also captures a benefit that was never in the plaintiff's possession but that the court finds would have

paierait toutes les primes de la police et, en échange, L maintiendrait la désignation de M à titre de bénéficiaire. À l'insu de M, L a désigné par la suite sa nouvelle conjointe de fait, R, à titre de bénéficiaire irrévocable de la police. Donc, lorsque L est décédé, le produit de la police était payable à R, et non à M. Au moment du décès de L, sa succession n'avait aucun actif important. M, qui avait payé environ 7 000 $ à titre de primes de la police depuis la séparation, a déposé une requête au sujet de son droit au produit de la police, d'une valeur de 250 000 $. Le juge de première instance a conclu que R s'était enrichie sans cause au détriment de M, et il a assujetti le produit à une fiducie par interprétation en faveur de M. La Cour d'appel a accueilli l'appel de R et a infirmé le jugement du juge de première instance.

Arrêt (les juges Gascon et Rowe sont dissidents) : Le pourvoi est accueilli.

Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown et Martin : R s'est enrichie, M a subi un appauvrissement correspondant, et tant l'enrichissement que l'appauvrissement ont eu lieu en l'absence d'un motif juridique. Par conséquent, il convient d'imposer une fiducie par interprétation en faveur de M à titre de réparation.

La fiducie par interprétation est principalement considérée comme une réparation en equity, qui peut être imposée à la discrétion de la cour. Il faut d'abord conclure à l'existence d'un motif valable en equity, telle une action accueillie pour enrichissement sans cause. Le demandeur aura gain de cause dans son action pour enrichissement sans cause s'il peut démontrer trois éléments : (1) que le défendeur s'est enrichi; (2) que le demandeur a subi un appauvrissement correspondant; et (3) que l'enrichissement du défendeur et l'appauvrissement correspondant du demandeur ont eu lieu en l'absence d'un motif juridique.

En ce qui concerne le premier élément, les parties ne contestent pas que R s'est enrichie à hauteur du produit de l'assurance d'une valeur de 250 000 $ grâce à son droit de le recevoir à titre de bénéficiaire irrévocable de la police de L.

Le deuxième élément met l'accent sur la perte réelle du demandeur et sur la question de savoir si cette perte correspond à l'enrichissement du défendeur, de sorte que ce dernier s'est enrichi au détriment du premier. La mesure de l'appauvrissement ne se limite pas aux dépenses du demandeur, ni à l'avantage qui lui a été pris directement. En fait, le concept de perte englobe également l'avantage qui n'a jamais été en la possession du demandeur mais qui,

accrued for his or her benefit had it not been received by the defendant instead. This element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant. In this case, the extent of M's deprivation is not limited to the $7,000 she paid in premiums. She stands deprived of the right to receive the entirety of the insurance proceeds, a value of $250,000. It is also clear that R's enrichment came at M's expense. Not only did M's payment of the premiums make R's enrichment possible, but R's designation gave her the statutory right to receive the insurance proceeds. Because R received the benefit that otherwise would have accrued to M, the requisite correspondence exists: the former was enriched at the expense of the latter.

To establish the third element, it must be demonstrated that both the enrichment and corresponding deprivation occurred without a juristic reason. The juristic reason analysis proceeds in two stages. The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the established categories of juristic reasons, such as disposition of law or statutory obligations. A plaintiff's claim will necessarily fail if a legislative enactment justifies the enrichment and corresponding deprivation. In this case, a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* does not provide a juristic reason for R's enrichment at M's expense. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. The legislature is presumed not to depart from prevailing law without expressing its intention to do so with irresistible clearness. While the *Insurance Act* provides the mechanism by which beneficiaries become statutorily entitled to receive policy proceeds, no part of the Act operates with the necessary irresistible clearness to preclude the existence of contractual or equitable rights in those proceeds once they have been paid to the named beneficiary. Furthermore, the *Insurance Act* provisions applicable to irrevocable beneficiary designations do not require, either expressly or implicitly, that a beneficiary keep the proceeds as against a plaintiff in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death. Accordingly, an irrevocable designation under the Act cannot constitute a juristic reason for R's enrichment and M's deprivation. Neither by direct reference nor by necessary implication does the *Insurance Act* either foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment

selon le tribunal, lui serait revenu s'il n'avait pas plutôt été remis au défendeur. Cet élément ne requiert pas l'octroi direct, par le demandeur au défendeur, de l'avantage en litige. En l'espèce, l'étendue de l'appauvrissement de M ne se limite pas aux 7 000 $ qu'elle a versés en primes. Elle est privée du droit de recevoir l'intégralité du produit de l'assurance, qui vaut 250 000 $. Il est tout aussi clair que R s'est enrichie au détriment de M. Non seulement le paiement des primes par M a permis à R de s'enrichir, mais la désignation de R lui a donné le droit statutaire de recevoir le produit de l'assurance. Puisque R a reçu le bénéfice qui aurait autrement été conféré à M, la correspondance requise existe : la première s'est enrichie au détriment de la seconde.

Pour établir le troisième élément, il faut démontrer que tant l'enrichissement que l'appauvrissement correspondant sont survenus sans motif juridique. L'analyse du motif juridique comporte deux étapes. À la première étape, le demandeur doit démontrer qu'aucune des catégories établies de motifs juridiques ne justifie que le défendeur conserve l'avantage au détriment du demandeur, comme la disposition légale ou les obligations imposées par la loi. L'action du demandeur sera nécessairement rejetée si un texte de loi justifie l'enrichissement et l'appauvrissement correspondant. En l'espèce, la désignation d'un bénéficiaire effectuée conformément aux par. 190(1) et 191(1) de la *Loi sur les assurances* ne fournit pas un motif juridique justifiant l'enrichissement de R au détriment de M. Rien dans la *Loi sur les assurances* ne peut être considéré comme excluant les droits que peuvent avoir, en common law ou en equity, d'autres personnes que le bénéficiaire désigné sur le produit de la police d'assurance. Le législateur est présumé ne pas s'écarter du droit existant sans exprimer de façon incontestablement claire son intention de le faire. Bien que la *Loi sur les assurances* prévoie le mécanisme par lequel les bénéficiaires acquièrent le droit au versement du produit de la police d'assurance, aucune partie de cette loi ne s'applique avec la clarté incontestable voulue pour exclure l'existence de droits contractuels ou en equity à ce produit d'assurance une fois que celui-ci a été versé au bénéficiaire désigné. En outre, les dispositions de la *Loi sur les assurances* qui s'appliquent aux désignations de bénéficiaire à titre irrévocable n'exigent ni expressément ni implicitement qu'un bénéficiaire conserve le produit à l'encontre d'un demandeur ayant intenté une action pour enrichissement sans cause qui est privé de son droit contractuel antérieur de réclamer ce produit à la mort de l'assuré. En conséquence, une désignation irrévocable au sens de la Loi ne peut constituer un motif juridique justifiant l'enrichissement de R et l'appauvrissement de M. Que ce soit par

claim against the designated beneficiary — revocable or irrevocable — or preclude the imposition of a constructive trust in circumstances such as these. Therefore, no established category of juristic reason applies.

Once the plaintiff has successfully demonstrated that no category of juristic reason applies, a *prima facie* case is established and the analysis proceeds to the second stage. At this stage, the defendant must establish some residual reason why the enrichment should be retained. Considerations such as the parties' reasonable expectations and moral and policy-based arguments come into play. In the present case, it is clear that both parties expected to receive the proceeds of the life insurance policy. However, the residual considerations favour M, given that her contribution towards the payment of the premiums actually kept the policy alive and made R's entitlement to receive the proceeds upon L's death possible.

Once each of the three elements of the cause of action in unjust enrichment is made out, the remedy is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation and can be viewed as the default remedy for unjust enrichment. In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature. The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust. Courts will impress the disputed property with a constructive trust only if the plaintiff can establish that a personal remedy would be inadequate; and that there is a link between his or her contributions and the disputed property. Ordinarily, a personal award would be adequate in cases such as this one where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Moreover, M's payment of the premiums was causally connected to the maintenance of the policy under which R was enriched. A constructive trust to the full extent of the proceeds should therefore be imposed in M's favour.

Per Gascon and Rowe JJ. (dissenting): There is disagreement with the majority that M has established a claim

mention directe ou par déduction nécessaire, la *Loi sur les assurances* n'empêche pas le tiers privé de son droit contractuel de réclamer le produit d'assurance en faisant valoir avec succès une allégation d'enrichissement sans cause contre le bénéficiaire désigné — à titre révocable ou irrévocable — ni n'interdit d'imposer une fiducie par interprétation dans des circonstances comme celles de l'espèce. Par conséquent, aucune catégorie établie de motif juridique ne s'applique.

Une fois que le demandeur est parvenu à démontrer qu'aucune catégorie de motif juridique ne s'applique, une preuve *prima facie* est établie et le tribunal passe alors à la deuxième étape de l'analyse. À cette étape, le défendeur doit établir qu'il existe un motif résiduel pour lequel il devrait conserver ce dont il s'est enrichi. Des facteurs entrent en jeu, comme les attentes raisonnables des parties et les arguments de morale et d'intérêt public. En l'espèce, il est clair que les deux parties s'attendaient à toucher le produit de la police d'assurance-vie. Cependant, les facteurs résiduels militent en faveur de M, puisque sa contribution au paiement des primes a effectivement permis de maintenir la police d'assurance en vigueur et rendu possible le droit de R de recevoir le produit au décès de L.

Une fois établi chacun des trois éléments de l'action pour enrichissement sans cause, le tribunal accorde une restitution à titre de réparation qui peut prendre deux formes : une réparation personnelle ou une réparation fondée sur le droit de propriété. La réparation personnelle est essentiellement une dette ou une obligation pécuniaire, et elle peut être considérée comme la réparation par défaut pour remédier à l'enrichissement sans cause. Dans certains cas, toutefois, le tribunal peut accorder au demandeur une réparation fondée sur le droit de propriété. La réparation fondée sur le droit de propriété la plus répandue et la plus importante pour remédier à l'enrichissement sans cause est la fiducie par interprétation. Les tribunaux n'assujettiront le bien contesté à une fiducie par interprétation que si le demandeur peut établir qu'une réparation personnelle serait insuffisante, et qu'il y a un lien entre ses contributions et le bien contesté. Habituellement, l'octroi d'une réparation personnelle conviendrait dans les cas comme celui en l'espèce où le bien en jeu est de l'argent. Or, en l'espèce, le produit d'assurance en litige a été déposé au greffe du tribunal et il est facile de lui imposer une fiducie par interprétation. De plus, le paiement des primes par M avait un lien de causalité avec le maintien en vigueur de la police en vertu de laquelle R s'est enrichie. Il y a donc lieu d'imposer une fiducie par interprétation à hauteur du produit en faveur de M.

Les juges Gascon et Rowe (dissidents) : Il y a désaccord avec les juges majoritaires pour dire que M a établi

in unjust enrichment on these facts and therefore, that a constructive trust should be imposed.

M had a contract with L to be maintained the named beneficiary of his life insurance policy while she paid the premiums. However, this contract does not create a proprietary or equitable interest in the policy's proceeds and simply being named as a beneficiary does not give one a right in the proceeds before the death of the insured. The right to claim the proceeds only crystalizes upon the insured's death. Further, as a revocable beneficiary, M had no right to contest L's redesignation of R as an irrevocable beneficiary outside of a claim against L for breach of contract. Thus, at the time of L's death, the only rights that M possessed in relation to the life insurance contract were her contractual rights.

While M would have a claim against L's estate for breach of contract, the estate's lack of assets has rendered any such recourse fruitless. Instead, M's claim is to reverse the purported unjust enrichment of R. In an action for unjust enrichment, a plaintiff must show that their deprivation corresponds to the defendant's enrichment. The correspondence between the deprivation and the enrichment, while seemingly formalistic, is fundamental. Correspondence is the connection between the parties — a plus and a minus as obverse manifestations of the same event — that uniquely identifies the plaintiff as the proper person to seek restitution against a particular defendant.

In this case, it is clear that but for M's payments, the policy would have lapsed, and but for L's breach of contract, M would have been the beneficiary at the time of his death. But these facts are not enough to establish that the deprivation and the enrichment are corresponding. R's enrichment was not at the expense of M because R's enrichment is not dependent on M's deprivation. What R received (a statutory entitlement to proceeds) is different from M's deprivation (the inability to enforce her contractual rights) — they are not two sides of the same coin.

Even if a corresponding deprivation could be established, M's claim in unjust enrichment would fail at the first stage of the juristic reason analysis, because the *Insurance Act* establishes a juristic reason for R's enrichment. Section 191(1) of the *Insurance Act* provides that an insured may designate an irrevocable beneficiary under a life insurance policy, and thereby provide special

le bien-fondé d'une action pour enrichissement sans cause au vu des faits de l'espèce et qu'il convient donc d'imposer une fiducie par interprétation.

M a conclu un contrat avec L en vue de rester la bénéficiaire désignée de sa police d'assurance-vie pendant qu'elle en payait les primes. Ce contrat ne donne toutefois pas naissance à un droit de propriété ou en equity sur le produit de la police et le simple fait d'être désigné bénéficiaire ne donne pas droit au produit avant la mort de l'assuré. Le droit de réclamer le produit ne se matérialise qu'au décès de l'assuré. De plus, à titre de bénéficiaire révocable, M n'avait pas le droit de contester la désignation par L de R comme bénéficiaire irrévocable, si ce n'est en poursuivant L pour rupture de contrat. Par conséquent, les seuls droits que possédait M à l'égard du contrat d'assurance-vie lorsque L est décédé étaient ses droits contractuels.

Même si M avait un droit d'action contre la succession de L pour rupture de contrat, l'insuffisance d'actifs dans la succession a rendu tout recours inutile. Le recours intenté par M a plutôt pour objet d'annuler le prétendu enrichissement sans cause de R. Dans une action pour enrichissement sans cause, le demandeur doit démontrer que son appauvrissement correspond à l'enrichissement du défendeur. Bien que formaliste en apparence, la correspondance entre l'appauvrissement et l'enrichissement est fondamentale. La correspondance s'entend du lien entre les parties — un plus et un moins en tant que manifestations contraires du même fait — qui identifie seulement le demandeur comme la personne pouvant réclamer la restitution à l'encontre d'un défendeur.

En l'espèce, il est clair que, n'eût été les paiements de M, la police d'assurance se serait éteinte et que, n'eût été la rupture de contrat de L, M aurait été la bénéficiaire au moment de son décès. Mais ces faits ne suffisent pas à établir que l'appauvrissement et l'enrichissement correspondent. R ne s'enrichit pas aux dépens de M parce que son enrichissement n'est pas tributaire de l'appauvrissement de cette dernière. Ce que R a reçu (un droit reconnu par la loi au produit) diffère de l'appauvrissement de M (l'incapacité d'exercer ses droits contractuels); ce ne sont pas deux côtés de la même médaille.

Même si l'on pouvait établir un appauvrissement correspondant, l'action de M pour enrichissement sans cause échouerait au premier stade de l'analyse du motif juridique, parce que la *Loi sur les assurances* établit un motif juridique justifiant l'enrichissement de R. Selon le par. 191(1) de la *Loi sur les assurances*, l'assuré peut désigner un bénéficiaire à titre irrévocable dans une police

protections to that beneficiary. From the moment an irrevocable beneficiary is designated, they have a right in the policy itself: the insurance money is not subject to the control of the insured or to the claims of his or her creditors, and the beneficiary must consent to any subsequent changes to beneficiary designation. As it is undisputed that R was the validly designated irrevocable beneficiary of the policy, she is entitled to the proceeds free of the claims of L's creditors.

The fact that M had an agreement with L for the proceeds of the policy pursuant to which she paid its premiums does not undermine the presence of this juristic reason. As M's rights are contractual in nature, she is a creditor of L's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds. The *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors and provides that the insurance proceeds do not form part of the insured's estate. Thus, the *Insurance Act* precludes the existence of contractual rights in those insurance proceeds.

The *Insurance Act*'s legislative history further supports R's retention of the insurance proceeds notwithstanding M's claim. The provisions of the *Insurance Act* were designed to protect the interests of beneficiaries in retaining the proceeds and provide no basis whatsoever for a person paying the premiums to assume she would have any claim to the eventual proceeds. The *Insurance Act* is deliberately indifferent to the source of the premium payments and renders the actions of the payers irrelevant as far as the beneficiaries are concerned.

In immunizing beneficiaries from the claims of the insured's creditors, the *Insurance Act* does not distinguish between types of creditors. Creditors of the insured's estate simply do not have a claim to the insurance proceeds. There is no basis to carve out a special class of creditor who would be exempt from the clear wording of the *Insurance Act*. Neither M's contributions to the policy, nor her contract with L are sufficient to take her outside the comprehensive scheme and grant her special and preferred status.

Even if the *Insurance Act* did not establish a juristic reason for R's enrichment, the policy considerations at the second stage of the juristic reason analysis weigh against allowing M's claim of unjust enrichment. It is an unfortunate reality that a person's death is sometimes accompanied by litigation that can tie up funds that the deceased

d'assurance-vie et lui accorder ainsi une protection spéciale. À partir du moment où elle est ainsi désignée, la personne en question a un droit sur la police elle-même : le produit de l'assurance n'est pas sous l'emprise de l'assuré ni ne peut être réclamé par ses créanciers et le bénéficiaire doit consentir à tout changement subséquent de désignation d'un bénéficiaire. Puisqu'il est admis que R était la bénéficiaire validement désignée à titre irrévocable de la police, elle a droit au produit à l'abri des réclamations des créanciers de L.

Le fait que M a conclu une entente avec L en vue de toucher le produit de la police aux termes de laquelle elle en a payé les primes ne compromet pas l'existence de ce motif juridique. Comme les droits de M sont de nature contractuelle, cela fait d'elle une créancière de la succession de L et elle n'a donc pas droit au produit suivant la *Loi sur les assurances*. En effet, la *Loi sur les assurances* met explicitement les bénéficiaires irrévocables à l'abri des réclamations des créanciers du défunt et dispose que le produit de l'assurance ne fait pas partie de la succession de l'assuré. Donc, la *Loi sur les assurances* exclut l'existence de droits contractuels à ce produit d'assurance.

L'historique de la *Loi sur les assurances* étaye lui aussi le droit de R de conserver le produit de l'assurance malgré la réclamation de M. Les dispositions de la *Loi sur les assurances* ont été conçues afin de protéger le droit des bénéficiaires de conserver le produit et ne permettent aucunement au payeur des primes de supposer qu'il aurait droit à l'éventuel produit. La *Loi sur les assurances* fait délibérément abstraction de la source des paiements de primes et fait perdre toute pertinence aux gestes des payeurs en ce qui concerne les bénéficiaires.

En mettant les bénéficiaires à l'abri des réclamations des créanciers de l'assuré, la *Loi sur les assurances* ne fait aucune distinction entre les différents types de créanciers. Les créanciers de la succession de l'assuré n'ont tout simplement pas droit au produit de l'assurance. Rien ne justifie d'établir une catégorie spéciale de créancier qui serait soustraite au texte clair de la *Loi sur les assurances*. Ni les contributions de M à la police, ni son contrat avec L ne suffisent pour l'exclure de ce régime exhaustif et lui accorder un statut particulier et privilégié.

Même si la *Loi sur les assurances* n'établissait pas un motif juridique justifiant l'enrichissement de R, les considérations de politique générale qui interviennent au second stade de l'analyse du motif juridique militent contre la décision d'accueillir l'action de M pour enrichissement sans cause. Malheureusement, le décès d'une

intended to support loved ones for a significant period of time, adding financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered policy holders to designate an irrevocable beneficiary under s. 191(1) of the *Insurance Act*. Such a designation ensures that the proceeds can be disbursed free from claims against the estate, giving certainty to insured, insurer and beneficiary alike. This provision should be given full effect.

personne s'accompagne parfois d'un litige qui peut entraîner pendant longtemps le blocage de fonds que le défunt comptait utiliser pour soutenir les êtres qui lui sont chers, ce qui ajoute des difficultés financières à la tragédie. Afin de soustraire le produit d'une police d'assurance-vie à pareille querelle, le législateur ontarien a habilité les titulaires d'une police d'assurance à désigner un bénéficiaire à titre irrévocable en vertu du par. 191(1) de la *Loi sur les assurances*. Une telle désignation assure que le versement du produit puisse être effectué à l'abri des réclamations visant la succession, ce qui confère une certitude tant à l'assuré qu'à l'assureur et au bénéficiaire. Il y a lieu de donner pleinement effet à cette disposition.

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Jurisprudence

Citée par la juge Côté

Arrêts appliqués : *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629; *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269; *Shannon c. Shannon* (1985), 50 O.R. (2d) 456; **distinction d'avec les arrêts :** *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Gladstone c. Canada (Procureur général)*, 2005 CSC 21, [2005] 1 R.C.S. 325; **arrêts mentionnés :** *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217; *Peter c. Beblow*, [1993] 1 R.C.S. 980; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575; *Institut professionnel de la fonction publique du Canada c. Canada (Procureur général)*, 2012 CSC 71, [2012] 3 R.C.S. 660; *Kleinwort Benson Ltd. c. Birmingham City Council*, [1997] Q.B. 380; *Citadelle (La), Cie d'assurances générales c. Banque Lloyds du Canada*, [1997] 3 R.C.S. 805; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Cie Immobilière Viger Ltée c. Lauréat Giguère Inc.*, [1977] 2 R.C.S. 67; *Lacroix c. Valois*, [1990] 2 R.C.S. 1259; *Love c. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Garland c. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127; *Saskatchewan Crop Insurance Corp. c. Deck*, 2008 SKCA 21, 307 Sask. R. 206; *Richardson (Estate Trustee of) c. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65; *Rawluk c. Rawluk*, [1990] 1 R.C.S. 70; *Gendron c. Syndicat des approvisionnements et services de l'Alliance de la Fonction publique du Canada, section locale 50057*, [1990] 1 R.C.S. 1298; *KBA Canada Inc. c. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273; *Banque de Montréal c. Innovation Credit Union*, 2010 CSC 47, [2010] 3 R.C.S. 3; *Chanowski c. Bauer*, 2010 MBCA 96, 258

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By Gascon and Rowe JJ. (dissenting)

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Ian M. Hull, *Suzana Popovic-Montag* and *David M. Smith*, for the appellant.

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Ian M. Hull, *Suzana Popovic-Montag* et *David M. Smith*, pour l'appelante.

Jeremy Opolsky and *Jonathan Silver*, for the respondent.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ. was delivered by

CÔTÉ J. —

I. Overview

[1] This appeal involves a contest between two innocent parties, both of whom claim an entitlement to the proceeds of a life insurance policy.

[2] The appellant, Michelle Constance Moore ("Michelle"), and the owner of the policy, Lawrence Anthony Moore ("Lawrence"), were former spouses. They entered into a contractual agreement pursuant to which Michelle would pay all of the policy's premiums and, in exchange, Lawrence would maintain Michelle as the sole beneficiary thereunder — and she would therefore be entitled to receive the proceeds of the policy upon Lawrence's death. While Michelle held up her end of the bargain, Lawrence did not. Shortly after assuming his contractual obligation, and unbeknownst to Michelle, Lawrence designated his new common law spouse — the respondent, Risa Lorraine Sweet ("Risa") — as the *irrevocable* beneficiary of the policy. When Lawrence passed away several years later, the proceeds were payable to Risa and not to Michelle.

[3] Should these proceeds be impressed with a constructive trust in Michelle's favour? A majority of the Ontario Court of Appeal found that they should not. I disagree; in my view, Risa was enriched, Michelle was correspondingly deprived, and both the enrichment and the deprivation occurred in the absence of a juristic reason. In these circumstances, a remedial constructive trust should be imposed for Michelle's benefit. I would therefore allow the appeal.

Jeremy Opolsky et *Jonathan Silver*, pour l'intimée.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Côté, Brown et Martin rendu par

LA JUGE CÔTÉ —

I. Aperçu

[1] Le présent pourvoi concerne un litige entre deux parties innocentes, qui soutiennent toutes deux avoir droit au produit d'une police d'assurance-vie.

[2] L'appelante, Michelle Constance Moore (« Michelle »), et le propriétaire de la police, Lawrence Anthony Moore (« Lawrence »), étaient mariés. Ils ont conclu une entente contractuelle aux termes de laquelle Michelle paierait toutes les primes de la police et, en échange, Lawrence maintiendrait sa désignation comme seule bénéficiaire et elle aurait par le fait même droit au produit de la police au décès de Lawrence. Bien que Michelle ait respecté sa part du marché, Lawrence ne l'a pas fait. En effet, peu de temps après avoir conclu cette entente, et à l'insu de Michelle, Lawrence a désigné sa nouvelle conjointe de fait — l'intimée, Risa Lorraine Sweet (« Risa ») — à titre de bénéficiaire *irrévocable* de la police. Lorsque Lawrence est décédé plusieurs années plus tard, le produit de la police était payable à Risa, et non à Michelle.

[3] Le produit de la police devrait-il faire l'objet d'une fiducie par interprétation en faveur de Michelle? Les juges majoritaires de la Cour d'appel de l'Ontario ont conclu que non. Je ne suis pas d'accord; à mon avis, Risa s'est enrichie, Michelle a subi un appauvrissement correspondant, et tant l'enrichissement que l'appauvrissement ont eu lieu en l'absence d'un motif juridique. Dans les circonstances, il convient d'imposer une fiducie par interprétation en faveur de Michelle, à titre de réparation. Par conséquent, je suis d'avis d'accueillir le pourvoi.

II. Context

[4] Michelle and Lawrence were married in 1979. Together, they had three children. In October 1985, Lawrence purchased a term life insurance policy from Canadian General Life Insurance Company, the predecessor of RBC Life Insurance Company ("Insurance Company"). He purchased this policy, with a coverage amount of $250,000, and initially designated Michelle as the beneficiary — but not as an *irrevocable* beneficiary. The annual premium of $507.50 was paid out of the couple's joint bank account until 2000.

[5] In December 1999, Michelle and Lawrence separated. Shortly thereafter, they entered into an oral agreement ("Oral Agreement") whereby Michelle "would pay the premiums and be entitled to the proceeds of the Policy on [Lawrence's] death" (Superior Court decision, 2015 ONSC 3914, at para. 13 (CanLII)). The effect of this agreement was therefore to require that Michelle remain designated as the sole beneficiary of Lawrence's life insurance policy.

[6] In the summer of 2000, Lawrence began cohabiting with Risa. They remained common law spouses and lived in Risa's apartment until Lawrence's death 13 years later.

[7] On September 21, 2000, Lawrence executed a change of beneficiary form designating Risa as the *irrevocable* beneficiary of the policy. Risa testified that Lawrence did so because he did not want her to worry about how she would pay the rent or buy medication, and wanted to make sure that she would be able to continue living in the building where she had resided for the preceding 40 years.

[8] The change in beneficiary designation was made through, and after consultation with, Lawrence's insurance broker, who also happened to be Michelle's brother-in-law. The new designation was recorded by the Insurance Company on September 25, 2000. Although Lawrence did not change the beneficiary designation surreptitiously, he did not advise

II. Contexte

[4] Michelle et Lawrence se sont mariés en 1979 et ont eu trois enfants. En octobre 1985, Lawrence a souscrit une police d'assurance-vie temporaire auprès de la Compagnie d'Assurance-Vie Canadienne Générale, le prédécesseur de la Compagnie d'assurance-vie RBC (« compagnie d'assurance »). Il a souscrit cette assurance-vie avec une couverture de 250 000 $. Il a désigné au départ Michelle comme seule bénéficiaire, mais non à titre *irrévocable*. La prime annuelle de 507,50 $ a été payée à même le compte bancaire conjoint du couple jusqu'en 2000.

[5] En décembre 1999, Michelle et Lawrence se sont séparés. Peu après, ils ont conclu une entente verbale (« entente verbale ») aux termes de laquelle Michelle [TRADUCTION] « paierait les primes et aurait droit au produit de la police au décès de [Lawrence] » (décision de la Cour supérieure, 2015 ONSC 3914, par. 13 (CanLII)). Cette entente visait donc à faire en sorte que Michelle demeure la seule bénéficiaire de la police d'assurance-vie de Lawrence.

[6] À l'été 2000, Lawrence a commencé à cohabiter avec Risa. Ils sont demeurés conjoints de fait et ont vécu dans l'appartement de Risa jusqu'au décès de Lawrence 13 ans plus tard.

[7] Le 21 septembre 2000, Lawrence a signé un formulaire de changement de bénéficiaire et a désigné Risa comme bénéficiaire *irrévocable* de la police. Selon Risa, Lawrence a effectué ce changement parce qu'il ne voulait pas qu'elle craigne de ne pas être en mesure de payer le loyer ou d'acheter des médicaments, et voulait s'assurer qu'elle puisse continuer à vivre dans l'immeuble où elle avait habité les 40 années précédentes.

[8] Lawrence a effectué le changement de bénéficiaire par l'entremise de son courtier d'assurance, après l'avoir consulté. Ce dernier est aussi le beau-frère de Michelle. La nouvelle désignation a été consignée par la compagnie d'assurance le 25 septembre 2000. Bien que Lawrence n'ait pas effectué le changement de bénéficiaire furtivement,

Michelle that she was no longer named as beneficiary.[1]

[9] Michelle and Lawrence entered into a formal separation agreement in May 2002. This agreement dealt with a number of issues as between them, but was silent as to the policy and anything related to it. They finalized their divorce on October 3, 2003.

[10] Pursuant to her obligation under the Oral Agreement, and without knowing that Lawrence had named Risa as the irrevocable beneficiary, Michelle continued to pay all of the premiums on the policy until Lawrence's death. By then, a total of $30,535.64 had been paid on account of premiums; about $7,000 had been paid since 2000.

[11] Lawrence died on June 20, 2013. His estate had no significant assets.

[12] Michelle was advised by the Insurance Company that she was not the designated beneficiary of the policy on July 5, 2013, around two weeks after Lawrence's death. On February 12, 2014, Michelle commenced an application seeking the opinion, advice and direction of the Ontario Superior Court of Justice as to her entitlement to the proceeds of the policy. Pursuant to a court order dated December 19, 2013, the Insurance Company paid the proceeds of the policy into court pending the resolution of the dispute.

[13] Part V of the *Insurance Act*, R.S.O. 1990, c. I.8, sets out a comprehensive scheme that governs the rights and obligations of parties to a life insurance policy. It applies to all life insurance contracts "[d]espite any agreement, condition or stipulation to the contrary" (s. 172(1)), which means that the parties cannot contract out of its provisions.

[14] Of particular relevance for the purposes of this appeal are the provisions of the *Insurance Act*

[1] There is no dispute between the parties that the Oral Agreement was entered into sometime prior to the date on which Lawrence designated Risa as irrevocable beneficiary (transcript, at pp. 6-7).

il n'a pas avisé Michelle qu'elle n'était plus désignée bénéficiaire[1].

[9] Michelle et Lawrence ont conclu un accord de séparation formel en mai 2002. Cet accord portait sur plusieurs questions qui les concernaient, mais était muet sur la police et sur tout élément connexe. Ils ont finalisé leur divorce le 3 octobre 2003.

[10] Conformément à son obligation assumée aux termes de l'entente verbale, et sans savoir que Lawrence avait nommé Risa comme bénéficiaire irrévocable, Michelle a continué de payer toutes les primes de la police jusqu'au décès de Lawrence. À ce moment-là, un total de 30 535,64 $ avait été versé à titre de primes, dont environ 7 000 $ avaient été versés depuis 2000.

[11] Lawrence est décédé le 20 juin 2013. Sa succession n'avait aucun actif important.

[12] Michelle fut avisée par la compagnie d'assurance qu'elle n'était pas la bénéficiaire désignée de la police le 5 juillet 2013, environ deux semaines après le décès de Lawrence. Le 12 février 2014, Michelle déposait une requête visant à obtenir l'avis, les conseils et les directives de la Cour supérieure de justice de l'Ontario quant à son droit au produit de la police. Conformément à une ordonnance de la cour datée du 19 décembre 2013, la compagnie d'assurance a consigné le produit de la police au tribunal, en attendant le règlement du litige.

[13] La partie V de la *Loi sur les assurances*, L.R.O. 1990, c. I.8, instaure un régime exhaustif qui régit les droits et obligations des parties à une police d'assurance-vie. Elle s'applique à tous les contrats d'assurance-vie « [m]algré toute convention, condition ou stipulation contraire » (par. 172(1)), ce qui empêche les parties de se soustraire par contrat à ses dispositions.

[14] Les dispositions de la *Loi sur les assurances* qui traitent de la désignation des bénéficiaires sont

[1] Les parties ne contestent pas que l'entente orale a été conclue quelque temps avant la date à laquelle Lawrence a désigné Risa comme bénéficiaire irrévocable (transcription de l'audience, p. 6-7).

that deal with the designation of beneficiaries. A "beneficiary" of a life insurance policy is defined as "a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration" (s. 171(1)). A beneficiary designation therefore identifies the intended recipient of the proceeds under the life insurance policy upon the death of the insured person, in accordance with the terms of the policy.

[15] Part V of the *Insurance Act* recognizes two types of beneficiary designations: those that are *revocable* and those that are *irrevocable*. A revocable beneficiary designation is one that can be altered or revoked by the insured without the beneficiary's knowledge or consent (s. 190(1) and (2)). An irrevocable beneficiary designation, by contrast, can be altered or revoked only if the designated beneficiary consents (s. 191(1)). When a valid irrevocable beneficiary designation is made, s. 191 of the *Insurance Act* makes clear that the insurance money ceases to be subject to the control of the insured, is not subject to the claims of the insured's creditors and does not form part of the insured's estate.

[16] It is clear that the interest of an irrevocable beneficiary is afforded much more protection than that of a revocable beneficiary; the former has a "statutory right to remain as the named beneficiary entitled to receive the insurance moneys unless he or she consents to being removed" (Court of Appeal decision, 2017 ONCA 182, 134 O.R. (3d) 721, at para. 82). The legislation contemplates only one situation where insurance money can be clawed back from a beneficiary, regardless of whether his or her designation is irrevocable: to satisfy a support claim brought by a dependant against the estate of the now-deceased insured person (*Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 58 and 72(1)(f)). No such claim has been brought in this case.

[17] Part V of the *Insurance Act* also deals with the assignment of a life insurance policy. A life insurance

particulièrement pertinentes en l'espèce. Le « bénéficiaire » d'une police d'assurance-vie s'entend de la « [p]ersonne, à l'exception de l'assuré ou de son représentant personnel, à laquelle ou au bénéfice de laquelle des sommes assurées sont payables dans un contrat ou par une déclaration » (par. 171(1)). La désignation permet donc d'identifier le récipiendaire voulu du produit de la police d'assurance-vie au décès de la personne assurée, conformément aux modalités de cette police.

[15] La partie V de la *Loi sur les assurances* reconnaît deux types de désignations de bénéficiaire : celles qui sont *révocables* et celles qui sont *irrévocables*. La désignation d'un bénéficiaire révocable peut être modifiée ou révoquée par l'assuré à l'insu du bénéficiaire ou sans son consentement (par. 190(1) et (2)). La désignation d'un bénéficiaire irrévocable, à l'inverse, ne peut être modifiée ou révoquée qu'avec le consentement du bénéficiaire (par. 191(1)). Lorsque la désignation valide d'un bénéficiaire irrévocable est effectuée, l'art. 191 de la *Loi sur les assurances* indique clairement que les sommes assurées cessent d'être sous le contrôle de l'assuré, ne peuvent être réclamées par les créanciers de l'assuré et ne font pas partie de la succession de l'assuré.

[16] Il est évident qu'une protection beaucoup plus grande est accordée à un bénéficiaire irrévocable qu'à un bénéficiaire révocable; le premier a un [TRADUCTION] « droit statutaire de demeurer le bénéficiaire désigné ayant droit de recevoir les sommes assurées à moins de consentir à ce que sa désignation soit révoquée » (décision de la Cour d'appel, 2017 ONCA 182, 134 O.R. (3d) 721, par. 82). La loi prévoit seulement un cas où les sommes assurées peuvent être réclamées d'un bénéficiaire, peu importe si sa désignation est irrévocable : pour se conformer à une demande d'aliments présentée par une personne à charge contre la succession de la personne assurée maintenant décédée (*Loi portant réforme du droit des successions*, L.R.O. 1990, c. S.26, art. 58 et al. 72(1)f)). Aucune demande de cette nature n'a été présentée en l'espèce.

[17] La partie V de la *Loi sur les assurances* traite également de la cession d'une police d'assurance-vie.

contract entails a promise by the insurer "to pay the contractual benefit when the insured event occurs" (*Norwood on Life Insurance Law in Canada* (3rd ed. 2002), by D. Norwood and J. P. Weir, at p. 359). It can therefore be understood as creating a chose in action against the insurer, which is transferrable from one person to another through the mechanism of an assignment. The statute provides that where the assignee gives written notice of the assignment to the insurer, he or she assumes all of the assignor's rights and interests in the policy. Pursuant to s. 200(1)(b) of the *Insurance Act*, however, an assignee's interest in the policy will not have priority over that of an irrevocable beneficiary who was designated prior to the time the assignee gave notice to the insurer — unless the irrevocable beneficiary consents to the assignment and surrenders his or her interest in the policy.

[18] The relevant provisions of the *Insurance Act* read as follows:

190 (1) Subject to subsection (4),[2] an insured may in a contract or by a declaration designate the insured, the insured's personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable.

(2) Subject to section 191, the insured may from time to time alter or revoke the designation by a declaration.

. . .

191 (1) An insured may in a contract, or by a declaration other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate.

(2) Where the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed

[2] The exception in subs. (4) does not apply in the circumstances of this case.

Un contrat d'assurance-vie implique une promesse de la part de l'assureur [TRADUCTION] « de payer le bénéfice contractuel lorsque se produit l'événement assuré » (*Norwood on Life Insurance Law in Canada* (3e éd. 2002), par D. Norwood et J. P. Weir, p. 359). On peut donc considérer qu'il crée une chose non possessoire contre l'assureur, qui est transférable d'une personne à une autre par le mécanisme d'une cession. La loi prévoit que lorsque le cessionnaire donne un avis écrit de la cession à l'assureur, le premier assume tous les droits et intérêts du cédant dans la police. Toutefois, conformément à l'al. 200(1)b) de la *Loi sur les assurances*, l'intérêt d'un cessionnaire dans la police n'aura pas priorité sur celui du bénéficiaire irrévocable qui a été désigné avant le moment où le cessionnaire a donné avis à l'assureur — à moins que le bénéficiaire irrévocable ne consente à la cession et renonce à son intérêt dans la police.

[18] Les dispositions applicables de la *Loi sur les assurances* sont rédigées comme suit :

190 (1) Sous réserve du paragraphe (4)[2], l'assuré peut, dans un contrat ou par une déclaration, se désigner lui-même ou désigner son représentant personnel ou un bénéficiaire comme personne à laquelle ou au bénéfice de laquelle les sommes assurées doivent être versées.

(2) Sous réserve de l'article 191, l'assuré peut modifier ou révoquer la désignation par une déclaration.

. . .

191 (1) L'assuré peut, dans le contrat ou par une déclaration, autre qu'une déclaration faisant partie d'un testament, déposée au siège social ou au bureau principal au Canada de l'assureur, du vivant de la personne sur la tête de qui repose l'assurance, désigner un bénéficiaire à titre irrévocable. Dans ce cas, l'assuré ne peut, tant que le bénéficiaire est en vie, ni modifier ni révoquer la désignation sans le consentement de celui-ci; les sommes assurées ne sont sous le contrôle ni de l'assuré ni de ses créanciers, ne peuvent être réclamées par les créanciers de l'assuré et ne font pas partie de sa succession.

(2) Lorsque l'assuré prétend désigner un bénéficiaire à titre irrévocable dans un testament ou une déclaration qui

[2] L'exception prévue au par. (4) ne s'applique pas dans les circonstances de l'espèce.

as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

200 (1) Where an assignee of a contract gives notice in writing of the assignment to the insurer at its head or principal office in Canada, the assignee has priority of interest as against,

(a) any assignee other than one who gave notice earlier in like manner; and

(b) a beneficiary other than one designated irrevocably as provided in section 191 prior to the time the assignee gave notice to the insurer of the assignment in the manner prescribed in this subsection.

(2) Where a contract is assigned as security, the rights of a beneficiary under the contract are affected only to the extent necessary to give effect to the rights and interests of the assignee.

(3) Where a contract is assigned unconditionally and otherwise than as security, the assignee has all the rights and interests given to the insured by the contract and by this Part and shall be deemed to be the insured.

. . .

III. Decisions Below

A. *Ontario Superior Court of Justice (Wilton-Siegel J.) — 2015 ONSC 3914*

[19] The application judge, Wilton-Siegel J., held that Risa had been unjustly enriched at Michelle's expense, and therefore impressed the proceeds of the policy with a constructive trust in Michelle's favour. He began his reasons by addressing a preliminary matter: the Oral Agreement that Lawrence and Michelle had entered into during their separation. He held that Michelle and Lawrence "each had an equitable interest in the proceeds of the Policy from the time that it was taken out" and that the Oral Agreement had effectively resulted in the "equitable assignment to [Michelle] of [Lawrence's] equitable interest in the proceeds in return for [Michelle's] agreement to pay the premiums on the Policy" (para. 17) (CanLII). According to the application

ne sont pas déposés conformément au paragraphe (1), la désignation a le même effet que si l'assuré n'avait pas prétendu la rendre irrévocable.

200 (1) Le cessionnaire d'un contrat qui donne avis écrit de la cession à l'assureur à son siège social ou à son bureau principal au Canada est titulaire d'un intérêt qui a priorité sur celui :

a) d'un cessionnaire, sauf de celui qui a donné un avis antérieur identique;

b) d'un bénéficiaire, sauf de celui qui a été désigné à titre irrévocable de la façon prévue à l'article 191, avant la date à laquelle le cessionnaire a avisé l'assureur de la cession de la façon prescrite au présent paragraphe.

(2) La cession en garantie d'un contrat ne porte atteinte aux droits donnés au bénéficiaire par le contrat que dans la mesure nécessaire pour donner effet aux droits et aux intérêts du cessionnaire.

(3) Lorsqu'un contrat est cédé sans condition et autrement qu'en garantie, le cessionnaire est titulaire de tous les droits et intérêts donnés à l'assuré par le contrat et par la présente partie, et est réputé être l'assuré.

. . .

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (le juge Wilton-Siegel) — 2015 ONSC 3914*

[19] Le juge de première instance, le juge Wilton-Siegel, a conclu que Risa s'était enrichie sans cause au détriment de Michelle, et il a par conséquent assujetti le produit de la police à une fiducie par interprétation en faveur de Michelle. Dans ses motifs, il s'est d'abord penché sur une question préliminaire : l'entente verbale conclue entre Lawrence et Michelle pendant leur séparation. Il a conclu que Michelle et Lawrence [TRADUCTION] « avaient chacun un intérêt en equity dans le produit de la police dès le moment où celle-ci a été souscrite » et que l'entente verbale avait effectivement emporté la « cession en equity à [Michelle] de l'intérêt en equity de [Lawrence] dans le produit, en échange du consentement de [Michelle] à payer les primes de la police » (par. 17)

judge, this equitable interest "took the form of a right to determine the beneficiary of the Policy" (para. 18).

[20] The application judge then turned to Michelle's unjust enrichment claim. He found that the first two elements of the cause of action in unjust enrichment — an enrichment of the defendant and a corresponding deprivation suffered by the plaintiff — were easily met in this case: Risa had been enriched by virtue of her valid designation as irrevocable beneficiary, and Michelle had suffered a corresponding deprivation to the extent that she paid the premiums and to the extent that the proceeds had been payable to Risa "notwithstanding the prior equitable assignment of such proceeds to her" (para. 27). With respect to the third and final element — the absence of a juristic reason for the enrichment — the application judge held that Risa's designation as beneficiary under the policy did not constitute a juristic reason that entitled her to retain the proceeds in the particular circumstances of this case (para. 46). This was because Risa's entitlement to the proceeds would not have been possible if Michelle had not performed her obligations under the Oral Agreement, and because the Oral Agreement itself amounted to an equitable assignment of the proceeds to Michelle (para. 48).

B. *Ontario Court of Appeal (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting) — 2017 ONCA 182, 134 O.R. (3d) 721*

[21] The Ontario Court of Appeal allowed Risa's appeal and set aside the judgment of the application judge. It ordered that the $7,000 Michelle had paid in premiums between 2000 and 2013 be paid out of court to her and that the balance of the insurance proceeds be paid to Risa.

(1) Majority Reasons

[22] Writing for himself and for Strathy C.J.O., Blair J.A. held that it was not open to the application judge to find that the Oral Agreement amounted to an equitable assignment, since the doctrine of equitable

(CanLII). Selon le juge de première instance, cet intérêt en equity « a pris la forme d'un droit de déterminer le bénéficiaire de la police » (par. 18).

[20] Le juge de première instance s'est ensuite penché sur l'action pour enrichissement sans cause de Michelle. Il a conclu que les deux premiers éléments constitutifs de l'action pour enrichissement sans cause — l'enrichissement du défendeur et l'appauvrissement correspondant subi par le demandeur — étaient aisément satisfaits en l'espèce : Risa a été enrichie en raison de sa désignation valide comme bénéficiaire irrévocable, et Michelle a subi un appauvrissement correspondant dans la mesure où elle avait payé les primes mais le produit revenait à Risa, [TRADUCTION] « malgré que le produit lui eût été antérieurement cédé en equity » (par. 27). Quant au troisième et dernier élément — l'absence d'un motif juridique justifiant l'enrichissement — le juge de première instance a conclu que la désignation de Risa à titre de bénéficiaire de la police ne constituait pas un motif juridique lui donnant le droit de conserver le produit dans les circonstances particulières de l'espèce (par. 46). Il en était ainsi parce que le droit de Risa au produit n'aurait pas été possible si Michelle n'avait pas exécuté ses obligations prévues par l'entente verbale, et parce que l'entente verbale elle-même équivalait à une cession en equity du produit à Michelle (par. 48).

B. *Cour d'appel de l'Ontario (le juge en chef Strathy et le juge Blair, le juge Lauwers étant dissident) — 2017 ONCA 182, 134 O.R. (3d) 721*

[21] La Cour d'appel de l'Ontario a accueilli l'appel de Risa et a infirmé le jugement du juge de première instance. Elle a ordonné que la somme de 7 000 $ versée par Michelle en primes entre les années 2000 et 2013 soit retirée du greffe du tribunal et lui soit remboursée, et que le solde du produit de l'assurance soit versé à Risa.

(1) Les motifs des juges majoritaires

[22] S'exprimant en son nom et en celui du juge en chef Strathy, le juge Blair a conclu qu'il n'était pas loisible au juge de première instance de conclure que l'entente verbale était assimilable à une cession

assignment had not been placed in issue by the parties before him.

[23] Turning to Michelle's unjust enrichment claim, Blair J.A. accepted the application judge's finding that Risa was enriched. He found it unnecessary to resolve the issue of whether the corresponding deprivation element had been made out as he found there was a juristic reason justifying the receipt by Risa of the proceeds. Specifically, Blair J.A. held that the application judge had erred in his approach to the juristic reason element of the unjust enrichment framework — first, by failing to recognize the significance of Risa's designation as an *irrevocable* beneficiary, and second, by failing to apply the two-stage analysis mandated by this Court in *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629. In Blair J.A.'s view, "the existence of the statutory regime relating to revocable and irrevocable beneficiaries . . . falls into an existing recognized category of juristic reason", constituting "both a disposition of law and a statutory obligation" (para. 99).

[24] Blair J.A. declined to decide whether a constructive trust can be imposed only to remedy unjust enrichment and wrongful acts or can also be based on the more elastic concept of "good conscience". He took the position that there was nothing in the circumstances of this case that put it in some "good conscience" category beyond what was captured by unjust enrichment and wrongful act.

(2) Dissenting Reasons

[25] In dissent, Lauwers J.A. agreed with the majority that the application judge had erred in relying on the equitable assignment doctrine. However, he disagreed with the majority as to the disposition of Michelle's unjust enrichment claim and the propriety of imposing a constructive trust over the proceeds in these circumstances. He would therefore have dismissed the appeal.

en equity, puisque les parties n'avaient pas soulevé la question de la cession en equity devant lui.

[23] Se penchant sur le recours pour enrichissement sans cause de Michelle, le juge Blair a retenu la conclusion du juge de première instance que Risa s'était enrichie. Il a jugé inutile de régler la question de savoir si l'élément de l'appauvrissement correspondant avait été établi, car il a conclu à la présence d'un motif juridique justifiant la réception du produit par Risa. Plus précisément, il a statué que le juge de première instance avait mal abordé l'élément du motif juridique du cadre d'analyse de l'enrichissement sans cause — premièrement, en omettant de reconnaître l'importance de la désignation de Risa comme bénéficiaire *irrévocable*, et, deuxièmement, en omettant de mener l'analyse à deux volets exigée par notre Cour dans l'arrêt *Garland c. Consumers' Gas Co*., 2004 CSC 25, [2004] 1 R.C.S. 629. Selon le juge Blair, [TRADUCTION] « l'existence du régime législatif sur les bénéficiaires révocables et irrévocables [. . .] appartient à une catégorie existante reconnue de motif juridique », puisqu'il constitue « à la fois une disposition légale et une obligation créée par la loi » (par. 99).

[24] Le juge Blair a refusé de décider si une fiducie par interprétation ne peut être imposée que pour remédier à un enrichissement sans cause et à une conduite fautive, ou si elle peut également se fonder sur la notion plus souple de la « conscience ». Il a estimé que rien dans les circonstances ne permettait de classer la présente affaire dans une quelconque catégorie de la « conscience » au-delà du cadre de l'enrichissement sans cause et de la conduite fautive.

(2) Motifs du juge dissident

[25] Dissident, le juge Lauwers s'est dit en accord avec les juges majoritaires pour dire que le juge de première instance avait commis une erreur en s'appuyant sur la doctrine de la cession en equity. Toutefois, il n'était pas d'accord avec eux quant à l'issue de l'action pour enrichissement sans cause de Michelle et à l'opportunité d'imposer une fiducie par interprétation sur le produit de l'assurance dans ces circonstances. Il aurait par conséquent rejeté l'appel.

[26] Lauwers J.A. began by considering this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, and held that it leaves open four routes by which a constructive trust may be imposed: (1) as a remedy for unjust enrichment; (2) for wrongful acts; (3) in circumstances where its availability has long been recognized; and (4) otherwise where good conscience requires it. According to Lauwers J.A., in relation to the fourth route, the *Soulos* court anticipated that the law of remedial trusts would continue to develop in a way that accommodates the changing needs and mores of society.

[27] On the issue of unjust enrichment, Lauwers J.A. concluded that Michelle had made out each of the requisite elements and that a constructive trust ought therefore to be imposed over the proceeds in her favour. With respect to the corresponding deprivation element, he rejected the submission that Michelle's financial contribution was the correct measure of her deprivation, and instead found that the asset for which she had paid and of which she stood deprived was the full payout of the life insurance proceeds — not just the amount she had paid in premiums.

[28] Lauwers J.A. also rejected the proposition that the applicable *Insurance Act* provisions provided a juristic reason for Risa's retention of the proceeds. In his view, Michelle's entitlement to the insurance proceeds as against Risa was neither precluded nor affected by the operation of the *Insurance Act*. He also held that a juristic reason could not be found based on the parties' reasonable expectations or public policy considerations.

[29] Finally, regarding to the imposition of a constructive trust, Lauwers J.A. considered a number of other cases that involved disappointed beneficiaries. Noting that these cases fit awkwardly under the unjust enrichment rubric, he observed that:

> . . . the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive

[26] Le juge Lauwers a commencé par examiner l'arrêt *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, de notre Cour, et a conclu qu'il ouvre quatre voies par lesquelles une fiducie par interprétation peut être imposée : (1) à titre de réparation pour remédier à l'enrichissement sans cause; (2) pour remédier aux conduites fautives; (3) dans des circonstances où la possibilité d'y recourir a été reconnue depuis longtemps; et (4) dans les autres cas où la conscience l'exige. Selon le juge Lauwers, pour ce qui est de la quatrième voie, la cour saisie de l'affaire *Soulos* s'attendait à ce que le droit relatif aux fiducies par interprétation continue d'évoluer d'une façon qui répond aux nécessités et aux mœurs changeantes de la société.

[27] En ce qui concerne la question de l'enrichissement sans cause, le juge Lauwers a conclu que Michelle avait établi chacun des éléments requis, et qu'une fiducie par interprétation devait en conséquence être imposée sur le produit de la police en sa faveur. Pour ce qui est de l'appauvrissement correspondant, il a rejeté l'argument selon lequel la contribution financière de Michelle est le bon mode de calcul de son appauvrissement. Il a plutôt conclu que l'actif pour lequel elle avait payé et dont elle a été privée correspondait à l'intégralité du produit de l'assurance-vie — et non seulement à la somme qu'elle avait payée en primes.

[28] Le juge Lauwers a également rejeté la proposition selon laquelle les dispositions applicables de la *Loi sur les assurances* donnent à Risa un motif juridique de conserver le produit de la police. À son avis, l'application de la *Loi sur les assurances* ne faisait pas obstacle au droit de Michelle au produit contre Risa ni n'influait sur ce droit. Il a également conclu qu'aucun motif juridique ne pouvait être établi sur la foi des attentes raisonnables des parties ou de considérations d'intérêt public.

[29] Enfin, en ce qui a trait à l'imposition d'une fiducie par interprétation, le juge Lauwers a examiné plusieurs autres décisions qui portent sur des bénéficiaires déçus. Soulignant que ces décisions cadrent mal avec la notion d'enrichissement sans cause, il a fait remarquer que :

> [TRADUCTION] . . . il est peut-être plus juste d'affirmer que la jurisprudence en matière de bénéficiaires déçus forme

trust can be imposed via the third route in *Soulos* — circumstances where the availability of a trust has previously been recognized — and the fourth route — where good conscience otherwise demands it, quite independent of unjust enrichment. [para. 276]

IV. Issues

[30] The issues in this case are as follows:

A. Has Michelle made out a claim in unjust enrichment by establishing:

(1) Risa's enrichment and her own corresponding deprivation; and

(2) the absence of any juristic reason for Risa's enrichment at her expense?

B. If so, is a constructive trust the appropriate remedy?

V. Analysis

[31] In the present case, Michelle requests that the insurance proceeds be impressed with a constructive trust in her favour. The primary basis on which she seeks this remedy is unjust enrichment. In the alternative, she submits that the circumstances of her case provide a separate good conscience basis upon which a court may impose a constructive trust.

[32] A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (*Waters' Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 478). In Canada, it is understood primarily as a *remedy*, which may be imposed at a court's discretion where good conscience so requires. As McLachlin J. (as she then was) noted in *Soulos*:

. . . under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts

un ensemble de décisions dans lesquelles une fiducie par interprétation peut être imposée par application du troisième critère de l'arrêt *Soulos* — les circonstances où la possibilité de recourir à une fiducie a été antérieurement reconnue — et du quatrième critère — lorsque la conscience l'exige, indépendamment de l'enrichissement sans cause. [par. 276]

IV. Questions en litige

[30] Les questions en litige sont les suivantes :

A. Michelle a-t-elle démontré le bien-fondé d'une action pour enrichissement sans cause en établissant :

(1) l'enrichissement de Risa et son propre appauvrissement correspondant;

(2) l'absence de motif juridique justifiant l'enrichissement de Risa aux dépens de Michelle?

B. Dans l'affirmative, l'imposition d'une fiducie par interprétation constitue-t-elle la réparation indiquée?

V. Analyse

[31] En l'espèce, Michelle demande que le produit de l'assurance fasse l'objet d'une fiducie par interprétation en sa faveur. Elle sollicite cette réparation principalement sur la base de l'enrichissement sans cause. À titre subsidiaire, elle soutient que dans les circonstances, la conscience constitue un fondement distinct qui permet au tribunal d'imposer une fiducie par interprétation.

[32] La fiducie par interprétation est le moyen en equity par lequel une personne est tenue par effet de la loi — indépendamment de toute intention — de détenir certains biens au profit d'une autre personne (*Waters' Law of Trusts in Canada* (4e éd. 2012), par D. W. M. Waters, M. R. Gillen et L. D. Smith, p. 478). Au Canada, elle est principalement considérée comme une *réparation*, qui peut être imposée à la discrétion de la cour lorsque la conscience l'exige. Comme l'a fait remarquer la juge McLachlin (plus tard juge en chef) dans *Soulos* :

. . . au nom de la conscience, l'application de la fiducie par interprétation est reconnue au Canada tant pour

like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. . . . Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate. [Emphasis added; para. 43.]

[33] What is therefore crucial to recognize is that a proper equitable basis *must* exist before the courts will impress certain property with a remedial constructive trust. The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 50-51). Absent this, a plaintiff seeking the imposition of a remedial constructive trust must point to some other basis on which this remedy can be imposed, like breach of fiduciary duty.[3]

[34] I now turn to consider Michelle's claim in unjust enrichment.

A. *Unjust Enrichment*

[35] Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."

[3] Whether the availability of a remedial constructive trust is limited to cases involving unjust enrichment or wrongful acts need not be decided in the present case (see para. 95).

sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. [. . .] Dans le cadre de ces deux grandes catégories les règles de droit relatives à la fiducie par interprétation pourront évoluer et se préciser au fil des ans et selon les cas qui pourront se présenter. [Je souligne; par. 43.]

[33] Par conséquent, il faut absolument reconnaître que, pour que les tribunaux puissent assujettir certains biens à une fiducie par interprétation, il *doit* y avoir un motif valable en equity. L'action pour enrichissement sans cause peut constituer un tel motif, pour autant que le demandeur puisse également établir qu'une réparation pécuniaire ne suffit pas et qu'il existe un lien entre ses contributions et le bien en litige (*Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 997; *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, par. 50-51). À défaut, le demandeur qui sollicite l'imposition d'une fiducie par interprétation à titre de réparation doit invoquer une autre raison pour laquelle cette réparation peut être imposée, comme un manquement à une obligation fiduciaire[3].

[34] Je me penche maintenant sur l'action pour enrichissement sans cause de Michelle.

A. *L'enrichissement sans cause*

[35] De manière générale, la doctrine de l'enrichissement sans cause s'applique lorsqu'un défendeur reçoit un avantage du demandeur dans des circonstances où il serait « contraire à la bonne conscience » pour lui de conserver cet avantage. Lorsque le tribunal conclut en ce sens, le défendeur est obligé de restituer cet avantage au demandeur. Comme l'a reconnu la juge McLachlin dans l'arrêt *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 788, « [a]u cœur de la doctrine de l'enrichissement sans cause [. . .] se trouve la notion de la restitution d'un avantage que la justice ne permet pas au bénéficiaire de conserver. »

[3] Il n'est pas nécessaire en l'espèce de décider si une fiducie par interprétation peut être imposée en guise de réparation seulement en cas d'enrichissement sans cause ou de conduite fautive (voir par. 95).

[36] Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.

[37] In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 *Can. Bus. L.J.* 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, per Laskin J., dissenting). Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.

[38] This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*,

[36] Historiquement, la restitution pouvait être accordée aux demandeurs dont les cas s'inscrivaient dans certaines « catégories de recouvrement » reconnues — notamment les cas où le demandeur a conféré un avantage au défendeur par erreur, sous la contrainte, par nécessité, par suite d'une opération manquée ou non consommée, ou à la demande du défendeur (*Peel*, p. 789; *Kerr*, par. 31). Même si ces catégories distinctes existent indépendamment les unes des autres, elles reposent chacune sur l'existence d'une quelconque injustice en permettant au défendeur de conserver l'avantage qu'il avait reçu au détriment du demandeur.

[37] Dans la dernière moitié du vingtième siècle, les tribunaux ont commencé à reconnaître les principes communs qui sous-tendent ces catégories distinctes et, sur ce fondement, ils ont élaboré [TRADUCTION] « un cadre qui peut expliquer toutes les obligations découlant de l'enrichissement sans cause » (L. Smith, « Demystifying Juristic Reasons » (2007), 45 *Rev. can. dr. comm.* 281, p. 281; voir également *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, et *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423, le juge Laskin, dissident). Selon ce cadre d'analyse rationnel, le demandeur aura gain de cause dans son action pour enrichissement sans cause s'il peut démontrer : a) que le défendeur s'est enrichi; b) que le demandeur a subi un appauvrissement correspondant; et c) que l'enrichissement du défendeur et l'appauvrissement correspondant du demandeur ont eu lieu en l'absence d'un motif juridique (*Pettkus c. Becker*, [1980] 2 R.C.S. 834, p. 848; *Garland*, par. 30; *Kerr*, par. 30-45). Bien que le cadre d'analyse rationnel de l'enrichissement sans cause et les catégories coexistent (*Kerr*, par. 31-32), les parties en l'espèce n'ont présenté des observations qu'au titre du premier. Les présents motifs sont rédigés sur cette base.

[38] Cette approche rationnelle en matière d'enrichissement sans cause est souple et permet aux tribunaux de préciser dans quelles circonstances la justice et l'équité exigent qu'une partie restitue un avantage à une autre. Le recouvrement ne se fait donc pas uniquement dans les cas qui s'inscrivent dans les catégories par lesquelles on considérait traditionnellement

at para. 32). As observed by McLachlin J. in *Peel* (at p. 788):

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[39] Justice and fairness are at the core of the dispute between Michelle and Risa, both of whom are innocent parties. Moreover, and to complicate matters, resolution of this dispute requires this Court to consider the elements of an unjust enrichment claim as they apply in a context that involves several parties. Pursuant to her Oral Agreement with Lawrence, Michelle paid around $7,000 in premiums to the Insurance Company between 2000 and 2013 in exchange for the right to remain named as beneficiary of the policy. When Lawrence passed away, however, the insurance proceeds (which totalled $250,000) were payable by the Insurance Company not to Michelle, but to Risa — the person whom Lawrence had subsequently named the irrevocable beneficiary, contrary to the contractual obligation he owed to Michelle. The result of this arrangement was that Risa's enrichment was significantly greater than Michelle's out-of-pocket loss. Moreover, Risa was entitled to receive the proceeds from the Insurance Company by virtue of her designation as irrevocable beneficiary, pursuant to ss. 190 and 191 of the *Insurance Act*.

[40] These unusual circumstances raise two distinct questions respecting the law of unjust enrichment. First, what is the proper measure of Michelle's deprivation, and in what sense does it "correspond" to Risa's gain? Second, does the legislative framework at issue provide a juristic reason for Risa's enrichment and Michelle's corresponding deprivation — and if not, can such a juristic reason be found on some other basis? I will deal with each of these questions in turn.

comme injuste la conservation de l'avantage ainsi reçu (*Kerr*, par. 32). Comme l'a fait remarquer la juge McLachlin dans *Peel* (p. 788) :

> L'on constate donc que le principe d'application générale à trois volets reconnu par notre Cour comme le fondement de l'action pour enrichissement sans cause procède des catégories traditionnelles de recouvrement. Ces catégories constituent l'essence du principe, quoique celui-ci puisse les déborder de manière à ce que le droit puisse évoluer avec la souplesse qui s'impose pour tenir compte des perceptions changeantes de la justice.

[39] La justice et l'équité sont au cœur du litige opposant Michelle à Risa, deux parties innocentes. De plus, et pour compliquer les choses, le règlement de ce litige oblige la Cour à examiner les éléments d'une action pour enrichissement sans cause qui s'appliquent dans un contexte faisant intervenir plusieurs parties. Conformément à son entente verbale avec Lawrence, Michelle a versé environ 7 000 $ en primes à la compagnie d'assurance entre 2000 et 2013, en échange du droit de demeurer la bénéficiaire désignée de la police. Toutefois, lorsque Lawrence est décédé, le produit de l'assurance (qui totalisait 250 000 $) devait être versé par la compagnie d'assurance non pas à Michelle, mais à Risa — la personne que Lawrence avait subséquemment désignée comme bénéficiaire irrévocable, contrairement à l'obligation contractuelle qu'il avait envers Michelle. Ainsi, l'enrichissement de Risa s'est avéré beaucoup plus important que la perte des sommes déboursées par Michelle. De plus, Risa avait le droit de recevoir le produit de la police de la part de la compagnie d'assurance puisqu'elle était désignée comme bénéficiaire irrévocable, conformément aux art. 190 et 191 de la *Loi sur les assurances*.

[40] Ces circonstances inhabituelles soulèvent deux questions distinctes à l'égard du droit de l'enrichissement sans cause. Premièrement, quelle est la juste mesure de l'appauvrissement de Michelle, et dans quel sens « correspond »-il au gain de Risa? Deuxièmement, le cadre législatif applicable fournit-il un motif juridique justifiant l'enrichissement de Risa et l'appauvrissement correspondant de Michelle — et, dans la négative, peut-on établir un motif juridique sur un autre fondement? Je me pencherai sur chacune de ces questions à tour de rôle.

(1) Risa's Enrichment and Michelle's Corresponding Deprivation

[41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis (*Kerr*, at para. 37; *Garland*, at para. 31). To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a "tangible benefit" — passed from the latter to the former (*Kerr*, at para. 38; *Garland*, at para. 31; *Peel*, at p. 790; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 15). This Court has described the enrichment and detriment elements as being "the same thing from different perspectives" (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 ("*PIPSC*"), at para. 151) and thus as being "essentially two sides of the same coin" (*Peter*, at p. 1012).

[42] The parties in the present case do not dispute the fact that Risa was enriched to the full extent of the $250,000 by virtue of her right to receive the insurance proceeds as the designated irrevocable beneficiary. The application judge found as much (at para. 27), and this finding is not contested on appeal.

[43] In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also *Peel*, at pp. 789-90, and *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or

(1) L'enrichissement de Risa et l'appauvrissement correspondant de Michelle

[41] Les deux premiers éléments de l'action pour enrichissement sans cause requièrent l'enrichissement du défendeur et l'appauvrissement correspondant du demandeur. Ces deux éléments sont étroitement liés; ils font tous deux l'objet d'une analyse économique simple, et les considérations de morale et de principe entrent en jeu plutôt à l'étape de l'analyse portant sur le motif juridique (*Kerr*, par. 37; *Garland*, par. 31). Pour établir que le défendeur s'est enrichi et que le demandeur a subi un appauvrissement correspondant, il faut démontrer que quelque chose de valeur — un « avantage tangible » — est passé du dernier au premier (*Kerr*, par. 38; *Garland*, par. 31; *Peel*, p. 790; *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575, par. 15). La Cour a dit des éléments d'enrichissement et d'appauvrissement qu'ils rendent compte « du même phénomène, mais sous des angles différents » (*Institut professionnel de la fonction publique du Canada c. Canada (Procureur général)*, 2012 CSC 71, [2012] 3 R.C.S. 660 (« *IPFPC* »), par. 151), et qu'ils sont donc « essentiellement comme les deux côtés d'une pièce de monnaie » (*Peter*, p. 1012).

[42] Les parties en l'espèce ne contestent pas que Risa s'est enrichie à hauteur de 250 000 $ grâce à son droit de recevoir le produit de l'assurance à titre de bénéficiaire irrévocable. Le juge de première instance a conclu en ce sens (par. 27), et cette conclusion n'est pas contestée dans le présent pourvoi.

[43] Outre l'enrichissement du défendeur, le demandeur qui plaide l'enrichissement sans cause doit aussi établir qu'il a subi un appauvrissement correspondant. Selon le professeur McInnes, cet élément sert à expliquer que le demandeur est la personne ayant qualité pour demander la restitution contre un défendeur qui s'est enrichi sans cause (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), p. 149; voir également *Peel*, p. 789-790, et *Kleinwort Benson Ltd. c. Birmingham City Council*, [1997] Q.B. 380 (C.A.), p. 393 et 400). Même si la conservation de l'avantage par le défendeur peut être qualifiée d'injuste, le demandeur n'a aucun droit de recouvrement contre ce défendeur

suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched *at the plaintiff's expense* (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (*The Canadian Law of Unjust Enrichment and Restitution*, at p. 149).

[44] The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer. As was succinctly articulated by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 669-70:

> When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, [the respondent] never in fact owned the [disputed] property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by [the appellant], [the respondent] would have acquired the property. In *Air Canada* . . . , at

s'il n'a subi aucune perte, ou s'il a subi une perte qui n'a rien à voir avec le gain du défendeur. En fait, le demandeur doit démontrer que la perte qu'il a subie *correspond* au gain du défendeur, en ce qu'il existe un certain lien de causalité entre les deux (*Pettkus*, p. 852). En clair, l'opération qui a permis au défendeur de s'enrichir doit également avoir causé l'appauvrissement du demandeur, ce qui permet d'affirmer que le défendeur s'est enrichi *au détriment du demandeur* (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (éd. feuilles mobiles), p. 3-24). Bien que la nature de la correspondance entre ce gain et la perte puisse varier d'un cas à l'autre, cette correspondance sert de fondement au droit du demandeur de demander la restitution contre le défendeur qui s'est enrichi sans cause. Le professeur McInnes explique que [TRADUCTION] « la conception canadienne d'un "appauvrissement correspondant" met en relief à juste titre le lien crucial entre le gain du défendeur et la perte du demandeur » (*The Canadian Law of Unjust Enrichment and Restitution*, p. 149).

[44] Les autorités sur ce point indiquent clairement que la mesure de l'appauvrissement du demandeur ne se limite pas à ses dépenses, ni à l'avantage qui lui a été pris directement. En fait, le concept de « perte » englobe également l'avantage qui n'a jamais été en la possession du demandeur mais qui, selon le tribunal, lui *serait* revenu s'il n'avait pas plutôt été remis au défendeur (*Citadelle (La), Cie d'assurances générales c. Banque Lloyds du Canada*, [1997] 3 R.C.S. 805, par. 30). Cette interprétation est logique parce que, dans un cas comme dans l'autre, le résultat est le même : le défendeur s'enrichit dans une situation où le demandeur s'appauvrit. Tel que l'a énoncé succinctement le juge La Forest dans *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, p. 669-670 :

> Lorsqu'on parle de restitution, on parle généralement de rendre à autrui ce qu'on lui a pris (restitution du bien) ou l'équivalent de sa valeur (indemnisation). Comme l'a souligné la Cour d'appel en l'espèce, [l'intimée] n'ayant en fait jamais été propriétaire du bien-fonds [en cause], celui-ci ne peut lui être « rendu ». Toutefois, les deux juridictions inférieures ont conclu que si [l'appelante] ne l'avait pas intercepté, [l'intimée] aurait acquis ce bien-fonds. Dans l'arrêt *Air Canada* [. . .], à la p. 1203, j'ai dit

pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." (Emphasis added.) In my view the fact that [the respondent in this case] never owned the property should not preclude it from the pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution*, at pp. 133-39. [The appellant] has therefore been enriched at the expense of [the respondent]. [Emphasis in original.]

While *Lac Minerals* turned largely on the defendant's breach of confidence and breach of fiduciary duty, the above comments were made in the context of La Forest J.'s analysis of the tripartite unjust enrichment framework as it was applied in that case. My view is thus that these comments are applicable to the analysis in the present case.

[45] The foregoing also indicates that the corresponding deprivation element does not require that the disputed benefit be conferred *directly* by the plaintiff on the defendant (see McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 155, but also see pp. 156-83; Maddaugh and McCamus, *The Law of Restitution*, at p. 35-1). This understanding of the correspondence between loss and gain has also been accepted under Quebec's civilian approach to the law of unjust enrichment:

The theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party . . . . The impoverished party looks to the one who profited from its impoverishment. It is then for the enriched party to find a legal justification for its enrichment.

(*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 79; see also *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at pp. 1278-79.)

[46] Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a

que le droit en matière de restitution « sert plutôt à garantir que, dans le cas où un demandeur a été privé d'une richesse qu'il avait en sa possession ou qui lui revenait, cette richesse lui sera rendue. En l'espèce, le recouvrement pour fins de restitution est égal au gain réalisé par la [défenderesse] aux dépens de la [demanderesse]. » (Je souligne.) À mon avis, le fait que [l'intimée en l'espèce] n'ait jamais été propriétaire du bien-fonds ne devrait pas l'empêcher de demander la restitution : voir Birks, *An Introduction to the Law of Restitution*, aux pp. 133 à 139. [L'appelante] s'est donc enrichie aux dépens de [l'intimée]. [Soulignement dans l'original.]

Bien que l'arrêt *Lac Minerals* porte en grande partie sur l'abus de confiance et le manquement à une obligation fiduciaire de la part de la défenderesse, le juge La Forest a fait les remarques qui précèdent dans le contexte de son analyse du cadre à trois volets de l'enrichissement sans cause tel qu'il a été appliqué dans cette affaire. J'estime donc que ces remarques sont applicables à l'analyse en l'espèce.

[45] Le passage précité indique aussi que l'élément d'appauvrissement correspondant ne requiert pas l'octroi *direct*, par le demandeur au défendeur, de l'avantage en litige (voir McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, p. 155, mais aussi les p. 156-183; Maddaugh et McCamus, *The Law of Restitution*, p. 35-1). Cette conception de la correspondance entre la perte et le gain a également été reconnue dans l'approche civiliste du Québec en droit de l'enrichissement sans cause :

La théorie de l'enrichissement injustifié n'exige pas que l'enrichissement passe directement du patrimoine de l'appauvri à celui de l'enrichi. [. . .] L'appauvri recherche à qui son appauvrissement a profité. C'est à l'enrichi qu'il incombe alors de trouver une justification juridique de son enrichissement.

(*Cie Immobilière Viger Ltée c. Lauréat Giguère Inc.*, [1977] 2 R.C.S. 67, p. 79; voir aussi *Lacroix c. Valois*, [1990] 2 R.C.S. 1259, p. 1278-1279.)

[46] Après avoir abordé les éléments de l'enrichissement et de l'appauvrissement correspondant selon l'analyse économique simple, je suis d'avis que Michelle est privée du droit de recevoir l'intégralité du produit de la police (d'une valeur de

value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.

[47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).

[48] My colleagues, Gascon and Rowe JJ., approach Michelle's loss differently. They take the position that unjust enrichment cannot be invoked by a claimant to protect his or her "contractual expectations against innocent third parties" (para. 104). While they agree that the Canadian principle against unjust enrichment operates where a plaintiff has lost

250 000 $), et qu'il y a la correspondance nécessaire entre cet appauvrissement et le gain de Risa. Quant à l'étendue de l'appauvrissement de Michelle, je suis d'avis que la quantification de sa perte ne devrait pas se limiter à ses débours — c'est-à-dire la somme de 7 000 $ qu'elle a versée en primes entre 2000 et 2013. Conformément à son obligation contractuelle, elle a effectué ces paiements durant 13 ans en échange du droit de recevoir le produit de la police de la compagnie d'assurance au décès de Lawrence. Toutefois, Lawrence a plutôt conféré ce droit à Risa, faisant ainsi défaut de respecter son obligation contractuelle. Si Lawrence avait respecté sa part du marché avec Michelle plutôt que de désigner Risa à titre de bénéficiaire irrévocable, le droit au versement du produit de la police serait revenu à Michelle. Au final, cependant, Michelle a non seulement perdu la somme qu'elle a versée en primes. Elle a été privée de la chose même pour laquelle elle a payé, c'est-à-dire le droit de réclamer la somme de 250 000 $ en produit d'assurance.

[47] Donc, pour être clair, c'est en raison du droit conféré par l'entente verbale à Michelle qu'elle a été privée de la *pleine* valeur du produit de l'assurance. Dans d'autres cas où le demandeur croyait en général que l'assuré aurait dû le désigner bénéficiaire, mais qu'il ne pouvait pas par ailleurs, en droit ou en equity, être considéré comme le bénéficiaire des sommes assurées, il sera vraisemblablement impossible de conclure que le demandeur a joui à quelque moment que ce soit du droit de toucher ces sommes ou qu'elles lui revenaient. Dans de tels cas, le bénéficiaire désigné à bon droit ne s'enrichit pas aux dépens d'un demandeur qui n'avait pas droit à l'origine aux sommes assurées, d'où le fait que le demandeur n'aura pas subi d'appauvrissement correspondant équivalant à la totalité du produit de l'assurance (*Love c. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, par. 42).

[48] Mes collègues les juges Gascon et Rowe abordent différemment la perte de Michelle. Ils sont d'avis qu'un demandeur ne peut invoquer le principe de l'enrichissement sans cause pour « [protéger ses] attentes contractuelles [. . .] contre des tiers innocents » (par. 104). Bien qu'ils conviennent que le principe de droit canadien interdisant l'enrichissement

wealth that was either in his or her possession or that would have accrued for his or her benefit, they take the position that "awards for expected property have generally been where there was a breach of an equitable duty", and they distinguish that situation from cases where the plaintiff held "a valid contractual expectation" of receiving certain property (para. 104).

[49] My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense* of the former. As was observed by Professors Maddaugh and McCamus in *The Law of Restitution*, one source of difficulty in these kinds of disappointed beneficiary cases is

> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . . [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

sans cause s'applique lorsqu'un demandeur a perdu une richesse qu'il avait en sa possession ou qui lui revenait, ils soutiennent que « le bien attendu a généralement été restitué lorsqu'il y avait manquement à un devoir en equity » et ont distingué la présente situation du cas où le demandeur avait « une attente contractuelle valable » de recevoir un bien (par. 104).

[49] À mon avis, il n'est pas utile, dans le contexte de l'enrichissement sans cause, de distinguer les attentes fondées sur une obligation contractuelle des attentes en cas de manquement à un devoir en equity (voir les motifs de mes collègues, par. 104). La démarche rigoureuse qui s'applique à l'élément de l'appauvrissement correspondant met plutôt l'accent sur la perte *réelle* du demandeur — c'est-à-dire le bien qu'il avait en sa possession ou qui lui revenait — et sur la question de savoir si cette perte correspond à l'enrichissement du défendeur, de sorte qu'il soit possible d'affirmer que ce dernier s'est enrichi *au détriment* du premier. Comme l'ont fait remarquer les professeurs Maddaugh et McCamus dans leur ouvrage *The Law of Restitution*, ce qui rend difficile ce genre d'affaires mettant en jeu des bénéficiaires déçus, c'est entre autres

> [TRADUCTION] l'application rigide de l'élément de « l'appauvrissement correspondant » ou du « détriment » comme s'il fallait que l'avantage reçu par le défendeur ait été transféré du demandeur ou corresponde aux dépenses engagées par le demandeur. [. . .] [L]a restitution d'un avantage reçu d'un tiers peut fort bien servir de fondement au recouvrement. Dans le contexte qui nous occupe, on peut normalement dire que l'avantage a de toute manière été reçu au détriment du demandeur, en ce sens que, n'eût été l'omission à tort de mettre en œuvre l'arrangement en question, le demandeur aurait reçu l'avantage. [Je souligne; p. 35-21.]

Je suis d'accord. En l'espèce, vu le fait que Michelle a respecté sa part du marché, qu'elle a maintenu la police en vigueur en payant les primes, qu'elle n'est pas décédée avant Lawrence et, malgré tout, qu'elle n'a pas reçu ce qui était prévu en fait dans le contrat, il paraît artificiel de prétendre que sa perte était autre que le droit de recevoir la totalité du produit de l'assurance.

[50] From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

[51] My colleagues also dispute this proposition. They say that any deprivation suffered by Michelle is attributable to the fact that she lacks the practical ability to recover anything against Lawrence's insolvent estate. The result, in their view, is that what Risa received — a statutory entitlement to the proceeds — is different than what Michelle lost — which they characterize as the ability to enforce her contractual rights against Lawrence's estate (para. 111). Again, I disagree; since Risa was given the very thing that Michelle had contracted to receive *and was otherwise entitled to receive* (given that she held up her end of the bargain), it seems evident to me that Risa was enriched at Michelle's expense. To be clear, it is not simply that Risa gained a benefit with a value equal to the amount of Michelle's deprivation. Rather, what Risa gained is the precise benefit that Michelle lost: the right to receive the proceeds of Lawrence's life insurance policy. I would also add that the insolvency of Lawrence's estate simply means that Michelle would be unable to recover the value of her loss by bringing an action against Lawrence's estate in breach of contract; it does not affect her ability to bring an unjust enrichment claim against Risa. The fact that a plaintiff has a contractual claim against one defendant does not preclude the plaintiff from advancing his or her case by asserting a separate cause

[50] Vu sous cet angle, il est tout aussi clair que Risa s'est enrichie au détriment de Michelle. Premièrement, le paiement des primes par Michelle a non seulement permis à Risa de s'enrichir — un fait reconnu par le juge de première instance : [TRADUCTION] « Le changement de désignation et la réception ultérieure du produit de la police par [Risa] n'auraient pas été possibles si [Michelle] n'avait pas exécuté ses obligations prévues dans l'entente » (par. 48). Fait plus important encore, la désignation de Risa comme bénéficiaire lui a donné le droit statutaire de recevoir le produit de l'assurance, ce qui laisse nécessairement entendre que Michelle n'y avait pas droit en vertu de la loi *en dépit* du fait qu'elle disposait d'un droit contractuel, découlant de l'entente conclue avec Lawrence, de demeurer désignée comme bénéficiaire. Puisque Risa a reçu le bénéfice qui aurait autrement été conféré à Michelle, la correspondance requise existe : la première s'est enrichie au détriment de la seconde.

[51] Mes collègues contestent aussi cette proposition. Ils affirment que tout appauvrissement de Michelle est attribuable au fait qu'il lui est impossible, sur le plan pratique, de recouvrer quoi que ce soit de la succession insolvable de Lawrence. Par conséquent, selon eux, ce que Risa a reçu — un droit reconnu par la loi au produit — diffère de l'appauvrissement de Michelle — ce qu'ils caractérisent comme la capacité d'exercer ses droits contractuels à l'encontre de la succession de Lawrence (par. 111). Encore une fois, je ne suis pas d'accord; puisque Risa a reçu précisément ce que Michelle devait recevoir en vertu du contrat *et ce à quoi elle avait par ailleurs droit* (étant donné qu'elle a respecté sa part du marché), il me semble évident que Risa s'est enrichie au détriment de Michelle. En clair, ce n'est pas simplement que Risa a obtenu un avantage de valeur équivalent à l'appauvrissement de Michelle. C'est plutôt que Risa a obtenu précisément ce que Michelle a perdu : le droit au versement du produit de la police d'assurance-vie de Lawrence. J'ajouterais aussi que l'insolvabilité de la succession de Lawrence se traduit simplement par l'impossibilité pour Michelle de recouvrer sa perte en intentant une action en violation de contrat contre la succession de Lawrence, mais cela ne l'empêche pas de présenter une action pour enrichissement sans cause contre Risa. Le fait

of action against another defendant if it appears most advantageous (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 206).

[52] I would therefore conclude that the requisite enrichment and corresponding deprivation are both present in this case. The payability of the insurance proceeds by the Insurance Company for Risa's benefit did in fact impoverish Michelle "to the full extent of the insurance payout in [Risa's] favour" (Court of Appeal decision, at para. 208 (Lauwers J.A., dissenting)).

[53] In light of this, the Court of Appeal's order — which was made on the consent of the parties, and which requires that $7,000 of the proceeds be paid to Michelle and that the balance be paid to Risa — cannot be upheld on a principled basis. If there is a juristic reason for Risa's retention of the insurance money, then Michelle's claim will necessarily fail and Risa will be entitled to the full $250,000. If there is no such juristic reason, however, then Michelle's unjust enrichment claim will succeed and she will be entitled to a restitutionary remedy totalling that amount.

(2) Absence of Any Juristic Reason

[54] Having established an enrichment and a corresponding deprivation, Michelle must still show that there is no justification in law or equity for the fact that Risa was enriched at her expense in order to succeed in her claim. As observed by Cromwell J. in *Kerr* (at para. 40):

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case . . . . [Emphasis added.]

que le demandeur ait une réclamation contractuelle contre un défendeur ne l'empêche pas de faire valoir sa cause au moyen d'une cause d'action distincte contre un autre défendeur, si cette façon de faire lui paraît plus avantageuse (*Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, p. 206).

[52] Je suis donc d'avis de conclure que les éléments requis de l'enrichissement et de l'appauvrissement correspondant sont tous deux présents en l'espèce. La faculté de la compagnie d'assurance de payer le produit de l'assurance au profit de Risa a effectivement appauvri Michelle [TRADUCTION] « à hauteur du produit de l'assurance payable en faveur de [Risa] » (décision de la Cour d'appel, par. 208 (le juge Lauwers, dissident)).

[53] À la lumière de ces constatations, l'ordonnance de la Cour d'appel — qui a été rendue sur consentement des parties et exige que la somme de 7 000 $ du produit soit versée à Michelle et que le solde soit versé à Risa — ne peut être confirmée sur le fondement de principes. Si l'existence d'un motif juridique permettant à Risa de conserver les sommes assurées est établie, Michelle sera forcément déboutée de son action et Risa aura droit à l'intégralité des 250 000 $. En l'absence d'un tel motif juridique, toutefois, l'action pour enrichissement sans cause de Michelle sera accueillie, et elle aura droit à la restitution de cette somme.

(2) Absence d'un motif juridique

[54] Ayant établi un enrichissement et un appauvrissement correspondant, Michelle doit tout de même démontrer, pour avoir gain de cause, que l'enrichissement de Risa à son détriment n'est pas justifié par un motif en droit ou en equity. Comme l'a fait remarquer le juge Cromwell dans l'arrêt *Kerr* (par. 40) :

> Le troisième élément d'une action pour enrichissement injustifié est qu'il doit y avoir eu un avantage et un appauvrissement correspondant sans motif juridique. En somme, ni le droit ni les exigences de la justice ne permettent au défendeur de conserver l'avantage conféré par le demandeur, rendant la conservation de l'avantage « injuste » dans les circonstances de l'affaire . . . [Je souligne.]

[55] This understanding of juristic reason is crucial for the purposes of the present appeal. The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated in *Peter* (at p. 990), "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'."

[55] Cette interprétation du motif juridique est cruciale pour les besoins du présent pourvoi. Le troisième élément de l'action pour enrichissement sans cause s'attache fondamentalement à la justification du fait que le défendeur a conservé l'avantage qui lui a été conféré aux dépens du demandeur ou, autrement dit, à la question de savoir si un motif juridique justifie l'opération ayant entraîné l'enrichissement du défendeur et l'appauvrissement correspondant du demandeur. S'il existe un tel motif juridique, le défendeur sera justifié de conserver l'avantage reçu au détriment du demandeur, et ce dernier sera conséquemment débouté de son action. La doctrine de l'enrichissement sans cause consiste fondamentalement à annuler le transfert d'un avantage qui a eu lieu sans motif en droit ou en equity. Comme l'a mentionné la juge McLachlin dans *Peter* (p. 990), « [c]'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont "injustes". »

[56] In *Garland*, this Court shed light on exactly what must be shown under the juristic reason element of the unjust enrichment analysis — and in particular, on whether this third element requires that cases be decided by "finding a 'juristic reason' for a defendant's enrichment" or instead by "asking whether the plaintiff has a positive reason for demanding restitution" (para. 41, citing *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (C.A.), at para. 105). In an effort to eliminate the uncertainty between these competing approaches, Iacobucci J. formulated a juristic reason analysis that proceeds in two stages.

[56] Dans l'arrêt *Garland*, la Cour a jeté un éclairage sur ce qu'il faut démontrer au juste pour satisfaire à l'élément du motif juridique de l'analyse de l'enrichissement sans cause — et, en particulier, au sujet de la question de savoir si ce troisième élément exige que les litiges soient tranchés [TRADUCTION] « en concluant à l'existence d'un "motif juridique" justifiant l'enrichissement du défendeur », ou plutôt « en se demandant si le demandeur avait une raison concrète d'exiger la restitution » (par. 41, citant *Garland c. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (C.A.), par. 105). Afin d'éliminer l'incertitude entre ces deux approches opposées, le juge Iacobucci a formulé une analyse du motif juridique qui comporte deux étapes.

[57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied

[57] À la première étape, le demandeur doit démontrer qu'aucune des catégories « établies » de motifs juridiques ne justifie que le défendeur conserve l'avantage au détriment du demandeur : le contrat, la disposition légale, l'intention libérale et les autres obligations valides imposées par la common law, l'equity ou la loi (*Garland*, par. 44; *Kerr*, par. 41). Si l'une ou l'autre de ces catégories s'applique, l'analyse prend fin; l'action du demandeur est forcément vouée à l'échec puisque le défendeur sera justifié de conserver l'avantage contesté. Par exemple, le

recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).

[58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

[59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.

(a) *First Stage — None of the Established Categories Applies in These Circumstances*

[60] The first stage of the *Garland* framework asks whether a juristic reason from an established category operates to deny recovery. Michelle submits that none of these categories applies in the circumstances of this case. Risa takes the position that the *Insurance Act* required the proceeds of the policy to be paid exclusively to her as the validly designated beneficiary, such that the applicable legislation constitutes a juristic reason to deny the recovery sought by Michelle.

demandeur n'aura pas droit au recouvrement dans le cas où il a conféré un avantage au défendeur sous la forme d'un don, puisqu'il n'y a rien d'injuste pour le défendeur à conserver une somme d'argent qui lui a été donnée par le demandeur (et qui a ainsi entraîné l'appauvrissement correspondant de) ce dernier. Ces catégories établies limitent de cette manière la subjectivité et le pouvoir discrétionnaire inhérents à l'analyse de l'enrichissement sans cause et aident à établir les limites de la cause d'action (*Garland*, par. 43).

[58] Si le demandeur parvient à démontrer qu'aucune des catégories établies de motifs juridiques ne s'applique, il aura alors établi une preuve *prima facie* et le tribunal passe alors à la deuxième étape de l'analyse. À ce stade, le défendeur a l'occasion de réfuter la preuve *prima facie* du demandeur en démontrant qu'il existe un autre motif de refuser le recouvrement (*Garland*, par. 45). Le défendeur a l'obligation *de facto* de démontrer pourquoi il devrait conserver ce dont il s'est enrichi. Pour décider si cela est possible, le tribunal doit tenir compte de deux facteurs : les attentes raisonnables des parties et l'intérêt public (*Garland*, par. 46; *Kerr*, par. 43).

[59] Cette analyse en deux étapes du motif juridique a été conçue pour établir un équilibre entre le besoin de prévisibilité et de stabilité, d'une part, et l'importance d'appliquer la doctrine de l'enrichissement sans cause avec souplesse et compte tenu de notre perception changeante de la justice, d'autre part.

a) *Première étape — Aucune des catégories établies ne s'applique dans les circonstances*

[60] Suivant la première étape du cadre établi dans l'arrêt *Garland*, il faut se demander si un motif juridique appartenant à une catégorie établie justifie de refuser le recouvrement. Michelle soutient qu'aucune de ces catégories ne s'applique dans les circonstances de l'espèce. Pour sa part, Risa est d'avis que la *Loi sur les assurances* exigeait que le produit de la police lui soit versé exclusivement en tant que bénéficiaire validement désignée, de sorte que la loi applicable constitue un motif juridique de refuser le recouvrement demandé par Michelle.

[61] The main issue at this stage of the analysis is therefore whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* — which, when coupled with Lawrence's insurance policy, makes it clear that Risa is the one to whom the insurance proceeds are payable — provides a juristic reason for Risa to retain those proceeds in light of Michelle's claim to the money. Put differently, the question can be framed as follows: is there any aspect of this statutory framework that justifies the fact that Risa was enriched *at Michelle's expense*? If so, Michelle's claim will necessarily fail.

[62] My colleagues dispute this proposition. In their view, it is sufficient to show that there is some juristic reason for the fact that the defendant was enriched, and there is thus no need to demonstrate that the enrichment *and the corresponding deprivation* occurred without a juristic reason. With respect, this proposition is at odds with the clear guidance provided by this Court in *Kerr* (para. 40, reproduced at para. 54 of these reasons) and disregards the work already done by the recognized categories of juristic reasons identified in *Garland*. Each of these categories points to a *relationship* between the plaintiff and the defendant that justifies the fact that a benefit passed from the former to the latter. To focus exclusively on the reason why the defendant was enriched is to ignore this key aspect of the law of unjust enrichment.

[63] Two categories of juristic reasons might be said to apply in the circumstances of this case: disposition of law and statutory obligations. Disposition of law is a broad category that applies in various circumstances, including "where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery" (*Kerr*, at para. 41 (emphasis added)). The statutory obligations category operates in a substantially similar manner, precluding recovery where a legislative enactment expressly or implicitly mandates a transfer of wealth from the plaintiff to the defendant. Although there is undoubtedly a degree of overlap between these two distinct categories, what matters for the purposes of this appeal is that a plaintiff's

[61] La question principale à cette étape de l'analyse est donc de savoir si la désignation du bénéficiaire effectuée conformément aux par. 190(1) et 191(1) de la *Loi sur les assurances* — laquelle, combinée à la police d'assurance de Lawrence, révèle clairement que c'est à Risa que revient le produit de la police d'assurance — établit un motif juridique permettant à Risa de conserver ce produit étant donné la réclamation de Michelle. Autrement dit, la question peut être formulée comme suit : y a-t-il un aspect de ce cadre législatif qui justifie le fait que Risa s'est enrichie *au détriment de Michelle*? Dans l'affirmative, l'action de Michelle sera forcément rejetée.

[62] Mes collègues sont en désaccord avec cette proposition. À leur avis, il suffit de démontrer qu'il existe un motif juridique quelconque justifiant l'enrichissement du défendeur, et qu'il n'est donc pas nécessaire de démontrer que l'enrichissement *et l'appauvrissement correspondant* sont survenus sans motif juridique. Avec égards, cette proposition va à l'encontre des directives claires données par la Cour dans *Kerr* (par. 40, reproduit au par. 54 des présents motifs) et ignore l'impact des catégories reconnues de motifs juridiques énoncées dans l'arrêt *Garland*. Chacune de ces catégories démontre une *relation* entre le demandeur et le défendeur qui justifie que l'avantage ait été transféré du premier au deuxième. Se concentrer exclusivement sur le motif de l'enrichissement du défendeur, c'est faire abstraction de cet élément important du droit relatif à l'enrichissement sans cause.

[63] Deux catégories de motifs juridiques peuvent s'appliquer dans les circonstances de l'espèce : la disposition légale et l'obligation imposée par la loi. La disposition légale est une catégorie générale qui entre en jeu dans diverses circonstances, y compris dans « les cas où la loi prescrit l'enrichissement du défendeur au détriment du demandeur, comme lorsqu'une loi valide empêche le recouvrement » (*Kerr*, par. 41 (je souligne)). La catégorie des obligations imposées par la loi opère sensiblement de la même façon, en interdisant le recouvrement lorsqu'un texte de loi prescrit expressément ou implicitement le transfert de richesse du demandeur au défendeur. Bien qu'il y ait indubitablement un degré de chevauchement entre ces deux catégories distinctes,

claim will necessarily fail if a legislative enactment provides a reason for the enrichment and corresponding deprivation, so as to preclude recovery in unjust enrichment. As Professors Maddaugh and McCamus note in *The Law of Restitution*:

. . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law. The payment of validly imposed taxes may be considered unjust by some but their payment gives rise to no restitutionary right of recovery. [Emphasis added; footnotes omitted; p. 3-28.]

[64] The jurisprudence provides ample support for this proposition. Among the issues in *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), was whether suppliers registered under the *Excise Tax Act*, R.S.C. 1985, c. E-15, that incurred costs in collecting the Goods and Services Tax on behalf of the federal government could recover those costs from the government on the basis of restitution. For a majority of this Court, Lamer C.J. answered this question in the negative:

Under the GST Act the expenses involved in collecting and remitting the GST are borne by registered suppliers. This certainly constitutes a burden to these suppliers and a benefit to the federal government. However, this is precisely the burden contemplated by statute. Hence, a juridical reason for the retention of the benefit by the federal government exists unless the statute itself is *ultra vires*. [Emphasis added; p. 477.]

[65] A similar issue arose in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325. In that case, the respondents were charged under the *Fisheries Act*, R.S.C. 1970, c. F-14, for harvesting and attempting to sell large quantities of herring spawn. The Department of Fisheries and Oceans seized and sold the herring spawn, and the appellant Crown in Right of Canada held the proceeds pending

ce qui importe pour les besoins du présent pourvoi est que l'action du demandeur sera nécessairement rejetée si un texte de loi prévoit un motif pour l'enrichissement et l'appauvrissement correspondant, faisant ainsi obstacle au recouvrement en cas d'enrichissement sans cause. Comme le signalent les professeurs Maddaugh et McCamus dans *The Law of Restitution* :

[TRADUCTION] . . . cela va peut-être de soi que l'enrichissement sans cause ne sera pas établi dans tous les cas où la loi prescrit l'enrichissement du défendeur au détriment du demandeur. Le paiement de taxes validement imposées peut être considéré comme injuste par certains, mais leur paiement ne donne pas droit au recouvrement. [Je souligne; notes en bas de page omises; p. 3-28.]

[64] La jurisprudence étaye amplement cette proposition. Parmi les questions soulevées dans le *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445 (« *Renvoi sur la TPS* »), il y avait celle de savoir si les fournisseurs inscrits aux termes de la *Loi sur la taxe d'accise*, L.R.C. 1985, c. E-15, qui engagent des dépenses pour percevoir la taxe sur les produits et services au nom du gouvernement fédéral peuvent recouvrer ces dépenses auprès de ce dernier sous forme de restitution. S'exprimant au nom des juges majoritaires de la Cour, le juge en chef Lamer a répondu à cette question par la négative :

Aux termes de la Loi sur la TPS, les dépenses engagées pour la perception et la remise de la TPS incombent aux fournisseurs inscrits. Cette situation représente certainement un fardeau pour ces fournisseurs et un avantage pour le gouvernement fédéral. Toutefois, il s'agit précisément du fardeau que prévoit la loi. Il existe donc un motif juridique pour que le gouvernement fédéral conserve cet avantage à moins que les dispositions elles-mêmes ne soient *ultra vires*. [Je souligne; p. 477.]

[65] Une question semblable a été soulevée dans *Gladstone c. Canada (Procureur général)*, 2005 CSC 21, [2005] 1 R.C.S. 325. Dans cette affaire, les intimés ont été accusés, en vertu de la *Loi sur les pêches*, L.R.C. 1970, c. F-14, d'avoir récolté et tenté de vendre de grandes quantités de rogue de hareng. Le ministère des Pêches et des Océans a saisi et vendu la rogue de hareng, et l'appelante, la Couronne du chef du

the outcome of the proceedings. The proceedings were eventually stayed and the net proceeds paid to the respondents. Because the Crown refused to pay interest or any other additional amount, however, the respondents sought restitution in the amount of $132,000, on the ground that the Crown had been unjustly enriched by its retention of the proceeds during the time of seizure. Writing for a unanimous Court, Major J. denied that claim on the following basis:

> Here, Parliament has enacted a statutory regime to regulate the commercial fishery. It has provided an extensive framework dealing with the seizure and return of things seized. This regime specifically provides for the return of any fish, thing, or proceeds realized. This was followed. Interest or some other additional amount might have been gratuitously included, but it was not. The validity of the *Fisheries Act* was not, nor could have been, successfully challenged. Therefore, the Act provides a juristic reason for any incidental enrichment which may have occurred in its operation. As a result, the unjust enrichment claim fails. [para. 22]

In short, it was Major J.'s position that the statutory regime, by specifying what had to be returned, made it clear that anything falling outside of the specified categories was to be retained by the Crown. In other words, the *Fisheries Act* stipulated that, in certain circumstances, a benefit would be retained by the Crown.

[66] These cases are examples of situations where a statute precluded recovery on the basis of unjust enrichment. It is to be noted that in each case, recovery was denied because the legislation in question expressly or implicitly required the transfer of wealth between the plaintiff and the defendant and therefore justified the defendant's retention of the benefit received at the plaintiff's expense. It is in this way that the applicable legislation can be understood as "denying" or "barring" recovery in restitution and therefore as supplying a juristic reason for the defendant's retention of the benefit.

[67] What, then, should we make of ss. 190(1) and 191(1) of the *Insurance Act*? The former permits the

Canada, a retenu le produit de la vente en attendant l'issue du litige. Les procédures ont finalement été suspendues, et le produit net de la vente a été versé aux intimés. Toutefois, comme la Couronne a refusé de payer les intérêts ou toute autre somme additionnelle, les intimés ont demandé la restitution de 132 000 $, au motif que la Couronne s'était enrichie sans cause en conservant le produit de la vente pendant la durée de la saisie. S'exprimant au nom de la Cour à l'unanimité, le juge Major a rejeté cette demande pour les motifs suivants :

> En l'espèce, le législateur a adopté des dispositions régissant la pêche commerciale. Il a établi un régime complet qui traite de la saisie et de la restitution des objets saisis. Ce régime prescrit expressément la restitution du poisson, des objets ou du produit de leur vente, et il a été appliqué. Des intérêts ou quelque autre montant additionnel auraient pu être accordés à titre gracieux, mais cela n'a pas été fait. La validité de la *Loi sur les pêches* n'a pas été contestée avec succès et n'aurait pas pu l'être non plus. Par conséquent, la Loi constitue un motif juridique justifiant tout enrichissement accessoire qui peut s'être produit dans le cadre de son application. Il s'ensuit que la demande fondée sur l'enrichissement injuste échoue. [par. 22]

Bref, selon le juge Major, il était clair que, puisque le régime législatif précisait ce qui devait être restitué, tout ce qui n'était pas visé par les catégories énoncées pouvait être conservé par la Couronne. Autrement dit, la *Loi sur les pêches* prévoyait que la Couronne conserverait un avantage dans certaines situations.

[66] Ces décisions illustrent des cas où la loi a empêché le recouvrement fondé sur l'enrichissement sans cause. Il convient de souligner que dans chacun des cas, le recouvrement a été refusé parce que la loi en cause exigeait expressément ou implicitement le transfert de richesse entre le demandeur et le défendeur, et justifiait par conséquent que le défendeur conserve l'avantage qu'il avait reçu au détriment du demandeur. Ainsi, la loi applicable peut être interprétée comme « refusant » ou « interdisant » le recouvrement par voie de restitution, et constitue ainsi un motif juridique justifiant le fait que le défendeur conserve l'avantage.

[67] Que devrait-on alors penser des par. 190(1) et 191(1) de la *Loi sur les assurances*? Le premier

insured to identify the person to whom or for whose benefit the insurance money is payable when the insured passes away. Coupled with the insurance contract, it directs the insurer to pay the proceeds to the person so designated. The latter provides that such a designation may be made irrevocably.

[68] Given the fact that a statute will preclude recovery for unjust enrichment where it requires (either explicitly or by necessary implication) that the defendant be enriched to the detriment of the plaintiff, the provisions of the *Insurance Act* may therefore provide a juristic reason for the beneficiary's enrichment vis-à-vis any corresponding deprivation that may have been suffered *by the insurer* at the time the insurance money is eventually paid out. For this reason, an unjust enrichment claim brought by the insurer against the designated beneficiary (revocable or irrevocable) would necessarily fail at this stage; the rights and obligations that exist in that context — both statutory and contractual — justify the beneficiary's enrichment at the insurer's expense (*Saskatchewan Crop Insurance Corp. v. Deck*, 2008 SKCA 21, 307 Sask. R. 206, at paras. 47-54).

[69] A valid beneficiary designation under the *Insurance Act* has also been found to constitute a juristic reason that defeats a third party's claim for the entirety of the death benefit in circumstances where that party paid some of the premiums under the erroneous belief that he or she was the named beneficiary. In *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, the deceased had maintained his first wife as the designated beneficiary under a life insurance policy. His second wife, who did not have a contractual right to be named as beneficiary, wrongly believed that he had executed a change of beneficiary designation in her favour, and paid some of the policy premiums — initially from a joint bank account she shared with the deceased and later from her own bank account. She sought the imposition of a constructive trust in her favour over the policy proceeds, arguing that there was no juristic reason for the first wife's enrichment. Even accepting that the second wife could be said to have suffered a corresponding deprivation, the Ontario Court of

permet à l'assuré d'identifier la personne à qui les sommes assurées devront être versées au décès de l'assuré et, conjugué au contrat d'assurance, il enjoint à l'assureur de verser le produit à la personne ainsi désignée. Le paragraphe 191(1), quant à lui, dispose que cette désignation peut être faite de manière irrévocable.

[68] Puisqu'une loi interdira le recouvrement pour enrichissement sans cause lorsqu'elle exige (soit en termes exprès, soit par déduction nécessaire) que le défendeur se soit enrichi au détriment du demandeur, les dispositions de la *Loi sur les assurances* peuvent donc constituer un motif juridique justifiant l'enrichissement du défendeur vis-à-vis de tout appauvrissement correspondant que *l'assureur* pouvait avoir subi au moment où les sommes assurées sont finalement versées. Pour cette raison, toute action pour enrichissement sans cause intentée par l'assureur contre le bénéficiaire désigné (révocable ou irrévocable) serait forcément rejetée à ce stade-ci; les droits et obligations statutaires et contractuels qui existent dans ce contexte justifient l'enrichissement du bénéficiaire au détriment de l'assureur (*Saskatchewan Crop Insurance Corp. c. Deck*, 2008 SKCA 21, 307 Sask. R. 206, par. 47-54).

[69] La désignation valide d'un bénéficiaire en vertu de la *Loi sur les assurances* a également été jugée comme étant un motif juridique qui fait obstacle au droit d'un tiers à l'intégralité de la prestation de décès dans des situations où ce tiers a payé une partie des primes en croyant à tort qu'il ou elle était le bénéficiaire désigné. Dans *Richardson (Estate Trustee of) c. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, le défunt avait maintenu la désignation de sa première épouse comme bénéficiaire d'une police d'assurance-vie. Sa deuxième épouse, qui n'avait pas de droit contractuel d'être nommée bénéficiaire, croyait à tort qu'il avait effectué un changement de bénéficiaire en sa faveur, et elle a payé une partie des primes de la police d'abord à partir d'un compte de banque qu'elle partageait avec le défunt et, ensuite, à même son propre compte de banque. Elle a demandé l'imposition d'une fiducie par interprétation en sa faveur sur le produit de la police d'assurance, soutenant qu'aucun motif juridique ne justifiait l'enrichissement de la première épouse. Même en acceptant

Appeal upheld the motion judge's finding that a valid beneficiary designation under the *Insurance Act* amounted to a juristic reason that defeated the second wife's claim for the insurance money that was payable to the first wife. I would observe that the claimant in that case sought a constructive trust over the entire death benefit, and not merely the return of any payments made on the basis of her erroneous belief; the Court of Appeal did not decide whether she would be entitled to the return of those payments, and that question is not before us today.

[70] At issue in this case, however, is whether a designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides any reason in law or justice for Risa to retain the disputed benefit notwithstanding Michelle's prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like Michelle, who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at p. 90, the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'" (see also *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298). In *KBA Canada Inc. v. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273, for example, the British Columbia Court of Appeal found that the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, provided a "complete set of priority rules" that was "designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty" (paras. 27 and 21, citing *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3). In those circumstances, there was no "room for priorities to be determined on the basis of common law or

que la deuxième épouse ait pu subir un appauvrissement correspondant, la Cour d'appel de l'Ontario a confirmé la conclusion du premier juge selon laquelle la désignation valide d'un bénéficiaire en vertu de la *Loi sur les assurances* constituait un motif juridique qui faisait obstacle au droit de la deuxième épouse d'obtenir les sommes assurées payables à la première épouse du défunt. Je tiens à faire remarquer que la demanderesse dans cette affaire réclamait une fiducie par interprétation sur toute la prestation de décès, et non seulement le remboursement de tout paiement effectué sur la base de sa croyance erronée; la Cour d'appel n'a pas décidé si elle aurait droit au remboursement de ces paiements, et nous ne sommes pas saisis de cette question aujourd'hui.

[70] Or, il s'agit en l'espèce de savoir si une désignation effectuée conformément aux par. 190(1) et 191(1) de la *Loi sur les assurances* fournit un motif en droit ou en justice permettant à Risa de conserver la prestation en litige malgré le droit contractuel antérieur de Michelle de demeurer la bénéficiaire désignée et, par conséquent, de recevoir le produit de la police d'assurance. Autrement dit, la loi empêche-t-elle le recouvrement dans le cas d'un demandeur qui, comme Michelle, est privé de l'avantage de la police d'assurance dans des circonstances comme celles de l'espèce? À mon sens, la réponse est négative. Rien dans la *Loi sur les assurances* ne peut être considéré comme excluant les droits que peuvent avoir, en common law ou en equity, d'autres personnes que le bénéficiaire désigné sur le produit de la police d'assurance. Comme l'a expliqué notre Cour dans *Rawluk c. Rawluk*, [1990] 1 R.C.S. 70, p. 90, le « législateur est présumé ne pas s'écarter du droit existant "sans exprimer de façon incontestablement claire son intention de le faire" » (voir aussi *Gendron c. Syndicat des approvisionnements et services de l'Alliance de la Fonction publique du Canada, section locale 50057*, [1990] 1 R.C.S. 1298). Dans *KBA Canada Inc. c. 3S Printers Inc.*, 2014 BCCA 117, 59 B.C.L.R. (5th) 273, par exemple, la Cour d'appel de la Colombie-Britannique a jugé que la *Personal Property Security Act*, R.S.B.C. 1996, c. 359, prévoyait un [TRADUCTION] « ensemble complet de règles déterminant l'ordre de priorité » « conçues pour remplacer les règles alambiquées issues de la common law, de l'equity et de la loi qui font régner la complexité et l'incertitude en droit des sûretés mobilières »

equitable principles" (para. 22). By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.

[71] The reasoning put forward by McKinlay J. (as she then was) of the Ontario High Court of Justice in *Shannon v. Shannon* (1985), 50 O.R. (2d) 456, is particularly instructive in this regard. Like Michelle, the plaintiff in *Shannon* was the former spouse of an insured person who had contractually agreed to maintain the plaintiff as the sole beneficiary of the life insurance policy in his name and "not to revoke such beneficiary designation at any time in the future" (p. 458). Shortly thereafter, and in breach of his contractual obligation, the insured person surreptitiously changed the beneficiary designation in favour of his niece and nephew. He passed away several years later, and when the plaintiff discovered the change in beneficiary designation, she commenced an action asserting her entitlement to the proceeds of her former spouse's insurance policy. McKinlay J. found in her favour and made the following observations (at p. 461):

> It would appear from s. 167(2) [i.e. the predecessor of s. 190(2) of the *Insurance Act*] that the insured may at any time before the filing of an irrevocable declaration alter or revoke an existing designation by way of a declaration.
>
> The position of the defendant is that this is precisely what the insured did, and that any finding of the court of a trust in favour of the plaintiff would have the effect of the court's attempting to overrule a clear statutory provision.
>
> But the *Insurance Act* provides a statutory framework for the protection of the insured, the insurer and beneficiaries;

(par. 27 et 21, citant *Banque de Montréal c. Innovation Credit Union*, 2010 CSC 47, [2010] 3 R.C.S. 3). Dans ces circonstances, il n'était pas « possible d'établir les priorités en fonction des principes de la common law ou de l'equity » (par. 22). Inversement, bien que la *Loi sur les assurances* prévoie le mécanisme de désignation des bénéficiaires et que ces derniers aient par le fait même droit au versement du produit de la police d'assurance, aucune partie de cette loi ne s'applique avec la « clarté incontestable » voulue pour exclure l'existence de droits contractuels ou en equity à ce produit d'assurance une fois que celui-ci a été versé au bénéficiaire désigné.

[71] Le raisonnement formulé par la juge McKinlay (plus tard juge de la Cour d'appel de l'Ontario) de la Haute Cour de justice de l'Ontario dans *Shannon c. Shannon* (1985), 50 O.R. (2d) 456, est particulièrement instructif à cet égard. À l'instar de Michelle, la demanderesse dans *Shannon* était l'ancienne épouse d'un assuré qui avait accepté par contrat de la nommer à titre de seule bénéficiaire de la police d'assurance-vie en son nom, et [TRADUCTION] « de ne jamais révoquer cette désignation dans le futur » (p. 458). Peu de temps après, et en contravention de son obligation contractuelle, l'assuré a furtivement changé la désignation du bénéficiaire en faveur de sa nièce et de son neveu. Il est décédé plusieurs années plus tard, et lorsque la demanderesse a découvert le changement de désignation, elle a intenté une action dans laquelle elle invoquait son droit au produit de l'assurance-vie de son ancien époux. La juge McKinlay a conclu en sa faveur et a formulé les observations suivantes (p. 461) :

> [TRADUCTION] Il semble ressortir du par. 167(2) [le prédécesseur du par. 190(2) de la *Loi sur les assurances*] que l'assuré peut en tout temps avant le dépôt d'une déclaration irrévocable modifier ou révoquer une désignation existante par voie de déclaration.
>
> Les défendeurs sont d'avis que c'est précisément ce que l'assuré a fait, et que toute conclusion de la cour à l'égard d'une fiducie en faveur de la demanderesse donnerait à penser que la cour tente d'annuler une disposition législative claire.
>
> Or, la *Loi sur les assurances* fournit un cadre législatif visant à protéger l'assuré, l'assureur et les bénéficiaires;

equity imposes duties of conscience on parties based on their relationship and dealings one with another outside the purview of the statute. When he concluded the separation agreement with his wife, the deceased bound himself to maintain the policy in good standing, which he did; he also bound himself to maintain it for the benefit of his wife, which he did not. [Emphasis added.]

[72] *Shannon* therefore supports the proposition that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it "does not specifically preclude the existence of rights outside its provisions" (p. 461). Similarly, in *Chanowski v. Bauer*, 2010 MCBA 96, 258 Man. R. (2d) 244, the Manitoba Court of Appeal recognized that courts have readily accepted that contractual rights to policy proceeds may operate to the detriment of named beneficiaries:

> Generally, the courts have imposed remedial constructive trusts in factual circumstances where the deceased has breached an agreement regarding life insurance benefits. These have arisen most commonly in cases where the husband executed a separation agreement promising to retain his former wife as the beneficiary of his life insurance policy and, in contravention of that promise, before his death, the deceased changed the designation of his beneficiary to that of his present wife or another family member. [para. 39]

[73] Accepting that contractual rights to claim policy proceeds can exist outside of the *Insurance Act*, can an irrevocable designation under the *Insurance Act* nonetheless constitute a juristic reason for Michelle's deprivation? In my view, it cannot. This is because the applicable statutory provisions do not require, either expressly or implicitly, that a beneficiary keep the proceeds *as against a plaintiff, in an unjust enrichment claim, who stands deprived of his or her prior contractual entitlement to claim such proceeds upon the insured's death*. By not ousting prior contractual or equitable rights that third parties may have in such proceeds, the *Insurance Act* allows an irrevocable beneficiary to take insurance money that may be subject to prior rights and therefore does not give such a beneficiary any absolute entitlement

l'equity impose des obligations de conscience aux parties sur le fondement de leur relation et de leurs rapports les unes avec les autres qui ne relèvent pas du champ d'application de la loi. Lorsqu'il a conclu l'entente de séparation avec sa femme, le défunt s'est engagé à maintenir la police en vigueur, ce qu'il a fait; il s'est également engagé à la maintenir en vigueur au bénéfice de sa femme, ce qu'il n'a pas fait. [Je souligne.]

[72] La décision *Shannon* étaye donc la proposition que, même si la *Loi sur les assurances* peut conférer au bénéficiaire le droit au versement du produit de l'assurance, elle [TRADUCTION] « n'écarte pas expressément l'existence de droits qui ne relèvent pas de ses dispositions » (p. 461). De même, dans *Chanowski c. Bauer*, 2010 MCBA 96, 258 Man. R. (2d) 244, la Cour d'appel du Manitoba a admis que les tribunaux reconnaissent volontiers que les droits contractuels au produit d'une police d'assurance peuvent s'exercer au détriment des bénéficiaires désignés :

> [TRADUCTION] En général, les tribunaux imposent des fiducies par interprétation à titre de réparation dans des circonstances factuelles où le défunt n'a pas respecté une entente concernant les prestations d'assurance-vie. Cela se produit la plupart du temps dans des cas où le mari a signé un accord de séparation par lequel il promettait de garder son ex-femme comme bénéficiaire de sa police d'assurance-vie et il a rompu sa promesse avant sa mort en désignant comme bénéficiaire son épouse actuelle ou un autre membre de la famille. [par. 39]

[73] Si l'on tient pour acquis que des droits contractuels de réclamer le produit d'une police d'assurance peuvent exister hors de la *Loi sur les assurances*, une désignation irrévocable au sens de cette loi peut-elle constituer néanmoins un motif juridique justifiant l'appauvrissement de Michelle? À mon avis, la réponse est non. Il en est ainsi parce que les dispositions statutaires applicables n'exigent ni expressément ni implicitement qu'un bénéficiaire conserve le produit *à l'encontre d'un demandeur ayant intenté une action pour enrichissement sans cause qui est privé de son droit contractuel antérieur de réclamer ce produit à la mort de l'assuré*. En n'écartant pas les droits antérieurs qui pourraient avoir été accordés par contrat ou en equity à des tiers sur ce produit, la *Loi sur les assurances* permet au bénéficiaire irrévocable de recevoir

to that money (*Shannon*, at p. 461). Put simply, the statute required that the Insurance Company pay Risa, but it did not give Risa a right to keep the proceeds as against Michelle, whose contract with Lawrence specifically provided that she would pay all of the premiums exclusively for her own benefit. Neither by direct reference nor by necessary implication does the statute either (a) foreclose a third party who stands deprived of his or her contractual entitlement to claim insurance proceeds by successfully asserting an unjust enrichment claim against the designated beneficiary — whether revocable or irrevocable — or (b) preclude the imposition of a constructive trust in circumstances such as these (see *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (C.A.); see also *KBA Canada*).

[74] On this basis, the applicable *Insurance Act* provisions are distinguishable from other legislative enactments that have been found to preclude recovery, such as valid statutory provisions requiring the payment of taxes to the government (see *GST Reference*, at pp. 476-77; *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65 (C.A.), at p. 69, aff'd [1991] 3 S.C.R. 593). In that context, the plaintiff's unjust enrichment claim must fail because the legislation permits the defendant to be enriched even when the plaintiff suffers a corresponding deprivation. The same cannot be said about the statutory framework at issue in this case, however; there is nothing in the *Insurance Act* that justifies the fact that Michelle, who is contractually entitled to claim the policy proceeds, is nevertheless deprived of this entitlement for Risa's benefit.

[75] Moreover, in my view, the fact that *Shannon* was decided prior to *Soulos* and *Garland* is of no moment (Court of Appeal decision, at paras. 84 and 89). While those cases add to our understanding of the law on constructive trusts and unjust enrichment, they do not in any way undermine the holding in *Shannon* with respect to the effect of the *Insurance Act* in circumstances such as these.

les sommes assurées qui peuvent être visées par des droits antérieurs, mais elle ne confère donc pas à ce bénéficiaire un droit absolu à ces sommes (*Shannon*, p. 461). En clair, la loi obligeait la compagnie d'assurance à payer Risa, mais elle ne conférait pas à cette dernière le droit de conserver le produit à l'encontre de Michelle, dont le contrat avec Lawrence prévoit en termes exprès qu'elle paierait toutes les primes pour son seul bénéfice. Que ce soit par mention directe ou par déduction nécessaire, la loi a) n'empêche pas le tiers privé de son droit contractuel de réclamer le produit de l'assurance en faisant valoir avec succès une allégation d'enrichissement sans cause contre le bénéficiaire désigné — à titre révocable ou irrévocable — ni b) n'interdit d'imposer une fiducie par interprétation dans des circonstances comme celles de l'espèce (voir *Central Guaranty Trust Co. c. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (C.A.); voir aussi *KBA Canada*).

[74] C'est pourquoi les dispositions applicables de la *Loi sur les assurances* se distinguent d'autres textes de loi qui, selon les tribunaux, empêchent le recouvrement, comme les dispositions statutaires valides exigeant le paiement de taxes au gouvernement (voir *Renvoi sur la TPS*, p. 476-477; *Zaidan Group Ltd. c. London (City)* (1990), 71 O.R. (2d) 65 (C.A.), p. 69, conf. par [1991] 3 R.C.S. 593). Dans ce contexte, l'action pour enrichissement sans cause du demandeur doit échouer parce que la loi permet au défendeur de s'enrichir même si le demandeur subit un appauvrissement correspondant. On ne peut toutefois en dire autant du cadre législatif en cause dans la présente affaire; rien dans la *Loi sur les assurances* ne justifie le fait que Michelle, qui a le droit contractuel de réclamer le produit de la police d'assurance, soit néanmoins privée de ce droit au profit de Risa.

[75] Qui plus est, le fait que la décision *Shannon* a été rendue avant les arrêts *Soulos* et *Garland* m'apparaît sans importance (décision de la Cour d'appel, par. 84 et 89). Bien que ces arrêts nous aident à comprendre le droit en matière de fiducie par interprétation et d'enrichissement sans cause, ils ne minent d'aucune manière la conclusion tirée dans *Shannon* concernant l'effet de la *Loi sur les assurances* dans des circonstances comme celles de la présente affaire.

[76] The majority below came to the opposite conclusion on this issue. Having considered the legislative regime governing beneficiary designations in Ontario, Blair J.A. held that the *Insurance Act* framework "lean[s] heavily in favour of payment of the proceeds of life insurance policies to those named as irrevocable beneficiaries, whereas it continues to recognize the right of an insured, at any time prior to such a designation, to alter or revoke a beneficiary who does not fall into that category" (para. 83). On this basis, he concluded that the legislative regime under which Risa had been designated as the irrevocable beneficiary of Lawrence's life insurance policy supplied a juristic reason for her receipt of the proceeds, since it constituted both a disposition of law and a statutory obligation (para. 99).

[77] With respect, I disagree with two aspects of Blair J.A.'s reasons. First, he framed the issue as being whether the applicable *Insurance Act* provisions, pursuant to which Risa had been designated as irrevocable beneficiary, provided a juristic reason for her receipt of the insurance proceeds (paras. 26(iii) and 83). This, in my view, is the wrong perspective from which to approach this third stage of the unjust enrichment analysis. As stated above, the authorities indicate that the court's inquiry should focus not only on why the defendant received the benefit, but also on whether the statute gives the defendant the right to retain the benefit against a correspondingly deprived plaintiff — in this case, whether the *Insurance Act* extinguishes an unjust enrichment claim brought by a plaintiff at whose expense the named beneficiary was enriched (*GST Reference*, at p. 477; *Kerr*, at para. 31). And given the view expressed earlier in these reasons, it seems to me that the *Insurance Act* does not.

[78] Second, Blair J.A. placed a significant degree of emphasis on the distinction between revocable and irrevocable beneficiaries, and on the certainty and predictability associated with the statutory regime

[76] Les juges majoritaires de la Cour d'appel sont parvenus à la conclusion contraire sur cette question. Ayant examiné le régime législatif régissant les désignations de bénéficiaire en Ontario, le juge Blair a conclu que le cadre de la *Loi sur les assurances* [TRADUCTION] « penche fortement en faveur du versement du produit de polices d'assurance-vie aux personnes désignées bénéficiaires irrévocables, alors qu'il continue également à reconnaître le droit de l'assuré, en tout temps avant une telle désignation, de modifier ou de révoquer la désignation du bénéficiaire qui n'appartient pas à cette catégorie » (par. 83). Il a conclu sur ce fondement que le régime législatif en vertu duquel Risa a été désignée bénéficiaire irrévocable de la police d'assurance-vie de Lawrence fournissait un motif juridique lui permettant de recevoir le produit, car il constituait à la fois une disposition légale et une obligation statutaire (par. 99).

[77] Avec égards, je ne souscris pas à deux aspects des motifs du juge Blair. Premièrement, il a estimé que la question en litige était celle de savoir si les dispositions applicables de la *Loi sur les assurances*, en vertu desquelles Risa avait été désignée bénéficiaire irrévocable, constituaient un motif juridique permettant à Risa de recevoir le produit de l'assurance (par. 26(iii) et 83). À mon avis, ce n'est pas la bonne façon d'aborder la troisième étape de l'analyse de l'enrichissement sans cause. Comme je l'ai déjà dit, les sources indiquent que le tribunal devrait concentrer son examen non seulement sur la raison pour laquelle le défendeur a reçu l'avantage, mais également sur la question de savoir si la loi donne au défendeur le droit de conserver cet avantage à l'encontre du demandeur privé en conséquence. En l'espèce, la *Loi sur les assurances* éteint-elle la demande fondée sur l'enrichissement sans cause présentée par le demandeur au détriment duquel le bénéficiaire désigné s'est enrichi (*Renvoi sur la TPS*, p. 477; *Kerr*, par. 31)? Compte tenu du point de vue exprimé plus tôt dans les présents motifs, je suis d'avis que la *Loi sur les assurances* ne le fait pas.

[78] Deuxièmement, le juge Blair a accordé beaucoup d'importance à la distinction entre les bénéficiaires révocables et les bénéficiaires irrévocables, ainsi qu'à la certitude et à la prévisibilité associées

governing irrevocable designations. While it is clear that an irrevocably designated beneficiary has a "statutory right to remain as the named beneficiary" and is therefore "entitled to receive the insurance moneys unless he or she consents to being removed" (para. 82), I am still not persuaded that s. 191 of the *Insurance Act* can be interpreted as barring the possibility of restitution to a third party who establishes that this irrevocable beneficiary cannot, in good conscience, retain those monies in the face of that third party's unjust enrichment claim. To borrow the words of Professors Maddaugh and McCamus, "the fact that the insurer is directed by statute, implicitly if not directly, to pay the insurance monies to the irrevocable beneficiary, does not preclude recovery by the other intended beneficiary where retention of the monies by the irrevocable beneficiary would constitute an unjust enrichment" (*The Law of Restitution*, at p. 35-16). Therefore, the fact that Risa was designated pursuant to s. 191(1) of the *Insurance Act*, as opposed to s. 190(1), does not assist her against Michelle in the circumstances of this case.

au régime statutaire régissant les désignations à titre irrévocable. Bien qu'il ne fasse aucun doute qu'un bénéficiaire désigné à titre irrévocable a un [TRADUCTION] « droit prévu par la loi de demeurer le bénéficiaire désigné », et a donc « droit aux sommes assurées à moins de consentir à la révocation de sa désignation » (par. 82), je ne suis toujours pas convaincue que l'art. 191 de la *Loi sur les assurances* puisse être interprété comme interdisant la restitution à un tiers qui établit que ce bénéficiaire irrévocable ne peut, en toute conscience, conserver ces sommes malgré l'action pour enrichissement sans cause de ce tiers. Pour reprendre les termes des professeurs Maddaugh et McCamus, [TRADUCTION] « le fait que l'assureur est obligé en vertu de la loi, implicitement, si ce n'est directement, de verser les sommes assurées au bénéficiaire irrévocable n'empêche pas le recouvrement par le premier bénéficiaire lorsque la conservation des sommes par le bénéficiaire irrévocable constituerait un enrichissement sans cause » (*The Law of Restitution*, p. 35-16). Par conséquent, le fait que Risa a été désignée conformément au par. 191(1) de la *Loi sur les assurances*, par opposition au par. 190(1), ne lui est d'aucun secours contre Michelle dans les circonstances de la présente affaire.

[79] I would also observe that the majority below declined to "go so far as to say that the designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* invariably trumps a prior claimant" (para. 91), but nevertheless found that it did in this case. It is with this latter statement that I would disagree; as outlined above, my view is that the statutory scheme does not prevent a claimant with a prior contractual entitlement from succeeding in unjust enrichment against the designated beneficiary.

[79] Je ferais également remarquer que les juges majoritaires de la Cour d'appel ont refusé d'[TRADUCTION] « aller jusqu'à dire que la désignation d'un bénéficiaire à titre irrévocable en vertu de la *Loi sur les assurances* l'emporte toujours contre un demandeur antérieur » (par. 91), mais ils ont néanmoins conclu que cette loi l'emportait sur le demandeur antérieur en l'espèce. C'est avec cette dernière affirmation que je suis en désaccord; comme je l'ai dit précédemment, je suis d'avis que le régime statutaire n'empêche pas le demandeur ayant un droit contractuel antérieur d'avoir gain de cause dans une action pour enrichissement sans cause contre le bénéficiaire désigné.

[80] My colleagues take the position that the *Insurance Act* provides a juristic reason for Risa's enrichment because it specifically provides that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by the insured's creditors. They say that because "Michelle's rights are

[80] Mes collègues sont d'avis que la *Loi sur les assurances* fournit un motif juridique pour l'enrichissement de Risa, parce qu'elle prévoit précisément que, dès qu'il est versé au bénéficiaire irrévocable, le produit est à l'abri des réclamations des créanciers de l'assuré. Ils soutiennent que, puisque « les droits

contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds" (para. 122). While there is no dispute that Michelle may have a claim against Lawrence's estate, my view is that she is *also* a person at whose expense Risa has been enriched — and therefore a plaintiff with standing to claim against Risa in unjust enrichment. And while the *Insurance Act* specifically precludes claims by creditors suing on the basis of some obligation owed by the insured's estate, it does not state "with irresistible clearness" that a claim *in unjust enrichment* — i.e. a claim based on a different cause of action — brought by a plaintiff who also has a contractual entitlement to claim the insurance proceeds must necessarily fail as against the named beneficiary.

[81] For all of the foregoing reasons, I would echo the conclusion arrived at by Lauwers J.A., dissenting in the court below, that "[Michelle's] entitlement to the insurance proceeds as against [Risa] is neither precluded nor affected by the operation of the *Insurance Act*", with the result that this case "falls outside the category of disposition of law as a juristic reason to permit [Risa] to retain the life insurance proceeds" (para. 229).

[82] Since there is no suggestion that any other established category of juristic reason would apply in these circumstances, my conclusion at this first stage is that Michelle has made out a *prima facie* case.

(b) *Second Stage — Policy Reasons Militate in Favour of Michelle*

[83] The second stage of the juristic reason analysis affords the defendant an opportunity to rebut the plaintiff's *prima facie* case by establishing that there is some residual reason to deny recovery. At this stage, various other considerations come into play, like the parties' reasonable expectations and moral and policy-based arguments — including considerations relating to the way in which the parties organized their relationship (*Garland*, at paras. 45-46; *Pacific National Investments*, at para. 25; *Kerr*, at paras. 44-45).

de Michelle sont de nature contractuelle, cela fait d'elle une créancière de la succession de Lawrence et elle n'a donc pas droit au produit suivant la *Loi sur les assurances* » (par. 122). Bien qu'il ne soit pas contesté que Michelle a peut-être un droit d'action contre la succession de Lawrence, à mon avis elle est *aussi* une personne au détriment de laquelle Risa s'est enrichie — et elle a donc la qualité requise pour intenter une action pour enrichissement sans cause contre Risa. Par ailleurs, bien que la *Loi sur les assurances* empêche expressément les créanciers d'intenter des poursuites sur le fondement d'une obligation de la succession de l'assuré, elle ne dispose pas « de façon incontestablement claire » qu'une action *pour enrichissement sans cause* — c.-à-d. fondée sur une autre cause d'action — intentée contre le bénéficiaire désigné par un demandeur qui a également le droit contractuel de réclamer le produit de l'assurance doit nécessairement échouer.

[81] Pour tous les motifs qui précèdent, je fais mienne la conclusion à laquelle est parvenu le juge Lauwers, dissident en Cour d'appel : [TRADUCTION] « [L]'application de la *Loi sur les assurances* ne fait aucunement obstacle au droit de [Michelle] au produit de l'assurance réclamé par [Risa], ni n'influe sur ce droit », de sorte qu'en l'espèce, la loi « ne constitue pas une disposition légale permettant à [Risa] de conserver le produit de l'assurance-vie » (par. 229).

[82] Personne n'ayant laissé entendre qu'une autre catégorie établie de motif juridique s'appliquerait dans les circonstances, je conclus à ce premier stade que Michelle a établi une preuve *prima facie*.

b) *Deuxième étape — Les considérations d'intérêt public militent en faveur de Michelle*

[83] La deuxième étape de l'analyse du motif juridique donne au défendeur l'occasion de réfuter la preuve *prima facie* du demandeur en établissant qu'il existe un motif résiduel de refuser le recouvrement. À ce stade, divers autres facteurs entrent en jeu, comme les attentes raisonnables des parties et les arguments de morale et d'intérêt public — y compris les facteurs relatifs à la façon dont les parties structurent leur relation (*Garland*, par. 45-46; *Pacific National Investments*, par. 25; *Kerr*, par. 44-45).

[84] It is clear that both parties expected to receive the proceeds of the life insurance policy. Pursuant to the Oral Agreement, Michelle had a contractual right to remain designated as beneficiary so long as she continued to pay the premiums and kept the policy alive for the duration of Lawrence's life. Although she could have better safeguarded her interests by requiring Lawrence to designate her irrevocably, her expectation with respect to the insurance money — rooted in the Oral Agreement — is clearly reasonable and legitimate.

[85] Risa, by contrast, expected to receive the insurance money upon Lawrence's death by virtue of the fact that she had been validly designated as irrevocable beneficiary. Because Risa was designated after Lawrence and Michelle entered into the Oral Agreement, however, I am of the view that her expectation cannot take precedence over Michelle's *prior contractual right* to remain named as beneficiary, regardless of whether Risa knew that this was actually the case. To echo the findings of the application judge:

> While there is no evidence that [Risa] knew that [Michelle] was paying the premiums on the Policy, she was aware that [Lawrence] was not in a position to do so. She says that she believed that [Lawrence's] brother was paying the premiums, but there is nothing in the record regarding the brother's motivation or intentions that would make [Risa's] belief in such action reasonable. [para. 49]

[86] Moreover, I am not persuaded that the oral nature of the agreement between Michelle and Lawrence undermines Michelle's expectation or serves as a public policy reason that favours Risa's retention of the proceeds. The legal force of unwritten agreements has long been recognized by common law courts. And while "kitchen table agreements" may in some cases result in situations where parties neither understand nor intend the legal significance of their agreement, this is not such a case; the parties do not dispute the finding that Michelle and Lawrence did in fact have an Oral Agreement that the former would pay the premiums on the policy and, in exchange, would be entitled to the proceeds of the policy upon the latter's death (Superior Court decision, at para. 17; Court of Appeal decision, at para. 22). Indeed, the existence of

[84] Il est clair que les deux parties s'attendaient à toucher le produit de la police d'assurance-vie. D'après l'entente verbale, Michelle avait un droit contractuel de demeurer désignée comme bénéficiaire tant qu'elle continuait de payer les primes et maintenait la police en vigueur durant la vie de Lawrence. Certes, elle aurait pu mieux protéger ses intérêts en obligeant Lawrence à la désigner à titre irrévocable, mais ses attentes à l'égard des sommes assurées — découlant de l'entente verbale — sont manifestement raisonnables et légitimes.

[85] Risa, en revanche, s'attendait à recevoir les sommes assurées au décès de Lawrence du fait qu'elle avait été validement désignée comme bénéficiaire irrévocable. Or, comme elle a été désignée après que Lawrence et Michelle eurent conclu l'entente verbale, je suis d'avis que l'attente de Risa ne peut l'emporter sur le *droit contractuel antérieur* de Michelle de demeurer la bénéficiaire désignée, peu importe si Risa savait que Michelle l'était en fait. Pour reprendre les conclusions du juge de première instance :

> [TRADUCTION] Même si rien n'indique que [Risa] savait que [Michelle] payait les primes de la police, elle savait que [Lawrence] n'était pas en mesure de le faire. Elle affirme qu'elle croyait que le frère [de Lawrence] payait les primes, mais il n'y a rien au dossier concernant la motivation ou l'intention du frère qui rendrait raisonnable cette croyance de [Risa]. [par. 49]

[86] De plus, je ne suis pas convaincue que la nature orale de l'entente entre Michelle et Lawrence mine les attentes de Michelle, ou sert de considérations d'intérêt public favorisant la conservation du produit par Risa. La force juridique des ententes non écrites est reconnue depuis longtemps par les tribunaux de common law. Et bien que les ententes privées puissent dans certains cas donner lieu à des situations où les parties ne comprennent pas la signification juridique de leur entente ou ne voulaient pas lui donner une telle signification, ce n'est pas le cas en l'espèce; les parties ne contestent pas la conclusion selon laquelle Michelle et Lawrence ont bel et bien conclu une entente verbale, aux termes de laquelle la première paierait les primes de la police et, en échange, aurait droit au produit de la police

the Oral Agreement is quite clearly corroborated by Michelle's payment of the premiums following her separation from Lawrence.

[87] As a final point, it appears to me that the residual considerations that arise at this stage of the *Garland* analysis favour Michelle, given that her contribution towards the payment of the premiums actually kept the insurance policy alive and made Risa's entitlement to receive the proceeds upon Lawrence's death possible. Furthermore, it would be bad policy to ignore the fact that Michelle was effectively tricked by Lawrence into paying the premiums of a policy for the benefit of some other person of his choosing.

[88] For the foregoing reasons, I would conclude that Risa has not met the burden of rebutting Michelle's *prima facie* case. It follows, therefore, that Michelle has made out each of the requisite elements of the cause of action in unjust enrichment.

B. *Appropriate Remedy: Imposition of a Constructive Trust*

[89] The remedy for unjust enrichment is restitutionary in nature and can take one of two forms: personal or proprietary. A personal remedy is essentially a debt or a monetary obligation — i.e. an order to pay damages — that may be enforced by the plaintiff against the defendant (*Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, at p. 47). In most cases, this remedy will be sufficient to achieve restitution, and it can therefore be viewed as the "default" remedy for unjust enrichment (*Lac Minerals*, at p. 678; *Kerr*, at para. 46).

[90] In certain cases, however, a plaintiff may be awarded a remedy of a proprietary nature — that is, an entitlement "to enforce rights against a particular piece of property" (McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, at p. 1295). The most pervasive and important proprietary remedy for unjust enrichment is the constructive trust — a

au décès du dernier (décision de la Cour supérieure, par. 17; décision de la Cour d'appel, par. 22). En fait, l'existence de l'entente verbale est clairement corroborée par le fait que Michelle a payé les primes à la suite de sa séparation d'avec Lawrence.

[87] En dernier lieu, il me semble que les facteurs résiduels soulevés à cette étape de l'analyse établie dans l'arrêt *Garland* militent en faveur de Michelle, puisque sa contribution au paiement des primes a effectivement permis de maintenir la police d'assurance en vigueur et rendu possible le droit de Risa de recevoir le produit au décès de Lawrence. Qui plus est, il serait déplorable de négliger le fait que Lawrence a amené Michelle par la ruse à payer les primes de la police au bénéfice d'une autre personne de son choix.

[88] Pour les motifs qui précèdent, je suis d'avis de conclure que Risa ne s'est pas acquittée du fardeau de réfuter la preuve *prima facie* de Michelle. Par conséquent, Michelle a établi chacun des éléments requis de l'action pour enrichissement sans cause.

B. *La réparation appropriée : l'imposition d'une fiducie par interprétation*

[89] Pour remédier à l'enrichissement sans cause, le tribunal accorde une restitution qui peut prendre deux formes : une réparation personnelle ou une réparation fondée sur le droit de propriété. La réparation personnelle est essentiellement une dette ou une obligation pécuniaire — p. ex. des dommages-intérêts — dont l'exécution peut être réclamée par le demandeur contre le défendeur (*Sorochan c. Sorochan*, [1986] 2 R.C.S. 38, p. 47). Dans la plupart des cas, cette réparation sera suffisante pour parvenir à la restitution, et elle peut donc être considérée comme la réparation « par défaut » pour remédier à l'enrichissement sans cause (*Lac Minerals*, p. 678; *Kerr*, par. 46).

[90] Dans certains cas, toutefois, le tribunal peut accorder au demandeur une réparation fondée sur le droit de propriété, c'est-à-dire la possibilité [TRADUCTION] « de faire respecter ses droits à l'égard d'un bien en particulier » (McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, p. 1295). La réparation fondée sur le droit de propriété la plus

remedy which, according to Dickson J. (as he then was),

> is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.

(*Pettkus*, at pp. 843-44)

[91] While the constructive trust is a powerful remedial tool, it is not available in *all* circumstances where a plaintiff establishes his or her claim in unjust enrichment. Rather, courts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed (*PIPSC*, at para. 149; *Kerr*, at paras. 50-51; *Peter*, at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

[92] The application judge concluded that Michelle had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment, and he accordingly ordered that Risa held those proceeds on constructive trust for Michelle (para. 52). He specifically found that Michelle had demonstrated a "clear 'link or causal connection' between her contributions and the proceeds of the Policy that continued for the entire duration of the Policy" (para. 50).

[93] While my analysis of Michelle's right to recover for unjust enrichment differs from that of

répandue et la plus importante pour remédier à l'enrichissement sans cause est la fiducie par interprétation — une réparation qui, selon le juge Dickson (plus tard juge en chef),

> est imposé[e] indépendamment de l'intention de créer une fiducie, et son but est de remédier à un résultat autrement injuste. C'est un outil général, souple et juste qui permet aux tribunaux d'apprécier toutes les circonstances de l'espèce, y compris les contributions respectives des parties, et de déterminer le droit de propriété véritable.

(*Pettkus*, p. 843-844)

[91] Bien que la fiducie par interprétation soit un puissant outil de réparation, on ne peut l'accorder dans *toutes* les circonstances où le demandeur établit le bien-fondé de son allégation d'enrichissement sans cause. En fait, les tribunaux n'assujettiront le bien contesté à une fiducie par interprétation que si le demandeur peut établir deux choses : premièrement, qu'une réparation personnelle serait insuffisante; et deuxièmement, que la contribution du demandeur à la base de l'action a un lien ou un rapport de causalité avec le bien qui serait grevé d'une fiducie par interprétation (*IPFPC*, par. 149; *Kerr*, par. 50-51; *Peter*, p. 988). Et même lorsque le tribunal estime qu'une fiducie par interprétation serait une réparation convenable, elle ne sera imposée que dans la mesure de la contribution proportionnelle du demandeur (directe ou indirecte) à l'acquisition, la conservation, l'entretien ou l'amélioration du bien (*Kerr*, par. 51; *Peter*, p. 997-998).

[92] Le juge de première instance a conclu que Michelle avait établi avoir droit à l'intégralité du produit de la police d'assurance-vie sur le fondement de l'enrichissement sans cause, et, par conséquent, il a ordonné à Risa de détenir ce produit en fiducie par interprétation pour le compte de Michelle (par. 52). Il a précisément conclu que Michelle avait démontré [TRADUCTION] « un "lien ou un rapport de causalité" clair entre ses contributions, qui ont continué pendant toute la durée de la police, et le produit de la police » (par. 50).

[93] Même si mon analyse du droit de Michelle au recouvrement pour remédier à l'enrichissement sans

the application judge, I see no reason to disturb his conclusion regarding the propriety of a remedial constructive trust in these circumstances. Ordinarily, a monetary award would be adequate in cases where the property at stake is money. In the present case, however, the disputed insurance money has been paid into court and is readily available to be impressed with a constructive trust. Furthermore, ordering that the money be paid out of court to Risa, and then requiring Michelle to enforce the judgment against Risa personally, would unnecessarily complicate the process through which Michelle can obtain the relief to which she is entitled. It would also create a risk that the money might be spent or accessed by other creditors in the interim.

[94] Moreover, the application judge found that Michelle's payment of the premiums was causally connected to the maintenance of the policy under which Risa was enriched. Because each of Michelle's payments kept the policy alive, and given that Risa's right as designated beneficiary necessarily deprived Michelle of her contractual entitlement to receive the entirety of the insurance proceeds, I would impose a constructive trust to the full extent of those proceeds in Michelle's favour.

[95] This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.

VI. Conclusion

[96] I would therefore allow the appeal without costs and order that the proceeds of the policy, with accrued interest, be impressed with a constructive

cause diffère de celle du juge de première instance, je ne vois aucune raison de modifier sa conclusion concernant l'à-propos d'imposer une fiducie par interprétation dans les circonstances. Habituellement, l'octroi d'une réparation pécuniaire conviendrait dans les cas où le bien en jeu est de l'argent. Or, en l'espèce, le produit d'assurance en litige a été déposé au greffe du tribunal et il est facile de lui imposer une fiducie par interprétation. En outre, si l'on ordonne que l'argent consigné au tribunal soit versé à Risa, puis que Michelle fasse exécuter le jugement à l'encontre de Risa en personne, cela compliquerait inutilement le processus permettant à Michelle d'obtenir la réparation à laquelle elle a droit. Cela ferait naître aussi le risque que l'argent soit dépensé ou pris entre-temps par d'autres créanciers.

[94] De plus, le juge de première instance a conclu que le paiement des primes par Michelle avait un lien de causalité avec le maintien en vigueur de la police en vertu de laquelle Risa s'est enrichie. Puisque chacun de ces versements a permis de maintenir la police en vigueur et que le droit de Risa en tant que bénéficiaire désignée a forcément privé Michelle de son droit contractuel de toucher l'intégralité du produit de l'assurance, je suis d'avis d'imposer une fiducie par interprétation à hauteur du produit en faveur de Michelle.

[95] Le pourvoi étant ainsi tranché, point n'est besoin de décider si l'arrêt *Soulos* de notre Cour devrait être interprété comme interdisant le recours à la fiducie par interprétation, outre les cas d'enrichissement sans cause et de conduites fautives, comme le manquement à une obligation fiduciaire. De même, la mesure dans laquelle notre Cour aurait incorporé, dans *Soulos*, les « fiducies institutionnelles anglaises traditionnelles » au cadre d'analyse des fiducies par interprétation imposées en guise de réparation déborde la portée du présent pourvoi. Ces questions demeurent certes en suspens, mais j'estime qu'il vaudra mieux les étudier à une autre occasion.

VI. Conclusion

[96] Par conséquent, je suis d'avis d'accueillir le pourvoi sans frais et d'ordonner l'imposition d'une fiducie par interprétation en faveur de Michelle sur

trust in favour of Michelle and accordingly be paid out of court for her benefit.

The following are the reasons delivered by

GASCON AND ROWE JJ. (dissenting) —

I. Introduction

[97] This appeal is, without question, a difficult one. Michelle and Risa are both innocent victims of Lawrence's breach of contract and they equally invite substantial sympathy. Michelle paid approximately $7,000 to keep alive an insurance policy on the promise she would receive the proceeds if Lawrence died within its term. Risa cared for and supported Lawrence for 13 years and expected, as irrevocable beneficiary, that she would receive support should he die. With Lawrence's broken promise now discovered, Michelle claims a constructive trust over the proceeds on the basis of unjust enrichment or "good conscience", while Risa insists her irrevocable beneficiary designation is unassailable.

[98] It is an unfortunate reality that a person's death is sometimes accompanied by uncertainty and conflict over the wealth that has been left behind. The resulting litigation can tie up funds that the deceased intended to support loved ones for a significant period of time, adding financial hardship to personal tragedy. In an attempt to ensure that life insurance proceeds could be free from such strife, the Ontario legislator empowered life insurance policy holders to designate an "irrevocable beneficiary" (*Insurance Act*, R.S.O. 1990, c. I.8, s. 191(1)). Such a designation ensures that the policy proceeds could be disbursed free from claims against the estate, giving certainty to insured, insurer, and beneficiary alike. This provision should be given full effect.

le produit de la police d'assurance, ainsi que les intérêts accumulés, et, par conséquent, le retrait de ces sommes du greffe du tribunal et leur versement au bénéfice de Michelle.

Version française des motifs rendus par

LES JUGES GASCON ET ROWE (dissidents) —

I. Introduction

[97] Le présent pourvoi est sans aucun doute difficile à trancher. Michelle et Risa sont deux victimes innocentes de la rupture de contrat de Lawrence et elles méritent beaucoup de sympathie. Michelle a versé environ 7 000 $ pour garder en vigueur une police d'assurance moyennant la promesse qu'elle toucherait le produit si Lawrence mourait pendant la durée de la police. Risa s'est occupée de Lawrence et l'a soutenu durant 13 ans et elle s'attendait, en tant que bénéficiaire irrévocable, à toucher ce produit s'il mourait. La promesse trahie de Lawrence ayant été mise au jour, Michelle réclame l'imposition d'une fiducie par interprétation sur le produit en invoquant l'enrichissement sans cause ou la « bonne conscience », alors que Risa insiste pour dire que sa désignation en tant que bénéficiaire irrévocable est inattaquable.

[98] Malheureusement, le décès d'une personne s'accompagne parfois d'incertitude et de conflit au sujet du patrimoine laissé par le défunt. Le litige qui en découle peut entraîner pendant longtemps le blocage de fonds que le défunt comptait utiliser pour soutenir les êtres qui lui sont chers, ce qui ajoute des difficultés financières à la tragédie. Afin de soustraire le produit d'une police d'assurance-vie à pareille querelle, le législateur ontarien a habilité les titulaires d'une police d'assurance-vie à désigner un « bénéficiaire à titre irrévocable » (*Loi sur les assurances*, L.R.O. 1990, c. I.8, par. 191(1)). Une telle désignation assure que le versement du produit de la police puisse être effectué à l'abri des réclamations visant la succession, ce qui confère une certitude tant à l'assuré qu'à l'assureur et au bénéficiaire. Il y a lieu de donner pleinement effet à cette disposition.

[99] There is no basis to impose a constructive trust in the circumstances of this case. We agree with Blair J.A. of the Ontario Court of Appeal that Michelle has not established that a "good conscience" constructive trust should be imposed (2017 ONCA 182, 134 O.R. (3d) 721). We rely on his reasons to dispose of this ground of appeal. We also agree that Michelle has failed to establish a claim in unjust enrichment. On this issue, we respectfully part ways with the majority of this Court on whether unjust enrichment can be made out on these facts. Michelle has only asserted contractual rights to the proceeds and has not established a proprietary or equitable interest in the proceeds themselves. In our view, there is no correlative deprivation between Michelle's failed contractual expectations and Risa's enrichment. In addition, the *Insurance Act* provides clear juristic reason for any enrichment Risa could have received through Michelle's loss as a creditor of Lawrence's insolvent estate. Opening up irrevocable beneficiary designations to challenges by an insured's creditors risks a recipe for litigation — a situation the legislator clearly intended to avoid. As such, for the reasons that follow, we would dismiss the appeal.

[99] Il n'y a aucune raison d'imposer une fiducie par interprétation dans les circonstances de la présente affaire. Nous convenons avec le juge Blair, de la Cour d'appel de l'Ontario, que Michelle n'a pas établi la nécessité d'imposer une fiducie par interprétation fondée sur la « bonne conscience » (2017 ONCA 182, 134 O.R. (3d) 721). Nous nous appuyons sur ses motifs pour trancher ce moyen d'appel. Nous convenons en outre que Michelle n'a pas établi le bien-fondé d'une action pour enrichissement sans cause. À cet égard, nous nous dissocions des juges majoritaires de la Cour sur la question de savoir s'il est possible de démontrer l'enrichissement sans cause au vu des faits de l'espèce. Michelle n'a fait que revendiquer des droits contractuels au produit et n'a pas prouvé qu'elle détenait un intérêt propriétal ou en equity dans le produit lui-même. À notre avis, il n'y a aucun appauvrissement corrélatif entre les attentes contractuelles non réalisées de Michelle et l'enrichissement de Risa. En outre, la *Loi sur les assurances* fournit un motif juridique clair à l'appui de tout enrichissement dont aurait bénéficié Risa par le biais de la perte subie par Michelle en tant que créancière de la succession insolvable de Lawrence. Exposer les désignations irrévocables de bénéficiaires aux contestations des créanciers de l'assuré risque de constituer une recette parfaite pour entraîner des litiges, une situation que le législateur souhaitait manifestement éviter. Ainsi, pour les motifs qui suivent, nous sommes d'avis de rejeter le pourvoi.

II. Analysis

A. *Characterizing Michelle's Claim*

[100] The majority of the Ontario Court of Appeal was correct in characterizing Michelle's claim as being that she had a contract with Lawrence for the policy proceeds and that she was using this contract to be entitled to restitution of the funds on the principle of unjust enrichment. According to Michelle's affidavit, the contract was to ensure that she would be "entitled to receive the Policy benefits" in exchange for paying the premiums (A.R., at p. 138). However, it is difficult to see how the contract she has put into evidence creates a proprietary right in the proceeds. Simply being named as a beneficiary

II. Analyse

A. *Le droit d'action de Michelle*

[100] Les juges majoritaires de la Cour d'appel de l'Ontario ont eu raison de dire, en parlant du droit d'action de Michelle, qu'elle avait conclu un contrat avec Lawrence afin d'obtenir le produit de la police et qu'elle se servait de ce contrat pour avoir droit à la restitution des fonds sur la base du principe de l'enrichissement sans cause. D'après l'affidavit de Michelle, le contrat visait à faire en sorte qu'elle ait le [TRADUCTION] « droit de toucher le produit de la police » en échange du paiement des primes (d.a., p. 138). Il est cependant difficile de voir en quoi le contrat qu'elle a déposé en preuve donne

does not give one a right in the proceeds before the death of the insured. The right to claim the proceeds only crystalizes upon the insured's death. Further, as a revocable beneficiary, Michelle had no right to contest the redesignation outside of a claim against Lawrence for breach of contract. Thus, at the time of Lawrence's death, the only rights that Michelle possessed in relation to the life insurance contract were her contractual rights.

[101] On different pleadings and a more developed record, Michelle may have been able to establish that the contract gave her a proprietary interest in the proceeds through an equitable assignment of Lawrence's chose in action. The Ontario Court of Appeal correctly found that this avenue was never properly put to the application judge, and Michelle has not otherwise pursued this line of argument. It follows that, with only contractual rights asserted, Michelle cannot be understood to have a proprietary right in the proceeds. Rather, her agreement with Lawrence must be understood as limited to a contractual right to be maintained the named beneficiary of the policy while she paid the premiums. If Lawrence had died while she was designated as a beneficiary, Michelle would consequently receive the proceeds, but the contract itself cannot be seen to give Michelle a right in the proceeds themselves.

[102] Of course, Lawrence breached his contractual obligations by redesignating Risa as an irrevocable beneficiary, entitling her to the policy proceeds on his death. While Michelle would have a claim against Lawrence's estate for breach of contract, the estate's lack of assets has rendered any such recourse fruitless. Instead, Michelle's claim before this Court is to reverse the purported unjust enrichment of Risa, an innocent beneficiary of Lawrence's breach of contract.

[103] Risa has argued that unjust enrichment should not be a vehicle for protecting expectation interests in a valid contract. Indeed, the availability of unjust enrichment for indirect claims against the

naissance à un droit de propriété sur le produit. Le simple fait d'être désigné bénéficiaire ne donne pas droit au produit avant la mort de l'assuré. Le droit de réclamer le produit ne se matérialise qu'au décès de l'assuré. De plus, à titre de bénéficiaire révocable, Michelle n'avait pas le droit de contester la nouvelle désignation, si ce n'est en poursuivant Lawrence pour rupture de contrat. Par conséquent, les seuls droits que possédait Michelle à l'égard du contrat d'assurance-vie lorsque Lawrence est décédé étaient ses droits contractuels.

[101] Si elle avait présenté des demandes différentes et un dossier plus étoffé, Michelle aurait peut-être été en mesure d'établir que le contrat lui accordait un intérêt propriétal dans le produit par le truchement d'une cession en equity de la chose non possessoire de Lawrence. La Cour d'appel de l'Ontario a conclu à juste titre que cette voie de recours n'avait jamais été régulièrement portée à l'attention du juge de première instance, et Michelle n'a pas non plus défendu cette thèse. On ne peut donc considérer qu'en invoquant seulement des droits contractuels, Michelle a un droit de propriété sur le produit. Son entente avec Lawrence ne doit plutôt être comprise que comme le droit contractuel de rester la bénéficiaire désignée de la police pendant qu'elle en paie les primes. Si Lawrence était mort alors qu'elle était désignée bénéficiaire, Michelle aurait ainsi touché le produit, mais le contrat lui-même ne peut conférer à Michelle un droit sur le produit en soi.

[102] Bien sûr, Lawrence a contrevenu à ses obligations contractuelles en désignant Risa bénéficiaire irrévocable, ce qui a permis à cette dernière de toucher le produit de la police lors du décès de Lawrence. Même si Michelle avait un droit d'action contre la succession de Lawrence pour rupture de contrat, l'insuffisance d'actifs dans la succession a rendu tout recours inutile. Le pourvoi formé par Michelle devant notre Cour a plutôt pour objet d'annuler le prétendu enrichissement sans cause de Risa, une bénéficiaire innocente de la rupture de contrat de Lawrence.

[103] Risa a fait valoir que l'enrichissement sans cause ne devrait pas servir à protéger les attentes envers un contrat valide. En fait, la possibilité d'invoquer l'enrichissement sans cause afin de poursuivre

innocent beneficiaries of a breach of contract is a matter of significant academic controversy. Professor Birks, while a general proponent of the availability of indirect claims, has posited that there is a general rule against "leap-frogging" out of an initially valid contract through unjust enrichment (P. Birks, *Unjust Enrichment* (2nd ed. 2005), at p. 90). One reason he suggests for this rule is that a contracting party "must not wriggle round the risk of insolvency" inherent in contractual relations (p. 90). Professor Burrows also recognizes such a rule, given the logical difficulty of establishing a causal link between the claimant's deprivation and the defendant's benefit (A. Burrows, *The Law of Restitution* (3rd ed. 2011), at pp. 70-71). In a similar vein, Professor Virgo has identified a "privity principle" to unjust enrichment that means indirect recipients of a benefit will generally not be liable for restitution (G. Virgo, *The Principles of the Law of Restitution* (3rd ed. 2015), at p. 105). The leading text on restitution from Lord Goff and Professor Jones, by contrast, suggests that there is no such general prohibition and that causation can be made out on a simple "but for" causation analysis (*Goff & Jones: The Law of Unjust Enrichment* (9th ed. 2016), by C. Mitchell, P. Mitchell and S. Watterson, at pp. 77 and 176). Yet, they also caution that courts should be hesitant to make such awards where they would have the effect of undermining an insolvency regime or avoid the contractual allocation of risk (p. 77).

[104] There is sparse Canadian authority on this matter, and we see no support for the view that unjust enrichment protects an individual's contractual expectations against innocent third parties. Certainly, this Court has recognized that the law of restitution ensures that where a plaintiff has been deprived of wealth that is either in their possession or would have accrued for their benefit, it is restored to them (*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-3). However, restitution awards for expected property have generally been where there was a breach of an equitable duty by a defendant (*Lac Minerals Ltd. v. International Corona Resources Ltd.*,

indirectement les bénéficiaires innocents d'une rupture de contrat suscite une grande controverse chez les universitaires. Le professeur Birks, bien que généralement favorable à la possibilité d'exercer des recours indirects, a opiné qu'une règle générale interdit de se soustraire à un contrat validement formé par la voie de l'enrichissement sans cause (P. Birks, *Unjust Enrichment* (2e éd. 2005), p. 90). Il prétend que cette règle existe notamment parce qu'une partie contractante [TRADUCTION] « ne doit pas esquiver le risque d'insolvabilité » inhérent aux rapports contractuels (p. 90). Le professeur Burrows reconnaît lui aussi l'existence de cette règle, vu la difficulté logique d'établir un lien de causalité entre l'appauvrissement du requérant et l'enrichissement du défendeur (A. Burrows, *The Law of Restitution* (3e éd. 2011), p. 70-71). Dans la même veine, le professeur Virgo a relevé un « principe de lien contractuel » applicable à l'enrichissement sans cause voulant que les bénéficiaires indirects d'un avantage ne soient généralement pas tenus de le restituer (G. Virgo, *The Principles of the Law of Restitution* (3e éd. 2015), p. 105). En revanche, l'ouvrage de référence de lord Goff et du professeur Jones sur la restitution tend à indiquer qu'il n'y a aucune interdiction générale de cette nature et que le lien de causalité peut être établi à l'aide d'une simple analyse du « facteur déterminant » (*Goff & Jones : The Law of Unjust Enrichment* (9e éd. 2016), par. C. Mitchell, P. Mitchell et S. Watterson, p. 77 et 176). Ils précisent pourtant que les tribunaux devraient hésiter à octroyer de telles réparations lorsque celles-ci auraient pour effet de saper un régime d'insolvabilité ou d'éviter la répartition du risque prévue au contrat (p. 77).

[104] Les sources canadiennes en la matière sont rares et nous ne voyons rien qui étaye l'opinion selon laquelle le principe de l'enrichissement sans cause protège les attentes contractuelles d'une personne contre des tiers innocents. Bien entendu, notre Cour a reconnu que le droit de la restitution garantit que, dans le cas où un demandeur a été privé d'une richesse qu'il avait en sa possession ou qui lui revenait, cette richesse lui sera rendue (*Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, p. 1202-1203). Toutefois, le bien attendu a généralement été restitué lorsqu'un défendeur avait manqué à un devoir en equity (*Lac Minerals Ltd. c. International Corona*

[1989] 2 S.C.R. 574, at pp. 668-70). In these cases, a defendant, through some wrongdoing, intercepts the property otherwise destined for the plaintiff. In the words of *Lac Minerals*: "but for [the defendant's] interception", the plaintiff "would have acquired the property" (p. 669). Critically, the plaintiff has no recourse against the third party. Its only claim is to the very thing in the defendant's hands. In our view, this is distinguishable from where the plaintiff holds a valid contractual expectation vis-à-vis the third party (here, Lawrence) that they would receive property, but that expectation was frustrated by an insolvency that prevents full compensation for a breach of contract. Our takeaway from *Lac Minerals* is encapsulated concisely by Professor McInnes' views on expected property awards:

Resources Ltd., [1989] 2 R.C.S. 574, p. 668-670). Dans ces affaires, le défendeur, par un quelconque acte répréhensible, intercepte le bien autrement destiné au demandeur. Pour reprendre les termes employés dans *Lac Minerals*, « si [la défenderesse] ne l'avait pas intercepté », la demanderesse « aurait acquis ce bien-fonds » (p. 669). Ce qui est d'une importance capitale, c'est que le demandeur n'a aucun recours contre le tiers. Son seul droit d'action vise la chose même qui se trouve entre les mains du défendeur. À notre avis, il y a lieu de distinguer cette situation du cas où la demanderesse a une attente contractuelle valable vis-à-vis le tiers (en l'occurrence Lawrence) suivant laquelle elle recevrait un bien, mais cette attente ne s'est pas réalisée en raison d'une insolvabilité qui empêche l'indemnisation complète du dommage causé par la rupture de contrat. Les enseignements que nous tirons de l'arrêt *Lac Minerals* sont résumés par les remarques du professeur McInnes sur l'octroi du bien attendu :

> The plaintiff is entitled to demand receipt of a benefit which, as a matter of legal certainty, would have been obtained from a third party, but for the defendant's intervention. The situation will be much different, however, if relief is available merely because the defendant realized a gain through the non-wrongful exploitation of an earning opportunity. [Emphasis added.]
>
> (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 179)

> [TRADUCTION] Le demandeur a le droit d'exiger la réception d'un avantage qui, sous l'angle de la sécurité juridique, aurait été obtenu d'un tiers, n'eût été l'intervention du défendeur. La situation est cependant très différente s'il est possible d'accorder réparation simplement parce que le défendeur a réalisé un gain en profitant d'une occasion sans commettre d'acte répréhensible. [Nous soulignons.]
>
> (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), p. 179)

To allow plaintiffs to wield contractual expectations against innocent third parties risks "drift[ing] dangerously away from reversing unjustified transfers and toward stripping non-wrongful profits" (McInnes, at p. 183).

Si l'on permet aux demandeurs d'imposer des attentes contractuelles à des tiers innocents, on risque de « passer dangereusement de l'annulation de transferts injustifiés au dépouillement de profits non répréhensibles » (McInnes, p. 183).

[105] Michelle has raised a number of so-called "disappointed beneficiary" cases in support of her claim. While many of these involved such indirect claims for unjust enrichment, none support using unjust enrichment to indirectly enforce a failed contractual expectation to receive policy proceeds. In many of these cases, the insured was alleged to have intended to redesignate the beneficiary but failed to do so before they died (see, e.g., *Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 10; *Holowa*

[105] Michelle a évoqué plusieurs cas dits de « bénéficiaires déçus » à l'appui de son recours. Même si bon nombre de ces cas concernaient de tels recours indirects pour enrichissement sans cause, aucun d'entre eux ne justifie d'utiliser le principe de l'enrichissement sans cause pour exécuter indirectement une attente contractuelle non réalisée dans le but de toucher le produit d'une police. Dans un grand nombre de ces cas, on a prétendu que l'assuré comptait désigner un nouveau bénéficiaire, mais qu'il ne l'avait pas fait

Estate v. Stell-Holowa, 2011 ABQB 23, 330 D.L.R. (4th) 693, at para. 14; *Richardson (Estate Trustee of) v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, at para. 18; *Roberts v. Martindale* (1998), 55 B.C.L.R. (3d) 63 (C.A.), at para. 17). Where courts have made awards for unjust enrichment, it has been where the defendant renounced their right to any benefit (*Holowa*, at paras. 23 and 25; *Roberts*, at para. 26). In our view, the defendant's renunciation of rights to the proceeds render these cases distinguishable and of little assistance.

[106] More germane to this appeal are cases where the insured redesignated the beneficiary in breach of an equitable or legal obligation (see, e.g., *Milne Estate v. Milne*, 2014 BCSC 2112, 54 R.F.L. (7th) 328, at para. 3; *Ladner v. Wolfson*, 2011 BCCA 370, 24 B.C.L.R. (5th) 43, at para. 3; *Schorlemer Estate v. Schorlemer* (2006), 29 E.T.R. (3d) 181 (Ont. S.C.J.), at para. 5; *Steeves v. Steeves* (1995), 168 N.B.R. (2d) 226 (Q.B.), at para. 29; *Gregory v. Gregory* (1994), 92 B.C.L.R. (2d) 133 (C.A.); *Shannon v. Shannon* (1985), 50 O.R. (2d) 456 (H.C.)). In these cases, courts have generally awarded the proceeds where the insured was found to have been bound by an equitable obligation or where the insured's rights were otherwise held in trust for the plaintiff's benefit. For instance, in *Schorlemer* the insured had designated the defendant as the beneficiary in breach of a written separation agreement, and the Ontario Superior Court of Justice found that the insured's rights were held in trust for the plaintiff. Similarly, in *Gregory*, *Milne* and *Steeves*, where the insured redesignated the beneficiary in breach of a court order, the court order was found to have imposed a trusteeship on the insured for the benefit of the plaintiff. *Shannon* did involve a broken contractual agreement; however, as we detail below, we understand McKinlay J.'s reasons as most consistent with having found that the written separation agreement itself created a trust. Regardless, the serious issues with enforcing contractual rights through unjust enrichment were not given consideration in *Shannon*.

avant de mourir (voir, p. ex., *Love c. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, par. 10; *Holowa Estate c. Stell-Holowa*, 2011 ABQB 23, 330 D.L.R. (4th) 693, par. 14; *Richardson (Estate Trustee of) c. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65, par. 18; *Roberts c. Martindale* (1998), 55 B.C.L.R. (3d) 63 (C.A.), par. 17). Les tribunaux ont accordé des réparations pour enrichissement sans cause lorsque le défendeur avait renoncé à son droit à quelque avantage que ce soit (*Holowa*, par. 23 et 25; *Roberts*, par. 26). Nous estimons qu'il convient de distinguer ces cas où le défendeur a renoncé à son droit au produit et qu'ils sont par conséquent peu utiles.

[106] Les cas qui s'apparentent davantage au présent pourvoi sont ceux où l'assuré a changé de bénéficiaire en contravention d'une obligation en equity ou en common law (voir, p. ex., *Milne Estate c. Milne*, 2014 BCSC 2112, 54 R.F.L. (7th) 328, par. 3; *Ladner c. Wolfson*, 2011 BCCA 370, 24 B.C.L.R. (5th) 43, par. 3; *Schorlemer Estate c. Schorlemer* (2006), 29 E.T.R. (3d) 181 (C.S.J. Ont.), par. 5; *Steeves c. Steeves* (1995), 168 N.B.R. (2d) 226 (B.R.), par. 29; *Gregory c. Gregory* (1994), 92 B.C.L.R. (2d) 133 (C.A.); *Shannon c. Shannon* (1985), 50 O.R. (2d) 456 (H.C.)). Dans ces affaires, les tribunaux ont généralement accordé le produit lorsqu'ils ont conclu que l'assuré était lié par une obligation en equity ou lorsque les droits de l'assuré étaient par ailleurs détenus en fiducie au profit du demandeur. Par exemple, dans *Schorlemer*, l'assuré avait désigné la défenderesse à titre de bénéficiaire en contravention d'un accord écrit de séparation, et la Cour supérieure de justice de l'Ontario a conclu que les droits de l'assuré étaient détenus en fiducie au profit de la demanderesse. De même, dans *Gregory*, *Milne* et *Steeves*, des affaires où l'assuré a changé de bénéficiaire en violation d'une ordonnance judiciaire, on a jugé que celle-ci avait imposé une mise en tutelle à l'assuré au profit de la demanderesse. L'affaire *Shannon* portait bel et bien sur un accord contractuel rompu; par contre, comme nous l'expliquons en détail ci-dessous, les motifs de la juge McKinlay nous semblent plutôt compatibles avec la conclusion selon laquelle l'accord écrit de séparation a créé en soi une fiducie. Quoi qu'il en soit, les questions sérieuses que pose l'exercice de droits contractuels par la voie de l'enrichissement sans cause n'ont pas été prises en compte dans *Shannon*.

[107] As such, the present appeal presents this Court with difficult questions about both the nature of how a transfer of wealth is measured in unjust enrichment and how such claims should be treated in the juristic reason analysis. To be clear, we do not wish to make any general statements regarding so-called "leap-frogging" cases. But in applying the facts of this case, as pled and proven, to the current law of unjust enrichment, we remain unconvinced that Michelle is entitled to a constructive trust for the whole of the proceeds.

B. *Corresponding Deprivation*

[108] In an action for unjust enrichment, a plaintiff must show that they suffered a corresponding deprivation. To establish a corresponding deprivation, there must be a transfer of wealth on a straightforward economic basis (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 35; *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 990). While the clearest examples of such transfers are where there is payment and receipt of money (e.g. *Garland*, *Air Canada*), it can also be made out to the extent of the plaintiff's expenditure for the defendant's benefit (e.g. *Peter*) or where the defendant has received property destined for the plaintiff but for their wrongdoing (e.g. *Lac Minerals*). In these types of cases, the issue of correspondence may pass without comment, but the importance of this structure must be kept firmly in mind when examining other cases where the nexus between the plaintiff and defendant is less obvious. Whatever factual matrix gives rise to an apparent transfer of wealth from the plaintiff to the defendant, it is crucial that a defendant's enrichment in fact corresponds to the plaintiff's deprivation. As explained by this Court in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, "the enrichment and detriment elements are the same thing from different perspectives" (para. 151). Enrichment and deprivation are "essentially two sides of the same coin" (*Peter*, at p. 1012).

[107] Ainsi, notre Cour est appelée en l'espèce à trancher des questions épineuses à propos de la façon dont un transfert de richesse est mesuré en matière d'enrichissement sans cause et du traitement qu'il convient de réserver aux réclamations qui en découlent dans l'analyse du motif juridique. Soyons clairs, nous ne voulons faire aucune remarque générale au sujet des affaires dites d'« esquive ». Mais lorsqu'on applique les faits plaidés et établis de l'espèce au droit actuel de l'enrichissement sans cause, nous ne pouvons nous convaincre que Michelle a droit à l'imposition d'une fiducie par interprétation sur l'ensemble du produit.

B. *Appauvrissement correspondant*

[108] Dans une action pour enrichissement sans cause, le demandeur doit prouver qu'il a subi un appauvrissement correspondant. Cette démonstration requiert un transfert de richesse selon une analyse économique simple (*Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 35; *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 990). Bien que les exemples les plus patents de transferts de ce genre se produisent dans les cas où il y a paiement et réception d'une somme d'argent (comme dans *Garland* et *Air Canada*), l'appauvrissement correspondant peut être établi dans la mesure où le demandeur a engagé une dépense au profit du défendeur (comme dans *Peter*) ou lorsque le défendeur a reçu un bien destiné au demandeur mais dans le but de commettre un délit (comme dans *Lac Minerals*). Dans ce type d'affaire, la question de la correspondance peut se passer de commentaire, mais il faut bien garder en tête l'importance de ce cadre au moment d'examiner d'autres cas où le lien entre le demandeur et le défendeur est moins évident. Quel que soit le contexte factuel à l'origine d'un transfert apparent de richesse du demandeur au défendeur, il est crucial que l'enrichissement du défendeur corresponde dans les faits à l'appauvrissement du demandeur. Comme l'explique notre Cour dans *Institut professionnel de la fonction publique du Canada c. Canada (Procureur général)*, 2012 CSC 71, [2012] 3 R.C.S. 660, « les éléments d'enrichissement et d'appauvrissement rendent compte du même phénomène, mais sous des angles différents » (par. 151). L'enrichissement et l'appauvrissement sont « essentiellement comme les deux côtés d'une pièce de monnaie » (*Peter*, p. 1012).

[109] The importance of the bilateral nature of unjust enrichment is highlighted by the fact that, unlike for many other causes of action, unjust enrichment will permit a plaintiff to recover from a defendant without any wrongdoing on the latter's part. For example, a defendant will be liable to return to the plaintiff any payments made to them by mistake. Where liability attaches to the defendant without any wrongdoing, the normative basis for such liability is strictly limited. As Professor Smith explains:

> Strict liability in unjust enrichment depends on both a material gain to the defendant and a material loss to the plaintiff. Moreover, the loss and the gain must be two sides of the same coin; there must always be a transfer of wealth from plaintiff to defendant. Only in this way can we justify liability through a one-sided normative flaw in the transaction. . . . Mere causal connection between plaintiff and defendant is not enough — any more than it is in negligence — because it does not carry enough normative force.
>
> ("Restitution: The Heart of Corrective Justice" (2001), 79 *Tex. L. Rev.* 2115, at p. 2156)

The correspondence between the deprivation and the enrichment, while seemingly formalistic, is fundamental. Proper correspondence, Professor McInnes notes, "is th[e] connection between the parties — a plus and a minus as obverse manifestations of the same event — that uniquely identifies the plaintiff as the proper person to seek restitution" (p. 149).

[110] The logic that permits recovery in the circumstances of unjust enrichment also conditions the measurement of any restitution. The defendant cannot be required to "return" to the plaintiff more than what they have received, even if the plaintiff suffered a loss greater than the defendant's gain. As an innocent party, there is no basis to require the defendant to return anything more. Inversely, the plaintiff cannot collect more from the defendant than they have lost. It does not matter that the defendant benefited more than the plaintiff lost. The plaintiff only has standing in respect of losses they have

[109] L'importance que revêt le caractère bilatéral de l'enrichissement sans cause ressort du fait que, contrairement à bien d'autres causes d'action, l'enrichissement sans cause permet au demandeur de recouvrer quelque chose du défendeur sans que ce dernier n'ait commis quelque faute que ce soit. Par exemple, le défendeur doit restituer au demandeur tout paiement qui lui a été versé par erreur. Lorsque la responsabilité du défendeur est engagée en l'absence d'une faute de sa part, le fondement normatif de cette responsabilité est strictement limité. Comme l'explique le professeur Smith :

> [TRADUCTION] La responsabilité stricte en matière d'enrichissement sans cause dépend à la fois d'un gain matériel du défendeur et d'une perte matérielle du demandeur. En outre, la perte et le gain doivent être deux côtés de la même médaille; il doit toujours y avoir un transfert de richesse du demandeur au défendeur. Ce n'est qu'ainsi que nous pouvons justifier la responsabilité au moyen d'une faille normative chez une partie à l'opération. [. . .] Un simple lien de causalité entre le demandeur et le défendeur ne suffit pas, pas plus que dans une action pour négligence, car il n'a pas une force normative suffisante.
>
> (« Restitution : The Heart of Corrective Justice » (2001), 79 *Tex. L. Rev.* 2115, p. 2156)

Bien que formaliste en apparence, la correspondance entre l'appauvrissement et l'enrichissement est fondamentale. Selon le professeur McInnes, une correspondance appropriée [TRADUCTION] « s'entend du lien entre les parties — un plus et un moins en tant que manifestations contraires du même fait — qui identifie seulement le demandeur comme la personne pouvant réclamer la restitution » (p. 149).

[110] La logique qui permet le recouvrement dans un cas d'enrichissement sans cause dicte aussi l'ampleur de toute restitution. Le défendeur ne peut être tenu de « restituer » au demandeur davantage que ce qu'il a reçu même si le demandeur a subi une perte plus grande que le gain du défendeur. Il n'y a aucune raison d'obliger le défendeur, une partie innocente, à restituer quoi que ce soit de plus. Inversement, le demandeur ne peut pas recouvrer du défendeur plus que ce qu'il a perdu. Il importe peu que le gain du défendeur excède la perte du demandeur. Ce dernier n'a qualité que pour se faire indemniser des pertes

suffered. Liability for unjust enrichment is limited to "the lesser of the two amounts, the enrichment or the impoverishment" (*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 77, cited in McIness, at p. 183).

[111] It is sufficiently clear that but for Michelle's payments, the policy would have lapsed, and but for Lawrence's breach of contract, she would have been the beneficiary at the time of his death. But, in our view, these facts are not enough to establish that the deprivation and the enrichment are corresponding. Risa's enrichment was not *at the expense of* Michelle. This is best illustrated by a hypothetical: suppose that Lawrence's estate was solvent. In that case, Risa would have retained her enrichment — the insurance proceeds — and Michelle would have suffered no deprivation, as she would hold a cause of action for breach of contract that is worth the equivalent of the proceeds. How can there then be correspondence if the enrichment and the deprivation could, in theory, co-exist? Risa's enrichment is not *at the expense of* Michelle because Risa's enrichment is not dependent on Michelle's deprivation. What Risa received (a statutory entitlement to proceeds) is different from Michelle's deprivation (the inability to enforce her contractual rights) — they are not "two sides of the same coin". It is not enough for Michelle's impoverishment to be equal to Risa's gain — they must be "necessarily equal" such that it is a "zero-sum game" (L. D. Smith, "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991), 11 *Oxford J. Leg. Stud.* 481, at pp. 482-83 (emphasis added)).

[112] In this regard, we note that the majority seeks to establish a correspondence between Risa's enrichment and Michelle's deprivation on the basis that Michelle's contributions to the premium payments kept the policy alive. But the fact that Michelle preserved the policy does not inform whether her deprivation corresponds to Risa's enrichment. And even if Michelle's premium payments could generate sufficient correspondence, Michelle's deprivation should be limited to the extent of her contributions, not to her contractual expectations. Her deprivation

qu'il a subies. La responsabilité pour enrichissement sans cause se limite à « la moindre des deux sommes, l'enrichissement ou l'appauvrissement » (*Cie Immobilière Viger Ltée c. Lauréat Giguère Inc.*, [1977] 2 R.C.S. 67, p. 77, cité dans McIness, p. 183).

[111] Il est suffisamment clair que, n'eût été les paiements de Michelle, la police d'assurance se serait éteinte et que, n'eût été la rupture de contrat de Lawrence, elle aurait été la bénéficiaire au moment de son décès. Nous estimons cependant que ces faits ne suffisent pas à établir que l'appauvrissement et l'enrichissement correspondent. Risa ne s'est pas enrichie *aux dépens de* Michelle. Une hypothèse l'illustre fort bien : supposons que la succession de Lawrence était solvable. Dans ce cas, Risa aurait conservé son enrichissement — le produit de l'assurance — et Michelle n'aurait subi aucun appauvrissement, car elle détiendrait alors une cause d'action pour rupture de contrat dont la valeur équivaut à celle du produit. Comment peut-il alors y avoir correspondance si l'enrichissement et l'appauvrissement peuvent coexister en théorie? Risa ne s'enrichit pas *aux dépens de* Michelle parce que son enrichissement n'est pas tributaire de l'appauvrissement de cette dernière. Ce que Risa a reçu (un droit reconnu par la loi au produit) diffère de l'appauvrissement de Michelle (l'incapacité d'exercer ses droits contractuels); ce ne sont pas « deux côtés de la même médaille ». Il ne suffit pas que l'appauvrissement de Michelle équivaille au gain de Risa; ils doivent être [TRADUCTION] « forcément égaux », de sorte qu'il s'agit d'un « jeu à somme nulle » (L. D. Smith, « Three-Party Restitution : A Critique of Birks's Theory of Interceptive Subtraction » (1991), 11 *Oxford J. Leg. Stud.* 481, p. 482-483 (nous soulignons)).

[112] À cet égard, nous constatons que les juges majoritaires cherchent à établir une correspondance entre l'enrichissement de Risa et l'appauvrissement de Michelle au motif que les contributions de Michelle aux paiements de prime ont gardé la police en vigueur. Le fait que Michelle a préservé la police n'indique toutefois pas si son appauvrissement correspond à l'enrichissement de Risa. Et même si les paiements de prime versés par Michelle pouvaient donner lieu à une correspondance suffisante, son appauvrissement devrait se limiter au montant de ses contributions, et non

is not measured by the value of the agreement that motivated her to pay the premiums. This principle is illustrated in this Court's decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575. In that case, the appellant sought to uphold an unjust enrichment claim against the City of Victoria for improvements it had made to public works pursuant to an agreement with the latter. The respondent city rezoned the appellant's development mid-project, which, the appellant argued, undermined the reason for having made the improvements. The fact that the appellant performed the work as a result of an agreement did not change the measure of the appellant's deprivation. The appellant's measure of restitution was not its expected profits under the agreement but rather only the cost of performing the work, which was effectively given gratuitously to the respondent. As such, even on the majority's understanding of correspondence, Michelle's claim should be limited to the return of the premium payments.

[113] On our view of the matter, Michelle has not established a corresponding deprivation between Risa's entitlement to the policy proceeds and her failed contractual expectation to be named beneficiary. As Risa has admitted liability for the approximately $7,000 in policy premiums, there is no need for us to consider whether Michelle would have been able to properly establish a corresponding deprivation for that amount.

C. *Juristic Reason*

[114] Even if a corresponding deprivation is assumed, we do not come to the conclusion that Risa was unjustly enriched at Michelle's expense. This is because there is a juristic reason for Risa's enrichment: the provisions of the *Insurance Act*.

[115] In *Garland*, this Court made a choice as to the threshold for when a transfer of wealth should be reversed. Prior to *Garland*, Canadian courts had either followed this Court's direction in *Rathwell v.*

à ses attentes contractuelles. Son appauvrissement ne se mesure pas en fonction de la valeur de l'entente qui l'a incitée à payer les primes. Ce principe se dégage de l'arrêt *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575. Dans cette affaire, l'appelante avait cherché à faire maintenir une action pour enrichissement sans cause intentée contre la ville de Victoria pour des améliorations qu'elle avait apportées à des ouvrages publics conformément à un accord conclu avec cette dernière. La ville intimée avait modifié le zonage du projet de l'appelante à mi-parcours des travaux, ce qui, soutenait l'appelante, avait sapé la raison d'être des améliorations. Le fait que l'appelante avait exécuté les travaux en application de leur accord n'a pas changé la portée de l'appauvrissement qu'elle a subi. La restitution à laquelle a eu droit l'appelante équivalait non pas aux profits qu'elle prévoyait réaliser grâce à l'accord, mais uniquement au coût de l'exécution des travaux qui avaient effectivement été réalisés gratuitement pour le compte de l'intimée. Par conséquent, même d'après la conception qu'ont les juges majoritaires de la correspondance, Michelle ne devrait avoir droit qu'au remboursement des paiements de prime.

[113] Selon nous, Michelle n'a pas établi un appauvrissement corrélatif entre le droit de Risa au produit de la police et son attente contractuelle non réalisée suivant laquelle elle serait nommée bénéficiaire. Puisque Risa a admis sa responsabilité à l'égard des quelques 7 000 $ payés en primes d'assurance, nous n'avons pas à nous demander si Michelle aurait été en mesure d'établir convenablement un appauvrissement correspondant de ce montant.

C. *Motif juridique*

[114] Même si l'on tient pour acquise l'existence d'un appauvrissement correspondant, nous ne pouvons conclure que Risa s'est enrichie sans cause aux dépens de Michelle. Il en est ainsi parce qu'un motif juridique justifie l'enrichissement de Risa : les dispositions de la *Loi sur les assurances*.

[115] Dans *Garland*, notre Cour a fixé le critère indiquant dans quelles circonstances il y a lieu d'annuler un transfert de richesse. Avant cet arrêt, les tribunaux canadiens avaient soit suivi les directives

Rathwell, [1978] 2 S.C.R. 436, which prescribed a juristic reasons approach, or they applied the English approach, searching for an unjust factor to reverse an impugned transfer of wealth (*Garland*, at paras. 40-41). Faced with this division, Iacobucci J. affirmed the "distinctive Canadian approach" to juristic unjust enrichment (para. 42). Along with his clear preference for the juristic reason approach, Iacobucci J. was responsive to the criticisms of it. Recognizing the difficulty of proving a negative — the absence of any juristic reason for a defendant's enrichment — Iacobucci J. formulated a two-stage approach to juristic reasons. At the first stage of the analysis, the plaintiff must show the absence of a juristic reason from a closed list of established categories. These include a disposition of law and a statutory obligation, among others. If the plaintiff establishes that there is no juristic reason from one of the established categories, there is a *prima facie* case for restitution. At the second stage of the analysis, the defendant may rebut the *prima facie* case by demonstrating that there is some other reason to deny recovery. While courts should look to "all of the circumstances of the transaction" in order to determine whether recovery should be denied, they are to have regard to two factors: ". . . the reasonable expectations of the parties and public policy considerations" (paras. 45-46).

[116] While the test is intended to be flexible and have the capacity to accommodate "changing perceptions of justice" (*Garland*, at para. 43; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788), it must be borne in mind that what prompted this articulation of the test was the need "to ensure that the juristic reason analysis was not 'purely subjective', thereby building into the unjust enrichment analysis an unacceptable 'immeasureable judicial discretion' that would permit 'case by case "palm tree" justice'" (*Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 43, citing *Garland*, at para. 40). As such, the reasonable expectations of the parties and public policy considerations must only be taken into account at the second stage of the analysis, provided

données par notre Cour dans *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, qui suggérait une approche axée sur le motif juridique, soit adopté l'approche anglaise, qui consistait à chercher un élément « sans cause » pour annuler un transfert de richesse contesté (*Garland*, par. 40-41). En présence de cette divergence d'opinions, le juge Iacobucci a confirmé la « façon proprement canadienne d'interpréter » le motif juridique en matière d'enrichissement sans cause (par. 42). En plus d'afficher clairement une préférence pour la conception du motif juridique, le juge Iacobucci a répondu aux critiques dont elle est l'objet. Reconnaissant qu'il est difficile de prouver un fait négatif — l'absence de motif juridique justifiant l'enrichissement d'un défendeur —, le juge Iacobucci a formulé une analyse en deux temps des motifs juridiques. Au premier stade de l'analyse, le demandeur doit prouver l'absence de motif juridique à partir d'une liste exhaustive de catégories établies, notamment une disposition législative et une obligation légale. Si le demandeur établit qu'il n'y a aucun motif juridique appartenant à l'une de ces catégories, il aura démontré qu'à première vue, la chose en litige doit lui être restituée. Au second stade de l'analyse, le défendeur peut réfuter la preuve *prima facie* en démontrant qu'il existe un autre motif de refuser le recouvrement. Même s'ils devraient examiner « toutes les circonstances de l'opération » afin de décider s'il convient de refuser le recouvrement, les tribunaux doivent tenir compte de deux facteurs : « . . . les attentes raisonnables des parties et les considérations d'intérêt public » (par. 45-46).

[116] Bien que le test se veuille souple et susceptible de tenir compte des « perceptions changeantes de la justice » (*Garland*, par. 43, *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 788), il importe de se rappeler que ce qui était à l'origine de cette formulation du test, c'était le besoin « d'éviter que l'analyse du motif juridique soit "purement subjecti[ve]", ajoutant à l'analyse de l'enrichissement injustifié un "pouvoir discrétionnaire incommensurable" inacceptable qui allait permettre le "cas par cas" » (*Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, par. 43, citant *Garland*, par. 40). Les attentes raisonnables des parties et les considérations d'intérêt public ne doivent donc être prises en compte qu'au second stade de l'analyse, pourvu que

that no established juristic reason is found (*Kerr*, at paras. 44-45). Simply put, if an established category of juristic reason applies, the analysis ends and the claim for unjust enrichment fails. Reasonable expectations and public policy cannot oust an established category of juristic reason where it is found to apply.

[117] The unique circumstances of Michelle's restitutionary claim — being an indirect claim involving third parties — demands a sharper examination of the object of the juristic reason. That is, a juristic reason *for what*? The majority suggests at various points that a juristic reason must simultaneously provide a reason for the defendant's enrichment, and a reason why that enrichment must occur *at the expense of* the plaintiff. It is this approach that appears to lead the majority to place great weight on the distinction between the receipt and retention of a benefit. We remain unconvinced this is a helpful tack to take. Rather, we would simply say that a juristic reason need only provide reason for the defendant's enrichment, as has been consistently stated in past jurisprudence (*Kerr*, at para. 32; *Garland*, at para. 30; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 66; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848).

[118] One can readily see how this important aspect of juristic reason can be easily overlooked and has been largely unaddressed. In the paradigmatic cases of unjust enrichment where only two parties are involved, and a transfer is made directly between them, the questions of enrichment and impoverishment may be one and the same. For example, if a transfer occurs by way of a gift from the plaintiff to the defendant, the plaintiff's donative intent is both a juristic reason for the defendant's retention of the wealth, and a reason for the defendant's enrichment *at the expense of* the plaintiff. After all, it was the plaintiff who intended the gift from their assets. In our view, the fact that in many cases the juristic reason for the defendant's enrichment simultaneously explains why that enrichment occurs at the expense of the plaintiff does not render this a requirement of the test for unjust enrichment.

l'on ne constate aucun motif juridique établi (*Kerr*, par. 44-45). Pour dire les choses simplement, si une catégorie établie de motif juridique s'applique, l'analyse prend fin et l'action fondée sur l'enrichissement sans cause est rejetée. Les attentes raisonnables et l'intérêt public ne sauraient écarter une catégorie établie de motif juridique lorsqu'on conclut à son application.

[117] Les circonstances propres à la demande de restitution de Michelle, une demande visant indirectement des tiers, exige une étude plus poussée de l'objet du motif juridique. C'est-à-dire, un motif juridique *justifiant quoi*? Les juges majoritaires laissent entendre à divers endroits qu'un motif juridique doit à la fois justifier l'enrichissement du défendeur et indiquer pourquoi cet enrichissement doit se faire *aux dépens du* demandeur. C'est cette approche qui semble avoir mené les juges majoritaires à attacher une grande importance à la distinction entre la réception et la conservation d'un avantage. Nous ne pouvons nous convaincre de l'utilité d'entreprendre cette tâche. Nous estimons plutôt suffisant de dire qu'un motif juridique doit uniquement justifier l'enrichissement du défendeur, comme cela a été constamment repris dans la jurisprudence (*Kerr*, par. 32; *Garland*, par. 30; *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 66; *Pettkus c. Becker*, [1980] 2 R.C.S. 834, p. 848).

[118] L'on peut aisément comprendre pourquoi cet aspect important du motif juridique peut être facilement négligé et laissé pour compte en bonne partie. Dans les cas paradigmatiques d'enrichissement sans cause où il y a seulement deux parties et le transfert se fait directement entre elles, les questions d'enrichissement et d'appauvrissement ne font bien souvent qu'une. Par exemple, si le transfert prend la forme d'un don du demandeur au défendeur, l'intention de donner du demandeur est à la fois un motif juridique justifiant la conservation de la richesse par le défendeur et un motif justifiant l'enrichissement du défendeur *aux dépens du* demandeur. Après tout, c'est le demandeur qui voulait faire le don à même ses actifs. À notre avis, le fait que, dans bien des cas, le motif juridique justifiant l'enrichissement du défendeur explique aussi pourquoi cet enrichissement se produit au détriment du demandeur n'en fait pas une exigence du test applicable.

[119] The situation is of course very different where multiple parties are involved and wealth is not transferred directly from one to another. In these cases, despite there being a reason that explains why each person is entitled to a particular thing and why another no longer is, it will be near impossible to find an explanation that can simultaneously capture both. The following example, while not a case of unjust enrichment, is instructive. A person who is given a car could sell it to another, who bears no relation to the original donor. The donor and purchaser are in effect legal strangers. In these situations, demanding a reason that simultaneously explains why the purchaser is entitled to the car and why the donor is no longer entitled to it imposes an impossible burden. Simply put, the reason the purchaser has the car is not the same reason the donor doesn't. The legal relationships of these individuals are mediated through other legal frameworks and actors and are not amenable to a single explanation. If the unjust enrichment analysis requires that juristic reasons have this kind of explanatory power, plaintiffs will almost always be successful in proving their absence in cases involving multiple parties and indirect transfers of wealth.

[119] La situation est évidemment fort différente lorsque plusieurs parties sont concernées et que la richesse n'est pas transférée directement de l'une à l'autre. Dans les cas de ce genre, même s'il existe une raison expliquant pourquoi chacun a droit à une chose en particulier et pourquoi une autre personne n'y a plus droit, il sera pratiquement impossible de trouver une explication qui vise les deux scénarios à la fois. Bien qu'il ne s'agisse pas d'un cas d'enrichissement sans cause, l'exemple qui suit est instructif. La personne qui reçoit une voiture pourrait la vendre à quelqu'un d'autre qui n'a aucun lien avec le donateur initial. Le donateur et l'acquéreur sont en fait des étrangers aux yeux de la loi. Dans ces situations, exiger la présence d'un motif qui explique en même temps pourquoi l'acquéreur a droit à la voiture et pourquoi le donateur n'y a plus droit revient à imposer un fardeau impossible. Pour dire les choses simplement, la raison pour laquelle l'acquéreur a la voiture n'est tout simplement pas la même pour laquelle le donateur ne l'a pas. Les rapports juridiques entre ces personnes s'opèrent par l'intermédiaire d'autres cadres juridiques et acteurs et ne se prêtent pas à une seule explication. Si l'analyse de l'enrichissement sans cause requiert que les motifs juridiques aient ce genre de pouvoir explicatif, les demandeurs parviendront presque toujours à prouver leur absence dans les cas mettant en cause plusieurs parties et des transferts indirects de richesse.

(1) The *Insurance Act* Establishes a Juristic Reason for Risa's Enrichment

[120] In this case, the issue at the first stage of the analysis is whether a beneficiary designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides a juristic reason for Risa's receipt and retention of the insurance proceeds. Arriving at an answer to this question requires an examination of the provisions of the *Insurance Act* and the legal relationships surrounding the (alleged) transfer. In our view, not only does the *Insurance Act* — in conjunction with the deceased's policy — specifically direct the payment of the proceeds to Risa, but it expressly contemplates doing so even in light of the very kind of claim advanced by Michelle.

(1) La *Loi sur les assurances* établit un motif juridique justifiant l'enrichissement de Risa

[120] En l'espèce, la question qui se pose au premier stade de l'analyse est de savoir si une désignation de bénéficiaire faite en vertu des par. 190(1) et 191(1) de la *Loi sur les assurances* fournit un motif juridique permettant à Risa de recevoir et de conserver le produit de l'assurance. Pour répondre à cette question, il faut examiner les dispositions de la *Loi sur les assurances* et les rapports juridiques entourant le transfert (allégué). À notre avis, non seulement la *Loi sur les assurances* — conjuguée à la police d'assurance du défunt — prescrit explicitement le versement du produit à Risa, mais elle le prévoit expressément malgré le type même de réclamation présenté par Michelle.

[121] Section 191(1) of the *Insurance Act* provides that an insured may designate an irrevocable beneficiary under a life insurance policy, and thereby provide special protections to that beneficiary. From the moment an irrevocable beneficiary is designated, they have a right in the policy itself: the insurance money is not subject to the control of the insured or to the claims of his or her creditors and the beneficiary must consent to any subsequent changes to beneficiary designation. As it is undisputed that Risa was the validly designated irrevocable beneficiary of the policy, Risa is entitled to the proceeds free of all of the claims of Lawrence's creditors. Simply put, the direction of this comprehensive statutory scheme, in conjunction with the deceased's policy, constitutes a juristic reason for Risa's enrichment (*Chanowski v. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Richardson*; *Love*).

[122] The fact that Michelle had an agreement with Lawrence for the proceeds of the policy does not undermine the presence of this juristic reason. As Michelle's rights are contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds. Indeed, the *Insurance Act* explicitly protects irrevocable beneficiaries from the claims of the deceased's creditors. Section 191(1) provides that where an insured designates an irrevocable beneficiary, the insurance money "is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate". Thus, contrary to the suggestion of the majority, the *Insurance Act* does, with irresistible clarity, "preclude the existence of contractual . . . rights in those insurance proceeds" (Majority Reasons, at para. 70 (emphasis added)). The French version of s. 191(1) of the Act is equally clear stating that the proceeds "*ne peuvent être réclamées par les créanciers de l'assuré et ne font pas partie de sa succession*".

[123] The *Insurance Act*'s legislative history further supports Risa's retention of the insurance proceeds notwithstanding Michelle's claim. This history

[121] Selon le par. 191(1) de la *Loi sur les assurances*, l'assuré peut désigner un bénéficiaire à titre irrévocable dans une police d'assurance-vie et lui accorder ainsi une protection spéciale. À partir du moment où elle est ainsi désignée, la personne en question a un droit sur la police elle-même : le produit de l'assurance n'est pas sous l'emprise de l'assuré ni ne peut être réclamé par ses créanciers et le bénéficiaire doit consentir à tout changement subséquent de désignation d'un bénéficiaire. Puisqu'il est admis que Risa était la bénéficiaire validement désignée à titre irrévocable de la police, elle a droit au produit à l'abri de toutes les réclamations des créanciers de Lawrence. En somme, la directive de ce régime légal exhaustif, conjuguée à la police d'assurance du défunt, constitue un motif juridique justifiant l'enrichissement de Risa (*Chanowski c. Bauer*, 2010 MBCA 96, 258 Man. R. (2d) 244; *Richardson*; *Love*).

[122] Le fait que Michelle a conclu une entente avec Lawrence en vue de toucher le produit de la police ne compromet pas l'existence de ce motif juridique. Comme les droits de Michelle sont de nature contractuelle, cela fait d'elle une créancière de la succession de Lawrence et elle n'a donc pas droit au produit suivant la *Loi sur les assurances*. En effet, la *Loi sur les assurances* met explicitement les bénéficiaires irrévocables à l'abri des réclamations des créanciers du défunt. La version anglaise du par. 191(1) dispose que, quand l'assuré désigne un bénéficiaire à titre irrévocable, le produit de l'assurance « *is not subject to the control of the insured, is not subject to the claims of the insured's creditor and does not form part of the insured's estate* ». Donc, contrairement à ce que suggèrent les juges majoritaires, la *Loi sur les assurances* « exclu[t] l'existence de droits contractuels [. . .] [au] produit d'assurance » avec une clarté incontestable (motifs de la majorité, par. 70 (nous soulignons). La version française du par. 191(1) de la Loi est tout aussi claire, indiquant que les sommes assurées « ne peuvent être réclamées par les créanciers de l'assuré et ne font pas partie de sa succession ».

[123] L'historique de la *Loi sur les assurances* étaye lui aussi le droit de Risa de conserver le produit de l'assurance malgré la réclamation de Michelle.

illustrates that the provisions of the *Insurance Act* were designed to protect the interests of beneficiaries in retaining the proceeds, and provide no basis whatsoever for a person paying the premiums to assume she would have any claim to the eventual proceeds. From the earliest days, the purpose of insurance statutes was in large part to securely provide for an insured's beneficiaries. In 1865, the then Province of Canada (which included what is now Ontario) passed legislation enabling any person to enter into a contract to insure his life for the benefit of his wife and children, with the proceeds free from the claims of any of their creditors (*An Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents*, S. Prov. C. 1865, 29 Vict., c. 17, ss. 3 and 5). Subsequently in 1884, as outlined in Risa's factum, "the legislation permitted a class of beneficiaries who were close family members of the insured (later known as 'preferred beneficiaries') to enforce the contract and to sue in their own right. This was effected by means of a statutory trust in favour of the preferred beneficiaries" (R.F., at para. 73; see also *An Act to Secure to Wives and Children the Benefit of Life Insurance*, S.O. 1884, c. 20, s. 5; E. H. McVitty, *A Commentary on the Life Insurance Laws of Canada* (1962), at p. 36). Subsequent versions of the insurance statutes in the province also provided protection to "beneficiaries for value", people who gave valuable consideration to the insured in exchange for designation as the beneficiary (*The Insurance Act*, R.S.O. 1960, c. 190). However, even under this regime, beneficiaries for value were only protected if a written description of the designation had been made (ss. 164(1) and 165).

[124] In 1962, significant principled changes were made to the *Insurance Act*, including the abolition of statutory trusts and beneficiaries for value (McVitty, at pp. 36-39 and 137-38). Rather than protect beneficiaries' interests by means of a statutory trust, the modern *Insurance Act* provided revocable beneficiaries with a statutory cause of action to enforce insurance contracts for their own benefit against the insurer (*Insurance Act*, s. 195). The modern *Insurance Act* also "shifted the regime away from granting

Cet historique révèle que les dispositions de la *Loi sur les assurances* visaient à protéger le droit des bénéficiaires de conserver le produit et ne permettaient aucunement au payeur des primes de supposer qu'il aurait droit à l'éventuel produit. Au tout début, les lois sur les assurances visaient en grande partie à s'assurer que le produit serve à subvenir aux besoins des bénéficiaires d'un assuré. En 1865, ce qui était à l'époque la province du Canada (laquelle englobait ce qui est aujourd'hui l'Ontario) a adopté une loi permettant à toute personne de conclure un contrat pour assurer sa vie au bénéfice de sa femme et de ses enfants et mettre le produit à l'abri des réclamations de tous ses créanciers (*Acte pour assurer aux femmes et aux enfants le bénéfice des assurances sur la vie de leurs maris et parents*, S. Prov. C. 1865, 29 Vict., c. 17, art. 3 et 5). Plus tard, en 1884, comme le souligne le mémoire de Risa, [TRADUCTION] « la loi a permis à un groupe de bénéficiaires qui étaient des proches parents de l'assuré (appelés subséquemment les "bénéficiaires privilégiés") d'obtenir l'exécution du contrat et d'ester en justice en leur nom. Elle l'a fait au moyen d'une fiducie légale en faveur des bénéficiaires privilégiés » (m.i., par. 73; voir aussi *An Act to Secure to Wives and Children the Benefit of Life Insurance*, S.O. 1884, c. 20, art. 5; E. H. McVitty, *A Commentary on the Life Insurance Laws of Canada* (1962), p. 36). Les versions subséquentes des lois de la province sur les assurances offraient également une protection aux « bénéficiaires à titre onéreux », soit des gens qui donnaient une contrepartie à l'assuré en échange de leur désignation en qualité de bénéficiaires (*The Insurance Act*, R.S.O. 1960, c. 190). Cependant, même sous ce régime, les bénéficiaires à titre onéreux n'étaient protégés que si une description écrite de la désignation avait été faite (par. 164(1) et art. 165).

[124] En 1962, de grands changements de principe ont été apportés à la *Insurance Act*, notamment l'abolition des fiducies légales et du statut de bénéficiaire à titre onéreux (McVitty, p. 36-39 et 137-138). Au lieu de défendre les intérêts des bénéficiaires au moyen d'une fiducie légale, la *Insurance Act* moderne reconnaissait aux bénéficiaires révocables une cause d'action leur permettant de faire exécuter à leur profit des contrats d'assurance contre l'assureur (*Insurance Act*, art. 195). La *Insurance Act* moderne

beneficiaries any control or proprietary interests in the proceeds. The sole exceptions were those beneficiaries validly designated by the insured as irrevocable beneficiaries — a status newly introduced in 1962 — and valid assignees" (R.F., at para. 75). These changes to the insurance scheme in Ontario represent the legislature's continued intention to protect beneficiaries from the claims of the insured's creditors, and to underline that a beneficiary's entitlement to the proceeds is not undermined by her status as a "mere volunteer". A beneficiary is not more or less entitled on the basis of her contribution to the policy's premiums. The *Insurance Act* is deliberately indifferent to the source of the premium payments, and renders the actions of the payers irrelevant as far as the beneficiaries are concerned.

a également [TRADUCTION] « modifié le régime de manière à enlever aux bénéficiaires tout contrôle ou intérêt propriétal sur le produit. Les seules exceptions étaient les bénéficiaires valablement désignés par l'assuré à titre irrévocable — un statut créé en 1962 — et les cessionnaires en règle » (m.i., par. 75). Ces changements au régime d'assurance ontarien témoignent de l'intention continue de la législature de mettre les bénéficiaires à l'abri des réclamations des créanciers de l'assuré et de souligner que le droit du bénéficiaire au produit n'est pas compromis par son statut de « simple volontaire ». Un bénéficiaire n'a pas plus ou moins droit au produit du fait de sa contribution aux primes de la police d'assurance. La *Loi sur les assurances* fait délibérément abstraction de la source des paiements de prime et fait perdre toute pertinence aux gestes des payeurs en ce qui concerne les bénéficiaires.

[125] Of course, beneficiaries who pay the premiums are not left completely vulnerable by the Act. These beneficiaries — like any beneficiary — can secure their priority over the insurance proceeds by requesting either designation as the irrevocable beneficiary of a policy, or requesting an assignment of the policy. This allows a promisee to protect themselves from the risk of contractual breach. Absent these steps, there are no guarantees for beneficiaries who pay premiums: the *Insurance Act* is explicitly and deliberately indifferent to the source of the premium payments.

[125] Bien entendu, les bénéficiaires qui paient les primes ne sont pas laissés sans protection aucune par la Loi. Ces bénéficiaires — comme tout autre bénéficiaire — peuvent avoir priorité sur le produit de l'assurance en demandant d'être désignés bénéficiaires d'une police à titre irrévocable ou en requérant la cession de la police. Cela permet au destinataire d'une promesse de se protéger contre le risque d'inexécution de contrat. Faute de telles mesures, il n'y a aucune garantie pour les bénéficiaires qui paient des primes : la *Loi sur les assurances* fait explicitement et délibérément abstraction de la source des paiements de prime.

[126] Consistent with the scheme, courts have declined to order restitution of insurance proceeds where plaintiffs pay the policy premiums under the mistaken belief that they are the named beneficiary. In *Richardson*, a plaintiff disputed the payment of her husband's insurance policy proceeds to his former wife, the defendant, who had remained the named beneficiary on the policy. The plaintiff argued that she had paid the premiums of the policy under the mistaken belief that she was in fact the named beneficiary, and therefore, that the defendant was unjustly enriched by the retention of the proceeds. The Ontario Court of Appeal upheld the motion judge's decision denying the plaintiff's claim in unjust enrichment. The plaintiff's contribution to the premium payments did

[126] Conformément au régime, les tribunaux ont refusé d'ordonner la restitution du produit de l'assurance lorsque le demandeur paie les primes de la police en croyant à tort qu'il a été nommé bénéficiaire. Dans *Richardson*, la demanderesse contestait le versement du produit de la police d'assurance contractée par son mari à son ex-femme, la défenderesse, qui était restée la bénéficiaire désignée de la police. La demanderesse a fait valoir qu'elle avait payé les primes de la police en croyant erronément qu'elle était en fait la bénéficiaire désignée et, donc, que la défenderesse s'était injustement enrichie en conservant le produit. La Cour d'appel de l'Ontario a confirmé la décision du juge saisi de la requête de rejeter l'action de la demanderesse fondée sur

not render the defendant's enrichment unjust. There was a juristic reason for her enrichment: the designation of the defendant as the beneficiary of the policy.

[127] If we were to impose on juristic reasons a requirement that they explain simultaneously a defendant's enrichment *and* a plaintiff's loss, it is unclear to us how the *Insurance Act* could then ever constitute a juristic reason in a third-party dispute relating to insurance proceeds. If plaintiffs can establish some correspondence in relation to a portion of the proceeds — e.g. through mistaken premium payments — the *Insurance Act* will likely never bar their claim to unjust enrichment. In our view, this is an especially troubling result in respect of the legislative history of the *Insurance Act*; it would undermine a deliberate legislative choice to divorce entitlement to the proceeds from the payment of the premiums.

[128] On the basis of this view of juristic reason, the majority disagrees that the *Insurance Act* constitutes a juristic reason in this case. On their view, this is because the *Insurance Act* does not explicitly oust the prior contractual claims of third parties to the policy proceeds. They rely on the Ontario High Court of Justice's decision in *Shannon*, finding that it supports the proposition "that while the *Insurance Act* may provide for the beneficiary's entitlement to payment of the proceeds, it 'does not specifically preclude the existence of rights outside its provisions'", including contractual entitlements such as Michelle's (Majority Reasons, at para. 72).

[129] We agree with Blair J.A., that it is unclear what proposition *Shannon* actually supports. In that case, the plaintiff argued that the provisions of the separation agreement became impressed with a trust, and that the designation of other beneficiaries in breach of that agreement constituted a disposition of trust property. We would note that the only way the designation of another beneficiary could constitute a

l'enrichissement sans cause. La contribution de la demanderesse aux paiements de prime n'a pas rendu injustifié l'enrichissement de la défenderesse. Un motif juridique justifiait son enrichissement : sa désignation à titre de bénéficiaire de la police.

[127] Si nous devions imposer aux motifs juridiques l'exigence qu'ils expliquent simultanément l'enrichissement du défendeur *et* la perte du demandeur, nous concevons mal comment la *Loi sur les assurances* pourrait alors constituer un motif juridique dans quelque litige portant sur le produit d'une assurance et impliquant un tiers. Si les demandeurs peuvent établir une correspondance quelconque relativement à une partie du produit — p. ex. au moyen du versement par erreur de primes —, la *Loi sur les assurances* ne fera probablement jamais obstacle à leur demande fondée sur l'enrichissement sans cause. Ce résultat nous paraît particulièrement troublant au regard de l'historique de cette loi; il contrecarrerait le choix délibéré du législateur de séparer le droit au produit du paiement des primes.

[128] Se fondant sur cette conception du motif juridique, les juges majoritaires n'estiment pas que la *Loi sur les assurances* puisse constituer pareil motif en l'espèce. À leur avis, il en est ainsi parce que la *Loi sur les assurances* n'écarte pas explicitement les droits d'action contractuels antérieurs de tiers sur le produit de la police d'assurance. Ils se fondent sur la décision de la Haute Cour de justice de l'Ontario dans *Shannon* et concluent qu'elle étaye la proposition « que, même si la *Loi sur les assurances* peut conférer au bénéficiaire le droit au versement du produit de l'assurance, elle [TRADUCTION] "n'écarte pas expressément l'existence de droits qui ne relèvent pas de ses dispositions" », notamment les droits contractuels comme ceux de Michelle (motifs de la majorité, par. 72).

[129] Nous convenons avec le juge Blair qu'on ne sait pas avec certitude quelle proposition est appuyée par la décision *Shannon*. Dans cette affaire, la demanderesse a soutenu qu'une fiducie avait été imposée sur l'accord de séparation et que la désignation d'autres bénéficiaires en violation de l'accord constituait une aliénation de biens en fiducie. Signalons que la désignation d'un autre bénéficiaire ne peut

disposition of trust property is if the trust arose at the time the agreement was concluded. Justice McKinlay explained that it would be unjust for the "plaintiff's clear rights under an agreement with her husband for good consideration [to] be taken away in favour of a niece and nephew who have given no consideration for those rights" (p. 461). She found that the proceeds of the insurance policy were impressed with a trust in favour of the plaintiff. She did not specify whether the trust was intentional (constituted at the time of formation) or constructive (remedial). To the extent the reasons suggest that the designation of beneficiaries according to the *Insurance Act* does not constitute a juristic reason because the beneficiaries are mere volunteers, we reject this argument. The very purpose of the *Insurance Act* is to distribute the policy proceeds to beneficiaries because of their designation as such, irrespective of their contribution directly to premiums or to the insured.

[130] Instead, *Shannon* and the jurisprudence that has followed can be understood to support the proposition that on the facts of a given case a separation agreement can be found to create either a trust over, or an equitable obligation in, the insurance proceeds. Indeed, this is the proposition for which *Shannon* is consistently cited. In *Fraser v. Fraser* (1995), 9 E.T.R. (2d) 136, the British Columbia Supreme Court, citing *Shannon*, found that "the covenant to maintain the beneficiary in the separation agreement is tantamount to an irrevocable designation of the beneficiary under the provisions of the *Insurance Act*" (para. 18). In *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 70 O.R. (3d) 61, the Ontario Court of Appeal found that pre-retirement death benefits in a vested Ontario Teachers' Pension Plan were validly assigned to a former spouse of the plan member under a separation agreement and that "a subsequent spouse who marries after a valid assignment of a pre-retirement death benefit to a former spouse should not reasonably expect to receive the already-assigned interest" (para. 62 (emphasis added)). In *Snider v. Mallon*, 2011 ONSC 4522, 3 R.F.L. (7th) 228, the Ontario Superior Court, citing *Shannon*, declared that "[i]t is therefore a well settled principle that

constituer une aliénation de biens en fiducie que si la fiducie a pris naissance au moment de la conclusion de l'accord. La juge McKinlay a expliqué qu'il serait injuste que les [TRADUCTION] « droits clairement accordés à la demanderesse par un accord conclu avec son mari pour une contrepartie valable lui soient enlevés en faveur d'une nièce et d'un neveu qui n'ont donné aucune contrepartie pour ces droits » (p. 461). Selon elle, une fiducie était imposée en faveur de la demanderesse sur le produit de la police d'assurance. Elle n'a pas précisé s'il s'agissait d'une fiducie délibérée (constituée au moment de sa création) ou par interprétation (réparatrice). Dans la mesure où les motifs laissent entendre que la désignation de bénéficiaires conformément à la *Loi sur les assurances* ne constitue pas un motif juridique parce que les bénéficiaires sont de simples volontaires, nous rejetons cet argument. L'objet même de cette loi est de remettre le produit de la police aux bénéficiaires en raison de leur désignation à ce titre, sans égard à leur contribution directe aux primes ou à l'assuré.

[130] On peut considérer plutôt que *Shannon* et la jurisprudence qui l'a suivie étayent la proposition selon laquelle, au vu des faits d'une affaire donnée, une entente de séparation peut donner naissance soit à une fiducie, soit à une obligation en equity sur le produit de l'assurance. En effet, c'est la proposition à l'appui de laquelle *Shannon* est couramment citée. Dans *Fraser c. Fraser* (1995), 9 E.T.R. (2d) 136, la Cour suprême de la Colombie-Britannique, citant *Shannon*, a conclu que [TRADUCTION] « la convention visant à maintenir le bénéficiaire désigné dans l'accord de séparation équivaut à une désignation à titre irrévocable selon les dispositions de la *Loi sur les assurances* » (par. 18). Dans *Ontario Teachers' Pension Plan Board c. Ontario (Superintendent of Financial Services)* (2004), 70 O.R. (3d) 61, la Cour d'appel de l'Ontario a jugé que, dans le cadre d'une pension acquise aux termes du régime de retraite des enseignants de l'Ontario, les prestations de décès avant la retraite avaient été valablement cédées à un ancien conjoint du participant au régime par suite d'un accord de séparation et que [TRADUCTION] « la personne qui se marie après la cession valide d'une prestation de décès avant la retraite à un ex-conjoint ne devrait pas raisonnablement s'attendre à recevoir l'intérêt déjà cédé » (par. 62 (nous

an undertaking in a separation agreement creates a trust interest which will operate to protect the beneficiary should the undertaking party fail to honour his or her commitment" (para. 13). So too in *Bielny v. Dzwiekowski*, [2002] I.L.R. ¶I-4018 (Ont. S.C.J.), where the court found that the "law relating to the irrevocable designations of beneficiaries in separation agreements has been settled for some time" (para. 8), aff'd [2002] O.J. No. 508 (QL) (C.A.). Unlike these cases, Michelle's interest in the policy does not arise from the contract itself, but from its breach.

[131] Therefore, we do not take *Shannon* to be authority for the proposition that a prior agreement to be designated the beneficiary of an insurance policy, without more, is sufficient to undermine the operation of an established juristic reason. A contractual entitlement is insufficient to create this kind of interest in the policy or its proceeds. This principle is illustrated in *Milne*: prior to passing away, a deceased, in breach of an order from a family law proceeding, changed the beneficiary designation from the plaintiff, his former spouse, to his current spouse. The former spouse argued that as a result of the breach of the order, which she likened to a contract in the family law context, she was entitled to the proceeds. The court found that while she was not entitled to the proceeds, she was entitled to damages for the contractual breach in the amount of the proceeds. While this case differs from the present appeal in that the estate's solvency was not in issue, it is nonetheless instructive. Similarly, in *Kang v. Kang Estate*, 2002 BCCA 696, 44 C.C.L.I. (3d) 52, the appellant claimed that her husband promised to name her as the designated beneficiary on his life insurance policy if she came with him to Canada. She accompanied her husband to Canada, but he retained his sister as the designated beneficiary under his policy of life insurance. The Court of Appeal rejected the appellant's claims, distinguishing the case from others in which "trial judges have imposed a constructive trust to remedy a husband's breach of fiduciary duty owed to his wife after separation" flowing from the covenant

soulignons)). Dans *Snider c. Mallon*, 2011 ONSC 4522, 3 R.F.L. (7th) 228, la Cour supérieure de l'Ontario, citant *Shannon*, a déclaré que [TRADUCTION] « [c]'est donc un principe bien établi qu'un engagement pris dans un accord de séparation crée un droit fiduciaire qui protégera le bénéficiaire si l'auteur de l'engagement ne respecte pas celui-ci » (par. 13). Il en va de même dans *Bielny c. Dzwiekowski*, [2002] I.L.R. ¶I-4018 (C.S.J. Ont.), où le tribunal a conclu que le [TRADUCTION] « droit relatif à la désignation de bénéficiaire à titre irrévocable dans des accords de séparation est établi depuis un certain temps » (par. 8), conf. par [2002] O.J. No. 508 (QL) (C.A.). Contrairement aux cas susmentionnés, l'intérêt de Michelle dans la police d'assurance découle non pas du contrat en soi, mais de la violation de celui-ci.

[131] Nous ne sommes donc pas d'avis que la décision *Shannon* appuie la thèse selon laquelle une entente antérieure visant à désigner le bénéficiaire d'une police d'assurance suffit en soi à compromettre l'application d'un motif juridique établi. Un droit contractuel est insuffisant pour faire naître ce genre d'intérêt dans la police ou son produit. La décision *Milne* illustre ce principe : avant de mourir, le défunt, en violation d'une ordonnance rendue dans une instance en matière familiale, a remplacé la demanderesse, son ex-conjointe, par sa conjointe actuelle à titre de bénéficiaire désignée. L'ex-conjointe a soutenu que, par suite de la violation de l'ordonnance, qu'elle a assimilée à un contrat en droit de la famille, elle avait droit au produit. La cour a jugé que, même si elle n'avait pas droit au produit, elle avait droit à des dommages-intérêts correspondant au produit pour la rupture du contrat. Bien que cette affaire se distingue du présent pourvoi en ce que la solvabilité de la succession n'était pas en cause, elle est néanmoins instructive. De même, dans *Kang c. Kang Estate*, 2002 BCCA 696, 44 C.C.L.I. (3d) 52, l'appelante a prétendu que son mari lui avait promis de la désigner bénéficiaire de sa police d'assurance-vie si elle venait avec lui au Canada. Elle a accompagné son mari au Canada, mais il a gardé sa sœur à titre de bénéficiaire désignée de sa police d'assurance-vie. La Cour d'appel a rejeté les prétentions de l'appelante et distingué l'affaire d'autres cas où [TRADUCTION] « le juge de première instance a imposé une fiducie par interprétation pour remédier au manquement du mari

in a separation agreement (para. 9). On its own, the agreement was not sufficient to give the plaintiff any entitlement to the proceeds, and ground a claim in unjust enrichment.

[132] The majority attaches significance to the fact that Michelle specifically contracted for the proceeds of the policy. She continued to pay the policy's premiums on this basis. Put another way, in the view of the majority, Michelle is not an ordinary creditor of Lawrence's estate; rather, she is in a special position vis-à-vis the policy proceeds. Respectfully, we cannot agree that this changes the nature of Michelle's claim to the policy proceeds. In immunizing beneficiaries from the claims of the insured's creditors, the *Insurance Act* does not distinguish between types of creditors. Creditors of the insured's estate simply do not have a claim to the insurance proceeds. There is no basis to carve out a special class of creditor who would be exempt from the clear wording of the *Insurance Act*. Bearing in mind the history of the relevant provisions of the *Insurance Act* and their clarity, neither Michelle's contributions to the policy, nor her contract with Lawrence are sufficient to take her outside the comprehensive scheme and grant her special and preferred status.

[133] That being said, we do not dispute Blair J.A.'s statement that the "designation of a beneficiary as an irrevocable beneficiary under the *Insurance Act* [does not] invariably trum[p] a prior claimant" (para. 91). Whether the *Insurance Act* fails to trump a prior claimant depends on the character of that prior claim. Where by some agreement, or otherwise, the insured has "placed the policy or its proceeds beyond his or her ability to deal with them, and, therefore, beyond his or her ability to make the purported irrevocable designation", the *Insurance Act* will not constitute a juristic reason for a beneficiary's enrichment (para. 91). For example, if a claimant successfully established the existence of a trust over the policy or its proceeds prior to the designation of an irrevocable beneficiary, her beneficial or proprietary interest in

à l'obligation fiduciaire qu'il avait envers sa femme après la séparation », une obligation qui découle de la convention figurant dans un accord de séparation (par. 9). L'entente ne suffisait pas en soi pour accorder à la demanderesse quelque droit que ce soit sur le produit et fonder une action pour enrichissement sans cause.

[132] Les juges majoritaires attachent de l'importance au fait que Michelle avait conclu un contrat lui conférant explicitement le produit de la police. Elle a continué de payer les primes de la police pour cette raison. Autrement dit, selon la majorité, Michelle n'est pas une créancière ordinaire de la succession de Lawrence; elle se trouve plutôt dans une situation particulière vis-à-vis le produit de la police. Avec égards, nous ne pouvons convenir que cela modifie la nature du droit de Michelle au produit de la police. En mettant les bénéficiaires à l'abri des réclamations des créanciers de l'assuré, la *Loi sur les assurances* ne fait aucune distinction entre les différents types de créanciers. Les créanciers de la succession de l'assuré n'ont tout simplement pas droit au produit de l'assurance. Rien ne justifie d'établir une catégorie spéciale de créancier qui serait soustraite au texte clair de la *Loi sur les assurances*. Compte tenu de l'historique des dispositions applicables de cette loi et de leur clarté, ni les contributions de Michelle à la police, ni son contrat avec Lawrence ne suffisent pour l'exclure de ce régime exhaustif et lui accorder un statut particulier et privilégié.

[133] Cela dit, nous ne nous inscrivons pas en faux contre l'affirmation du juge Blair selon laquelle la [TRADUCTION] « désignation d'un bénéficiaire à titre irrévocable en vertu de la *Loi sur les assurances* [ne] l'emporte [pas] toujours sur le détenteur d'une créance antérieure » (par. 91). La réponse à la question de savoir si cette loi ne l'emporte pas sur le détenteur d'une créance antérieure dépend du caractère de cette créance. Lorsque, par une entente quelconque ou un autre moyen, l'assuré a « placé la police ou le produit de celle-ci hors de son emprise et, par conséquent, hors de sa faculté de faire la prétendue désignation irrévocable », la *Loi sur les assurances* ne constitue pas un motif juridique justifiant l'enrichissement d'un bénéficiaire (par. 91). Par exemple, si une demanderesse parvient à établir

the policy would have prevented the insured from designating an irrevocable beneficiary. Any such designation would be invalid. In those circumstances the *Insurance Act* could not constitute a juristic reason for a defendant's enrichment.

[134] But in the normal course, a contract between two parties does not at the time of the contract formation, be it for legal or equitable reason, prevent a promisor from dealing with the property that is the subject matter of the contract. In *Ladner Estate, Re*, 2004 BCCA 366, 40 B.C.L.R. (4th) 298, the British Columbia Court of Appeal considered the appropriate remedy for the deceased's breach of his covenants in a separation agreement to pay permanent spousal support to the appellant, and to maintain insurance to secure payment of that support. Instead of acting in accordance with the agreement, the deceased made the insurance proceeds of his policies payable to his estate, and thus available for estate administration costs, and vulnerable to the claims of unsecured creditors. The appellant argued that contract law does not permit a party (or their estate) to gain an advantage from wrongful conduct. The Court of Appeal was unpersuaded, finding that a promisor's wrongdoing "does not confer a property right or priority on the other party to the contract" (para. 23).

[135] This is indeed reflected in the reasons of the majority, which acknowledge that in the regular course, Michelle could pursue a remedy for breach of contract against Lawrence's estate. It is only because Lawrence's estate has no significant assets to satisfy an order for payment that any claim is being made to the insurance proceeds. As such, even on their view, Michelle's interest specifically in the policy proceeds does not crystallize until Lawrence's death, that is, long after Lawrence designated Risa as the irrevocable beneficiary. Thus, contrary to Lauwers J.A.'s dissenting reasons at the court below, the agreement did not place the policy or its proceeds beyond Lawrence's ability to deal with them.

qu'une fiducie a été imposée sur la police ou son produit avant la désignation d'un bénéficiaire à titre irrévocable, son intérêt bénéficiaire ou propriétal dans la police aurait empêché l'assuré de désigner un bénéficiaire à titre irrévocable. Toute désignation de ce genre serait invalide. Dans les circonstances, la *Loi sur les assurances* ne saurait constituer un motif juridique justifiant l'enrichissement d'un défendeur.

[134] Mais en temps normal, un contrat conclu entre deux parties n'empêche pas le promettant, que ce soit pour un motif en droit ou en equity, de disposer du bien visé par le contrat. Dans *Ladner Estate, Re*, 2004 BCCA 366, 40 B.C.L.R. (4th) 298, la Cour d'appel de la Colombie-Britannique a examiné la réparation qu'il convient d'accorder pour la violation par le défunt des engagements qu'il avait pris dans un accord de séparation de verser en permanence à l'appelante une pension alimentaire et de garder en vigueur une police d'assurance pour garantir le paiement de ces aliments. Au lieu de respecter l'accord, le défunt avait fait en sorte que le produit de ses polices d'assurance soit payable à sa succession et puisse donc servir à acquitter les frais d'administration de la succession et être exposé aux réclamations des créanciers non garantis. L'appelante avait soutenu que le droit des contrats ne permettait pas à une partie (ou à sa succession) de tirer profit d'une inconduite. La Cour d'appel n'en a pas été convaincue, jugeant que le comportement fautif d'un promettant [TRADUCTION] « ne confère pas un droit de propriété ou une priorité à l'autre partie au contrat » (par. 23).

[135] C'est en effet ce qui se dégage des motifs des juges majoritaires, qui reconnaissent qu'en temps normal, Michelle pourrait exercer un recours pour rupture de contrat contre la succession de Lawrence. C'est uniquement parce que la succession de Lawrence ne dispose pas d'éléments d'actif importants susceptibles de respecter une ordonnance de paiement que le produit de l'assurance est réclamé. Ainsi, même selon eux, l'intérêt de Michelle dans le produit de la police ne se réalise qu'à la mort de Lawrence, soit bien après que Lawrence eut désigné Risa bénéficiaire à titre irrévocable. Donc, contrairement à ce qu'indiquent les motifs dissidents du juge Lauwers, de la Cour d'appel, l'entente n'empêchait pas Lawrence de disposer de la police ou de son produit.

[136] We note that the thrust of the cases on which Michelle seeks to rely for her position recognize either explicitly or implicitly that unjust enrichment is available only where there is some proprietary or equitable entitlement to the insurance proceeds. In *Steeves*, the New Brunswick Queen's Bench found that the insured "held the inchoate proceeds of the insurance policy in the event of his death in trust for the plaintiff" (para. 36). In *Schorlemer*, the Ontario Superior Court of Justice summarized the relevant legal principles as follows: ". . . where an insured is obligated under a separation agreement to designate the other party or their children as a beneficiary, that agreement will prevent the designation of another person as beneficiary . . ." (para. 48). These cases confirm, in our view, that a claim in unjust enrichment for the proceeds of a life insurance policy cannot be rooted in a mere contractual entitlement.

[136] Nous constatons que l'essentiel de la jurisprudence que Michelle cherche à invoquer à l'appui de sa position reconnaît explicitement ou implicitement qu'un recours pour enrichissement sans cause ne peut être intenté que s'il existe un droit propriétal ou en equity sur le produit de l'assurance. Dans *Steeves*, la Cour du Banc de la Reine du Nouveau-Brunswick a estimé que l'assuré [TRADUCTION] « détenait le produit non réalisé de la police d'assurance en fiducie pour la demanderesse au cas où il décéderait » (par. 36). Dans *Schorlemer*, la Cour supérieure de justice de l'Ontario a résumé en ces termes les principes juridiques pertinents : [TRADUCTION] « . . . l'accord de séparation qui oblige l'assuré à désigner l'autre partie ou leurs enfants à titre de bénéficiaires empêche la désignation d'une autre personne à ce titre . . . » (par. 48). À notre avis, cette jurisprudence confirme qu'une action pour enrichissement sans cause visant à toucher le produit d'une police d'assurance-vie ne peut se fonder sur un simple droit contractuel.

[137] Still, the majority does not accept that the *Insurance Act*'s clear bar of creditor claims against beneficiaries is sufficient to oust Michelle's claim against Risa. While acknowledging that Michelle's breach of contract claim renders her a creditor of Lawrence's estate, they nonetheless insist that this has no bearing on a potential claim in unjust enrichment. Respectfully, we cannot agree. Framed in either contract or unjust enrichment, Michelle has not shown a proprietary or equitable entitlement to the proceeds. Michelle relies on her rights as a contractual creditor to anchor a claim in unjust enrichment. In our view, the *Insurance Act* explicitly ousts claims of this character.

[137] Malgré cela, les juges majoritaires n'acceptent pas que l'interdiction claire, dans la *Loi sur les assurances*, des réclamations des créanciers à l'encontre des bénéficiaires suffit pour écarter la demande de Michelle contre Risa. Ils reconnaissent certes que la réclamation de Michelle pour violation de contrat fait d'elle une créancière de la succession de Lawrence, mais ils insistent néanmoins pour dire que cela n'a aucune incidence sur une réclamation potentielle pour enrichissement sans cause. Soit dit en tout respect, nous ne sommes pas d'accord. Que ce soit en droit des contrats ou sur la foi des principes de l'enrichissement sans cause, Michelle n'a pas démontré l'existence d'un droit de propriété ou en equity sur le produit. Elle s'appuie sur ses droits en tant que créancière contractuelle pour ancrer une demande fondée sur l'enrichissement sans cause. Nous estimons que la *Loi sur les assurances* écarte explicitement les réclamations de cette nature.

[138] In sum, we consider that the *Insurance Act* reflects a deliberate policy choice to channel the insurance proceeds directly to the designated beneficiary free from any and all creditor claims. The Act is a juristic reason for the transfer to Risa. The relevant jurisprudence, including *Shannon*, does not dislodge or undercut the clear statutory language. Instead, the

[138] En somme, nous considérons que la *Loi sur les assurances* témoigne de la décision de principe délibérée de verser le produit de l'assurance directement au bénéficiaire désigné et de le soustraire à toute réclamation d'un créancier. La Loi est un motif juridique justifiant le transfert à Risa. La jurisprudence applicable, y compris la décision *Shannon*,

cases confirm that, absent some proprietary or equitable entitlement to the insurance proceeds, creditors cannot use unjust enrichment claims to undermine the *Insurance Act* and an insured's valid designation.

n'écarte ni n'affaiblit le libellé clair de la loi. En fait, les décisions confirment qu'à défaut d'un quelconque droit de propriété ou en equity sur le produit de l'assurance, les créanciers ne peuvent utiliser des réclamations fondées sur l'enrichissement sans cause pour saper la *Loi sur les assurances* et la désignation valide faite par l'assuré.

(2) Policy Considerations Weigh Against Allowing Michelle's Claim for Unjust Enrichment

(2) Les considérations de politique générale militent contre la décision d'accueillir l'action de Michelle pour enrichissement sans cause

[139] Even if the *Insurance Act*, on its own, did not establish a juristic reason for Risa's enrichment, we add that the policy considerations at the second stage of the juristic reason analysis would nevertheless favour the denial of restitution to Michelle.

[139] Même si la *Loi sur les assurances*, en soi, n'établissait pas un motif juridique justifiant l'enrichissement de Risa, nous ajoutons que les considérations de politique générale intervenant au second stade de l'analyse du motif juridique favoriseraient néanmoins le refus de restituer le produit à Michelle.

[140] The legislature's choice for intended beneficiaries to receive the proceeds is rooted in the sound policy considerations underpinning that choice. Estate distributions are subject to frequent disputes, leading to lengthy and expensive litigation. Tying up insurance proceeds in litigation can create immense hardship for beneficiaries, many of whom stare at financial instability without support from their now-deceased spouse. Where there is a significant delay between an insured's death and the receipt of the insurance proceeds, designated beneficiaries may struggle to take care of household expenses or meet basic needs. Such is the case with Risa.

[140] La décision de la législature de faire en sorte que les bénéficiaires désignés touchent le produit prend sa source dans les solides considérations de politique générale qui sous-tendent ce choix. La liquidation d'une succession engendre souvent des litiges et donne lieu à des poursuites longues et coûteuses. Le blocage du produit de l'assurance lors d'une action en justice peut occasionner d'énormes difficultés aux bénéficiaires, dont un grand nombre sont en proie à l'instabilité financière sans le soutien de leur conjoint maintenant décédé. Lorsqu'il y a un délai considérable entre la mort d'un assuré et la réception du produit de l'assurance, les bénéficiaires désignés peuvent avoir du mal à s'occuper des dépenses ménagères ou à répondre à des besoins essentiels. Tel est le cas de Risa.

[141] The *Insurance Act* is structured in large part to minimize these hardships. Irrevocable beneficiary designations are meant to provide the insured and beneficiary alike with the certainty that the insurance proceeds will be received in a timely manner free of creditor claims. As per s. 196(1) of the *Insurance Act*, "Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured." The *Insurance Act* provides even greater protection of the

[141] La *Loi sur les assurances* est conçue en grande partie pour réduire au minimum ces difficultés. La désignation d'un bénéficiaire à titre irrévocable a pour objet de donner à l'assuré tout comme au bénéficiaire la certitude que le produit de l'assurance sera touché en temps opportun à l'abri des réclamations des créanciers. Aux termes du par. 196(1) de la *Loi sur les assurances*, « [l]orsqu'un bénéficiaire est désigné, les sommes assurées ne font pas partie de la succession de l'assuré et ne peuvent être réclamées par les créanciers de l'assuré, dès la survenance de l'événement qui rend les sommes assurées exigibles. » Cette

policy and proceeds where an irrevocable beneficiary is designated. In that case, from the moment such a designation is made, the policy and its proceeds are not subject to the claims of any of the insured's creditors and are immune from any attempted redesignations. The inability of creditors and the insured to access or control the policy proceeds provides certainty to the insured and beneficiary that the latter will be provided the support that they were intended to have.

[142] At the expense of the above considerations, the majority seems to stress the *Insurance Act*'s interest in certainty for insurers, but not the insured or their chosen beneficiaries. The *Insurance Act* purportedly outlines who should *receive* the proceeds, but not who should *retain* them. Michelle makes the same argument. While it is true that the insurance scheme benefits when insurers can identify with certainty the person who is entitled to receive a policy's proceeds, the provisions of the *Insurance Act* go beyond this. If the interests protected by the beneficiary provisions were principally those of the insurers, there would be no need for the proceeds to be free from creditor claims, or to bypass the insured's estate. A statute could achieve certainty for the insurer by merely directing that the proceeds be paid to the insured's estate, to be distributed according to the insured's testamentary dispositions. The function of these provisions is not merely to ensure that a beneficiary *receive* the proceeds, and they should not be treated as such.

[143] In fact, if Risa only has a right to receive but not retain the proceeds, it would seem to follow that all insurance proceeds would be subject to the claims of creditors, contrary to the express wording of the provisions. As such, if one were to accept — which we do not — that there is a principled basis to distinguish between creditors like Michelle and other creditors of an insured's estate, insurance proceeds would still end up being the subject of disputes and litigation. Various creditors would argue that they, too, have preferred status that should exempt them from the operation of the *Insurance Act*. Regardless

loi prévoit une protection encore plus grande de la police et de son produit en cas de désignation d'un bénéficiaire à titre irrévocable. Dès qu'une telle désignation est faite, la police et son produit échappent aux réclamations de l'un ou l'autre des créanciers de l'assuré et sont à l'abri de toute tentative de nouvelle désignation. L'impossibilité pour les créanciers et l'assuré d'obtenir le produit de la police ou d'avoir une emprise sur celui-ci offre à l'assuré et au bénéficiaire la certitude que ce dernier recevra le soutien qu'il était censé avoir.

[142] C'est au détriment des considérations susmentionnées que les juges majoritaires semblent insister sur l'intérêt de la *Loi sur les assurances* à offrir une certitude aux assureurs, mais non aux assurés ou aux bénéficiaires de leur choix. La *Loi sur les assurances* est censée indiquer qui doit *toucher* le produit, mais non qui doit le *conserver*. Michelle avance le même argument. Certes, le régime d'assurance en sort gagnant quand les assureurs peuvent identifier avec certitude la personne qui a droit au produit de la police, mais les dispositions de la *Loi sur les assurances* vont plus loin. Si les intérêts protégés par les dispositions applicables aux bénéficiaires étaient en majeure partie ceux des assureurs, il ne serait pas nécessaire de protéger le produit des réclamations des créanciers ou de contourner la succession de l'assuré. Une loi pourrait garantir la certitude de l'assureur en disposant simplement que le produit doit être versé à la succession de l'assuré et réparti selon ses dispositions testamentaires. Ces dispositions n'ont pas simplement pour fonction de faire en sorte que le bénéficiaire *touche* le produit, et elles ne doivent pas être considérées comme telles.

[143] En fait, si Risa a seulement le droit de toucher le produit, et non de le conserver, il semblerait que tous les produits d'assurance soient exposés aux réclamations des créanciers, contrairement aux termes exprès des dispositions. Partant, si l'on acceptait — ce que nous ne faisons pas — qu'il y a une raison de principe de distinguer les créanciers comme Michelle des autres créanciers de la succession d'un assuré, le produit de l'assurance finirait tout de même par être l'objet de différends et de poursuites en justice. Divers créanciers feraient valoir qu'ils ont eux aussi un statut privilégié qui

of whether these creditors would ultimately be successful in their claims for unjust enrichment, the result reached by the majority invites them to nonetheless attempt to collect on the insured's policy proceeds and tie up the proceeds in potentially protracted and expensive litigation, contrary to the intention of the *Insurance Act*. Even worse, this could leave designated beneficiaries vulnerable not just to creditors, but also to those who have sustained the policy for any period. Beneficiaries and insureds will thus be denied the certainty that the *Insurance Act* would otherwise provide.

devrait les soustraire à l'application de la *Loi sur les assurances*. Que les actions de tels créanciers pour enrichissement sans cause soient finalement accueillies ou non, le résultat auquel parviennent les juges majoritaires les incite néanmoins à tenter de piger dans le produit de la police de l'assuré et de bloquer le produit lors de poursuites qui risquent de s'avérer longues et coûteuses, contrairement à l'objet de la *Loi sur les assurances*. Pire encore, cela pourrait laisser les bénéficiaires désignés à la merci non seulement des créanciers, mais aussi des personnes qui ont maintenu la police d'assurance en vigueur pour quelque période que ce soit. Les bénéficiaires et les assurés se verront par conséquent privés de la certitude qu'offre par ailleurs cette loi.

III. Conclusion

III. Conclusion

[144] Death is sometimes accompanied by much uncertainty and strife. To the extent that it is possible, the *Insurance Act* moderates such uncertainty by creating a comprehensive regime for all those involved in a life insurance contract. Notwithstanding our view that there is no corresponding deprivation of Michelle, there is also a juristic reason for the transfer to Risa; we would not attenuate the sensible regime put forward by the legislature. As Michelle's claim of unjust enrichment is not made out, we would dismiss the appeal.

[144] La mort s'accompagne parfois d'énormément d'incertitude et de querelles. La *Loi sur les assurances* atténue autant que possible cette incertitude en instaurant un régime complet pour toutes les parties à un contrat d'assurance-vie. Nonobstant notre opinion selon laquelle Michelle ne subit aucun appauvrissement correspondant, le transfert à Risa est également justifié par un motif juridique; nous estimons inopportun d'atténuer le régime judicieux mis de l'avant par la législature. Puisque Michelle n'a pas établi le bien-fondé de son allégation d'enrichissement sans cause, nous rejetterions le pourvoi.

Appeal allowed, GASCON *and* ROWE JJ. *dissenting.*

Pourvoi accueilli, les juges GASCON *et* ROWE *sont dissidents.*

Solicitors for the appellant: Hull & Hull, Toronto.

Procureurs de l'appelante : Hull & Hull, Toronto.

Solicitors for the respondent: Torys, Toronto.

Procureurs de l'intimée : Torys, Toronto.

Tab 5

Court File No.: 06-CL-6781
Released: 20070205

ONTARIO
SUPERIOR COURT OF JUSTICE

Re: Alnoor Gulamani and 1119713 Ontario Inc. v. Iqbal Dewji et al.

Before: Swinton J.

Counsel: Simon Schneiderman for Iqbal Dewji and Dewshaf Investments Inc., Moving Parties (Respondents)
Michael Title and A. Pribetic for Responding Parties (Applicants)

Heard: January 29, 2007

ENDORSEMENT

[1] Iqbal Dewji and Dewshaf Investments Inc. seek leave to appeal from the order of Mesbur J. dated December 21, 2006, in which she dismissed a motion to discharge a certificate of pending litigation ("CPL") registered against a hotel property owned by the respondents.

[2] The moving parties submit that the motions judge erred in two ways: in finding that there is a triable issue as to whether the applicants have an interest in land based on a remedial constructive trust in the property, and in exercising her discretion on the question of pre-action delay by the applicants.

[3] The applicants claim an incentive bonus in accordance with a management agreement which was terminated on November 7, 2000. Pursuant to that agreement, the applicants are entitled to 10% of the net capital gain on the sale of the hotel property, payable within five years of termination of the agreement or the sale of the property, whichever occurs first. The management agreement contemplates an appraisal to determine the value and the provision of a promissory note by the respondents. If the sale includes a vendor take back mortgage, there is a formula for the payment of the bonus.

[4] The applicants commenced an action seeking the enforcement of the management agreement in 2001. The respondents commenced their own action challenging the validity of the agreement. There was little activity in these proceedings.

[5] In November 2006, the applicants commenced an application in which they claimed, *inter alia*, oppression, breach of fiduciary duty and an order that they were entitled to enforce their rights by means of a remedial constructive trust. In the Notice of Application, they seek an order for a CPL to protect their "interest in the lands and the proceeds of sale". However, they do not explicitly identify the interest that they seek to

protect in particular lands. Rather, they appear to rest their claims for relief on the terms of the Management Agreement dealing with the incentive bonus. For example, they state at p. 7 , "The respondents have failed, refused or neglected to make the payments due and owing to the applicants as stipulated by the Management Agreement. The Promissory Note has not been delivered as required by the Management Agreement."

[6] The moving parties assert that the motions judge's decision conflicts with other decisions - in particular, the jurisprudence of the Supreme Court of Canada on remedial constructive trusts. In my view, no conflicting decision has been identified. The motions judge exercised her discretion not to discharge the CPL on the basis of well-established legal principles. The existence of case law where another court has exercised its discretion in a different manner in different circumstances does not satisfy the conflicting decisions requirement in Rule 62.02(4)(a) (*Fand Investments Inc. (Re)*, [2005] O.J. No. 1223 (S.C.J.) at para. 9).

[7] The test for leave to appeal under Rule 62.02(4)(b) requires a demonstration that there is good reason to doubt the correctness of the decision, and the proposed appeal raise matters of such importance that leave should be granted.

[8] With respect to pre-action delay, the motions judge considered the material before her and determined that this was not a reason to vacate the CPL. The fact that another judge might have exercised her discretion differently based on the facts does not mean that there is good reason to doubt the correctness of her decision on this issue.

[9] The motions judge set out the applicants' submission on their interest in lands as follows:

> The application here refers to the incentive bonus provided in the management agreement as recognizing that effective management would increase the value of the properties. As a result, the applicants suggest they have an equitable interest in the proceeds of sale, or a remedial constructive trust or equitable lien."

She concluded that "considering the facts I have set out above, I am persuaded that the applicants raise a triable issue regarding an interest in land, based on the claim for a remedial constructive trust interest in the property".

[10] A party moving to discharge a CPL has an onus to demonstrate that there is no triable issue in respect to whether the responding party has a "reasonable claim to the interest in the land claimed". The onus is analogous to that of a defendant seeking summary judgement to dismiss a plaintiff's claim under Rule 20 (*G.P.I. Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (C.A.) at para. 20).

[11] The applicants' claim arises out of the management agreement. What they seek is payment of the incentive bonus. The terms of the management agreement confer a right to payment of an incentive bonus on the sale of the hotel properties or five years after termination, whichever occurs earlier.

[12] The remedy of a constructive trust is a proprietary remedy which may be ordered when there has been unjust enrichment or breach of trust. To obtain such a remedy for unjust enrichment, a plaintiff must show that there has been a benefit conferred on the defendant, the corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment (*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 20). Where a plaintiff seeks a constructive trust over a property, the courts have looked for a nexus between the plaintiff's deprivation and the property in question (*Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at para. 20). Moreover, in *Sorochan*, Dickson C.J.C. held that a court must ask whether the plaintiff reasonably expected to receive an actual interest in property, as opposed to monetary relief, and whether the respondent was or reasonably ought to have been cognizant of that expectation (at para. 33).

[13] When these principles are applied to the affidavit evidence in the record, I have good reason to doubt the correctness of the motions judge's conclusion that there is a triable issue in respect to the applicants' interest in the hotel property.

[14] In this case, the applicants had a contractual arrangement with the respondents for the payment of an incentive bonus. Their claim is rooted in that contract, and it must be considered in relation to the constructive trust claim. While the applicants may have conferred a benefit on the respondents by giving their services and improving the value of the hotels, there is some question as to whether there was a corresponding deprivation, given that they were paid for their services. More importantly, even if there was a deprivation because of the level of compensation paid, there was a juristic reason for the benefit – namely, the terms of the contract. In the circumstances, there is no evidence that they could have a reasonable expectation to acquire an interest in the hotel properties because of their work, given that the contract entitles them to payment of a sum of money.

[15] The affidavit of Mr. Gulamani filed on the *ex parte* motion does not provide any evidentiary basis for a claim to a constructive trust over the properties. He claims a breach of the management agreement. This would give rise to a claim for damages, but the facts in his affidavit do not support a claim for unjust enrichment or a proprietary remedy.

[16] During the hearing of this motion, counsel for the applicants also submitted that they had a claim for breach of fiduciary duty which could give rise to a constructive trust as a remedy. The motions judge did not deal with this argument. Again, however, the claim is essentially one for breach of contract, and the affidavit sets out no facts which would lead to the conclusion that there is a triable issue with respect to an interest in land because of breach of fiduciary duty.

[17] While I have reason to doubt the correctness of the decision that there is a triable issue respecting an interest in land, I must also be satisfied that the proposed appeal raises issues of general importance to the development of the law. The applicants correctly point out that the motions judge has made no final determination of the constructive trust

issue, and that she has exercised her discretion not to discharge the CPL at a very early stage of these proceedings. They submit that the issues in this motion are of importance only to the parties.

[18] While the applicants submitted that a CPL is only notice that an interest in land is in issue in litigation, the Court of Appeal in *G.P.I. Greenfield Pioneer Inc., supra*, observed that a CPL "can be as effective as an interlocutory injunction in restraining dealings with property as, generally speaking, it is considered to be an encumbrance on land" (at para. 15). Given the serious effects that a CPL may have, it is important for an appellate court to clarify the evidentiary basis necessary to show whether there is a triable issue with respect to whether a party has a "reasonable claim to the interest in the land claimed" in cases where constructive trust is sought as a remedy.

[19] Therefore, the motion for leave to appeal is granted. Costs of the motion are reserved to the panel hearing the appeal.

Swinton J.

Released: February , 2007

Tab 6

CITATION: Kingsett Mortgage Corp et al v. Stateview Homes et al., 2023 ONSC 7105
COURT FILE NO.: CV-23-00698395-00CL
CV-23-00698632-00CL
CV-23-00698637-00CL
CV-23-00698576-00CL
CV-23-00699067-00CL
DATE: 2023-12-XX

SUPERIOR COURT OF JUSTICE – ONTARIO [COMMERCIAL LIST]

RE: KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION, Applicant

AND:

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC. et al, Respondents

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DORR CAPITAL CORPORATION Applicant

AND:

HIGHVIEW BUILDING CORP INC. Respondent

DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (BEA TOWNS) INC. Respondent

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI, AND CARLO TAURASI Respondents

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MERIDIAN CREDIT UNION Applicant

AND:

STATEVIEW HOMES (ELM&CO) INC. Respondent

BEFORE: J. STEELE J.

COUNSEL: *Adam Slavens, David Outerbridge, Mike Noel, Jonathan Silver* for the Moving Party, Tarion Warranty Corporation

Alan Merskey, Kiyan Jamal for the Receiver, KSV Restructuring Inc. (NAO Phase 1, Minu, On the Mark, High Crown and Taurasi Holdings Recieverships)

Jeffrey Larry, Daniel Rosenbluth for the Receiver, KSV Restructuring Inc. (NAO Phase 2, BEA, Highview and Elm Receiverships)

Sean Zweig, Joseph Blinick for Kingsett Mortgage Corporation

Eric Golden for Dorr Capital Corporation

George Benchetrit for Atrium Mortgage Corporation

Vern W. DaRe for Meridian Credit Union Limited

Geoff R. Hall for Toronto-Dominion Bank

Kelly Smith Wayland for Canada Revenue Agency

Stewart Thom for Reliance Comfort Limited Partnership d/b/a Reliance Home Comfort

HEARD: November 2, 2023

ENDORSEMENT

OVERVIEW

[1] This motion arises following the declaration of bankruptcy of the Stateview entities. The Stateview entities were residential real estate developers. When the Receiver was appointed over the assets of the Stateview entities, the home construction in respect of the residential projects, other than High Crown and On the Mark, had not started. Many purchasers, however, had made deposits to one of the Stateview entities in respect of a new home purchase (the "Purchasers"). The deposits made by the Purchasers have been spent by the Stateview entities. Tarion Warranty Corporation ("Tarion") seeks declaratory relief on behalf of these Purchasers. Tarion asks the court to declare that the deposits were subject to either an express trust or a constructive trust arising because of unjust enrichment, the beneficiaries of which express trust or constructive trust are the Purchasers. Because the deposits were not held by the Stateview entities in separate trust accounts, Tarion also seeks a remedial constructive trust and a charge elevating the Purchasers' ranking in priority.

[2] Under the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Warranties Act"), new home purchasers, who would otherwise lose their deposits if the vendor went bankrupt, are entitled to receive payment out of the guarantee fund administered by Tarion for the amount of the deposit (up to $100,000). Tarion has a statutory right of subrogation, which is why Tarion seeks declaratory relief on these issues.

[3] The Receiver made submissions opposing the relief sought by Tarion. KingSett Mortgage Corporation ("KingSett"), a secured creditor of the Stateview entities, filed materials and made submissions in support of the Receiver's position. Several other secured creditors made brief oral submissions in support of the Receiver's position. The Canada Revenue Agency also supports the Receiver's position.

[4] For the reasons set out below, Tarion's motion is dismissed.

[5] Below I provide the detailed analysis on the issues. However, at a high level, the motion fails for a few reasons. First, the Purchasers all entered into agreements with the Stateview entities under which they agreed that the lenders that provided a secured mortgage or construction financing would have priority. To the extent that any priority argument could be raised, the Purchasers contracted that these lenders would have a priority over the Purchasers' interest. Second, Parliament sets out a statutory scheme of priorities in bankruptcy. That priority scheme recognizes super priorities for certain statutory deemed trusts. There is no statutory deemed trust in respect of the deposit funds. Further, unlike the applicable statute for condominiums (see s. 81 of the *Condominium Act, 1998*, S.O. 1998, c. 19), the applicable legislation for new homes does not require the recipient of the deposit funds to hold them in trust. There were also no express trusts created, other than in respect of limited agreements where there was an early termination provision. In these cases, however, the monies were not set aside and held in trust by the Stateview entities. Finally, the court is generally reluctant to grant an equitable remedy such as a constructive trust where doing so would upset the priority scheme set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In a bankruptcy, there can be many parties that are negatively impacted, and Parliament has established a priority scheme to deal with what money is available in the bankrupt's estate.

[6] As submitted by Meridian, the first mortgagee on Stateview's Elm project, it is important that the law is interpreted in a way that supports certainty, predictability, and uniformity. The subordination clause in the pre-purchase agreements provides certainty to the lenders regarding their priority status. In terms of predictability, the lenders have lent millions of dollars based on the statutory regime, which does not provide for a statutory deemed trust for Purchaser deposit monies. Finally, the Purchasers are unsecured creditors, and under the BIA priority scheme secured creditors rank ahead.

Background

[7] The moving party, Tarion, is a consumer protection agency that the Ontario government designated to administer the Warranties Act and the regulations thereunder (the "Warranties Regulations").

[8] The Stateview entities owned and operated pre-construction residential development projects.

[9] The Stateview entities were placed into receivership under section 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 pursuant to orders granted on May 2, 2023, and May 18, 2023.

[10] KSV Restructuring was appointed as the Receiver over the Stateview entities' assets.

[11] The expectation is that there will not be sufficient money in the Stateview estates to pay the secured creditors in full.

[12] The beneficiaries of the trust remedy requested in this motion are approximately 765 Purchasers who paid deposits to the Stateview entities in respect of new homes to be built. In total, the deposits amount to approximately $77 million.

[13] Under the terms of the Pre-Sale Purchase Agreements, the Purchasers were not granted any security for the deposits over the Stateview entities' real or personal property.

[14] The deposits paid by the Purchasers were held by the Stateview entities in standard mixed operating bank accounts and were used, in addition to other sources of financing, by the Stateview entities to fund their general operations and the development of the various projects. Most, if not all, of the deposits were spent by the Stateview entities prior to the commencement of the receivership proceedings.

[15] Under the Warranties Act, if a new home purchaser is entitled to a refund of their deposit from a vendor and is unable to obtain such a refund, then the purchaser can make a claim from Tarion's guarantee fund up to a maximum of $100,000. Tarion then can assert a claim against the vendor.

[16] KingSett is owed approximately $168 million by the Stateview entities.

Analysis

[17] Tarion requests declaratory relief from the court. Tarion's view is that clarity is required regarding certain trust and other issues to confirm the protections applicable when purchasers make deposits in respect of freehold homes.

[18] The Receiver did not raise an issue regarding whether it is appropriate for Tarion to seek declaratory relief.

[19] I consider first whether the subordination clause in the Pre-Sale Purchase Agreements is a complete answer to Tarion's motion.

Does the Subordination Clause preclude the Purchasers from asserting a priority claim?

[20] The Purchasers executed agreements in which they agreed that secured mortgages and construction financing would have priority over their interests, which precludes them from now asserting priority.

[21] The Receiver submits that the Subordination Clause contained in the Pre-Sale Purchase Agreements precludes any express contractual trust, unjust enrichment constructive trust, and remedial constructive trust claims by the Purchasers. The relevant Subordination Clause provides:

> **The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary**... **Without limiting the generality of the foregoing the Purchaser agrees that this Agreement shall be subordinated and postponed to the mortgages(s) assumed and/or arranged by the Vendor**... The Purchaser agrees to execute all necessary documents and assurances to give effect to the foregoing as required by the Vendor. Any breach by the Purchaser of this section shall be considered a material breach... Further the Purchaser hereby covenants and agrees that at any time prior to the Closing Date any default by him in the performance of any of his covenants or obligations contained herein shall entitle the Vendor, at its sole option, to terminate this Agreement and upon such termination, all monies paid to the Vendor hereunder shall be forfeited to the Vendor and this Agreement shall be at an end and the Purchaser shall not have any further rights hereunder... [emphasis added]

[22] The Receiver submits that this language is included in the Pre-Sale Purchase Agreements to avoid priority disputes such as the one that is now before this court. The Receiver further submits that it is reasonable to assume that lenders required the inclusion of this language and/or relied upon it.

[23] The Purchasers entered into Pre-Sale Purchase Agreements that contained explicit language acknowledging the priority of any construction financing or other mortgages that are secured on the property over the Purchaser's interest.

[24] Tarion submits that the subordination clause only pertains to the Purchaser's interest in the "Property."[1] I disagree.

[25] As set out above, the Purchaser acknowledges the priority of any construction financing or secured mortgages "over his interest as Purchaser." The word "Property" is used in the above provision to describe the security of the mortgagee not to limit what is covered by the Purchaser's agreement to subordinate. The Purchaser agreed to a complete subordination of his or her interest, which would include any interest in the deposit funds.

[1] "Property" is defined to mean the Dwelling and the POTL collectively. The POTL is the freehold parcel-of-tied land.

[26] I agree that the subordination clause that was contractually agreed to by the Purchasers precludes the Purchasers from asserting a priority claim.

Trust Claims

[27] Tarion has asked the court for declarations in respect of the trust issues in any event, which I next address.

[28] I address first whether there was an express trust in respect of home buyers where the contracts contained an early termination provision. I determine that there was an express trust in respect of these Purchasers.

[29] I next consider whether there was unjust enrichment. The unjust enrichment claim would apply in respect of those Purchasers where there is no express trust. I determine that there was no unjust enrichment because I am not satisfied that there is a lack of juristic reason.

[30] Finally, I consider whether a remedial constructive trust ought to be imposed in respect of the Purchasers where I determined that there was an express trust. I determine not to impose a remedial constructive trust based on the record before me.

Was there an express trust in respect of certain home buyers?

[31] Tarion asserts that the deposits made by the Purchasers in the Elm project (and potentially other home buyers if they had contracts with similar early termination provisions) were subject to an express trust. There are approximately 145 Purchasers in the Elm project, who have in aggregate deposited over $16 million.

[32] I am satisfied that there was an express trust in respect of the contracts containing the early termination provisions.

[33] Purchase agreements for freehold homes in Ontario are required to incorporate the standard form Addendum pursuant to s. 9 of O. Reg. 165/08 passed under the Warranties Act. The Addendum is required to be attached to the agreement of purchase and sale and signed by the purchaser and vendor. The Addendum addresses numerous items, including conditions upon which a vendor may terminate the agreement. If the agreement is conditional on a certain sales threshold or conditional on the vendor obtaining financing (an "early termination provision"), schedule A to the Addendum contains language requiring the deposit amounts to be held in trust until the condition is waived or satisfied. Schedule A to the Addendum further provides that if the vendor fails to hold the deposit amounts in trust pending waiver or satisfaction of the early termination condition, the vendor will be deemed to hold the amounts in trust.[2]

[2] The Vendor of a home is permitted to make the Purchase Agreement conditional as follows:

> b. upon:
>
> i. Subject to paragraph 1(c), receipt by the Vendor of confirmation that sales of homes in the Freehold Project have exceeded a specified threshold by a specified date;

[34] Tarion argues that the Elm project contracts contain an early termination provision regarding satisfactory financing and, therefore, Stateview was required to hold the deposit amounts in trust, or was deemed to do so, under Tarion's standard form Addendum.

[35] There was no evidence before the court as to whether the early termination provision regarding satisfactory financing in the Elm project had been satisfied.

[36] The relevant provisions in Schedule A to the Addendum, where applicable, require the vendor to hold the deposit funds pursuant to a Deposit Trust Agreement. Where the funds are deemed to be held in trust under Tarion's Addendum, they are deemed to be held on the same terms as set out in the form of Deposit Trust Agreement. The Recitals to the Deposit Trust Agreement that was generally used by Tarion include the following:

> B. Each purchaser (a "Purchaser") of a home in the Freehold Project (a "Home" or collectively referred to as the "Homes") has paid or will pay directly to the Escrow Agent in trust deposit monies, including any sums for upgrades and extras (a "Deposit" and collectively referred to as the "Deposits") pursuant to the provisions of the agreement of purchase and sale in connection therewith (the "Purchase Agreement" and collectively referred to as the "Purchase Agreements");
>
> C. The Purchase agreements will include conditions ("Early Termination Conditions") described in subparagraphs 1(b)(i) or 1(b) (ii) of Schedule A to the mandatory addendum form (the "Addendum") required to be attached pursuant to Regulation 165-08 under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended, and all regulations enacted thereunder (the "ONHWP Act") thus pursuant to Section 1(c)(iv) of Schedule A to the Addendum the Deposits are required to be held in trust (the "Purchaser Trust") by the Vendor's lawyer (Escrow Agent) pursuant to the Addendum and subject to the interest of Tarion pursuant to a deposit trust agreement in form specified by Tarion or secured by other security acceptable to Tarion and arranged in writing with Tarion. This Agreement is the afore-mentioned deposit trust agreement.

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ii. Subject to paragraph 1(c), receipt by the Vendor of confirmation that financing for the Freehold Project on terms satisfactory to the Vendor has been arranged by a specified date;

[...]

c. the following requirements apply with respect to the conditions set out in subparagraph 1(b)(i) or 1(b)(ii):

[...]

iv. until the condition is satisfied or waived, all monies paid by the Purchaser to the Vendor, including deposit(s) and monies for upgrades and extras: (A) shall be held in trust by the Vendor's lawyer pursuant to a deposit trust agreement (executed in advance in the form specified by Tarion Warranty Corporation, which form is available for inspection at the offices of Tarion Warranty Corporation during normal business hours), or secured by other security acceptable to Tarion and arranged in writing with Tarion, or (B) failing compliance with the requirement set out in clause (A) above, shall be deemed to be held in trust by the Vendor for the Purchaser on the same terms as are set out in the form of deposit trust agreement described in clause (A) above.

D. Subject to the contractual trust requirements – the Purchaser Trust – under Schedule A to the Addendum the Deposits are to be held in trust with the Escrow Agent until Tarion determines, in accordance with this Agreement, that the Deposit Funds can be released upon and subject to the terms of this Agreement;

E. The Escrow Agent has agreed to hold all of the Deposits received by it from time to time pursuant to the provisions of the Purchase Agreements and this Agreement and to place and invest same in a separate, designated and segregated trust account at, account no. (the "Bank Account"), and to hold and monitor same in trust for Purchasers and Tarion in accordance with the terms and provisions of this Agreement. Interest accruing on all Deposits held in the Bank Account shall remain in the Bank Account and may only be released from and after the Purchaser Trust Termination Date to the Vendor upon the production of Replacement Security (as this term is later defined) or upon Tarion's written confirmation that security in respect of the Deposits is no longer required hereunder, and under those circumstances contemplated in Section 5.2 hereof same shall be paid or remitted to Tarion;

F. The Deposits (together with all prescribed interest earned or accrued thereon, less any amounts released in accordance with the provisions of this Agreement) (the "Deposit Funds") placed or invested in the Bank Account shall constitute continuing security for the payment of the present and future indebtedness and/or liability of the Vendor (the "Secured Obligations") to Tarion in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor and Tarion with respect to the obligations of the Vendor (the "Vendor/Builder Agreement"); and/or (c) the ONHWP Act; and

G. After the provisions of Section 1(c)(iv) of Schedule A to the Addendum no longer apply and the contractual trust for the deposits no longer applies (the "Purchaser Trust Termination Date"), the parties have agreed that the sum of [xxx $ per home] the "Tarion Security Amounts") shall be maintained in trust for Tarion as security for the obligations of the Vendor in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor and Tarion with respect to the Secured Obligations and from and after the Purchaser Trust Termination Date the term Deposits is deemed to be a reference to the amounts referred to in this paragraph G.

[37] The Deposit Trust Agreements contained the following terms:

4.1 The Vendor covenants and agrees with Tarion that:

> a. all Deposit Funds held by the Escrow Agent shall be (a) held in trust for the Purchaser pursuant to the Addendum; and (b) subject to the trust referred to in (a), held in trust for Tarion and subject to Tarion's security interest pursuant to this Agreement;

> b. each of the Purchase Agreements shall provide and stipulate that all Deposits payable on account of the purchase price of any Home shall (prior to the Purchaser Trust Termination Date) be made payable to the Escrow Agent in trust, and as soon as the Vendor has received any funds representing Deposits, the Vendor shall within fifteen (15) business days after receipt of such funds deliver same to the Escrow Agent to be deposited in the Bank Account and held in accordance with the terms of the Addendum and this Agreement;

[38] Tarion submits that the provisions in the Addendum are enough to meet the requirements for an express trust for the benefit of Purchasers who have agreements with an early termination provision. Tarion's position is that the three certainties required for an express trust are satisfied: certainty of intention, certainty of objects, and certainty of subject matter.

[39] First, Tarion submits that the language in Schedule A to the Addendum sets out an intention to create a trust. Tarion submits that both the Purchasers and the applicable Stateview entity's intention that the deposits were to be held in trust was reduced to writing in the Addendum, which is required to be appended to the purchase agreement.

[40] In some cases, the Addendum was attached to the purchase agreement. Where the Addendum was attached to the agreement and there was an early termination provision that had not been met, I am satisfied that there was certainty of intention to create a trust regarding the deposit funds.

[41] I am also satisfied that there was certainty of intention where the Addendum was not attached to the purchase agreement. The Addendum is required under the Warranties Act to be attached. When the Stateview entities entered into the Builder/Vendor agreements with Tarion, the agreements specified that the vendor would ensure that the appropriate Addendum would be attached to each agreement of purchase and sale. As noted, the Addendum requires the vendor to hold the funds in trust until the applicable condition is met.

[42] Second, Tarion argues that the objects are certain. The Stateview vendor is to hold the money in trust for the respective Purchaser. It is clear who is the beneficiary of each trust.

[43] Finally, Tarion submits that the subject matter is certain. That is, until the applicable early termination condition is satisfied, all monies that are paid by the Purchaser to the Stateview vendor are to be held in trust by the Stateview vendor for the benefit of the Purchaser. The terms upon which the monies are held/released are further delineated in the Deposit Trust Agreement.

[44] The Receiver submits that there is no evidence whether some of the deposits have been released or whether the early termination condition has expired. This is a question that would have to be determined in respect of each trust. It does not impact whether an express trust was created.

[45] I am satisfied that there is certainty of subject matter. The monies paid by the Purchaser to the Stateview vendor are the subject matter of the trust. The applicable Stateview entity was required to hold that money in trust for the respective Purchaser in accordance with the trust terms.

[46] I am satisfied that there was an express trust created in respect of the agreements that contained the early termination provision.

[47] However, the deposit funds were not set aside and held in trust by the Stateview entities as required. Accordingly, where an express trust came into existence, and where the applicable termination condition has not been satisfied, and the trust funds have not been set aside and held in trust, the express trust terms would have been breached. Accordingly, below I discuss the requested remedy of constructive trust.

[48] While I agree with Tarion that there was an express trust created in respect of the agreements that contained the early termination provision, it is not a statutory deemed trust. A statutory trust is a "trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property:" *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225 ("*Guarantee Company*"), at para. 18. For statutory deemed trusts, the legislation deems the trust into existence. As noted by the Supreme Court in *Canada v. Canada North Group Inc.*, 2021 SCC 30, 460 D.L.R. (4th) 309, at paras. 118 and 119, statutory deemed trusts are "unique legal vehicle[s]" and do "not have to fulfill the ordinary requirements of trust law."

[49] The Warranties Act and Warranties Regulations do not create a statutory deemed trust. Instead, the Warranties Regulations require the parties to agree to create a trust and include deeming language if certain conditions are met. While the Schedule to the Addendum refers to the deposit amounts being deemed to be held in trust until the early termination provision is satisfied if the funds are not set aside in trust, this is not a statutory deemed trust. A statutory deemed trust is a creature of legislation and cannot be created by the parties agreeing to the terms of the Addendum. Although the Warranties Regulations require the Addendum, neither the statute nor the regulations deem a trust into existence or "impose a "statutory trust obligation", namely, an obligation on a person to hold in trust certain property:" *Guarantee Company*, at para. 19.

Was there unjust enrichment in respect of the Purchasers without an express trust?

[50] As noted above, the agreements in respect of the Elm project contained an early termination provision. However, there was no evidence as to whether there were similar early termination provisions in the contracts for the other projects. Where the applicable agreement does not contain an early termination provision, an express trust would not have been created further to the terms of the contract/Addendum. Tarion asks the court to find that there was unjust enrichment in respect of those Purchasers who did not have an express trust.

[51] I am not satisfied that there was unjust enrichment in respect of the Purchasers who did not have an express trust.

[52] Tarion submits that the Stateview entities were unjustly enriched by their misappropriation of the deposits in respect of all Purchasers. Tarion's position is that all Purchasers are entitled to a constructive trust remedy or good conscience trust remedy because of the unjust enrichment.

[53] For the court to find unjust enrichment, the court must be satisfied that there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment or deprivation: *Becker v. Pettkus*, [1980] 2 SCR 834, at p. 835.

[54] The Stateview entities were clearly enriched with the deposits made by the Purchasers, and the Purchasers have been correspondingly deprived. The Purchasers provided the deposit monies to the Stateview entities in good faith toward the purchase of new build homes. These Purchasers no longer have their deposit funds and given the insolvency proceedings, are not going to have the home they contracted to purchase.

[55] The issue is whether there is a juristic reason to allow the enrichment or deprivation. The Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 ("*Kerr*") described this element of the test for unjust enrichment as follows, at paras. 40 and 41:

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention unjust in the circumstances of the case.
>
> Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract". [Citations omitted.]

[56] Tarion submits that there is no juristic reason justifying the enrichment or deprivation. Tarion points to the Purchase Agreements and submits that the Stateview entities were not permitted to take the benefit of the deposits paid by the Purchasers and give them nothing in return.

[57] The Receiver submits that contract breaches in insolvencies are different because every creditor before the court has a claim. In an insolvency, for a party to have an absence of juristic reason for the enrichment or deprivation, the Receiver argues that there must be more than a breach of contract. The Receiver argues that in the absence of express statutory or contractual trusts, the Stateview entities were free to use the deposits in the everyday operation of their business, which they did.

[58] The Receiver submits that the operation of the BIA is in and of itself a juristic reason that precludes the possibility of a constructive trust. The Alberta Court of Appeal in *Bassano Growers ltd. v. Price Waterhouse Ltd.* (1997), 6 CBR (4th) 188 ("*Bassano Growers*"), citing the British Columbia Court of Appeal in *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215, noted that the operation of the BIA can be a juristic reason precluding a constructive remedy, at para. 19:

> Before a constructive trust can be imposed, unjust enrichment must be established, see *Becker v. Pettkus*, [1980] 2 S.C.R. 834. An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason

> to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the BIA. The British Columbia Court of Appeal was asked to find a constructive trust in *National Bank,* supra where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, **the operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy**, *National Bank,* supra at 238. [emphasis added]

[59] The Receiver further notes that, as highlighted in *Kerr*, one consideration for the court is the legitimate expectations of the parties. Here, the Purchasers entered into Pre-Purchase Agreements with clear subordination clauses. The expectation of the secured mortgagees would be that the Purchasers would not then assert a priority claim.

[60] I agree with the Receiver. I am not satisfied that there is an absence of juristic reason in this case. The Stateview entities were free to use the deposit funds in their business because there was no express trust or statutory trust over the deposit funds. The Stateview entities are now in bankruptcy and there are limited funds to go around. The BIA contemplates how creditors will be addressed in an insolvency. Similar to *Bassano Growers*, the fact that the deposit funds were retained by the Stateview entities upon bankruptcy does not give rise to an unjust enrichment. "[T]he operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy."

[61] In addition, the Purchasers agreed to subordinate their interests to the secured mortgagees and construction financing claimants. This is yet another reason why there is not an absence of juristic reason in this case.

[62] Accordingly, the Purchasers have not established unjust enrichment.

[63] Given that there is no unjust enrichment, the Purchasers that do not have an express trust cannot seek the imposition of a constructive trust.

Imposition of a constructive trust

[64] I next consider whether the Purchasers would be entitled to a constructive trust over the deposit funds where an express trust arose and there was a breach of such express trust by Stateview. Because I have concluded that the Purchasers who do not have an express trust have not established unjust enrichment, there is no need to consider whether a constructive trust should be imposed for those Purchasers.

[65] Where there has been a breach of an express trust, remedies may include damages or compensation, or recovery of the property through tracing. In this case, it was submitted that tracing would not be possible because of the status of the finances of the Stateview entities.

[66] Tarion submits that the proper remedy for the Stateview entities' breach of an express trust in respect of certain Purchasers is to impress the proceeds from the sale of the real property with a constructive trust for the Purchasers' benefit.

[67] A constructive trust is an equitable remedy that the court has jurisdiction to impose. The constructive trust is a proprietary remedy. It is granted over specified property. Where a constructive trust is granted, the property is removed from the bankrupt's estate, which effectively reorganizes the BIA priorities: *306440 Ontario Ltd. v. 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548, 324 O.A.C. 21 ("*Alrange Container Services*"), at para. 24.

[68] Here, Tarion asks the court to declare that the Purchasers are entitled to a constructive trust in the proceeds of sale from the real property as a remedy for breach of trust. The imposition of a constructive trust would effectively remove the property subject to the trust from the estate of the Stateview entity.

[69] A constructive trust is available as a remedy where a party has been unjustly enriched to the prejudice of another party, or a party has obtained property by committing a wrongful act, such as a breach of a fiduciary obligation: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 ("*Soulos*"), at para. 36.

[70] A constructive trust arising from a wrongful act may be imposed by the court. As set out in *Soulos*, at para. 45, there are certain conditions that generally should be met before a constructive trust is ordered:

> a. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in the defendant's hands;
>
> b. The assets in the defendant's hands must have resulted from agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
>
> c. The plaintiff must show a legitimate reason for seeking a proprietary remedy; and
>
> d. There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.

[71] In considering the above in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor, specifically the impact on other creditors: *Caterpillar Financial Services v. 360networks corporation*, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, at para. 66, *KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458, 190 D.L.R. (4th) 47, at para. 71, and *Creditfinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377 ("*Creditfinance*"), at para. 44. If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high:" *Creditfinance*, at paras. 32 and 33.

[72] In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and effectively take funds from the secured creditors to pay certain unsecured creditors.

[73] In *Ascent Ltd. (Re)*, [2006] 18 C.B.R. (5th) 269 (ON SC) ("*Ascent*"), this court imposed a constructive trust in an insolvency proceeding. However, in that case the court had made an order that Ascent set aside $24,374 and hold it in trust for a certain creditor pending certain events. Ascent did not set aside and hold the funds in trust as had been ordered. Accordingly, when Ascent was assigned into bankruptcy, the affected creditor argued that the proper remedy was a declaration of constructive trust over Ascent's assets sufficient to provide the creditor with the $24,374 that had been ordered by the court to be held in trust. The court found that there was unjust enrichment. In the court's analysis of whether there was juristic reason, the court emphasized that there was an intervening Court Order requiring the funds to be set aside and held in trust. The court stated, at para. 15, that the failure to comply with the Court Order was the source of the unjust enrichment. In determining that a constructive trust was an appropriate remedy, the court also referred to the failure to comply with the Court Order, and stated, at para. 17:

> It is also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. <u>It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment</u>. [Emphasis added.]

[74] Unlike *Ascent* there was no court order in the instant case requiring the Stateview entities to hold the deposit funds in trust. There was an express trust, and the Stateview entities, in their capacity as trustee, failed to adhere to the terms of the trust.

[75] Further, a constructive trust, which is not otherwise available, cannot be imposed by the court for the purpose of altering the priority scheme under the BIA: *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.).

[76] For a court to order a constructive trust remedy in a bankruptcy case, there must be a close and causal connection between the property over which the party seeks the constructive trust and the misappropriated trust property. The Court of Appeal in *Alrange Container Services*, stated at paras. 26 and 27:

> The very nature of the constructive trust remedy demands a close link between the property over which the constructive trust is sought and the improper benefit

> bestowed on the defendant or the corresponding detriment suffered by the plaintiff. Absent that close and direct connection, I see no basis, regardless of the nature of the restitutionary claim, for granting a remedy that gives the plaintiff important property-related rights over specific property. A constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant. [...]
>
> Professor Paciocco goes on to argue that the requirement of a close connection between the property over which the trust is sought and the product of the unjust enrichment is particularly strong in the commercial context. He observes, at p. 333:
>
> > In the commercial contest where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law.

[77] Tarion acknowledges that a close causal connection to the property is required. Tarion cited *British Columbia Securities Commission v. Bossteam E-Commerce Inc.*, 2017 BCSC 787 ("*Bossteam*") as support for their position that establishing a close causal connection does not necessarily require forensic tracing. *Bossteam* involved an award of a constructive trust for fraud, and this award meant that defrauded investors benefitting from the trust were given priority over other creditors. This award was granted notwithstanding the fact that there was no tracing because the court found evidence of a close causal connection between the property in the bank account and the investor's money: *Bossteam*, at para. 36.

[78] Tarion submits that there is a close causal connection between the deposit monies and the proceeds of sale from the real property. Tarion points to Mr. Pollack's affidavit where he stated that certain monies funded from KingSett, the High Crown Real Property first mortgagee, and Purchaser deposits were for the purpose of paying development charges and cash in lieu of parkland dedication in connection with the High Crown Real Property. However, Mr. Pollack further stated that approximately half of those funds were inappropriately diverted for other purposes. The Receiver submits that Tarion has not provided any material evidence as to how the Purchaser deposits were used to improve or acquire the real property. The Receiver further notes that Tarion's assertion is contradicted by Tarion's other allegation that the deposits were misused in ways that were unconnected to the real property projects.

[79] I am not satisfied that Tarion has established a close causal connection between the deposits and the proceeds from the sale of the real property such that a proprietary remedy is appropriate in the circumstances.

[80] In addition, I am not satisfied that "extraordinary circumstances" exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme. Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have

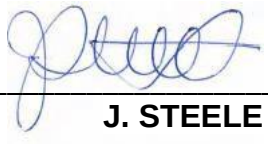
appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.

[81] In my view the fact that the Purchasers agreed to the Subordination Clause in the Pre-Sale Purchase Agreements is also a factor weighing against the ordering of this remedy.

[82] As noted above, the express trusts are individual trusts that arose between each individual Purchaser and the respective Stateview entity. There was not evidence before the court on each trust relationship. Accordingly, I am not foreclosing the possibility of the court in an individual case determining that a constructive trust remedy could be appropriate in the specific circumstances.

Disposition

[83] Tarion's motion is dismissed.



J. STEELE J.

Date of Release: December 20, 2023

Tab 7

CITATION: Credifinance Securities Limited v. DSLC Capital Corp., 2011 ONCA 160
DATE: 20110302
DOCKET: C51766

COURT OF APPEAL FOR ONTARIO

Goudge, Sharpe and LaForme JJ.A.

In the Matter of the Bankruptcy of Credifinance Securities Limited, of the City of Toronto, in the Province of Ontario

BETWEEN

Deloitte & Touche Inc.,
in its Capacity as Trustee in Bankruptcy of
Credifinance Securities Limited

Appellant

and

DSLC Capital Corp.

Respondent

Catherine Francis, for the appellant

Gregory Sidlofsky, for the respondent

Heard: January 7, 2011

On appeal from the order of Justice F. N. Marrocco of the Superior Court of Justice, dated February 16, 2010, with reasons reported at 63 C.B.R. (5th) 250.

H.S. LaForme J.A.:

INTRODUCTION

[1] Credifinance Securities Limited ("Credifinance") made an assignment in bankruptcy. DSLC Capital Corp. ("DSLC") filed a proof of claim in the amount of $400,000. In its proof of claim, DSLC maintained that the sum of $310,500 in the possession of Credifinance was its property. Deloitte & Touche Inc., as Trustee of Credifinance (the "Trustee"), denied the claim in full. DSLC appealed that decision in the Superior Court.

[2] The appeal judge found that DSLC had been defrauded into loaning Credifinance the $400,000. The appeal judge granted DSLC a constructive trust over what remained of the loan – $310,500 – and determined that it did not form part of the bankrupt estate. The Trustee appeals this decision.

[3] DSLC cross-appeals, seeking leave to appeal the decision of the appeal judge not to award costs to DSLC. If leave is granted, DSLC is seeking an award of costs against the Trustee personally.

BACKGROUND

[4] There is a good deal more to the factual background of this case than what I propose to set out. What I intend to do is simply provide that background that I believe is necessary to give context to my analysis and ultimate conclusions.

The lawsuit

[5] On February 6, 2009, DSLC issued a notice of action against Credifinance, Georges Benarroch (who controlled Credifinance) and others and obtained an *ex parte* Mareva injunction.

[6] On March 6, 2009, DSLC filed a statement of claim seeking damages, an Order winding up Credifinance, oppression remedy relief, and the appointment of a receiver. DSLC did not assert a constructive trust claim; rather, it alleged that Credifinance had failed to repay the $400,000 loan.

[7] On April 2, 2009 DSLC amended its claim seeking an Order rescinding the Subscription Agreement and the Share Purchase Agreement (the agreements related to the loan and the relationship between DSLC and Credifinance) on the basis of the alleged "dishonest and fraudulent conduct of the defendants". DSLC repeated its allegation that Credifinance had refused to repay the $400,000 loan.

[8] On April 20, 2009, the Mareva injunction was dismissed as against the defendants other than Credifinance. However, the motion judge ordered that $310,500 be preserved pursuant to r. 45.02 of the *Rules of Civil Procedure*, whereupon the injunction would be dissolved against Credifinance. He found that, of the $460,000 that had been frozen in Credifinance's bank accounts, $310,500 on deposit with the National Bank could be identified as remaining from the $400,000 loan.

[9] On July 23, 2009, Credifinance's motion for leave to appeal the order of the motion judge was dismissed. On August 24, 2009 Benarroch assigned Credifinance into bankruptcy. Credifinance has never paid the $310,500 into court.

[10] The only creditors of Credifinance are DSLC, Benarroch – directly and through a corporation – and Benarroch's lawyers. Benarroch and his company Credifinance Capital Corp. allege that they are secured creditors owed $127,032.07. The lawyers who represent the defendants including Benarroch claim to be owed a total of $128,546.25.

The trustee proceedings

[11] Before setting out the basic facts of this part of the background, I think it will be useful to set out the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) that are at the core of this appeal. Section 81 provides in part:

> **81.** (1) Where a person claims any property or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.
>
> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee'[s] decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all

> his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.

[12] On September 9, 2009, pursuant to this section, DSLC filed a property proof of claim with the trustee claiming a property interest in the $310,500 that remained on deposit in Credifinance's bank account. In the proof of claim, DSLC outlined the basic facts relied upon, including the allegation of fraudulent misrepresentations made by Credifinance, and asserted that "the $310,500 are trust funds belonging to DSLC".

[13] In its notice of dispute of this claim dated September 25, 2009, the Trustee refused to consider the merits of DSLC's fraud allegations and denied DSLC's property claim. In doing so, and among other things, it responded with this: "The allegations of fraudulent misrepresentation made by DSLC, even if they could be established, are incapable at law of elevating DSLC's subordinate unsecured claim to the status of a property claim with priority over the Trustee or other creditors of the bankrupt."

[14] DSLC appealed the Trustee's decision and by agreement, the matter was placed on the Commercial List to be heard by a judge of the Superior Court. The procedure to be followed for the hearing was agreed upon by counsel for the parties and reflected in a case conference order. As set out in the order, the parties agreed to file and rely on affidavits and transcripts from the civil proceeding and DSLC would also call *viva voce* evidence. Counsel for the Trustee declined to call witnesses as she expressly intended to rely only on the affidavit and transcript evidence from the civil proceeding.

[15] The appeal judge conducted what he called a hearing *de novo* and, as I noted earlier, allowed DSLC's appeal. He awarded DSLC a constructive trust over the $310,500. He made no order as to costs – he held that, given the result of his order on the estate would mean it has "virtually no assets".

The position of the Trustee

[16] The Trustee's position is that the appeal judge erred in determining DSLC's fraud allegations in the context of an appeal from a disallowance. It says that these issues were not properly before the court. Rather, the issue before the court was whether DSLC could, at law, establish a property claim to the funds in priority to the interests of the Trustee.

[17] The Trustee decided that DSLC could not establish a property claim to the funds and that the loan advance was not required to be held in trust. Accordingly, it disallowed DSLC's proof of claim. This was, it argues, based upon well-established legal principles and admissions from DSLC's own representatives that DSLC's interest in the funds was subordinate to the interests of Credifinance's other creditors.

The position of DSLC

[18] DSLC asserts that the hearing before the appeal judge proceeded as a hybrid trial of an issue. It submits that the procedure adopted for the hearing was agreed to by the parties and was the appropriate means to determine the issues. That is, by agreement of

counsel, the Trustee and DSLC each filed and relied on various affidavits and transcript evidence from a related civil proceeding. DSLC also called *viva voce* evidence at the hearing in support of its fraud allegations.

[19] The issue for the appeal judge, DSLC argues, was whether DSLC was defrauded into loaning the $400,000 to Credifinance – the appeal judge's finding of fraud is a finding of fact supported by the evidence.

[20] I would dismiss the appeal. I conclude that both the process followed by the appeal judge and the issues he decided were, in the circumstances of this case, correct in law. I also conclude that the appeal judge committed no errors in either his decision or his analysis. Finally, I would not grant DSLC leave to appeal the issue of costs. This is not an obvious case where leave should be granted.

DISCUSSION

[21] The Trustee essentially disputes the factual and jurisdictional basis for the appeal judge's remedy under the statutory regime of the BIA. The essence of the Trustee's appeal to this court, and the answer to it, I believe, is bound up in two questions. First, did the Trustee agree to the process and the issue to be decided? Second, was it within the jurisdiction of the court to proceed in the fashion it did and to decide the issue it did? I find that the answer to both is "yes", and I conclude that the appeal should be dismissed.

(1) The process

[22] By way of brief summary, under the BIA the Chief Justice of the Ontario Superior Court of Justice designates judicial officers who sit as part of Ontario's Bankruptcy Court. Appeals from a decision made by a Trustee in bankruptcy proceedings are most often made to a Registrar of the Ontario Bankruptcy Court. From time to time, however, appeals are heard by judges of the Superior Court.

[23] It seems that in Ontario the usual course for appeals under the BIA may be to proceed by way of *viva voce* evidence. This includes appeals under s. 81 of the BIA of a Notice of Dispute of property claims. Occasionally the court permits these appeals to proceed by way of affidavit evidence or partly by way of affidavit evidence and partly by way of *viva voce* evidence: *Katz (Bankruptcy) (Re)* (2005), 14 C.B.R. (5th) 193 (Ont. S.C.) at paras. 4 and 5.

[24] At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance, will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: *Charlestown Residential School (Re)* (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.

[25] I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the BIA is not intended to be a trial *de novo* but

rather a true appeal: *Galaxy Sports Inc. (Re)* (2004), 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency.

[26] This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency in the operation of the bankruptcy scheme would be lost. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the BIA, which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality: *Galaxy Sports* at para. 41.

[27] However, since counsel before us did not raise the issue of the correctness of this practice, I do not intend to comment on it further. This is not the case that requires this court to consider the merits of the Ontario practice. I would add that the practice appears to have been developed mainly through decisions of Ontario's Bankruptcy Court.

[28] The procedure adopted for the hearing of the appeal in this case was agreed to by the parties and was, in their view, the appropriate means to determine the issues. On that there is no dispute. There is, however, a dispute that the Trustee describes as this: the Trustee did not seek a trial of DSLC's fraud allegations against Benarroch, nor was it the

Trustee's understanding that such allegations were supposed to have been tried before the appeal judge.

[29] There is no doubt that DSLC's appeal of the Trustee's Notice of Dispute was focused entirely on its allegation of fraud. That was the very issue it sought to have decided by the appeal judge. At para. 2 of his reasons, the appeal judge describes DSLC's position on the appeal this way:

> [T]hat it is the victim of a fraud at the hands of Georges Benarroch and that, as a result of that fraud, it loaned $400,000 to Credifinance Securities Limited. According to DSLC Capital Corp., the $310,500 is directly traceable to that $400,000 loan and, therefore, should be impressed with a constructive trust in favour of DSLC Capital Corp.

[30] It was DSLC's appeal. It framed the issue to be heard by the appeal judge, and all parties agreed to the process to be followed. While the Trustee may have disagreed with what issue was to be decided, the appeal judge was required to address the issue put forward by DSLC. I fail to see where he committed any error in doing so. There is no merit to this submission.

(2) The fraud issue

[31] Before the appeal judge, counsel for the Trustee – who is also counsel on this appeal – took two positions that demonstrate that the Trustee was fully engaged in the issue of fraud that she now asserts the appeal judge had no jurisdiction to decide. First, she argued that, even if there was a fraudulent misrepresentation, it would not allow

DSLC to bypass the BIA. Her view was – as it continues to be – that in bankruptcy proceedings, there is no special status accorded to a victim of a fraud.

[32] Second, she fairly conceded – again as she does here – that constructive trust principles can be applied in bankruptcy proceedings, however, those principles are applied only in the most extraordinary cases. She relies on *Ascent Ltd. (Re)* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.) as illustrating such a case. Indeed, in her oral submissions, counsel conceded that a trustee could, albeit in extraordinary circumstances, find a *de facto* constructive trust by allowing the property claim, or otherwise refer the issue for a hearing before a Bankruptcy Registrar or judge of the Superior Court.

[33] There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8): "A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).

[34] *Ascent*, a case decided by an Ontario Registrar in Bankruptcy, is a case that demonstrates the type of circumstances that can make a case extraordinary. I found this case to be very instructive.

[35] The Registrar in *Ascent* held that in its role as the arbiter of commercial morality, the Bankruptcy Court can rely on equitable principles, "even at the expense of the formulaic aspects of the BIA scheme of distribution": para. 17.

[36] An example of commercial immorality is described in *Ascent* as being where a bankrupt and its creditors benefit from misconduct by the bankrupt which was the basis upon which the property was obtained. The Registrar held that to permit an estate to retain the property in such circumstances amounts to an unjust enrichment, and the court can impose a constructive trust on an estate's assets to remedy the injustice. Furthermore, "it matters not which assets are consumed to remedy this": para. 18.

[37] Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.

[38] A Trustee in bankruptcy is an officer of the court and must act in an equitable manner. Enriching creditors with a windfall and depriving another of its interest in property, has been held to be an offence to natural justice. As Karakatsanis J. (as she then was) held at para. 14 in *Elez (Re)* (2010), 54 E.T.R. (3d) 31 (Ont. S.C.), "The court will not allow the trustee, as an officer of the court, to stand on his legal rights if to do so would offend natural justice" (citations omitted).

[39] Some of the relevant findings of the appeal judge, which demonstrate why this case is somewhat exceptional, bear repeating:

> [23] I am also satisfied, on a balance of probabilities, that, but for the deceit, Mr. Lorenzo [the director of DSLC who negotiated with Benarroch] would not have entered into any agreement concerning Credifinance Securities Limited, would not have lent Credifinance Securities Limited $400,000, and Credifinance would not have $310,500 in its bank account.
>
> [24] At present, it appears that Georges Benarroch and a company he controls, Credifinance Capital Corp., have filed secured claims in the bankruptcy of Credifinance Securities Limited. It appears that the other creditors are lawyers who acted for Credifinance Securities Limited in the litigation against DSLC Capital Corp and its attempts to recover the $400,000 and in the IDA [Investment Dealers Association] investigations. In this regard, it is also a fact that Georges Benarroch, through his company, Donabo Inc., has guaranteed the fees of the Trustee.

[40] Thus, as the appeal judge found, DSLC was the victim of a fraud perpetrated by Credifinance and Benarroch. Importantly, the only creditors of Credifinance impacted by the appeal judge's order are Benarroch and his lawyers. Enriching Benarroch, therefore, with a windfall and depriving DSLC of its interest in the $310,500 would be fundamentally unjust.

[41] The constructive trust granted by the appeal judge was just in the circumstances of this case and did not unjustly deprive creditors of their rights under the BIA. In the words of the appeal judge at para. 34, "those funds should be the subject of a constructive

trust in favor of DSLC Capital Corp. in order to prevent the unjust enrichment of Credifinance Securities Limited."

[42] It was within the appeal judge's jurisdiction to grant the remedy he did. Furthermore, there was ample evidence upon which the appeal judge could rely to make the findings he did, and they are reasonable and entitled to deference from this court. I would, therefore, reject this argument.

[43] Before leaving this issue, I believe it is important to make a final observation. The appeal judge's reasons should not be interpreted to suggest that once a civil fraud by the bankrupt on the claimant, whose claim was disallowed by the trustee, is proven, and that is coupled with a loss and an ability to trace the consequences of the fraud, then a constructive trust will always be imposed. That, in my view, is too broad.

[44] Constructive trust is a discretionary remedy. In a bankruptcy there are other interests to consider besides those of the defrauder and the defraudee: there are other creditors. Thus, the exercise of remedial discretion must be informed by additional considerations than in a civil fraud trial. The appeal judge in our case clearly understood this, considered the claims of the creditors, found them to be tainted by Benarroch's misconduct, and concluded that a rigid formulaic approach, relying strictly on the letter of the BIA would produce an unjust result.

THE CROSS-APPEAL

[45] The appeal judge's decision on costs is explained in full in his reasons at para. 35: "Having regard to the fact that the effect of my ruling means that the Estate of Credifinance Securities Limited has virtually no assets, there will be no order concerning costs." DSLC in its cross-appeal asserts that this was an error and the appeal judge's decision is not entitled to deference. I disagree.

[46] The general rule in these types of proceedings is found in the provisions of the BIA. Section 197(1) provides that the costs of and incidental to any proceedings in court under the BIA are in the discretion of the court. Section 197(3) provides that where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding, he is not personally liable for costs unless the court otherwise directs.

[47] As this court held in *McNaughton Automotive Ltd.* v. *Co-operators General Insurance Co.* (2008), 95 O.R. (3d) 365 (C.A.) at paras. 23-26, leave to appeal a costs decision is granted sparingly and only in obvious cases. This is because decisions as to costs are highly discretionary and are accorded a very high degree of deference. Generally, they will only be interfered with where it can be demonstrated that the decision maker is plainly wrong or has made an error in principle.

[48] While trustees in bankruptcy are not exempt from liability for costs, the jurisprudence in the field suggests that they will only be liable in limited circumstances:

see *Farm Mutual Financial Services Inc. (Re)* (2010), 66 C.B.R. (5th) 85 (Ont. S.C.). I fail to see any such limited circumstances in this case. DSLC has not met its heavy burden and has not satisfied me that this is an obvious case.

[49] Accordingly, I would deny DSLC leave to appeal the award of costs.

DISPOSITION

[50] For the reasons herein I would dismiss the Trustee's appeal. I would deny DSLC leave to appeal the costs order of the appeal judge.

[51] Although DSLC was unsuccessful on its cross-appeal, it was wholly successful in the main appeal. After factoring this into my analysis, I would award DSLC its costs in this court fixed in the amount of $20,000, inclusive of disbursements and taxes, paid from the estate.

RELEASED:

"MAR -2 2011" "H.S. LaForme J.A."

"STG" "I agree S.T. Goudge J.A."

"I agree Robert Sharpe J.A."

Tab 8

194 F.3d 357
United States Court of Appeals,
Second Circuit.

Josephine COUNIHAN,
Plaintiff–Appellant,
United States of America,
Plaintiff–Intervenor–Appellee,
v.
ALLSTATE INSURANCE CO., Defendant.

No. 98–6163.
|
Argued: May 25, 1999.
|
Decided: Oct. 13, 1999.

Synopsis

After arson partially destroyed residential dwelling which United States sought to seize by forfeiture, claimant brought suit against insurer of the property to recover insurance proceeds. United States intervened. The United States District Court for the Eastern District of New York, Wexler, J., imposed constructive trust in favor of United States, and claimant appealed. The Court of Appeals, Miner, Circuit Judge, held that constructive trust was proper.

Affirmed.

Attorneys and Law Firms

***358** Richard B. Lind, New York, NY, for Plaintiff–Appellant.

Charles S. Kleinberg, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney, Eastern District of New York, Deborah B. Zwany and Arthur P. Hui, Assistant United States Attorneys), for Plaintiff–Intervenor–Appellee.

Before: KEARSE, MINER and McLAUGHLIN, Circuit Judges.

Opinion

MINER, Circuit Judge:

Plaintiff–Appellant Josephine Counihan appeals from a judgment entered in the United States District Court for the Eastern District of New York (Wexler, J.) imposing a constructive trust in favor of plaintiff-intervenor-appellee the United States of America (the "government" or the "United States") on benefits paid pursuant to an insurance policy issued by defendant Allstate Insurance Co. ("Allstate"). During the course of forfeiture proceedings against Counihan, but prior to the final entry of judgment, the property which the United States sought to seize by forfeiture was partially destroyed by arson. After the fire, Counihan brought the action giving rise to this appeal against Allstate to recover the insurance proceeds. The United States intervened in the action, asserting that it was entitled to the benefits of the fire insurance policy under a theory of constructive trust. The district court imposed a constructive trust on the proceeds, concluding that Counihan would ***359** be unjustly enriched if she were to receive the benefits of the fire insurance policy.

Affirmed.

BACKGROUND

The extensive background of this action is set out in our three previous opinions dealing with this litigation. *See Counihan v. Allstate Ins. Co.,* 25 F.3d 109 (2d Cir.1994) (Miner, J.), *United States v. Certain Real Property,* 990 F.2d 1250 (2d Cir.1993) (summary order), *United States v. 890 Noyac Road,* 945 F.2d 1252 (2d Cir.1991). We presume familiarity with each of those opinions and recount here only those facts most pertinent to the resolution of this appeal.

Josephine Counihan owned a one-half interest in property at 890 Noyac Road in Noyac, New York (the "Property"). In July of 1988, police raided the Property and arrested Thomas Counihan, Counihan's son, for drug dealing. In February of 1989, the government filed a complaint *in rem* seeking forfeiture of Counihan's interest in the Property pursuant to 21 U.S.C. § 881(a)(7) (the "forfeiture action"), predicating forfeiture on Counihan's knowledge of the prior drug activity at the Property. In response, Counihan filed a claim in the forfeiture action as an innocent owner. In December of 1989, Counihan renewed an insurance policy on the residence that she had first obtained a year earlier from Allstate.

In July of 1990, a jury in the forfeiture action returned a verdict in the government's favor, and the district court entered a judgment of forfeiture. Counihan appealed the judgment and continued to exercise the incidents of ownership without objection from the government. On November 1, 1990, arson destroyed the Property. In October of 1991, we reversed the judgment of forfeiture and remanded for a new trial, holding that the district court abused its discretion by allowing a post-trial amendment of the complaint to set forth matters that occurred after July 22, 1988, the date Thomas Counihan was arrested. *See 890 Noyac Road,* 945 F.2d at 1259. After reversal, in October of 1991, Counihan instituted the action giving rise to this appeal in order to recover the proceeds of the insurance policy due on account of the fire (the "insurance action").[1]

On remand in the forfeiture action, a jury again returned a verdict in the government's favor, and the district court entered a final judgment of forfeiture in May of 1992. On appeal, we affirmed the judgment. *See Certain Real Property,* 990 F.2d 1250. Pursuant to the forfeiture judgment, the government sold the property for $50,000. From these proceeds, the government paid closing costs and Counihan's first mortgage debt of $32,275.25, receiving net proceeds of $5,000.

In August of 1993, the parties cross-moved for summary judgment in the insurance action. The district court granted Allstate's motion and dismissed the complaint, concluding that Counihan had no insurable interest in the Property at the time of the fire due to the "relation-back" provision of the Comprehensive Drug Abuse Prevention & Control Act of 1970, 21 U.S.C. § 881(h). *See Counihan v. Allstate Ins. Co.,* 827 F.Supp. 132, 136 (E.D.N.Y.1993). On appeal, we reversed and remanded. *Counihan,* 25 F.3d 109. We held that the "relation-back" provision of the statute could not serve retroactively to divest Counihan of the Property because, at the time

of the fire, the final judgment of forfeiture had not been entered and Counihan therefore still had an insurable interest in the Property. *See id.* at 113. We commented that

> ***360** [e]ven if arson is not detected, it lies within the power of the government to reach the proceeds of the fire insurance policy through various means.
>
> The government may seek to intervene in an action brought by the owner to recover the insurance proceeds.... After a final adjudication of forfeiture, it is open to the government to assert ownership of the proceeds on a claim of constructive trust.

Id.

In November of 1995, the district court granted a motion by the government to intervene in the insurance action. *See Counihan v. Allstate Ins. Co.,* 907 F.Supp. 54, 55 (E.D.N.Y.1995). Prior to trial, Allstate agreed to pay the fire insurance proceeds plus interest into an escrow account, to be held until Counihan and the United States resolved the issue of entitlement to the proceeds. Thereafter Counihan and the United States stipulated

> that the Court can take judicial notice of all prior proceedings, filings and opinions in [the forfeiture action] and [the insurance action], and can make findings of fact based thereon.

On June 16, 1998, the district court issued its decision, listing twenty numbered findings of fact and seven conclusions of law, determining that the government was entitled to the policy proceeds under a theory of constructive trust. The court noted that the purpose of a constructive trust is to prevent unjust enrichment and found that retention of the insurance policy proceeds by Counihan would result in her unjust enrichment. In imposing the constructive trust, the district court observed that the government's right to the proceeds did not depend upon a showing of Counihan's involvement in the arson. The district court concluded that, under the circumstances, equity and good conscience dictated the remedy provided. Judgment was entered accordingly, and this appeal followed.

DISCUSSION

On appeal, we review the district court's underlying findings of fact for clear error, and its conclusions of law are reviewed *de novo. See Herman v. RSR Sec. Servs. Ltd.,* 172 F.3d 132, 139 (2d Cir.1999); *Brand v. Brand,* 811 F.2d 74, 77–78 (2d Cir.1987) (affirming district court's imposition of a constructive trust). In this diversity action, we apply the substantive law of New York. *See id.* at 77.

“ ‘[A] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.’ ” *Simonds v. Simonds,* 45 N.Y.2d 233, 241, 408 N.Y.S.2d 359, 380 N.E.2d 189 (1978) (quoting *Beatty v. Guggenheim Exploration Co.,* 225 N.Y. 380, 386, 122 N.E. 378 (1919) (Cardozo, J.)); *see* 106 N.Y.Jur.2d Trusts § 162 (1993) (“a person may be deemed to be ‘unjustly enriched’ if he has received a benefit, the retention of which would be unjust”).

Constructive trusts have been imposed in a variety of situations where equity had dictated such a remedy. *See, e.g., United States v. Coluccio,* 51 F.3d 337, 340 (2d Cir.1995) (constructive trust imposed in favor of claimant's mother who provided monies to secure cost bond so that claimant could contest criminal seizure of his aircraft); *Golden Budha Corp. v. Canadian Land Co. of America,* 931 F.2d 196, 202 (2d Cir.1991) (cause of action stated against party allegedly in possession of converted treasure trove); *Latham v. Father Divine,* 299 N.Y. 22, 29, 85 N.E.2d 168 (1949) (constructive trust imposed where fraud, duress or undue influence prevented testatrix from executing a will bequeathing property to others); *G & M Motor Co. v. Thompson,* 567 P.2d 80, 84 (Okla.1977) (constructive trust impressed upon proceeds of life insurance policies where portion of premiums paid with embezzled funds).

***361** A constructive trust is an equitable remedy, necessarily flexible to accomplish its purpose. *See Simonds,* 45 N.Y.2d at 241, 408 N.Y.S.2d 359, 380 N.E.2d 189. Its purpose is to prevent unjust enrichment, although unjust enrichment does not necessarily implicate the performance of a wrongful act. *See id.* at 242, 408 N.Y.S.2d 359, 380 N.E.2d 189. What is necessary is that the court identify a party who is holding property "under such circumstances that in equity and good conscience he ought not to retain it." *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337 (1916). Counihan contends that she is not such a party and that she would not be unjustly enriched at the government's expense if she received the insurance proceeds. We disagree and adopt the district court's conclusion that "[i]f plaintiff is allowed to retain the policy proceeds, she will be unjustly enriched, notwithstanding her contention that the government has failed to prove that she was involved in the arson."

Whether a party is unjustly enriched is a legal conclusion "reached through the application of principles of equity." *Sharp v. Kosmalski,* 40 N.Y.2d 119, 123, 386 N.Y.S.2d 72, 351 N.E.2d 721 (1976). Equity is the essential component with which a court must concern itself. *See Beatty,* 225 N.Y. at 389, 122 N.E. 378 ("A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."). Unjust enrichment results when a person retains a benefit which, under the circumstances of the transfer and considering the relationship of the parties, it would be inequitable to retain. *See McGrath v. Hilding,* 41 N.Y.2d 625, 629, 394 N.Y.S.2d 603, 363 N.E.2d 328 (1977).

The insurance proceeds here represent a portion of the value of the Property that the United States would have received but for the arson. The district court found that prior to the fire the value of the Property was approximately $150,000. After the fire, the United States sold the Property for $50,000. The fire insurance proceeds at issue total $110,000.[2] Equity would be offended if, due to the fortuity of the fire, Counihan retained the insurance proceeds when she could not retain the Property. The insurance proceeds represent the same economic benefits in the Property which, pursuant to the forfeiture judgment, Counihan was required to forfeit directly to the United States. A constructive

trust is properly imposed in this situation in order to make the government whole for its loss of the value of the Property; unjust enrichment would otherwise result. Any other disposition would serve to encourage the intentional and clandestine destruction of insured properties that are the subject of forfeiture proceedings.

In its findings of fact, the district court observed that the circumstances strongly suggested that Counihan arranged for the arson. While Counihan contests this point, we need not reach this question because a finding of unjust enrichment "does not require the performance of any wrongful act by the one enriched." *Simonds,* 45 N.Y.2d at 242, 408 N.Y.S.2d 359, 380 N.E.2d 189. Indeed, "[i]nnocent parties may frequently be unjustly enriched." *Id.* (citations omitted). However, Counihan cannot be said to be innocent under the circumstances. Her property was forfeited because she knew of the drug activity at the Property and did nothing to stop it.

Counihan argues that the government has not established the four elements that she claims are required by New York law to erect a constructive trust. These elements, set out by the New York Court of Appeals in *Sharp,* 40 N.Y.2d at 121, 386 N.Y.S.2d 72, 351 N.E.2d 721, ***362** are: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." This argument need not detain us long, for the New York Courts do not insist that a constructive trust must fit within the framework of these elements. *See Palazzo v. Palazzo,* 121 A.D.2d 261, 503 N.Y.S.2d 381, 383–84 (1st Dep't 1986) ("[T]he power of equity to employ a constructive trust to reach a just result is not strictly limited by the conditions set forth in *Sharp v. Kosmalski* "); *Tordai v. Tordai,* 109 A.D.2d 996, 486 N.Y.S.2d 802, 804 (3d Dep't 1985) (*Sharp v. Kosmalski* factors "are not rigid, but flexible considerations for the court to apply in determining whether a constructive trust should be imposed"); *Coco v. Coco,* 107 A.D.2d 21, 485 N.Y.S.2d 286, 289 (2d Dep't 1985) (" 'these factors are merely useful guides and are not talismanic' ") (quoting *Reiner v. Reiner,* 100 A.D.2d 872, 474 N.Y.S.2d 538, 541 (2d Dep't 1984)). Applying New York law, we have observed that, "[a]lthough these factors provide important guideposts, the constructive trust doctrine is equitable in nature and should not be 'rigidly limited.' " *In re Koreag, Controle et Revision S.A. v. Refco F/X Assoc., Inc.* (*In re Koreag*), 961 F.2d 341, 352 (2d Cir.1992) (quoting *Simonds,* 45 N.Y.2d at 241, 408 N.Y.S.2d 359, 380 N.E.2d 189); *accord Lines v. Bank of Am. Nat'l Trust & Sav. Ass'n,* 743 F.Supp. 176, 180 (S.D.N.Y.1990) (the elements are not talismanic and courts have imposed a constructive trust in the absence of some of these elements). What the New York courts do insist upon is a showing that property is held under circumstances that render unconscionable and inequitable the continued holding of the property and that the remedy is essential to prevent unjust enrichment. As has been demonstrated, such a showing has been made here with regard to the insurance proceeds sought by Counihan.

Addressing the four *Sharp* factors specifically, it can be argued that the first, or fiduciary relation, factor is made out by the trust and confidence reposed by the government in Counihan by permitting her to retain the incidents of ownership even after the first

judgment of forfeiture was entered. In any event, the lack of a fiduciary relationship does not defeat the imposition of a constructive trust. *See In re Koreag,* 961 F.2d at 353. As to the "promise" factor, it can be said that Counihan impliedly promised to transfer the insurance proceeds to the government. "[A] promise may be implied or inferred from the very transaction itself." *Sharp,* 40 N.Y.2d at 122, 386 N.Y.S.2d 72, 351 N.E.2d 721. Although the government's forfeiture interest was in the Property, the insurance proceeds represent the portion of the value of the property that was destroyed. By implication, Counihan promised to deliver the Property or the proceeds while exercising the prerogatives of an owner pending the final determination of the forfeiture question.

As to the third *Sharp* factor, transfer in reliance upon a promise, Counihan contends that the government could not have established the transfer of the insurance policy in reliance upon a non-existent promise. As noted, we imply the existence of a promise to convey the full value of the property in this situation. Even though there was no formal transfer of the insurance policy from Counihan to the government prior to the fire, this deficiency should not be allowed to spawn an inequitable result. We impose a constructive trust where the holder of legal title should not, in good conscience and equity, retain the benefits derived from such title. It is for this reason that we designate Counihan as the constructive trustee of the insurance proceeds. We do so in accordance with the fourth, and most significant, of the *Sharp* factors—unjust enrichment, the deterrence of which is the purpose of a constructive trust. In this case, we have no hesitation in finding that the circumstances revealed here call for "the imposition of a constructive trust under the 'equity and good conscience' rule." *Security Pac. Mortgage and Real Estate Servs., Inc. v.* ***363** *Republic of the Philippines,* 962 F.2d 204, 210 (2d Cir.1992).

* * * *

As a final point of error, Counihan contends that the district court's findings of fact were clearly erroneous because (1) the findings of fact constituted "near-verbatim" or "wholesale" adoptions of the Government's proposed findings, (2) the district court refused to include a finding of fact proposed by Counihan, and (3) two of the district court's findings of fact were not supported by substantial evidence.

Findings of fact that have been taken *verbatim* from those proposed by counsel have been criticized, *see Anderson v. City of Bessemer City,* 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); nonetheless, "they are not to be rejected out-of-hand, and they will stand if supported by evidence." *United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). When a district judge does more than merely adopt a party's proposed findings, "the findings issued by the District Court represent the judge's own considered conclusions," *Philbrook v. Ansonia Bd. of Educ.,* 925 F.2d 47, 53 (2d Cir.1991) (internal quotation omitted), which may not be set aside unless clearly erroneous. *See* Fed.R.Civ.P. 52(a). Here, the district court did not adopt the government's proposed findings *in haec verba* but revised them in certain respects and not in others, demonstrating that its findings were based on its own perspective.

We therefore review the findings under the clearly erroneous standard.

A finding of fact is clearly erroneous when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504 (quotations omitted). This standard, however, does not entitle a reviewing court to reverse the findings of fact simply because it is convinced it would have decided the case differently. *See id.* Because the district court's findings of fact were supported by the record, and in accordance with the stipulation of the parties, they were not clearly erroneous.

We have considered the remainder of Counihan's arguments and find them to be without merit.

CONCLUSION

In accordance with the foregoing, the judgment of the district court is affirmed.

All Citations

194 F.3d 357

Footnotes

1 Patricia Ljunquist, former wife of Thomas Counihan and owner of a one-half interest in the Property, sought to intervene in the insurance action. Her motion was denied, however, because she was neither a party to the insurance policy nor an intended third-party beneficiary. *See Counihan v. Allstate Ins. Co.,* 142 F.R.D. 387, 388 (E.D.N.Y.1992). Ljunquist had no other insurance covering her interest in the Property.

2 The record does not indicate why the insurance proceeds ($110,000) plus the value of the Property sold ($50,000) are $10,000 more than the value of the Property prior to the fire ($150,000).

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Tab 9

CITATION: Albert Gelman Inc. v. 1529439 Ontario Limited, 2022 ONSC 4170
COURT FILE NO.: CV-14-010638-00CL
DATE: 20220715

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ALBERT GELMAN INC. in its capacity as Trustee in Bankruptcy of SPIROS PANTZIRIS, v. 1529439 ONTARIO LIMITED	)	*Lou Brzezinski and Alex Fernet Brochu,* for the Plaintiff
Plaintiff	)	
AND	)	
1529439 ONTARIO LIMITED, AGLAIA PANTZIRIS, ASPE CONSULTING SERVICES LTD., JULIE PANTZIRIS also known as JULIE TAYLOR also known as JULIE TAYLOR PANTZIRIS and ELLEN BOWLIN	)	*Frank Bennett,* for Julie Pantziris
Defendants	)	
	)	**HEARD: July 5, 2022**

REASONS FOR DECISION

OSBORNE J.

Background

[1] There are two related motions before the Court.

[2] The first is a motion by Albert Gelman Inc. in its capacity as Trustee in Bankruptcy of Spiros Pantziris (the "Trustee") for an order:

(a) directing the Accountant of the Ontario Superior Court of Justice to pay out of Court to counsel for the Trustee, in trust, the sum of $1,974,416.09, plus accrued interest to the date of payment, and

(b) directing Steven Bellissimo, former counsel to Julie Pantziris, to release the sum of $90,000.00 held in trust, also to counsel for the Trustee, in trust.

[3] The second motion is a cross-motion by the Defendant Julie Pantziris for an order declaring that she is entitled to be paid the sum of $704,451 by way of an order:

(a) directing the Accountant of this Court to pay to her the sum of $614,451 from the Trustee's share of the net proceeds in Court; and

(b) directing Stephen Bellissimo to release to her or as she may direct the sum of $90,000 being held by him in trust (the same $90,000 referred to above.

[4] All amounts claimed relate to the sale of a property at 9 Berkindale Crescent, Toronto, Ontario (the "Property").

[5] The amount of $614,451 sought by Ms. Pantziris is comprised of amounts claimed in respect of carrying costs, maintenance and improvements for the Property in the amount of $582,201, together with a claim for $20,000 in respect of personal items and contents in the Property included in the sale that Ms. Pantziris claims are owned by her and not the Trustee. She also claims a further $12,250 that she maintains ought to have been adjusted on closing of the Property in respect of taxes and utilities.

[6] The $90,000 held in trust by Mr. Bellissimo, and the claim by each party to those funds, relates to that portion of the HSBC facility secured by the Property that exceeds the estimated amount of the mortgage of $750,000. It relates to a portion of an outstanding amount on a line of credit.

[7] The Defendant Julie Pantziris is the wife of the bankrupt, Spiros Pantziris.

[8] Summary judgment was granted against the Defendants by Dietrich, J. on September 28, 2020. The Court ordered that the transfer by Spiros Pantziris of his one-half interest in the Property to his wife, the defendant Julie Pantziris, be set aside and that the one-half interest be vested in the Trustee.

[9] The Court held that the transfer was both an undervalue transfer within the meaning of section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and a fraudulent conveyance within the meaning of section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c.F.9.

[10] The Defendants appealed the judgment to the Court of Appeal for Ontario.

[11] As the hearing of the appeal was pending, the Trustee became aware that the Property had in fact been listed for sale. Ultimately, the Trustee and Julie Pantziris (each an owner of a one-half interest in the Property) entered into an agreement to permit the sale of the Property (the "Agreement").

[12] Upon the closing of that sale, and pursuant to the order of McEwen, J. Dated October 5, 2021, the Trustee's share of the net proceeds from the sale of the Property in the amount of $1,974,416.09 was paid into Court pending the determination or resolution of the appeal.

[13] The appeal was dismissed with costs by the Court of Appeal for Ontario on November 5, 2021. No leave to appeal that judgment was sought. There is no stay of that judgment.

[14] Accordingly, the Trustee seeks the payment out of Court and from Mr. Bellissimo for its share of the proceeds from the sale of the Property.

Analysis

[15] The chronology set out above, including the judgment of Dietrich, J., the dismissal of the appeal and the sale of the Property, are not contested. The issue is effectively whether the amount to be paid out to the Trustee representing its proceeds of the 50% interest in the Property should be adjusted as claimed by the Defendant Julie Pantziris.

[16] The Agreement sets out the terms for the sale of the Property and how the proceeds would be distributed. The sale price of the Property was $4,680,000.

[17] The Agreement between the Trustee and Julie Pantziris was executed by Ms. Pantziris on August 24, 2021 and by the Trustee the following day (both, I observe, by counsel acting on their behalf). It provided that on closing, the funds were to be distributed as follows:

(a) payment of the outstanding mortgage in the approximate amount of $750,000;

(b) payment of the usual adjustments on the Statement of Adjustments;

(c) payment of the real estate commissions;

(d) payment of transaction legal fees in an amount not to exceed $5000 plus HST and disbursements;

(e) one half of the net proceeds remaining, plus the amount of $170,000 (the costs award) representing the Trustee's share of the proceeds pending appeal, to be paid into Court; and

(f) the balance of the net proceeds representing Julie Pantziris' share to be paid to her or as she may direct.

[18] With respect to the payout of the mortgage in the approximate amount of $750,000 to be deducted from the purchase price, Ms. Pantziris provided to the Trustee a payout statement in the aggregate amount of $839,906.69 particularizing two amounts:

(a) $689,834.87 for HSBC Mortgage Registration No. AT4129770; and

(b) $150,071.82 for HSBC Line of Credit Account No. 002-315653-150.

[19] The Trustee objected to the deduction in respect of the line of credit amount, as a result of the inclusion of which, the total amount sought to be deducted exceeded the estimated amount of $750,000, by an additional amount of approximately $90,000. To permit the sale of the Property to proceed, the parties agreed that counsel for Ms. Pantziris, Mr. Bellissimo, would hold the $90,000 in trust pending further agreement or court order.

[20] Ms. Pantziris almost immediately took the position that property taxes outstanding as at the date of closing in the amount of $18,830.54 be deducted from the proceeds of sale. The Trustee refused. She paid those outstanding taxes from her share of the proceeds.

[21] That $90,000, and the amounts now claimed by Ms. Pantziris in respect of maintenance and improvements to the Property that she claims should be deducted from the monies held in Court before they are paid to the Trustee, are the amounts an issue on this motion.

[22] Those amounts fall into two categories: the mortgage on the one hand, and the collection of personal items, carrying costs and improvements on the other hand. The mortgage was addressed at the time the Agreement was entered into in that the issue was postponed until another day.

[23] The Agreement entered into by the parties addresses how the closing proceeds are to be divided and paid. There is no reference in the Agreement to any payment of, or reserve in respect of, additional amounts for personal items, carrying costs or alleged improvements. It refers only to the distribution of funds as set out above.

[24] By correspondence dated August 30, 2021, counsel for Ms. Pantziris delivered to counsel for the Trustee a chart entitled "Closing Funds and Distribution". It makes no reference to any claim for any of these amounts. It specifically refers to adjustments on closing but that does not include a reference to these adjustments, even if they could be said to be ordinary course adjustments required for closing. The chart confirmed the amount payable to the Trustee is exactly the amount paid into Court and now sought by the Trustee of $1,974,416.09.

[25] That Agreement, negotiated with the benefit of counsel for both parties in acrimonious circumstances where many items were disputed, represents the bargain between the parties and, in numerous respects, a negotiated compromise by both sides.

[26] Prior to the execution of the Agreement, the Trustee was clear and unequivocal in its position, as conceded by Mr. Bellissimo in his affidavit filed on this motion, that in the event of the sale of the Property, the Trustee would not agree to the distribution of these amounts from the proceeds and that any claim asserted by Ms. Pantziris for those costs could be advanced by her by filing a proof of claim in the bankruptcy.

[27] The Agreement does not provide as a term the payment of the amounts now sought by Ms. Pantziris, with the result that, I find, she is not entitled to any such payment by way of deduction from the proceeds held in Court for the benefit of the Trustee. The Agreement should be read as a whole, giving the words used their ordinary meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. (see *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 47.

[28] The consent order of McEwen, J. dated October 5, 2021 providing for the payment of the Trustee's share of the proceeds into Court approximately one month after the Agreement, similarly makes no reference to any claim for these amounts from the proceeds, whether pursuant to the Agreement or in addition thereto.

[29] That order provided that the funds were to be paid into Court pending the outcome of the then outstanding appeal. There is no reference to any other outstanding issue or reason for the funds being held. None of these amounts was the subject of the appeal, which was limited effectively to a determination of whether the summary judgment granted by Dietrich, J. would be affirmed or set aside.

[30] Ms. Pantziris asserted for the first time months later, on January 12, 2022, the position that the funds paid into Court were subject to the resolution of disputed items. There is no evidence that a claim to these amounts was ever asserted by her before that time, let alone asserted and corresponding funds agreed to be set aside for further resolution or adjudication resulting in a possible adjustment of the quantum of the proceeds held in Court for the benefit of the Trustee pending the outcome of the appeal.

[31] The Trustee takes the position that if Ms. Pantziris wishes to assert claims for these amounts, such claims are properly asserted as alleged claims provable in bankruptcy, made in that proceeding and not as against the specific proceeds held in Court. I agree.

[32] This is consistent with the position taken by the Trustee prior to the execution of the Agreement. It is also consistent with the position taken by Mr. Pantziris through her counsel in correspondence to counsel for the Trustee dated October 20, 2020 in which her counsel put the Trustee on notice that she would be submitting a proof of loss in the bankruptcy, in the event the appeal was unsuccessful, and then again by correspondence dated February 3, 2021, following the dismissal of the appeal when her counsel advised the Trustee that she wished to proceed to file a proof of claim in the bankruptcy.

[33] The affidavit sworn by Mr. Bellissimo on this motion confirms that these amounts were not agreed by the Trustee as adjustments to net proceeds, and that if Julie had a claim for them, she could advance them in the bankruptcy by filing a proof of claim (see para. 7). It is as against that advice that Mr. Bellissimo authored his correspondence of February 3, 2021 referred to above.

[34] The reply affidavit of Ms. Pantziris further confirms her understanding that the Trustee took the position that the cost of repairs, maintenance and other items she claimed did not increase the capital value and therefore were not capable of setoff as against the proceeds. She clearly understood this, as stated in her reply affidavit, well before she entered into the Agreement. Her reply affidavit further states that she instructed her lawyer to "close the deal and reserve my rights to claim against the sale proceeds. Mr. Bellissimo did that as evidenced in his two emails, October 28 , 2020 and February 3, 2021." However, as observed above, that correspondence clearly states that the claims will be advanced in the bankruptcy by way of a proof of claim.

[35] In my view, that is sufficient to dispose of her claim for those amounts. However, if I am wrong in that view, or if claims to those amounts were asserted notwithstanding the Agreement and on the basis that the Agreement did not govern because these claims were beyond its scope or terms, I find that in the circumstances Ms. Pantziris is not entitled to those amounts.

[36] The Courts have consistently held that claims for items such as the payment of mortgage interest, real property taxes, and improvements or repairs constitute current expenses and do not increase the capital value of the property. (See *Duthie v Duthie (Trustee of),* 2001 MBQB 235 at para. 9-10; and *McKenzie (Trustee of) v. McKenzie,* 2005 MBCA 35 at paras. 4-5 and 22-33).

[37] I agree with the position of the Trustee that Ms. Pantziris is not entitled to any set off for these amounts, first because they are not provided for as terms of the Agreement she entered into and subsequently confirmed through her consent to the order of McEwen, J., and second because they are current expenses which do not increase the capital value of the Property.

[38] The issue is not whether the expenses were in fact incurred; the issue is whether the evidence establishes that such expenses increased the capital value of the property, which is the asset that yielded the proceeds of which she is entitled to 50%, subject to adjustments.

[39] Put differently, does the evidence on the record establish that the expenses said to be incurred by Ms. Pantziris increased the capital value of the Property of which she is entitled to a 50% interest? In my view it does not.

[40] Moreover, there is no evidence here as to what the quantum of the alleged increase in the capital value of the Property would be, as a result of an improvement made, or expense incurred, at a time well in advance of the sale. There is no evidence on the record to establish that, even if these amounts (or some of them) were properly items that increased the capital value of the Property, they resulted in an increase of the capital value of the Property in the full amount of the expenses paid or incurred.

[41] It cannot be assumed in the absence of any evidence that the increase in the capital value to be divided now would be on a dollar for dollar basis relative to the expense incurred, in some cases years earlier. For example, costs in respect of the improvements to the kitchen in the Property were incurred in 2008 and 2009, over ten years before the sale. In her affidavit, Ms. Pantziris claims costs for maintenance and improvements incurred from August 2008 to August, 2021. She claims the amount of all of those costs incurred, adjusted for inflation forward from a valuation of the Property as at August, 2008.

[42] There is no evidence as to what, if any, proportion of the market value of the Property in 2021 could be said to be attributable to these amounts. Moreover, Ms. Pantziris enjoyed the use of the Property (including the improvements) until it was sold.

[43] The balance of the items claimed in this category relate to regular maintenance, upkeep and operating expenses of the Property, rather than capital improvements, and similarly must be claimed by Ms. Pantziris, if at all, by asserting a proof of claim in the bankruptcy but they do not represent a proper set off as against the proceeds in Court.

[44] Certainly, the claim for $20,000 in respect of contents cannot be said, and is not argued to be, a capital improvement. While those items were included in the agreement of purchase and sale for the third party purchaser and described under a “List of Inclusions” as described in the affidavit of Ms. Pantziris, the Agreement does not provide that she is to be credited for that amount. Rather, as discussed above, it provides for the division of proceeds from the sale of the Property, and that sale occurred pursuant to the terms of the agreement of purchase and sale with the purchaser, including the contents described under the “List of Inclusions”.

[45] The second claim or category of claims relates to the mortgage. The Agreement clearly contemplates, as noted above, the deduction of funds to pay out the mortgage before the proceeds

were divided. The issue is whether the amounts claimed in respect of the line of credit are included in the mortgage.

[46] The Agreement provides at section 2 (a) that a deduction may be made for:

> "…the outstanding mortgage (in the approximate amount of $750,000), such amount to be confirmed to the Trustee by Julie by way of a payout statement issued by the mortgagor and provided to the Trustee upon receipt of same by (counsel) from the mortgagee".

[47] Two documents were issued by HSBC on August 27, 2021. The first, "Payout Statement Details", relates to account number 002-315653-B01 and mortgage registration number AT4129770. It confirms the payout amount as that August 27, 2021 as CAD $689,834.87. There is no reference to the line of credit.

[48] The second document issued by HSBC on the same day is a letter confirming a "payout figure" of $150,071.82 for "the above Line of Credit", defined as account number 002-315653-150. The letter further states that the payout figure should be confirmed on the day of payout, as it is a fluctuating overdraft facility.

[49] In her affidavit, Ms. Pantziris states that "in previous correspondence regarding the house sale, the mortgage on the house was incorrectly stated at approximately $750,000".

[50] In his affidavit, Mr. Bellissimo does not address the issue of the quantum of the mortgage, or whether the letter of credit amount should be included, at all.

[51] I find that the mortgage amount referenced in the Agreement at section 2(a) does not include the additional amounts in respect of the line of credit. It follows that the Trustee is entitled to the payment of the $90,000 held in Mr. Bellissimo's trust account.

[52] I acknowledge that both amounts are secured by the equity in the Property. However, the mortgage and the line of credit have different account numbers. The payout confirmation documents issued by the mortgagor, HSBC, on August 27, 2021 address the mortgage and the line of credit separately, in separate documents, neither of which refers to the other.

[53] There is no dispute that the line of credit was secured by the Property. However, I am satisfied that, again applying the principles set out by the Supreme Court of Canada in *Sattva*, supra, at the reference to the "mortgage" in the Agreement between the parties does not include a reference to the separate line of credit facility.

[54] I also observe that unless challenged elsewhere, this result, and the corresponding payment from Mr. Bellissimo's trust account to the Trustee in the amount of $90,000 would effectively give credit to Ms. Pantziris for the full estimated amount of the mortgage at the time of the Agreement of $750,000, notwithstanding that, as confirmed by HSBC, the actual amount of the Mortgage outstanding was only $689,834.87.

[55] Ms. Pantziris further asserts on this motion that, in the event her claim for the line of credit amount is not part of the mortgage and therefore owing to her pursuant to the terms of the

Agreement, as I have now found, she is entitled to this amount either by way of remedial constructive trust or equitable lien.

[56] She asserts that the remedial constructive trust ought to be imposed as the Trustee would be unjustly enriched at her expense, and that this Court has jurisdiction under section 183 of the *BIA* to grant that relief. That provision invests in this Court such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and other proceedings authorized by that Act. Ms. Pantziris argues that jurisdiction should be exercised to impose a constructive trust here. In my view, it should not.

[57] The position of Ms. Pantziris is that the Trustee would be unjustly enriched if she is not given credit for her carrying charges and improvement costs for the Property. For the reasons set out above, I am of the view that the Trustee is not receiving any benefit or enrichment in respect of those carrying charges and improvement costs, whether just or unjust. As stated above, the carrying charges represent ordinary course expenses associated with the occupation and use of the Property, which Ms. Pantziris enjoyed prior to the sale. There is no benefit to the Trustee.

[58] I reach the same conclusion in respect of the improvement costs, also for the reasons expressed above. There is no evidence that the improvement costs, even if incurred by Ms. Pantziris, resulted in any benefit or enrichment to the Trustee in the form of an increased sale price for the Property, 50% of which is for the benefit of the Trustee.

[59] For all of these components of the claim, I find that none of the required elements of a constructive trust are made out here. There is no enrichment, there is no corresponding deprivation, and even if there were an enrichment, there is no absence of a juristic reason for it. The juristic reasons for the vesting in the Trustee of a 50% interest in the Property were the findings of Dietrich, J. resulting in summary judgment.

[60] The claim for an equitable lien must also fail. The court may impose a lien, as acknowledged by Ms. Pantziris, where one of the parties has improved the value of the asset to the exclusion of the other party. For the same reasons, I am not satisfied that the evidence establishes that she has improved the value of the asset.

[61] Moreover, I accept the position of the Trustee that if I am mistaken with respect to the claim for a constructive trust or an equitable lien, the doctrine of cause of action estoppel would apply so as to bar Ms. Pantziris from asserting those claims now. (See *Cliffs Over Maple Bay Investments Ltd., Re.*, 2011 BCCA 180 at para. 28, quoting with approval from *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248).

[62] As observed by the British Columbia Court of Appeal in *Maple Bay*, *res judicata* takes two forms in modern practice: cause of action estoppel and issue estoppel, where the former means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding; and the latter means that a litigant is estopped because the issue has clearly been decided in the previous proceeding.

[63] The requirements for a cause of action estoppel to be made out are these:

(a) there must be a final decision of a court of competent jurisdiction in the prior action;

(b) the parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action;

(c) the cause of action and the prior action must not be separate and distinct; and

(d) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercise reasonable diligence.

[64] I am satisfied that those requirements are made out here. Both parties to this motion were the parties to the motion for summary judgment resulting in the judgment of Dietrich, J. and the appeal from that judgment. The cause of action or claim asserted on this motion and on the summary judgment motion are not separate and distinct, and the very claims that Ms. Pantziris advances now ought to have been argued on the summary judgment motion by her.

[65] The basis of that motion was the dispute about whether the Trustee ought to be entitled to a declaration that it was the owner of a 50% interest in the Property. If Ms. Pantziris were of the view that, even if the Trustee were found to have an interest in the Property as a result of the transfer under value or fraudulent conveyance, as were asserted, the proportionate interest ought to be adjusted or reduced from 50% to account for the claims that she now makes, those claims ought to have been advanced as part of the summary judgment motion and subsequent appeal. They were not, and they cannot be raised now.

Disposition

[66] For all of the above reasons, the motion of the Trustee is granted and the cross-motion of Ms. Pantziris is dismissed. The Accountant of the Superior Court of Justice is directed to pay out of Court the sum of $1,974,416.09 plus accrued interest to the date of payment, to counsel for the Trustee, in trust. Mr. Steven Bellissimo, lawyer, is directed to pay to counsel for the Trustee, in trust, the sum of $90,000 on deposit in his solicitor's trust account.

[67] The Trustee seeks costs of this motion in the partial indemnity amount of $26,964.74 or the higher amounts set out in its Bill of Costs on a substantial indemnity scale of $39,651.52 or full indemnity scale in the amount of $43,958.91, plus disbursements of $1120.38. Ms. Pantziris provided a Costs outline seeking costs on a partial indemnity scale of $$44,110 plus HST, an amount which is in excess of, but very close to, the full indemnity amount sought by the Trustee.

[68] The Trustee has been successful on both motions. Having regard to all of the circumstances, the nature of both motions, the issues raised and all of the relevant factors, I award the Trustee costs in the amount of $40,000 inclusive of taxes and disbursements.

Osborne J.

Released: July 15, 2022

CITATION: Albert Gelman Inc. v. 1529439 Ontario Limited, 2022 ONSC 4170
COURT FILE NO.: CV-14-010638-00CL
DATE: 20220715

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ALBERT GELMAN INC. in its capacity as Trustee in Bankruptcy of SPIROS PANTZIRIS, v. 1529439 ONTARIO LIMITED

Plaintiff

AND

1529439 ONTARIO LIMITED, AGLAIA PANTZIRIS, ASPE CONSULTING SERVICES LTD., JULIE PANTZIRIS also known as JULIE TAYLOR also known as JULIE TAYLOR PANTZIRIS and ELLEN BOWLIN

Defendants

REASONS FOR DECISION

P. Osborne J.

Released: July 15, 2022

Tab 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lehman (Re),*
2015 BCSC 1668

Date: 20150917
Docket: 50557
Registry: Vernon

In Bankruptcy and Insolvency

In the matter of the Bankruptcy of
Mary Leeanne Lehman
of the City of West Kelowna, in the Province of British Columbia
(Summary Administration)

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Bankrupt:	M.E.A. Danielson
Counsel for the Creditor:	J.C. Chandler (Agent for R. Kwasnicki)
Counsel for the Trustee	J. Harry
Place and Date of Hearing:	Kelowna, B.C. September 11, 2015
Place and Date of Judgment:	Kelowna, B.C. September 17, 2015

Introduction

[1] Mr. Toth is a creditor of Ms. Lehman. He seeks an order that Ms. Lehman's bankruptcy not bar his making a claim that the proceeds of the sale of Ms. Lehman's trailer home - funds that are in the hands of her trustee - are impressed by a constructive trust in his favor. Mr. Toth asserts that he should be afforded an opportunity to press his claim for that trust notwithstanding Ms. Lehman's bankruptcy.

Background

[2] Mr. Toth and Ms. Lehman were common-law spouses. They jointly owned real estate in Grimsby Ontario (the "Grimsby property"). The Grimsby property was subject to a charge in favor of the Royal Bank of Canada ("RBC"). The RBC charge secured a line of credit to a maximum of $246.000. Mr. Toth and Ms. Lehman were authorized to make withdrawals on the line of credit.

[3] Without first telling Mr. Toth of her intentions, on December 12, 2007, Ms. Lehman used her authority to draw a total of $157,044.47 from the RBC line of credit. Shortly after that withdrawal, Ms. Lehman used approximately $125,000 of the line of credit funds to purchase an interest in a residence in North Bay, Ontario (the "North Bay property"). The North Bay property was located on an Indian reservation.

[4] In February 2008, Mr. Toth commenced an action in Ontario against Ms. Lehman. He claimed judgment for the $157,044.47 she removed from the line of credit, interest on that amount, and a declaration that he was the sole legal and beneficial owner of the Grimsby property.

[5] In July 2009, Mr. Toth's counsel examined Ms. Lehman under oath. In her answers to questions 30 - 34 Ms. Lehman testified that she used $125,000 from the line of credit withdrawal to purchase the North Bay property. Mr. Toth was therefore aware that Ms. Lehman had acquired the North Bay property using funds from the line of credit. Notwithstanding that knowledge, Mr. Toth did not advance a claim that

Ms. Lehman held an interest in the North Bay property in trust for him, or that a constructive trust had arisen out of her use of the line of credit funds to purchase the North Bay property.

[6] In May 2010, Ms. Lehman sold her interest in the North Bay property for $188,000. That same month Ms. Lehman bought a mobile home in West Kelowna, B.C. She paid $60,000 for the mobile home. Mr. Toth was aware of those transactions.

[7] In April 2011, the Ontario action went to trial before the Honourable Mr. Justice Ramsay. In the course of that trial, Ms. Lehman testified that she could borrow enough money to retire the balance of the line of credit.

[8] Ramsay J. ordered that Mr. Toth have judgment against Ms. Lehman for $157,000 plus $16,979.97 prejudgment interest and post-judgment interest at the rate of 3 percent per year. Ramsay J. went on to find that Ms. Lehman would be unjustly enriched were she to retain a one-half interest in the Grimsby property. Ramsay J. ordered that Mr. Toth be entitled to an 87 percent interest in the Grimsby property and that Ms. Lehman be entitled to the remaining 13 percent interest in the property. Ramsay J. awarded costs of $20,000 to Mr. Toth.

[9] Mr. Toth registered his judgment against Ms. Lehman in B.C. In August 2011, Mr. Toth caused a Writ of Seizure and Sale to be issued against Ms. Lehman. Later that month a bailiff seized two automobiles registered to Ms. Lehman. The bailiff also purported to seize Ms. Lehman's mobile home.

[10] At Ms. Lehman's request and on Mr. Toth's instruction, the bailiff took no further steps to execute against the mobile home. Over the next twelve to fourteen months Mr. Toth and Ms. Lehman attempted to negotiate a mechanism by which Ms. Lehman would give Mr. Toth some money and Mr. Toth would release Ms. Lehman from the judgment. As those negotiations progressed, Mr. Toth obtained from Ms. Lehman her interest in the Grimsby property. He credited Ms. Lehman $39,806. Ms. Lehman then proposed to settle Mr. Toth's claim against

her upon payment of the judgment less a small discount. Mr. Toth refused Ms. Lehman's offer and reiterated his demand that he receive payment of the judgment in full. The parties not having reached a meeting of their minds, the settlement negotiations failed.

[11] Ms. Lehman then made a proposal under the *Bankruptcy and Insolvency Act* (the "*BIA*"). Her proposal was effective on October 26, 2012. Ms. Lehman's trustee in bankruptcy relieved Mr. Toth's bailiff of possession of the mobile home. In September 2014, the trustee sold the mobile home and received net proceeds of $49,888.99. The trustee continues to hold that sum pending the outcome of this application.

Parties' Positions

Mr. Toth

[12] Mr. Toth maintains that Ms. Lehman used part of the $157,000 line of credit withdrawal to buy the North Bay property and then to buy the West Kelowna mobile home. He says that Ms. Lehman, and through her bankruptcy her trustee, has been unjustly enriched by virtue of her taking the line of credit funds and using them to acquire the West Kelowna mobile home. Mr. Toth says that when she made her proposal in bankruptcy her interest in the mobile home was impressed by a constructive trust in his favor.

[13] Mr. Toth acknowledges that a necessary element of a successful constructive trust claim is that a monetary judgment is not an appropriate remedy. He also acknowledges that he actually has a monetary judgment against Ms. Lehman. Mr. Toth says, however, that the monetary judgment was predicated on Ms. Lehman's evidence in the trial of the Ontario proceeding that she could pay off the balance of the line of credit. Mr. Toth argues that under that circumstance, it was not necessary for Ramsay J. to turn his mind to the issue of unjust enrichment. As things turned out, however, Ms. Lehman did not borrow money to pay off the line of credit and, according to Mr. Toth, the only and only proper remedy now available to him is a declaration of constructive trust in his favor.

Ms. Lehman

[14] Ms. Lehman argues that at the trial of the Ontario matter Mr. Toth elected to confine his claim against her to a monetary judgment. She says that it is too late now for Mr. Toth to make an alternative claim in equity.

Trustee

[15] The trustee echoes Ms. Lehman's position. The trustee emphasizes the purpose of the *BIA* - i.e.: that it is intended to provide an orderly and efficient method for the resolution of a bankrupt's estate - and says that Mr. Toth's application, if allowed, would frustrate that purpose.

The Law

[16] When Ms. Lehman's filed her proposal she became entitled to the protection of s. 69.1(1) of the *BIA*. That provision operates as a bar to the commencement against a bankrupt person of proceedings by a creditor. The bar is commonly referred to as a stay of proceedings.

[17] Section 69.4 of the *BIA* authorizes the court to declare that s. 69.1 not apply to a creditor:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[18] When assessing the materiality of prejudice and the equitable grounds for the application, the court may consider the merits of the proposed action against the bankrupt: *Ma (Re)* (2001), 24 C.B.R. (4th) 68 (ONCA).

Discussion

[19] The fatal flaw in Mr. Toth's application to allow him to pursue a constructive trust claim for an interest in the proceeds of sale of Ms. Lehman's mobile home is that it runs afoul of the principle of cause of action estoppel. As was said of cause of action estoppel in *H.Y. Louie Co. v. Bowick (c.o.b. Power Quest Batteries)*, 2015 BCCA 256:

> [28] . . . As noted by Lange, *supra*, at 131, in order for this principle to apply, a second proceeding must be initiated in which a party raises a cause of action or defence that could have been raised but was not raised in the first proceeding. . . .

[20] It is patently obvious that Mr. Toth was aware of the use to which Ms. Lehman put the line of credit money: he knew that she bought the North Bay property with it. It is equally obvious that Mr. Toth knew what an unjust enrichment claim was all about: in the Ontario action he had actually invoked that principle and relied on it to assert a claim for Ms. Lehman's interest in the Grimsby property. The only rational conclusion that can be drawn from these facts is that Mr. Toth was aware of the possibility of making a constructive trust claim based on unjust enrichment against Ms. Lehman's interest in the North Bay property. He elected to not pursue that remedy and contented himself with a monetary judgment. The trust claim is one that he could have raised in the Ontario action but he chose not to raise it. Any such claim against the West Kelowna mobile home would have to be based upon a tracing of the funds from the sale of the North Bay property, and on application of cause of action estoppel any such claim would be doomed to certain failure.

[21] For that reason I am compelled to conclude that the constructive trust action that he proposes to bring against Ms. Lehman has no merit and could not succeed. Preventing Mr. Toth from pursuing an action that has no merit would not prejudice him in the least; in fact, sustaining the s. 69.1 stay would actually work to his benefit because it would keep him from unnecessary legal fees and would shield him from having to pay Ms. Lehman's costs of defending the proceeding.

Conclusion

The application is dismissed. The trustee is entitled to her costs on Scale B.

"Rogers J."

Tab 11

In the Matter of a Plan of Compromise or Arrangement of
Sino-Forest Corporation

[Indexed as: Sino-Forest Corp. (Re)]

114 O.R. (3d) 304

2012 ONCA 816

Court of Appeal for Ontario,
Goudge, Hoy and Pepall JJ.A.
November 23, 2012

Debtor and creditor -- Arrangements -- Shareholders of company commencing class actions against company, underwriters and auditors for misrepresentation -- Plaintiffs alleging that misrepresentations artificially inflated price of company's shares -- Company successfully seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Underwriters and auditors filing proofs of claim against company seeking contribution and indemnity for any amounts they might be ordered to pay as damages in class actions -- Supervising judge not erring in finding that those claims were equity claims within meaning of s. 2(1) of CCAA despite fact that underwriters and auditors were not holders of an equity interest -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1).

The appellant underwriters provided underwriting services in connection with three S Co. equity offerings and four S Co. note offerings. The appellant auditors served as S Co.'s auditors at the relevant time. Shareholders of S Co. brought

proposed class actions against S Co. and, among others, the underwriters and auditors, alleging that S Co. repeatedly misrepresented its assets and financial situation and its compliance with generally accepted accounting principles in its public disclosure, that the auditors and underwriters failed to detect those misrepresentations, and that the auditors misrepresented that their audit reports [page305] were prepared in accordance with generally accepted auditing standards. They claimed that the misrepresentations artificially inflated the price of S Co.'s shares and that proposed class members suffered damages when the shares fell after the truth was revealed. S Co. successfully sought protection pursuant to the provisions of the Companies' Creditors Arrangement Act ("CCAA"). The auditors and underwriters filed proofs of claim seeking contribution and indemnity for, among other things, any amounts that they were ordered to pay as damages to the plaintiffs in the class actions. S Co. applied for an order that the claims against it arising from the ownership, purchase or sale of an equity interest in the company, including shareholder claims, and any indemnification claim against it related to or arising from the shareholder claims, including the claims for contribution or indemnity, were equity claims under the CCAA. The application was granted. The underwriters and auditors appealed.

Held, the appeal should be dismissed.

The definition of equity claim in s. 2(1) of the CCAA focuses on the nature of the claim, and not the identity of the claimant. The appellants' claims for contribution and indemnity were clearly equity claims, despite the fact that the appellants did not have an equity interest in S Co. Parliament adopted expansive language in defining "equity claim". Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)". The Supreme Court of Canada has repeatedly held that the words "in respect of" are of the widest possible scope, conveying some link or connection

between two related subjects. It was conceded that the shareholder claims against S Co. were claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There was an obvious link between the appellants' claims against S Co. for contribution and indemnity and the shareholders' claims against S Co. Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that the phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term. Accordingly, the appellants' claims, which clearly fell within para. (e), were included within the meaning of the phrase "claim that is in respect of an equity interest". Parliament chose not to include language in s. 2(1) restricting claims for contribution or indemnity to those made by shareholders. If only a person with an equity interest could assert an equity claim, para. (e) would be rendered meaningless. No legislative provision should be interpreted so as to render it mere surplusage. Looking at s. 2(1) as a whole, it appeared that the remedies available to shareholders were all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supported the notion that para. (e) referred to claims for contribution and indemnity not by shareholders, but by others. The definition of "equity claim" was sufficiently clear to alter the pre-existing common law.

Cases referred to

Blue Range Resource Corp. (Re), [2000] A.J. No. 14, 2000 ABQB 4, [2000] 4 W.W.R. 738, 76 Alta. L.R. (3d) 338, 259 A.R. 30, 15 C.B.R. (4th) 169, 94 A.C.W.S. (3d) 223; CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, 171 D.L.R. (4th) 733, 237 N.R. 373, J.E. 99-861, 122 B.C.A.C. 1, 133 C.C.C. (3d) 426, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 41 W.C.B. (2d) 411; [page306] Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359, 132 D.L.R. (4th) 223, 88 O.A.C. 161, 26 B.L.R. (2d) 88, 38 C.B.R. (3d) 1, 61 A.C.W.S. (3d) 18 (C.A.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102; Goodyear Tire & Rubber

Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, 4 D.L.R. (2d) 1, 28 C.P.R. 25, 56 D.T.C. 1060; In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999); Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, 239 F.T.R. 159, 223 D.L.R. (4th) 17, 300 N.R. 321, J.E. 2003-506, 2003 D.T.C. 5185, 120 A.C.W.S. (3d) 532; National Bank of Canada v. Merit Energy Ltd., [2002] A.J. No. 6, 2002 ABCA 5, [2002] 3 W.W.R. 215, 317 A.R. 319, affg [2001] A.J. No. 918, 2001 ABQB 583, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15, 28 C.B.R. (4th) 228, 107 A.C.W.S. (3d) 182 (Q.B.); National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, 74 D.L.R. (4th) 197, 115 N.R. 42, J.E. 90-1410, 32 Q.A.C. 250, 50 C.C.L.I. 1, [1990] I.L.R. 1-2663 at 10478, 23 A.C.W.S. (3d) 74; Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 75 B.L.R. (4th) 302, 71 C.B.R. (5th) 153 (S.C.J.); Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, 230 D.L.R. (4th) 257, 308 N.R. 271, 177 O.A.C. 235, J.E. 2003-1790, 7 Admin. L.R. (4th) 177, 31 C.C.E.L. (3d) 1, [2003] CLLC 220-062, 125 A.C.W.S. (3d) 85; R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 18 A.C.W.S. (2d) 2; R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, 182 D.L.R. (4th) 1, 249 N.R. 201, [2000] 4 W.W.R. 21, J.E. 2000-264, 142 Man. R. (2d) 161, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, 44 W.C.B. (2d) 479; Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123, 206 A.C.W.S. (3d) 464 (S.C.J.) [Leave to appeal refused [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141, 211 A.C.W.S. (3d) 264]; Stelco Inc. (Re), [2006] O.J. No. 276, 14 B.L.R. (4th) 260, 17 C.B.R. (5th) 78, 145 A.C.W.S. (3d) 194 (S.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 [as am.], 121 [as am.]

Bankruptcy Code, 11 U.S.C.S. 502(e)(1)(B)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as

am.], ss. 2(1) [as am], (a)-(e), 6(8), 22.1 [as am.]
Negligence Act, R.S.O. 1990, c. N.1 [as am.], s. 2
Securities Act, R.S.A. 2000, c. S-4, s. 203(1) [as am.], (10)
Securities Act, R.S.B.C. 1996, c. 418, s. 131(1) [as am.], (11)
Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8)
Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8)
Securities Act, R.S.O. 1990, c. S.5, s. 130(1) [as am.], (8)
Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12)
Securities Act, R.S.Q., c. V-1.1, ss. 218 [as am.], 219, 221 [as am.]
Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9)
Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12)
Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12)
Securities Act, S.Y. 2007, c. 16, s. 111(1), (13)
The Securities Act, C.C.S.M. c. S50, s. 141(1), (11)
The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9)
Authorities referred to
Driedger, Elmer A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) [page307]

APPEAL from the order of Morawetz J., [2012] O.J. No. 3627, 2012 ONSC 4377 (S.C.J.) declaring that the appellants' claims were equity claims within the meaning of the Companies' Creditors Arrangement Act.

Peter H. Griffin, Peter J. Osborne and Shara Roy, for appellant Ernst & Young LLP.

Sheila Block and David Bish, for appellants Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Kenneth Dekker, for appellant BDO Limited.

Robert W. Staley, Derek J. Bell and Jonathan Bell, for respondent Sino-Forest Corporation.

Benjamin Zarnett, Robert Chadwick and Julie Rosenthal, for respondent Ad Hoc Committee of Noteholders.

Clifton Prophet, for monitor FTI Consulting Canada Inc.

Kirk M. Baert, A. Dimitri Lascaris and Massimo Starnino, for respondent Ad Hoc Committee of Purchasers.

Emily Cole, for respondent Allen Chan.

Erin Pleet, for respondent David Horsley.

David Gadsden, for respondent Pyry (Beijing).

Larry Lowenstein and Edward A. Sellers, for respondent board of directors.

BY THE COURT: --

I Overview

[1] In 2009, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"), was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.

[2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation. [page308]

[3] The appellants argue that the supervising judge erred in concluding that the claims at issue are equity claims within

the meaning of the CCAA and in determining the issue before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[4] For the reasons that follow, we conclude that the supervising judge did not err and accordingly dismiss this appeal.

II The Background

(a) The parties

[5] Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which in turn own, directly or indirectly, forestry assets located principally in the People's Republic of China. Its common shares are listed on the Toronto Stock Exchange. Sino-Forest also issued approximately $1.8 billion of unsecured notes, in four series. Trading in Sino-Forest shares ceased on August 26, 2011, as a result of a cease-trade order made by the Ontario Securities Commission.

[6] The appellant underwriters [See Note 1 below] provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010. Certain underwriters entered into agreements with Sino-Forest in which Sino-Forest agreed to indemnify the underwriters in connection with an array of matters that could arise from their participation in these offerings.

[7] The appellant BDO Limited ("BDO") is a Hong Kong-based accounting firm that served as Sino-Forest's auditor between 2005 and August 2007, and audited its annual financial statements for the years ended December 31, 2005 and December 31, 2006.

[8] The engagement agreements governing BDO's audits of Sino-Forest provided that the company's management bore the primary responsibility for preparing its financial statements in accordance with generally accepted accounting principles ("GAAP") [page309] and implementing internal controls to

prevent and detect fraud and error in relation to its financial reporting.

[9] BDO's audit report for 2006 was incorporated by reference into a June 2007 prospectus issued by Sino-Forest regarding the offering of its shares to the public. This use by Sino-Forest was governed by an engagement agreement dated May 23, 2007 in which Sino-Forest agreed to indemnify BDO in respect of any claims by the underwriters or any third party that arose as a result of the further steps taken by BDO in relation to the issuance of the June 2007 prospectus.

[10] The appellant Ernst & Young LLP ("E&Y") served as Sino-Forest's auditor for the years 2007 to 2012, and delivered auditors' reports with respect to the consolidated financial statements of Sino-Forest for fiscal years ended December 31, 2007 to 2010, inclusive. In each year for which it prepared a report, E&Y entered into an audit engagement letter with Sino-Forest in which Sino-Forest undertook to prepare its financial statements in accordance with GAAP, design and implement internal controls to prevent and detect fraud and error, and provide E&Y with its complete financial records and related information. Some of these letters contained an indemnity in favour of E&Y.

[11] The respondent Ad Hoc Committee of Noteholders consists of noteholders owning approximately one-half of Sino-Forest's total noteholder debt. [See Note 2 below] They are creditors who have debt claims against Sino-Forest; they are not equity claimants.

[12] Sino-Forest has insufficient assets to satisfy all the claims against it. To the extent that the appellants' claims are accepted and are treated as debt claims rather than equity claims, the noteholders' recovery will be diminished.

(b) The class actions

[13] In 2011 and January of 2012, proposed class actions were commenced in Ontario, Quebec, Saskatchewan and New York State against, amongst others, Sino-Forest, certain of its officers, directors and employees, BDO, E&Y and the underwriters. Sino-

Forest is sued in all actions. [See Note 3 below] [page310]

[14] The proposed representative plaintiffs in the class actions are shareholders of Sino-Forest. They allege that Sino-Forest repeatedly misrepresented its assets and financial situation and its compliance with GAAP in its public disclosure; the appellant auditors and underwriters failed to detect these misrepresentations; and the appellant auditors misrepresented that their audit reports were prepared in accordance with generally accepted auditing standards ("GAAS"). The representative plaintiffs claim that these misrepresentations artificially inflated the price of Sino-Forest's shares and that proposed class members suffered damages when the shares fell after the truth was revealed in 2011.

[15] The representative plaintiffs in the Ontario class action seek approximately $9.2 billion in damages. The Quebec, Saskatchewan and New York class actions do not specify the quantum of damages sought.

[16] To date, none of the proposed class actions has been certified.

(c) CCAA protection and proofs of claim

[17] On March 30, 2012, Sino-Forest sought protection pursuant to the provisions of the CCAA. Morawetz J. granted the initial order which, among other things, appointed FTI Consulting Canada Inc. as the monitor and stayed the class actions as against Sino-Forest. Since that time, Morawetz J. has been the supervising judge of the CCAA proceedings. The initial stay of the class actions was extended and broadened by order dated May 8, 2012.

[18] On May 14, 2012, the supervising judge granted an unopposed claims procedure order which established a procedure to file and determine claims against Sino-Forest.

[19] Thereafter, all of the appellants filed individual proofs of claim against Sino-Forest seeking contribution and indemnity for, among other things, any amounts that they are

ordered to pay as damages to the plaintiffs in the class actions. Their proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including breach of contract, contractual terms of indemnity, negligent and fraudulent misrepresentation in tort, and the provisions of the Negligence Act, R.S.O. 1990, c. N.1.

(d) Order under appeal

[20] Sino-Forest then applied for an order that the following claims are equity claims under the CCAA: claims against Sino-Forest arising from the ownership, purchase or sale of an equity [page311] interest in the company, including shareholder claims ("shareholder claims"); and any indemnification claims against Sino-Forest related to or arising from the shareholder claims, including the appellants' claims for contribution or indemnity ("related indemnity claims").

[21] The motion was supported by the Ad Hoc Committee of Noteholders.

[22] On July 27, 2012, the supervising judge granted the order sought by Sino-Forest and released a comprehensive endorsement.

[23] He concluded that it was not premature to determine the equity claims issue. It had been clear from the outset of Sino-Forest's CCAA proceedings that this issue would have to be decided and that the expected proceeds arising from any sales process would be insufficient to satisfy the claims of creditors. Furthermore, the issue could be determined independently of the claims procedure and without prejudice being suffered by any party.

[24] He also concluded that both the shareholder claims and the related indemnity claims should be characterized as equity claims. In summary, he reasoned that

-- the characterization of claims for indemnity turns on the characterization of the underlying primary claims. The shareholder claims are clearly equity claims and they led to and underlie the related indemnity claims;
-- the plain language of the CCAA, which focuses on the nature

of the claim rather than the identity of the claimant, dictates that both shareholder claims and related indemnity claims constitute equity claims;

-- the definition of "equity claim" added to the CCAA in 2009 broadened the scope of equity claims established by pre-amendment jurisprudence;

-- this holding is consistent with the analysis in Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (S.C.J.), which dealt with contractual indemnification claims of officers and directors. Leave to appeal was denied by this court, [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141; and

-- "[i]t would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors [page312] when the underlying actions of shareholders cannot achieve the same status" (para. 82). To hold otherwise would run counter to the scheme established by the CCAA and would permit an indirect remedy to the shareholders when a direct remedy is unavailable.

[25] The supervising judge did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. That determination is not appealed.

III Interpretation of "Equity Claim"

(a) Relevant statutory provisions

[26] As part of a broad reform of Canadian insolvency legislation, various amendments to the CCAA were proclaimed in force as of September 18, 2009.

[27] They included the addition of s. 6(8):

> 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 22.1, which provides that creditors with equity claims may not vote at any meeting unless the court orders otherwise, was also added.

[28] Related definitions of "claim", "equity claim" and "equity interest" were added to s. 2(1) of the CCAA:

> 2(1) In this Act,
>
> . . . . .
>
> "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the Bankruptcy and Insolvency Act;
>
> . . . . .
>
> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation, [page313]
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "equity interest" means
>
> (a) in the case of a company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- other than one that is derived from a convertible debt, and
>
> (b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt[.]

(Emphasis added)

[29] Section 2 of the Bankruptcy and Insolvency Act, R.S.C.

1985, c. B-3 ("BIA") defines a "claim provable in bankruptcy". Section 121 of the BIA in turn specifies that claims provable in bankruptcy are those to which the bankrupt is subject.

> 2. "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
>
> . . . . .
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(Emphasis added)

(b) The legal framework before the 2009 amendments

[30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:

> Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential. [page314]
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement.

(Citations omitted) [See Note 4 below]

(c) The appellants' submissions

[31] The appellants essentially advance three arguments.

[32] First, they argue that on a plain reading of s. 2(1), their claims are excluded. They focus on the opening words of the definition of "equity claim" and argue that their claims against Sino-Forest are not claims that are "in respect of an equity interest" because they do not have an equity interest in Sino-Forest. Their relationships with Sino-Forest were purely contractual and they were arm's-length creditors, not shareholders with the risks and rewards attendant to that position. The policy rationale behind ranking shareholders below creditors is not furthered by characterizing the appellants' claims as equity claims. They were service providers with a contractual right to an indemnity from Sino-Forest.

[33] Second, the appellants focus on the term "claim" in para. (e) of the definition of "equity claim", and argue that the claims in respect of which they seek contribution and indemnity are the shareholders' claims against them in court proceedings for damages, which are not "claims" against Sino-Forest provable within the meaning of the BIA and, therefore, not "claims" within s. 2(1). They submit that the supervising judge erred in focusing on the characterization of the underlying primary claims.

[34] Third, the appellants submit that the definition of "equity claim" is not sufficiently clear to have changed the existing law. It is assumed that the legislature does not intend to change the common law without "expressing its intentions to do so with irresistible clearness": Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, at para. 39, citing Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, at p. 614 S.C.R. The appellants argue that the supervising judge's interpretation of "equity claim" dramatically alters the common [page315] law as reflected in National Bank of Canada v. Merit Energy Ltd., [2001] A.J. No. 918, 2001 ABQB 583, 294 A.R. 15, affd [2002] A.J. No. 6, 2002 ABCA 5, 317 A.R. 319. There, the court

determined that in an insolvency, claims of auditors and underwriters for indemnification are not to be treated in the same manner as claims by shareholders. Furthermore, the Senate debates that preceded the enactment of the amendments did not specifically comment on the effect of the amendments on claims by auditors and underwriters. The amendments should be interpreted as codifying the pre-existing common law as reflected in National Bank of Canada v. Merit Energy Ltd.

[35] The appellants argue that the decision of Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. is distinguishable because it dealt with the characterization of claims for damages by an equity investor against officers and directors, and it predated the 2009 amendments. In any event, this court confirmed that its decision denying leave to appeal should not be read as a judicial precedent for the interpretation of the meaning of "equity claim" in s. 2(1) of the CCAA.

(d) Analysis

(i) Introduction

[36] The exercise before this court is one of statutory interpretation. We are therefore guided by the following oft-cited principle from Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

[38] The appellants' arguments do not give effect to the expansive language adopted by Parliament in defining "equity claim" and read in language not incorporated by Parliament. Their interpretation would render para. (e) of the definition meaningless and defies the logic of the section.

(ii) The expansive language used

[39] The definition incorporates two expansive terms.

[40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of [page316] an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)" (emphasis added).

[41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. In CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, at para. 16, citing R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, at p. 39 S.C.R., the Supreme Court held as follows:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

(Emphasis added in CanadianOxy)

That court also stated as follows in Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, at para. 26:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters.

(Citations omitted)

[42] It is conceded that the shareholder claims against Sino-Forest are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There is an obvious link between the appellants' claims against Sino-Forest for contribution and indemnity and the shareholders'

claims against Sino-Forest. The legal proceedings brought by the shareholders asserted their claims against Sino-Forest together with their claims against the appellants, which gave rise to these claims for contribution and indemnity. The causes of action asserted depend largely on common facts and seek recovery of the same loss.

[43] The appellants' claims for contribution or indemnity against Sino-Forest are therefore clearly connected to or "in respect of" a claim referred to in para. (d), namely, the shareholders' claims against Sino-Forest. They are claims in respect of equity claims by shareholders and are provable in bankruptcy against Sino-Forest.

[44] Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive [page317] interpretation, and include matters which might not otherwise be within the meaning of the term, as stated in National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, at p. 1041 S.C.R.:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.

[45] Accordingly, the appellants' claims, which clearly fall within para. (e), are included within the meaning of the phrase a "claim that is in respect of an equity interest".

(iii) What Parliament did not say

[46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of

an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.

(iv) An interpretation that avoids surplusage

[47] A claim for contribution arises when the claimant for contribution has been sued. Section 2 of the Negligence Act provides that a tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort. The securities legislation of the various provinces provides that an issuer, its underwriters and, if they consented to the disclosure of information in the prospectus, its auditors, among others, are jointly and severally liable for a misrepresentation in the prospectus, and provides for rights of contribution. [See Note 5 below] [page318]

[48] Counsel for the appellants were unable to provide a satisfactory example of when a holder of an equity interest in a debtor company would seek contribution under para. (e) against the debtor in respect of a claim referred to in any of paras. (a) to (d). In our view, this indicates that para. (e) was drafted with claims for contribution or indemnity by non-shareholders rather than shareholders in mind.

[49] If the appellants' interpretation prevailed, and only a person with an equity interest could assert such a claim, para. (e) would be rendered meaningless, and as Lamer C.J.C. wrote in R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, at para. 28:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

(v) The scheme and logic of the section

[50] Moreover, looking at s. 2(1) as a whole, it would appear that the remedies available to shareholders are all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supports the notion that para. (e) refers to claims for

contribution or indemnity not by shareholders, but by others.

(vi) The legislative history of the 2009 amendments

[51] The appellants and the respondents each argue that the legislative history of the amendments supports their respective interpretation of the term "equity claim". We have carefully considered the legislative history. The limited commentary is brief and imprecise. The clause-by-clause analysis of Bill C-12 comments that "[a]n equity claim is defined to include any claim that is related to an equity interest". [See Note 6 below] While, as the appellants submit, there was no specific reference to the position of auditors and underwriters, the desirability of greater conformity with United States insolvency law to avoid forum shopping by debtors was highlighted in 2003, some four years before the definition of "equity claim" was included in Bill C-12.

[52] In this instance, the legislative history ultimately provided very little insight into the intended meaning of the amendments. We have been guided by the plain words used by Parliament in reaching our conclusion. [page319]

(vii) Intent to change the common law

[53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law. National Bank of Canada v. Merit Energy Ltd., an Alberta decision, was the single case referred to by the appellants that addressed the treatment of auditors' and underwriters' claims for contribution and indemnity in an insolvency before the definition was enacted. As the supervising judge noted, in a more recent decision, Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., the courts of this province adopted a more expansive approach, holding that contractual indemnification claims of directors and officers were equity claims.

[54] We are not persuaded that the practical effect of the change to the law implemented by the enactment of the definition of "equity claim" is as dramatic as the appellants suggest. The operations of many auditors and underwriters extend to the United States, where contingent claims for

reimbursement or contribution by entities "liable with the debtor" are disallowed pursuant to 502(e)(1)(B) of the U.S. Bankruptcy Code, 11 U.S.C.S. [See Note 7 below]

(viii) The purpose of the legislation

[55] The supervising judge indicated that if the claims of auditors and underwriters for contribution and indemnity were not included within the meaning of "equity claim", the CCAA would permit an indirect remedy to the shareholders when a direct remedy is not available. We would express this concept differently.

[56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity. [page320]

IV Prematurity

[57] We are not persuaded that the supervising judge erred by determining that the appellants' claims were equity claims before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[58] The supervising judge noted, at para. 7 of his endorsement, that from the outset, Sino-Forest, supported by the monitor, had taken the position that it was important that these proceedings be completed as soon as possible. The need to address the characterization of the appellants' claims had also been clear from the outset. The appellants have not identified any prejudice that arises from the determination of the issue at this stage. There was no additional information that the appellants have identified that was not before the supervising judge. The monitor, a court-appointed officer, supported the motion procedure. The supervising judge was well positioned to

determine whether the procedure proposed was premature and, in our view, there is no basis on which to interfere with the exercise of his discretion.

V Summary

[59] In conclusion, we agree with the supervising judge that the appellants' claims for contribution or indemnity are equity claims within s. 2(1)(e) of the CCAA.

[60] We reach this conclusion because of what we have said about the expansive language used by Parliament, the language Parliament did not use, the avoidance of surplusage, the logic of the section and what, from the foregoing, we conclude is the purpose of the 2009 amendments as they relate to these proceedings.

[61] We see no basis to interfere with the supervising judge's decision to consider whether the appellants' claims were equity claims before the completion of the claims procedure.

VI Disposition

[62] This appeal is accordingly dismissed. As agreed, there will be no costs.

Appeal dismissed.

Notes

Note 1: Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Note 2: Noteholders holding in excess of $1.296 billion, or 72 per cent, of Sino-Forest's approximately $1.8 billion in noteholders' debt have executed written support agreements in favour of the Sino-Forest CCAA plan as of March 30, 2012. These include noteholders represented by the Ad Hoc Committee of Noteholders.

Note 3: None of the appellants are sued in Saskatchewan and all are sued in Ontario. E&Y is also sued in Quebec and New York and the appellant underwriters are also sued in New York.

Note 4: The supervising judge cited the following cases as authority for these propositions: Blue Range Resource Corp., (Re), [2000] A.J. No. 14, 2000 ABQB 4, 259 A.R. 30; Stelco Inc. (Re), [2006] O.J. No. 276, 17 C.B.R. (5th) 78 (S.C.J.); Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359 (C.A.); Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 71 C.B.R. (5th) 153 (S.C.J.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102.

Note 5: Securities Act, R.S.O. 1990, c. S.5, s. 130(1), (8); Securities Act, R.S.A. 2000, c. S-4, s. 203(1), (10); Securities Act, R.S.B.C. 1996, c. 418, s. 131(1), (11); The Securities Act, C.C.S.M. c. S50, s. 141(1), (11); Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9); Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8); Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8); Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12); Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12); Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12); Securities Act, R.S.Q., c. V-1.1, ss. 218, 219, 221; The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9); Securities Act, S.Y. 2007, c. 16, s. 111(1), (13).

Note 6: We understand that this analysis was before the Standing Senate Committee on Banking, Trade and Commerce in 2007.

Note 7: The United States Bankruptcy Court for the District of Delaware in In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999) indicated that this provision

applies to underwriters' claims, and reflects the policy rationale that such stakeholders are in a better position to evaluate the risks associated with the issuance of stock than are general creditors.

Tab 12

DATE: 20060919

SUPERIOR COURT OF JUSTICE - ONTARIO

COURT FILE NO.: 98-CL-2872

BETWEEN:

DEBBIE GAIL COHEN

THE DEBBIE GAIL ZAGDANSKI TRUST; and

Debbie Gail Cohen on behalf of the three corporations

HERIOT BAY INVESTMENTS LTD.,

607915 ONTARIO LTD., and **659527 ONTARIO LIMITED**

Plaintiffs

- and -

HENRY ZAGDANSKI

BARRY ZAGDANSKI; IAN ZAGDANSKI

FELICIA POSLUNS

HENRY ZAGDANSKI and **BARRY ZAGDANSKI**

in their capacity as former trustees of The Debbie Gail Zagdanski Trust;

HENRY ZAGDANSKI, BARRY ZAGDANSKI, and **IAN ZAGDANSKI,**

in their capacity as trustees of the Barry Zagdanski, Ian for Zagdanski,

Felicia Zagdanski, and Debbie Gail Zagdanski Trust;

HERIOT BAY INVESTMENTS LTD; BIFD HOLDINGS LIMITED;

ZAGJO HOLDINGS LIMITED;

HENZAG HOLDINGS LIMITED; and **ZAGJO INVESTMENTS 11-A LIMITED**

Defendants

AND COURT FILE NO.: 93-CQ-34037

BETWEEN:

JOHANNA KLEIN

Plaintiff

- and -

HENRY ZAGDANSKI, BARRY MARVIN ZAGDANSKI, IAN STEWART ZAGDANSKI, FELICIA POSLUNS and ZAGJO HOLDINGS LIMITED Defendants

AND COURT FILE NO.: ND166822/89

BETWEEN:

JOHANNA ZAGDANSKI

Petitioner (Wife)

-and-

HENRY ZAGDANSKI

Respondent (Husband)

HEARD: July 11, 12, 13, 2006

BEFORE: Lane J.

COUNSEL: *Deborah Glendinning*, *Nancy Roberts* and *Derek Ronde* for the Plaintiffs in 98-CL-2872;
Karon C. Bales and *Charles Beall*, for the plaintiff Johanna Klein (formerly Zagdanski;
L. David Roebuck and *Samuel M. Robinson* for all defendants except Henry Zagdanski;
Philip M. Epstein and *Richard W. Greene* for Henry Zagdanski in ND166822/89;
Allan Sternberg and *Robert A. Watson* for Henry Zagdanski in the other actions and for Heriot Bay Investments Ltd. as defendant.

R E A S O N S F O R D E C I S I O N

LANE J.:

[1] The parties come before me, as the managing judge appointed under Rule 37.15, on a motion by the plaintiffs to require the defendants to answer questions ordered or agreed to be

answered, but not yet answered, at least to the satisfaction of the plaintiffs; to answer questions refused; and to require further documents and information which the plaintiffs say are relevant to the issues.

General Overview

[2] The present actions are three in number. The first in the above title is action 98-CL-2872 ("Debbie's action") which is made up of several actions and applications brought by Debbie Zagdanski Cohen, daughter of Henry Zagdanski, which, on April 8, 2006, were merged into a Consolidated Statement of Claim. There are two Statements of Defence, one from Henry Zagdanski ("Henry") and one from all other defendants. The third action listed is actually the first in time: Mrs. Zagdanski's petition for divorce, ("the matrimonial action") ND166822/89 which has not been consolidated. The outstanding issue there is what should be the contents of Henry's NFP. The second listed action is also brought by the former Mrs. Zagdanski, Johanna Klein, ("the Klein action") and was not consolidated. In it, Johanna claims damages for breach by Henry and the siblings (Barry, Ian and Felicia) of what is said to be a fiduciary relationship between them, including setting aside certain transactions known as the "estate freezes", and damages for other transactions involving assets belonging to her, pursuant to a conspiracy to deprive her of the benefit of her share of the NFP by artificially reducing Henry's assets. She claims a trust on all assets owned by the defendants into which her assets can be traced.

[3] Consolidation of Debbie's actions has provided, for the first time, a comprehensive document setting out the issues and making it easier to analyse relevance issues. All of these proceedings raise closely related issues, which will be heard together. The human parties are family members: Henry, ex-husband and father; Johanna, ex-wife and mother; Barry, Ian, Felicia and Debbie, grown children. The corporate parties are vehicles through which the holdings accumulated by Henry are held in a web of inter-relationships, including corporations, co-tenancies, trusts and agreements. The investments are land; it is said that there are some 400 properties involved.

[4] These actions began many years ago. The first, the divorce action brought by Joanne Zagdanski (Johanna Klein) against Henry began in 1989, following the parties' separation either

in 1988 or 1989. The divorce has long since been granted, but property issues continue. Prior to separation, in 1986 and 1987, Henry executed gifts and other dispositions including two estate freezes, designed to pass assets to the next generation, but he continued to manage those assets. If the estate freezes are confirmed in the litigation, his assets are as he has declared in his NFP statement and the complexity of valuing them for NFP purposes is virtually removed. If the estate freezes are set aside, as Johanna asks, the scale of the holdings, primarily real estate, accumulated by Henry is quite daunting and the obtaining of the information needed to make a valuation would be a complex business, which would be further complicated by the dispute over the date of separation. Much of the information sought in previous motions, as in this one, is designed to enable the plaintiff to make her own valuation of what Henry's assets would be if the freezes were set aside. I have allowed a great deal of this valuation fact-finding in previous orders. However, the farther away we get from 1986 through 1990 when the key events occurred, the less relevance these inquiries have. The fact remains, as Mr. Sternberg emphasized, the trial judge will make findings of whether Henry entered into the freezes and other transactions intending to cheat his wife or not. If not, neither the separation date value, nor the present valuation of the assets which Henry disposed of in those transactions prior to separation is relevant. As will be developed in detail below, this case has reached the point at which further exploration of transactions relating to these assets should be quite limited until Johanna has established the right to set the freezes aside and the further need to trace the relevant assets in aid of her equitable rights as established in the ultimate judgment.

[5] The other actions were begun in 1991, 1993 and 1998. Speaking very generally, they involve allegations by Johanna and by Debbie that Henry, and latterly Barry, and to a limited extent Ian and Felicia Zagdanski (the siblings), negligently or deliberately, in breach of trust, and in the case of corporations, oppressively, managed properties which belonged to the plaintiffs so as to deprive them of value and to benefit Henry and the siblings. Henry had established a trust for his first three children, the Zagdanski Children's Trust, with himself as sole trustee, and later a trust for Debbie, the plaintiff Trust. Debbie asserts that her Trust has been mismanaged by him, to her severe detriment, in part because of his anger at her marriage. Johanna asserts that

certain estate freezes orchestrated by Henry in the early eighties, prior to their separation, were a fraud on her and seeks to set them aside under, inter alia, the Fraudulent Transactions Act.

[6] The defence is primarily focused on the existence of a family arrangement under which Henry continued to operate the family business, which he founded and built up into its present state, notwithstanding that legal ownership had passed to the children through corporations or trusts, as part of the estate freezes and gifting undertaken in the 1980s. It is said that this family arrangement contemplated that Henry would move money around the group of companies from whoever had it to whoever needed it. He decided the terms, repayment, interest, etc. of all such financial manoeuvres. Management fees could be paid as a method of profit distribution at his discretion. Whether there was such an agreement or not, and it is hotly contested, it is plain that Henry acted much as described. It is not contested that he carried out the transactions of which his former wife and his daughter Debbie complain, in his capacity as Trustee or company director, or in the case of the estate freezes, as father planning his estate. His intent to hurt the plaintiffs is denied; his right to deal with property that was legally theirs as he chose is strongly affirmed. So far as Johanna's claim to set aside the estate freezes and for a trust on the defendants' assets into which the proceeds of her assets went, the defence says that she was at all times aware of and agreed to the estate freezes and to the transactions now complained of. The key issue is not so much what he did in moving assets around, but why he did it: in good faith or in bad.

The Present State of the Action

[7] The estate freezes occurred in 1986 and 1987, nearly twenty years ago; the parents separated at the latest in 1989 and were divorced in 1992. The other actions began in the early nineties. The defendants were examined for discovery, with not very satisfactory results, in the mid-90s and some again more recently. The plaintiffs have not been examined. In 2006 I am hearing a motion about production of documents and arguments as to relevance. This is a scandalous timetable by any standard and all parties must share the blame and bear the consequences. There have been numerous changes of counsel such that Mr. Epstein alone survives from the original group. There was a period of several years after December, 2000, when the plaintiffs took no action to move the matter forward. The obstructionism of one

defence counsel made the attempt at discovery of Henry useless. In the years since I became the managing judge, I have made numerous orders requiring production by the defendants. One major order was made in December, 2000 and there are still controversies over whether it has been complied with. More than once I have expressed my chagrin at the glacial pace of disclosure and the narrow and ungenerous interpretation given by the defendants to the questions asked, giving as little information as possible to comply with even their narrow interpretation. I have criticized circular answers, sending the questioner back to the incomplete disclosure that gave rise to the follow-up question; and answers that the information will be found in the financial statements, when it is not in fact there. In fairness, the plaintiffs' appetite for exploring the entire Zagdanski family assets has grown over the years. I have turned aside at least two amendments designed to make relevant every such asset on the basis of a duty to ensure that the siblings all benefited equally, or in rough parity from the activities of the father. Throughout the case I have sought to confine it to those activities of family members which are in breach of trust or otherwise improper, as contrasted with those which disappoint more familial expectations.

[8] It is my responsibility to combine justice to the parties' need for relevant information to make their cases with the need to bring this case to trial in as timely a manner as possible. That means ensuring that the plaintiffs' requests for more information relating to twenty years of investment and operation of companies are actually relevant to the issues that the court must deal with and do not involve the defendants in unnecessary work. One of the major issues to be dealt with is the timing of some of the inquiries: are they necessary before trial or are they better postponed until the plaintiffs have established their rights? Already, the opportunity for the trial judge to hear the evidence of Henry Zagdanski has been lost by the inordinate delay which has already occurred. Other witnesses may cease to be available and in any event memories are fading. The trial has been scheduled for April 2008, over twenty years after the key events, the estate freezes, and nearly that since the transactions complained of in the Debbie Trust and Heriot Bay. As to this motion, Mr. Sternberg stressed that the decisions the trial judge will have to make concern transactions carried out in the 1980s and early 1990s and production requests for documents relating to assets of Zagdanski companies today should be viewed with scepticism, a view with which I agree. Against this background, I turn to the issues at hand.

Outstanding Answers from the Discoveries

[9] With respect to the answers to questions asked on examination for discovery, the defendants were ordered in June 2001 to answer the questions refused and undertakings still outstanding within ninety days. This order was made on the consent of the defendants, but the plaintiffs say that the defendants still, five years later, have not provided full and complete answers to all of the questions and undertakings. The plaintiffs ask that the outstanding answers be provided forthwith. I will deal with some particular questions in a schedule, but speaking generally, it is obvious that these questions must be answered as a matter of high priority by November 30, 2006.

Fresh Production Requests

[10] With respect to the production of further documents and information, the plaintiffs say that, upon review of the documentary and oral discovery evidence provided by the defendants, which cast fresh light on relevant topics, further documents and information are required. The Debbie action plaintiffs provided the defendants with two series of documentary and information requests, one on August 26, 2005 and one on March 7, 2006. The Klein action plaintiffs sent a similar request by letter of March 2, 2006 and another on March 17, 2006. In each case, the defendants agreed to produce some of the requested material, largely that related to Debbie companies, but refused production with respect to a large amount of it, in many cases because it asked for analysis of information already provided. I agree with the stand of the defendants that the plaintiff's own experts should perform whatever analysis is wanted. In other cases, the information was refused as irrelevant and those matters will be dealt with in these reasons.

[11] It is important to understand the scope of these inquiries, for they seek the most detailed disclosure of documents and facts imaginable about the several hundred properties in which the Zagdanski family had an interest. In the first Klein letter, for example, the following paragraphs give an idea of the scope of the inquiry: [matter in square brackets added by me]

> 2. Where entities [meaning all companies or other entities on the complete Zagdanski corporate organization chart] are not controlled by members of the family, we require details of the relationship if any to the other shareholders, co-

venturers, partners or co-tenants and the relationship if any among the other shareholders, partners or co-tenants.

4(b) Listing of all real property held at July 1, 1988 including address, dates of acquisition or disposition, purchase price, subsequent selling price, undepreciated capital cost at July 1, 1988, all appraisals prepared for any purpose, estimated fair market value of land building and improvements at July 1, 1988, estimated hold period as of July 1, 1988, estimated fair market value of land as at December 31, 1971.

4(c) Where they exist shareholder, co-venturer, co-tenant and partnership agreements as at July 1, 1988.

4(d) Details where deferred income tax amounts in corporate balance sheets for the fiscal years including July 1, 1988 relate to matters other than the difference between net book value for accounting and undepreciated capital cost for income tax.

13. Dates of distribution of drawings and/or payments of capital contributions to partnerships/joint ventures/co-tenancies in the fiscal years which include July 1, 1988 for all such entities;

15. details of all litigation threatened or pending as at the valuation date with respect to each of the entities including statements of claim and defence and correspondence from the entities counsel in this regard up to and including the valuation date and details of settlements and court decisions with respect to the litigation.

17. Details of impact on adjusted cost base of properties of any distributions of the pre 1972 Capital Surplus On Hand and other tax surplus accounts between 1972 and valuation date [July 1,1988]

36. Breakdown of loan interest income from the Zagdanski Group of Companies for each of Henry, Johanna, Barry, Ian, Felicia and Debbie between 1988 and 1990 by payor company and by year where interest income on their personal income tax returns is based on a three-year accrual.

[12] There are seven pages of this sort of request followed by information requests about the properties owned by the entities. The level of detail may be illustrated by a few examples. As to apartment buildings, in addition to information about address, income and existing valuations and zoning, a detailed rent roll is demanded. For every suite in the many buildings the rent is to be detailed suite by suite stating whether it is 1, 2 or 3 bedrooms, rental rate, anniversary date, parking rent, rent increase above guideline etc. Details of the laundry contract are to be set out, along with all environmental, structural and similar reports. There are several pages of such requests relating to each class of building.

[13] Some two weeks later, the Klein plaintiff sent the letter of March 17 with even more requests to "continue our analysis of the Zagdanski Holdings as of December 31, 2005". Many of the requests repeat for 2005 the information required for 1988 in the previous letter. Other requests are more personal to the parties:

> 13. Details of all non-arm's length remuneration and other distributions including return of capital in excess of $1,000 paid by any of the entities from 1988 to date and details of the use of these amounts by members of the family.
>
> 15. Details of all gifts and loans in excess of $1,000 made by any members of the family from 1989 to date [2006] including [date, recipient, purpose, security, copies of documents and date repaid or amount owing]
>
> 16. All valuations and personal net worth calculations prepared for any member of the family for any purpose including but not limited to those prepared in application for credit from 1988 to 2006.

[14] These examples illustrate the very detailed and highly intrusive nature of the requests now put forward in these actions for information said to be required for the cases as pleaded.

The Debbie Breach of Trust action:

[15] Much of the information sought is with reference to two companies: Zagjo Holdings Limited and Barian Holdings Limited (now amalgamated as Zagjo). These are companies which function as holding companies for Henry, Ian, Barry and Felicia. There is some additional relevance to Zagjo because Johanna was a shareholder until 1984 when Henry re-organized it and redeemed her shares. This is relied on as part of the plan to defraud Johanna. As well, Zagjo is a company said to have been the recipient of assets and investment opportunities that were diverted from Debbie. So certain financial information, including financial statements of Zagjo (and Barian since it amalgamated with Zagjo) has been provided. But the request of August 26, 2005 and the follow-up request of March 7, 2006, take us into a new level of detail which is objected to. Some background in the pleadings is required to address this point.

[16] Paragraphs 83 to 90 of the Statement of Claim allege that the defendant family members breached their fiduciary duties to the plaintiff Debbie by diverting corporate opportunities of which they became aware, away from Heriot Bay, Debbie's company, to Zagjo and Barian, their own companies. There has been no identification as yet of any opportunity which was specifically offered to Heriot Bay and was wrongfully diverted to another company. So far, this is not a case of a specific corporate opportunity like *Canadian Aero*. What seems to be alleged is that after Debbie's marriage, Henry and the siblings simply ceased to include Heriot Bay in any new ventures so that there was no growth in Heriot Bay while there was much growth in Zagjo and Barian. Given that Debbie was suing them through most of the period at issue, this would be a normal human reaction, but it is highly likely that it would also be a breach of the fiduciary duties arising from the trust and corporate structure which placed Henry and later Barry in a position to control the fate of Debbie's companies. Mr. Roebuck submitted that there could be no claim of diversion because the investment opportunities were presented to Zagjo and related companies and not to Heriot Bay. I agree with Ms. Glendinning's response, that the opportunities were presented to people: the managers who had the fiduciary duty of managing Debbie's companies, as well as their own, with integrity and fairness. They could do as they liked with their own companies, but as to Debbie's they had the duties of trustees and corporate directors. It is certainly arguable that their duties included allocating some share in new opportunities to Debbie.

[17] In further response, the defendants say that Heriot Bay had no funds to invest in any opportunities and so none were offered to it. Counsel for Debbie responds that Heriot Bay would have had funds but for the improvident transactions which the defendants, in breach of their duties, caused it to undertake in order to strip it for their benefit. All such transactions took place many years ago and documents as to them have long since been produced. A few loose ends appear in the current request and they are being ordered to be answered.

[18] One issue of importance to the plaintiff is obtaining evidence as to the scope of the loss caused to Debbie by the conduct of the defendants. One technique is to notionally reverse the allegedly improvident transactions and so restate the financial position of Heriot Bay and the Debbie Trust as of the mid-1980s. One could then consider the investments made available to

Zagjo but not to Heriot Bay and select those in which Heriot Bay could have afforded to participate and estimate the benefits lost by Heriot Bay. Disclosure orders were made long ago to enable the information to be obtained from the financial statements of the affected companies.

[19] But on the present motion a different approach is added. Debbie says that the scope of the deprivation she has suffered is to some degree measurable by comparing the performance of Heriot Bay since the 1980s with the entire performance of Zagjo and Barian under the same management. The pleadings refer to this indirectly at paragraphs 89 and 90 where it is pleaded that Henry and Barry, acting as directors of Heriot Bay, and Henry acting as director of 659527 did not exercise the care, skill and diligence as a corporate director "that a reasonably prudent person would expect in the circumstances, which circumstances include their performance as directors of Zagjo Holdings and of Barian Holdings." [emphasis added]. It should be noted that the management of these companies was not identical at all relevant times.

[20] Their factum sums up their latest approach at paragraph 43:

> The plaintiffs require an accurate picture of Zagjo's economic performance for the purposes of their derivative claims in order to compare the economic performance of Heriot Bay and 659527 Ontario Limited with that of Zagjo in order to prove and value the fiduciary breaches of Henry and Barry.

[21] Thus the plaintiff seeks to make relevant the whole course of management of Zagjo and Barian from the mid-eighties to the present day as a comparator. In support of this process, they bring this motion to go behind the financial statements of these companies, to conduct a virtual audit of their costs, management fees, related party dealings and the like. The basis for this is to eliminate all non-legitimate items to get at the companies' real worth, which is said to be greater than the financial statements indicate because of the practice of moving money around to benefit the family without regard to the legal niceties. I accept that non-arms-length dealings can affect the financial picture, but in my view this request is overbroad and untimely.

[22] The plaintiffs' factum asserts, in support of their position:

> In cases where directors and officers have diverted corporate opportunities from

> one corporation to another to the detriment of the first corporation, courts will examine the financial performance of the second corporation in order to determine the damages suffered by the first corporation.
> *400280 Alberta Ltd*. v. *Franko's Heating & Air Conditioning* (1992) Ltd., [1995] A.J. No. 121 (Q.B.).
> *Waxman* v. *Waxman*, [2002] O.J. No. 2528 (S.C.J.), paras. 438 to 440 (for example); appeal allowed in part, [2004] O.J. No. 1765 (C.A)

[23] In my view, *Waxman* does not assist the plaintiff in any meaningful way. The case was very complex, but in the passages cited, the trial judge is dealing with the diversion of business from I. Waxman and Sons (IWS) to Greycliffe, a company incorporated by an officer of IWS to perform services previously performed by IWS internally. The evidence was that this was a device to overcharge IWS and divert the profit from these operations to the officer. The trial judge found that IWS could have continued to perform those services, and all Greycliffe profits could have been earned within IWS. The Greycliffe profits came straight off the IWS bottom line. This is a radically different situation than the one put forward by the plaintiffs here. It was a single corporate opportunity and the profit could be relatively readily identified. The plaintiffs here have not identified any corporate opportunity whose financial performance could be measured and awarded. Nor has Debbie identified which fiduciary was responsible for a diversion.

[24] The new theory of the plaintiffs is that the bad faith, breach of trust or negligence of Henry and Barry, the managers of Heriot Bay and 659527 (in each of which Debbie has an interest) and also of Zagjo, (in which she has no interest), may be demonstrated by comparing the overall financial results of the two. Unless the Debbie holdings are substantially similar in growth and economic rate of return to Zagjo, then the Debbie holdings were managed improperly. To this end they wish to eliminate factors which might affect the value of Zagjo as a comparator and so they make fresh and highly intrusive demands for very detailed information.

[25] One might well assume that the same persons acting as managers of two different enterprises investing in real estate might achieve comparable rates of return over time. While one must recognize that the results of the operations depend on many factors including the scale of investment which the resources of the enterprises permit, the appetite for risk, and the investment objectives of the owners/beneficiaries, it may still be feasible and useful to the trial judge to

know the growth and the rate of return on investments made by Zagjo since the transactions which are said to have stripped Heriot Bay of its ability to finance further investment. The assumption would be that Heriot Bay would have used those lost assets to make similar investments and achieve a similar rate of return. If the plaintiffs were prepared to accept the financial statements as defining the profitability, there would be little difficulty in going forward on this theory. The breach of duty pleaded is failure to act fairly in the allotment of new investment opportunities by allotting none to Debbie, a situation which, if it exists, will be obvious from the financial statements: Debbie's will show no new investments and Zagjo's will show many new investments. These documents are already produced. However, as noted, the plaintiffs wish to have the requested information to calculate the damages with greater precision now, rather than establish their liability case and do the tracing and refining of the damages later.

[26] The plaintiffs have had access to extensive information about Zagjo and to all information about Heriot Bay, and have yet to identify in their pleading any transaction that Zagjo got that should have been made available to Debbie. If and when a specific opportunity is proved at trial that Zagjo got but which could have been allotted to Debbie, and which, absent the alleged pillaging of Heriot Bay, she could have financed, then that opportunity may be traced through the company that actually got it. That is not the situation, however. The plaintiff demands now to explore every transaction in Zagjo and its affiliates, to learn about every non-arms-length transaction of whatever size, under the rubric of doing this comparison. This is a demand to go on a massive fishing expedition through the whole so-called empire of the very sort which I have repeatedly refused, and which, if allowed, would make this case unmanageable. I do not say that such an exploration may not produce relevant evidence. Rather, it is my view that it would be irresponsible for me as case manager to permit this process to take place at this stage of this very much delayed case.

[27] Another justification for the broad exploration of all companies related to the defendants' investments is the plaintiffs' claims to recover all the profits made by the recipients of their assets. I accept that the loss may be measured by the profits earned on the diverted assets in many fiduciary claims. The plaintiffs are not seeking damages in this part of their case, but a proprietary right: each seeks to recover her own property. This she can do by tracing the property

taken from her until it becomes unidentifiable or comes into the hands of a bona fide purchaser for value without notice. But the first step is to establish the proprietary interest at the trial. The tracing comes after the trial and not before. In *Waxman* the trial court ordered tracing of the amounts found to be subject to constructive trusts in support of the constructive trust remedy. In the Court of Appeal this order was attacked but the Court upheld the trial judge saying that tracing was not itself a remedy. The remedy was the finding of the constructive trust and the tracing was a process to make that finding effective.[1] Until the constructive trust is proved, disclosure for the purposes of tracing is inappropriate.

[28] For these reasons, this request is not reasonable at the present stage of these actions. The exercise is costly, time consuming, highly intrusive into the affairs of these companies and individuals and entirely unnecessary at this time. The plaintiffs already have ample information to show that they suffered damages if they prove their liability case. Any tracing of profit, which is also claimed, is a post-trial activity as a means of effecting the remedies which the court may grant. This new exercise, if the plaintiffs continue to think it necessary, may best be done in concert with any tracing of profits. To come forward with this request now, so long after the events, and six years after the comprehensive production order of December, 2000, is unfair and unreasonable. There was a certain amount of scoffing on the part of the plaintiffs at the suggestion that this demand could mean the case would not be ready for trial in April 2008, but I do not share their optimism. The trial is 18 months away and, given the scale of documentary production already made, the fact that the plaintiffs have not yet been examined for discovery, the extensive use which is likely to be made of expert's reports, the staleness of much of the evidence and the risk of the loss of additional witnesses, that is little enough time to prepare. Further delay in this case is intolerable. Justice requires that the liability issues be resolved before there is this sort of extended discovery on damages.

[29] The detail demanded by the plaintiffs is unnecessary for the comparison exercise, premature for the tracing exercise and hugely onerous on the defendants. Even if the defendants employ added resources for the production process, as I have urged them to do, it is apparent to me that the April 2008 trial date is now at risk unless I impose reasonable limits on the demands

for information. It is now seventeen years since this litigation began and eight years since I gave leave for the derivative action amendments. When I gave that leave, I issued an express warning against the idea that the whole Zagdanski group of companies would thereby be opened up for examination. I did so in the hope of alerting the plaintiffs to bring on any wide disclosure requests in a timely way. Eight years later is, in addition to all the other reasons discussed above, simply too late in the day for the plaintiffs to make such enormous fresh demands for information of very limited present value.

[30] I will not require the production demanded by the plaintiff as to the non arms-length construction/development/acquisition costs of Zagjo or its affiliates from 1986 to the present. Heriot Bay is entirely different: it is a Debbie company and the defendants have already agreed to produce that information.

[31] In making this order, I am not bifurcating the trial into liability and damages sections; far from it. I have no motion to bifurcate before me, but the possibility was the subject of discussion during the hearing. I am refusing as inappropriate at this time, for all the reasons noted, the detailed refinement of the numbers by going behind the financial statements as asked. It will be open to the plaintiffs to ask the trial judge for a reference for that purpose if the plaintiffs prove their case on liability and continue to believe that the damages based on the financial statements are an inadequate reflection of their true loss.

[32] Many of the requests in the March 7, 2006 follow-up letter relate to updating documentary disclosure already made for relevant time periods. I do not accept that because a case was made for the production of certain records up to 1994, or any other date, that the subsequent records are thereby automatically available to the plaintiffs. The farther away we get in time from the acts complained of, the less relevance there is to the current records of the companies involved. There must be a case made for the relevance to this action, which deals with specific events in the management of particular assets owned by the plaintiffs, for requests as to recent and current values. I do not accept that these updates are necessary.

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[1] *Waxman v Waxman* [2004] O.J. No. 1765 (CA) at paragraphs 571 to 584

[33] The requests in Schedule B (Plaintiffs Further Supp. Record vol. 2, pages 436 ff.) seek not only information as to the current adjusted cost base of Heriot Bay, a legitimate object of inquiry as it is a Debbie company, but also the same information for Zagjo and Barian as to any properties in which they have any interest. First, the relevance of the current adjusted cost base of properties owned by these companies, including Heriot Bay, is far from apparent. This is a tax concept and not necessarily related to actual value. Second, the relevance of current value to this case is doubtful. This request smacks of a pre-trial examination in aid of execution and not legitimate discovery. These requests are not confined to assets in which the plaintiffs have an interest, but go far beyond. Production has been required in previous orders as to Zagjo and some other companies in which the plaintiff has no interest but which appeared to have received proceeds from disposal of Debbie assets. But those transactions occurred many years ago and there is no need for broadening that line of inquiry at this stage. This case is not about the present value of the whole Zagdanski family enterprise and I will not permit unlimited inquiry as to companies or assets in which the plaintiffs have no real or potential interest, it is just a fishing expedition and a very costly one indeed. I have never set out a date after which discovery is no longer relevant, but I have no hesitation in directing that any requests for current or recent values, financial data, etc. will require special proof of relevance to the case as pleaded. I decline these requests.

[34] Schedule B provides an example of another problem: it does not confine itself to documents which exist. B3 simply says:

> Provide the current adjusted cost base of all real estate and other tangible assets in which Heriot Bay Investments owns a direct or indirect interest. The information requested should be provided to mirror the asset descriptions/ classes reflected in the financial statements of the entities listed in Schedule 2.

[35] This format is repeated for non-Debbie companies as well. It is not an acceptable form of document discovery to require the opposite party to perform this sort of work. If the documents exist and are relevant, they get produced and the recipient can do any work he pleases on them. No doubt the adjusted cost base is calculated in the tax returns or working papers, but the

plaintiffs cannot expect the defendant to create documents in a particular format. In any event, as noted above, the adjusted cost base need not be provided.

[36] The requests in Schedule C for accountant's working papers for Heriot Bay and entities in which it has an interest are proper; the balance of the request is not. The request in D for the tax planning documents at the time when the estate freezes were under consideration is proper, but the request as to BIFD is overbroad as there is no time period specified. If confined to the time when the estate freezes were under consideration, the question must be answered. The request in E for real estate appraisals for any real estate owned by any Zagdanski family member is not proper, nor is the request in Schedule F for an organizational chart of all of the siblings' holdings to a current date. The information is not relevant. Schedule G is overbroad and should be confined to property management fees paid from or debited to Debbie companies; payments from other entities are not relevant for reasons noted above. Schedules H to N, except as related to Debbie companies, are not relevant. Schedule O relates to the financial circumstances prevailing at the time that Heriot Bay's shares in Henzag were redeemed and these questions must be answered. Schedule P relates to Nu-Mode in which Debbie first acquired and then sold an interest in that company, through the actions of Henry. These questions must be answered. Schedule Q does not appear to be relevant unless Debbie is a shareholder. The defendants say that the information was provided in Henry's affidavit in 1999. Schedule R is not relevant and is in any event unreasonable as requiring review of twenty years of T4s for all companies paying salaries. Schedules S and T are relevant and must be answered. Schedule V refers to Heriot Bay investments and must be answered except for "Allan Plaza" and "Fredzag" on page 84 and "Zagjo Holdings: and "Zagjo Investments IIA" on page 85.

[37] At page 92 of the Record there begins a second schedule of "Follow-up document production requests". Items AA1 to CC2 are seeking explanations of answers already given and should be answered. Items DD1 to GG1 are irrelevant. HH should be answered.

FBI Group of Companies

[38] The plaintiffs have sought production of information regarding three companies incorporated by Felicia, Barry and Ian to act as investment vehicles. The plaintiffs explain the request in their factum as follows:

> 42. The material sought concerning the FBI Companies is relevant to the Plaintiffs' pleadings. Zagjo Holdings Limited has made multi-million dollar zero-interest loans to three of the FBI Companies. These loans have been outstanding for at least eight years, and totaled over $20 million at year-end 2004. This diversion of income-producing assets occurred subsequent to the commencement of litigation by the Plaintiffs, and it distorts the true picture of Zagjo's economic performance from 1996 onwards.
>
> 43. The Plaintiffs require an accurate picture of Zagjo's economic performance for the purposes of their derivative claims in order to compare the economic performance of Heriot Bay and 659527 Ontario Limited with that of Zagjo in order to prove and value the fiduciary breaches by Henry and Barry.

[39] Any distortion caused by the interest-free loans can be corrected by attributing a market rate of interest to Zagjo as income for the purposes of the comparison the plaintiffs wish to make. There is no need to explore what FBI did with the loans in order to compare Zagjo and the Debbie companies. Such an intrusion into the affairs of the FBI companies cannot be justified on the ground advanced in paragraphs 42 and 43 of the plaintiffs' factum. In her submissions, counsel for Debbie urged that FBI should be investigated because the siblings were now investing through it rather than through Zagjo and so its profits needed to be added back. I cannot accept that proposition as justification for so intrusive an order at this time. The siblings are entitled to invest through any vehicle they choose and that does not make that vehicle a party liable to be examined or have its documents produced. I decline to make the order requested.

The Siblings' Post 1994 Tax Returns

[40] By order of December 1, 2000, Barry, Ian and Felicia were ordered to produce their tax returns up to 1994 because they would throw light upon the issues. I see no reason to exclude the post-1994 returns altogether. The returns may be the only way to enforce disclosure on relevant issues such as the individual drawings from Debbie companies for management fees. Given the admission that Henry moved money around as he pleased, the normal assumption that management fees are either actually paid for management services, or are a method of distributing profits to the owners do not apply here. The allegation is that such fees were often paid for no services and the recipients were not owners of the company. It was submitted that only those parts of the returns relating to issues in the litigation should be disclosed. I am sympathetic to this submission, as there is no value in exposure of the siblings' other business affairs, particularly in the light of the present rulings. In *Janhevich*[2], Southey J. required disclosure of only any portions of the return related to the issue in question and I will do the same. The returns will be disclosed only to the extent necessary to disclose any payments made directly or indirectly to the taxpayer by or from any Debbie entity.

The Matrimonial Action:

[41] Mr. Epstein submitted that the further inquiries sought by counsel for Johanna into Henry's affairs are both irrelevant and unfair. Henry, as a husband, has very different obligations from Henry as a defendant in civil proceedings. His obligation is to disclose his family property as at the date of separation and to calculate his net family property. Prior to separation, Henry had executed estate freezes in March, 1986 and January 1987 whereby, inter alia, he transferred properties to his children's various companies and took back preferred shares in BIFD Holdings with a fixed redemption value and special voting shares in 659527 Ontario Ltd. Henry did not purchase additional properties after the freeze and as a result his assets were substantially the same at either of the possible separation dates and indeed to this day. These assets have been fully disclosed in his Financial Statement and questions about them have been asked and answered long ago. Mr. Epstein submitted that the fact that Henry managed the assets even after the freezes did not make them his personal assets and so part of his NFP.

[2] *Janhevich v. Thomas* (1977), 15 O.R. (2d) 765 (H.C.J.); see also *Collins v. Beach*, [1988] O.J. No. 43

[42] In response, counsel for Johanna submitted that section 4(1) of the FLA defined "property" as including "..property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, …". Counsel cited my words in my December, 2000 endorsement that Henry controlled the whole group even without an equity interest, was able to pay himself from it, to move assets in and out at will, and manifestly had de facto control.

[43] There is no indication that Henry had the power to revoke the disposition, i.e. reverse the freezes, and I agree with Mr. Epstein that the mere fact that Henry managed the assets did not bring them within the definition of property in the FLA where he had no ownership interest. It may be that what is described in the pleadings, including the defence pleadings, indicates a de facto ownership role despite the legal niceties, but it does not reflect any legal power to dispose of the properties to his own benefit or the benefit of persons other than the owner; that is the very point the plaintiffs are making throughout these cases when they claim he did so improperly. In my decision of December 1, 2000 I ordered that Henry would make full disclosure as to the freezes, the values involved, the reasons for them and Henry's on-going role. I also directed that every aspect of Henry's assets at the valuation date, including what he did prior to separation, allegedly to reduce his NFP, was to be disclosed. It is my understanding that, at least for the most part, that has been done; in any event it has been ordered. That is, generally speaking, the realm which the plaintiff is entitled to explore in the matrimonial and 1993 cases: the value of Henry's assets at separation broadly defined, including the efforts said to have been made to reduce his NFP.

[44] The letter of March 17, 2006 begins:

> In order to continue our analysis of the Zagdanski Holdings as of December 31, 2005, we require the following information and documentation:

[45] In my view, the value of the entire Zagdanski family holdings as of December 31, 2005 has no relevance to the issues in the matrimonial action. The NFP valuation is to be done as at the date of separation as found by the court in due course. If the estate freezes are set aside, the

result will be to affect the NFP as at separation, but the Family Law Act does not create a regime of community property between husband and wife. Where property is owned by one spouse the rights of the other on separation are not ownership rights, but a right to a division of value of the net family property. All the trial judge needs to know to establish the net family property in which Ms. Klein has a share is the value at the date of separation. Evidence may clearly be sought on discovery and production to show what that value was, including some limited evidence as to events occurring in, about and after separation having an impact on that value. However, in my view, whatever Henry or the siblings may have done with that property after separation, or may be doing with it now, is irrelevant to its valuation at the date of separation. Therefore the information demanded in counsel's letter of March 17, 2006 is irrelevant and need not be produced in the matrimonial action, except to the extent that the defendant has already agreed to produce it.

The Klein Action

[46] In her 1993 claim, Johanna Klein seeks a variety of relief against Henry, Ian and Barry for alleged breaches of trust and fiduciary obligations. Against Henry she complains of his sale of Dylex shares out of a trust for her benefit of which he was trustee, and his use of the proceeds between 1968 and 1986 for unauthorized investments and loans which mainly benefited the siblings and did not earn a return for her. She also attacks a series of gifts by Henry to the siblings in excess of $6 million and a restructuring of investments in the mid-eighties to leave Henry with only Class B shares valued at $1 per share of the holding company which owned Zagjo, and the siblings with the common shares valued at over $1 million per share. She also attacks the gifting by Henry of a further $7 million in 1986 and 1987, as well as the two estate freezes in 1986 and 1987. She says that conveyances by Henry to the other defendants were fraudulent under the Fraudulent Conveyances Act ("FCA") and should be void as against her. Success on all these claims would not give her any proprietary right to Henry's property so conveyed, but would bring the value at separation of the assets so conveyed into Henry's NFP. She also seeks to impose a trust upon Henry's assets into which her own assets, including those conveyed as part of the freezes, can be traced. Should she succeed in her claims, the necessary tracing will take place after the trial and not before.

[47] The only property of Johanna's involved in all this gifting and transferring and freezing were the Dylex shares referred to above and the Aldgate Construction common shares which she was "directed" to agree to exchange for preference shares in the 1986 freeze. Henry was long ago ordered to disclose all aspects of the freeze transactions and the reductions in his potential NFP and has done so.

[48] Mr. Roebuck submitted, persuasively, that the fiduciary breach claim, the conspiracy claim and the FCA claim are all flawed in significant ways, but it is not my present function to make such determinations. However, he makes significant points as to the implications for discovery of documents raised by these particular claims. Mr. Roebuck points out that Johanna's tort claim for damages for conspiracy, unaccompanied by any claim to rescind the transaction, is inconsistent with a claim for a continuing interest in the common shares. Thus the tort claim does not require extensive disclosure as to these shares for tracing purposes.

[49] The FCA claim is that the freeze conveyances to three of the four children (those made to Debbie are not attacked) should be set aside. These were conveyances by Henry of his own property. If successful, this action would restore the assets to Henry so that they would count in the NFP calculation, but would not give Johanna any proprietary interest in them. That would not open the door to disclosure as to the financial affairs of the Zagdanski group except at the time of separation. Johanna does not seek a proprietary interest in the property gifted to the three children so no tracing issue can arise in that respect. The allegation of a conspiracy to deprive her of future growth in the common shares, does not require an exploration of the value of the whole Zagdanski holdings, but only an exploration of the values of those shares.

[50] In pursuance of these claims, counsel for Johanna in the 1993 action sent a letter of March 2, 2006 requiring further production. The letter begins by asking for confirmation of the correctness of the entire Zagdanski organization chart at July 1, 1988; for details of other shareholders in any entities not controlled by Zagdanski family members; very detailed information on all classes of outstanding shares in each entity; complete information on every piece of real estate in the group including fair market value as of December 31, 1971 and July 1, 1988. For the many buildings in the family holdings, the plaintiff seeks such detail as rent rolls

and much more. The documentation demanded is that required for a full appraisal of the properties, but such a valuation is only relevant to the extent that Henry had an ownership interest in such property at the relevant time, that is at separation. Where such an interest existed, as for example the value of the properties that were put into BIFD at or before separation, the relevant information has already been ordered to be produced in my order of December 1, 2000. What is now demanded goes far beyond that.

[51] Mr. Epstein submits that there is no relevance to the information now sought until the court finds whether there are grounds for the imposition of a trust and if so, upon what property. If the freezes are not set aside, there is nothing to trace and no impact upon Henry's NFP. If they are set aside, then their value will be added to the NFP on Henry's side. If Henry dealt improperly with her property outside of the freezes, then Johanna can trace her property into its ultimate resting place. If her assets are sufficiently recognizable to be traced, then they can still be recovered in specie and their present value is unimportant. If they are no longer recognizable, damages for any fraudulent dealings with those assets can be awarded. In either event, neither the 1988 nor the 2005 value of the entire "empire" is relevant to the Klein action claims.

[52] I agree with Mr. Epstein's submissions. In my opinion the demand is so wide that it can only be regarded as oppressive. This level of detail in respect of the entire family holdings cannot reasonably be ordered at this stage of the proceedings for the reasons canvassed above in connection with the consolidated actions. The 1993 action deals with Henry's prior dealings with Johanna's property and his efforts in 1986 and 1987 to reduce his NFP by means said to be a fraud upon Johanna. The 2005 value of the whole "empire" is not relevant to the issues. Ms. Klein's damages for any fraud in the freezes do not relate to the value of the whole of the holdings at 2005, but to their value at separation, for she can have no ownership of the whole, only her equalization payment. The need for the detail demanded for a valuation at separation does not exist unless the freezes are set aside and, in the circumstances that now exist in this case, it is oppressive and unnecessary to undertake such a costly exercise until the liability issues are decided. Reading the claim broadly, it also seeks to claim the profits made by others on Johanna's assets taken from her. But even that claim cannot support the demand for production contained in the letter of March 2 for two reasons. First, if tracing is to take place, it will be after

the right to recover the property being traced has first been established at trial. So far as the claim against Ian and Barry is concerned, there are none of the classic pleadings as to fiduciary duty and its breach in support of the claim to trace. Further, Mr. Robinson demonstrated that Johanna's Aldgate Construction assets, conveyed in the freeze, can readily be traced by the information already produced and are residing in a number of identified properties, so there is no need for the further information sought to accomplish the tracing function. Should the court agree that the profits on those properties are Johanna's, they can then be calculated.

[53] I therefore decline to order the disclosure in the Klein action of the information requested by counsel for Ms. Klein in their letters of March 2, 2006, and March 27, 2006 except to the extent that the defendants have already agreed to produce it.

[54] I have attached a schedule of rulings as to the specific questions outstanding from the discoveries of the defendants which the parties have not been able to settle and which were identified during the hearing as requiring a ruling. I am grateful to them for their success in settling so many.

[55] An order will go in accordance with these reasons. Brief submissions in writing as to the costs of these motions may be made within 30 days of the release of these reasons.

_____

Lane J.

SCHEDULE OF RULINGS AS TO OUTSTANDING DISCOVERY QUESTIONS

[56] Examination of Barry Zagdanski, May 10 and 11, 1994

Q 1445: The June 30 answer indicates that the deponent has made inquiries of his siblings and has no additional information. The question asks whether he can "find out" the date

and there is no indication whether any professional advisor who may have been consulted has any record. This should be addressed.

Q 2718: The present value of the interest in BIFD is not relevant.

[57] Examination of Ian Zagdanski, April 4, 2000

Q.823, 824: The Chart is as of July 1988 and is relevant. The "comments" mentioned in the answer as not being provided should be provided.

Q. 982: The objection to the answer was that the question was broader than Ian's activities, but it actually covered Barry as well. It has been answered.

[58] Re letter of March 2, 2006: Questions where best efforts to be made:

1.This question is re the corporate organization as at July 1, 1988. See 823 and 824 supra.

12. Assuming the agreements of 1977 and 1990 are produced, the question has been answered.

[59] Questions refused:

These questions are in tab E of the factum of the defendants other than Henry. The plaintiff Johanna seeks information designed to "ascertain the value of the Zagdanski empire as at July 1, 1988." The defendants other than Henry are not parties to the Divorce action and pleadings in that action do not provide a basis for questioning them. As to the Klein 1993 action, it pleads a conspiracy to deprive Johanna of her own property and to reduce her access to Henry's property on separation. Nothing in the pleadings makes the value of the whole "empire", which includes the property of other defendants than Henry, a relevant matter in these actions. None of the questions in tab E need be answered.

[60] I was informed during the hearing that the refusals in tabs F and G were settled.

[61] Tab H is in two parts. The questions refused with reference to Ms. Creery's letter of August 25, 2006 have been referred to in the body of the reasons. The second part refers to issues

raised in Osler's letter of March 7, 2006 which have been largely dealt with in the body of the reasons. The remaining questions are devoted to the comparison theory or to the idea that the reasonableness of management fees may be judged by examining all management fees paid throughout the Zagdanski holdings. This is an oppressive request for irrelevant information and need not be answered.

RELEASED: September 19, 2006

Tab 13

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

Tab 14

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:	)	
	)	
BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for the Applicants
Applicants	)	
– and –	)	
THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP	)	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	
AND BEWTWEEN	)	
BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for BCIMC Construction Fund Corporation
Applicants	)	*Virginie Gauthier, Allan Merskey and Peter Tae-Min Choi* counsel for Otera Capital Inc.
- and -	)	

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP	)))	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	See Schedule A for complete list of counsel

Heard: March 27, 2020

KOEHNEN J.

Overview

[1] This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

[3] At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

[4] In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact

on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

[5] The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

[6] The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

[7] The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

[8] The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

[9] The Debtors are special-purpose, project-level entities for the development of each of the three projects.

[10] Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

[11] Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

[12] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

[13] The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of $172,616,007 and $37,450,668 and a non-revolving letter of credit facility of up to $3,000,000.

[14] As of March 2, 2020, the Receivership Applicants had advanced $107,668,017.82 under the Clover Facilities. In addition, $3,000,000 in letters of credit have been extended. The

Receivership Applicants also extended a mezzanine mortgage on Clover, with $34,035,878.69 in principal outstanding.

[15] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[16] There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

(b) The Halo Project

[17] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

[18] The Halo Commitment Letter provides for two non-revolving construction loans in amounts of $156,850,7747 and $29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to $2,000,000.

[19] As of March 2, 2020, the Receivership Applicants have advanced $47,429,211.83 in principal. In addition, $1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with $25,725,159.27 in principal outstanding.

[20] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[21] There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

(c) The Yorkville Project

[22] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

[23] The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to $571,300,000 and $83,000,000, respectively.

[24] As of March 2, 2020, the Receivership Applicants had advanced $122,432,764.85 under the Facilities. In addition, $79,592,744.24 in letters of credit have been extended.

[25] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

[26] There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

[27] There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately $38,000,000 registered against the properties.

B. Deterioration of the Relationship

[28] In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

[29] First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

[30] Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately $10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

[31] Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately $ X of increased costs were hidden in this manner.

[32] In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was

recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

[33] Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over $ X in discounted sales fall into this category.

[34] The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

[35] Cost overruns on the three projects come to more than $ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately $ X were construction costs that were hidden from the lenders. The amount hidden on Clover was $ X; on Halo $ X and on 33 Yorkville, $ X.

[36] Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is $ X over budget. The Debtors say PWC's number is overstated by $ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by $ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

[37] In addition to the foregoing breaches, approximately $3.5 million in interest payments to the Receivership Applicants are overdue.

[38] On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

[39] The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

[40] Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the

allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

[41] In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

[42] A receiver may be appointed where it is just and convenient equitable to do so.

[43] Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Limited v. Seafield Resources Ltd*., 2014 ONSC 5205 (Commercial List), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27.

[44] The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J.(Commercial List) at para. 20.

[45] In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

(a) The lenders' security is at risk of deteriorating;

(b) There is a need to stabilize and preserve the debtors' business;

(c) Loss of confidence in the debtors' management;

(d) Positions and interests of other creditors.

[46] All four factors apply here.

[47] **Security at risk of deteriorating**: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The

lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

[48] **The need to stabilize the business**: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

[49] **Loss of confidence in management**: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

[50] **Position and interests of other creditors**: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

[51] In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

[52] The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

[53] The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

[54] The share sale to Concord would close on payment of one dollar. An additional $38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

(a) Court approval of CCAA protection for Clover and Halo.

(b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo

(c) Completion of construction financing either with the existing lenders or new lenders.

[55] As part of the CCAA process Concord states that it will

(a) provide $20,000,000 of debtor-in-possession financing at a rate of 5%. $7,000,000 would be advanced during the first 10 days.

(b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

[56] The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

[57] With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

[58] Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

[59] I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

[60] In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc*., 2014 ONSC 2781 at para. 61.

[61] The factors addressed in argument relevant to this exercise were as follows:

(a) Payment of the Receivership Applicants

(b) Reputational damage

(c) Preservation of employment

(d) Speed of the process

(e) Protection of all stakeholders

(f) Cost

(g) Nature of the business

(a) Payment of the Receivership Applicants

[62] During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

[63] It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

[64] Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the CCAA proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

[65] Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

[66] The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

> We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

[67] As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants.

Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

[68] Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

[69] From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

[70] I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

[71] At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

[72] The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

[73] One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

[74] This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

[75] In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

[76] The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

[77] The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

[78] There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

[79] The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

[80] The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

[81] As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

[82] The Debtors submit that the CCAA is faster than a receivership.

[83] During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

[84] In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financer would probably want to see a certain percentage of units sold before committing to financing.

[85] It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

[86] If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

[87] The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive $38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive $38,000,000 in cash.

[88] There has been no explanation in the materials before me to justify the receipt of $38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

[89] In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

[90] Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of "discount" and of "current market value" are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

(f) Costs

[91] The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC's fees. Regardless of whether Concord does or does not charge fees, the risk of PWC's fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

[92] The costs of financing a receivership or a CCAA proceeding are similar. Concord has offered a DIP loan of $20,000,000 at 5% interest. The Receivership Applicants have offered a loan of $29,000,000 at 5% interest.

[93] CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

[94] Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put $38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

[95] During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

[96] In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

[97] More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

[98] In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., 2008 BCCA 327 the British Columbia Court of Appeal stated at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[99] Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

[100] The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61*; Dondeb Inc., Re*, 2012 ONSC 6087 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), at para. 17.

[101] The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to

compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

[102] As Justice Kent pointed out in *Octagon*, as para 17,

> …if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[103] Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

[104] Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

[105] In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

[106] The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

[107] By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

[108] In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier.

Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

[109] More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

[110] The Debtors also point to *Re 2607380 Ontario Inc.,* a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that *260* is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

[111] In my view *Re 2607380 Ontario Inc*. does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.,* two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

[112] With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

[113] For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

[114] For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

Koehnen J.

Released: March 30, 2020

SCHEDULE A – COUNSEL SLIP

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Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

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Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc,, Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION

Applicants

– and –

THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP

Respondents

AND BEWTWEEN

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.

Applicants

- and -

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

REASONS FOR JUDGMENT

Koehnen, J.

Released: March 30, 2020

Tab 15

CITATION: Hush Homes Inc. (Re), 2015 ONSC 370
COURT FILE NO.: CV-14-10800-00CL
DATE: 20150119

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF HUSH HOMES INC., HUSH INC., 2122763 ONTARIO INC. and 2142301 ONTARIO INC.

BEFORE: Penny J.

COUNSEL: *Kyla Mahar and Asim Iqbal* for the Applicants

Kyle Peterson for MarshallZehr

Robin Dodokin and David Fenig for Diversified Capital Inc.

Sanja Sopic for VS Capital

Brian Empey for CVC Ardellini Investments

G. Benchentrit for the proposed Monitor

Leonard Loewith for the City of Mississauga

HEARD: January 15, 2015

ENDORSEMENT

[1] This is an application for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The application seeks an order:

(a) appointing the Fuller Landau group as Monitor of the applicants in these proceedings;

(b) staying all proceedings and remedies in respect of the applicants or any of their property, except as otherwise prescribed;

(c) authorizing the applicants to enter into a debtor in possession credit facility of up to $3 million and granting a DIP lender's charge over the applicants' assets;

(d) granting an administrative charge and directors' charge over the applicants' assets; and

(e) authorizing the applicants to prepare a plan of compromise and arrangement for the consideration of the creditors of the applicants.

[2] Each of the applicants is an Ontario incorporated company. Each is wholly owned and controlled by Naheel Suleman.

[3] Each of the applicants, except Hush Inc., which is a bare trustee, owns a residential development project in Mississauga or Oakville. I shall, where necessary, collectively refer to all three of these developments as the Projects.

[4] Each of Hush Homes Inc., 2122763 Ontario Inc. (Thornyco) and 2142301 Ontario Inc. (Silverthornco) has liabilities in excess of $5 million, with total liabilities of $64.9 million, including $46.9 million of current mortgage debt against the projects. The liabilities of each of these applicants exceed the realizable value of their assets, worth approximately $25.2 million in the aggregate on an "as is" liquidation basis and they are each unable to meet their liabilities as they become due.

[5] Hush Homes is the owner of the Coronation project in Oakville. It is a 14 lot housing development, partially developed. Some homes have been sold, others are in development and awaiting sale. The applicants' evidence is that this project can be completed within 12 months. Hush Homes has liabilities of approximately $38.7 million.

[6] Silverthornco owns a 13 lot housing development in Mississauga. It is partially developed. The applicants' evidence is that this project can also be completed within approximately 12 months. Silverthornco has liabilities of approximately $13.6 million.

[7] Thornyco owns a third property in Mississauga. The original proposal was for the development of a high rise condominium and townhouses. It is raw land, not yet even zoned for the proposed housing uses. The applicants say they have downsized this project to a 45 lot housing development. At best, however, it will still take 2 to 3 years to develop this project. Thornyco has liabilities of approximately $12.3 million.

[8] Hush Inc. is a bare trustee with no assets but has liabilities owing to the landlord of the head offices of the Hush organization and is unable to meet its obligations as they become due.

[9] All of the mortgages secured against the Projects are currently in default and numerous creditors have initiated enforcement steps in respect of the applicants. In addition to several pending claims and enforcement actions, the landlord of the Hush group's offices has taken legal action and issued a distress warrant. The applicants say that, absent the protection of the court

afforded under the CCAA, it will be impossible for the applicants to proceed with any form of restructuring for the benefit of their creditors.

[10] I am satisfied that the preconditions for the exercise of the court's jurisdiction under s. 3 of the CCAA are met. The applicants are each a "debtor company" as defined in s. 2. They are affiliated companies and all but the bare trustee have claims against them in excess of $5 million.

Thornyco – Rceivership or CCAA?

[11] The only contentious issue on the return of the application for the initial order is whether the Thornyco project should be carved out of the CCAA proceedings and subject to disposition by a receiver whose appointment by the court is sought by the first mortgagee of the Thornyco property, Diversified Capital Inc.

[12] Since the applicants have said that they will not proceed with the application under the CCAA without the Thornyco project, I will deal with that issue first, and return to other aspects of the application once the threshold Thornyco issue is resolved.

[13] Diversified has four mortgages on the Thornyco property:

(i) a first mortgage and the principal amount of $6,950,000

(ii) a second mortgage in the face amount of $1,500,000

(iii) third mortgage in the face amount of $2 million; and

(iv) a sixth mortgage in the face amount of $2,532,000.

[14] The evidence does not permit the determination of the total amount actually secured under Diversified's mortgages because some of the mortgages are said to be restricted to collateral security for possible deficiencies on the realization of mortgage amounts owing on other properties. A full accounting of realization on these other properties was not before the Court.

[15] According to Diversified, however, $9,078,675.35, as of December 1, 2014, is secured under its first mortgage. This quantification of the amount of the first mortgage is in dispute, which will be discussed below.

[16] Diversified's first mortgage has been in default for over a year and a half. A notice of sale was issued by Diversified in May 2013. Diversified recently entered into an agreement of purchase and sale with an arm's length third party to sell the Thornyco property under power of sale for $9.3 million. Diversified's evidence is that after paying arrears of taxes, this price would result in a modest shortfall in the recovery of Diversified's first mortgage debt (and, obviously, no recovery under any subsequent mortgages).

[17] At the initial return of this application (which was adjourned to permit the parties to discuss the matter) Diversified sought to have the Thornyco property carved out of the CCAA proceedings and to be permitted to carry on with its power sale.

[18] By the time of the return of the application, however, a good deal of additional evidence had been filed dealing with the nature and amount of Diversified's mortgages, the validity of the notice of sale and the validity of Diversified's purported exercise of its power of sale.

[19] Both the notice of sale and the process followed by Diversified in the power of sale are under attack in these proceedings. Recognizing the potential for risky litigation over various issues relating to the notice of sale, the validity of the sale process and possible claims for improvident realization, Diversified, during oral argument of the application, abandoned its initial proposal to proceed with the power of sale and now wishes to proceed by way of court appointed receiver to sell the Thornyco property. At the time of oral argument, there was no notice of application for that appointment before the court but Diversified has now served an application record for the purpose of seeking the appointment of a receiver to market and sell the Thornyco property.

[20] Both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented, *Romspen Investment Corp. v. 6711162 Canada Inc.* 2014 CarswellOnt 5836 (S.C.J.) at para. 61.

[21] In the case of land development companies, some courts have identified several factors which might influence a decision about whether to grant an initial order under the CCAA. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, [2008] CarswellBC 1758 for example, the B.C.C.A. said that the priorities of the security against the land development are often straightforward and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing etc.

[22] In *Encore Developments Ltd. v. Patton Construction (2002) Ltd.*, 2009 CarswellBC 84, D. Brenner C.J.S.C. found, in a case where the "project" was raw land, there was no project development work in progress, no business activity being carried out, no equity in the project and likely a substantial shortfall to secured lenders, that there was no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner should they choose to do so.

[23] It is nevertheless clear, as D. Brown J. found in *Romspen*, *supra*, that there is no "generic" prohibition against a land development business being subject to a CCAA process. Both the receivership and CCAA processes are highly discretionary and require the court to

consider and balance competing interests of various economic stakeholders in coming to a conclusion about which remedial process is more appropriate.

[24] Diversified argues that real estate development projects are not well suited to CCAA proceedings. This is especially so when raw land is involved as is the case with the Thornyco project. There are few employees, no active business and there is no immediate prospect of an improved return without the expenditure of very significant additional money and after taking on the risk of a long-term development. The "build-out" of the Thornyco property, Diversified submits, is in reality a risky long-term real estate play that will take at least two to three years to come to fruition.

[25] If the applicants' proposal was that Diversified would have to sit on its hands for two to three years with its capital tied up while the applicant and its new financial backer undertake the Thornyco development in the hope that there would be a sufficient return after payment of contractors, trades, taxes, super-priorities and the like to pay back the full amount of what is owed, I would entirely agree with Diversified's position. Such a proposal would be doomed to fail as unfair and prejudicial to Diversified. That, however, is not the proposal being made by the applicants in this case.

[26] MarshallZehr Group Inc. is the first secured creditor on the Coronation and Silverthornco projects. In preparation for these proceedings, the applicants negotiated a restructuring agreement with MarshallZehr which provides the framework for what the applicants and MarshallZehr hope will be a viable CCAA plan for the applicants to put forward to their creditors.

[27] If implemented, the applicants (and MarshallZehr) maintain that the restructuring agreement will provide the financial and other means to enable the applicants to avoid an "as is" liquidation and proceed with an orderly "build-out" of the Projects with a view to maximizing value for the benefit of all the applicants' creditors. They estimate that an incremental $10 million can be generated for creditors under this scenario.

[28] MarshallZehr has agreed to provide the applicants with a DIP loan facility in the amount of $3 million subject to obtaining a DIP lenders charge in priority to other security interests.

[29] Importantly, however, the DIP lender's charge along with the other charges sought to be given a super-priority secured against the applicants' assets, will be secured on a Project-specific basis, based, in the case of the DIP financing at least, on where the funds, or the benefits of the expenditure of the funds, go. The restructuring agreement governing the DIP financing provides that:

> each of the Thorny, Silverthorn and Coronation property shall be security for amounts advanced, including interest accrued and accruing thereon, on account of professional fees, developer's working capital, financing fees and closing costs *in such manner and to such extent as is recommended by the Monitor and approved and allocated by the Court*. [emphasis added]

[30] The vast majority of the DIP financing is forecast to be spent on the Coronation and Silverthornco projects, not the Thornyco project. Further, the applicants agreed during oral argument that the amount of DIP financing secured against the Thornyco property would be capped at $500,000 in any event.

[31] Even more importantly, MarshallZehr also proposes to pay out Diversified's first mortgage in full (in an amount determined by the Court) and assume the first mortgagee position on Thornyco. The proposal is that a claims process will be established promptly which will be used to determine the amount properly secured under Diversified's first mortgage. MarshallZehr has undertaken to the Court that it will pay whatever amount is found to be owed under Diversified's first mortgage.

[32] Thus, if Diversified is right that it is owed $9,078,675.35 on its first mortgage (plus additional accrued interest since December 1, 2014), it would be in a better position under the applicants' CCAA proposal than it would have been if it had gone through with its power of sale (the power of sale process involved an offer that Diversified was prepared to, and did, accept which would have resulted in a *shortfall* on the amount it says it is owed under the first mortgage). In the former scenario, Diversified would not be "dragged into" a CCAA proceeding and would not, presumably, have any obvious reason to vote against a plan of compromise since any amount it might receive on its subsequent mortgages would be a "windfall" compared to what Diversified was willing to accept on its proposed power of sale of the Thornyco property.

[33] Ultimately, Diversified's complaint about being drawn into the CCAA process, as opposed to asserting its own rights through a receivership process, is that the Court may find in the CCAA claims process that Diversified's first mortgage is not $9,078,675.35 but some lesser amount. Diversified's concern is that if the "difference" is allocated to its second, third or even sixth mortgages, it will be paid out the amount of its first mortgage but amounts found to be secured by subsequent mortgages will be tied up indefinitely in the CCAA proceedings.

[34] The problem with this argument is that the issues which have been raised about the calculation of Diversified's first mortgage debt will be raised in whatever process is adopted to realize on the value of its first mortgage.

[35] The disputes over the calculation of the amount of Diversified's mortgage entitlements appear to involve four issues:

(i) whether a $1.4 million increase to the first mortgage was, in fact, advanced;

(ii) whether a deficiency resulting from a 2013 refinancing of a first mortgage Diversified formally held on the Silverthornco property was secured under its first mortgage on Thornyco;

(iii) whether there is a shortfall resulting from realization on another property, Langston Hall, for which Diversified's first, second or third Thornyco mortgages are collateral security; and

(iv) whether certain payments made in 2013 totaling about $700,000 were "advances" under the first mortgage made with knowledge of the subsequent fourth and fifth mortgages (and therefore subordinate to those mortgages) or whether they qualify as amounts secured by the Thornyco mortgages at all.

[36] The Diversified first mortgage is a conventional charge for monies actually advanced to the borrower, rather than a collateral charge. The applicants take the position that under an August 2012 mortgage amending agreement which increased the first mortgage by $1.4 million, Diversified did not "advance" $1.4 million to Thornyco. Rather, they argue, this increase in the amount of the Diversified first mortgage was intended as collateral security given in consideration for the discharge of Diversified's mortgages over certain Silverthornco properties. Diversified takes the position that valuable consideration was provided for this mortgage.

[37] In June 2013, MarshallZehr refinanced Diversified's Silverthornco mortgage, repaying the loan that Diversified argues was collaterally secured by Diversified's first mortgage on Thornyco. This refinancing left a shortfall of approximately $600,000 which was only then crystallized and allegedly transferred to the Thornyco first mortgage to be secured on the Thornyco property. The applicants again argue that no portion of this $600,000 was "advanced" to Thornyco.

[38] Finally, there were payments made to Thornyco on June 4 and June 25, 2013 in the amounts of $450,000 and $250,000 respectively. Diversified's mortgage summaries and Acknowledgment at the time characterized these payments a "advances." At the time of these advances, Diversified had actual knowledge of the subsequent fourth and fifth mortgages on the Thornyco property.

[39] Initially, Diversified took the position that all of its advances were secured under its first Thornyco mortgage and that it could not advance funds under the second or third mortgages because those mortgages were collateral security for a mortgage Diversified held on another property, Langston Hall. In a subsequent affidavit, Diversified took the position that these amounts were not "advances" under the first mortgage after all but repayments of an overpayment credit owed to Thornyco. Diversified says that its second and third mortgages nevertheless "secured" the $450,000 repayment on June 4, 2013 and the $250,000 repayment on June 25, 2013. Diversified also still maintains that the second and third mortgages represent collateral security for a mortgage loan made on the other property, Langston Hall.

[40] There is a potential swing of roughly $2 million in the calculation of Diversified's first mortgage security as a result of these issues.

[41] I am not being asked, nor would it be possible on the record before me, to resolve the question of which of these amounts in dispute represent proper and valid amounts due and owing under Diversified's first mortgage on Thornyco and which do not. But it is clear that they are issues that will have to be resolved by the court in the event of either a receivership or a CCAA claims process.

[42] If Diversified is right about the amount secured under its first mortgage, it will be paid ought its first mortgage obligation accordingly. If it is wrong, some amounts may not be secured by the first mortgage or at all. Either way, the "disallowed" portion of Diversified's first mortgage claim will not be available to it. And, under either process, Diversified will receive what it is entitled to receive under its first mortgage. This is because, in a CCAA process, MarshallZehr has undertaken to the court that it will take out Diversified's first mortgage for the amount the court says is properly secured. And in a receivership process, likewise, the court will award Diversified the amount of any sale proceeds to which it is entitled under its first mortgage in priority to other creditors.

[43] Although it is theoretically possible that amounts "disallowed" as not being secured under Diversified's first mortgage could slide seamlessly into a secured position under Diversified's second or third mortgages, it is by no means clear on the present record how that could necessarily be so.

[44] In short, it is difficult to see how Diversified would be worse off in a claims process under the CCAA (in which MarshallZehr has undertaken to pay out Diversified on its first mortgage at full value, as found by the court) than it would in a receivership process, especially when compared to the amount Diversified was prepared to accept under its power of sale.

[45] Diversified also complains that under a CCAA order, it claims will be subordinated to the DIP lender's and other charges sought in these proceedings. The concern is lessened, however, by the manner in which the proposal has been structured. First, I was advised during oral argument that MarshallZehr will pay out to Diversified its first mortgage, in the full amount found by the court to be properly secured by that mortgage, without adjustment for DIP financing priority.

[46] Second, and in any event, the super-priority charges that will be secured against the applicants' assets will be allocated between Projects subject to court approval. Thus, to the extent Diversified has concerns about the allocation of these charges between Projects, it will have the opportunity to address this issue at a future court proceeding.

[47] It must also be noted that the appointment of a receiver by the court now being sought by Diversified, will come with its own set of significant costs.

[48] Finally, I am prepared to order (to the extent that this right would not already exist) that Diversified is at liberty to return to court at a future juncture, for example, when the proposed claims process has run its course, prior to a vote on the applicants' proposed plan of compromise or arrangement to renew its request if any new or additional prejudice has been identified.

[49] In conclusion, I find that the concerns which led other courts to dismiss some CCAA applications concerned with land development businesses are not present here. I find, on the unique facts of this case, that the "prejudice" to Diversified, that is the risks it faces in seeking recovery on its mortgage security, is roughly the same whether realization takes place in the receivership scenario or the CCAA scenario.

[50] For this reason, I find that Diversified's concerns are not sufficient, at this initial stage, to warrant carving the Thornyco project out of the CCAA application and denying the stay in respect of that Project.

The Stay

[51] The CCAA is remedial legislation. It is intended to provide a structured environment for the negotiation of compromises between the debtor company and creditors for the benefit of both. Where a debtor company realistically plans to continue to deal with its assets so as to benefit creditors but requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA, *Re Lehndorff General Partners Ltd.,* 1993 CarswellOnt 183 (Gen. Div.) at para. 6.

[52] Section 11.02 of the CCAA provides that a court may, on the initial application, make an order staying all proceedings in respect of the debtor company for a period of 30 days, provided the court is satisfied that circumstances exist that make the order appropriate.

[53] The applicants require a stay of proceedings in order to stay the enforcement actions that have been initiated against the applicants and their property. Absent the protection of the court afforded under the CCAA, it would be impossible for the applicants to proceed with any form of restructuring. The stay of proceedings will allow the applicants to refine and implement a restructuring plan, including a claims process as discussed above, based on the restructuring agreement with MarshallZehr that could, realistically, result in more value for all creditors.

Prefiling Obligations

[54] The proposed initial order does not seek to designate critical suppliers but proposes to grant to the applicants' the power, with the approval of the Monitor or by order of the court, to determine if payments of certain prefiling expenses are necessary to the continued operations of the applicants. In granting the authority to permit payments of this kind, the courts have considered factors such as:

(a) whether the supply of goods or services is integral to the business;

(b) the dependency of the business on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor or the court; and

(d) the effect on the ongoing operations of the business and the applicants' ability to restructure if were unable to make prefiling payments to critical suppliers.

[55] In this case, the continued supply of materials and services to the Coronation and Silverthornco projects to undertake restructuring efforts is absolutely critical. The Monitor is

supportive of the grant of this authority and has undertaken to work with the applicants to minimize payments of prefiling liabilities.

[56] In the circumstances, I am prepared to grant the order sought.

The Monitor

[57] Section 11.7 of the CCAA requires that the Monitor be a trustee within the meaning of ss. 2(1) of the BIA. There are also certain restrictions on who may be a Monitor set out in ss. 11.7(2) of the CCAA. Gary Abrahamson of the Fuller Landau group is a trustee and is not subject to any of the restrictions. Fuller Landau has consented to its appointment as Monitor. Their appointment is approved.

The DIP Financing and Charge

[58] The authority to grant this order is set out in s. 11.2 of the CCAA. The listed factors include:

(a) the period during which the applicants are expected to be subject to CCAA proceedings;

(b) how the applicants' business and financial affairs are to be managed during the proceedings;

(c) whether the applicants' management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made;

(e) the nature and value of the property involved; and

(f) the views of the proposed monitor contained in its prefiling report.

[59] In this case, the DIP lender's charge does not purport to rank in priority over any secured creditor that has not received notice of this application. The amount to be advanced under the DIP facility is appropriate and required, having regard to the debtors' cash flow statement as reviewed by the proposed Monitor and, the charge does not secure any obligation which existed before the order was made, *Canwest Global Communications Corp., Re*, 2009 Carswell Ont 618 (S.C.J. [Comm. List]) at paras. 31 – 35.

[60] It is true that Diversified has advanced a strongly held view that it has no confidence in the applicants' management. However, as discussed above, very little of the DIP facility is going to be spent on the Thornyco project, so that any charge on the Thornyco property will be limited and, in any event, shall not exceed $500,000.

[61] It is clear that the DIP facility is needed to enhance the prospects of any viable compromise or arrangement. It will, among other things, enable all restructuring costs including fees and disbursements to be paid. It is also necessary to unlock the value which resides in the Coronation and Silverthornco projects which are relatively close to completion.

[62] Finally, there is no evidence of any other immediate sources of interim financing available on better terms.

[63] Accordingly, the request for an order approving the DIP facility in the maximum principal amount of $3 million, in accordance with the terms and conditions of the relevant agreements and as specified in this endorsement, is approved.

Administrative and Directors' Charge

[64] It is clear that the applicants' legal advisers and the proposed Monitor must have a secure source of payment in order to perform their functions. The court has jurisdiction to make this order under section 11.52 of the CCAA. Having regard to the factors outlined in *Canwest Publishing Inc., Re*, 2010 ONSC 222 at paras. 42 – 45 (Comm. List), I find the amount is proportional to the size and complexity of the business being restructured and there is no apparent duplication of roles. The only objecting secured creditor, Diversified, will be minimally affected by these charges because, again, they will have to be allocated on a Project-specific basis.

Conclusion

[65] In conclusion the application for an initial order under the CCAA is granted. I am prepared to sign the Initial Order submitted subject to counsels' confirmation (or upon a further submissions if necessary) that the Order reflects the guidance of this endorsements in all material respects.

Penny J.

Date: January 19, 2015

Tab 16

CITATION: Romspen Investment Corporation v. 6711162 Canada Inc., 2014 ONSC 2781
COURT FILES NOS.: CV-14-10470-00CL and CV-14-10529-00CL
DATE: 20140505

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

COURT FILE NO. CV-14-10470-00CL

RE: Romspen Investment Corporation, Applicant

AND:

6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

AND:

COURT FILE NO. CV-14-10529-00CL

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF 6711162 CANADA INC., AND THOSE OTHER COMPANIES LISTED IN SCHEDULE "A" HERETO

BEFORE: D. M. Brown J.

COUNSEL: S. Jackson, for the Romspen Investment Corporation

D. Magisano and S. Puddister, for 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc., respondents/CCAA Applicants

A. Bouchelev, for Altaf Soorty and Zoran Cocov

E. Tingley, for Pezzack Financial Services Inc.

HEARD: May 2, 2014

REASONS FOR DECISION

I. Competing applications for the appointment of a receiver and the making of an initial order under the *Companies' Creditors Arrangement Act*

[1] Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

[2] 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

[3] The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario – a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

[4] For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

[5] Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

[6] By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

[7] The funds were to be used "for general corporate purposes…to retire existing mortgage indebtedness [on two properties]…to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

[8] The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

[9] A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

[10] However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

[11] Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

[12] After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

[13] Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear – there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they

did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

[14] To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender)(approximately $7,000,000) and to pay further fee and transaction costs."

[15] Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

[16] The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

[17] The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[18] According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*. (emphasis added)

[19] Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

[20] The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

[21] Rompsen stopped making any further advances under the Loan in October, 2013.

[22] In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

[23] On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

[24] On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

[25] On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

[26] Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the *CCAA* Applicants

[27] Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

[28] The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

[29] The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts

acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

[30] Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

[31] There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

[32] The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner – i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> …
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back*. (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

[33] The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

[34] Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

[35] Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

[36] The CCAA Applicants contended that the four Ramara Properties – 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road – were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

[37] The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

[38] A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

[39] Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

[40] 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a *CCAA* initial order

[41] Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> … I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

[42] As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

[43] The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

[44] Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

[45] Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter; nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

[46] Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

[47] The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

[48] Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

[49] The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

[50] Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

[51] As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

[52] In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

[53] The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

[54] Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

[55] Romspen filed its own internal calculations which placed all of the costs to complete – both "hard" and "soft" – several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

[56] In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

[57] Soorty also deposed that the CCAA Applicants proposed "…leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-

Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

> The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

[58] Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

[59] Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently…It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed….
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an

> examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

[60] The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.[2]

[61] Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs over Maple Bay Investments Ltd. v. Fisgard Captial Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development

[1] (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.), paras. 10 and 12.
[2] [2010] 3 S.C.R. 379, para. 14.

> while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.[3]

[62] More recently, C. Campbell J., in *Re Dondeb Inc.*, after quoting the above passage from *Cliffs over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.
>
> A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.
>
> In *Edgeworth*, dealing with the specifics of that case I noted:
>
> > Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.
>
> …
>
> [In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent,

[3] 2008 BCCA 327, para. 36.

> Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.
>
> In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.
>
> …
>
> Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.[4]

B. Applying the legal principles to the evidence

[63] The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan – the Midland Condo Project – the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

[64] In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default

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[4] 2012 ONSC 6087, paras. 19-21, 25, 26 and 31.

under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

[65] First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

[66] While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations,[5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[67] The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*.

[68] In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

[69] The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014

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[5] *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 456 C.B.R. (3d) 267 (Ont. Gen. Div.)

email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly…the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever*. (emphasis added)

[70] The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan – internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

[71] Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

[72] At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.

[73] I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

[74] Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

[75] Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

[76] Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

[77] Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the

First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

[78] For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

[79] Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties – 6711162 Canada Inc. and 1794247 Ontario Inc. – the companies which own the Cambridge Properties – 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. – and the company which owns the Midland Properties – Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

[80] One of the Ramara Properties – 4271-4275 Hopkins Bay Road, Rama – is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

[81] Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

[82] Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

[83] Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

[84] A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

V. Costs

[85] I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

[86] Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[6]

D. M. Brown J.

Date: May 5, 2014

[6] (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.

Tab 17

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091215

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

COUNSEL: *Lyndon Barnes, Alex Cobb and Shawn Irving* for the CMI Entities

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders

K. McElcheran and G. Gray for GS Parties

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild

Hilary Clarke for Senior Secured Lenders to LP Entities

Steve Weisz for CIT Business Credit Canada Inc.

DATE HEARD: December 8, 2009

REASONS FOR DECISION

PEPALL J.

Relief Requested

[1] The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and

GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

[2] Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

[3] The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

[4] CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

[5] According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

[6] The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

[7] A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall

> sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

[8] The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

[9] On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

[10] For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

[11] The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

[12] On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

[13] The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the

> applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[14] The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
>
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
>
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
>
> (e) if necessary, a trial of the issues arising from the foregoing.

[15] They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

[16] The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

[17] In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

[18] The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

[19] In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

[20] In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

[21] Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

[22] The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

[23] The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

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[1] (2000), 19 C.B.R. (4th) 1.
[2] [1990] B.C.J. No. 2385 (C.A.) at p. 4.

[24] The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

[25] Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

[26] First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

[27] The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[28] The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of

the CCAA: *Re Stelco Inc* [3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed….The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

[29] The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

[30] Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.* [8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA,

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[3] (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.
[4] (2000), 19 C.B.R. (4th) 1.
[5] (1993), 17 C.B.R. (e3d) 24.
[6] Ibid, at p. 32.
[7] Supra, note 2

section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

[31] The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

[32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

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[8] (1992) 14 C.B.R. (3d) 303.
[9] R.S.O. 1990, c.C.43.
[10] Supra, note 6 at paras. 24 and 25.
[11] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.
[12] (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.
[13] Ibid, at para. 68.

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14]and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

[14] Supra, note 3.

[34] Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

[35] In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

[36] In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

[37] It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

[38] The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

[39] When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the

transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

[40] Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

[41] The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

[42] The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

[43] The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]*:*

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

[44] Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

[45] If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility

[15] This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.
[16] Specifically, GS Capital Partners VI Fund, L.P.
[17] 5 C.B.R. (5th) 92 at para.37.
[18] Ibid, at para. 37.
[19] (1988), 72 C.B.R. (N.S.) 1.

for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

[46] While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

[47] A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[48] Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor

does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

[49] In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

[50] Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

[51] The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

[52] The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Pepall J.

DATE: December 15, 2009

Tab 18

McConnell v. Huxtable

Ontario Reports

Court of Appeal for Ontario,

Laskin, Rosenberg and Goudge JJ.A.

January 31, 2014

118 O.R. (3d) 561 | 2014 ONCA 86

Case Summary

Limitations — Real property — Claim for unjust enrichment in which claimant asks court to impose constructive trust upon respondent's real property constituting "action to recover any land" within meaning of s. 4 of Real Property Limitations Act — Claim subject to ten-year limitation period — Alternative claim for monetary award sheltering under s. 4 — No legislative gap existing if s. 4 of Real Property Limitations Act does not apply — Limitations Act, 2002 applying to equitable claims — Limitations Act, 2002, S.O. 2002, c. 24, Sch. B — Real Property Limitations Act, R.S.O. 1990, c. L.15.

The applicant brought an action for unjust enrichment seeking a remedial constructive trust in real property owned by the respondent. Alternatively, she sought a monetary award. The parties agreed that the applicant was aware that she had claims or potential claims against the respondent in June 2007. The action was commenced in February 2012. The respondent brought a motion for summary judgment dismissing the action as statute-barred as it was not brought within the two-year limitation period in the *Limitations Act, 2002*. The motion judge found that the ten-year limitation period in the *Real Property Limitations Act* applied. Alternatively, he found that there was a legislative gap and there was no limitation period for the action. The respondent appealed.

Held, the appeal should be dismissed.

A claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another's property is "an action to recover any land" within the meaning of s. 4 of the *Real Property Limitations Act*. "Recover" in s. 4 does not have its ordinary meaning, which implies the return of something that the person previously held. Rather, it means to obtain land by judgment of the court. The plain meaning of "recover any land" includes seeking an equitable interest in land through imposition of a constructive trust. The ten-year limitation period in s. 4 of the *Real Property Limitations Act* applied. The plaintiff's alternative claim for a monetary award sheltered under s. 4.

The motion judge erred in finding that if s. 4 of the *Real Property Limitations Act* did not apply to the applicant's claim, there was a legislative gap and no limitation period applied. The *Limitations Act, 2002* applies to equitable claims.

Equitable Trust Co. v. Marsig (2012), 109 O.R. (3d) 561, [2012] O.J. No. 1605, 2012 ONCA 235, 16 R.P.R. (5th) 173, 289 O.A.C. 345, 348 D.L.R. (4th) 733, 214 A.C.W.S. (3d) 266; *Hartman Estate v. Hartfam Holdings Ltd.*, [2006] O.J. No. 69, 263 D.L.R. (4th) 640, 205 O.A.C. 369, 22 E.T.R. (3d) 161, 23 R.F.L. (6th) 201, 145 A.C.W.S. (3d) 52 (C.A.); *Kerr v. Baranow*, [2011] 1 S.C.R. 269, [2011] S.C.J. No. 10, 2011 SCC 10, 274 O.A.C. 1, 328 D.L.R. (4th) 577, 2011EXP-624, 411 N.R. 200, J.E. 2011-333, [2011] 3 W.W.R. 575, 64 E.T.R. (3d) 1, 14 B.C.L.R. (5th) 203, 300 B.C.A.C. 1, 93 R.F.L. (6th) 1, EYB 2011-186472, **consd**

Other cases referred to

Bouchan v. Slipacoff, [2010] O.J. No. 2592, 2010 ONSC 2693 (S.C.J.); *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, [1993] 3 W.W.R. 337, J.E. 93-660, 23 B.C.A.C. 81, 77 B.C.L.R. (2d) 1, [1993] R.D.F. 369, 48 E.T.R. 1, 44 R.F.L. (3d) 329, EYB 1993-67100, 39 A.C.W.S. (3d) 646; [page562] *Pettkus v. Becker*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 6 A.C.W.S. (2d) 263; *Placzek v. Green*, [2009] O.J. No. 326, 2009 ONCA 83, 307 D.L.R. (4th) 441, 69 C.P.C. (6th) 42, 245 O.A.C. 220; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, 76 A.C.W.S. (3d) 894; *Schneider v. State Farm Mutual Automobile Insurance Co*., [2010] O.J. No. 3850, 2010 ONSC 4734 (S.C.J.); *Wilson v. Fotsch*, [2010] B.C.J. No. 850, 2010 BCCA 226, 286 B.C.A.C. 276, [2010] 11 W.W.R. 29, 319 D.L.R. (4th) 26, 81 R.F.L. (6th) 241, 57 E.T.R. (3d) 159

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3, s. 7(3)

Limitations Act, R.S.O. 1990, c. L.15, Part I, s. 4, Part II, ss. 42, 43, (2), Part III

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.], ss. 1, 2(1)(*a*), (*f*), 4, 5 [as am.], (1) (*a*), (i), (iii), 13, (7), 15 [as am.], (2), 19

Real Property Limitations Act, R.S.O. 1990, c. L.15 [as am.], ss. 1, 4, 15, 42 [as am.]

Rules and regulations referred to

Family Law Rules, O. Reg. 114/99, Rule 16 [as am.]

Authorities referred to

Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991)

Maddaugh, Peter D., and John D. McCamus, *The Law of Restitution*, looseleaf, release no. 11 (Toronto: Canada Law Book, 2013)

Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969)

APPEAL from the order of Perkins J. (2013), 113 O.R. (3d) 727, [2013] O.J. No. 612, 2013 ONSC 948 (S.C.J.) dismissing a motion for summary judgment.

Bryan R.G. Smith and *Lindsey Love-Forester*, for appellant.

Bill Rogers, for respondent.

The judgment of the court was delivered by

[1] **ROSENBERG J.A.**: — This appeal concerns the relationship between the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B and the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 in the context of a family law dispute. It is a matter of first impression in this court. The respondent, Judith McConnell, brings an action for unjust enrichment seeking a remedial constructive trust in a property owned by the appellant, Brian Huxtable. In the alternative, she seeks a monetary award. By June 2007, the respondent was aware that she had claims or potential claims against the appellant including a claim for unjust enrichment and a remedy of constructive trust. Since she did not start this action [page563] until February 2012, her action may be out of time if the general two-year limitation period in the *Limitations Act, 2002* applies, but not if the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applies. Thus, the issues in this appeal are (1) which, if either, of these two limitation periods applies; or (2) whether neither Act applies, leaving a legislative gap such that there is no statutory limitation period.

[2] The appellant brought a motion for summary judgment under Rule 16 of the *Family Law Rules*, O. Reg. 114/99. The motion judge, Perkins J., found that the *Real Property Limitations Act* applied. Alternatively, he found that there was a legislative gap and there was no limitation period for this action. I agree with the motion judge that the *Real Property Limitations Act* applies. I do not agree with the motion judge's alternative conclusion that there is a legislative gap. Accordingly, I would dismiss the appeal.

The Facts

[3] As indicated, this appeal arises out of a motion for summary judgment brought by the appellant. There are significant factual disputes between the parties as to the nature of their relationship and what if any contribution the respondent made to the properties owned by the appellant. The respondent claims that she made significant contributions to improving the properties, particularly the most recent property on Royal York Road. The appellant alleges that she made minimal contributions, perhaps as little as 20 hours of work, and that her contributions

were of little value. The factual dispute is not germane to this motion. The facts relating to the limitation period issue are not disputed.

[4] The parties had a relationship from 1993 or 1994 to 2007. They did not marry and they did not have children. During their relationship, the appellant bought and sold two houses and owned a third at the time the parties' relationship ended. All properties were in the appellant's name. All funds to acquire the properties were provided by the appellant. The parties' relationship ended in June 2007, when the police removed the respondent from the home and charged her with attempting to extort the appellant. She did not live at the property after that time. The respondent does not admit the attempted extortion. She does admit that the parties' relationship ended in June 2007. The parties have not shared a residence, had any relationship, shared any financial responsibilities or had any financial obligations to one another since June 2007. [page564]

[5] Following the end of the parties' relationship in June 2007, the respondent retained a lawyer who wrote to the appellant seeking an amicable settlement of issues "arising from your joint ownership of property, cohabitation and separation". There was an exchange of correspondence but no settlement was reached. Nothing else occurred until February 2012, when the respondent learned that the appellant was selling his home. On February 28, 2012, the appellant was served with the material in this proceeding including an *ex parte* order that granted the respondent a certificate of pending litigation ("CPL") on the appellant's home. The relevant parts of the respondent's claim for the purposes of the appeal are the following:

> (a) A declaration that pursuant to the doctrines of resulting trust, constructive trust, or as a proprietary award for unjust enrichment, the Applicant has a 50% interest (traceable to any proceeds) in the house at [Royal York Road property], which is registered solely in the name of the Respondent;
>
> (b) A Certificate of Pending Litigation with respect to the abovementioned house, and an Order that it cannot be sold without the written consent of the Applicant;
>
> (c) In the alternative, an award to the Applicant of monetary damages for unjust enrichment in an amount to be determined[.]

[6] The appellant brought the motion for summary judgment to have the action dismissed because it was out of time and to have the CPL removed. Correspondence between counsel on the motion for summary judgment confirmed discovery was not an issue. The parties included the following in an agreed statement of facts:

> On June 27, 2007, the Applicant Judith June Barry McConnell was aware that she had claims, or potential claims, against the Respondent Brian Wesley Scott Huxtable, in the nature of relief as against Mr. Huxtable's property, including but not limited to claims for unjust enrichment, and the remedies of constructive trust and/or damages flowing therefrom.

The Reasons of the Motion Judge

[7] In lengthy and compelling reasons, the motion judge found that the *Real Property Limitations Act* governed the respondent's claim. While the *Limitations Act, 2002* seeks to enact a comprehensive scheme for limitation periods, s. 2(1)(*a*) expressly exempts "proceedings to

which the *Real Property Limitations Act* applies". The motion judge found that the respondent's claim came within s. 4 of the *Real Property Limitations Act*, which provides as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some [page565] person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[8] The motion judge held that a claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another party's property is "an action to recover any land" within the meaning of s. 4. In reaching this conclusion, the motion judge conducted a thorough review of the authorities and engaged in the statutory interpretation exercise mandated by the Supreme Court of Canada in decisions such as *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2. He considered the statutory history and the scheme and object of the *Real Property Limitations Act* and the *Limitations Act, 2002*.

[9] The motion judge also noted an apparent anomaly that would occur if the two-year limitation period under the *Limitations Act, 2002* applied. In family law cases involving a married couple, an unjust enrichment claim seeking a remedial constructive trust is often paired with a claim for equalization under the *Family Law Act*, R.S.O. 1990, c. F.3. The two claims typically cover, in part, the same property and subject matter, and the equalization claim ordinarily has a six-year limitation period by virtue of s. 7(3) of the *Family Law Act*. Section 19 of the *Limitations Act, 2002* preserves those limitation periods set out in the Schedule to that Act, including s. 7(3) of the *Family Law Act*.

[10] The motion judge also concluded that the respondent's alternative claim for monetary compensation sheltered under her claim for recovery of land. Since the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applied to the claim, the motion for summary judgment was dismissed.

[11] Supposing in the alternative that the *Real Property Limitations Act* did not apply by virtue of the exemption in s. 2(1)(*a*) of the *Limitations Act, 2002*, the motion judge went on to consider whether the *Limitations Act, 2002* applied at all or whether there was instead a legislative gap. Again in comprehensive reasons in which he drew on his long experience conducting family law cases, the motion judge found that the *Limitations Act, 2002* could not apply to the respondent's claim and thus there was a legislative gap. In the result, there was no statutory limitation period. The motion judge left open the question of whether the equitable doctrine of *laches* could apply. That issue could only be determined on a full record and would not be suitable for resolution on the motion for summary judgment in the form it was brought in this case. [page566]

The Issues

[12] The motion judge articulated the issues with clarity as follows [at para. 1]:

> 1. Is a claim in a family law case in which the claimant pleads facts to establish a constructive trust and asks the court to award an ownership interest in land, with an

alternative claim for monetary compensation, governed by the ten year limitation period set out in section 4 of the *Real Property Limitations Act* or by the two year limitation period set out in section 4 of the *Limitations Act, 2002*?

2. Is there a gap in the limitations legislation such that there is no applicable statutory limitation period for a constructive trust claim in a family law case, leaving scope for the court to devise a time limit using its equitable jurisdiction?

I will deal with the issues in the same order. As I agree with the motion judge's resolution of the first issue, in these reasons I will rely extensively upon his reasons.

Analysis

Application of the Real Property Limitations Act

[13] The most relevant parts of the *Real Property Limitations Act* are the following:

1. In this Act,

"action" includes an information on behalf of the Crown and any civil proceeding;

. . . . .

"land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency[.]

. . . . .

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[14] Other parts of the Act are also of some assistance in interpreting the legislation and I will refer to those provisions [page567] later in these reasons. The *Real Property Limitations Act* is, with some modifications, what used to be Part I of the *Limitations Act*, R.S.O. 1990, c. L.15. I will usually refer to this latter legislation as the old *Limitations Act.* When the legislature decided to overhaul the law of limitations in this province, it decided to leave the law as applied to real property largely untouched; hence the archaic and difficult language in the *Real Property Limitations Act.* For example, the key definition in s. 1 of "land" uses the archaic term

"messuages", which, as I understand it, means a dwelling house, its outbuildings, the area immediately surrounding the dwelling, and the adjacent land appropriate to its use.

[15] To understand the application of s. 4, it will be helpful to remove those parts that do not directly apply to this case:

> 4. No person shall . . . bring an action to recover any land . . . , but within ten years next after the time at which the right to . . . bring such action first accrued to the person bringing it.

Thus, s. 4 creates a ten-year limitation period for an action to recover land. The central question raised by this appeal is whether a claim for unjust enrichment in which the claimant asks the court to impose a constructive trust upon the respondent's real property is an action to recover any land. The motion judge broke the issue down into three parts: (1) is the respondent's claim an "action", (2) is the action to "recover" and (3) is the action to recover "land"? There is no dispute that the respondent's claim is an action within the meaning of s. 4. I therefore turn to the other questions.

Meaning of "recover"

[16] The appellant challenges the motion judge's approach to defining "recover" and, of course, his decision. The motion judge considered both the ordinary meaning of the term as well as its meaning as used in legal contexts and this court's decision in *Hartman Estate v. Hartfam Holdings Ltd*., [2006] O.J. No. 69, 263 D.L.R. (4th) 640 (C.A.). The appellant submits that the motion judge did not go far enough and subject the term to the full *Rizzo & Rizzo* interpretive analysis. I do not accept the appellant's submissions on this issue, for the following reasons.

[17] As the motion judge noted, the term "recover" in ordinary language implies the return of something that the person previously held. A claim for a constructive trust does not fit comfortably within that definition since the applicant does not have any interest in the property until the court makes a declaration to that effect. However, legal dictionaries refer to a different usage [page568] of the term as that of gaining through a judgment or order. This was the definition adopted by this court in *Hartman Estate*, at para. 57:

> On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the Act. In *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court". See also *OAS Management Group Inc. v. Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect.

[18] The court in *Hartman Estate* was concerned with s. 43(2) of the old *Limitations Act*, which has no exact equivalent in the *Real Property Limitations Act*, although there is some vestige of the provision in s. 42 of the *Real Property Limitations Act*, which I will discuss later. Section 43 was found in Part II of the old *Limitations Act*, which was repealed when the *Limitations Act, 2002* came into force. Part II dealt with limitations in cases involving trusts and trustees where the trust was created by an instrument or an Act of the legislature (s. 42). Section 43 allowed a

trustee the benefit of any statutory limitation period, with some exceptions. One of those exceptions was to "recover trust property" still retained by the trustee. Having found that the exception applied, this court did not have to decide whether the limitation period in s. 4 (identical under the *Real Property Limitations Act* and the old *Limitations Act*) applied.

[19] It is therefore true, strictly speaking, that the *Hartman Estate* court's discussion of the meaning of "recover" in s. 4 was *obiter*, since the court was concerned with the exception in s. 43. However, while the court's consideration of s. 4 was *obiter*, its holding on the meaning of the term "recover" in s. 43 was not. That determination was a step towards finding that the trustees in that case could not rely upon a statutory limitation period, such as the limitation period in s. 4. It would be an odd result if "recover" had one meaning in s. 43 of the Act and a different meaning in s. 4, particularly given that s. 43 references s. 4, albeit in general terms ("any statute of limitations"). *Hartman Estate* was a considered decision of this court and I see no reason to depart from the determination of the term "recover" in that case.

[20] The appellant places considerable emphasis on other parts of the *Real Property Limitations Act* that he says provide context for interpreting s. 4 and which should lead to a different result. In particular, he relies upon s. 15, which provides as follows: [page569]

> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the *right and title of such person to the land or rent*, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

(Emphasis added)

The appellant submits that s. 15 presumes that the claimant had right and title that were extinguished once the limitation period expired. He submits that a person with nothing more than a claim for a constructive trust had no right or title to be extinguished. The difficulty with this submission is that it gives a very narrow reading to s. 15. Once the limitation period expires, the applicant's right to recover the land through an action is extinguished. Section 15 does not depend upon the claimant being the former legal owner of the land. While it is true that the claimant's title cannot be extinguished since the claimant never had title, the effect of s. 15 is also to extinguish the right to the land. A claim for a constructive trust as a remedy for unjust enrichment is a claim for a right to the land. I see no inconsistency between s. 15 and the *Hartman Estate* definition of "recover". I agree with the motion judge's resolution of this issue.

Recovery of land

[21] This brings us to the central question at issue in this appeal: whether the respondent's claim for a constructive trust based on unjust enrichment is an action for recovery of land. The appellant's broad submission is that, as developed in Canada, a constructive trust is "merely" a remedy, not an independent claim. Therefore, the claim in this case is for unjust enrichment and not an action for recovery of land.

[22] *Hartman Estate* provides some guidance on this issue but there are material differences between s. 43 of the old *Limitations Act* and s. 4 of the *Real Property Limitations Act*. Section 43 speaks of recovery of "trust property". Section 4 refers to recovery of "any land". It is therefore

necessary, as did the motion judge, to delve more deeply into the interpretation exercise in accordance with the *Rizzo & Rizzo* principles. Fortunately, I have the advantage of the motion judge's reasons on this matter, with which I agree.

[23] The motion judge held that the plain meaning of recover any land includes seeking an equitable interest in land through imposition of a constructive trust. As he said, at para. 59, "a case in which someone asks the court to award them ownership of part or all of a piece of land held by somebody else is an action to recover land". The motion judge then considered the entire [page570] context of s. 4 of the *Real Property Limitations Act*, the scheme and object of the Act, and the intention of the legislature. This context included the *Limitations Act, 2002*, and the historical context of limitations law in the province. The motion judge reviewed at some length the historical context beginning with a 1969 *Report on Limitation of Actions* by the Ontario Law Reform Commission (Toronto: Department of the Attorney General, 1969) through various reports and iterations of proposed bills that resulted in the 2002 legislation that came into force in 2004. The conclusion of his analysis is found in paras. 74-80. For present purposes, it is sufficient to set out para. 77:

> A party seeking an ownership interest by way of constructive trust must plead and then prove facts establishing entitlement to it. The fact that a claimant must prove enrichment of the other party and a corresponding deprivation of the claimant, with no juristic reason for the enrichment in order to establish a constructive trust, and must also show that damages alone are insufficient and only a proprietary remedy is adequate, does not alter the fact that the claimant has asked the court from the beginning to award an interest in land. To me, all this means is that the claimant has to plead and prove those key elements, usually called "material facts" in litigation, to justify the order sought. It should not matter how many material facts there are or whether the entitlement to land requires a two step analysis, so long as the application makes a claim of entitlement to ownership of land.

[24] The appellant argues that the motion judge erred in his treatment of the context in which s. 4 is found and the history of the *Real Property Limitations Act*. He makes two important points. First, s. 4, when it was found in Part I of the old *Limitations Act*, tended to be used for adverse possession cases. Second, other parts of the *Real Property Limitations Act* suggest that Act was not intended to apply to constructive trusts.

[25] I begin with the adverse possession point. Resolution of that issue requires a discussion of the legislature's intent when it revised the limitation period scheme in this province. As the motion judge noted, originally the intent was to deal with limitation periods for all claims. However, this approach was abandoned apparently as a result of consultations that resulted in the March 1991, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991). The group reported that it did not have the necessary expertise to deal with actions to recover land. Thus, language in earlier drafts of the new limitation legislation dealing with limitations of actions to recover real property was stripped out of what eventually became the *Limitations Act, 2002.* This history strongly suggests that actions to recover land are outside the *Limitations Act, 2002*. [page571]

[26] The legislature's inability to deal with real property claims unfortunately detracts from the clarity that was a paramount objective of the new approach to limitation periods as represented by the *Limitations Act, 2002*. However, the fact that the legislature did retain Part I of the old

Limitations Act demonstrates that the legislature has not wholly abandoned the field of claims for recovery of real property. And, in my view, the objective of clarity should not be abandoned by a narrow reading of s. 4 to place artificial limits on its scope when the plain words of the section cannot fairly bear that interpretation. There is nothing in s. 4 to suggest it is limited to claims for adverse possession. The fact that the section itself refers to recovery of rent, not just land, tells against a narrow interpretation of the provision to adverse possession claims.

[27] The appellant also relies upon other parts of the *Real Property Limitations Act*, particularly s. 42, which is as follows:

> 42. Where land or rent is vested in a trustee upon an express trust, the right of the beneficiary of the trust or a person claiming through the beneficiary to bring an action against the trustee or a person claiming through the trustee to recover the land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through the purchaser.

[28] The appellant argues that since the legislation only refers to express trusts, the legislature could not have intended the Act to apply to other types of trusts, particularly constructive trusts. I do not accept this submission, primarily because of the legislative history. The old *Limitations Act* dealt in Part II with trusts created by instrument and by legislation. When the new legislation repealed Part II (and Part III) of the old *Limitations Act*, it left no express provision for real property held by trustees. The legislature apparently believed that in the case of express trusts there was the need for some clarification. At this point, it is impossible to know why the legislature did not deal more broadly with all kinds of trust. One can only guess that given the consultation group's lack of expertise and the constant, indeed, rapid evolution of equitable trusts, the legislature was of the view that the area was not ripe for codification. I see nothing in the *Real Property Limitations Act* that suggests that the legislature intended to exhaustively deal with trust cases involving land. To the contrary, the legislative history suggests that the legislature intended to leave the area largely as it was. Thus, if s. 4 can fairly bear the interpretation of applying to recovery of real property through a constructive trust then I see no reason [page572] to impose an artificial and narrow interpretation on the section's very broad language.

[29] In *Hartman Estate*, in dealing with s. 43 of the old *Limitations Act*, Gillese J.A., speaking for the court, did hold that the term "trust property" not only applies to express trusts but includes constructive trusts granted as a remedy for unjust enrichment as discussed in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103, which was the genesis of the modern principle of unjust enrichment discussed in *Kerr v. Baranow*, [2011] 1 S.C.R. 269, [2001] S.C.J. No. 10, 2011 SCC 10, which I will discuss more fully below. In doing so, she adopted a plain reading of the section. She left open the broader question of application of statutory limitation periods for claims to land based on resulting or constructive trusts, at para. 85:

> It is apparent that there is no clear, general answer to the question of whether claims to land based on resulting or constructive trust are subject to a statutory limitation period and, if so, whether the exceptions in s. 43(2) apply to all trustees who hold property by way of resulting

> or constructive trust. In the case at bar, however, if the statutory limitation period does apply to such claims, for the reasons already given, I am not bound to apply *Taylor v. Davies*. I would give a plain reading to s. 43(2) with the result that the proposed trust claims fall within the second exception.

[30] I adopt a similar approach to the interpretation of s. 4. Its plain language is broad enough to encompass an equitable claim for property based on the remedy of constructive trust. Thus, I agree with the motion judge's conclusion on this point, at para. 79:

> It seems odd, more than a century after the abolition of the common law forms of action and the merger of common law and equitable jurisdiction, more than 40 years after the debate on limitations reform began in Ontario and more than a decade since the enactment of a new limitations scheme, that we would be constrained to adopt the "traditional" approach of limiting section 4 of the *Real Property Limitations Act* to adverse possession claims. The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old *Limitations Act*, RSO 1990, c L.15, does not shed light on the meaning of section 4. A ten year period for constructive trust claims seeking ownership of land is not inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act.*

[31] The appellant also relies heavily on the judicial history of the treatment of constructive trust in Canadian courts and particularly on the most recent Supreme Court decision on the issue, *Kerr*, which emphasizes the nature of the constructive [page573] trust as a remedy and the preference for a monetary award for all unjust enrichment claims, even those where the claimant is seeking a constructive trust in identified property.

[32] *Kerr* was decided after this court's decision in *Hartman Estate*. It deals with some issues that are not germane to this appeal, such as the common intention resulting trust. The court held, at para. 24, that the common intention resulting trust no longer has a role in resolving domestic cases. The respondent originally brought a claim based on resulting trust. The parties agreed that the respondent did not have the evidence to support a claim for resulting trust and that claim was dismissed.

[33] In *Kerr*, the court dealt at length with unjust enrichment. At para. 33, Cromwell J. held that there is no separate line of authority for family cases developed within the law of unjust enrichment and reaffirmed the statement in *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] S.C.J. No. 36, at p. 997 S.C.R., that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases". I refer to this point because, although this is a family law case, the determination of the limitation period issue will have ramifications beyond family law. The resolution of the limitation period issue cannot turn on the fact that this is a family law case. Thus, in my view, the fact that the *Family Law Act* prescribes a limitation period for claims under that Act cannot be determinative of the limitation period issue.

[34] I recognize that Cromwell J. went on to hold, at para. 34, again referring to *Peter*, at p. 997 S.C.R., that the courts must "exercise flexibility and common sense applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases". Indeed, the family law context was front and centre when considering the remedy for unjust enrichment in such cases. But, in my view, the resolution of the strictly legal question as to the application of the *Limitations Act, 2002* and the *Real Property Limitations Act* turns on the interpretation of the relevant provisions of those Acts. The issue of whether the *Real Property Limitations Act* applies to a claim for a constructive trust will be the same whether the equitable claim for an interest in land arises out of a domestic relationship or a purely business transaction.

[35] In *Kerr*, at para. 32, the court reiterated the by now well-known elements of a claim for unjust enrichment as developed in Canadian law: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment. At this stage of the proceeding, those elements are not in issue. The motion judge was asked [page574] to deal with the legal issue on the assumption that the respondent could make out those elements: see para. 13 of the motion judge's reasons. This case turns rather on the remedy for the unjust enrichment and how the remedies should be characterized.

[36] Remedies for unjust enrichment are restitutionary and the court in *Kerr* affirmed that proprietary and monetary remedies are available for unjust enrichment. At para. 46, Cromwell J. described the two available remedies in these terms:

> A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

Further, Cromwell J. also noted that the court should first consider whether a monetary award is sufficient; in most cases it is: para. 47. Most of *Kerr* is concerned with calculating the monetary award. The case does, however, refer to the proprietary award in several contexts. The first context is where the plaintiff, like this respondent, seeks a constructive trust. Justice Cromwell explains as follows, at para. 50:

> The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). *Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour* (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

(Emphasis added)

[37] *Kerr* also makes the point that there must be a significant link between the plaintiff's contribution and the property that she seeks to have impressed with the trust. As Cromwell J. said, at para. 51:

> As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution [page575] will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

[38] With that background, I return to the interpretive issue and specifically to the question of whether an application for the equitable remedy of a constructive trust in real property is an application for recovery of any land. In my view, the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the court. That the court might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property. The repeated references to constructive trust as a remedy for unjust enrichment in *Kerr* demonstrate that a proprietary remedy is a viable remedy for unjust enrichment where there is a link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property.

[39] In sum, I agree with the motion judge's conclusion, at para. 80 of his reasons:

> From the plain meaning of the words "action to recover any land" in section 4 of the *Real Property Limitations Act*, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the *Real Property Limitations Act.* It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.

[40] I also agree with the motion judge that her alternative claim for a monetary award can shelter under s. 4 for the reasons he gave at para. 88:

> My analysis of the question begins with the words of the section: ". . . bring an action to recover any land . . .". In contrast to the *Limitations Act, 2002*, which deals with individual "claims", this provision deals with an "action" (extended by section 1 of the *Real Property Limitations Act* to include "any civil proceeding"). An action or application can and frequently does include a principal claim with an alternative claim, as in this case. Here the damages claim is an alternative or fallback position to the first claim advanced by the applicant, which

> is for an ownership interest. The statute does not say "action to recover *only* land". Further, it would not make sense to interpret section 4 of the *Real Property Limitations Act* as a sort of all or nothing proposition, forcing the court either to award a proprietary interest on what it finds to be a meritorious claim, when a monetary award would otherwise [page576] be an adequate and appropriate remedy, or to award nothing at all, because a shorter limitation period for a damage award bars that kind of remedy. To interpret the section as not protecting an alternative damage award would mean that a claimant would never be able to rely on the section in determining when to launch a court case involving land and would always have to meet the limitation period for a damages claim, for fear of being locked out at the end of the case.

[Emphasis is original]

[41] The appellant also submits that the motion judge's interpretation of s. 4 will result in absurdity because there will be a different limitation period for unjust enrichment claims depending on the remedy sought. For example, the claimant may be seeking an interest in a pension or a business to which s. 4 does not apply. The decision of this court in *Equitable Trust Co. v. Marsig* (2012), 109 O.R. (3d) 561, [2012] O.J. No. 1605, 2012 ONCA 235 is instructive in resolving that issue. In that case, the plaintiff brought an action against the guarantors of a mortgage loan. The loan was given in respect of real property and the guarantee was included in the mortgage document. One of the defendants sought summary judgment on the basis that the limitation period under the *Limitations Act, 2002* had expired because of s. 2(5) of the Act, which provides that the day on which the loss occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation. The defendant argued that the demand obligation was made when the plaintiff issued a notice of sale under the mortgage in December 2007. The action to recover the deficiency from the guarantors was not commenced until September 2010, more than two years after demand. This court agreed with the motion judge that, despite the broad language in the *Limitations Act, 2002*, the limitation period under s. 43 of the *Real Property Limitations Act* applied. That section provides for a ten-year limitation period for actions on a covenant contained in a mortgage. Speaking for the court, Perell J. (*ad hoc*) dismissed the argument that all guarantees should be treated the same. As he said, at para. 30:

> It is true that it may not always be easy to determine whether a particular guarantee, like the guarantee in *Bank of Nova Scotia v. Williamson*, is subject to the *Limitations Act, 2002* or, like the guarantee in the case at bar, is subject to the *Real Property Limitations Act*. However, it does not follow that all guarantees should be treated the same way. *It has been the case historically that guarantees associated with land transactions have different limitation periods from guarantees associated with contract claims.* Moreover, as already noted, it is my view that the legislature intended that all limitation periods affecting land be governed by the *Real Property Limitations Act*.

(Emphasis added) [page577]

[42] Despite the advances in the application of constructive trust claims and unjust enrichment generally, it is open to the legislature to prescribe different limitation periods for unjust enrichment actions where the claim is for a proprietary remedy. I would not give effect to the

appellant's arguments. Accordingly, I would dismiss the appeal.

Is there a legislative gap?
The motion judge's reasons

[43] Given my conclusion on the application of s. 4 of the *Real Property Limitations Act*, it is not strictly necessary to deal with the legislative gap argument. However, the matter was dealt with fully by the motion judge and his decision has potential application to other claims that may not be covered by the *Real Property Limitations Act*. In my view, it would be helpful to deal with that issue.

[44] In short, the motion judge held that if s. 4 of the *Real Property Limitations Act* did not apply to the respondent's claim, there was no statutory limitation period because the *Limitations Act, 2002* could not apply to an unjust enrichment case in the family law context. The motion judge reached this conclusion because of the difficulty of applying ss. 4 and 5 of the *Limitations Act, 2002* to an unjust enrichment claim in the family law context. The motion judge dealt with this issue at length but I have reluctantly concluded that I cannot agree with his decision.

[45] To appreciate the issue, it is necessary to consider the wording of ss. 4 and 5, especially the latter:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5(1) A claim is discovered on the earlier of,
>
> *(a)* the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and [page578]
>
> *(b)* the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (*a*).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(*a*) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
> (3) For the purposes of subclause (1)(*a*)(i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

[46] The motion judge's concern was with the exhaustive statutory definition of discoverability in s. 5(1)(*a*). He found that it was problematic as to when the injury, loss or damage occurred

within the meaning of s. 5(1)(*a*)(i). He appears to have rejected the suggestion that in a family law case, ordinarily the separation date would be the date when the loss occurred. He was also concerned that the plaintiff would not know that the act or omission was that of the person against whom the claim was made. In his view, in many family law cases the defendant has done nothing more than be passively enriched by the plaintiff's actions. As he said, at paras. 122-23:

> On the third element, as set out in section 5(1)(a)(iii), I find that there will often, in fact usually, be constructive trust claims in family law where there is no act or omission of the respondent that caused or contributed to the claimant's loss. This could be true even where the claimant has made a request (direct or indirect) for a change in title or for compensation, which the respondent has neither accepted nor rejected. There is no duty to say yes. With no act or omission of the respondent, the claimant could not reasonably have knowledge of suffering a loss caused or contributed to by an "act or omission" of the respondent. Without that knowledge, the third element is not satisfied, the claim has not been "discovered" and the limitation period never starts to run. I conclude that section 5(1)(a)(iii) simply does not work for family law constructive trust claims.

[47] Finally, the motion judge considered the fourth element [at para. 125], "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy". As I read his reasons, although he had some concerns, the motion judge found that, even in a family law case, a claimant would know whether the nature of an injury, loss or damage was such that a proceeding would be appropriate.

Analysis

[48] I take a different approach to the application and interpretation of the *Limitations Act, 2002.* In my view, the starting [page579] point must be whether the Act was intended to apply to equitable claims. To resolve this issue, it is necessary to consider the various sections of the legislation and, in my view, they point unequivocally to the legislature's intent to apply the Act to such claims, unless the claim falls within one of the exceptions. For example, s. 2(1) not only excludes proceedings to which the *Real Property Limitations Act* applies (2(1)(*a*)), but "proceedings based on *equitable* claims by aboriginal peoples against the Crown" (2(1)(*f*)) (emphasis added). Section 13 of the Act, which deals with acknowledgments states in 13(7):

> 13(7) An acknowledgment of liability in respect of a claim to recover or enforce *an equitable interest* in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

(Emphasis added)

[49] These references to equitable claims show that the Act was intended to be comprehensive and to apply to equitable claims, at least to claims other than for land that may be covered by the *Real Property Limitations Act* or other claims expressly exempted from application by the Act. The few cases that have considered the issue have held that equitable claims were intended to be covered by the *Limitations Act, 2002*. See, for example, *Bouchan v. Slipacoff*, [2010] O.J. No. 2592, 2010 ONSC 2693 (S.C.J.) and *Schneider v. State Farm Mutual*

Automobile Insurance Co., [2010] O.J. No. 3850, 2010 ONSC 4734 (S.C.J.). This court's decision in *Placzek v. Green*, [2009] O.J. No. 326, 2009 ONCA 83, 307 D.L.R. (4th) 441 would also seem to support the view that the Act was intended to cover equitable claims.

[50] A claim for equitable relief, including a claim based on unjust enrichment, fits within the broad definition of "claim" in s. 1 of the *Limitations Act, 2002* as a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission". Since equitable claims are covered by the Act, there is no statutory gap. Thus, s. 4 of the Act applies and a proceeding "shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered".

[51] The motion judge did find, at para. 109 of his reasons, that the definition of "claim" in s. 1 of the *Limitations Act, 2002* "fits comfortably enough in a family law constructive trust case". However, he also found, in the same paragraph (and again in para. 122), that ordinarily the only act or omission giving rise to a family law constructive trust claim is an act by the claimant, namely, "the claimant's contributions directly or indirectly to the property of another person". As the motion judge spelled out in [page580] his analysis, this latter finding raises a problem for the application of the s. 1 definition of "claim" to family law constructive trust claims, because the "act or omission" referred to in that definition must be that of the person against whom the claim is brought. This is made clear, for instance, in s. 5(1)(*a*)(iii), quoted above, which states that a claim is not discovered until, among other things, the claimant knows that the act or omission giving rise to injury, loss or damage is "the act or omission . . . of the person against whom the claim is made".

[52] I do not agree with the motion judge that a remedial constructive trust claim does not require any act or omission by the person against whom the claim is brought. Generally speaking, a claim of unjust enrichment requires that the defendant retain a benefit without juristic reason in circumstances where the claimant suffers a corresponding deprivation. In other words, the relevant act of the defendant is simply the act of keeping the enrichment (or the omission to pay it back) once the elements of the unjust enrichment claim have crystallized. In the family law context, this may typically occur on the date of separation, when shared assets, including real property, are divided and the possibility therefore arises of one party holding onto more than a fair share.

[53] I agree with the motion judge that in some cases it may be difficult to apply the s. 5 definition of discoverability to equitable claims, including claims for unjust enrichment. But, that does not mean that the Act does not apply. It may well mean that the claim has not been discovered within the meaning of s. 5 and so the two-year limitation period does not run. This does not mean there is a gap in the legislation and there is no limitation period. Rather, the plaintiff will be able to pursue his or her claim until the ultimate limitation period in s. 15 applies, in most cases the period established by s. 15(2):

> 15(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

[54] That said, I would think that ordinarily the claim should be taken not to have been discovered until the parties have separated and there is no prospect of resumption of cohabitation: see Maddaugh and McCamus, *The Law of Restitution*, looseleaf, release no. 11

(Toronto: Canada Law Book, 2013), at 3:500.30; and *Wilson v. Fotsch*, [2010] B.C.J. No. 850, 2010 BCCA 226, at para. 10. [page581]

Disposition

[55] Accordingly, I would dismiss the appeal. The respondent is entitled to her costs, which I would fix at $15,000, inclusive of taxes and disbursements.

Appeal dismissed.

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Court File No. CV-24-00718083-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANTIBE THERAPEUTICS INC. (the "Applicant")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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