Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.
Plaintiff

- and -

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES
Defendants

COMPENDIUM FOR ORAL ARGUMENT OF THE PLAINTIFF
(Default Judgment Motion Returnable November 17, 2025)

November 13, 2025

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Defendants

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TAB 1

CITATION: Elekta Ltd. v. Rodkin, 2012 ONSC 2062
COURT FILE NO.: CV-11-9471-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Elekta Ltd., Plaintiff

AND:

Timothy Rodkin, Kathleen Thornton, Julie Waldriff a.k.a. Julie Smith a.k.a. Julie Josh Kennedy, Just A Kid Productions, Inc., Law Enforcement Canada Media Group, Robert Rodkin a.k.a. Bob Rodkin, Gail Smith, Cindy Doucette, John Doe and Jane Doe, Defendants

BEFORE: D. M. Brown J.

COUNSEL: I. Nishisato, for the Plaintiff

No one appearing for the Defendant, Timothy Rodkin

HEARD: February 29, March 13 and March 23, 2012

REASONS FOR DECISION

I. Motion for default judgment in a case alleging fraud

[1] Elekta Ltd. alleges that its former controller, the defendant, Timothy Rodkin, defrauded it of at least $12.4 million over the course of a number of years. Elekta has sued Rodkin, and others, in an effort to recoup its lost funds. Rodkin did not file a Statement of Defence, leading Elekta to note Rodkin in default and bring this motion for default judgment under Rule 19.05 of the *Rules of Civil Procedure*.

II. Overview of Elekta's claim

[2] Elekta manufactures and distributes medical equipment and materials. Its offices are located in Montreal, Quebec. From 1998 until August 31, 2011 Elekta employed Timothy Rodkin as its controller. Rodkin lived in a house at 8 Bicknell Court, Ajax, Ontario (the "Ajax House") and he worked out of his home. Rodkin managed and reconciled Elekta's bank

on the responding party and filing proof of such service, a court can satisfy itself that the person against whom default judgment is sought knew about the claim, knew about the motion for default judgment yet, nevertheless, elected not to defend or respond.

[11] The motion came back before me on March 13. Notwithstanding service of the motion on Rodkin, he did not attend. As a result of some questions I posed to counsel, I adjourned the hearing and it concluded on March 23, following the receipt of some helpful written submissions from plaintiff's counsel.

III. Governing legal principles for Rule 19.05 default judgment motions

[12] When a defendant is noted in default, Rule 19.02(1) provides that it "is deemed to admit the truth of all allegations of fact made in the statement of claim". A motion for default judgment before a judge under Rule 19.05(1) "shall be supported by evidence given by affidavit if the claim is for unliquidated damages". Although there has been some suggestion in the case law that the default proceeding really involves an assessment of damages, rather than an inquiry by the judge into the facts or the underpinning of the causes of action that the defendants are deemed to have admitted by their default and, as well, a suggestion that a judge cannot divide factual allegations in a statement of claim into "pure allegations of fact",[2] which are deemed to be admitted, and conclusions of law, which are not, Rule 19.06 provides that:

> A plaintiff is not entitled to judgment on a motion for judgment or trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

Rule 19.06 therefore requires that a trial judge should inquire into whether the deemed factual admissions resulting from a default are adequate to support a judgment on liability as well as damages.

[13] That approach is the one currently used by judges of this court in dealing both with motions for default judgment in the context of an undefended trial,[3] as well as for motions for default judgment under Rule 19.05(1). In that respect Himel J. stated, in *Fuda v. Conn* that:

> [A]lthough the Rules provide the consequences for noting in default, the court has the jurisdiction and the duty to be satisfied on the civil standard of proof that the plaintiff is able to prove the claim and the damages. If the court finds the evidence to be lacking in

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[2] *Umlauf v. Umlauf* (2001), 53 O.R. (3d) 255 (C.A.), paras. 13 and 14.
[3] *Plouffe v. Roy*, [2007] O.J. No. 3452 (S.C.J.), para. 52: "In the course of such a trial, the court is not relegated to the role of a rubber stamp. The court is entitled to make findings of credibility, weigh the evidence of the plaintiff and then make findings of fact."

credibility or lacking "an air of reality", the court can refuse to grant judgment or grant partial judgment regardless of the default.[4]

[14] Accordingly, on a motion for default judgment the inquiry undertaken by the court is the following:

(i) What deemed admissions of fact flow from the facts pleaded in the Statement of Claim?

(ii) Do those deemed admissions of fact entitle the plaintiffs, as a matter of law, to judgment on the claim?

(iii) If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitles it to judgment on the pleaded claim?[5]

IV. Analysis of the plaintiff's claim for default judgment

A. Claim for damages for fraud

[15] In its Amended Statement of Claim Elekta seeks against Rodkin damages for fraud "in the amount of $15,000,000.00, plus further sums, the particulars of which will be provided prior to trial". On this motion for default judgment Elekta seeks judgment for damages for fraud in the amount of $12,421,401.00. In addition, Elekta seeks an order that it "be entitled to seek additional damages" against Rodkin "upon evidence of further fraud against Elekta or damages caused by Rodkin to Elekta".

[16] Although section 117 of the *Courts of Justice Act* permits a "rolling assessment" of damages for a continuing cause of action, the cause of action pleaded against Rodkin is not a continuing one, but one in respect of events which occurred in the past. Accordingly, I will treat the plaintiff's motion for default judgment for general damages as one for partial default judgment, leaving it to the plaintiff to prove any additional damages which it might discover it has suffered on a subsequent motion for partial default judgment.[6]

[17] As to the liability of Rodkin to Elekta for damages for fraud, fraudulent misrepresentation, misappropriation and conversion of property, fraudulent conveyance, unjust enrichment, breach of contract, breach of duty of loyalty and breach of fiduciary duty, Elekta pleaded sufficient facts to establish that Rodkin, its controller, engaged in unauthorized acts which resulted in unauthorized payments of Elekta funds being made to his co-defendants and others for his own benefit and for the benefit of others: See Amended Statement of Claim, paras. 16 to 18, 22 to 47. The facts pleaded by Elekta in those portions of its Amended Statement of Claim are deemed admitted by Rodkin.

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[4] *Fuda v. Conn*, [2009] O.J. No. 188 (S.C.J.), para. 16.
[5] *Viola v. Hornstein*, 2009 CanLII 16584 (ON S.C.), para. 18.
[6] *Flavorchem International Inc. v. Hillis*, 2007 CarswellOnt 513 (S.C.J.).

TAB 2

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

STATEMENT OF CLAIM
(Notice of Action issued on August 5, 2025)

1. The Plaintiff, KSV Restructuring Inc. ("**KSV**"), solely in its capacity as receiver and manager of London Valley IV Inc. ("**LV IV**") and not in its personal capacity or in any other capacity, claims against the Defendants, Behzad Pilehver also known as Ben Pilehver also known as Behzad Pilehvar also known as Ben Pilehvar also known as Ben Pilevhr ("**Pilehver**"), Mahtab Nali also known as Mahtab Nali Pilehvar also known as Mahtab Pilehvar ("**Nali**") and 2621598 Ontario Inc. doing business as Nali and Associates ("**Nali and Associates**"), jointly and severally:

(a) an interim, interlocutory and permanent injunction:

(i) restraining the Defendants, and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, from directly or indirectly, by any means whatsoever, selling, removing, dissipating, alienating, transferring, assigning, encumbering, or

similarly dealing with any assets of the Defendants, wherever situate and whether held in the Defendants' own names or whether they are solely or jointly owned, and including if a third party holds or controls the assets in accordance with any of the Defendants' direct or indirect instructions, including without limitation the accounts at The Toronto-Dominion Bank ("**TD Bank**") bearing account numbers 1929-6177612 and 1929-5023332, which are believed to be held in the name of Mahtab Nali and/or Nali and Associates (the "**Nali Bank Account(s)**");

(ii) ordering that TD Bank and all financial institutions and other entities at which the Defendants, or any of them, hold bank accounts, credit cards, loans, or other assets in their name, whether jointly or individually (such financial institutions and entities being collectively referred to herein as "**Financial Institutions**"), forthwith freeze such accounts and assets, and prevent any removal or transfer of such monies and assets of the Defendants until further Order of the Court, including without limitation contained in the Nali Bank Accounts;

(iii) requiring the Financial Institutions and other persons having notice of the injunction to forthwith disclose and deliver up to the Plaintiff any and all records related to accounts or assets held by the Defendants, or any of them, including but not limited to account agreements, account statements, cheques, cancelled cheques, deposit vouchers, internal credit applications, loan agreements, security documents, communications and any other records whatsoever;

(b) a constructive trust, equitable lien and/or damages in the amount of $1,071,551.06, and such additional amounts as may be particularized prior to trial, for:

(i) with respect to Pilehver, fraud, breach of fiduciary duty, conversion, unjust enrichment and knowing receipt and/or knowing assistance;

(ii) with respect to Nali and Nali and Associates, conversion, unjust enrichment and knowing receipt and/or knowing assistance;

(c) orders for restitution, an accounting and disgorgement of all assets belonging to the Plaintiff and improperly diverted by or to the Defendants or any person, corporation or other entity on the Defendants' behalf;

(d) a declaration that the Plaintiff is entitled to trace its assets into the hands of the Defendants and a declaration that the Defendants hold those assets as a constructive trustee for the Plaintiff;

(e) an order for an accounting of all funds, benefits and real and personal property that the Defendants have obtained, directly or indirectly, that have been wrongfully derived by any of the Defendants directly or indirectly from the LV IV Property (as defined herein) and the proceeds from the sale thereof;

(f) special damages, including all costs and expenses arising out of the detection, investigation, and quantification of the losses suffered by the Plaintiff, in an amount to be particularized prior to trial;

(g) punitive damages in the sum of $250,000;

(h) a declaration that LV IV is a "complainant" for the purposes of advancing a claim under section 248 of Ontario's *Business Corporations Act* (the "**OBCA**");

(i) relief pursuant to section 248 of the OBCA that this Honourable Court deems just;

(j) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(k) costs of this action, including the costs of any and all interim and interlocutory motions, on a full indemnity or other appropriate scale, including all applicable taxes; and

(l) such further and other relief as this Honourable Court deems just.

Parties

2. Pursuant to an Order dated March 6, 2025 (the "**Receivership Order**") in the proceedings bearing Court File No. CV-25-00736577-00CL (the "**Receivership Proceedings**"), the Honourable Madam Justice Steele of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") appointed KSV as receiver and manager (in such capacity, and not in its personal, corporate or any other capacity, the "**Receiver**") of the assets, undertakings and personal property of, *inter alios*, LV IV, and the proceeds thereof, including with respect to the LV IV Property (as defined below) and any assets or property held by LV IV in trust for any third party, pursuant to section 101 of the *Courts of Justice Act.*

3. LV IV is an Ontario corporation incorporated under the OBCA, and owned the property municipally known as 6211 Colonel Talbot Road, London, Ontario (the "**LV IV Property**") until the property was sold and transferred to a third-party purchaser for consideration of $2 million on February 5, 2025. The transfer occurred prior to the Receiver's appointment.

4. Nali and Associates is a registered business name of 2621598 Ontario Inc., which is an Ontario corporation incorporated under the OBCA.

5. The Defendants are Ontario residents. Pilehver is the sole director and officer of LV IV. Nali is believed to be Pilehver's spouse. Nali is the sole director and officer of Nali and Associates.

Background to Receivership Proceedings

6. The Receiver was appointed on an application made by Mizue Fukiage, Akiko Kobayashi, Yoshiki Fukiage, Kobayashi Kyohodo Co., Ltd. and Toru Fukiage (collectively, the "**Kobayashi Group**").

7. The Kobayashi Group are investors (co-owners) in the LV IV Property, having acquired an approximately 72% undivided beneficial interest in this property pursuant to four sale agreements, dated November 13, 2013, November 13, 2013, January 10, 2014 and January 10, 2014, respectively, among the applicable member of the Kobayashi Group, as purchaser, LV IV, as nominee, and TSI-LV IV International Canada Inc., as vendor.

8. Attached to the foregoing sale agreements (the "**Sale Agreements**") were certain co-owner agreements (the "**Co-Owner Agreements**") which governed ownership of the LV IV Property.

9. The Sale Agreements provide, among other things:

(a) Pursuant to sections 11.1 and 11.3:

(i) LV IV, as nominee, holds the registered title to the LV IV Property to the extent of the co-owner's interest as nominee and bare trustee for the co-owner to the extent of its undivided interests in the LV IV Property;

(ii) LV IV agreed to execute and deliver to the co-owner a declaration of trust wherein it will confirm that it is holding the title to the LV IV Property for and on behalf of the co-owner to the extent of its interest;

(b) Pursuant to sections 13.1 and 13.2, the Co-Owners Agreements govern any future sale of the LV IV Property, procedures for consents and approvals by co-owners, and the obligations of LV IV as nominee for and on behalf of co-owners; and

(c) Pursuant to section 20, Schedule "C", the Co-Owners Agreement forms an integral part of the Sale Agreement.

10. The Co-Owner Agreements provide, among other things:

(a) Pursuant to section 19, any offer to purchase the LV IV Property is to be presented to all co-owners ("**Co-Owners**") for consideration;

(b) Pursuant to section 8, the LV IV Property can only be sold if an ordinary resolution is passed by the owners, being a resolution signed by the co-owners (which includes the Kobayashi Group) holding in aggregate not less than 51% of the interests in the property; and

(c) Pursuant to section 6(j), the net income from the financing, refinancing and sale of the LV IV Property is to be distributed to the co-owners, which includes the Kobayashi Group.

11. The sale of the LV IV Property (as is addressed below) was completed without the Kobayashi Group's knowledge or consent, in violation of the Sale Agreements and Co-Owner Agreements. The Kobayashi Group did not know of or approve the sale of the LV IV Property, nor

did they receive any net income or other proceeds in connection with the sale of the LV IV Property.

12. The Receivership Order, including paragraph 4(t) thereof, specifically empowers the Receiver to trace and follow the proceeds of any real property previously owned by LV IV that was sold, transferred, assigned or conveyed, including the LV IV Property which is described in Schedule “B” to the Appointment Order.

13. In furtherance of the scope of its appointment, the Receiver seeks to trace and recover the proceeds from the sale of the LV IV Property for the benefit of the LV IV estate and its Co-Owners and creditors.

Misappropriation of Funds

14. This action is in respect of a scheme whereby the LV IV Property was improperly sold on February 5, 2025, and a significant portion of the sale proceeds, being $1,071,551.06, were improperly diverted, prior to the Receiver’s appointment, from LV IV and its Co-Owners (including the Kobayashi Group) to, directly or indirectly, Nali, Nali and Associates and Pilehver, all at Pilehver’s direction. Such funds ought to have been distributed to the underlying Co-Owners of LV IV, including the Kobayashi Group.

15. The applicable members of the Kobayashi Group, holding an approximately 72% undivided beneficial interest in the LV IV Property, did not have knowledge or give consent regarding the sale of the LV IV Property.

16. The sale of the LV IV Property was in contravention of the Sale Agreements and Co-Owner Agreements governing the LV IV Property which, as stated above, require that, *inter alia*, such property can only be sold if an ordinary resolution is passed by the applicable Co-Owners,

and that net income from the financing, refinancing and sale of the LV IV Property is to be distributed to the Co-Owners. No such distribution occurred.

17. In particular, on February 5, 2025, the LV IV Property was sold and transferred for $2 million.

18. Upon the sale of the LV IV Property, proceeds of $1,899,510.740 (the "**Proceeds**") were paid into the trust account of a lawyer named Parminder Hundal also known as Pam Hundal of the law firm Parminder Hundal Law Professional Corporation ("**Hundal**"), who acted as counsel to LV IV in the transaction.

19. In February and March 2025, prior to the Receiver's appointment, the Proceeds were disbursed at Pilehver's direction, including as follows:

(a) Per a written direction executed by Pilehver, Pilehver directed that the net proceeds of the sale be payable to Nali and Associates and Mahtab Nali, which resulted in the following disbursements totalling $897,859.49:

(i) By certified cheque dated February 6, 2025, $817,859.49 of the Proceeds was paid from Hundal's trust account to Nali, which was deposited in the Nali Bank Account at TD Bank bearing account number 6177612. Initially, a wire in this amount was sent to the Nali Bank Account bearing account number 1929-5023332, but was voided and did not go through;

(ii) By cheque dated February 18, 2025, a further $80,800 was paid from Hundal's trust account to Nali and Associates and was deposited into the Nali Bank Account at TD Bank bearing account number 5023332, which the Receiver believes to be to the benefit of Nali and/or Pilehver;

(b) Per a further written direction executed by Pilehver on February 10, 2025:

(i) On February 12, 2025, $5,000 was wired by Hundal to Bally Hundal/Hundal Law Firm which appears to have no connection to LV IV or the LV IV Property;

(ii) on February 14, 2025, $30,000 was wired by Hundal to Stockwoods LLP which again appears to have no connection to LV IV or the LV IV Property;

(c) payments totalling $103,040.42 were paid to Hundal on February 10, 12, 20, and March 5, 2025 in purported satisfaction of accounts rendered, of which at least $94,000.42 appears to have no connection to LV IV or the LV IV Property; and

(d) On March 5, 2025, one day prior to the Receivership Order, $34,000 was wired by Hundal to a third law firm, Blaney McMurtry LLP ("**Blaney**"). On March 21, 2025, Blaney advised the Service List in the Receivership Proceedings that it was retained by Pilehver in his personal capacity, as well as by 2630306 Ontario Inc. o/a Paybank Financial ("**Paybank**") and TGP Canada Management Inc. ("**TGP Canada**") (collectively, the "**Paybank Parties**"). Pilehver is an officer and director of Paybank and TGP Canada. On August 11 and 12, 2025, after the August 7 *Mareva* Order (as defined below) was served on the Defendants and Blaney, Blaney advised the Receiver that it was no longer retained by the Paybank Parties and that Blaney would hold the funds which it received from Hundal in trust until further order of the Court.

20. Pilehver, in his capacity as director of LV IV, breached his fiduciary and other legal obligations to LV IV and exercised his powers as a director in a manner that was oppressive, unfairly prejudicial and which unfairly disregarded the interests of LV IV and its underlying Co-

Owners, by failing to comply with the co-ownership arrangements governing the LV IV Property. He wrongfully directed the sale of the LV IV Property and then misappropriated the proceeds of sale therefrom by directing LV IV's counsel, Hundal, to disburse the foregoing proceeds as detailed in paragraph 19 above. There was no consideration nor valid business purpose for the proceeds of sale to have been disbursed in this regard.

21. Pilehver profited and benefited from these breaches of his duties, as did the Defendants Nali and Nali and Associates.

Fraud

22. Pilehver:

(a) falsely and knowingly represented to LV IV, either expressly or by omission, that the Co-Owners of LV IV had consented to the sale of the LV IV Property;

(b) directed, caused and/or facilitated prohibited payments of the Proceeds to be made by LV IV to persons and entities for which no goods or services, or no good or service of any material value, was provided to LV IV or the LV IV Property;

(c) diverted funds from LV IV, including to obtain improper benefits for himself; and

(d) knowingly received, retained and used funds which rightfully belonged to LV IV, and as a direct result LV IV suffered a loss.

23. In conceiving and executing his plan to intentionally defraud LV IV, and in breaching his fiduciary duties to LV IV, Pilehver's knowledge of his fraud cannot be imputed to LV IV.

Breach of Fiduciary Duty

24. As a director of LV IV, Pilehver owed duties to LV IV, including a duty of care and fiduciary duty. He wrongfully exercised his discretion and power so as to adversely affect LV IV's legal and practical interests, and LV IV was peculiarly vulnerable to and at the mercy of Pilehver who held such discretion and power.

25. In breach of his duties to LV IV, Pilehver concealed and misrepresented material facts, breached the trust of LV IV, all with a view to making a secret profit and acting in a conflict of interest through his misappropriation of the LV IV Property sale proceeds.

26. The actions knowingly and intentionally taken by Pilehver in furtherance of the foregoing scheme caused LV IV to breach the Sale Agreements and Co-Owner Agreements and were in breach of Pilehver's fiduciary duties to LV IV, by, among other things:

(a) misappropriating LV IV funds or using LV IV funds in a manner inconsistent with the business of LV IV;

(b) failing to act prudently, reasonably, honestly, in good faith and in the best interests of LV IV and its stakeholders; and

(c) failing to disclose the self dealing and conflicts of interest, as detailed above, to Co-Owners, including the Kobayashi Group.

27. Pilehver knew he was breaching the Sale Agreements and Co-Owner Agreements and did so in order to generate a benefit for himself and the other Defendants.

28. The Receiver pleads and relies upon section 134 of the OBCA which sets out the standard of care of directors and officers of a corporation.

29. As the sole director of LV IV, Pilehver owed a fiduciary duty to LV IV and had the obligation to act in the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

30. Pilehver failed to do so. Instead of acting in accordance with the Sale Agreements and Co-Owner Agreements and facilitating returns to Co-Owners of LV IV such as the Kobayashi Group, Pilehver breached his fiduciary duty by selling the LV IV Property without authority and by engaging in his fraudulent and improper conduct by misappropriating the LV IV Property sale proceedings to benefit the Defendants.

31. None of the actions taken by Pilehver were in the best interests of LV IV. His actions were purely self-motivated and were in breach of his duties to LV IV.

Oppression

32. LV IV is a complainant for the purposes of section 248 of the OBCA.

33. Pilehver's actions, as director and officer of LV IV, have been oppressive, unfairly prejudicial and unfairly disregard LV IV's interests and those of its investors, being the Co-Owners.

34. LV IV and its investors had the reasonable expectation that Pilehver, as LV IV's sole director and officer, would cause LV IV to act in accordance with the Sale Agreements and Co-Owners Agreements so as to not unfairly prejudice or disregard their interests.

35. Instead, Pilehver used his power as a director to obtain a personal benefit through the unlawful sale of the LV IV Property and subsequent distribution of the Proceeds to the Defendants' personal benefit as pleaded in paragraph 19 above. Pilehver has acted solely in his own interest,

to LV IV's detriment, and ought to be ordered to compensate the Plaintiff for the quantum of the Proceeds wrongfully distributed in this regard.

Restitution and Tracing

36. The Plaintiff pleads that by receiving the proceeds of sale of the LV IV Property and/or directing such proceeds to be paid to third parties for their own benefit contrary to the Sale Agreements and Co-Owner Agreements, each of the Defendants have been unjustly enriched by conversion at LV IV's expense and are each liable to the Plaintiff for all amounts by which they have been unjustly enriched. The Plaintiff has been correspondingly deprived of the benefit of these amounts, and there is no juristic reason for the Defendants' enrichment. The Plaintiff pleads and relies upon the doctrine of unjust enrichment and claims that it is entitled to restitution from the Defendants.

37. The Plaintiff pleads that the Defendants hold any amounts by which they have been unjustly enriched at the Plaintiff's expense as trust funds and/or pursuant to a constructive trust, and that the Plaintiff is the beneficiary of those funds. The Plaintiff further pleads that, given the circumstances, there are no factors that would render unjust the imposition of a constructive trust in favour of the Plaintiff. Indeed, per the terms of the Sale Agreements and Co-Owner Agreements, the LV IV Property and the proceeds of sale therefrom were to be held in trust for the benefit of the Co-Owners.

38. Any funds originating with or that should have been paid to the Plaintiff but which were instead obtained by, or for the benefit of, the Defendants by way of fraud, breach of fiduciary duty, oppression, conversion, knowing assistance and/or knowing receipt or other improper conduct, as applicable, should be impressed with a trust in favour of the Plaintiff.

39. The Plaintiff seeks such orders as may be necessary to trace such misappropriated funds, including any such funds or assets currently held by or transferred to the Defendants, or transferred to any other person or entity not yet known to the Plaintiff.

40. The Plaintiff further seeks orders requiring the Defendants to disgorge and/or pay restitution in relation to any benefit obtained directly or indirectly as a consequence of the fraud, breach of fiduciary duty, oppression, conversion, knowing assistance and/or knowing receipt or other improper conduct, as applicable and as pleaded herein, including any assets obtained with funds originating with or that should have been paid to the Plaintiff.

Knowing Receipt/Knowing Assistance

41. The Defendants, or any of them, have directly or indirectly benefitted from the transfer and misappropriation of the Proceeds, despite knowing that such Proceeds were to be held in trust by LV IV for its Co-Owners.

42. Given that LV IV was controlled by Pilehver at the time of the sale and the distribution of Proceeds therefrom, the Defendants knew or ought to have known that any such transfer or misappropriation of the Proceeds was a breach of LV IV's duties to its Co-Owners. The Defendants are therefore jointly and severally liable to LV IV for the value of the misappropriated Proceeds on the basis of knowing receipt.

43. Further and/or in the alternative, the Defendants participated in, authorized and/or acquiesced to the transfer or misappropriation of the Proceeds as pleaded herein and knew or ought to have known that such conduct was in breach of LV IV's obligations. Accordingly, the Defendants are jointly and severally liable to LV IV for the value of the misappropriated Proceeds on the basis of knowing assistance of a breach of trust.

Injunctive Relief

44. The Plaintiff has a strong *prima facie* case against the Defendants, or any of them, for fraud, breach of fiduciary duty, conversion, unjust enrichment, oppression, knowing assistance and/or knowing receipt, as applicable and as pleaded above.

45. Pilehver and Nali are Ontario residents. Nali and Associates is a corporation incorporated in Ontario. There are grounds for believing that the Defendants have assets in Ontario including, without limitation, shares in several Ontario corporations, and ownership of the Nali Bank Accounts.

46. The inference of a sufficient risk of asset disposition can reasonably be drawn from the facts herein, namely, the fraudulent conduct and misappropriation and conversion of the LV IV Proceeds as pleaded above.

47. The Plaintiff and its stakeholders will suffer irreparable harm and will be prevented from recovering their misappropriated funds and assets, and assets traceable thereto, or other exigible assets, if the Defendants are not prevented from further moving, dissipating or otherwise attempting to put their assets beyond the reach of LV IV and its stakeholders.

48. The balance of convenience favours granting a *Mareva* injunction.

49. The Plaintiff, by its Receiver, ought not to be required to provide an undertaking as to damages given the Receiver's role as a court-appointed officer and the strong *prima facie* strength of the case.

50. In light of the foregoing, the requested *Mareva* Order and accompanying *Norwich* relief is warranted. The Plaintiff has a *bona fide* claim against the Defendants, the Financial Institutions from whom discovery is sought are the only practical source of information available to the Plaintiff

and will be reasonably compensated for the expense arising out of compliance with the discovery order, and the public interests in favour of disclosure outweigh any privacy concerns which may be alleged by the Defendants.

51. On August 7, 2025, this Honourable Court issued an *ex parte* Order (the "**August 7 *Mareva* Order**") granting *Mareva* and *Norwich* relief as against the Defendants.

52. On August 7, 2025, Pilehver was served with the August 7 *Mareva* Order and motion materials which were relied upon by the Plaintiff in obtaining the August 7 Order. On August 8, 2025, Nali and Nali and Associates were served with the August 7 *Mareva* Order and the same materials.

53. On April 15, 2025, this Honourable Court issued a further Order which expanded and extended the application of the August 7 *Mareva* Order until further Order of the Court.

54. Notwithstanding the obligation imposed upon the Defendants by the August 7 *Mareva* Order to produce a sworn statement of assets to the Plaintiff within seven (7) days of the issuance of the August 7 *Mareva* Order, no such sworn statements have been received at the time of filing this Statement of Claim.

55. Following service of the August 7 *Mareva* Order on TD Bank, a representative thereof advised the Receiver and its counsel that pursuant to the August 7 *Mareva* Order, the Nali Bank Accounts, as well as one additional account previously unknown to the Plaintiff, had been frozen as of August 8, 2025, and provided account statements (collectively, the "**Account Statements**") for each account for the period on or after February 5, 2025, as follows:

(a) Account 6177612 in the name of Mahtab Nali, being the Nali Bank Account into which $817,859.49 of the Proceeds had been paid. The Account Statement provided by TD Bank reflected that the proceeds had been quickly dissipated from

this account, and that this account had a negative balance of -$15.89 as of July 31, 2025;

(b) Account 5023332 in the name of Nali and Associates, being the account into which $80,800 of the Proceeds had been paid. The Account Statement provided by TD Bank again reflected that the proceeds had been quickly dissipated from this account, and that this account had a nominal balance of $6.20 as of August 5, 2025; and

(c) Account 6189920 (Mahtab Nali) had a negative balance of -$368.23 as of July 31, 2025.

56. The Account Statements reflect the deposit of the Proceeds, as described above, into the aforementioned accounts, as well as the dissipation of such assets shortly thereafter in a series of large transactions by way of drafts, transfers, withdrawals, wire transfers and e-transfers, amongst other transactions, including to jewellery stores, a car dealership and other transactions which appear to have no connection to LV IV or the LV IV Property. Thereafter, the Account Statements reflect what appears to be deliberate and habitual account management such that the balances never exceeded several thousand dollars, with funds being transferred into the accounts on an *ad hoc* basis to cover transactions.

Punitive Damages

57. An award of punitive damages against the Defendants in favour of the Plaintiff is warranted, given their high-handed, malicious, arbitrary and reprehensible misconduct that departs from a marked degree from ordinary standard of decent behaviour, and given the misappropriated funds were trust funds which are beneficially owned by vulnerable public investors, being the Co-Owners. The loss and harm suffered by the Plaintiff cannot be adequately

compensated merely by compensatory damages equal to the sum of the misappropriated Proceeds.

General

58. The Plaintiff pleads and relies upon:

(a) rules 1.04, 2.01, 2.03, 3.02 and 40 of the Ontario *Rules of Civil Procedure*;

(b) sections 96 and 101 of the Ontario *Courts of Justice Act*;

(c) section 248 of the OBCA; and

(d) the statutory, inherent and equitable jurisdiction of this Honourable Court.

59. Based on the foregoing, the Plaintiff pleads that it is entitled to the relief claimed herein and as claimed in the Notice of Action issued August 5, 2025.

Date: September 3, 2025

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LONDON VALLEY IV INC. **by its Court-Appointed Receiver and Manager,** **KSV RESTRUCTURING INC.** Plaintiff	and	**BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES** Defendants

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

STATEMENT OF CLAIM

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TAB 3

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

- and -

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

AFFIDAVIT OF JORDAN WONG
(sworn November 5, 2025)

I, **JORDAN WONG**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. On March 6, 2025, under Court File No. CV-25-00736577-00CL (the "**Receivership Proceedings**"), the Honourable Madam Justice Steele of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") appointed KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacities, the "**Receiver**") of the assets, undertakings and properties of, *inter alios*, LV IV, and the proceeds thereof, including with respect to the LV IV Property (as defined below), pursuant to section 101 of the *Courts of Justice Act* (as amended and restated on October 23, 2025, the "**Appointment Order**"). A copy of the Appointment Order is attached as **Exhibit "A"**.

2. I am a Director at KSV. As such, I have knowledge of the matters to which I depose herein, and was directly involved in the preparation of the Third Report, Supplement and Second Supplement (as defined below).

Issuance and Service of Claim

3. This action was commenced by the Receiver, on behalf of LV IV, by issuance of a Notice of Action on August 5, 2025 (the "**Notice of Action**"). A copy of the Notice of Action is attached as **Exhibit "B"**.

4. On September 3, 2025, the Receiver filed with the Court LV IV's Statement of Claim dated September 3, 2025 (the "**Claim**") and took steps to serve same on each of the Defendants. A copy of the as-filed Claim is attached as **Exhibit "C"**.

5. Capitalized terms used but not defined herein have the meanings ascribed to them in the Claim.

6. On September 3, 2025, the law firm of Henein Hutchison Robitaille LLP ("**HHR**") accepted service of each of the Notice of Action and Claim on behalf of the Defendant, Behzad Pilehver ("**Pilehver**"). Copies of the backpages of the Notice of Action and Claim, each endorsed as accepted for service by HHR as of September 3, 2025, are collectively attached as **Exhibit "D"**.

7. On September 9, 2025, the Receiver's process server, Lisa Maitman ("**Ms. Maitman**"), effected personal service on the Defendant, Mahtab Nali ("**Nali**") in her personal capacity, and in her capacity as director of the Defendant, 2621598 Ontario Inc. doing business as Nali and Associates ("**Nali and Associates**"), of the Notice of Action and Claim, together with a covering letter and certain other documents as listed therein (the "**Service Letter**"). A copy of this Service Letter is attached as **Exhibit "E"**.

8. Copies of Ms. Maitman's affidavits of service, which reflect that personal service was effected on Nali and Nali and Associates by Ms. Maitman on September 9, 2025, are collectively attached as **Exhibit "F"**.

Injunctive Relief and Case Conferences

9. On August 7, 2025, on an *ex-parte* motion brought by the Receiver, the Honourable Madam Justice J. Dietrich issued an Order (the "**August 7 Order**") and accompanying Endorsement (the "**August 7 Endorsement**") granting, among other relief, a worldwide *Mareva* injunction against all of the Defendants and a *Norwich* order compelling The Toronto-Dominion Bank ("**TD Bank**")

to disclose certain information and records to the Receiver regarding the Defendants' accounts. Copies of the August 7 Order and the August 7 Endorsement are attached as **Exhibit "G"** and **Exhibit "H"**, respectively.

10. In support of the relief sought at the initial hearing, the Receiver filed the Third Report of the Receiver dated August 1, 2025 (the "**Third Report**") and the Supplement to the Third Report dated August 5, 2025 (the "**Supplement**"), copies of which are attached collectively, without appendices, as **Exhibit "I"**.[1] Among other things, the Third Report provides full and fair disclosure of all material facts pertinent to the relief sought at the initial hearing, and provides the basis to obtain an *ex-parte* interim and interlocutory *Mareva* injunction (and a *Norwich* order) against each of the Defendants.

11. Immediately upon receiving the August 7 Order and Endorsement, the Receiver took steps to serve the same on each of the Defendants. The Receiver's process server, Neil Markowski ("**Mr. Markowski**"), effected personal service of the August 7 Order and Endorsement, together with all of the associated motion materials including, without limitation, the Notice of Action, on Pilehver on the evening of August 7, 2025 at his residence. A copy of the covering letter delivered to Pilehver with the materials is attached as **Exhibit "J"**. A copy of Mr. Markwoski's affidavit of service reflecting the foregoing is attached as **Exhibit "K"**.

12. Upon serving Pilehver, Pilehver indicated to Mr. Markowski that Pilehver could assist in serving Nali by arranging a time for a process server to meet Nali. Pilehver did in fact facilitate this meeting such that Ms. Maitman effected personal service of the August 7 Order and Endorsement, together with all of the associated motion materials including, without limitation, the Notice of Action, on Nali, in her personal capacity and in her capacity as director of Nali and Associates, on August 8, 2025 in the parking lot adjacent to 25 Mallard Road, North York, Ontario. A copy of the covering letter delivered to Nali with the materials is attached as **Exhibit "L"**. A copy of Ms. Maitman's affidavit of service reflecting the foregoing is attached as **Exhibit "M"**.

13. On August 9, 2025, being two days after the issuance of the August 7 Order, an email (the "**August 9 Email**") was sent from "Trans Global Partners Limited" at info@paybank.ca to what

[1] Full copies of the Receiver's Third Report, Supplement and Second Supplement, with appendices, are contained on the Receiver's Case Website as hyperlinked herein.

the Receiver believes to be all Co-Owners in the land banking scheme (as described in the Third Report), inviting them to participate in a class action proceeding against, among other parties, "KSV Advisory" (an affiliate of the Receiver), Aird & Berlis LLP (the Receiver's counsel) and Bennett Jones LLP (counsel to the applicants in the Receivership Proceedings). That email address appears to be associated with 2630306 Ontario Inc. o/a Paybank Financial ("**Paybank Financial**"), being one of Pilehver's companies. A copy of the corporate profile report for Paybank Financial is attached as **Exhibit "N"**.

14. An investor forwarded the August 9 Email to the Receiver, which is attached as **Exhibit "O"** (the investor's name has been redacted for privacy purposes) and which contained links to several letters to regulators and government officials setting out accusations against the named parties. Each of these letters was on the letterhead of TGP Canada Management Inc. ("**TGP**"), another of Pilehver's companies. A copy of the corporate profile report for TGP is attached as **Exhibit "P"**. As such, the Receiver believes that Pilehver sent these communications or caused them to be sent.

15. The Receiver has serious concerns that the August 9 Email and letters contain unfounded, baseless and fabricated accusations and has caused confusion among Co-Owners, including Co-Owners of LV IV, many of which have reached out directly to the Receiver to inquire about the legitimacy of TGP and Paybank Financial's communications.

16. Following the initial *ex-parte* hearing of the Receiver's motion on August 7, 2025, the Receiver and its counsel re-attended before the Court for a comeback hearing on August 15, 2025 (the "**Comeback Hearing**").

17. In support of relief sought at the Comeback Hearing, the Receiver filed the Second Supplement to the Third Report dated August 13, 2025 (the "**Second Supplement**"). The Second Supplement describes, among other things, (i) the Receiver's efforts to serve the Defendants with the August 7 Order and Endorsement and the motion materials filed in support thereof, (ii) service of the August 7 Order and Endorsement on TD Bank and TD Bank's response to such service, namely, account statements for each of the accounts held at TD Bank in the names of the Defendants, and (iii) efforts by the Defendant, Pilehver, and his companies, TGP and Paybank, to obtain support from Co-Owners to join a proposed class action lawsuit against the Receiver, its counsel, and others.

18. A copy of the Second Supplement is attached, without appendices, as **Exhibit "Q"**.[2]

19. At the Comeback Hearing, Justice J. Dietrich issued an Order (the "**August 15 Order**") and accompanying Endorsement (the "**August 15 Endorsement**") extending the August 7 Order until further Order of the Court and expanding the application of the *Norwich* relief therein to capture accounts which received monies from accounts in the names of the Defendants at TD Bank on or after February 5, 2025. Copies of the August 15 Order and the August 15 Endorsement are attached as **Exhibit "R"** and **Exhibit "S"**, respectively.

20. Pilehver attended the Comeback Hearing and advised the Court that he was in the process of retaining counsel and intended to bring a motion to discharge the August 7 Order (the "**Discharge Motion**"). For the purpose of timetabling the Discharge Motion, Justice J. Dietrich scheduled a case conference to be held on August 26, 2025.

21. As Pilehver attended the Comeback Hearing, the Court provided him with copies of the August 15 Order and Endorsement directly via e-mail. A copy of Court Registrar David Basskin's e-mail to, *inter alios*, Pilehver is attached as **Exhibit "T"**.

22. Immediately upon receiving the August 15 Order and Endorsement, the Receiver took steps to serve the same on each of the Defendants. On August 15, 2025, the Receiver's counsel served the August 15 Order and Endorsement on Pilehver by sending him copies via e-mail. On August 15, 2025, the Receiver's counsel also served all of the Defendants by sending copies of the August 15 Order and Endorsement to all known addresses for each of the Defendants by same-day courier. The affidavit of service of Calvin Horsten reflecting the foregoing is attached as **Exhibit "U"**.

23. On August 26, 2025, the Receiver, its counsel and HHR attended a case conference before the Honourable Mr. Justice Osborne. At this attendance, HHR had not yet been formally engaged by Pilehver and HHR asked that Justice Osborne adjourn the case conference to be held on September 9, 2025. A copy of the Endorsement of Justice Osborne dated August 26, 2025 is attached as **Exhibit "V"**.

[2] A full copy of the Receiver's Second Supplement, with appendices, is contained on the Receiver's Case Website as hyperlinked herein.

24. On September 9, 2025 (by which date the Notice of Action and Claim had been served on all of the Defendants), the Receiver, its counsel and HHR attended a case conference before Justice J. Dietrich. Rather than schedule a Discharge Motion, HHR advised the Court that Pilehver would deliver a sworn statement of his assets (as required by paragraph 5 of the August 7 Order) by September 16, 2025. Justice J. Dietrich scheduled a further case conference for September 23, 2025. A copy of the Endorsement of Justice J. Dietrich dated September 9, 2025 is attached as **Exhibit "W"**.

25. In purported compliance with paragraph 5 of the August 7 Order, on September 16, 2025, Pilehver delivered a two-page sworn statutory declaration (the "**Stat Dec**") without any supporting documents. The Stat Dec is unsatisfactory for a number of reasons, including that it fails to fully disclose Mr. Pilehver's assets (i.e. it references an undisclosed bank account) or supporting documentation in connection therewith. A copy of the Stat Dec is attached as **Exhibit "X"**.

26. On September 18, 2025, the Receiver's counsel contacted Pilehver's counsel to address the issues with the Stat Dec and to schedule Pilehver's examination in accordance with paragraph 6 of the August 7 Order. Pilehver's counsel instead advised the Receiver's counsel that HHR would be seeking to be removed as Pilehver's lawyers of record, and that counsel therefore had no instructions to discuss the matter.

27. On September 23, 2025, the Receiver, its counsel, Pilehver and HHR attended a case conference before Justice J. Dietrich. Her Honour's Endorsement of that date (the "**September 23 Endorsement**") reflects as follows: (i) the Receiver identified deficiencies with the Stat Dec; (ii) the Receiver intended to proceed with its examination of Pilehver on September 30, 2025 without prejudice to its right to seek production thereafter of relevant documents; (iii) HHR is seeking to withdraw as counsel; and (iv) Pilehver advised the Court that he had hoped to have retained new counsel by the following week, being the week ending October 3, 2025. A copy of the September 23 Endorsement is attached as **Exhibit "Y"**.

28. Given its pending withdrawal as counsel to Pilehver, HHR required that Pilehver's September 30 examination be adjourned. The Receiver agreed to the adjournment on a without prejudice basis.

29. On October 14, 2025, at HHR's request, the Receiver, the Receiver's counsel, HHR and Pilehver attended a further case conference before Justice J. Dietrich. At the October 14 case conference, two motions were scheduled: (i) a motion by HHR to be removed as Pilehver's lawyer of record, returnable on November 3, 2025; and (ii) a motion for default judgment to be brought by the Receiver as against each of the Defendants, returnable November 17, 2025. Her Honour's Endorsement of that date (the "**October 14 Endorsement**") reflects that Pilehver indicated at the October 14 case conference that he remained in the process of attempting to engage new counsel (having failed to do so by October 3, 2025 as he had previously indicated), and intended to defend this action by October 31, 2025. As of the date of swearing this Affidavit, Pilehver has done neither of these things.

30. A copy of the October 14 Endorsement is attached as **Exhibit "Z"**.

Location of Certain Proceeds

31. As set out in the Claim, the Third Report and the Second Supplement, $34,000 of the Proceeds were paid, at Pilehver's direction, to Blaney McMurtry LLP ("**Blaney**"). A redacted copy of Hundal's trust account statement for the impugned period is attached as **Exhibit "AA"** and reflects the foregoing payment. A copy of the wire confirmation from Hundal's trust account to Blaney is attached as **Exhibit "BB"**.

32. On August 12, 2025, Timothy Dunn of Blaney ("**Mr. Dunn**") emailed the Receiver's counsel indicating "*it has come to our attention that Blaney received approximately $34,000 from real estate counsel for Mr. Pilehvar that appears to be proceeds from the sale of a property that is subject to the instant proceedings*". Mr. Dunn requested that Blaney transmit such funds to the Receiver or its counsel. The Receiver's counsel responded to Mr. Dunn to indicate that Blaney should continue to hold the subject funds in trust, pending further order of the Court. A copy of this email exchange is attached as **Exhibit "CC"**.

33. The Receiver now seeks the imposition of a constructive trust over the foregoing amount in Blaney's possession, and an Order directing that such amount be paid to the Receiver for application against the Judgment sought in this default judgment motion.

Noting in Default

34. Despite being served at each stage of these proceedings to date, including, without limitation, by personal service of the Notice of Action and Claim, Nali and Nali and Associates have not participated in any way in these proceedings. They have not complied with the August 7 and August 15 Orders and have not served any Statement of Defence. As a result, on October 2, 2025, they were each noted in default. A copy of the filed Requisition to Note in Default is attached as **Exhibit "DD"**.

35. Pilehver failed to serve a Notice of Intent to Defend or Statement of Defence (or to retain new counsel) by the end of October 2025, despite his representations to the Court that he would do so.

36. In addition, on November 3, 2025, HHR was successful on its motion to be removed as counsel of record for Pilehver, such that Pilehver is now unrepresented. Pilehver did not attend HHR's motion on November 3, 2025, and neither he nor a representative on his behalf has communicated with the Receiver or its counsel subsequent to the October 14, 2025 case conference. The Order and accompanying Endorsement of Justice J. Dietrich, each dated November 3, 2025 are collectively attached as **Exhibit "EE"**. The Endorsement reflects that Pilehver did not attend the November 3, 2025 hearing date.

37. In light of the foregoing, Pilehver was noted in default on November 3, 2025. A copy of the filed Requisition to Note in Default is attached as **Exhibit "FF"**.

38. As none of the Defendants have filed a Statement of Defence, the time by which Statements of Defence were required to be filed under the *Rules of Civil Procedure* has expired, and Pilehver has repeatedly failed to meaningfully participate in these proceedings (whether by retaining new counsel or advancing a defence), the Receiver seeks default judgment against the Defendants.

39. To date, no steps have been taken by the Defendants to have the noting in default set aside.

Liability and Damages

40. The Receiver submits that the facts and evidence contained in the Claim and this Affidavit, including the Receiver's Third Report, Supplement and Second Supplement upon which the

Mareva Orders were issued, entitle LV IV to the judgment sought in the form of the draft judgment filed.

41. The Receiver's Third Report, Supplement and Second Supplement were filed in support of the Mareva Orders issued, and gave rise to this Court's finding that the Receiver had established: (i) a strong *prima facie* case that Pilehver had breached his fiduciary duty to LV IV;[3] and (ii) the mere fact that Nali and Nali and Associates obtained the sale proceeds belonging to LV IV (and by virtue, its underlying Co-Owners) without permission, and without any legal entitlement, amounts to a strong *prima facie* case of conversion.[4]

42. Compensatory damages ought to be fixed at an amount no less than the sum of the misappropriated Proceeds as set out in the Claim and the Third Report.

43. In addition, an award of punitive damages is appropriate. The Co-Owners are largely individuals residing overseas, primarily in Asia, many of whom are elderly and do not speak English. Beyond the high-handed, malicious, arbitrary and reprehensible misconduct by the Defendants as against vulnerable Co-Owners as set out in the Claim, the facts within this Affidavit further reflect an effort by the Defendants to evade justice to the continued detriment of such vulnerable Co-Owners. As discussed above, Pilehver has even attempted to garner support from Co-Owners, as against the Receiver and others, to hinder the Receivership Proceedings and manipulate the opinions of Co-Owners.

44. The Receiver submits that the costs incurred by the Receiver, and as sought on this motion, are fair and reasonable. These fees, and the activities of the Receiver as set out in the Third Report, Supplement, and Second Supplement, were all approved by the Court in the endorsement and Order of Justice Steele issued in the receivership proceedings on October 23, 2025, which motion was on notice to, and unopposed by, Pilehver.[5] Attached hereto as **Exhibit "GG"** and **Exhibit "HH"** are the Order and Endorsement of Justice Steele issued October 23, 2025. Attached hereto

[3] August 7 Endorsement at para 27.
[4] August 7 Endorsement at para 28.
[5] The Fee Affidavit filed as Appendix "BB" to the Fourth Report of the Receiver dated October 14, 2025 in respect of the approval motion heard on October 23, 2025, which Fee Affidavit includes all time entries from Aird & Berlis LLP through September 30, 2025, is contained on the Receiver's Case Website as hyperlinked herein.

as **Exhibit "II"** is the Affidavit of Service of Calvin Horsten, reflecting that the aforesaid approval motion was on notice to Pilehver.

45. Attached at **Tab 3** of the Motion Record filed herein is the Bill of Costs in support of the request for costs sought on this motion, which predominantly includes the fees already approved by the Court in its October 23, 2025 Order and endorsement issued in the underlying Receivership Proceedings.

46. This Affidavit is made in support of the Plaintiff's default judgment motion, and for no improper purpose.

SWORN BEFORE ME via videoconference at the City of Toronto, in the Province of Ontario, this 5th day of November, 2025, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

Calvin Horsten (LSO No. 90418I)

JORDAN WONG

TAB 4

Paras 5, 75.b, 91, and 136.b.

Third Report of KSV Restructuring Inc. as Receiver of London Valley IV Inc. *et al*.

August 1, 2025

b. the income derived in any way from the ownership, operation, use, leasing, financing, refinancing, sale of, development and/or any other dealing whatsoever with any of the real property previously or currently owned by any of the Nominee Respondents, including the real properties municipally and legally described in Schedule "B" of the Appointment Order (the "**Segregated Funds**") provided that such Segregated Funds shall not include any income derived from or by an arm's length purchaser of such property after the date of such sale.

2. One of the properties listed in Schedule "B" to the Appointment Order is 6211 Colonel Talbot Road, London, Ontario (the "**LV IV Property**").

3. Based on the Receiver's investigatory steps taken to-date, it appears to the Receiver that the LV IV Property was improperly sold and transferred[2] on February 5, 2025, and that certain of the sale proceeds were improperly disbursed at the direction of Mr. Behzad Pilehver[3] ("**Mr. Pilehver**"), including to Mahtab Nali[4] ("**Ms. Nali**") and to 2621598 Ontario Inc. doing business as Nali and Associates ("**Nali and Associates**") (collectively, the "**Defendants**").

4. At the time of the Receiver's appointment, Mr. Pilehver was and remains a director and officer of certain Nominee Respondents in the Land Banking Enterprise, including LV IV of which he is the sole director and President. According to various corporate records, Ms. Nali and Mr. Pilehver have the same address, and the Receiver believes Ms. Nali is Mr. Pilehver's spouse, although that has not been confirmed by the Receiver.

5. As is detailed in Section 4.0 below, there is evidence that $1,071,551.06 of the LV IV Property sale proceeds appear to have been improperly distributed to or for the benefit of Ms. Nali and Mr. Pilehver, through payments made to Ms. Nali, Nali and Associates and to various law firms.

6. These transfers were completed on and after February 7, 2025, and were not subsequently reversed, despite Mr. Pilehver, either directly or through his lawyers, having been provided with notice of: (i) an October 31, 2024 Injunction Order issued in the Hamilton Proceedings[5] prohibiting the sale of property within the Land Banking Enterprise, including the LV IV Property; (ii) the pending Receivership Proceedings; and subsequently, (iii) the Appointment Order.

7. The Receiver is of the view that such sale proceeds were improperly converted for the benefit of the Defendants, that LV IV and its underlying public investors were correspondingly deprived, and that there is no juristic reason for the Defendants' enrichment in this regard.

[2] Titan Lands Inc. was the ultimate purchaser of the LV IV Property and is an Ontario corporation whom the Receiver understands to be an arm's length purchaser.

[3] Behzad Pilehver is also known as Ben Pilehver, Behzad Pilehvar, Ben Pilehvar, and Ben Pilevhr.

[4] Mahtab Nali is also known as Mahtab Nali Pilehvar and Mahtab Pilehvar.

[5] The Hamilton Proceedings and October 31, 2024 Injunction Order are addressed in Section 3.0 below. The October 31, 2024 Injunction Order is attached hereto as Appendix "SS", and contains the *Mareva* injunction order at paragraph 5 thereof.

70. Additionally, the Receiver understands that by letter dated February 25, 2025, the lawyers for the Hamilton Respondents, Brar Tamber Rigby Badham Litigation Lawyers ("**BTRB Lawyers**"), sent a letter to Mr. Pilehver, Ms. Hundal and the real estate broker representing LV IV on the LV IV Property sale transaction, alleging amongst other things, that Mr. Pilehver was falsely representing himself as the officer and director of LV IV. The letter further asserted that Mr. Pilehver did not have authority to control LV IV or any other company acquired by First Global from Trans Global. The letter requested that the sale proceeds of the LV IV Property be delivered to BTRB Lawyers in trust. A copy of this letter is attached hereto as **Appendix "BBB".**

4.2 The Norwich Order and Hundal Law Account Statement Provided by TD Bank

71. The Appointment Order was subsequently issued on March 6, 2025. None of the parties to the Hamilton Proceedings, nor Mr. Pilehver, opposed the Appointment Order.

72. Paragraph 4(t) of the Appointment Order provides the Receiver with the power to trace and follow any proceeds of the real property previously owned by LV IV, including the LV IV Property enumerated in Schedule B to the Appointment Order.

73. Paragraphs 29 to 33 of the Appointment Order set out the Norwich Order issued by the Court. On March 12, 2025, in response to the Appointment Order, TD Bank provided the Receiver with a detailed account statement for the Hundal Account for the period February 5, 2025 (the closing date of the LV IV Property sale) through to March 10, 2025 (the "**Hundal Law Account Statement**").

74. The Hundal Law Account Statement reflected, among other information, that:

    a. on February 5, 2025, the Sale Proceeds in the sum of $1,899,510.70 were received in the Hundal Account from "Mckenzie Lake Lawyers LLP", being the lawyers for the purchaser of the LV IV Property; and

    b. on February 5, 2025, a payment was disbursed from the Hundal Account to "Olympia Trst company" in the amount of $731,331.20.

75. Ultimately, as is detailed below, the Receiver was able to identify the disbursements of the Sale Proceeds made by Hundal Law, who claims to have distributed such funds at Mr. Pilehver's direction:

    a. **Olympia Trust Charge**: On February 5, 2025, a payment was disbursed from the Hundal Account to "Olympia Trst company" in the amount of $731,331.20 in order to discharge a collateral mortgage registered by Olympia Trust on the LV IV Property. The Receiver's understanding is that there was no basis for this collateral charge to have been registered on the LV IV Property, and that it was placed on the LV IV Property as collateral for indebtedness owing by Mr. Hoffner, as is further discussed in Section 4.3 below;

    b. **Payments to or for the benefit of the Defendants**: $1,071,551.06 of the Sale Proceeds appear to have been improperly distributed to or for the benefit of Ms. Nali, Nali and Associates and Mr. Pilehver, through payments made to Ms. Nali, Nali and Associates and to the various law firms as detailed in Section 4.5 below;

02/12/2025	HI133 TFR-TO 5017322	$5,000	DR	5017322 1140 – Hundal Law	**Appendix "SSS"**
02/18/2025	CERTIFIED CHQ #03354	$80,800	DR	To: NALI AND ASSOCIATES	**Appendix "TTT"**
02/20/2025	IJ540 TFR-TO 5017322	$30,000	DR	5017322 1140 - Hundal Law	**Appendix "SSS"**
02/28/2025	CHQ#03349-2144381989	$7,001.19	DR	City of London	**Appendix "UUU"**
03/03/2025	RR042 TFR-TO 5017322	$4,040	DR	5017322 1140 - Hundal Law	**Appendix "SSS"**
03/03/2025	RR101 TFR-TO 5017322	$6,000.42	DR	5017322 1140 - Hundal Law	**Appendix "SSS"**
Net Sale Proceeds Disbursed	**$1,889,832.30 (of the total Sale Proceeds of $1,899,528.20)**				

91. The Receiver provides the following summary as to how the Sale Proceeds appear to have been distributed:

a. $817,859.49 to Mahtab Nali (reason unknown);

b. $80,800 to Nali and Associates (reason unknown);

c. $731,331.20 to Olympia Trust Company to discharge the Olympia Charge;

d. $30,000 to Unik Credit Management, which may in fact be a reference to "Stockwoods LLP – Nader Hasan" (reason unknown);

e. $5,000 to Bally Hundal Law Firm (reason unknown);

f. $103,040.42 paid to Hundal Law Professional Corporation (much of this amount is unsupported and/or appears to pertain to matters for Mr. Pilehver and/or other entities unrelated to LV IV);

g. $7,001.19 paid to City of London on account of property taxes owed by LV IV;

h. $34,000 to Blaney McMurtry (reason unknown, but given the reference to Timothy Dunn of Blaney McMurtry LLP, it appears this amount may have been paid to fund a retainer on behalf of Mr. Pilehver personally, TGP Canada and Paybank so that they could engage Blaney McMurtry LLP to represent them in the Receivership Proceedings); and

i. $80,800 to Remax West Realty Inc. Brokerage (commission payment).

92. As indicated in the Table above, these transfers total $1,889,832.30 ($9,678.40 less than the Sale Proceeds). The Receiver received the Remaining Balance of $8,844.75 from Hundal Law on May 21, 2025.[30]

[30] There is accordingly a small discrepancy of $833.65 between the total Sale Proceeds, and the amounts disbursed by Hundal Law, for which the Receiver is unable to account.

133. On May 27 and June 23, 2025, the Receiver's counsel again sent correspondence to the Paybank Parties' lawyers, copying Mr. Pilehver, requesting that Mr. Pilehver respond to the LV IV Sale Proceeds Inquiry. The Receiver's counsel's emails in this regard are also contained in **Appendix "MMMM"**, together with the Paybank Parties' lawyer's May 27 email indicating he would follow-up with Mr. Pilehver.

134. To date, neither Mr. Pilehver nor the Paybank Parties' counsel on his behalf has responded to the LV IV Sale Proceeds Inquiry.

135. As a result of the documentation delivered by Ms. Hundal's LawPro counsel in the July 4 Email concerning the improper distribution of the LV IV Sale Proceeds, the Receiver proceeded to bring the within motion in an effort to trace and secure LV IV's property in accordance with the Appointment Order.

5.0 Injunctive Relief

136. Based on the information set out in this Third Report, the Receiver believes there is strong evidence that:

a. The LV IV Property was sold at the direction of Mr. Pilehver in breach of the October 31, 2024 Injunction Order, and contrary to the notice and approval requirements contained in the Co-Owners Agreements;

b. The LV IV Sale Proceeds were not distributed as required by the Co-Owner Agreements. Instead, $1,071,551.06 of the Sale Proceeds appears to have been improperly distributed to or for the benefit of Ms. Nali and Mr. Pilehver, through the payments made to Ms. Nali, Nali and Associates, and to the various law firms as noted in Section 4.5 above. As a result, the Receiver believes Ms. Nali, Nali and Associates and Mr. Pilehver were unjustly enriched, LV IV has suffered a corresponding deprivation, and there is no juristic reason for their enrichment in this regard;

c. Despite the Receiver's repeated requests of Mr. Pilehver and his counsel to advise as to how the LV IV Sale Proceeds were distributed, Mr. Pilehver has failed or refused to respond to the Receiver's inquiries;

d. The Receiver has reason to believe that Mr. Pilehver, Ms. Nali and Nali and Associates each have assets or businesses in Ontario;

e. Given the conduct observed by the Receiver, the Receiver believes that if the requested injunctive relief is not granted as against the Defendants to restrain them from transferring or dealing with assets, there is a serious risk of their assets being removed from the jurisdiction or otherwise dissipated or disposed of before a judgment can be obtained against them to recover the improperly distributed Sale Proceeds; and

TAB 5

Paras 18-20

Second Supplement to the Third Report of KSV Restructuring Inc. as Receiver of London Valley IV Inc. *et al*.

August 13, 2025

18. On August 11, 2025, a representative of TD Bank advised the Receiver and its counsel that pursuant to the *Mareva* Order, the following accounts had been frozen as of August 8, 2025, and provided account statements (collectively, the "**Account Statements**") for each account for the period on and after February 5, 2025, as follows:

    i. **Account 6177612 (Mahtab Nali)** with a negative balance of -$15.89 as of July 31, 2025 – see **Appendix "I"**.

    As detailed in paragraph 101.b. and **Appendix "OOO"** of the Third Report, a certified cheque from the LV IV Sale Proceeds was issued by Hundal Law and deposited into this account on February 7, 2025 in the sum of $817,859.49.

    ii. **Account 5023332 (Nali and Associates)** with a balance of $6.20 as of August 5, 2025 – see **Appendix "J"**.

    As detailed in paragraphs 90, 99, **Appendix "KKK"** and **Appendix "TTT"** of the Third Report, a certified cheque from the LV IV Sale Proceeds in the sum of $80,800 was issued by Hundal Law and deposited by Nali and Associates on February 18, 2025, which deposit is reflected in the 5023332 Account Statements.

    iii. **Account 6189920 (Mahtab Nali)** with a negative balance of -$368.23 as of July 31, 2025 — see **Appendix "K"**.

    The account statements for Account 6189920 reflect various transfers from and to Accounts 6177612 and 5023332 subsequent to February 5, 2025.

19. TD Bank did not advise of the existence of any accounts in the name of Mr. Pilehver.

20. The Account Statements provided by TD Bank reflect, without limitation, the following notable transactions in Accounts 6177612 and 5023332:

Account 6177612 (Mahtab Nali)

Date	Amount	Recipient
Credits		
February 7	$817,859.49 (account balance prior to deposit -$12.10)	Deposit on account of the certified cheque from Hundal Law per paragraph 18.i above.

Debits		
February 7	$646,669.55	Undefined – paid via drafts, transfers, withdrawals, wire to customer and e-transfers
February 10	$2,200.00	Undefined – paid via e-transfers
February 10	$13,217.61	Michael Hill (jewelry store)
February 10	$7,300.00	Peoples (jewelry store)
February 10	$411.55	SHEIN (online apparel store)
February 10	$2,185.70	Bella Barnett (online apparel store)
February 11	$1,740.10	SHEIN – various transactions (online apparel store)
February 11	$10,000.00	Faraz Auto Sale
February 11	$5,009.95	Undefined – paid via draft
February 11	$39,000.00	Undefined – paid via transfer
February 12	$3,976.47	Michael Hill (jewelry store)
February 12	$2,620.00	Undefined – paid via e-transfer
February 13	$958.36	Bella Barnett (online apparel store)
February 13	$4,438.00	Dolce and Gabbana
February 13	$2,630.00	Undefined – paid via e-transfers
February 14	$2,000.00	Undefined – paid via e-transfer
February 18	$1,505.43	SHEIN – various transactions (online apparel store)
February 18	$5,000.00	Undefined – paid via transfer
February 18	$1,370.00	Undefined – paid via e-transfers
February 19	$480.00	Undefined – paid via e-transfer
February 19	$50,009.95	Undefined – paid via draft

From February 20, 2025 to August 11, 2025, the balance of the above Account 6177612 has been maintained at less than $5,000 (sometimes falling into overdraft) with various amounts being credited to the account on an *ad hoc* basis to cover same-day transactions.

Account 5023332 (Nali and Associates)

Date	Amount	Recipient
Credits		
February 18, 2025	$80,800 (account balance prior to deposit - $191.84)	Deposit on account of the certified cheque from Hundal Law per paragraph 18.ii above.
Debits		
February 19	$25,009.95	Undefined – paid via draft
February 19	$25,009.95	Undefined – paid via draft
February 20	$13,674.95	Undefined – paid via draft
February 24	$1,000.00	Undefined – paid via e-transfer
February 26	$1,200.00	Undefined – cash withdrawal
February 26	$1,000.00	Undefined – paid via e-transfer

From February 27, 2025 to August 11, 2025, the balance of this account has been maintained at less than $10,000 (sometimes falling into overdraft) with various amounts being credited to the account on an *ad hoc* basis to cover same-day transactions.

2.4 TGP Canada and Paybank's Attempts to obtain Support from Co-Owners to Join a Class Action Lawsuit against the Receiver, the Receiver's Counsel, Bennett Jones LLP and others

21. Following the August 7 and 8, 2025 service of the *Mareva* Order, Endorsement and Motion Materials on the Defendants, the Receiver was forwarded an email on August 9, 2025 by a Co-Owner which appears to have been sent by Paybank and TGP Canada[1] to Co-Owners, from the email address info@paybank.ca (the "**August 9 Paybank/TGP Canada Email to Co-Owners**"). A copy of the August 9 Paybank/TGP Canada Email to Co-Owners is attached as **Appendix "L"**.

[1] As indicated in paragraph 19.b. and **Appendix "C"** and **Appendix "D"** of the Third Report, Mr. Pilehver is the director, President and principal of Paybank. As indicated in paragraphs 19.a., 59 and **Appendix "C"** of the Third Report, Mr. Pilehver is also the director, President and principal of TGP Canada.

TAB 6

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-25-00748799-00CL **DATE: August 7, 2025**

NO. ON LIST: 5

TITLE OF PROCEEDING:

London Valley IV, by Its Court-Appointed Receiver And Manager, KSV Restructuring
Vs.
Pilehver, Behzad / Nali, Mahtab / 2621598 Ontario Inc.

BEFORE: Justice J. Dietrich

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Mark van Zandvoort, Counsel Calvin Horsten, Counsel	The Plaintiff	mvanzandvoort@airdberlis.com chorsten@airdberlis.com
David Sieradzki, Receiver Jordan Wong, Receiver	KSV Advisory	dsieradzki@ksvadvisory.com jwong@ksvadvisory.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE J. DIETRICH:

Introduction

[1] London Valley IV Inc. ("**LV IV**") by KSV Restructuring Inc. ("**KSV**") solely in its capacity as the Court-Appointed Receiver and Manager of LV IV, (the "**Receiver**") seeks on an ex parte basis a Mareva injunction and Norwich Order as against the Defendants, Behzad Pilehver ("**Pilehver**"), Mahtab Nali ("**Nali**") and 2621598 Ontario Inc. doing business as Nali and Associates ("**Nali and Associates**").

[2] Defined terms used but not otherwise defined herein have the meaning provided to them in the factum of the Receiver filed for use on this motion.

[3] As an initial matter, in support of this motion the Receiver filed the third Report of KSV dated August 1, 2025 as evidence. For the reasons set out in *Intercity Realty Inc v. PricewaterhouseCoopers Inc. et al*., 2024 ONSC 2400 at para 51-53, I accept that a report of the Receiver as a court-officer is appropriate evidence in this context.

[4] For the reasons set out below, the relief requested by the Receiver is granted.

Background

The Receivership Proceedings and the Parties

[5] On March 6, 2025, under Court File No. CV-25-00736577-00CL (the "**Receivership Proceedings**"), KSV was appointed as Receiver of the assets, undertakings and properties of, among others, LV IV, and the proceeds thereof, including with respect to the LV IV Property (as defined below) (the "**Appointment Order**").

[6] The Receivership Proceedings were commenced by Mizue Fukiage, Akiko Kobayashi, Yoshiki Fukiage, Kobayashi Kyohodo Co., Ltd. and Toru Fukiage (collectively, the "**Kobayashi Group**").

[7] The Kobayashi Group, other members of their family and numerous other investors (collectively, the "**Co-Owners**") invested funds in certain land banking projects to finance the acquisition of real estate (the "**Land Banking Enterprise**"). Various companies (some of which are defined in the Appointment Order as the "**Nominee Respondents**"), including LV IV, were formed to hold title to various pieces of real estate in Ontario as nominees and bare trustees for the Co-Owners.

[8] As part of the Receiver's powers under the Appointment Order, it was authorized to trace and follow the proceeds of any real property previously owned by any of the Nominee Respondents that was sold, transferred, assigned or conveyed on or after October 31, 2024, including in respect of the LV IV Property.

[9] LV IV is an Ontario corporation, and owned the property municipally known as 6211 Colonel Talbot Road, London, Ontario (the "**LV IV Property**") until the property was sold and transferred to a third-party purchaser for consideration of $2 million on February 5, 2025.

[10] At the time of the Receiver's appointment, Pilehver was and remains a director and officer of certain Nominee Respondents in the Land Banking Enterprise, including LV IV of which he is the sole director and President.

[11] Nali is believed to be Pilehver's wife, although this has not been confirmed by the Receiver.

[12] Nali and Associates is a business name registered by 2621598 Ontario Inc. (an Ontario Corporation). Nali is the President and sole director of Nali and Associates. In corporate filings, both Nali and Pilehver list their address for service as 48 Chelford Road, North York, Ontario.

The LV IV Property

[13] The Kobayashi Group claims to have invested the aggregate amount of $3.7 million to acquire an approximately 72% undivided beneficial interest in the LV IV Property. This interest was acquired pursuant to four sale agreements among the applicable member of the Kobayashi Group, as purchaser, LV IV, as nominee, and TSI-LV IV International Canada Inc., as vendor. Each of these sale agreements includes certain co-owner agreements, which require that, amongst other things, net income from the property be paid to Co-Owners and that Co-Owners holding at least 51% of the interests in the property approve any sale.

[14] On October 31, 2024, the Honourable Justice MacNeil issued an Order (the "**October 31, 2024 Injunction Order**") in the proceedings under Court File No. CV-24-00087580-0000 (the "**Hamilton Proceedings**") which includes at paragraph 5 of the Order provided that all persons with notice of the order were restrained from selling, removing, dissipating alienating, transferring, assigning, encumbering, or similarly dealing with their assets, or the assets of certain companies. The Receiver's reading of this Order is that the companies referenced included LV IV and therefore the restriction applied to the LV IV Property. Although the defined terms in the October 31, 2024 Injunction Order are not straightforward, it appears on the evidence that all parties understood that the LV IV Property was subject to the Order and that formed part of the basis set out in the Receivership Proceedings.

[15] Mr. Philehver was aware of the October 31, 2024 Injunction Order as he attached it to an affidavit he swore in the Hamilton Proceedings on January 20, 2025 (prior to the transfer of the LVI IV Property on February 5, 2025).

[16] The Kobayashi Group, as a subset of the Co-Owners of the LV IV Property, filed evidence in support of the Appointment Order that the sale of the LV IV Property on February 5, 2025 was completed without the Kobayashi Group's knowledge or consent. Further, the Kobayashi Group asserted that they have not received any net income or other proceeds in connection with the LV IV Property.

Sale of LV IV Property and Alleged Misappropriation of Funds

[17] The LV IV Property was sold without compliance with the co-owners agreement. Accepting the Receiver's interpretation of the October 31, 2024 Injunction Order, the LV IV Property was also sold in contravention of that Orde and in the face of the pending Receivership Proceeding of which Pilehver was aware.

[18] Based on the terms of the Appointment Order the Receiver was provided with information that on February 5, 2025, the proceeds from the sale of the LV IV Property were deposited into the trust account (the "**Hundal Account**") for the lawyer, Parminder Hundal ("**Hundal**"), who acted for LV IV on the sale transaction were subsequently disbursed by Hundal, at Pilehver's direction, to the following persons and entities who appear to have no connection to LV IV or the LV IV Property:

a. on February 7, 2025, a payment was made from the Hundal Account to Nali in the amount of $817,859.49, which payment was made by cheque and deposited into the Nali Bank Account. Initially, a wire in this amount was evidently sent to "Mahtab Nali" on February 6, 2025 with reference to an account number 1929-5023332 (together with the Nali Bank Account, the "**Nali Bank Accounts**"), but was evidently voided and did not go through;

b. on February 18, 2025, a further $80,800 was paid by cheque from the Hundal Account to Nali and Associates;

c. on February 12, 2025, $5,000 was wired by Hundal to Bally Hundal/Hundal Law Firm;

d. on February 14, 2025, $30,000 was wired by Hundal to Stockwoods LLP;

e. payments totalling $103,040.42 were paid to Hundal's law firm on February 10, 12, 20 and March 5, 2025 in purported satisfaction of accounts rendered, of which at least $94,000. appears to have no connection to LV IV or the LV IV Property; and

f. on March 5, 2025, one day prior to the Appointment Order, $34,000 was wired by Hundal to a third law firm, Blaney McMurtry LLP.42 On March 21, 2025, Blaney McMurtry LLP advised the service list in the Receivership Proceedings that it had been retained by Pilehver in his personal capacity, as well as by 2630306 Ontario Inc. o/a Paybank Financial ("**Paybank**") and TGP Canada (collectively, the "**Paybank** Parties"). Pilehver is an officer and director of Paybank and TGP Canada.

[19] Despite the Receiver's inquiries of Pilehver and his known lawyers as to what happened to the sale proceeds from the LV IV Property, no explanation or response has been provided by Pilehver.

Issues

[20] The issues to be decided in this motion are whether:

a. the Court should grant an ex parte interim and interlocutory Mareva injunction against the Defendants; and

b. the Norwich relief requested ought to be granted.

Analysis

Mareva Order

[21] This Court has jurisdiction to grant an interlocutory injunction, including a Mareva injunction, pursuant to section 101 of the *Courts of Justice Act* (the "**CJA**"), where it appears just or convenient to do so. Pursuant to *Rule* 40.01 of the *Rules of Civil Procedure* RRO Reg 194 (the "**Rules**"), an interlocutory injunction or mandatory order under section 101 of the CJA may include such terms as are just, and may be sought on motion made without notice for a period not exceeding 10 days.

[22] A Mareva injunction is an exceptional remedy see *Aetna Financial Services v. Feigelman*, 1985 CanLII 55 (SCC).

[23] The factors to be ordinarily considered in determining whether to grant Mareva relief include:

a. a strong prima facie case;

b. particulars of its claim against the defendant, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the defendant;

c. some grounds for believing that the defendant has assets in Ontario (although this requirement has been modified by more recent jurisprudence discussed below, such that it is perhaps better expressed as: some grounds for believing that the defendant has assets within the jurisdiction of the Ontario Court);

d. some grounds for believing that there is a serious risk of defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied;

e. proof of irreparable harm if the injunctive relief is not granted;

f. the balance of convenience favours the granting of the relief; and

g. an undertaking as to damages.

See *Original Traders Energy Ltd. (Re)*, 2023 ONSC 1887 [***Original Traders #1***] at para 22.

Strong Prima Facie Case

[24] To find a strong prima facie case the court must be satisfied that upon a preliminary review of the case, there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice see *R v Canadian Broadcasting Corp*., 2018 SCC 5 at para 17.

[25] Here, the Receiver claims fraud, breach of fiduciary duty, conversion, unjust enrichment, knowing assistance and knowing receipt as against the Defendants or any of them. Only one cause of action against each Defendant must show a strong prima facie case.

[26] With respect to Pilehver, the claim of breach of fiduciary duty is asserted. To establish a breach of fiduciary duty, a plaintiff must establish the following elements: (a) proof of the duty, including that the fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest, and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (b) breach of the duty, including concealment or failure to advise of material facts, breach of trust, making a secret profit or acting in a conflict of interest, a causal connection between the breach and the alleged damages and the fiduciary's profit from its actions see *Hodgkinson v Simms,* [1994] 3 SCR 377.

[27] Pilehver owed a fiduciary duty to LV IV, as the sole director thereof. By orchestrating a sale of the LV IV Property without proper authorization and then improperly transferring the proceeds to benefit the Defendants – the Receiver has established a strong prima facie case of breach of fiduciary duty.

[28] The tort of conversion is also asserted against all defendants. It involves a wrongful interference with the goods of another, such as taking, using or destroying the goods in a manner inconsistent with the owner's right to possession. The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence see *Wymor Construction Inc. v Gray*, 2012 ONSC 5022 at paras 18-19. In the present case, whether or not Nali knew about Pilehver's fraudulent activities is immaterial. The mere fact that she and Nali and Associates obtained funds belonging to LV IV (and, by virtue, its Co-Owners) without permission, and without any legal entitlement, amounts to strong pima facie case of conversion.

[29] It may be that strong prima facie cases are also established in additional causes of action asserted including fraud, unjust enrichment, knowing assistance and knowing receipt, however, given my finding that a strong prima facie causes of action have been established against each of the defendants above it is not necessary to consider each of the causes of action asserted.

Full Disclosure of the Case

[30] I am satisfied that at this time the Receiver has provided full disclosure of the case. This matter will be subject to a comeback hearing and the Defendants will provided an opportunity to challenge the order that that time.

Grounds for Believing the Defendants have Assets in Ontario

[31] The evidence that each of the Defendants has assets in Ontario is limited.

[32] In Borrelli, in his Capacity as Trustee of the *SFC Litigation Trust v. Chan*, 2017 ONSC 1815 (CanLII) *[SFC Litigation Trust*], the Divisional Court reviewed a decision of Hainey J. where a worldwide Mareva

injunction was granted, despite a lack of evidence that the defendant had assets in Ontario. In reviewing the decision Justices Leitch and Sachs wrote:

> [25] ...The appellant's position is that in order to obtain an injunction, there is a substantive requirement that a defendant have assets in the jurisdiction to be subject to the restraining order. The appellants say there must be assets in this jurisdiction to ensure the order of the court is capable of implementation.
>
> [26] I do not accept the appellant's assertion. I recognize that in Chitel the injunction was sought to restrain the dissipation of assets in Ontario. Similarly, in virtually all of the cases referenced by counsel on this appeal, the assets which were at the risk of dissipation existed in Ontario.
>
> [27] However, a court's in personam jurisdiction over a defendant justifying the issuance of a Mareva injunction is not dependant, related to or "tied to" a requirement that a defendant has some assets in the jurisdiction.
>
> [28] Section 101(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides the court with jurisdiction to grant an interlocutory junction or mandatory order "where it appears to a judge of the court to be just or convenient to do so".
>
> [29] A Mareva injunction is an equitable remedy and as such I agree with the respondent's submission that this remedy evolves as facts and circumstances merit.

[33] As was recognized in *SFC Litigation Trust* (see para 38), although the usual case for a Maerva injunction is to prevent assets from leaving the jurisdiction, world-wide Maerva injunctions have been granted with increasing frequency to ensure that a judgment can be enforced in the exceptional circumstances where the plaintiff has established a strong prima facie case on the merits.

[34] The evidence shows that Pilehver and Nali are each directors of several Ontario corporations with addresses for service listed in the corporate profile reports for each of them in Richmond Hill and Toronto. As noted above, Nali & Associates in incorporated in Ontario and the corporate profile report shows a registered or head office in North York, Ontario.

[35] In addition, the evidence reflects that the cheque paid to Nali in the amount of $817,859.49 was deposited into an account in the name of “NALI M” bearing Account No. 6177612 at The Toronto-Dominion Bank.

Risk of Dissipation of Assets

The risk of dissipation may be inferred by evidence suggestive of the defendants' fraudulent conduct see *Sibley & Associates LP v Ross*, 2011 ONSC 2951 [***Sibley***] at para 64. As in Sibley, here it is a reasonable inference given the following evidence that the Defendants are likely to attempt other means to put money out of the reach of the Receiver:

a. Pilehver directed the sale of the LV IV Property and the distribution of sale proceeds therefrom despite having prior notice of the pending Receivership Proceedings concerning the LV IV Property and the October 31, 2024 Injunction Order restraining dealings with the LV IV Property, and despite being well aware of the consent and distribution requirements established by the relevant co-owner agreements (which requirements had not been complied with);

b. the Defendants caused and/or facilitated the misappropriation of LV IV Property sale proceeds as evidenced by, among other things, (i) the payment of proceeds to Nali, Nali and Associates and

other third parties; and (ii) written directions signed by Pilehver authorizing such payments without compliance with the requirements of the co-owner agreements; and

c. despite repeated requests to Pilehver and his counsel to provide information and documentation regarding the distribution of the LV IV Property sale proceeds, which requests have gone unanswered.

Undertaking

[36] The Receiver has not provided an undertaking as to damages. As noted by Justice Osborne in Original Traders #1 at para 51 " In my view, it is appropriate to dispense with the requirement for an undertaking as to damages where, as here, the case of the moving parties is strong and they are insolvent: *Sabourin & Sun Group of Cos. v. Laiken*, [2006] OJ No. 3847 at para. 16." Here LV IV is insolvent and the Receiver as a Court officer is pursuing the relief for the benefit of LV IV's creditors.

[37] As well, in *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300, the Ontario Court of Appeal rejected that the court-appointed officer (a receiver) should be required to provide an undertaking as to damages in similar circumstances.

[38] Accordingly, I am satisfied that the requirement for an undertaking as to damages is not required in this case.

Irreparable Harm & Balance of Convenience

[39] An analysis of the irreparable harm and the balance of convenience is also required given that injunctive nature of the relief requested. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR at 341. 26.

[40] In cases where a strong prima facie case for fraud has been established, it has been recognized that if the assets of the defendant are not secured, the plaintiff will likely not be able to collect on a money judgment, if successful.

[41] LV IV stakeholders will suffer irreparable harm, and will be prevented from recovering their misappropriated funds and assets, and assets traceable thereto, or other exigible assets, if the Defendants are not prevented from further moving, dissipating or otherwise attempting to put their assets beyond the reach of LV IV and its stakeholders. Indeed, “the probability of irreparable harm increases as the probability of recovering damages decreases” see Original Traders #1 at para 49, citing *Christian-Philip v Rajalingam*, 2020 ONSC 1925 at para 33.

Norwich Order

[42] In addition to a Mareva injunction, the Plaintiffs also seek a Norwich Order requiring the Defendants to produce documents from financial institutions.

[43] The Supreme Court of Canada has confirmed the elements of the test for obtaining a Norwich Order: (a) a bona fide claim against the unknown alleged wrongdoer; (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander; (c) the person from whom discovery is sought must be the only practical source of information available to the applicants; (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order; and (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns. See *Rogers Communications v. Voltage Pictures*, LLC, 2018 SCC 38 at para 18.

[44] As noted above, a *bone fide* claim has been established. Courts have emphasized that financial institutions are "innocently involved" third parties from whom Norwich relief is regularly sought in fraud cases: see *Carbone v. Boccia*, 2022 ONSC 6528 [***Carbone***] at para 20. Records at such financial institutions are necessary in order to trace the funds obtained by the Defendants and identify any others involved in the scheme. The need to identify and trace to be legitimate objectives on which a Norwich order can be based see **Carbone** at para 17.

[45] At this time, the order to produce documents is limited to The Toronto-Dominion Bank, however, the request for expanded relief may be made in the future on appropriate evidence.

Order and Comeback

[46] Order to go in the form signed by me today with immediate effect and without the necessity of a formal order being taken out.

[47] Because the Mareva Order is being granted on a motion without notice, it can only be granted for a limited duration of up to ten days. Accordingly, the matter has been scheduled to return to court on Friday, **August 15, 2025, at 9:00 a.m** (virtually), at which time, the Receiver may ask for the Mareva Order to be extended.

[48] If they appear, the court will hear from the Defendants. They may file evidence for purposes of that return date, or they may appear and ask to schedule a further return date, to challenge the Order and have it dissolved or terminated.

[49] If none of the Defendants appear at the next return date, the Court will consider, based on the evidence to be provided by the Receiver about his efforts to serve them, whether to set a further return date or what further and other orders and directions might be appropriate regarding service and any future court appearances.

[50] To that end, the Receiver shall make reasonable efforts to serve, or at least bring to the attention of, the Defendants as soon as possible this endorsement and the Order signed by me today. The Receiver shall also provide to the defendants its motion record in support of this motion.

August 7, 2025 Justice J. Dietrich

TAB 7

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE 17TH
	)	
JUSTICE J. DIETRICH	)	DAY OF NOVEMBER, 2025

B E T W E E N:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

- and -

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

JUDGMENT

THIS MOTION, made by London Valley IV Inc. ("**LV IV**") by its Court-Appointed Receiver and Manager, KSV Restructuring Inc. (in such capacity, the "**Receiver**"), for default judgment against the defendants, Behzad Pilehver also known as Ben Pilehver also known as Behzad Pilehvar also known as Ben Pilehvar also known as Ben Pilevhr ("**Pilehver**"), Mahtab Nali also known as Mahtab Nali Pilehvar also known as Mahtab Pilehvar ("**Nali**") and 2621598 Ontario Inc. doing business as Nali and Associates ("**Nali and Associates**" and collectively with Pilehver and Nali, the "**Defendants**") was heard this day via Zoom videoconference at the courthouse at 330 University Ave., Toronto, Ontario M5G 1R7.

ON READING the Motion Record of LV IV, including, without limitation, the Notice of Action and Statement of Claim, the Affidavit of Jordan Wong sworn November 5, 2025 (the "**Wong Affidavit**"), the Bill of Costs and the Factum of LV IV, all of which were served on the Defendants as reflected by the Affidavit of Service of Calvin Horsten sworn November 5, 2025, and upon hearing the submissions of counsel for LV IV, no one appearing on behalf of any other party,

1. **THIS COURT ORDERS** that the time for service of the materials filed in this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND ADJUDGES** that each of the Defendants jointly and severally pay to LV IV the sum of $1,071,551.06.

3. **THIS COURT ORDERS AND ADJUDGES** that each of the Defendants jointly and severally pay to LV IV the sum of $250,000 on account of punitive damages.

4. **THIS COURT ORDERS AND ADJUDGES** that each of the Defendants jointly and severally pay to LV IV pre-judgment interest from February 5, 2025 on the amount set out in paragraph 2 hereof in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, at the rate of 3.0 *per cent* per annum, fixed in the amount of $25,100.72.

5. **THIS COURT ORDERS** that the Defendants shall provide LV IV with a full accounting of all funds paid to any of the Defendants or to other persons or entities by or on behalf of LV IV on or after February 5, 2025 (such funds being "**Funds**"), including, without limitation, from Parminder "Pam" Hundal and Parminder Hundal Law Professional Corporation. For the purposes

of this Order, a "full accounting" shall include without limitation: a complete summary of all such Funds paid by or on behalf of LV IV, where the Funds were transferred and to whom the funds were paid or transferred (each, a "**Recipient**"), and where such Funds were subsequently disbursed by each Recipient and for what purpose, with all backup, supporting documents and records, including but not limited to copies of any cheques, bank drafts, wire details, e-transfers, bank account details, invoices and any agreements, communications, telephone records, correspondence or documents of any kind in relation to any such deposit, withdrawal, payment or transfer otherwise, including from the Defendants' accounts to other persons or entities.

6. **THIS COURT DECLARES** that LV IV is entitled to trace all Funds taken from it into the hands of the Defendants or other persons or entities, or any of them, and into the hands of any subsequent other person or entity.

7. **THIS COURT ORDERS** that, with respect to all Funds paid by LV IV or anyone acting on its behalf to the Defendants or to the benefit of the Defendants, or to any other person or entity without valid consideration and entitlement, LV IV is entitled to and has a constructive trust and equitable lien with respect to those Funds including any assets (whether real or personal property) obtained using those Funds, and that LV IV may register its equitable lien on title thereto.

8. **THIS COURT FURTHER ORDERS** that the amount of approximately $34,000 being held in trust by Blaney McMurtry LLP ("**Blaney**") as detailed in the Wong Affidavit shall be forthwith paid by Blaney to LV IV in partial satisfaction of this judgment. Blaney is hereby authorized and directed to transfer such funds, and any interest earned thereon, to the Receiver of LV IV forthwith.

9. **THIS COURT ORDERS** that paragraphs 1-2, 5-6, 8-9, and 13-17 of the Order of Justice J. Dietrich dated August 7, 2025, as amended and continued by the Order of Justice J. Dietrich dated August 15, 2025, which Orders are appended hereto as Schedule "A", shall remain in effect as a *Mareva* in aid of execution until the Defendants have fully satisfied this judgment.

10. **THIS COURT DECLARES** that the judgement obtained against Pilehver is a debt or liability arising out of fraud and misappropriation while acting in a fiduciary capacity and therefore survives any past, present or future assignment in bankruptcy pursuant to section 178(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3.

11. **THIS COURT DECLARES** that the judgment obtained against Nali and Nali and Associates is a debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim, and survives any past, present or future assignment in bankruptcy pursuant to section 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3.

12. **THIS COURT ORDERS AND ADJUDGES** that each of the Defendants jointly and severally pay to LV IV the sum of $328,342.30 on account of costs of these proceedings, including, without limitation, this motion and all prior interim and interlocutory steps, which sum is fixed on a full indemnity scale.

The Judgment herein bears interest at the rate of 4% per annum commencing on the date of this Judgment.

SCHEDULE "A"
[See attached]

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Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-25-00748799-00CL

Court File No.: CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 15TH
	)	
JUSTICE J. DIETRICH	)	DAY OF AUGUST, 2025

B E T W E E N :

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

ORDER

NOTICE

If you, the Defendants, disobey this Order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized. You are entitled to apply on at least forty-eight (48) hours' notice to the Plaintiff, for an order granting you sufficient funds for ordinary living expenses and legal advice and representation.

Any other person who knows of this Order and does anything which helps or permits the Defendants to breach the terms of this Order may also be held to be

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in contempt of court and may be imprisoned, fined or have their assets seized.

THIS MOTION, made by the Plaintiff, London Valley IV Inc. by its Court-Appointed Receiver and Manager, KSV Restructuring Inc., solely in its capacity as Receiver and Manager of certain property of London Valley IV Inc. and all proceeds thereof, and not in its personal capacity or in any other capacity (in such capacity, the "**Receiver**"), for, among other relief, an interlocutory Order continuing and extending the Order of Justice J. Dietrich issued August 7, 2025 which issued a *Mareva* injunction restraining the Defendants from dissipating their assets and which ordered other relief, was heard this day via Zoom videoconference at 330 University Avenue, Toronto, Ontario.

ON READING the motion materials filed by the Plaintiff, including the Notice of Action, the Notice of Motion dated August 1, 2025, the Notice of Motion dated August 7, 2025, the Third Report of the Receiver dated August 1, 2025 and the Appendices thereto, the Supplement to the Third Report of the Receiver dated August 5, 2025 and the Appendix thereto, the Second Supplement to the Third Report of the Receiver dated August 13, 2025 and the Appendices thereto, the Factum of the Plaintiff and the Aide-Memoire of the Plaintiff dated August 14, 2025 (collectively, the "**Motion Materials**"), and on reviewing the Affidavit of Service of Neil Markowski sworn August 8, 2025, the Affidavit of Service of Lisa Maitman sworn August 8, 2025 and the Affidavit of Service of Calvin Horsten sworn August 13, 2025, and on hearing the submissions of counsel for the Plaintiff and the submissions of the Defendant, Behzad Pilehver, who appeared in person to request an adjournment of today's hearing on behalf of the Defendants, no one appearing on behalf of any other Defendant despite service having been effected as set out in the Affidavits of Service filed,

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SERVICE

1. **THIS COURT ORDERS** that the time for service of the Motion Materials of the Plaintiff is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

EXTENSION OF ORDER

2. **THIS COURT ORDERS** that the Order of Justice J. Dietrich dated August 7, 2025, attached as Schedule "A", (the "**August 7 Order**"), is hereby extended until further Order of the motion judge who hears the Discharge Motion (as defined in paragraph 4 below).

3. **THIS COURT ORDERS** that the term "Bank", as defined in paragraphs 8 and 9 of the August 7 Order, shall be hereby amended such that the term "Bank" also includes all financial institutions and entities which have received funds from The Toronto-Dominion Bank account nos. 6177612, 5023332 or 6189920 on or after February 5, 2025 and have held such funds in any account or on credit on behalf of any of the Defendants.

4. **THIS COURT ORDERS** that the parties shall attend at a case conference at 11 a.m. on August 26, 2025 for the purpose of timetabling and scheduling the Defendants' motion, should they wish to bring it, to request that the within Order and the August 7 Order be varied or discharged (the "**Discharge Motion**") or any ancillary motion related to such Orders.

COSTS

5. **THIS COURT ORDERS** that the costs of this motion and of the *ex parte* motion heard on August 7, 2025 shall be in the cause, or as otherwise determined by the motion judge who hears the Discharge Motion.

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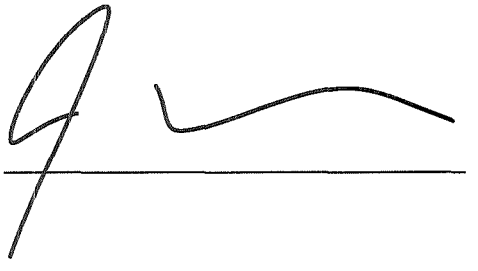
GENERAL

6. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom, or any other jurisdiction, to give effect to this Order and to assist the Plaintiff and its respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Plaintiff, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Plaintiff in any foreign proceeding, or to assist the Plaintiff and its agents in carrying out the terms of this Order.

7. **THIS COURT ORDERS** that the Plaintiff is authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition and/or enforcement of this Order and any further orders issued in these proceedings, and for assistance in carrying out the terms and/or intent of all such orders.

8. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order without the need for entry or filing.



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Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-25-00748799-00CL

SCHEDULE "A"

Court File No.: CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 7TH
	)	
JUSTICE J. DIETRICH	)	DAY OF AUGUST, 2025

B E T W E E N :

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

ORDER

NOTICE

If you, the Defendants, disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized. You are entitled to apply on at least forty-eight (48) hours' notice to the Plaintiff, for an order granting you sufficient funds for ordinary living expenses and legal advice and representation.

Any other person who knows of this order and does anything which helps or permits the Defendants to breach the terms of this Order may also be held to be

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in contempt of court and may be imprisoned, fined or have their assets seized.

THIS MOTION, made without notice by the Plaintiff, London Valley IV Inc. by its Court-Appointed Receiver and Manager, KSV Restructuring Inc., solely in its capacity as Receiver and Manager of certain property of London Valley IV Inc. and all proceeds thereof, and not in its personal capacity or in any other capacity (in such capacity, the "**Receiver**"), for an interim Order in the form of a *Mareva* injunction restraining the Defendants from dissipating their assets and in the form of a *Norwich* Order compelling third parties to disclose information and documents relating to the assets and accounts of the Defendants, and for other relief, was heard this day via Zoom videoconference at 330 University Avenue, Toronto, Ontario.

ON READING the materials filed by the Plaintiff, including the Notice of Action, the Notice of Motion, the Third Report of the Receiver dated August 1, 2025 and the Appendices thereto, the Supplement to the Third Report of the Receiver dated August 5, 2025 and the Appendix thereto, and the Factum of the Plaintiff, and on hearing the submissions of counsel for the Plaintiff,

***Mareva* Injunction**

1. **THIS COURT ORDERS** that the Defendants, and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, are restrained from directly or indirectly, by any means whatsoever:

   (a) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of the Defendants, wherever situate, including but not limited to the accounts listed in Schedule "A" hereto;

   (b) instructing, requesting, counselling, demanding, or encouraging any other

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person to do so; and

(c) facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so.

2. **THIS COURT ORDERS** that paragraph 1 of this Order applies to all of the Defendants' assets whether or not they are in his, her or its own name and whether they are solely or jointly owned. For the purpose of this Order, the Defendants' assets include any asset which he, she or it has the power, directly or indirectly, to dispose of or deal with as if it were his, her or its own. The Defendants are to be regarded as having such power if a third party holds or controls the assets in accordance with any of the Defendants' direct or indirect instructions.

3. **THIS COURT ORDERS** that if the total value free of charges or other securities of the Defendants' assets exceeds $1,071,551.06, the Defendants may sell, remove, dissipate, alienate, transfer, assign, encumber, or similarly deal with them so long as the total unencumbered value of the Defendants' assets remains above $1,071,551.06.

Ordinary Living Expenses

4. **THIS COURT ORDERS** that the Defendants may apply for an order, on at least forty-eight (48) hours' notice to the Plaintiff, specifying the amount of funds and source thereof from which the Defendants seek to have access in order to spend on ordinary living expenses and legal advice and representation.

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Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-25-00748799-00CL

Disclosure of Information

5. **THIS COURT ORDERS** that the Defendants each prepare and provide to the Plaintiff within seven (7) days of the date of service of this Order, with a sworn statement describing the nature, value, and location of the Defendants' respective assets worldwide, whether in the Defendants' own names or not and whether solely or jointly owned.

6. **THIS COURT ORDERS** that the Defendants each submit to examinations under oath within fifteen (15) days of the delivery by the Defendants of the aforementioned sworn statements.

7. **THIS COURT ORDERS** that if the provision of any of this information is likely to incriminate the Defendants, they may be entitled to refuse to provide such information, but are recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information referred to in paragraph 5 herein is contempt of court and may render the Defendants liable to be imprisoned, fined, or have their assets seized.

Third Parties

8. **THIS COURT ORDERS** that The Toronto-Dominion Bank (the "**Bank**") forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any account or on credit on behalf of any of the Defendants, with the Bank, until further Order of the Court, including but not limited to the accounts listed in Schedule "A" hereto.

9. **THIS COURT ORDERS** that the Bank and any other person having notice of this Order forthwith disclose and deliver up to the Plaintiff any and all past, present and future records held by the Bank and such persons concerning the Defendants' assets and

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accounts, including the existence, nature, value and location of any monies or assets or credit, wherever situate, held on behalf of the Defendants worldwide.

Alternative Payment of Security

10. **THIS COURT ORDERS** that this Order will cease to have effect if the Defendants provide security by paying the sum of $1,500,000.00 to the Receiver to be held in trust until further Order of the Court.

Variation, Discharge or Extension of Order

11. **THIS COURT ORDERS** that anyone served with or notified of this Order may apply to this Court at any time to vary or discharge this Order, on four (4) days' notice to the Plaintiff.

12. **THIS COURT ORDERS** that the Plaintiff shall apply for an extension of this Order within ten (10) days hereof, failing which this Order will terminate.

General

13. **THIS COURT ORDER** that the Plaintiff shall not be required to provide an undertaking to abide by any order concerning damages under Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 194.

14. **THIS COURT ORDERS** that the Plaintiff is hereby granted leave to register this Order against title to any real property in the name or names of the Defendants.

15. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom, or any other jurisdiction, to give effect to this Order and to assist the

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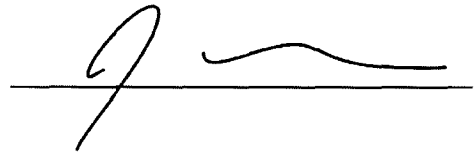
Plaintiff and its respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Plaintiff, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Plaintiff in any foreign proceeding, or to assist the Plaintiff and its agents in carrying out the terms of this Order.

16. **THIS COURT ORDERS** that the Plaintiff is authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition and/or enforcement of this Order and any further orders issued in these proceedings, and for assistance in carrying out the terms and/or intent of all such orders.

17. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order without the need for entry or filing.



SCHEDULE "A"

BANK	ACCOUNT NO.
The Toronto-Dominion Bank	1929-6177612
Unknown	1929--5023332

Court File No./N° du dossier du greffe : CV-25-00748799-00CL

LONDON VALLEY IV INC. by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEHZAD PILEHVAR also known as BEN PILEHVAR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business NALI AND ASSOCIATES

Defendants

Court File No.: CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

ORDER

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
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Email: chorsten@airdberlis.com

Tel: (416) 863-1500

Lawyers for the Plaintiff

[illegible] by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PIL[illegible] as BEHZAD PILEHVAR also known as BEN PILEHVAR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business NALI AND ASSOCIATES

Defendants

Court File No.: CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

ORDER

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Lawyers for the Plaintiff

LONDON VALLEY IV INC., by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.	- and -	**BEHZAD PILEHVER, *et al.***
Plaintiff		Defendants

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

JUDGMENT

AIRD & BERLIS LLP
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Lawyers for the Plaintiff

TAB 8

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

- and –

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

AFFIDAVIT OF SERVICE
(sworn November 5, 2025)

I, **CALVIN HORSTEN**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am an Associate with the law firm of Aird & Berlis LLP, lawyers for Plaintiff, and, as such, have knowledge of the following matters.

2. On November 5, 2025, I served copies of the Motion Record, Factum and Book of Authorities of the Plaintiff, each dated November 5, 2025 (collectively, the "**Default Judgment Materials**") on Mr. Pilehver via email. A copy of my sent email is attached as **Exhibit "A"**.

3. On November 5, 2025, my law firm also served the Default Judgment Materials by sending copies via same-day courier to Mr. Pilehver at his last two known addresses. A copy of the accompanying cover letter is attached as **Exhibit "B"**.

4. On November 5, 2025, my law firm also served the Default Judgment Materials by sending copies via same-day courier to Ms. Nali, in her personal capacity and in her capacity as director of 2621598 Ontario Inc., at her last two known addresses. A copy of the accompanying cover letter is attached as **Exhibit "C"**.

SWORN before me via videoconference at the City of Toronto in the Province of Ontario this 5th day of November, 2025, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

A Commissioner, etc.
Cristian Delfino (LSO No. 87202N)

CALVIN HORSTEN

This is **Exhibit "A"**
referred to in the Affidavit of Calvin Horsten
sworn before me this 5th day of November, 2025

C. Delfino

A Commissioner, etc.

From: Calvin Horsten
Sent: November 5, 2025 3:49 PM
To: 'ben@sandgecko.ca'
Cc: David Sieradzki; Jordan Wong; Tony Trifunovic; Mark van Zandvoort; Kyle Plunkett; Adrienne Ho; Peter Henein
Subject: LONDON VALLEY IV INC. by its Receiver v. BEHZAD PILEHVER, et al. - Court File No. CV-25-00748799-00CL
Attachments: Cover Letter - Default Judgment Materials - 05-NOV-2025(66339362.1).pdf; Factum - Plaintiff - London Valley IV Inc. by its Receiver - 05-NOV-2025(66339013.1).pdf; Motion Record - Plaintiff - London Valley IV Inc. by its Receiver - 05-NOV-2025(66332536.1).pdf; Book of Authorities - Plaintiff - London Valley IV Inc. by its Receiver - 05-NOV-2025(66325814.1).pdf

Mr. Pilehver,

In connection with the Default Judgment Motion scheduled to be heard in the above-noted matter on November 17, 2025 at 11:00 a.m., please see attached correspondence and the Motion Record, Factum and Book of Authorities of the Plaintiff, each dated November 5, 2025, which are hereby served upon you pursuant to the *Rules of Civil Procedure*.

Thank you,

Calvin Horsten
Associate

T 416.865.3077
F 416.863.1515
E chorsten@airdberlis.com

Aird & Berlis LLP | Lawyers
Toronto | Vancouver

Brookfield Place, 181 Bay Street, Suite 1800
Toronto, ON M5J 2T9 | airdberlis.com

This is **Exhibit "B"**
referred to in the Affidavit of Calvin Horsten
sworn before me this 5th day of November, 2025

C. Delfino

A Commissioner, etc.

Mark van Zandvoort
Direct: 416.865.4742
E-mail: mvanzandvoort@airdberlis.com

November 5, 2025

DELIVERED VIA COURIER AND EMAIL (ben@sandgecko.ca)

BEHZAD "BEN" PILEHVER
48 Chelford Road
Toronto, ON M3B 2E5

BEHZAD "BEN" PILEHVER
25 Mallard Road
North York, ON M3B 1S4

Dear Mr. Pilehver:

Re: LONDON VALLEY IV INC., by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC. v. BEHZAD PILEHVER, *et al*.
Court File No. CV-25-00748799-00CL

In connection with the Default Judgment motion scheduled in the above-noted matter for November 17, 2025 at 11:00 a.m., please find enclosed the Motion Record, Factum and Book of Authorities of the Plaintiff, each dated November 5, 2025 and hereby served upon you pursuant to the *Rules of Civil Procedure*.

The motion will proceed by videoconference at the following Zoom coordinates:

https://ca01web.zoom.us/j/64683302309?pwd=hk4renYSbUXbUn41tPpZqSX8FIZNTl.1%27

Yours truly,

Mark van Zandvoort

MZ/ch
Encl.

This is **Exhibit "C"**
referred to in the Affidavit of Calvin Horsten
sworn before me this 5th day of November, 2025

C. Delfino

A Commissioner, etc.

Mark van Zandvoort
Direct: 416.865.4742
E-mail: mvanzandvoort@airdberlis.com

November 5, 2025

DELIVERED VIA COURIER

MAHTAB NALI
48 Chelford Road
Toronto, ON M3B 2E5

MAHTAB NALI
335 Parkview Avenue
Toronto, ON M2N 3Z6

2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES
48 Chelford Road
Toronto, ON M3B 2E5

2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES
335 Parkview Avenue
Toronto, ON M2N 3Z6

Dear Ms. Nali:

Re: LONDON VALLEY IV INC., by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC. v. BEHZAD PILEHVER, *et al*.
Court File No. CV-25-00748799-00CL

In connection with the Default Judgment motion scheduled in the above-noted matter for November 17, 2025 at 11:00 a.m., please find enclosed the Motion Record, Factum and Book of Authorities of the Plaintiff, each dated November 5, 2025 and hereby served upon you pursuant to the *Rules of Civil Procedure*.

The motion will proceed by videoconference at the following Zoom coordinates:

https://ca01web.zoom.us/j/64683302309?pwd=hk4renYSbUXbUn41tPpZqSX8FIZNTl.1%27

As we have repeatedly requested, please provide us with your email address and advise us if your intention is to attend the aforementioned hearing, whether on your own or with counsel, so that we may submit a participant information form to the Court. If your counsel will be attending, please also provide their name and contact information.

Yours truly,

Mark van Zandvoort

MZ/ch
Encl.

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager,
KSV RESTRUCTURING INC.
Plaintiff

- and -

BEHZAD PILEHVER, *et al*.

Defendants

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AFFIDAVIT OF SERVICE

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Lawyers for the Plaintiff

TAB 9

Paulus et al. v. Fleury
[Indexed as: Paulus v. Fleury]

Ontario Reports

Court of Appeal for Ontario

K.N. Feldman, Pardu and L.B. Roberts JJ.A.

December 21, 2018

144 O.R. (3d) 791 | 2018 ONCA 1072

Case Summary

Civil procedure — Settlement — Setting aside — Defendant agreeing to settle action for damages arising from motor vehicle accident after plaintiffs' counsel stated at pre-trial conference that he had independent witnesses to collision — Defence counsel subsequently discovering that witnesses' son lived across street from plaintiffs — Motion judge erring in refusing to enforce settlement on basis that statement of plaintiff's counsel amounted to civil fraud — Plaintiff's counsel's statement not amounting to civil fraud as there was reasonable basis for it and it was made in good faith — Plaintiffs' counsel not intending opposing counsel to rely on his submission in deciding whether to settle action — Defence counsel not acting with due diligence in investigating link between plaintiffs and witnesses.

Torts — Fraud — Defendant agreeing to settle action for damages arising from motor vehicle accident after plaintiffs' counsel stated at pre-trial conference that he had independent witnesses to collision — Defence counsel subsequently discovering that witnesses' son lived across street from plaintiffs — Motion judge erring in refusing to enforce settlement on basis that statement of plaintiff's counsel amounted to civil fraud — Plaintiff's counsel's statement not amounting to civil fraud as there was reasonable basis for it and it was made in good faith — Plaintiffs' counsel not intending opposing counsel to rely on his submission in deciding whether to settle action — Defence counsel not acting with due diligence in investigating link between plaintiffs and witnesses.

During a pre-trial conference in an action for damages arising from a motor vehicle accident, counsel for the plaintiffs stated that he had "independent" witnesses to the collision who were "good people" and "solid . . . good witnesses". The defendant's counsel agreed to settle the claim. Defence counsel then discovered that the witnesses' son lived across the street from the plaintiffs. He repudiated the settlement. The plaintiffs brought a motion to enforce the settlement. They argued that when their counsel described the witnesses as independent, he meant that they could give evidence extrinsic to that of the plaintiffs, as they were in a separate car in a separate lane, and not that they did not know the plaintiffs. The motion judge rejected that interpretation. He found that the plaintiffs' counsel's statement that the witnesses were "independent" was a statement of fact, not opinion, and that it was untrue. He concluded that the

[3] He found that counsel for the plaintiffs' statement that the witnesses were "independent . . . solid . . . good" was untrue. He found that this was untrue because the witnesses contacted one of the plaintiffs, Mr. Paulus, at his office to tell him they had witnessed the accident, because Mr. Paulus provided his own counsel with the witnesses' contact information and because plaintiffs' counsel knew his client was acquainted with the witnesses in some undefined way. The motion judge also relied on information not known to the plaintiffs' counsel at the time of the pretrial to corroborate his finding that the statement was false.[1] [page794]

[4] The motion judge found that plaintiffs' counsel knew the statement was untrue or was reckless as to its truth. He drew this conclusion because, at the time of the pre-trial, plaintiffs' counsel knew that it was Mr. Paulus who had provided him with the names, address and contact information for the witnesses, knew that his clients and the witnesses were somehow acquainted with one another, and knew the witnesses had difficulty communicating in English.

[5] He also held that counsel had a duty to opposing counsel not to knowingly make misleading statements. He characterized counsel's statement about the characteristics of the witnesses as a statement of fact, not opinion.

[6] The motion judge concluded that the plaintiffs' counsel's statement amounted to civil fraud and that the defendant was induced to settle the case as a result of the false representation. He accordingly refused to enforce the settlement.

[7] The plaintiffs appeal from this decision and ask that the settlement be enforced. For the reasons that follow, I would allow the appeal and enforce the settlement.

C. *Analysis*

(1) *The test for civil fraud*

[8] As the defendant's allegation of civil fraud was central to the motion judge's decision, I begin by noting that courts have used the same test for civil fraud as they have for the torts of deceit and fraudulent misrepresentation: see, *e.g.*, *Deposit Insurance Corp. of Ontario v. Malette*, [2014] O.J. No. 2194, 2014 ONSC 2845 (S.C.J.), at para. 19; *Amertek Inc. v. Canadian Commercial Corp.* (2005), 76 O.R. (3d) 241, [2005] O.J. No. 2789 (C.A.), at para. 63, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 439; and *Midland Resources Holding Ltd. v. Shtaif* (2017), 135 O.R. (3d) 481, [2017] O.J. No. 1978, 2017 ONCA 320, at para. 162, leave to appeal to S.C.C. refused [2017] S.C.C.A. No. 246.

[9] For the purposes of this appeal, I adopt Brown J.A.'s articulation of this test in *Midland Resources Holding Ltd.*, at para. 162. The five elements of the test are as follows:

> (i) a false representation of fact by the defendant to the plaintiff; (ii) knowledge the representation was false, absence of belief in its truth, or recklessness as to its truth; (iii) an intention the plaintiff act in reliance on the representation; (iv) the plaintiff acts on the representation; and (v) the plaintiff suffers a loss in doing so.

(Citations omitted)

TAB 10

Canadian Dredge & Dock Company, Limited, Marine Industries Limited, The J.P. Porter Company Limited, and Richelieu Dredging Corporation Inc. *Appellants*;

and

Her Majesty The Queen *Respondent.*

File Nos.: 16422, 16425, 16435.

1983: May 24, 25, 26; 1985: May 23.

Present: Laskin C.J.* and Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Corporate liability — Conspiracy to defraud — Whether or not liability arises where directing mind acting (1) in fraud of corporation, or (2) for his own benefit, or (3) contrary to instructions not to act illegally — Criminal Code, R.S.C. 1970, c. C-34, ss. 338(1), 423(1)(d).

Four corporate appellants appealed their convictions under ss. 338(1) and 423(1)(*d*) of the *Criminal Code*. The several counts in the indictment related to contracts between certain public authorities and the accused where the bids were alleged to have been tendered on a collusive basis, with the low bidders including in their costs compensation to be paid to the "high bidders" or "non-bidders". Each company had a manager who conducted the business of the company relating to the submission of bids for tender. Corporate criminal liability was denied by the appellants, notwithstanding the position of these managers because these managers allegedly (1) were acting in fraud of the appellant-employers, (2) were acting throughout for their own benefit, or (3) were acting contrary to instructions and hence outside of the scope of their employment with the appellants. Several companies also challenged the existence of any theory of corporate criminal liability for *mens rea* offences.

Held: The appeals should be dismissed.

Appellants are criminally liable in the circumstances by operation of the identification theory. The underlying premise of this theory is that the identity of the directing

* Laskin C.J. and Ritchie J. took no part in the judgment.

Canadian Dredge & Dock Company, Limited, Marine Industries Limited, The J.P. Porter Company Limited et Richelieu Dredging Corporation Inc. *Appelantes*;

et

Sa Majesté La Reine *Intimée.*

N^os^ du greffe: 16422, 16425, 16435.

1983: 24, 25, 26 mai; 1985: 23 mai.

Présents: Le juge en chef Laskin* et les juges Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

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

Droit criminel — Responsabilité des compagnies — Complot en vue de frauder — La responsabilité d'une compagnie est-elle engagée lorsque son âme dirigeante agit (1) frauduleusement envers elle, ou (2) pour son propre avantage, ou (3) contrairement à des instructions de ne pas agir illégalement? — Code criminel, S.R.C. 1970, chap. C-34, art. 338(1), 423(1)d).

Il s'agit de pourvois formés par quatre compagnies reconnues coupables d'infractions au par. 338(1) et à l'al. 423(1)*d*) du *Code criminel*. Les différents chefs énoncés dans l'acte d'accusation se rapportent à des contrats intervenus entre certaines autorités publiques et les accusées par suite de soumissions à l'égard desquelles il y aurait eu collusion, les futurs adjudicataires incluant dans leurs frais des indemnités à verser aux autres «soumissionnaires» ou à des «non-soumissionnaires». Chacune des compagnies en cause avait un directeur responsable des soumissions. Malgré la situation personnelle de ces directeurs, les appelantes prétendent qu'elles ne sont pas responsables en droit criminel parce que lesdits directeurs auraient agi (1) frauduleusement envers elles, (2) pour leur propre avantage, ou (3) contrairement aux instructions qu'ils avaient reçues, de sorte qu'ils ont dépassé le cadre de leurs fonctions au sein des appelantes. De plus, certaines de ces dernières ont contesté l'existence d'une théorie de la responsabilité criminelle des personnes morales lorsqu'il s'agit d'une infraction qui exige la *mens rea*.

Arrêt: Les pourvois sont rejetés.

En l'espèce, l'application de la théorie de l'identification permet de conclure à la responsabilité criminelle des appelantes. Cette théorie repose sur l'identité de l'âme

* Le juge en chef Laskin et le juge Ritchie n'ont pas pris part au jugement.

appears to apply the identity doctrine attributing this conduct to the corporation to establish its guilt, but does not purport to follow *Bresler* because the learned justices interpreted that case (in the light of *Tesco*, *supra*) as apparently being decided upon the basis of vicarious liability. Despite a reluctance "to impose the rather clumsy sanction of criminal liability on corporations where no blame could fairly be imputed to those truly responsible for the affairs of the corporation", the Court found corporate liability. At the conclusion of his judgment Cooke J. foreclosed any defence of fraud on the company (at p. 202):

> ... once identification has been made out, it must follow, I think, that for the purposes of the criminal law in a case of the present kind the question of fraud on the company becomes irrelevant and indeed meaningless. A person cannot defraud himself. The essence of the doctrine of identification is that the individual is treated as the company's self. They are one and the same.

This case, in the result, follows the popular interpretation of *Bresler* on the issue of the defence of fraud on the company by the directing mind by denying such a defence at least in the circumstances of that case. It must be noted that because *Nordik* is a case where the directing mind owned over eighty per cent of the shares, it is less than a telling comment when the Court said that a person cannot defraud himself for the purposes of the identification doctrine. Where there are several directing minds, and there is no economic identity between the directing minds and the shareholders, it is less realistic to extend the fiction of identity. The dishonest directing mind is in fact cheating the company and thereby its shareholders and not himself.

In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in

La cour paraît avoir appliqué la doctrine de l'identification, prêtant cette conduite frauduleuse à la compagnie de manière à pouvoir la déclarer coupable. Elle ne suit apparemment pas l'arrêt *Bresler* puisque, selon l'interprétation des savants juges (à la lumière de l'arrêt *Tesco*, précité), il reposait sur la responsabilité du fait d'autrui. Malgré sa répugnance à [TRADUCTION] «imposer à une compagnie la sanction plutôt gauche de la responsabilité criminelle dans un cas où on ne peut, en toute justice, imputer de faute aux véritables responsables des affaires de cette compagnie», la cour a conclu à la responsabilité de la compagnie en cause. À la fin de ses motifs de jugement, le juge Cooke écarte toute possibilité d'un moyen de défense de fraude perpétrée contre la compagnie (à la p. 202):

> [TRADUCTION] ... selon moi, une fois l'identification établie, il s'ensuit inévitablement que, aux fins du droit criminel, dans un cas comme celui qui nous intéresse présentement, la question de savoir s'il y a eu fraude contre la compagnie n'est plus pertinente et, en fait, ne se pose même pas. Une personne ne peut se frauder elle-même. L'essence de la doctrine de l'identification est que l'individu est assimilé à la compagnie. Ils forment une seule et même entité.

En définitive, du moins dans des circonstances comme celles qui se présentent dans l'arrêt *Bresler*, l'arrêt *Nordik* rejette le moyen de défense fondé sur la fraude perpétrée contre une compagnie par son âme dirigeante, suivant en cela, l'interprétation populaire de l'arrêt *Bresler*. Il faut souligner toutefois que, parce que dans l'arrêt *Nordik*, l'âme dirigeante possédait plus de quatre-vingts pour cent des actions, le fait que la cour a dit que, aux fins de la doctrine de l'identification, une personne ne peut se frauder elle-même ne revêt pas une très grande importance. Mais, il est moins réaliste d'appliquer la fiction de l'identité lorsqu'il y a plusieurs âmes dirigeantes et que, sur le plan économique, il n'y a pas identité des âmes dirigeantes et des actionnaires. L'âme dirigeante qui agit malhonnêtement commet en réalité une fraude contre la compagnie et, partant, contre ses actionnaires, et non pas contre elle-même.

Selon moi, les limites de l'applicabilité de la doctrine de la délégation sont atteintes et dépassées lorsque l'âme dirigeante cesse complètement

substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. Similarly, but not so importantly, a benefit to the directing mind in single transactions or in a minor part of the activities of the directing mind is in reality quite different from benefit in the sense that the directing mind intended that the corporation should not benefit from any of its activities in its undertaking. A benefit of course can, unlike fraud, be in whole or in part, but the better standard in my view is established when benefit is associated with fraud. The same test then applies. Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.

Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts could not be attributed to the corporation under the identification doctrine. This might be true as well on the American approach through *respondeat superior*. Whether this is so or not, in my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing

d'agir, en fait ou pour l'essentiel, dans l'intérêt de la compagnie. Lorsque cela entraîne un acte frauduleux, il ne sert à rien de qualifier cet acte de frauduleux en totalité ou en partie parce qu'une fraude est une fraude. À mon avis, la question vise la situation où toutes les activités de l'âme dirigeante ont pour but de nuire aux intérêts de la compagnie pour lui causer un préjudice, peu importe que l'âme dirigeante en retire ou non un avantage économique; on peut dire alors qu'il y a fraude contre la compagnie. Dans le même ordre d'idées, bien que ce facteur soit moins important, si l'âme dirigeante obtient un avantage par suite d'opérations isolées ou dans l'exercice de ses fonctions secondaires, cela est en réalité bien différent du cas où l'âme dirigeante vise à priver la compagnie d'un avantage relié à l'exploitation de son entreprise commerciale. Bien entendu, un avantage est différent d'une fraude en ce sens qu'il peut être partiel, mais, à mon avis, la norme la plus appropriée est établie quand on associe l'avantage à la fraude. C'est alors le même critère qui s'applique. Lorsque l'âme dirigeante d'une compagnie conçoit, élabore et exécute un plan visant à frauder intentionnellement ladite compagnie et que l'acte constitue une partie importante des activités normales de l'âme dirigeante, il est à ce moment-là très irréaliste de conclure que le directeur agit en sa qualité d'âme dirigeante de la compagnie. En pareil cas, ses efforts ont pour but la destruction de l'entreprise de la compagnie. Du moment qu'il commence à agir de la sorte, il cesse d'être l'âme dirigeante et la doctrine de l'identification ne s'applique plus. Le raisonnement et la terminologie sont les mêmes pour le concept de l'avantage.

Lorsque l'acte criminel est complètement frauduleux envers la compagnie employeur, que cet acte était censé profiter exclusivement au directeur employé qui l'a commis et que tel a été le résultat, l'employé, âme dirigeante, dès la conception et l'exécution de son plan criminel, cesse d'être l'âme dirigeante de la compagnie. Par conséquent, ses actes ne peuvent être imputés à la compagnie en vertu de la doctrine de l'identification. Peut-être aussi que le principe de *respondeat superior* appliqué par les tribunaux des États-Unis permettrait d'arriver au même résultat. Quoi qu'il en soit, j'estime que la doctrine de l'identification ne joue

TAB 11

Paras 16, 30, 44, 58, 79-80 and 108

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: CNOOC Petroleum North America ULC v. 801 Seventh Inc | 2021 ABQB 81, 2021 CarswellAlta 258, [2021] A.W.L.D. 1041, 329 A.C.W.S. (3d) 272 | (Alta. Q.B., Feb 2, 2021)

1994 CarswellBC 438
Supreme Court of Canada

Hodgkinson v. Simms

1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, [1994] B.C.W.L.D. 2658, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 16 B.L.R. (2d) 1, 171 N.R. 245, 22 C.C.L.T. (2d) 1, 49 B.C.A.C. 1, 50 A.C.W.S. (3d) 469, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, 6 C.C.L.S. 1, 80 W.A.C. 1, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, J.E. 94-1560, EYB 1994-67089

ROBERT L. HODGKINSON v. DAVID L. SIMMS and JERRY S. WALDMAN, carrying on business as SIMMS & WALDMAN and said SIMMS & WALDMAN, a partnership

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

Heard: December 6, 1993
Judgment: September 30, 1994
Docket: 23033

Counsel: *Earl A. Cherniak, Q.C., Gregory T. Walsh* and *Kirk Stevens*, for appellant.
Glenn A. Urquhart and *Arthur M. Grant*, for respondents.

Subject: Intellectual Property; Securities; Insolvency; Torts; Property; Corporate and Commercial; Estates and Trusts; Income Tax (Federal); Contracts; Public

Related Abridgment Classifications
Professions and occupations
II Accountants
II.6 Fiduciary duties
Torts
VIII Fraud, deceit, and misrepresentation
VIII.1 Fraudulent misrepresentation [civil fraud, deceit]
VIII.1.c Particular relationships
VIII.1.c.iii Fiduciary relationship
Torts
VIII Fraud, deceit, and misrepresentation
VIII.6 Remedies
VIII.6.b Damages
VIII.6.b.i Assessment of damages
VIII.6.b.i.A Fraudulent misrepresentation

Headnote
Fraud and Misrepresentation --- Fraudulent misrepresentation — Particular relationships — Fiduciary relationship — Failure to disclose
Fraud and Misrepresentation --- Remedies — Damages — Assessment of damages — Fraudulent misrepresentation
Professions and Occupations --- Accountants
Duties and liability — Defendant chartered accountant advising plaintiff on tax shelters and recommending certain MURB projects — Defendant failing to disclose relationship with developers and fees received from developers for structuring projects

allowed Mr. Hodgkinson's action for breach of fiduciary duty and breach of contract and awarded him damages in the amount of $350,507.62. The British Columbia Court of Appeal upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duties. As well, the Court of Appeal varied the damages award, setting damages at an amount equal to the fees received by Mr. Simms from the developers on account of the four projects, prorated as between the various investors in those projects.

Judgments Below

Supreme Court of British Columbia, 1989, 43 B.L.R. 122 (Prowse J.)

13 Prowse J. first examined the claim for breach of fiduciary duty. She noted that in construing a relationship as fiduciary, everything turns on the particular facts of the relationship. She cited, inter alia, the Australian decision, *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 (H.C.), for the proposition that a fiduciary relationship exists where one party agrees to act on behalf of, or in the best interests of another person and, as such, is in a position to affect the interests of that other person in a legal or practical sense. As such, fiduciary relationships are marked by vulnerability in that the fiduciary can abuse the power or discretion given him or her to the detriment of the beneficiary.

14 On the facts before her, Prowse J. concluded that the parties were indeed in a fiduciary relationship. She found that Mr. Hodgkinson trusted and relied on Mr. Simms to exercise his special skills on Mr. Hodgkinson's behalf, and that Mr. Simms was aware of this fact. She also found as a fact that the particular relationship between the parties was such that if Mr. Simms recommended an investment, Mr. Hodgkinson invested. She stated, at p. 168:

> This was not simply the case of an accountant preparing a client's income tax return, or advising what the tax consequences of tax shelter "A" versus tax shelter "B" would be ... Here, Mr. Simms went far beyond that, to the extent of "analysing tax shelters", which analysis was directed toward the relative merits of location, construction costs, potential revenues and expenses, management of the project, options for financing, obtaining legal advice on the forms of agreement and so on. He never once referred Mr. Hodgkinson out for any other kind of professional advice or suggested that there was any need for it. On the contrary, he led Mr. Hodgkinson to believe that everything was in hand and that he was doing his homework and was in control of the situation. He knew very well that Mr. Hodgkinson was not relying on any other professional advice except his own with respect to all of these projects ... In effect, Mr. Simms assumed the responsibility for Mr. Hodgkinson's choice. He analyzed the investments, he recommended the investments, and he effectively chose the investments for Mr. Hodgkinson.

With respect to the issue of vulnerability, the learned trial judge stated, at p. 165:

> He [Mr. Simms] recognized in Mr. Hodgkinson a "neophyte" taxpayer, with no experience in dealing with large real estate tax shelters. Mr. Simms not only recognized Mr. Hodgkinson's vulnerability in that regard, but he cultivated that vulnerability and trust by impressing upon Mr. Hodgkinson that he knew the developers of these projects, that he had done his homework in his analyses of these projects and, generally, that he was experienced in the field of tax-shelter analysis.

15 Prowse J. acknowledged that during the relevant period Mr. Hodgkinson made several risky investments without consulting Mr. Simms, and in one case proceeded with an investment in a movie financing deal which Mr. Simms in fact opposed. However, she was of the view, at p. 151, that "Mr. Hodgkinson's relationship with his co-investors in other investments ... cannot excuse Mr. Simms for any breach of his own duty to Mr. Hodgkinson." In particular, she found that Mr. Hodgkinson and Mr. Simms had an understanding that Mr. Simms was being relied upon to apply a certain portion of Mr. Hodgkinson's income towards stable, tax sheltering investments which were distinct from the speculative world with which Mr. Hodgkinson was more familiar.

16 Having found that the parties were in a fiduciary relationship, Prowse J. turned to the scope of the fiduciary duties owed by Mr. Simms to Mr. Hodgkinson. She once again cited the *Hospital Products* case, at pp. 169-70, here for the proposition that a fiduciary "'is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict ... between his personal interests and those of the persons whom he is bound to protect.'"She found that Mr.

Simms violated this duty by failing to disclose to Mr. Hodgkinson that at the time he was advising Mr. Hodgkinson to invest in certain projects, he was also advising and being paid by the developers of these projects. She stated, at p. 170:

> ... Mr. Simms was serving two masters, and was attempting to make both of them happy. One of those masters, the developer, and in particular the Olma brothers, were in a position to provide Mr. Simms with even more lucrative work if he served them well. Part of serving them well was to provide them with purchasers for their projects. Mr. Simms had a vested personal interest in so doing. Thus, he was in a conflict of interest, not only in the sense of potentially preferring one set of clients over another, but also in preferring his own monetary gain above his clients generally.

Prowse J.'s jaundiced view of Mr. Simms' behaviour was supported by the professional standards required of accountants by the accounting profession. These standards required Mr. Simms to disclose any real or potential conflict of interest.

17 Prowse J. then turned to the question of damages for breach of fiduciary duty. In dealing with this issue, Prowse J. was guided by the principles set forth in the "non-disclosure" cases. Based on the principles set forth, inter alia, in *Burns v. Kelly Peters & Associates Ltd.* (1987), 16 B.C.L.R. (2d) 1 [[1987] 6 W.W.R. 1] (C.A.), and *Jacks v. Davis*, [1983] 1 W.W.R. 327 [39 B.C.L.R. 353] (B.C.C.A.), she concluded that Mr. Hodgkinson was entitled to be put in the position he would have been in had he never been induced to make the four investments. These damages should account for the capital invested in the four projects, minus the tax benefits received as a result of the investments, plus an additional amount paid by way of arrears on the income tax reassessments on Bella Vista and Oliver Place relating to overstated "soft cost" write-offs. In addition, Mr. Hodgkinson was entitled to consequential damages, namely, the legal and accounting fees required by Mr. Hodgkinson to extricate himself from each of the MURBs and in settling his accounts with Revenue Canada.

18 With respect to the claim for breach of contract, Prowse J. found that the damages for the breach of contract were the same as those for the breach of the fiduciary duty. Based on the principle that damages for breach of contract should as much as possible be calculated in such a way as to put the injured party in the same position as he or she would have been had the contract been performed, subject to the principle that damages are limited to those losses which would have been in the reasonable contemplation of the contracting parties at the time of contracting. In this case, if the contract had been performed,that is if Mr. Simms had dis closed his affiliation with the developers, Mr. Hodgkinson would not have made the impugned investments. In addition, Prowse J. held that at the time of contracting it was reasonably foreseeable that a change in the economy could adversely affect real estate investments.

19 Prowse J. dismissed the claim for damages based on negligence. She found no evidence that any damage flowed from the manner in which Mr. Simms conducted his investigations into any of the projects.

British Columbia Court of Appeal, 1992, 65 B.C.L.R. (2d) 264, [1992] 4 W.W.R. 330] (McEachern C.J.B.C., Wood and Gibbs JJ.A. concurring)

20 McEachern C.J.B.C. purported to accept the trial judge's findings of fact, though as will become apparent later, I am of the view that he failed to respect those findings on several important points. He did, however, uphold the trial judge's ruling that the respondent owed the appellant a duty of disclosure flowing from the implied retainer between the parties.

21 Turning to the fiduciary duty issue, McEachern C.J.B.C. reversed the trial judge's finding of liability. He noted that the trial judgment was rendered before the judgment of this Court in *LAC Minerals*, *supra*, and observed that while the trial judge felt bound by the majority judgment in *Kelly Peters*, the dissenting view of Lambert J.A. more closely accorded with *LAC Minerals*.

22 Turning to the facts before him, McEachern C.J.B.C. stated that the critical matter was to examine the degree of vulnerability or dependency between the parties. The Chief Justice found that the requisite degree of vulnerability had not been made out. He found that the appellant did not give the respondent any unilateral authority or discretion to prefer his own position or that of the developers to the appellant's disadvantage. In his view, the evidence tended to show that "the choice to invest or not to invest was entirely that of the [appellant]" (p. 275). With respect to the Duncana investment, McEachern C.J.B.C. cited the fact that the appellant was given a chance to meet the developers and was given a written description of the development with accurate projections. Similarly, the appellant discussed the Bella Vista project with the respondent, received

> ... where by statute, agreement, or perhaps by unilateral undertaking, *one party has an obligation to act for the benefit of another*, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary ...
>
> It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. *It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty*. The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added.]

30 This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; see *LAC Minerals*, *supra*, per Sopinka J., at p. 599, and per La Forest J., at p.646; *Canson*, *supra*, at p. 543; *M.(K.) v. M.(H.)*, *supra*, at pp. 63-64. Wilson J.'s guidelines constitute indicia that help recognize a fiduciary relationship rather than ingredients that define it.

31 In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

32 As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see *supra*, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

33 Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of *Dolton v. Capitol Federal Savings & Loan Assn.*, 642 P. 2d 21(Colo. Ct. App., 1982), at pp. 23-24, in the banker-customer context, to be a state of affairs:

> ...which impels or induces one party "to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger." ... [and] ... has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution.

In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 [[1980] 3 W.W.R. 214]; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369, leave to appeal refused [1982] 1 S.C.R. xi. Similarly, the relationship of an investor to his or her discount broker will not likely give rise to a fiduciary duty, where the broker is simply a conduit of information and an order taker. There are, however, other advisory relationships where, because of the presence of elements such as trust, confidentiality, and the complexity and importance of the subject matter, it may be reasonable for the advisee to expect that the

Accident Assurance Co. (1977), 17 O.R. (2d) 529 (C.A.); *Fletcher v. Manitoba Public Insurance Corp.*, [1990] 3 S.C.R. 191 (insurance agents); J.G. Edmond, "Fiduciary Duties Owed by Insurance, Real Estate and Other Agents" in *The 1993 Isaac Pitblado Lectures: Fiduciary Duties/Conflicts of Interest*, at pp. 75-86.

43 More importantly for present purposes, courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships; see *Baskerville v. Thurgood* (1992), 100 Sask. R. 214 [[1992] 5 W.W.R. 193] (C.A.); *Kelly Peters*, *supra*; *Elderkin v. Merrill Lynch, Royal Securities Ltd.* (1977), 80 D.L.R. (3d) 313 (N.S.C.A.) (investment counsellor-client); *Glennie v. McDougall & Cowans Holdings Ltd.*, [1935] S.C.R. 257; *Burke v. Cory* (1959), 19 D.L.R. (2d) 252 (Ont. C.A.); *Maghun v. Richardson Securities of Canada Ltd.* (1986), 34 D.L.R. (4th) 524 (Ont. C.A.) (stockbroker-client); *Lloyds Bank*, *supra*; *Standard Investments Ltd. v. Canadian Im perial Bank of Commerce* (1985), 52 O.R. (2d) 473, leave to appeal refused [1986] 1 S.C.R. vi (banker-client); *Wakeford v. Yada Tompkins Huntingford & Humphries* (unreported, B.C.S.C., August 1, 1985), (Vancouver Reg. No. C826216 [[1985] B.C.W.L.D. 3000]), affirmed (1986), 4 B.C.L.R. (2d) 306 (C.A.) (accountant-client); see, generally, Mark Ellis, "Financial Advisors" (cc. 7 and 8) in *Fiduciary Duties in Canada* (looseleaf). In all of these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice; see *Elderkin*, *supra*; *Laskin v. Bache & Co.* (1971), [1972] 1 O.R. 465 (C.A.); *Wakeford*, *supra*, at p. 8. Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact.

44 Much of this case law was recently canvassed by Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Gen. Div.), in an effort to demarcate the boundaries of the fiduciary principle in the broker-client relationship. Keenan J. stated, at pp. 234-36:

> The relationship of broker and client is not *per se* a fiduciary relationship ... Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist ... The circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of *Ryder v. Osler; Wills, Bickle Ltd.* (1985), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account ... At the other end of the spectrum is the unreported case of *Merit Investment Corp. v. Mogil*, Ont. H.C.J., Anderson J., March 23, 1989 [summarized at 14 A.C.W.S. (3d) 378], in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order-taker", whose advice was not sought and whose warnings were ignored ...
>
> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith ... It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.

In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisors be accountants, stockbrokers, bankers or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

Policy Considerations

45 Apart from the idea that a person has breached a trust, there is a wider reason to support fiduciary relationships in the case of financial advisors. These are occupations where advisors to whom a person gives trust has power over a vast sum of

disclose an error of law. The trial judge carefully considered the parties' relationship and found it to have all the characteristics of those relationships the law labels as fiduciary. In the end, she had little difficulty concluding that the appellant relied on the respondent's recommendations in deciding to make the four impugned investments, and that the respondent was aware of this reliance.

57 While the foregoing is sufficient to dispose of the fiduciary issue in favour of the appellant, it is useful to review the trial judge's findings of fact. In so doing, I propose to separate the analysis into two steps. First, I will examine the trial judge's findings with respect to the nature of the parties' relationship, and then I will turn to the question of reliance. In so doing, I recognize that the two are in reality intertwined. Moreover, I caution against the use of this approach in all cases where the issue of a fiduciary duty arises. While the approach is perhaps a useful guide in the professional advisor context, a different fact situation may call for a different approach.

The Nature of the Relationship

58 The trial judge's findings on this point are virtually uncontestable. The respondent under cross-examination admitted that his relationship with the appellant was such that he was under a duty to serve the best interests of the appellant at the expense of his own self-interest. The relevant testimony is as follows:

> Q. But you know that he came to trust you? He trusted you an awful lot, didn't he?
>
> A. Yes he did ...
>
> Q. Now, Mr. Hodgkinson trusted you as his professional advisor, correct?
>
> A. Correct.
>
> Q. He was trusting you to give him independent advice, correct?
>
> A. Correct.
>
> Q. *Advice which was not directed towards protecting your personal interests but was directed exclusively to protecting his interests as your client, correct?*
>
> A. *Correct*.
>
> Q. *And he was trusting you not to protect the interests of someone on the other side of a transaction on which you were advising but to protect exclusively his interests, correct?*
>
> A. *Correct*.
>
> Q. And you assumed that responsibility to provide him with independent advice?
>
> A. Yes, I did.

In my view this testimony, taken by itself, vindicates the appellant's fiduciary expectation. Concepts like "trust", independence from outside interests, disregard for self-interest, are all hallmarks of the fiduciary principle. It lies ill in the mouth of the respondent to argue that the appellant was not vulnerable to a breach of loyalty when he himself concedes that loyalty was the central feature of the parties' business relationship. As it turned out, of course, the respondent used the position of ascendency granted him by the appellant to line his own pockets and the pockets of his developer clients.

59 The frequency with which courts have enforced fiduciary duties in professional advisory relationships is not surprising. The very existence of many professional advisory relationships, particularly in specialized areas such as law, taxation and investments, is premised upon full disclosure by the client of vital personal and financial information that inevitably results in a "power-dependency" dynamic. The case at bar is typical. The respondent testified in cross-examination as follows:

> The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says, "Yes, but you would have assumed a position other than the *status quo ante*", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the *status quo ante*.

Further, mere "speculation" on the part of the defendant will not suffice; see ibid., at p. 15; *Commerce Capital*, *supra*, at p. 764. In the present case the respondent has adduced no concrete evidence to "displac[e] the plaintiff's assertion of the *status quo ante*", and this submission must, therefore, be dismissed.

77 The respondent also argued that even assuming the appellant would not have invested had proper disclosure been made, the non-disclosure was not the proximate cause of the appellant's loss. Rather, he continued, the appellant's loss was caused by the general economic recession that hit the British Columbia real estate market in the early 1980s. The respondent submits that it is grossly unjust to hold him accountable for losses that, he maintains, have no causal relation to the breach of fiduciary duty he perpetrated on the appellant.

78 I observe that a similar argument was put forward and rejected in the *Kelly Peters* case, supra. There the plaintiffs, like the appellant in the present case, had approached the defendant investment advisors for, inter alia, investment advice particular to the real estate tax shelter market; see *supra*, at p. 38. The defendants, like the respondent here, used their position of influence to put the plaintiffs in those specific real estate projects in which they had a pecuniary interest, namely, "Kona condominiums" located in Hawaii. The plaintiffs suffered heavy losses when the real estate market for Hawaiian MURBs crashed. As I noted earlier, the defendants were eventually found liable for breach of fiduciary duties. The defendants argued that damages should be assessed with reference to the date of sale on the grounds that neither the buyer nor the seller should be affected by later market fluctuations. This argument was rejected at trial and in the Court of Appeal. In a passage cited with approval by Macfarlane J.A., the trial judge, at p. 49, stated that a purchaser has a right to recovery of losses, "up to the time he learns of the fraud and whether or not the losses result from a falling market."

79 The similarity between *Kelly Peters* and the present case is striking. Both the defendant in *Kelly Peters* and the respondent here induced parties into investments they would not otherwise have made by deliberately concealing their own financial interest. These respective investors were thereby exposed to *all* the risks, i.e., including the general market risks, of these investments. On the finding of facts, these investors would not have been exposed to *any* of the risks associated with these investments had it not been for their respective fiduciary's desire to secure an improper personal gain. In short, in each case it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this loss in full.

80 Contrary to the respondent's submission, this result is not affected by the ratio of this Court's decision in *Canson Enterprises*, *supra*. *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate; see also *McInerney v. MacDonald*, *supra*, at p. 149. Writing extra-judicially, Huband J.A. of the Manitoba Court of Appeal recently remarked upon this idea, in "Remedies and Restitution for Breach of Fiduciary Duties" in *The 1993 Isaac Pitblado Lectures*, 21-32, at p. 31:

> A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning.

Canson is an example of the latter type of fiduciary breach, mentioned by Huband J.A. There, the defendant solicitor failed to warn the plaintiff, his client, that the vendors and other third parties were pocketing a secret profit from a "flip" of the subject real estate such that the property was overpriced. See also *Jacks*, *supra*. In this situation, the principle of full restitution should

not entitle a plaintiff to greater compensation than he or she would otherwise be entitled to at common law, wherein the limiting principles of intervening act would come into play.

81 Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M. (K.) v. M. (H.)*, *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:

> ... barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.

82 Returning to the facts of the present case, one immediately notices significant differences from the wrong committed by the defendant in *Canson* as compared to the character of the fiduciary breach perpetrated by the respondent. In *Canson* there was no particular nexus between the wrong complained of and the fiduciary relationship; this was underlined, at p. 577, by my colleague, McLachlin J., who followed a purely equitable route. Rather, the fiduciary relationship there arose by operation of law, and was in many ways incidental to the particular wrong. Further, the loss was caused by the wrongful act of a third party that was unrelated to the fiduciary breach. In the present case the duty the respondent breached was directly related to the risk that materialized and in fact caused the appellant's loss. The respondent had been retained specifically to seek out and make independent recommendations of suitable investments for the appellant. This agreement gave the respondent a kind of influence or discretion over the appellant in that, as the trial judge found, he effectively chose the risks to which the appellant would be exposed based on investments which in his expert opinion coincided with the appellant's overall investment objectives. In *Canson* the defendant solicitor did not advise on, choose, or exercise any control over the plaintiff's decision to invest in the impugned real estate; in short, he did not exercise any control over the risks that eventually materialized into a loss for the plaintiff.

83 Indeed, courts have treated common law claims of the same nature as the wrong complained of in the present case in much the same way as claims in equity. I earlier referred to *Rainbow Industrial Caterers*. The plaintiff there had contracted to cater lunches to CN employees at a certain price per meal. The price was based on the estimated number of lunches the defendant would require over the period covered by the contract. This estimate was negligently misstated, and the plaintiff suffered a significant loss. The Court was satisfied that but for the misrepresentation, the plaintiff would not have entered into the contract. The defendant, however, alleged that much of the loss was not caused by the misrepresentation but rather by certain conduct of CN employees, e.g., taking too much food. This argument was rejected by the Court in the following terms, at p. 17:

> ... CN bore the burden of proving that Rainbow would have bid even if the estimate had been accurate. That was not proved, and so it is taken as a fact that Rainbow would *not* have contracted had the estimate been accurate. The conduct referred to in para. 49 [i.e. the conduct of the CN employees] would not have occurred if there had been no contract, and therefore the loss caused thereby, like all other losses in the proper execution of the contract by Rainbow, is directly related to the negligent misrepresentation. [Emphasis in original.]

Thus, where a party can show that but for the relevant breach it would not have entered into a given contract, that party is freed from the burden or benefit of the rest of the bargain; see also *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at 40-41 [[1993] 2 W.W.R. 321, 75 B.C.L.R. (2d) 145] (per La Forest and McLachlin JJ.). In short, the wronged party is entitled to be restored to the pre-transaction status quo.

84 An identical principle was applied by the British Columbia Court of Appeal in *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1982), 40 B.C.L.R. 1, a case relied upon by Macfarlane J.A. in *Kelly Peters*. In *K.R.M.* the defendant

real estate developer named Olma Bros. was developing in the Okanagan region of the province. Later in the year, the appellant invested in a third Okanagan development of Olma Bros. Mr. Simms billed Olma Bros. for the financial services he was performing in connection with these MURB's. He did not disclose this to Mr. Hodgkinson.

103 In late 1980, Mr. Hodgkinson, on Mr. Simms' advice, invested in a development called Enterprise Way promoted by Mr. Dale-Johnson, a friend and client of Mr. Simms. Mr. Dale-Johnson paid fees to Mr. Simms for "structuring" this project which Mr. Simms did not disclose to Mr. Hodgkinson.

104 During the time Mr. Hodgkinson was investing in MURB's on Mr. Simms' recommendations, he was also making other investments on his own. These included a MURB in Richmond to which he committed over $900,000; a $250,000 investment in a joint venture development, also in Richmond; a $95,000 investment in the Montreal Allouette Football Club; a $122,435 investment in "flow-through" shares of Platte River Resources; and a $24,000 investment in a movie.

105 In 1981, the price of real estate crashed. Mr. Hodgkinson sustained large losses. He sold some of his investments at a loss to avoid cash calls. Others were foreclosed upon when they could not be sold or rented.

106 In 1985, Mr. Hodgkinson learned that the respondent may have received fees and payments from Olma Bros. with respect to the three Okanagan projects. In 1986, he sued Mr. Simms in negligence. In early 1987, further documents came to light indicating that Simms & Waldman had been collecting fees on the projects but the extent of their involvement remained unclear. As evidence accumulated, the pleadings were amended to include a claim for breach of fiduciary duty.

II.Judgments Below

Supreme Court of British Columbia (1989), 43 B.L.R. 122 (Prowse J.)

107 Mr. Hodgkinson sought to recover all losses on the four investments recommended by Mr. Simms based upon breach of fiduciary duty, breach of contract and negligence. He essentially founded his claim upon Mr. Simms' failure to disclose the payments he had taken for "structuring" the projects he recommended.

108 Prowse J. found, at p. 168, a fiduciary relationship between Mr. Hodgkinson and Mr. Simms based on the fact that Mr. Simms, "took it upon himself to investigate and make recommendations on the relative merits of tax shelter investments for a client he knew was dependent upon him for that advice and who accepted that advice and acted upon it" and thus "assumed the responsibility for Mr. Hodgkinson's choice." This fiduciary duty required Mr. Simms to disclose to Mr. Hodgkinson "all facts material to Mr. Hodgkinson's decision whether to invest in these projects" (at p. 170). Prowse J. concluded that Mr. Simms had breached his fiduciary duty by failing to disclose the nature and extent of his relationship with both Olma Bros. and Mr. Dale-Johnson, and by writing billing and reporting letters in such a way as to suggest that the investors were the sole source of payment for the work which he was doing on the tax shelters.

109 Prowse J. assessed damages for breach of fiduciary duty at $350,507.62. The calculation of these damages included the return of the capital Mr. Hodgkinson had invested in the four projects, adjusted to take into consideration the tax benefits which the appellant received, as well as the consequential losses flowing from his investment in the projects.

110 Prowse J. also found Mr. Simms liable for breach of contract. She held that Mr. Simms' professional contract with Mr. Hodgkinson obliged Mr. Simms to disclose all material facts concerning prospective tax shelters and investments. The contract further required the respondent to disclose if he was acting for a developer or vendor of a project in which he was advising the appellant as an investor, and to disclose the nature and extent of any affiliation with the vendor of tax shelters upon which he was advising. For substantially the same reasons that the respondent was found in breach of his fiduciary obligations, Prowse J. held that he was also in breach of the terms of the contract.

111 Prowse J. accepted that damages for breach of contract are limited to those in the reasonable contemplation of the parties at the time they entered into the contract: *Baud Corp., N.V. v. Brook, (*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1979] 1 S.C.R. 633 [[1978] 6 W.W.R. 301]. See also *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 1 All

TAB 12

CITATION: Wymor Construction Inc. v. Gray 2012 ONSC 5022
COURT FILE NO.: 12-53360
DATE: 2012/09/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Wymor Construction Inc. Plaintiff	Martin Z. Black, for the Plaintiff
– and –	
Hannah Gray, also known as Heather Lyn Gray, Christina O'Shea and the Toronto-Dominion Bank Defendants	Danesh Rana, for the Defendant, Hannah Gray
	HEARD: August 23, 2012

REASONS FOR SUMMARY JUDGMENT

AITKEN J.

Nature of Proceedings

[1] The Plaintiff, Wymor Construction Inc. ("Wymor") seeks summary judgment against the Defendants, Hannah Gray ("Gray") and Christina O'Shea ("O'Shea"), for damages in the amount of $27,023.44, plus pre-judgment and post-judgment interest and costs. The Plaintiff also seeks punitive and exemplary damages against O'Shea in the amount of $20,000. Finally, the Plaintiff seeks a declaration as against O'Shea that the total liability arose out of fraud and misappropriation while acting in a fiduciary capacity, such that the judgment not be released from O'Shea's bankruptcy, if any.

[2] Gray defended the action and this motion for summary judgment. O'Shea did neither.

Facts

(b) As against Gray

[16] Gray has defended the action and filed an affidavit in response to the motion for summary judgment. Her counsel argued that summary judgment would be inappropriate in the circumstances of this case – though he was unable to articulate why a trial judge would be in any better position than this Court to hear and decide the action.

[17] The thrust of the argument advanced by Gray's counsel seemed to be that, since summary judgment was denied in *Fisher v. McKean* 2011 ONSC 5251, a case with similar facts to those in this case, the Court should deny the motion. In *Fisher*, Mrs. McKean misappropriated funds from her employer and deposited those funds in an account she held jointly with her husband. The employer sued both Mr. and Mrs. McKean. The employer obtained default judgment against Mrs. McKean and recovered a portion of the damages claimed. Mr. McKean defended the action and also responded to the employer's motion for summary judgment. He argued that (1) he had been an innocent party throughout who had been unaware of his wife's fraud, (2) he had not benefitted from any of the funds taken by his wife, and (3) the amount of money fraudulently taken by his wife from her employer was less than that claimed by the employer. DiTomaso J. decided that there was a genuine issue to be tried, both in regard to Mr. McKean's liability and in regard to the quantum of damages he might owe. In regard to the liability issue, DiTomaso J. implied that Mr. McKean might be able to answer the claim for damages for the tort of conversion where he had no knowledge of his wife's wrongdoing, there was no common purpose between them, and he may not have benefitted from the funds being deposited to the account he held jointly with his wife. With respect, this Court has difficulty fitting such an analysis into the framework set out in *Boma* and *Westboro Flooring*.

[18] As has been repeated in numerous cases, the tort of conversion is a strict liability tort. All that has to be established is that the defendant wrongfully interfered with the goods of another, such as taking, using, or destroying those goods in a manner inconsistent with the owner's right of possession. Further wrongdoing on the part of the defendant need not be established. Individuals acting in all innocence can still be found liable for the tort of conversion – the many cases where banks have been found liable for conversion speaks to that.

[19] It is admitted by Gray that cheques drawn on Wymor's account – to which Gray had no legal right – were deposited into a bank account in her sole name and were thereby available for her use, whether that was in regard to payment of a Visa bill or in regard to allowing O'Shea to remove such funds and use them for her own purposes. The mere fact that she had, to her credit, funds belonging to another, without that person's permission, and without such possession being pursuant to any legal entitlement, amounts to conversion.

[20] In summary, no material facts are in dispute. All of the fraudulent cheques have been identified and their deposit to Gray's bank account has been acknowledged. In regard to the question of law, as to the requirements to establish the tort of conversion, the law is clear. This Court is as well suited as a judge hearing any subsequent trial in this action to apply that law to the facts at hand.

[21] Rule 20.04 of the *Rules of Civil Procedure* reads as follows:

TAB 13

COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2018 ONCA 60
DATE: 20180125
DOCKET: C62822

Cronk, Blair and van Rensburg JJ.A.

BETWEEN

DBDC Spadina Ltd., and
Those corporations listed on Schedule A hereto

Applicants (Appellants)

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd., and Eglinton Castle Inc. and those corporations listed on Schedule C hereto

Respondents (Respondents)

and

Those corporations listed on Schedule B hereto,
to be bound by the result

and

Such other respondents from time to time as are on notice of these proceedings and are necessary to effect the relief sought

AND BETWEEN

Christine DeJong Medicine Professional Corporation

Applicant (Respondent)

and

Norma Walton, Ronauld Walton, and The Rose & Thistle Group Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd., and Emerson Developments Ltd.

Respondents (Respondents)

ANALYSIS

A. KNOWING RECEIPT

[37] A stranger to a trust or fiduciary relationship may be liable under the doctrine of "knowing receipt" if the stranger receives trust property in his or her own personal capacity with constructive knowledge of the breach of trust or fiduciary duty. It is a recipient-based claim arising under the law of restitution: see *Citadel General Assurance Co. v. Lloyds Bank Canada,* [1997] 3 S.C.R. 805, at para. 48.

[38] I agree with the Application Judge that a claim for knowing receipt cannot be made out here. The DBDC Applicants chose not to pursue their rights under the tracing order granted by Brown J. They are not able to – nor do they seek to – demonstrate the receipt of any particular funds by any particular Schedule C Company other than the funds with respect to which Brown J. previously granted constructive trusts.

[39] Accordingly, I will not conduct a separate analysis of the knowing receipt claim, but will refer to it, where appropriate, in the discussion about the claim for "knowing assistance".

B. KNOWING ASSISTANCE

(1) General Considerations

[40] A stranger to a trust or fiduciary obligation may also be liable in equity on the basis of "knowing assistance" where the stranger, with actual knowledge, participates in or assists a defaulting trustee or fiduciary in a fraudulent and dishonest scheme. The rationale underlying this category of liability is that actual knowledge of and assistance in the fraudulent conduct is sufficient to "bind the stranger's conscience so as to give rise to personal liability": see *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787, at p. 812. Fraudulent and dishonest conduct for these purposes means the taking of a risk by the trustee or fiduciary to the prejudice of the beneficiary where the risk is known to be one which there is no right to take: see *Air Canada*, at pp. 815, 826.[7]

[41] Knowing assistance and knowing receipt are both doctrines arising in equity. However, there is a fundamental difference between the two types of liability. Knowing receipt liability is restitution-based and falls within the law of restitution; its essence is unjust enrichment. Knowing assistance, however – sometimes referred to as "accessory liability" – is fault-based and is concerned about correcting matters related to the furtherance of fraud: see *Gold v.*

[7] Other Canadian and British authorities in which the principles relating to "knowing assistance" and "knowing receipt" are outlined and developed include the following: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at paras. 30-36, per Iacobucci J. (dissenting, but not on this point); *Citadel General*; *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; *Agip (Africa) Ltd. v. Jackson*, [1992] 4 All E.R. 451 (C.A.); *El Ajou v. Dollar Land Holdings plc,* (1993), [1994] 2 All E.R. 685 (C.A.).

Rosenberg, at para. 41; *Citadel General*, at paras. 46-48. I shall return to this distinction later in these reasons.

[42] The criteria for establishing a claim for knowing assistance in the breach of a fiduciary duty were summarized by this Court in *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para. 8, and again in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, 355 D.L.R. (4th) 333, at para. 23. They are the following:

(i) there must be a fiduciary duty;

(ii) the fiduciary – in this case, Ms. Walton – must have breached that duty fraudulently and dishonestly;

(iii) the stranger to the fiduciary relationship – in this case, the Listed Schedule C Companies – must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and

(iv) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

(2) The Issues In Applying The Criteria

[43] In determining whether the foregoing criteria have been met and whether the Listed Schedule C Companies are to be held jointly and severally liable for damages arising from knowing assistance in the breach by Ms. Walton of her

TAB 14

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

N° 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

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*.

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.

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".

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».

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):

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):

TAB 15

CITATION: Bank of Montreal v. 1886758 Ontario Inc., 2022 ONSC 4642
COURT FILE NO.: CV-21-00667945-0000
DATE: 20220810

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BANK OF MONTREAL Plaintiff	)	*Randy Schliemann* for the Plaintiff
- and –	)	
1886758 ONTARIO INC. operating as REJUV MEDICAL and NAJAT DANIAL ORAHA also known as NAJAT D. ORAHA also known as NAHAT ORAHA Defendants	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a default judgment and related relief in a debt collection and fraud action by the Bank of Montreal ("BMO") against 1886758 Ontario Inc. operating as Rejuv Medical ("Rejuv Medical") and Najat Danial Oraha also known as Nahat Oraha.

[2] On this motion, BMO seeks:

a. an Order granting the Plaintiff Default Judgment as against the Defendants in accordance with paragraph 1 of the Plaintiff's Statement of Claim, including: a. judgment in the aggregate sum of **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date;

b. punitive damages in the amount of **$150,000.00**;

c. substantive indemnity for all costs, charges, expenses and fees, including legal fees, incurred to date;

d. a mandatory Order compelling the Defendants to deliver forthwith an accounting of all monies or benefits received from the Plaintiff, and the accounting shall include particulars as to how and where the money

Medical, it believes that Alpha Capital and Dionysus may have been operating as a form of cheque casher/cheque factoring companies, and they and related parties are tied to other CSBFA loans that bear similar concerns as this one, where BMO is now pursuing borrowers for fraud. BMO has terminated its banking relationship with Alpha Capital and Dionysus and its related parties and closed their accounts.

[29] On **May 17, 2021**, Ms. Mohamed, a Senior Forensic Analyst with the Legal & Regulatory Compliance Department of BMO contacted Northern Optotronics Inc., the equipment supplier indicated in the invoice and spoke to Maria Medina, who identified herself as the bookkeeper.

[30] BMO learned from Ms. Medina that:

a. The account no. 4368 on the Invoice is for a quote prepared for Rejuv Medical.

b. The quote for the equipment was $43,787.50, and not the $196,000.00 indicated on the Invoice, and the invoice included equipment that was not part of the quote.

c. However, Rejuv Medical did not actually purchase any equipment from Northern Optotronics Inc.

D. Discussion and Analysis

[31] Treating the case at bar as a debt collection case, the evidence establishes that the loans went into default and have not been repaid. The evidence establishes that Rejuv Medical owes and is liable to pay BMO **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date. Subject to their limits, Mr. Oraha is also liable under his guarantees.

[32] Treating the case at bar as a fraud case, both Defendants are jointly liable to pay BMO **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date plus punitive damages of $150,000.

[33] The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages.[4] As my findings of fact reveal, the elements of a claim of fraudulent misrepresentation have been proven in the immediate case against the Defendants jointly and severally and there should be judgment accordingly.

[34] A court may award punitive damages on a motion for a default judgment.[5] The Bank seeks punitive damages of $150,000.00.

[35] In *Whiten v. Pilot Insurance Co.*,[6] the Supreme Court of Canada held that the purposes of

[4] *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549; *Tsui-Wong v. Xiao*, 2018 ONSC 3315; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Fiorillo v. Krispy Kreme Doughnuts, Inc.* (2010), 98 O.R. (3d) 103 (S.C.J.); *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 at p. 344 (S.C.C.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

[5] *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329 (C.A.); *Canadian Premier Life Insurance Co. v. Ho*, 2016 ONSC 496.

[6] 2002 SCC 18.

punitive damages were retribution, denunciation, and deterrence. Justice Binnie, writing for the majority, stated at paragraph 36:

> 36. Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[36] It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.[7]

[37] In the immediate case, the purposes of retribution, denunciation, and deterrence would be well served by an award of punitive damages.[8] The facts reveal that this was an organized fraud and the Defendants took advantage of a government sponsored program, which is designed to assist small business, to defraud a bank into making a loan for an entity that did not carry on business.

[38] In my opinion a proportionate response to the victimization of the bank and of the public is $150,000. I, therefore, award BMO $150,000 in punitive damages.

[39] In furtherance of the collection of its loans and the Defendants' ill-gotten funds, BMO seeks an order that it has a constructive trust over the loan proceeds and a tracing order.

[40] Courts may impress a constructive trust over fraudulently obtained funds, and issue tracing and accounting orders, in cases such as this, to assist in recovery efforts.[9] Such orders are appropriate in the immediate case where the moneys were fraudulently procured and there is evidence that the funds were not used for their designated purposes and that BMO has not to date been able to trace what happened to the loan funds. Orders to go accordingly.

[41] BMO seeks a declaration that the Defendants' debt and liability herein results from obtaining property or services by false pretences or fraudulent misrepresentations.

[42] BMO does not seek a direction that its claim will survive a bankruptcy discharge or fall within s. 178 of the *Bankruptcy and Insolvency Act*, but BMO is transparent that its intent is to rely on s. 178 of the *Bankruptcy and Insolvency Act* should the Defendants take the protection of bankruptcy.

[43] Section 178 of the *Bankruptcy and Insolvency Act* states:

---

[7] *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549 at para. 103.
[8] *Gennett Lumber Co. v. John Doe a.k.a. Milton Harvey et al.*, 2019 ONSC 1345; *IBEW, Local 353 Trust Funds (Trustees of) v. Shojaei*, 2014 ONSC 3656.
[9] *Kim v. Jung*, 2021 BCSC 1352; *Noreast Electronics Co. v. Danis*, 2018 ONSC 5169; *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

TAB 16

CITATION: Carbone v. Boccia, 2025 ONSC 1966
COURT FILE NO.: CV-22-00683894-0000
DATE: 20250328

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ALBERT CARBONE and CATHY HORVATH, Plaintiffs

AND:

SALVATORE BOCCIA, ROSANNA BOCCIA, 215 HOLDING CORP., JANE DOE, DAVID SHPILT, PAMELA ATKINSON, JOHN DOE and DOE CORP., Defendants

BEFORE: Parghi J.

COUNSEL: *Daniel Milton* and *Sophie Vaisman* (student-at-law), for the Plaintiffs

Eli Smolarcik, for the Defendant Rosanna Boccia

HEARD: November 14, 2024

ENDORSEMENT

[1] The Plaintiffs allege that the Defendants misappropriated their life savings by deceiving them into lending money to a non-existent business. The background to this matter is aptly summarized in an earlier decision of Morgan J. (*Carbone v. Boccia*, 2022 ONSC 6528), and I reproduce his summary here:

> In early 2021, the Plaintiffs, who are retirees, were introduced to the Defendant, Salvatore Boccia, who was seeking investors for his cannabis business, Sustainable Growth Strategic Capital Corp. ("Sustainable"). Mr. Boccia explained that Sustainable was producing creams, oils, and other cannabis products for pain relief. He told the Plaintiffs that Sustainable was owned by another company, 215 Holding Corp. ("215 Hold Co."). The President, Secretary, and sole director of 215 Hold Co. is Mr. Boccia's mother, the Defendant, Rosanna Boccia.
>
> In February and March of 2021, Mr. Boccia took a number of further steps to convince the Plaintiffs of the legitimacy of Sustainable and its operations. These included: a) producing documents, such as a cannabis license issued by Health Canada and a contract to sell product to a supposed veterans organization in Nova Scotia), b) taking one of the Plaintiffs on a tour of a facility in North York which Mr. Boccia claimed was being rented by Sustainable; during this time, Mr. Boccia

Mr. Boccia perpetrated the fraud through the vehicle of 215, and accordingly punitive damages against 215 are also appropriate.

[11] The principles governing punitive damages are articulated in the Supreme Court of Canada decision of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. In *Whiten,* the Court held (at para. 94) that punitive damages are very much the exception rather than the rule and are to be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are, or are likely to be, inadequate to achieve the objectives of retribution (giving the defendant their just desert), deterrence (deterring the defendant and others from similar misconduct in the future), and denunciation (marking the community's collective condemnation of what has happened). Punitive damages are to be awarded only where compensatory damages are insufficient to accomplish these objectives.

[12] When punitive damages are awarded, they should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff, and any advantage or profit gained by the defendant; and having regard to any other fines or penalties suffered by the defendant for the misconduct in question (*Whiten,* at para. 94). They are to be awarded in an amount that is no greater than necessary to rationally accomplish their purpose. The Court held that underlying these principles is "the need to emphasize the nature, scope and exceptional nature" of the punitive damages remedy, and "fairness to both sides" (*Whiten,* at para. 95).

[13] In my view, the full extent of the Plaintiffs' loss can only be compensated through a punitive damages award. The loss and harm they suffered cannot be adequately compensated merely by a compensatory damages award equal to their investment. Those damages merely would make them whole for their investment but would not recognize or purport to compensate them for the distress and emotional harm they experienced as a result of their dealings with Mr. Boccia, Mr. Shpilt, and 215. An award of punitive damages is appropriate and indeed necessary, because it offers the only vehicle for redress of the harm and loss the Plaintiffs suffered.

[14] Additionally, punitive damages are appropriate. The behaviour of these Defendants, detailed in the record before me and entirely uncontested, was outrageous and offensive to this court's sense of decency. It was a marked departure from ordinary standards of decent behaviour. I therefore grant default judgment against Mr. Boccia, Mr. Shpilt, and 215 for punitive damages in the amount of $250,000.00, on a joint and several basis. I consider this quantum of punitive damages to be appropriate in light of the nature of their conduct and the magnitude of the fraud they perpetrated against the Plaintiffs.

Motion for default judgment against Ms. Boccia

[15] At the outset of the hearing, I heard submissions from counsel on whether to grant default judgment against Ms. Boccia rather than proceeding with a motion for summary judgment.

TAB 17

CITATION: Elekta Ltd. v. Rodkin, 2012 ONSC 2062
COURT FILE NO.: CV-11-9471-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Elekta Ltd., Plaintiff

AND:

Timothy Rodkin, Kathleen Thornton, Julie Waldriff a.k.a. Julie Smith a.k.a. Julie Josh Kennedy, Just A Kid Productions, Inc., Law Enforcement Canada Media Group, Robert Rodkin a.k.a. Bob Rodkin, Gail Smith, Cindy Doucette, John Doe and Jane Doe, Defendants

BEFORE: D. M. Brown J.

COUNSEL: I. Nishisato, for the Plaintiff

No one appearing for the Defendant, Timothy Rodkin

HEARD: February 29, March 13 and March 23, 2012

REASONS FOR DECISION

I. Motion for default judgment in a case alleging fraud

[1] Elekta Ltd. alleges that its former controller, the defendant, Timothy Rodkin, defrauded it of at least $12.4 million over the course of a number of years. Elekta has sued Rodkin, and others, in an effort to recoup its lost funds. Rodkin did not file a Statement of Defence, leading Elekta to note Rodkin in default and bring this motion for default judgment under Rule 19.05 of the *Rules of Civil Procedure*.

II. Overview of Elekta's claim

[2] Elekta manufactures and distributes medical equipment and materials. Its offices are located in Montreal, Quebec. From 1998 until August 31, 2011 Elekta employed Timothy Rodkin as its controller. Rodkin lived in a house at 8 Bicknell Court, Ajax, Ontario (the "Ajax House") and he worked out of his home. Rodkin managed and reconciled Elekta's bank

funds to the benefit of himself and friends. Such conduct was egregious. It constituted "actionable wrongs", being breaches of Rodkin's fiduciary obligation and contractual duty of good faith to his employer. It deserves punishment. Although I have awarded partial default judgment in the amount of approximately $12.459 million, that judgment simply provides Elekta with the legal means to recover, by way of execution and tracing, its own money which was fraudulently taken from it by Rodkin. In my view, that judgment, by itself, would be insufficient in the circumstances to achieve the goal of punishment and deterrence.

[30] This is not a case like *Whiten* where the defendant put the plaintiff through a protracted legal battle. Rodkin provided an affidavit of assets and submitted to examinations in compliance with the *Mareva* order, and he has elected not to contest the judgment sought by Elekta, so default judgment will issue. At the same time, a message must be sent to those who are placed in positions of trust over corporate funds, including this specific defendant, that theft of those funds, which is what happened here, simply will not be tolerated by the courts of this country.

[31] Elekta seeks an award of $500,000 in punitive damages. In light of the amounts awarded in the *Jefflin Investments* and *iTrade Finance Holdings* cases, an award at that level would represent a marked departure from the range of punitive damages awarded in recent years by this court in somewhat similar cases. That said, an award at the level of $25,000 as was made in those cases would be insufficient in the present one. Rodkin defrauded his employer of a large amount of money – at least in excess over $12 million. That was significantly more than the losses in the *Jefflin* and *iTrade* cases. Further, the message sent by the *iTrade* (2006) and *Jefflin* (2009) cases does not seem to be sinking into the consciousness of the Ontario public, as evidenced by Rodkin's continued defrauding of Elekta until his termination in mid-2011. I think it is time to raise the range of possible awards of punitive damages made in cases involving serious, protracted fraud by an employee who works in a position of trust handling the funds of his employer. Consequently, I conclude that in the circumstances of this case an award of punitive damages is justified against Rodkin, and I fix the amount of the award at $200,000.00.

C. Judgment for a declaration of an equitable interest in Rodkin's primary residence

[32] Elekta claims an equitable interest in Rodkin's Ajax House on the basis of a constructive or resulting trust.[22] Although Elekta filed supplementary materials to address my questions about the evidentiary record upon which default judgment could be granted for such equitable relief, on a review of Elekta's notice of motion for default judgment I discovered that Elekta had not formally requested such relief on this motion. Although Elekta's notice of motion contains the standard "basket clause",[23] I am not prepared to grant default judgment in the nature of an equitable interest in the Ajax House, even where evidence exists to do so, without the plaintiff expressly having asked for such relief in its notice of motion. Elekta will have to bring a further proper motion, on notice to Rodkin, requesting such relief.

---

[22] Amended Statement of Claim, para. 1(g).
[23] "Such further and other relief as counsel may advise and this Honourable Court may deem just."

TAB 18

CITATION: Bank of Montreal v. 1886758 Ontario Inc., 2022 ONSC 4642
COURT FILE NO.: CV-21-00667945-0000
DATE: 20220810

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BANK OF MONTREAL Plaintiff	)	*Randy Schliemann* for the Plaintiff
- and –	)	
1886758 ONTARIO INC. operating as REJUV MEDICAL and NAJAT DANIAL ORAHA also known as NAJAT D. ORAHA also known as NAHAT ORAHA Defendants	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a default judgment and related relief in a debt collection and fraud action by the Bank of Montreal ("BMO") against 1886758 Ontario Inc. operating as Rejuv Medical ("Rejuv Medical") and Najat Danial Oraha also known as Nahat Oraha.

[2] On this motion, BMO seeks:

a. an Order granting the Plaintiff Default Judgment as against the Defendants in accordance with paragraph 1 of the Plaintiff's Statement of Claim, including: a. judgment in the aggregate sum of **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date;

b. punitive damages in the amount of **$150,000.00**;

c. substantive indemnity for all costs, charges, expenses and fees, including legal fees, incurred to date;

d. a mandatory Order compelling the Defendants to deliver forthwith an accounting of all monies or benefits received from the Plaintiff, and the accounting shall include particulars as to how and where the money

[24] Rejuv Medical and Mr. Oraha did not respond to the BMO's demands for repayment and the indebtedness remains outstanding.

[25] As of **February 23, 2022**, the outstanding debt inclusive of principal and interest was **$460,204.99**. Interest continues to accrue on the CSBFA Loan at $49.77 *per diem*, on the Overdraft Facility at $10.66 *per diem* and on the Mastercard Facility at $11.14 *per diem*.

[26] By virtue of Rejuv Medical and Mr. Oraha being noted in default and not defending the action, it is taken to be admitted that:

a. Rejuv Medical and or Mr. Oraha did not intend to use the funds advanced by BMO to purchase the equipment specified in the CSBFA application process, or the Invoice.

b. Rejuv Medical never purchased the equipment specified in the invoice, or any comparable property or asset.

c. Rejuv Medical never intended to purchase the equipment in the manner represented, or at all.

d. Rejuv Medical and or Mr. Oraha did not intend to operate a small business for a sustained period intending to make a profit or gain, or at all.

e. The representations and declarations were false, and Rejuv Medical and Mr. Oraha made the representations and declarations knowing that they were false, without belief in their truth, or they were recklessly indifferent to whether the representations and declarations were true or false.

f. The fraudulent misrepresentations caused BMO to suffer losses and damages, including for the amounts owing for the loans.

[27] A review of the account statements and transaction histories in connection with Rejuv Medical's Business Account at BMO from its inception in November 2020 through to and including April 2021 reveals the following:

a. The Business Account was opened with a nil balance on November 24, 2020. The CSBFA Loan in the sum of $350,000.00 was received and then transferred into the Business Account on November 24, 2020.

b. The funds were depleted through a series of three bank drafts dated November 25, 2020, January 4, 2021, and March 17, 2021 totaling $399,637.25. The Bank Drafts were made purportedly payable to: (a) Northern Optotronics", (b) 1903092 Ontario Ltd., and (c) "Floran General Contracting Inc. but actually deposited in two BMO accounts; *i.e.*,

   i. account no. 0002-1700-612 held in the name of Alpha Capital Inc.

   ii. account no. 0654-1991-596 held in the name of Dionysus Capital Corporation.

[28] While BMO has not, to date, identified a direct connection between these accounts to Rejuv

Medical, it believes that Alpha Capital and Dionysus may have been operating as a form of cheque casher/cheque factoring companies, and they and related parties are tied to other CSBFA loans that bear similar concerns as this one, where BMO is now pursuing borrowers for fraud. BMO has terminated its banking relationship with Alpha Capital and Dionysus and its related parties and closed their accounts.

[29] On **May 17, 2021**, Ms. Mohamed, a Senior Forensic Analyst with the Legal & Regulatory Compliance Department of BMO contacted Northern Optotronics Inc., the equipment supplier indicated in the invoice and spoke to Maria Medina, who identified herself as the bookkeeper.

[30] BMO learned from Ms. Medina that:

a. The account no. 4368 on the Invoice is for a quote prepared for Rejuv Medical.

b. The quote for the equipment was $43,787.50, and not the $196,000.00 indicated on the Invoice, and the invoice included equipment that was not part of the quote.

c. However, Rejuv Medical did not actually purchase any equipment from Northern Optotronics Inc.

D. Discussion and Analysis

[31] Treating the case at bar as a debt collection case, the evidence establishes that the loans went into default and have not been repaid. The evidence establishes that Rejuv Medical owes and is liable to pay BMO **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date. Subject to their limits, Mr. Oraha is also liable under his guarantees.

[32] Treating the case at bar as a fraud case, both Defendants are jointly liable to pay BMO **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date plus punitive damages of $150,000.

[33] The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages.[4] As my findings of fact reveal, the elements of a claim of fraudulent misrepresentation have been proven in the immediate case against the Defendants jointly and severally and there should be judgment accordingly.

[34] A court may award punitive damages on a motion for a default judgment.[5] The Bank seeks punitive damages of $150,000.00.

[35] In *Whiten v. Pilot Insurance Co.*,[6] the Supreme Court of Canada held that the purposes of

[4] *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549; *Tsui-Wong v. Xiao*, 2018 ONSC 3315; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Fiorillo v. Krispy Kreme Doughnuts, Inc.* (2010), 98 O.R. (3d) 103 (S.C.J.); *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 at p. 344 (S.C.C.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

[5] *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329 (C.A.); *Canadian Premier Life Insurance Co. v. Ho*, 2016 ONSC 496.

[6] 2002 SCC 18.

punitive damages were retribution, denunciation, and deterrence. Justice Binnie, writing for the majority, stated at paragraph 36:

> 36. Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[36] It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.[7]

[37] In the immediate case, the purposes of retribution, denunciation, and deterrence would be well served by an award of punitive damages.[8] The facts reveal that this was an organized fraud and the Defendants took advantage of a government sponsored program, which is designed to assist small business, to defraud a bank into making a loan for an entity that did not carry on business.

[38] In my opinion a proportionate response to the victimization of the bank and of the public is $150,000. I, therefore, award BMO $150,000 in punitive damages.

[39] In furtherance of the collection of its loans and the Defendants' ill-gotten funds, BMO seeks an order that it has a constructive trust over the loan proceeds and a tracing order.

[40] Courts may impress a constructive trust over fraudulently obtained funds, and issue tracing and accounting orders, in cases such as this, to assist in recovery efforts.[9] Such orders are appropriate in the immediate case where the moneys were fraudulently procured and there is evidence that the funds were not used for their designated purposes and that BMO has not to date been able to trace what happened to the loan funds. Orders to go accordingly.

[41] BMO seeks a declaration that the Defendants' debt and liability herein results from obtaining property or services by false pretences or fraudulent misrepresentations.

[42] BMO does not seek a direction that its claim will survive a bankruptcy discharge or fall within s. 178 of the *Bankruptcy and Insolvency Act*, but BMO is transparent that its intent is to rely on s. 178 of the *Bankruptcy and Insolvency Act* should the Defendants take the protection of bankruptcy.

[43] Section 178 of the *Bankruptcy and Insolvency Act* states:

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[7] *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549 at para. 103.
[8] *Gennett Lumber Co. v. John Doe a.k.a. Milton Harvey et al.*, 2019 ONSC 1345; *IBEW, Local 353 Trust Funds (Trustees of) v. Shojaei*, 2014 ONSC 3656.
[9] *Kim v. Jung*, 2021 BCSC 1352; *Noreast Electronics Co. v. Danis*, 2018 ONSC 5169; *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

TAB 19

CITATION: Bank of Montreal v. 1886758 Ontario Inc., 2022 ONSC 4642
COURT FILE NO.: CV-21-00667945-0000
DATE: 20220810

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BANK OF MONTREAL Plaintiff	)	*Randy Schliemann* for the Plaintiff
- and –	)	
1886758 ONTARIO INC. operating as REJUV MEDICAL and NAJAT DANIAL ORAHA also known as NAJAT D. ORAHA also known as NAHAT ORAHA Defendants	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a default judgment and related relief in a debt collection and fraud action by the Bank of Montreal ("BMO") against 1886758 Ontario Inc. operating as Rejuv Medical ("Rejuv Medical") and Najat Danial Oraha also known as Nahat Oraha.

[2] On this motion, BMO seeks:

a. an Order granting the Plaintiff Default Judgment as against the Defendants in accordance with paragraph 1 of the Plaintiff's Statement of Claim, including: a. judgment in the aggregate sum of **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date;

b. punitive damages in the amount of **$150,000.00**;

c. substantive indemnity for all costs, charges, expenses and fees, including legal fees, incurred to date;

d. a mandatory Order compelling the Defendants to deliver forthwith an accounting of all monies or benefits received from the Plaintiff, and the accounting shall include particulars as to how and where the money

punitive damages were retribution, denunciation, and deterrence. Justice Binnie, writing for the majority, stated at paragraph 36:

> 36. Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[36] It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.[7]

[37] In the immediate case, the purposes of retribution, denunciation, and deterrence would be well served by an award of punitive damages.[8] The facts reveal that this was an organized fraud and the Defendants took advantage of a government sponsored program, which is designed to assist small business, to defraud a bank into making a loan for an entity that did not carry on business.

[38] In my opinion a proportionate response to the victimization of the bank and of the public is $150,000. I, therefore, award BMO $150,000 in punitive damages.

[39] In furtherance of the collection of its loans and the Defendants' ill-gotten funds, BMO seeks an order that it has a constructive trust over the loan proceeds and a tracing order.

[40] Courts may impress a constructive trust over fraudulently obtained funds, and issue tracing and accounting orders, in cases such as this, to assist in recovery efforts.[9] Such orders are appropriate in the immediate case where the moneys were fraudulently procured and there is evidence that the funds were not used for their designated purposes and that BMO has not to date been able to trace what happened to the loan funds. Orders to go accordingly.

[41] BMO seeks a declaration that the Defendants' debt and liability herein results from obtaining property or services by false pretences or fraudulent misrepresentations.

[42] BMO does not seek a direction that its claim will survive a bankruptcy discharge or fall within s. 178 of the *Bankruptcy and Insolvency Act*, but BMO is transparent that its intent is to rely on s. 178 of the *Bankruptcy and Insolvency Act* should the Defendants take the protection of bankruptcy.

[43] Section 178 of the *Bankruptcy and Insolvency Act* states:

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[8] *Gennett Lumber Co. v. John Doe a.k.a. Milton Harvey et al.*, 2019 ONSC 1345; *IBEW, Local 353 Trust Funds (Trustees of) v. Shojaei*, 2014 ONSC 3656.
[9] *Kim v. Jung*, 2021 BCSC 1352; *Noreast Electronics Co. v. Danis*, 2018 ONSC 5169; *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

TAB 20

CITATION: Noreast Electronics Co. v. Danis, 2018 ONSC 5169
COURT FILE NO.: 17-72985
DATE: 20180904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Noreast Electronics Co. Ltd. Plaintiff/Moving Party	Ira Nishisato and Maureen Doherty for Plaintiff/Moving Party
– and –	
Eric Danis, EAJ Technical Corporation, Anya Watson and 8339724 Canada Inc. Defendants/Respondents	Laurent Kanemy and Alexander H. Duggan for Defendants/Respondents
	HEARD: May 29, 2018

JUSTICE SALLY GOMERY

Overview

[1] The plaintiff Noreast Electronics Co. Ltd. ("Noreast") seeks summary judgment against the defendants for damages arising from a false invoicing scheme.

[2] Noreast is an electronics manufacturer in Hawkesbury, Ontario. The defendant Eric Danis ("Eric") worked for Noreast from 1985 to June 21, 2017, when he was fired.[1] The defendant Anya Watson ("Watson") is married to Eric. The defendants EAJ Technical Corporation ("EAJ") and 8339724 Canada Inc. ("833 Inc.") are two companies he owns.

[3] Noreast alleges that, between April 2010 and March 2017, Eric deceived Noreast into thinking it was purchasing components directly from Chinese suppliers, when in fact it was

[1] In this decision, I will refer to members of the Danis family by their first names to avoid any confusion.

components listed on the remaining five invoices, because no comparable items were shipped during the same time frame. The total value of these five invoices is about $30,000. Deloitte's lower estimate excludes any compensation for the shipments covered by these invoices.

[151] Noreast has the burden of proving its damages. In the absence of any supporting invoice from a supplier or any other evidence of how much EAJ paid for the components on the five invoices at issue, I cannot assume that EAJ made any profit on these shipments. I am therefore limiting Noreast's compensatory damages to $864,238.75 USD.

Constructive trust and equitable tracing

[152] Noreast seeks an order that all banks and financial institutions holding accounts in the defendants' names that contain funds traceable to Noreast be authorized and directed to pay such funds to Noreast up to the total amount of the judgment awarded. This would impress the proceeds of the fraud with a trust in Noreast's favour and allow it to trace and recover them.

[153] In *Soulos v. Korkontzilas*, the Supreme Court held that a judge may impose a constructive trust over funds "where good conscience so requires".[41] This includes situations where property has been obtained by a wrongful act by the defendant, such as a breach of a fiduciary relationship or breach of duty of loyalty.

[154] In this case, Noreast has proved that it paid money to EAJ as a result of the defendants' fraud. It has shown that although some money remained in the EAJ bank account, most of it was transferred to other bank accounts in the U.S. and Canada, including Eric and Watson's joint RBC U.S. chequing account. Noreast has not however been able to trace where all of the money ultimately ended up, or whether it was used to purchase assets such as retirement savings plans and the defendants' new house. Although cross-examined on these issues, Watson evaded some questions and simply refused to provide answers to others.

[155] In my view, "good conscience" requires that Noreast have the means to recover money misappropriated by the defendants through fraud. I therefore conclude that Noreast is entitled to

[41] [1997] 2 S.C.R. 217, at paras. 34-36.

a declaration of constructive trust as requested and a tracing order in order to permit it to obtain further information about how the misappropriated funds were used and to assist in their recovery.

[156] For this same purpose, the Mareva injunction granted by Justice Ryan Bell on June 20, 2017, and the certificate of pending litigation registered against Eric and Watson's residential property, should be remain in place until the defendants have fully satisfied this judgment.

Punitive damages

[157] Noreast acknowledges that punitive damages are an exceptional remedy that can be awarded only when a defendant has engaged in "high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." [42] It nonetheless says that punitive damages of $250,000 should be imposed on the defendants in this case, based on the evidence with respect to the fraud and the principles set out by Justice D.M. Brown in *Elekta Ltd. v. Rodkin*.[43]

[158] In *Elekta*, the plaintiff employer obtained default judgment against its former controller for fraud of $12.4 million carried out over 13 years. The court also awarded the employer punitive damages of $200,000 based on the defendant's gross abuse of his position of trust and authority over a prolonged period of time. Justice Brown concluded that:

> Such conduct was egregious. It constituted "actionable wrongs", being breaches of Rodkin's fiduciary obligation and contractual duty of good faith to his employer. It deserves punishment. Although I have awarded partial default judgment in the amount of approximately $12.459 million, that judgment simply provides Elekta with the legal means to recover, by way of execution and tracing, its own money which was fraudulently taken from it by Rodkin. In my view, that judgment, by itself, would be insufficient in the circumstances to achieve the goal of punishment and deterrence.[44]

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[42] *Whiten v. Pilot*, 2002 SCC 18, at para. 94; see also *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at para. 27, and *Keays v. Honda*, 2008 SCC 39, at para. 62.
[43] 2012 ONSC 2062 ("*Elekta*").
[44] *Elekta*, at para. 29.

TAB 21

CITATION: Noreast Electronics Co. v. Danis, 2018 ONSC 5169
COURT FILE NO.: 17-72985
DATE: 20180904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Noreast Electronics Co. Ltd. Plaintiff/Moving Party	Ira Nishisato and Maureen Doherty for Plaintiff/Moving Party
– and –	
Eric Danis, EAJ Technical Corporation, Anya Watson and 8339724 Canada Inc. Defendants/Respondents	Laurent Kanemy and Alexander H. Duggan for Defendants/Respondents
	HEARD: May 29, 2018

JUSTICE SALLY GOMERY

Overview

[1] The plaintiff Noreast Electronics Co. Ltd. ("Noreast") seeks summary judgment against the defendants for damages arising from a false invoicing scheme.

[2] Noreast is an electronics manufacturer in Hawkesbury, Ontario. The defendant Eric Danis ("Eric") worked for Noreast from 1985 to June 21, 2017, when he was fired.[1] The defendant Anya Watson ("Watson") is married to Eric. The defendants EAJ Technical Corporation ("EAJ") and 8339724 Canada Inc. ("833 Inc.") are two companies he owns.

[3] Noreast alleges that, between April 2010 and March 2017, Eric deceived Noreast into thinking it was purchasing components directly from Chinese suppliers, when in fact it was

[1] In this decision, I will refer to members of the Danis family by their first names to avoid any confusion.

components listed on the remaining five invoices, because no comparable items were shipped during the same time frame. The total value of these five invoices is about $30,000. Deloitte's lower estimate excludes any compensation for the shipments covered by these invoices.

[151] Noreast has the burden of proving its damages. In the absence of any supporting invoice from a supplier or any other evidence of how much EAJ paid for the components on the five invoices at issue, I cannot assume that EAJ made any profit on these shipments. I am therefore limiting Noreast's compensatory damages to $864,238.75 USD.

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[152] Noreast seeks an order that all banks and financial institutions holding accounts in the defendants' names that contain funds traceable to Noreast be authorized and directed to pay such funds to Noreast up to the total amount of the judgment awarded. This would impress the proceeds of the fraud with a trust in Noreast's favour and allow it to trace and recover them.

[153] In *Soulos v. Korkontzilas*, the Supreme Court held that a judge may impose a constructive trust over funds "where good conscience so requires".[41] This includes situations where property has been obtained by a wrongful act by the defendant, such as a breach of a fiduciary relationship or breach of duty of loyalty.

[154] In this case, Noreast has proved that it paid money to EAJ as a result of the defendants' fraud. It has shown that although some money remained in the EAJ bank account, most of it was transferred to other bank accounts in the U.S. and Canada, including Eric and Watson's joint RBC U.S. chequing account. Noreast has not however been able to trace where all of the money ultimately ended up, or whether it was used to purchase assets such as retirement savings plans and the defendants' new house. Although cross-examined on these issues, Watson evaded some questions and simply refused to provide answers to others.

[155] In my view, "good conscience" requires that Noreast have the means to recover money misappropriated by the defendants through fraud. I therefore conclude that Noreast is entitled to

[41] [1997] 2 S.C.R. 217, at paras. 34-36.

TAB 22

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

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

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

TAB 23

Margaret Patricia Kerr *Appellant*

v.

Nelson Dennis Baranow *Respondent*

- and -

Michele Vanasse *Appellant*

v.

David Seguin *Respondent*

INDEXED AS: KERR *v.* BARANOW

2011 SCC 10

File Nos.: 33157, 33358.

2010: April 21; 2011: February 18.

Present: McLachlin C.J. and Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

Family law — Common law spouses — Property — Unjust enrichment — Monetary remedy — Whether monetary remedy restricted to quantum meruit award — Whether evidence of joint family venture should be considered in conferring remedy — Whether mutual benefit conferral and reasonable expectations of parties should be considered in assessing award.

Family law — Common law spouses — Property — Resulting trust — Whether evidence of common intention should be considered in context of resulting trust — Whether resulting trust principles apply to property or monetary award in resolution of domestic cases.

Family law — Common law spouses — Support — Parties separating after living together for more than 25 years — Female partner commencing proceedings for a share of property and support — Whether support should be payable from date of trial or date on which proceedings commenced.

In the *Kerr* appeal, K and B, a couple in their late 60s separated after a common law relationship of more

Margaret Patricia Kerr *Appelante*

c.

Nelson Dennis Baranow *Intimé*

- et -

Michele Vanasse *Appelante*

c.

David Seguin *Intimé*

RÉPERTORIÉ : KERR *c.* BARANOW

2011 CSC 10

N^os^ du greffe : 33157, 33358.

2010 : 21 avril; 2011 : 18 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Abella, Charron, Rothstein et Cromwell.

EN APPEL DES COURS D'APPEL DE LA COLOMBIE-BRITANNIQUE ET DE L'ONTARIO

Droit de la famille — Conjoints de fait — Biens — Enrichissement injustifié — Réparation pécuniaire — Une réparation pécuniaire est-elle restreinte au quantum meruit? — La preuve de coentreprise familiale doit-elle être prise en compte au moment d'accorder une réparation? — Les avantages réciproques et les attentes raisonnables des parties doivent-ils être pris en compte dans l'évaluation de la réparation?

Droit de la famille — Conjoints de fait — Biens — Fiducie résultoire — La preuve de l'intention commune doit-elle être prise en compte dans le contexte de la fiducie résultoire? — Les principes de la fiducie résultoire s'appliquent-ils aux réparations accordées en biens ou en argent dans le cadre de la résolution des litiges familiaux?

Droit de la famille — Conjoints de fait — Aliments — Séparation des conjoints après plus de 25 ans de vie commune — Action de la conjointe réclamant une pension alimentaire et une part des biens — La pension alimentaire est-elle rétroactive à la date du procès ou à la date d'introduction de l'instance?

Dans le pourvoi *Kerr*, K et B, tous deux dans la soixantaine avancée, se sont séparés après plus de 25

"Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruits*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J. W. Neyers, M. McInnes and S. G. A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

[49] A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also *Matrimonial Property Law in Canada* (loose-leaf), vol. 1, by J. G. McLeod and A. A. Mamo, eds., at pp. 40.78-40.79.

(b) *Proprietary Award*

[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

rendu par chacune des parties et en déterminer la valeur » (R. E. Scane, « Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts » (1991), 70 *R. du B. can.* 260, p. 281). Un auteur a judicieusement qualifié ce problème pratique de [TRADUCTION] « duel de *quantum meruit* » (J. D. McCamus, « Restitution on Dissolution of Marital and Other Intimate Relationships : Constructive Trust or Quantum Meruit? » dans J. W. Neyers, M. McInnes et S. G. A. Pitel, dir., *Understanding Unjust Enrichment* (2004), 359, p. 376). La juge McLachlin a également mentionné ce problème pratique dans *Peter*, p. 999.

[49] Une deuxième difficulté tient au fait que, selon certains tribunaux et certains auteurs, l'arrêt *Peter* pose qu'une réparation pécuniaire appropriée doit invariablement être calculée en fonction de la valeur monétaire des services non rémunérés. On parle souvent, dans ce cas, de *quantum meruit*, de « valeur reçue » ou de « rémunération des services ». Ce raisonnement a été suivi dans *Bell c. Bailey* (2001), 203 D.L.R. (4th) 589 (C.A. Ont.). D'autres cours d'appel ont conclu que la réparation pécuniaire pouvait être évaluée de manière plus souple — selon la méthode fondée sur la valeur accumulée — en fonction, par exemple, de l'augmentation globale de la richesse du couple pendant l'union : *Wilson c. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, par. 50; *Pickelein c. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison c. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane c. Smith*, 2003 NBCA 6, 256 R.N.-B. (2e) 108, par. 31-34 et 41-43; *Shannon c. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, par. 37. Quant aux incohérences relevées dans la façon de calculer une réparation personnelle pour enrichissement injustifié, voir aussi *Matrimonial Property Law in Canada* (feuilles mobiles), vol. 1, J. G. McLeod et A. A. Mamo, dir., p. 40.78-40.79.

b) *Réparation fondée sur le droit de propriété*

[50] La Cour a reconnu que, dans certains cas, si une réparation pécuniaire est inappropriée ou insuffisante, il peut être nécessaire d'accorder une réparation fondée sur le droit de propriété. C'est

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 trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

dans l'arrêt *Pettkus* qu'on a d'abord reconnu un remède important en enrichissement injustifié au Canada : la fiducie constructoire de nature réparatoire. Imposée sans qu'il y ait une intention de créer une fiducie, la fiducie constructoire est un outil général, souple et juste qui permet de déterminer le droit de propriété véritable (*Pettkus*, p. 843-844 et 847-848). Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, une part proportionnelle à l'enrichissement injustifié peut faire l'objet d'une fiducie constructoire en sa faveur (*Pettkus*, p. 852-853; *Sorochan*, p. 50). Il ressort clairement de l'arrêt *Pettkus* que ces principes s'appliquent également aux conjoints non mariés, puisque « [l]e principe d'*equity* sur lequel repose le recours à la fiducie par interprétation [ou fiducie constructoire] est large et général; son but est d'empêcher l'enrichissement sans cause dans toutes les circonstances où il se présente » (p. 850-851).

[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 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).

[51] Quant à la nature du lien exigé entre la contribution et le bien, la Cour a toujours jugé que le demandeur devait démontrer un lien « suffisamment important et direct », un « lien causal » ou un « lien » entre les contributions du demandeur et le bien visé par la fiducie (*Peter*, p. 988, 997 et 999; *Pettkus*, p. 852; *Sorochan*, p. 47-50; *Rathwell*, p. 454). Une contribution mineure ou indirecte ne suffit pas (*Peter*, p. 997). Comme l'a dit le juge en chef Dickson dans *Sorochan*, la question fondamentale est de savoir si les contributions « se rapportent clairement aux biens » (p. 50, citant les notes du professeur McLeod relatives à *Herman c. Smith* (1984), 42 R.F.L. (2d) 154, p. 156). La contribution indirecte d'argent et la contribution directe de labeur peuvent être suffisantes, pourvu qu'un lien soit établi entre l'appauvrissement du demandeur et l'acquisition, la conservation, l'entretien ou l'amélioration du bien (*Sorochan*, p. 50; *Pettkus*, p. 852).

[52] The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the

[52] Le demandeur doit aussi prouver qu'une réparation pécuniaire serait insuffisante dans les circonstances (*Peter*, p. 999). À cet égard, le tribunal peut tenir compte de la probabilité de recouvrement ainsi que de la question de savoir s'il existe

TAB 24

CITATION: Trez v. Wynford, 2015 ONSC 2794
COURT FILE NO.: CV-14-10493-00CL
DATE: 20151210

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF Section 101 of the *Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

RE: Trez Capital Limited Partnership and Computershare Trust Company of Canada, Applicants

AND:

Wynford Professional Centre Ltd. and Global Mills Inc., Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Shawn Pulver* and *Debora Miller-Lichtenstein*,
For Metro Toronto Condominium Corporation No. 1037

Irving Marks and *Dominique Michaud*,
For Trez Capital Limited Partnership

Danielle Glatt,
For DBDC Spadina Ltd. et al.

HEARD: April 28, 2015

ENDORSEMENT

Introduction

respect to Wynford's common element fee arrears pursuant to ss. 85 and 86 of the Act.

Equitable Lien

[24] An equitable lien is a form of equitable charge upon property until certain claims are satisfied. It arises by operation of equity from the relationship of the parties, rather than by any act of theirs: *Snell's Equity*, 32nd edition, General Editor John McGhee (2010, Thomson Reuters) at Ch. 44-004, p. 1146.

[25] Equitable liens will be available in circumstances that would give rise to a constructive trust (such as breach of fiduciary obligation and breach of confidence) as well as circumstances outside the fiduciary context such as response to improvements made to land under mistake and in the context of indemnity insurance: Maddaugh and McCamus, *The Law of Restitution*, Looseleaf Edition, at pp. 5-45 and 5-46.

[26] MTCC 1037 submits that it is entitled to an equitable lien based on Wynford's unjust enrichment (not having to pay its 2012 and 2013 common expense fees) to MTCC 1037's corresponding detriment.

[27] Trez/Computershare submit that MTCC 1037's lien rights are restricted to the provisions of the Act which it has failed to comply with and accordingly, it is not entitled to an equitable lien.

[28] Part VI of the Act, sections 84 to 88 deal with common expenses.

[29] Section 84(1) of the Act provides that the owners shall contribute to the common expenses in the proportion specified in the declaration.

[30] Section 85 of the Act allows a condominium corporation to register a lien against an owner's unit for up to three (3) months of common expense fee arrears. If a certificate of lien is not registered on title during this time period, the lien expires. Once a certificate of lien is registered, s. 85(3) provides that all future unpaid common expense fee arrears are captured under the registered lien.

[31] Section 86 of the Act provides that a certificate of lien registered pursuant to s. 85 has priority over all mortgages registered against the unit in question provided that the condominium corporation complies with the notice provision in s. 86(3). That subsection requires that the condominium corporation shall, on or

TAB 25

CITATION: Caroti v. Vuletic 2024 ONSC 6776
COURT FILE NOS.: CV-17-5302 and CV-17-1481
DATE: 2024 12 06

ONTARIO - SUPERIOR COURT OF JUSTICE

BETWEEN: Aleardo Caroti, Jacinta Caroti, Ian Grounds, Moraig Grounds, Nancy Kostelac, Brian McDowell, Biljana Nizalek, Marielle Pelchat-Morris, Wilma Jesus, Monica Savona and Mike Klecina in his capacity as Estate Trustee of the Estate of Boris Klecina (also known as Borislav Klecina), Plaintiffs

AND:

Anthony Vuletic, John Vuletic, Mira Vuletic, Embleton Properties Corp., 1857325 Ontario Ltd., and Brampton G&A Holdings Inc., Defendants

AND BETWEEN:

Anthony Vuletic, John Vuletic, Mira Vuletic, Embleton Properties Corp. and 1857325 Ontario Ltd**.,** Plaintiffs by Counterclaim

AND:

Aleardo Caroti, Jacinta Caroti, Ian Grounds, Moraig Grounds, Nancy Kostelac, Brian McDowell, Biljana Nizalek, Marielle Pelchat-Morris, Wilma Jesus, Monica Savona, Milena Boland, Frank Demaria, Jurica Biondic, Renato Biondic, Roberta Biondic, Mike Klecina in his capacity as Estate Trustee of the Estate of Boris Klecina (also known as Borislav Klecina), Anna Bilich, Emma Faria, Katarina Granic, Anton Granic, Marianne Martinovic, Frank Samardzic and Robert Sokic, Defendants by Counterclaim

AND BETWEEN:

Milena Boland, Frank Demaria, Jurica Biondic, Renato Biondic and Roberta Biondic, Defendants by Counterclaim

AND:

Anthony Vuletic, John Vuletic, Mira Vuletic, Embleton Properties Corp. and 1857325 Ontario Ltd**.,** Defendants by Counterclaim

AND BETWEEN:

Peter Pichelli, Todd Leslie, Frank Toth and 958041 Ontario Limited, Plaintiffs and Defendants by Counterclaim

AND:

But an equitable lien is a form of equitable charge upon property until the claims are satisfied: *Silaschi* at para 8; *Ristimaki* at paras 10 and 21. Equitable liens arise by operation of equity from the relationship of the parties, and not by any act of theirs: *Trez v Wynford*, 2015 ONSC 2794 at paras 24-25; *Pierce v. Belows*, 2019 ONSC 3014 at para 43. To this end, an equitable lien does *not* arise from a common intention or agreement of the parties. In *Steeves v. Steeves*, 1995 CanLII 10369 (NBKB) at 8, the court adopted an observation made by Professor G.B. Klippert, *Unjust Enrichment* (Butterworth) 1983 at pp. 201-202 who described the fundamental nature or character of an equitable lien as follows:

> [A]n equitable lien, like a constructive trust, does not arise from the common intention or agreement of the parties. This remedial device enables the plaintiff to secure a monetary claim against a definable piece of property in the hands of the defendant. The pressing of such a lien arises as a matter of law and is supposed to prevent unjust enrichment...The constructive trust entitles the claimant to compel the legal title owner to hold the beneficial ownership, in part or in whole as a trustee. An equitable lien is a security mechanism. [Emphasis added]

[107] The general approach that courts have taken is to declare an equitable lien where there is a finding of an unjust enrichment or a constructive trust. The equitable lien is then impressed upon the trust property as a security interest: *St. Paul (County) v. Genereux Workshop (Bonnyville) Ltd.*, 1984 ABCA 218 at para 10. Professor Duggan summarized the distinction between equitable liens and constructive trusts as follows:

> An equitable lien is a security interest arising by operation of law to secure performance of a monetary or other obligation. For example, as an alternative to granting constructive trust relief, the court might award damages secured by an equitable lien over the disputed property. An equitable lien may be worth more to the plaintiff than a constructive trust if the disputed property has depreciated in value.
>
> See A. Duggan "*Constructive Trusts in Insolvency: A Canadian Perspective*" 2016 94-1 *Canadian Bar Review 86*, 2016 CanLIIDocs at 95; citing D.W.M. Waters, M. Gillen & L. Smith eds *Water's Law of Trusts in Canada,* 4th (Toronto: Carswell, 2012) at 502-503 and 1341, and P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Toronto: Canada Law Book, 2014) Looseleaf, note 10 at ch 5 at 300.

d. The Need for Ownership by the Defendants

[108] The Defendants do not own the preserved funds paid into court. It follows that the Settling Parties cannot be granted an equitable interest over these funds based on their minutes of settlement with the Defendants.

TAB 26

From: Timothy Dunn <TDunn@blaney.com>
Sent: August 12, 2025 5:54 PM
To: Mark van Zandvoort
Cc: Calvin Horsten
Subject: RE: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL

Thanks Mark. We will continue to hold the subject funds in trust pending further order of the court.

Best regards, Tim.

Timothy Dunn
Partner
tdunn@blaney.com
416-597-4880 | 416-593-5148

From: Mark van Zandvoort <mvanzandvoort@airdberlis.com>
Sent: Tuesday, August 12, 2025 5:50 PM
To: Timothy Dunn <TDunn@blaney.com>
Cc: Calvin Horsten <chorsten@airdberlis.com>
Subject: RE: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL

Tim:

Thank you for your email. We are of the view that Blaney McMurtry LLP should continue to hold the subject funds in trust, pending further order of the court. We will of course advise you should the court make an endorsement or order at the August 15th comeback hearing, or at some other time in the future, concerning the transfer of the subject funds which your firm is currently holding in trust.

It is the Receiver's intention to proceed with the comeback hearing on August 15th as scheduled.

Regards,

Mark van Zandvoort
Partner

T 416.865.4742
E mvanzandvoort@airdberlis.com

Aird & Berlis LLP | Lawyers
Toronto | Vancouver

From: Timothy Dunn <TDunn@blaney.com>
Sent: August 12, 2025 5:26 PM

To: Mark van Zandvoort <mvanzandvoort@airdberlis.com>
Cc: Calvin Horsten <chorsten@airdberlis.com>
Subject: FW: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL

Mark, it has come to our attention that Blaney received approximately $34,000 from real estate counsel for Mr. Pilehvar that appears to be proceeds from the sale of a property that is subject to the instant proceedings.

Would you please provide me with the appropriate wire instructions for either your firm or the receiver and we will make the necessary arrangements for the transmission of these funds.

Best regards, Tim.

Timothy Dunn
Partner

tdunn@blaney.com
416-597-4880 | 416-593-5148

From: Timothy Dunn
Sent: Tuesday, August 12, 2025 5:21 PM
To: Calvin Horsten <chorsten@airdberlis.com>
Cc: Mark van Zandvoort <mvanzandvoort@airdberlis.com>; Kyle Plunkett <kplunkett@airdberlis.com>; Adrienne Ho <aho@airdberlis.com>; David Sieradzki <dsieradzki@ksvadvisory.com>; Jordan Wong <jwong@ksvadvisory.com>; Tony Trifunovic <ttrifunovic@ksvadvisory.com>
Subject: RE: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL

Afternoon all, I have been informed by Mr. Pilevhar that he is in the process of retaining new counsel and that either he or his new counsel will be requesting an adjournment of the motion that is returnable on Friday.

As previously indicated, Blaney is no longer retained and will not be attending.

Best regards, Tim.

Timothy Dunn
Partner

tdunn@blaney.com
416-597-4880 | 416-593-5148

From: Calvin Horsten <chorsten@airdberlis.com>
Sent: Monday, August 11, 2025 3:31 PM
To: Timothy Dunn <TDunn@blaney.com>; BenP <ben@sandgecko.ca>
Cc: Mark van Zandvoort <mvanzandvoort@airdberlis.com>; Kyle Plunkett <kplunkett@airdberlis.com>; Adrienne Ho <aho@airdberlis.com>; David Sieradzki <dsieradzki@ksvadvisory.com>; Jordan Wong <jwong@ksvadvisory.com>; Tony Trifunovic <ttrifunovic@ksvadvisory.com>
Subject: RE: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL

Dear Mr. Pilehver and Mr. Dunn,

Further to the below correspondence, please be advised that the Comeback Hearing scheduled for Friday, August 15, 2025 at 9:00 am will proceed by videoconference at the following Zoom coordinates:

Meeting ID: 646 8330 2309 Passcode: 548152
https://ca01web.zoom.us/j/64683302309?pwd=hk4renYSbUXbUn41tPpZqSX8FIZNTl.1%20%27

Kindly advise us if your intention is to attend the Comeback Hearing (or if another lawyer will be attending on Mr. Pilehver's behalf), so that we may submit a participant information form to the Court. If other counsel will be attending, please also provide their name and contact information.

Furthermore, we re-iterate the request in the correspondence below that you please provide us with Ms. Nali's email address so that we may advise her of the Zoom details via email as well.

Thank you,

Calvin Horsten
Associate

T 416.865.3077
E chorsten@airdberlis.com

Aird & Berlis LLP | Lawyers
Toronto | Vancouver

From: Calvin Horsten <chorsten@airdberlis.com>
Sent: August 7, 2025 5:14 PM
To: Timothy Dunn <tdunn@blaney.com>; BenP <ben@sandgecko.ca>
Cc: Mark van Zandvoort <mvanzandvoort@airdberlis.com>; Kyle Plunkett <kplunkett@airdberlis.com>; Adrienne Ho <aho@airdberlis.com>; David Sieradzki <dsieradzki@ksvadvisory.com>; Jordan Wong <jwong@ksvadvisory.com>; Tony Trifunovic <ttrifunovic@ksvadvisory.com>
Subject: Notice of Mareva Injunction and Other Matters - LONDON VALLEY IV INC. v. BEHZAD PILEHVER et al. - Court File No. CV-25-00748799-00CL
Importance: High

Dear Mr. Pilehver and Mr. Dunn,

Please see the attached correspondence and enclosures including, without limitation, the Order and Endorsement of the Ontario Superior Court of Justice (Commercial List), each dated August 7, 2025, **for your immediate attention**.

Yours truly,

Calvin Horsten
Associate

T 416.865.3077
F 416.863.1515
E chorsten@airdberlis.com

Aird & Berlis LLP | Lawyers
Toronto | Vancouver

Brookfield Place, 181 Bay Street, Suite 1800
Toronto, ON M5J 2T9 | airdberlis.com

TAB 27

CITATION: Elekta Ltd. v. Rodkin, 2012 ONSC 2062
COURT FILE NO.: CV-11-9471-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Elekta Ltd., Plaintiff

AND:

Timothy Rodkin, Kathleen Thornton, Julie Waldriff a.k.a. Julie Smith a.k.a. Julie Josh Kennedy, Just A Kid Productions, Inc., Law Enforcement Canada Media Group, Robert Rodkin a.k.a. Bob Rodkin, Gail Smith, Cindy Doucette, John Doe and Jane Doe, Defendants

BEFORE: D. M. Brown J.

COUNSEL: I. Nishisato, for the Plaintiff

No one appearing for the Defendant, Timothy Rodkin

HEARD: February 29, March 13 and March 23, 2012

REASONS FOR DECISION

I. Motion for default judgment in a case alleging fraud

[1] Elekta Ltd. alleges that its former controller, the defendant, Timothy Rodkin, defrauded it of at least $12.4 million over the course of a number of years. Elekta has sued Rodkin, and others, in an effort to recoup its lost funds. Rodkin did not file a Statement of Defence, leading Elekta to note Rodkin in default and bring this motion for default judgment under Rule 19.05 of the *Rules of Civil Procedure*.

II. Overview of Elekta's claim

[2] Elekta manufactures and distributes medical equipment and materials. Its offices are located in Montreal, Quebec. From 1998 until August 31, 2011 Elekta employed Timothy Rodkin as its controller. Rodkin lived in a house at 8 Bicknell Court, Ajax, Ontario (the "Ajax House") and he worked out of his home. Rodkin managed and reconciled Elekta's bank

D. Partial judgment on tracing claim

[33] In its action Elekta seeks an order entitling it to "an equitable tracing of all monies of Elekta into the assets, property and interests of Rodkin".[24] On this motion for default judgment Elekta seeks an order that funds frozen by the *Mareva* injunction held in certain accounts in Rodkin's name located at (i) the Toronto Dominion Bank (Acct. No. 6225591), (ii) Mackenzie Financial Corporation (Acct. No. 85151595) (the "Mackenzie Account"), and (iii) Standard Life Assurance Company of Canada (Acct. No. 2336915) (the "Standard Life Account") be paid to Elekta.

[34] Paragraphs 36(b), 57 and 58 of Elekta's Factum identify the evidence in the record upon which Elekta relies to establish its tracing claim to funds in those accounts. Section 4.19 of the Navigant Report stated that one fraudulent payment of $60,000.00 was traced to the Standard Life account ($10,000) and the Mackenzie account ($50,000), and Rodkin admitted that the funds were converted to his own investment uses.[25] According to Ms. Peacock's February 24, 2012 affidavit $10,307.23 has been frozen in the Standard Life Account and $95,915.11 has been frozen in the Mackenzie Account.

[35] Funds acquired by fraud are impressed with a trust and may be followed and recovered by their true owner unless acquired by a *bona fide* purchaser for value without notice of the fraud.[26] Elekta has proven that $10,000 of the funds frozen in the Standard Life Account and and $50,000 of the funds in the Mackenzie Account are its funds which Rodkin misappropriated to his own use. Elekta is entitled to an order directing both those financial institutions to pay to it those amounts out of the specified accounts.

[36] As to the funds in the TD Bank account, Elekta did not point me to evidence tracing those funds back to it. Although there is evidence that those funds are in accounts in the name of Rodkin and therefore exigible for execution, there is no evidence before me as to whether Rodkin has other judgment creditors. Accordingly, I am not prepared to grant the relief requested with respect to the TD Bank account on the present state of the record.

E. Claim for investigative costs

[37] Elekta also seeks judgment for "damages arising out of the detection, investigation and quantification of the losses suffered by Elekta".[27] Elekta filed evidence in support of its claim, including the invoices rendered to it by PWC and Navigant to investigate and quantify the extent of Rodkin's defalcation.[28] Those fees totaled $491,065.82.

---

[24] Amended Statement of Claim, paras. 1(i), 44, 45 and 46.
[25] See the Rodkin examination evidence referenced in Elekta's Factum, para. 58.
[26] *iTrade Finance Holdings, supra.,* para. 71.
[27] See Amended Statement of Claim, paras. 5(a), 47 and 48.
[28] Affidavit of Julie Peacock sworn February 24, 2012, pars. 52 and 53; Exhibits "U" and "V".

TAB 28

CITATION: Coast to Coast Against Cancer v. Sokolowski, 2016 ONSC 170
COURT FILE NO.: CV-14-515989
DATE: 20160108

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
COAST TO COAST AGAINST CANCER	)	*Kirsten A. Thoreson*, for the plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
STEVEN H. SOKOLOWSKI, THE COURTYARD GROUP OF COMPANIES INC., SHERRY AZIM (in her personal capacity and in her corporate capacity, o/a COMPLETE BUSINESS SOLUTIONS) and PHILIPPA L. HERRINGTON (in her personal capacity and in her corporate capacity, o/a HERRINGTON ASSOCIATES)	)	Steven H. Sokolowski, self-represented
	)	
Defendants	)	

ENDORSEMENT

DIAMOND J.:

[1] On November 30, 2015, I released my Endorsement granting the plaintiff Coast to Coast Against Cancer ("Coast") summary judgment against the defendant Steven H. Sokolowski ("Sokolowski") in the total sum of $697,237.00.

[2] On December 18, 2015, I released a further Endorsement addressing the outstanding issue of Coast's request for punitive damages, and ordering Sokolowski to pay Coast punitive

damages in the amount of $50,000.00 without pre-judgment interest. I further permitted Sokolowski an opportunity to serve and file written submissions on or before January 5, 2016 to respond to Coast's request that the *Mareva* injunction against Sokolowski (previously ordered and continued by Justice Chiappetta and Justice Brown respectively) be further continued post-judgment.

[3] The deadline of January 5, 2016 passed, and Sokolowski did not serve or file any written submissions. On January 6, 2016, counsel for Coast (a) advised that the parties had consented to a formal judgment codifying the terms of my two said Endorsements, and (b) renewed her request that the *Mareva* injunction against Sokolowski be further continued post-judgment.

[4] Normally, an interlocutory order merges into a final judgment. This would include interlocutory injunctive orders. As Justice Perell recently stated in *2057552 Ontario Inc. v. Dick* 2015 ONSC 3182 (S.C.J.), affirmed 2016 ONCA 7 (C.A.), a *Mareva* injunction by its very nature is "an extraordinary remedy and not a substitute for receivership and never an easily obtainable way to obtain pre-judgment execution".

[5] Notwithstanding, there is jurisprudence supporting the availability of post-judgment *Mareva* injunctions. Ironically, such relief has been described as a "*Mareva* injunction in aid of execution". I use the term "ironically" because the primary purpose of a *Mareva* injunction is to restrain a party from dissipating assets pending the Court's determination in a proceeding. Where a judgment has been granted, the determination of the proceeding has been completed. A *Mareva* injunction in aid of execution thus amounts to injunctive relief restraining a party from dissipating assets pending execution of the judgment itself.

[6] In *Lamont v. Ken* (1999) 30 C.P.C. (4th) 168 (Ont. Gen. Div.) Justice Sachs held that a *Mareva* injunction is indeed available as an aid to execution following judgment provided the requirements for such an injunction are met. Those requirements are as follows:

a) the plaintiff must make full and frank disclosure of all material facts within his/her knowledge;

b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;

c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;

d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction, or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment; and

e) the plaintiff must give an undertaking as to damages.

[7] It is trite to state that a condition precedent to a *Mareva* injunction is that the plaintiff must demonstrate a strong *prima facie* case. This is not an issue as I granted summary judgment against Sokolowski for fraud and breach of fiduciary duty.

[8] In *Sibley & Associates LP v. Ross* 2011 ONSC 2951 (S.C.J.), Justice Strathy (as he then was) held that in cases of fraud, the requirement that a plaintiff show a risk of assets being removed or dissipated can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself.

[9] In the case before me, Coast has already satisfied the requirements for a *Mareva* injunction when it obtained the Orders from Justice Chiappetta and Justice Brown on November 20 and 28, 2014. In granting Coast's motion for summary judgment, I made additional findings of fact that Sokolowski committed fraudulent acts in breach of his fiduciary duties owed to Coast. While I was not specifically asked to make a finding that Sokolowski had or remains intent upon dissipating his assets, in my view the evidence of fraud was so strong that, even if the prior *Mareva* injunction had not been granted or extended, Sokolowski's fraud gave rise to an inference that there was a real risk that he would attempt to dissipate or hide his assets, or remove them from the jurisdiction.

[10] I therefore find that Coast is entitled to a post-judgment *Mareva* injunction in aid of execution. Specifically, I am prepared to grant the identical relief set out in the following paragraphs of the Order dated November 20, 2014 of Justice Chiappetta: 1 (as modified by paragraph 2 of the Order of Justice Brown), 2, 3, 7, 8 and 10.

[11] However, I further order that this post-judgment *Mareva* injunction in aid of execution shall be in effect for 6 months from the date of the release of this Endorsement, without prejudice to Coast applying at any time before the expiry of that 6 month period for an order further extending the post-judgment *Mareva* injunction in aid of execution. Coast's original request was for a *Mareva* injunction in aid of execution "until such time that the plaintiff can have a writ of seizure and sale issued or a receiver appointed over Sokolowski's assets". In my view, the term of the post-judgment *Mareva* injunction in aid of execution should not be indefinite, and Coast should be able to achieve those stated execution goals within the prescribed 6 month period.

Diamond J.

Released: January 8, 2016

TAB 29

CITATION: Noreast Electronics Co. v. Danis, 2018 ONSC 5169
COURT FILE NO.: 17-72985
DATE: 20180904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Noreast Electronics Co. Ltd. Plaintiff/Moving Party	Ira Nishisato and Maureen Doherty for Plaintiff/Moving Party
– and –	
Eric Danis, EAJ Technical Corporation, Anya Watson and 8339724 Canada Inc. Defendants/Respondents	Laurent Kanemy and Alexander H. Duggan for Defendants/Respondents
	HEARD: May 29, 2018

JUSTICE SALLY GOMERY

Overview

[1] The plaintiff Noreast Electronics Co. Ltd. ("Noreast") seeks summary judgment against the defendants for damages arising from a false invoicing scheme.

[2] Noreast is an electronics manufacturer in Hawkesbury, Ontario. The defendant Eric Danis ("Eric") worked for Noreast from 1985 to June 21, 2017, when he was fired.[1] The defendant Anya Watson ("Watson") is married to Eric. The defendants EAJ Technical Corporation ("EAJ") and 8339724 Canada Inc. ("833 Inc.") are two companies he owns.

[3] Noreast alleges that, between April 2010 and March 2017, Eric deceived Noreast into thinking it was purchasing components directly from Chinese suppliers, when in fact it was

[1] In this decision, I will refer to members of the Danis family by their first names to avoid any confusion.

a declaration of constructive trust as requested and a tracing order in order to permit it to obtain further information about how the misappropriated funds were used and to assist in their recovery.

[156] For this same purpose, the Mareva injunction granted by Justice Ryan Bell on June 20, 2017, and the certificate of pending litigation registered against Eric and Watson's residential property, should be remain in place until the defendants have fully satisfied this judgment.

Punitive damages

[157] Noreast acknowledges that punitive damages are an exceptional remedy that can be awarded only when a defendant has engaged in "high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." [42] It nonetheless says that punitive damages of $250,000 should be imposed on the defendants in this case, based on the evidence with respect to the fraud and the principles set out by Justice D.M. Brown in *Elekta Ltd. v. Rodkin*.[43]

[158] In *Elekta*, the plaintiff employer obtained default judgment against its former controller for fraud of $12.4 million carried out over 13 years. The court also awarded the employer punitive damages of $200,000 based on the defendant's gross abuse of his position of trust and authority over a prolonged period of time. Justice Brown concluded that:

> Such conduct was egregious. It constituted "actionable wrongs", being breaches of Rodkin's fiduciary obligation and contractual duty of good faith to his employer. It deserves punishment. Although I have awarded partial default judgment in the amount of approximately $12.459 million, that judgment simply provides Elekta with the legal means to recover, by way of execution and tracing, its own money which was fraudulently taken from it by Rodkin. In my view, that judgment, by itself, would be insufficient in the circumstances to achieve the goal of punishment and deterrence.[44]

---

[42] *Whiten v. Pilot*, 2002 SCC 18, at para. 94; see also *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at para. 27, and *Keays v. Honda*, 2008 SCC 39, at para. 62.
[43] 2012 ONSC 2062 ("*Elekta*").
[44] *Elekta*, at para. 29.

TAB 30

CITATION: Ernst & Young Inc. v. Aquino, 2025 ONSC 3101
COURT FILE NO.: CV-19-630908-00CL and BK-25-00208753-OT31
DATE: 20250603

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	
ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited Applicant	*Alan Merskey and Evan Cobb*, for the Monitor
– and –	
JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, LUCIA COCCIA a.k.a. LUCIA CANDERLE, THE ESTATE OF MICHAEL SOLANO, GIOVANNI ANTHONY SIRACUSA a.k.a. JOHN SIRACUSA, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, 2420595 ONTARIO LTD. a.k.a. STRADA HAULAGE, 2304288 ONTARIO INC., 2466601 ONTARIO INC. a.k.a. MMC CONTRACTING, 2420570 ONTARIO LTD. a.k.a. MTEC CONSTRUCTION, TIME PASSION, INC. and RCO GENERAL CONTRACTING LTD. Respondents	*Terry Corsianos, George Corsianos, David Ullmann and Stephen Gaudreau*, for John Aquino *Jeremy Opolsky and Alex Bogach*, for KSV Restructuring Inc. *Tanya Pagliaroli*, for Ralph Aquino *Domenico Magisano and Chelsea McKee*, for Crowe Soberman Inc.
	HEARD: May 23, 2025

CONWAY J.

REASONS FOR DECISION

his assets or his sources of his income to pay for litigation and other expenses. The TUV Judgment speaks for itself on John's role in the false invoicing scheme and the Bondfield looting.

[59] Finally, there is no need for the Monitor to provide an undertaking as to damages. This requirement was not imposed when the Monitor obtained the original *Mareva* Order. More important, I cannot see how John can claim damages from the continuation of the *Mareva* Order where the TUV Judgment has been upheld by the Supreme Court of Canada and remains unpaid.

Decision

[60] The bankruptcy application is granted. The *Mareva* Order is continued in effect as a post-judgment order in aid of execution.

[61] John's cross-motion is dismissed. In light of the bankruptcy order, it will be up to John's trustee in bankruptcy to set the Aquino Action down for trial. I therefore decline John's request to schedule the trial.

[62] If the parties are unable to agree on costs, they shall arrange a scheduling appointment with me through the Commercial List office to address the process for making cost submissions.

Conway J.

Released: June 3, 2025

TAB 31

Paras 15 and 22.F

CITATION: Ingarra v. Cartel & Bui LLP**,** et al., 2024 ONSC 6228
COURT FILE NO.: CV-24-00719081-0000
DATE: 20241112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOHANN INGARRA, ANTHONY INGARRA, JOHN PAUL INGARRA, PAUL EVANS and SHAUN HENDERSON	)	*Self-represented*
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
CARTEL & BUI LLP, NICHOLAS CARTEL and SINGA BUI	)	
	)	
Defendants	)	
	)	
	)	**HEARD: In Writing**
	)	

REASONS FOR JUDGMENT

CHALMERS, J.

OVERVIEW

[1] The plaintiffs Johann Ingarra, Anthony Ingarra, John Paul Ingarra, Paul Evans and Shaun Henderson bring this motion for default judgment in the amount of $410,714.14, plus $25,000 in

> d. any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity [….]

[15] I am satisfied that the deemed admission that she fraudulently misappropriated funds while acting in a fiduciary capacity justifies an order under s. 178(1) of the *Act* that the judgment survives any past, present or future assignment in bankruptcy and that Ms. Bui shall not be released by any discharge from bankruptcy. I am satisfied that this order is appropriate in the circumstances of this case even though Ms. Bui has not yet declared bankruptcy: *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242, at para. 23.

[16] The plaintiffs seek judgment in the amount of $410,744.16. This was the amount that was paid into the defendants' trust account in payment of the first and second loans. The money was not paid and was instead misappropriated by the defendants

[17] The first loan was funded 35.1% by Anthony John Paul and Johann Ingarra and 64.9% was funded by Paul Evans. A total of $313,150.46 was paid to the defendants' trust account on December 1, 2023 with respect to the first loan. Anthony, John Paul, and Johann are entitled to 35.1% or $109,915.74. Paul Evans is entitled to 64.9% or $203,234.52. The second loan was in the amount of $97,563.88. The funds for the second loan were funded by Shaun Henderson.

[18] I am satisfied that the plaintiffs have proved their damages.

[17] The first and second loans were paid into the defendants' trust account on December 1, 2023. I am satisfied that the plaintiffs are entitled to prejudgment interest on the amount of $410,744.16 from December 1, 2023 to the date of judgment. The statement of claim was issued in the second quarter of 2024. The applicable interest rate is 5.3 % *per annum*. The *per diem* interest rate is 0.01452%. The number of days from December 1, 2023 to November 12, 2024 is 346. The total prejudgment interest rate is 5.024%.

[18] The plaintiffs also seek an award of punitive damages. The Court has jurisdiction to make an award of punitive damages on a motion for default judgment: *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329, at paras. 54-65. Punitive damages may be awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct. The objective is to punish the defendant rather than compensate the plaintiff: *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 36.

[19] Based on the deemed admissions I find that Ms. Bui breached her fiduciary duty to the plaintiffs. Instead of paying the funds to the plaintiffs in accordance with her retainer, she misappropriated the funds for her own use. I am satisfied that Ms. Bui acted in a manner that was callous, high-handed and reprehensible. Her conduct is particularly egregious because at the time, she was a licenced lawyer and officer of the court.

[20] I award punitive damages to the plaintiffs in the amount of $25,000. I allocated the punitive damages award as follows: $6,250 to the plaintiffs Anthony, John Paul and Johann; $12,500 to Paul Evans and $6,250 to Shaun Henderson. I am satisfied that an award of punitive damages in this amount is appropriate to punish Ms. Bui for her reprehensible conduct and to send the message that lawyers who defalcate trust funds have more to lose than simply paying back their ill-gotten gains: *IBEW, Local 353 Trust Funds (Trustees of) b. Shojaei*, 2014 ONSC 3656, at para. 16.

[21] The plaintiffs are successful on this motion and are entitled to their costs. The plaintiffs seek their costs of the motion for default judgment on a partial indemnity rate in the all inclusive amount of $2,500. I am satisfied that the amount claimed by the plaintiffs is reasonable and fair. I award costs to the plaintiffs fixed in the amount of $2,500.

DISPOSITION

[22] For the reasons set out above, I make the following order:

A. I grant default judgment against Ms. Bui in favour of the plaintiffs,

B. I award damages to Anthony, John Paul and Johann Ingarra in the amount of $109,915.74, plus prejudgment interest in the amount of $5,522.17, plus punitive damages in the amount of $6,250;

C. I award damages to Paul Evans in the amount of $203,234.52, plus prejudgment interest in the amount of $10,210.50, plus punitive damages in the amount of $12,500;

D. I award damages to Shaun Henderson in the amount of $97,593.88, plus prejudgment interest in the amount of $4,903.10, plus punitive damages of $6,250;

E. I award costs to the plaintiffs fixed in the all-inclusive amount of $2,500;

F. I order that the judgment obtained against Ms. Bui is a debt or liability arising out of fraud while acting in a fiduciary capacity and therefore survives any past, present or future assignment in bankruptcy.

[23] I signed the draft order.

Date: November 12, 2024

_____

Chalmers J.

TAB 32

CITATION: Bank of Montreal v. 1886758 Ontario Inc., 2022 ONSC 4642
COURT FILE NO.: CV-21-00667945-0000
DATE: 20220810

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BANK OF MONTREAL Plaintiff	)	*Randy Schliemann* for the Plaintiff
- and –	)	
1886758 ONTARIO INC. operating as REJUV MEDICAL and NAJAT DANIAL ORAHA also known as NAJAT D. ORAHA also known as NAHAT ORAHA Defendants	)	**HEARD**: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion for a default judgment and related relief in a debt collection and fraud action by the Bank of Montreal ("BMO") against 1886758 Ontario Inc. operating as Rejuv Medical ("Rejuv Medical") and Najat Danial Oraha also known as Nahat Oraha.

[2] On this motion, BMO seeks:

a. an Order granting the Plaintiff Default Judgment as against the Defendants in accordance with paragraph 1 of the Plaintiff's Statement of Claim, including: a. judgment in the aggregate sum of **$442,723.36** as at June 29, 2021, plus accruing pre- and post-judgment interest from that date;

b. punitive damages in the amount of **$150,000.00**;

c. substantive indemnity for all costs, charges, expenses and fees, including legal fees, incurred to date;

d. a mandatory Order compelling the Defendants to deliver forthwith an accounting of all monies or benefits received from the Plaintiff, and the accounting shall include particulars as to how and where the money

> case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that
>
> (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
>
> (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.
>
> *Claims released*
>
> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[44] There are cases where before there has been an assignment into bankruptcy, courts have granted a declaration that the debt survives a bankruptcy discharge under s. 178 of the *Bankruptcy and Insolvency Act*.[10] I need not consider these cases because no such declaration is being sought in the immediate case.

[45] What is appropriate in the immediate case is simply to declare that the Defendants' debt in the immediate case results from "fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity" or "from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim", which declaration characterizes the debt or liability reflecting the language of s. 178(1)(d) and (e) of the *Bankruptcy and Insolvency Act*. This approach has been employed in several cases,[11] and this approach reflects the reality of the facts and the law of the immediate case.

[46] Finally, there is the matter of costs. Based on the above findings of facts, I agree with BMO's submission that the Defendants have engaged in reprehensible conduct that merits an award of costs on a substantial indemnity basis.[12] BMO seeks the all-inclusive sum of $20,632.40 on a substantial indemnity scale, as detailed in its Cost Outline, which claim for costs I find fair and reasonable.

E. Conclusion

[47] A judgment should issue in accordance with these reasons for decision. Counsel may send me a draft judgment for signature.

Perell, J.

Released: August 10, 2022

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[10] See: *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242; *Sunwell Investments Ltd. v. Cheung*, 2013 ONSC 483.

[11] *Ontario Limited v. Larkin*, 2021 ONSC 1608; *B2B Bank v. Batson*, 2014 ONSC 6105.

[12] *Growth Capital Corp. v. 2221448 Ontario Inc. d.b.a. Caliber Express*, 2020 ONSC 3063; *Canadian Premier Life Insurance Co. v. Ho*, 2016 ONSC 496; *IBEW, Local 353 Trust Funds (Trustees of) v. Shojaei*, 2014 ONSC 3656; *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062; *Davies v. Clarington (Municipality),* (2009), 100 O.R. (3d) (C.A.).

TAB 33

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

LONDON VALLEY IV INC.,
by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

and

BEHZAD PILEHVER also known as BEN PILEHVER also known as BEHZAD PILEHVAR also known as BEN PILEHVAR also known as BEN PILEVHR, MAHTAB NALI also known as MAHTAB NALI PILEHVAR also known as MAHTAB PILEHVAR and 2621598 ONTARIO INC. doing business as NALI AND ASSOCIATES

Defendants

BILL OF COSTS OF THE PLAINTIFF
(Default Judgment Motion returnable November 17, 2025)

STATEMENT OF EXPERIENCE & HOURLY FEES: AIRD & BERLIS LLP

Name of Lawyer	Year of Call	Year	Partial Indemnity Rate	Substantial Indemnity Rate	Full Indemnity Rate
Mark van Zandvoort (MVZ)	2010	2025	$504.00	$756.00	$840.00
Kyle Plunkett (KP)	2011	2025	$495.00	$742.50	$825.00
Adrienne Ho (AH)	2015	2025	$396.00	$594.00	$660.00
Calvin Horsten (CH)	2020	2025	$255.00	$382.50	$425.00

Name of Student at Law	Year	Partial Indemnity Rate	Substantial Indemnity Rate	Full Indemnity Rate
Matthew Graham (MG)	2025	$225.00	$337.50	$375.00

Hannah Jones (HJ)	2025	$225.00	$337.50	$375.00
Daniel Kim (DK)	2025	$225.00	$337.50	$375.00

Name of Law Clerk	Year	Partial Indemnity Rate	Substantial Indemnity Rate	Full Indemnity Rate
Roxana Manea (RM)	2025	$237.00	$355.50	$395.00
Linh Nguyen (LN)	2025	$195.00	$292.50	$325.00

FEES

1. ***Pleadings***

Correspondence and communicatons with client; Conduct legal research; Receipt and review of client documents; Fact gathering and analysis of case; Draft, revise, and finalize Notice of Action, and later, Statement of Claim, and arrange for issuance and service of same.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	17.8	$8,971.20	$13,456.80	$14,952.00
AH	2025	1	$396.00	$594.00	$660.00
CH	2025	25.2	$6,426.00	$9,639.00	$10,710.00
MG	2025	3.5	$787.50	$1,181.25	$1,312.50
DK	2025	10.4	$2,340.00	$3,510.00	$3,900.00
RM	2025	0.8	$189.60	$284.40	$316.00
Total:		**58.7**	**$19,110.30**	**$28,665.45**	**$31,850.50**

2. ***Mareva Injunction Motion***

Draft, revise and finalize Notice of Motion; Draft, revise, and finalize Motion Record dated August 1, 2025 including Third Report of the Receiver dated August 1, 2025; Draft, revise, and finalize Factum and Book of Authorities, both dated August 1, 2025; Draft, revise, and finalize Supplementary Motion Record dated August 5, 2025 including Supplement to Third Report of KSV dated August 5, 2025; Attend to service and filing of aforementioned; Legal research; Attend to confirmation of motion; Preparation and attendance at first attendance on August 7,

2025; Fact gathering; Received communications sent by Paybank Parties to Co-Owners; Correspondence with TD Bank and other financial institutions regarding account statements and freezing of accounts; Correspondence with Defendants regarding Comeback Hearing; Draft, revise, and finalize Second Supplementary Motion Record including Second Supplement to Third Report; Draft, revise, and finalize Aide-Memoire; Arrange for service and filing of materials; Preparation and attendance at second attendance on August 15, 2025.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	134.2	$67,636.80	$101,455.20	$112,728.00
KP	2025	5.3	$2,623.50	$3,935.25	$4,372.50
AH	2025	14.4	$5,702.40	$8,553.60	$9,504.00
CH	2025	124.7	$31,798.50	$47,697.75	$52,997.50
MG	2025	24.9	$5,602.50	$8,403.75	$9,337.50
HJ	2025	9	$2,025.00	$3,037.50	$3,375.00
DK	2025	8.8	$1,980.00	$2,970.00	$3,300.00
RM	2025	3.3	$782.10	$1,173.15	$1,303.50
LN	2025	3.7	$721.50	$1,082.25	$1,202.50
Total:		**328.3**	**$118,872.30**	**$178,308.45**	**$198,120.50**

3. ***Case Conferences***

Preparation of Aide Memoires for case conferences on August 26, 2025, September 9, 2025, Septemebr 23, 2025 and October 14, 2025; Arrange for service and filing of same; Preparation for and attendance at aforementioned case conferences; Arrange for service of Endorsements flowing from case conferences.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	22	$11,088.00	$16,632.00	$18,480.00
KP	2025	4.7	$2,326.50	$3,489.75	$3,877.50
AH	2025	0.4	$158.40	$237.60	$264.00
CH	2025	11.1	$2,830.50	$4,245.75	$4,717.50
Total:		**38.2**	**$16,403.40**	**$24,605.10**	**$27,339.00**

4. ***Examination***

Correspondence regarding scheduling of examinations; Preparation and service of Notice of Examination; preparation for examination.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	14.5	$7,308.00	$10,962.00	$12,180.00
CH	2025	7.8	$1,989.00	$2,983.50	$3,315.00
Total:		**22.3**	**$9,297.00**	**$13,945.50**	**$15,495.00**

5. ***Motion Materials re: Default Judgment***

Correspondence with client, defendants and court office regarding Default Judgment Motion; Conduct legal research; Draft, revise, and finalize Motion Record dated November 5, 2025, including Affidavit of Jordan Wong sworn November 5, 2025 with exhibits; Draft, revise, and finalize Factum and arrange for service and filing of same.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	0.6	$302.40	$453.60	$504.00
CH	2025	15.8	$4,029.00	$6,043.50	$6,715.00
Total:		**16.4**	**$4,331.40**	**$6,497.10**	**$7,219.00**

6. ***Bill of Costs***

Preparation of bill of costs; Review dockets and office communications re: same.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
LN	2025	2	**$390.00**	**$585.00**	**$650.00**

7. ***Preparation for Attendance on November 17, 2025***

Preparation for motion, including reviewing all motion materials, and prepare outline of oral argument.

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	2	$1,008.00	$1,512.00	$1,680.00
CH	2025	2	$510.00	$765.00	$850.00
	Total:	**4.0**	**$1,518.00**	**$2,277.00**	**$2,530.00**

8. ***Attendance on November 17, 2025***

Attendance for argument on the Motion [Estimated].

Name	***Year***	***Hours***	***Partial Indemnity Rate***	***Substantial Indemnity Rate***	***Full Indemnity Rate***
MVZ	2025	1	$504.00	$756.00	$840.00
CH	2025	1	$255.00	$382.50	$425.00
	Total:	**2.0**	**$ 759.00**	**$1,138.50**	**$1,265.00**

DISBURSEMENTS – AIRD & BERLIS LLP:	
Courier and Deliveries	$2,403.36
Photocopies	$3,181.00
HST (13%)	$725.97
Statement of Claim (non-taxable Court filing fee)	$243.00

Motion for Default Judgment (non-taxable Court filing fee)	$339.00
AIRD & BERLIS LLP TOTAL Disbursements, incl. HST	**$6,892.33**

PARTIAL TOTAL FEES & DISBURSEMENTS & TAXES:	
TOTAL FEES	$170,681.40
TAXES ON FEES	$22,188.58
TOTAL DISBURSEMENTS incl. TAXES	$6,892.33
GRAND TOTAL Partial Fees & Disbursements:	**$199,762.31**

SUBSTANTIAL TOTAL FEES & DISBURSEMENTS & TAXES:	
TOTAL FEES	$256,022.10
TAXES ON FEES	$33,282.87
TOTAL DISBURSEMENTS incl. TAXES	$6,892.33
GRAND TOTAL Substantial Fees & Disbursements:	**$296,197.30**

FULL TOTAL FEES & DISBURSEMENTS & TAXES:	
TOTAL FEES	$284,469.00
TAXES ON FEES	$36,980.97
TOTAL DISBURSEMENTS incl. TAXES	$6,892.33
GRAND TOTAL Full Fees & Disbursements:	**$328,342.30**

Date: November 5, 2025

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Lawyers for the Plaintiff

LONDON VALLEY IV INC., by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.	- and 392	**BEHZAD PILEHVER, *et al.***
Plaintiff		Defendants

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BILL OF COSTS OF THE PLAINTIFF

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Lawyers for the Plaintiff

TAB 34

Court File No. CV-25-00736577-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 23RD
	)	
JUSTICE STEELE	)	DAY OF OCTOBER, 2025

B E T W E E N:

MIZUE FUKIAGE, AKIKO KOBAYASHI, YOSHIKI FUKIAGE, KOBAYASHI KYOHODO CO., LTD., TORU FUKIAGE , and KWANG-CHENG (TONY) WEI, IN HIS PERSONAL CAPACITY AS A TAIWANESE INVESTOR AND IN HIS CAPACITY AS AGENT FOR THE OTHER TAIWANESE INVESTORS

Applicants

- and -

CLEARVIEW GARDEN ESTATES INC., TALBOT CROSSING INC., NIAGARA ESTATES OF CHIPPAWA II INC., LONDON VALLEY INC., LONDON VALLEY II INC., LONDON VALLEY III INC., LONDON VALLEY IV INC., LONDON VALLEY V INC., FORT ERIE HILLS INC., 2533430 ONTARIO INC., CGE CAPITAL MANAGEMENT INC., TGP-TALBOT CROSSING INC., NEC II CAPITAL MANAGEMENT INC., LV CAPITAL MANAGEMENT INC., LV II CAPITAL MANAGEMENT INC., LV III CAPITAL MANAGEMENT INC., LV IV CAPITAL MANAGEMENT INC., LV V CAPITAL MANAGEMENT INC., FORT ERIE HILLS CAPITAL MANAGEMENT INC., HALTON PARK INC., NIAGARA FALLS PARK INC., TSI-HP INTERNATIONAL CANADA INC., and TSI INTERNATIONAL-GRANDTAG A2A NIAGARA IV INC.

Respondents

ORDER
(Ancillary Relief)

THIS MOTION, made by KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacities, the "**Receiver**"), without security, of the assets, undertakings and properties of Clearview Garden Estates Inc., Talbot Crossing Inc., Niagara Estates of Chippawa II Inc., London Valley Inc., London Valley II Inc., London Valley III Inc., London Valley IV Inc., London Valley V Inc., Fort Erie Hills Inc., 2533430 Ontario Inc.,

and as Receiver in respect of certain property of CGE Capital Management Inc., TGP-Talbot Crossing Inc., NEC II Capital Management Inc., LV Capital Management Inc., LV II Capital Management Inc., LV III Capital Management Inc., LV IV Capital Management Inc., LV V Capital Management Inc., Fort Erie Hills Capital Management Inc., Halton Park Inc., Niagara Falls Park Inc., TSI-HP International Canada Inc., and TSI International-Grandtag A2A Niagara IV Inc. for an order, in substance: (i) approving each of the Third Report of the Receiver dated August 1, 2025 (the "**Third Report**"), the Supplement to the Third Report of the Receiver dated August 5, 2025 (the "**Supplement to the Third Report**"), the Second Supplement to the Third Report of the Receiver dated August 13, 2025 (the "**Second Supplement to the Third Report**"), and the Fourth Report of the Receiver dated October 14, 2025 (the **"Fourth Report**" and collectively with Third Report, the Supplement to the Third Report and the Second Supplement to the Third Report, the "**Reports**"), and the actions of the Receiver described therein; and (ii) approving the fees and disbursement of the Receiver and its counsel to and including September 30, 2025, as set out in the applicable fee affidavits, was heard this day via judicial videoconference.

ON READING the Motion Record of the Receiver, appending the Reports, which includes, without limitation, the fee affidavits appended thereto in support of the fees and disbursements of the Receiver and its legal counsel (together, the "**Fee Affidavits**"), and on hearing the submissions of counsel for the Receiver and such other counsel as were present, no one appearing for any other person on the Service List, as appears from the affidavit of service of Calvin Horsten sworn October 15, 2025,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record of the Receiver is hereby validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

RECEIVER'S REPORTS AND APPROVAL OF FEES & DISBURSEMENTS

2. **THIS COURT ORDERS** that the Third Report and the actions and activities of the Receiver and its counsel described therein be and are hereby approved; provided that only the

Receiver in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

3. **THIS COURT ORDERS** that the Supplement to the Third Report and the actions and activities of the Receiver and its counsel described therein be and are hereby approved; provided that only the Receiver in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

4. **THIS COURT ORDERS** that the Second Supplement to the Third Report and the actions and activities of the Receiver and its counsel described therein be and are hereby approved; provided that only the Receiver in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

5. **THIS COURT ORDERS** that the Fourth Report and the actions and activities of the Receiver and its counsel described therein be and are hereby approved; provided that only the Receiver in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

6. **THIS COURT ORDERS** that the professional fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP, for the period to and including September 30, 2025 as set out in the Fourth Report and supported by the Fee Affidavits appended thereto, be and are hereby approved.

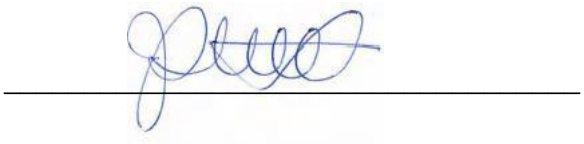
GENERAL

7. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

THIS COURT HEREBY REQUESTS the aid and recognition of any other Canadian and foreign court, tribunal, regulatory or administrative body ("**Judicial Bodies**") to give effect to this Order and to assist the Receiver and its respective agents in carrying out the terms of this Order. All Judicial Bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver as an officer of this Court, as may be necessary or desirable to give

effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its respective agents in carrying out the terms of this Order.

8. **THIS COURT ORDERS** that this Order is effective from 12:01 a.m. on the date hereof.



MIZUE FUKIAGE et al.

Applicants

- and -

CLEARVIEW GARDEN ESTATES INC. et al.

Respondents

Court File No. CV-25-00736577-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

ORDER
(ANCILLARY RELIEF)

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Lawyers for the Receiver

TAB 35

COURT OF APPEAL FOR ONTARIO

CITATION: Net Connect Installation Inc. v. Mobile Zone Inc., 2017 ONCA 766
DATE: 20171003
DOCKET: C63190

Hourigan, Roberts and Nordheimer JJ.A.

BETWEEN

Net Connect Installation Inc.

Plaintiff (Respondent)

and

Mobile Zone Inc. and Mohammad Shahzad

and Swati Damle

Defendants (Appellants)

AND BETWEEN

Mobile Zone Inc., Mohammad Shahzad and Swati Damle

Plaintiffs by Counterclaim

(Appellants)

and

Net Connect Installation Inc., ICT North Inc., Wayne LaPlante

and Charleen Wunderlich

Defendants to the Counterclaim

(Respondents)

Ralph Swaine, for the appellant

Christopher Salazar, for the respondent

Heard and released orally: September 29, 2017

ground among many in support of his costs award. For the reasons discussed below, we decline to grant leave to appeal costs.

[7] We are of the view that the motion judge erred in making his damage award in favour of all of the respondents, as only the corporate litigants were parties to the agreement. Accordingly we order the judgment be varied to remove the handwritten amendment in paragraph 3.

[8] While we would not interfere with the costs award made by the motion judge, we would express a cautionary note on this issue. In this case, the motion judge awarded costs on a full indemnity basis. There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

[9] In this case, full indemnity costs were warranted given the factual findings that the motion judge made regarding the conduct of the appellants, especially the movement of funds out of the country in an effort to place them out of reach

TAB 36

CITATION: Elekta Ltd. v. Rodkin, 2012 ONSC 2062
COURT FILE NO.: CV-11-9471-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Elekta Ltd., Plaintiff

AND:

Timothy Rodkin, Kathleen Thornton, Julie Waldriff a.k.a. Julie Smith a.k.a. Julie Josh Kennedy, Just A Kid Productions, Inc., Law Enforcement Canada Media Group, Robert Rodkin a.k.a. Bob Rodkin, Gail Smith, Cindy Doucette, John Doe and Jane Doe, Defendants

BEFORE: D. M. Brown J.

COUNSEL: I. Nishisato, for the Plaintiff

No one appearing for the Defendant, Timothy Rodkin

HEARD: February 29, March 13 and March 23, 2012

REASONS FOR DECISION

I. Motion for default judgment in a case alleging fraud

[1] Elekta Ltd. alleges that its former controller, the defendant, Timothy Rodkin, defrauded it of at least $12.4 million over the course of a number of years. Elekta has sued Rodkin, and others, in an effort to recoup its lost funds. Rodkin did not file a Statement of Defence, leading Elekta to note Rodkin in default and bring this motion for default judgment under Rule 19.05 of the *Rules of Civil Procedure*.

II. Overview of Elekta's claim

[2] Elekta manufactures and distributes medical equipment and materials. Its offices are located in Montreal, Quebec. From 1998 until August 31, 2011 Elekta employed Timothy Rodkin as its controller. Rodkin lived in a house at 8 Bicknell Court, Ajax, Ontario (the "Ajax House") and he worked out of his home. Rodkin managed and reconciled Elekta's bank

[38] Damages for the cost of investigating and quantifying an employee fraud flow naturally and directly from the employee's breach of its duties to its employer under contract and as a fiduciary, and therefore should be recoverable, upon proof, as special damages. This court has awarded such damages in other cases.[29] Accordingly, I grant judgment in favour of Elekta against Rodkin in the amount of $491,065.82 as special damages for the costs of detecting, investigating and quantifying the loss caused by the fraudulent acts of its employee.

F. Claim for legal costs

[39] Elekta seeks costs and disbursements against Rodkin in the amount of $402,575.20 calculated on a substantial indemnity basis.[30] The costs sought cover legal work performed to obtain and execute the *Anton Pillar, Mareva* and *Norwich* orders, to gain access to the evidence seized on the execution of the *Anton Pillar* order, to conduct the examinations of Rodkin and to bring this motion for default judgment. Fees, including H.S.T., total $357,330.86; disbursements amount to $45,244.34, including the fees paid to the Independent Supervising Solicitor for the execution of the *Anton Pillar* order.

[40] In *Forbes & Manhattan v. URSA Major Minerals* I attempted to summarize the principles which presently guide the consideration of making an award of substantial indemnity costs:

> The starting point for any consideration of an award of substantial indemnity costs is the Court of Appeal decision in *Davies v. Clarington (Municipality)*. In the *Davies* case the Court of Appeal identified the circumstances when elevated – i.e. substantial or full indemnity – costs may be awarded by a court:
>
> > 28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.
> >
> > …
> >
> > 40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law

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[29] Order of Hainey J. in *Novo Nordisk Canada Inc. v. Murray*, November 21, 2011, Court File No. CV-11-432161; such damages were also sought in *Jefflin Investments Ltd. v. Crown Grading & Sodding Ltd.,* [2009] O.J. No. 5348 (S.C.J.), but it is unclear from the Reasons whether the court ultimately awarded such damages.
[30] Amended Statement of Claim, para. 59(c).

> that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, *elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made.* As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction. (emphasis added)

In *Smith Estate v. Rotstein* I attempted to summarize the types of cases in which elevated costs had been awarded:

> Cases referred to by the moving party disclosed that courts have awarded elevated, full indemnity costs when: (i) one party was an innocent party to the proceeding and the court concluded that she should not experience any loss as a result of the conduct and actions of the defendant which resulted in the litigation; (ii) one party made baseless allegations of wrongdoing or meritless claims of fraud, deceit, and dishonesty based on pure speculation against the other; or, (iii) it was clear shortly after the event in question that the plaintiff was blameless, but was required to proceed to trial because of disputes amongst the defendants about their share of liability.[31]

Finally, as stated by the Court of Appeal in *St. Elizabeth Home Society v. Hamilton (City)*, the law remains that "solicitor and client costs are only awarded in rare and exceptional cases."[32]

[41] The proof of fraudulent conduct by an employee against an employer has attracted the award of substantial indemnity costs.[33] Given the proof made by the plaintiff of Rodkin's fraud and defalcation, I conclude that Elekta has established that Rodkin engaged in reprehensible conduct which merits an award of substantial indemnity costs. Elekta is entitled to an award on that scale for the work described in its Bill of Costs.

[42] While I accept the hourly rates used by Elekta to calculate its substantial indemnity costs, I question the adequacy of the evidence it has filed to support the hours claimed. I have no quarrel with the amount claimed for the motion for default judgment and ancillary relief, and I fix the substantial indemnity costs for that work at the amount claimed - $24,007.50.

[43] However, Elekta seeks to recover fees for about 887 hours of work in respect of its motion for *Mareva* relief, *Norwich* disclosure, a certificate of pending litigation, an *Anton Pillar* order and a sealing order. I have no doubt that a large amount of legal work was expended on those tasks – they are very time intensive steps in any piece of litigation. But, without seeing the actual time and disbursements ledgers of Elekta's counsel for those amounts, I cannot determine

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[31] 2011 ONSC 3911 (CanLII), paras. 11 and 12.
[32] 2010 ONCA 280, para. 92.
[33] *Novo Nordisk, supra.*

LONDON VALLEY IV INC., by its Court-Appointed Receiver and Manager, KSV RESTRUCTURING INC.

Plaintiff

- and -

BEHZAD PILEHVER, *et al.*

Defendants

Court File No. CV-25-00748799-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

COMPENDIUM FOR ORAL ARGUMENT OF THE PLAINTIFF – Returnable November 17, 2025

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