Court File No: CV-18-602745-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ASTRAZENECA CANADA INC.

Plaintiff

-and-

SAMEH SADEK also known as SAM SADEK,
ST. MAHARIAL PHARMACY INC., dba MD HEALTH PHARMACY,
ST. MAHARIAL CLINIC INC., SRX INVESTMENT INC.,
SHEPPARD RX PHARMACY INC. and LILIAN FAM

Defendants

BOOK OF AUTHORITIES OF THE CREDITOR MD HEALTH MEDICAL CENTRE (BRAMPTON) INC.

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PROFESSIONAL CORPORATION
Barristers-At-Law
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Bldg. A, Suite 200
Vaughan, Ontario
L4K 0A4

Emilio Bisceglia
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Lawyers for the Creditor
MD Heath Medical Centre (Brampton) Inc.

TO: SEE SERVICE LIST ATTACHED

SERVICE LIST
(Updated July 23, 2019)

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TAB 1

1993 CarswellOnt 251
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Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)

1993 CarswellOnt 251, [1993] O.J. No. 3021, 1 E.T.R. (2d) 1,
23 C.B.R. (3d) 161, 44 A.C.W.S. (3d) 1303, 6 P.P.S.A.C. (2d) 5

Re bankruptcy of JULIUS H. MELNITZER

CANADIAN IMPERIAL BANK OF COMMERCE v. PEAT MARWICK THORNE INC. (trustee in bankruptcy of JULIUS MELNITZER), GRAND CANYON PROPERTIES LTD., 808756 ONTARIO INC., COOPERS & LYBRAND LIMITED, NATIONAL BANK OF CANADA and ROYAL BANK OF CANADA

Killeen J.

Heard: December 7-11, 1992
Judgment: November 26, 1993
Docket: Doc. 35-039665

Counsel: *F. Angeletti* and *I. Wallace*, for Canadian Imperial Bank of Commerce.
A.G.J. VanKlink and *D. Grace*, for 808756 Ontario Inc.
R.F. Leach, for Grand Canyon Properties Ltd.
C. Osborne and *J. Badley*, for Coopers & Lybrand Limited and National Bank of Canada.
M. Neirinck, for Royal Bank of Canada.
No one appearing for Peat Marwick Thorne Inc., trustee of estate of Julius Melnitzer.

Killeen J.:

1 This case is the trial of an issue arising out of the bankruptcy of a prominent London lawyer, Julius H. Melnitzer. Much litigation has been spawned by this bankruptcy and its attendant circumstances. In this case, the plaintiff, CIBC, and two of the defendants, 808756 Ontario and Grand Canyon are asserting equitable or security-interest claims in shares purchased by Melnitzer in a company known as Champion Chemtech Limited. The defendants, the Royal Bank and National Bank, are unsecured creditors of Melnitzer and are challenging the validity of the alleged interests of the three aforementioned parties. Finally, Coopers & Lybrand, the former court-appointed Receiver of Melnitzer, joins the Royal Bank and National Bank in challenging the equitable and security-interest claims but also asserts a court-created charge for its fees and disbursements against the Chemtech shares.

I. The Evidence

A. The CIBC Involvement

2 In the first few days of August, 1991, representatives of the National Bank uncovered facts showing that Melnitzer had perpetrated a massive fraud involving well over 20 million dollars. Victims of the fraud included several of Canada's major banks, some private companies and personal investors and even some of Melnitzer's law partners.

3 Mr. Thomas Kahnert was called as a witness by the CIBC. He was the account manager of the London corporate banking centre from January, 1990, up to October, 1992, and was responsible for Melnitzer's account. He produced bank records with respect to Melnitzer's account going back to September, 1984, when the seeds of Melnitzer's fraudulent activities had their approximate birth.

4 On September 27, 1984, Melnitzer applied to the CIBC for an $800,000 line of credit for the ostensible purpose of buying shares in the Vanguard Trust Company. Exhibit 7 (CIBC's Brief of Documents, Book II) dramatically shows at Tab 79 and 80 how this $800,000 credit facility was extended and increased over the ensuing years.

5 Tab 79 indicates that, on September 28, 1988, Melnitzer applied for a revised and increased credit line of $3,150,000. The internal bank assessment of the application indicates that Melnitzer was providing security for the line in the form of stock in a Melnitzer family holding company, Melfan Investments, additional stock in Vanguard Trust and a guarantee bond and undertaking from Melfan Investments. The bank assessor thought that these securities were worth $11,740,000. Of course, all of these apparently strong securities instruments were later found to be largely worthless or fraudulent or both.

6 A critically important change in the credit arrangements occurred under a July 21, 1989, credit application submitted by Melnitzer. He was now asking that the credit line be increased sharply to $7,150,000: see ex. 6, tab 3, CIBC Book of Documents, Book 1. The bank assessment records indicate that, on this occasion, Melnitzer wanted the $4,000,000 increase for 2 purposes, namely, (1) to purchase for $1,500,000 his father's remaining interest in Melfan Investments and (2) to purchase for $2,500,000 a substantial share interest in Champion Chemtech. These records also show that, by this time, the bank felt it already had securities worth about $16,239,000 from Melnitzer and that, now, Melnitzer would be assigning the additional Melfan and Champion Chemtech shares he was planning to buy.

7 Mr. Kahnert testified that, on about February 9, 1990, he was called by Melnitzer who advised that he needed to activate the increased credit line immediately to buy 500,000 Class G shares and 332 Class F shares in Champion Chemtech for $2,500,000. Mr. Melnitzer transferred the $2,500,000 from his personal account, no. 64-10716, to the CIBC trust account of the Cohen, Melnitzer law firm. Then, on February 12, a $2,500,000 cheque was issued on the law firm's account in favour of Champion Chemtech for the shares.

8 Mr. Melnitzer received the two share certificates covering the two classes of shares on March 2. His acknowledgment of receipt is on the back of the certificates: (ex. 6, tabs 16-17). He then turned these certificates over the Mr. Kahnert on March 6 in accordance with the credit commitment of July 21, 1989. Mr. Kahnert, in turn, immediately lodged the certificates for safekeeping with the security department of the CIBC.

9 The final step in the pledge of these shares occurred on May 17 when Melnitzer executed both a power of attorney and hypothecation agreement covering them. On the surface of things, at least, these shares were legally in the possession of the CIBC as part of the package of collateral security held for the credit line.

10 The form of the credit line did not remain static after the hypothecation of the Champion Chemtech shares was completed. Throughout the balance of 1990 and into 1991 the line was amended several times. An application on April 22, 1991, included a proposal by Melnitzer that he provide replacement "gilt-edged" public stock in substitution for the Vanguard Trust and Champion Chemtech shares. This application and its component proposal for an exchange of shares was quickly approved by CIBC on April 25. The actual exchange of shares took place on July 4 when Mr. Kahnert drove from London and met Melnitzer at his Toronto residence at around 6:45 a.m. Mr. Melnitzer turned over to Kahnert a share certificate in his own name for 98,435 shares of IBM and, in turn, Kahnert handed over the previously hypothecated shares in Vanguard Trust and Champion Chemtech. The exchange was sealed, as it were, with a letter agreement (ex. 6, tab 54) signed by both Melnitzer and Kahnert, reading as follows:

> Re: Release of Assigned Shares of Champion Chemtech Limited and Vanguard Trust of Canada Limited
>
> Further to our Terms Letter dated April 16, 1991, we hereby release the following listed shares (registered in your name) which have been hypothecated as part of the security package in support of your line of credit.

Name of Company	No. of Shares	Share Certificate Number
Vanguard Trust of Canada Limited	200,000 Common	A-393
	300,000 Common	86-C

	200,000 Common	A-027
	55,000 Common	A-014
Champion Chemtech Limited	332 Class 'F' Preferred F-1	
	500 Class 'G' Preferred G-1	

Following your acknowledgement of receipt of the above shares on the attached duplicate copy of this letter, we confirm that the respective

Hypothecation and Power of Attorney Forms held by the Bank regarding the above mentioned shares will be cancelled.

Yours very truly,

"T.G. Kahnert"
T.G. Kahnert
Account Manager
Corporate Bank

TGK/

I hereby acknowledge receipt of the above shares

Date: "July 4/91"

"Julius Melnitzer"

Julius Melnitzer
---

11 The last amendment to Melnitzer's credit line occurred under an application submitted on July 15, 1991. Mr. Kahnert said that, at this time, Melnitzer was complaining about the "restraints" on his then line of credit and wanted the line increased from $8,850,000 to $20,000,000 in exchange for the hypothecation of more gilt-edged securities in public companies such as Exxon, Canadian Pacific, McDonald's, BCE Inc. and IBM. The CIBC quickly approved this application on July 19, noting in its internal assessment of the loan proposal that the shares offered by Melnitzer were worth $29,413,647. The hypothecation agreements and powers for Melnitzer's newly pledged shares were all signed and delivered by Melnitzer by July 30.

12 The next development was the discovery by National Bank, on August 2, that it had received forged stock certificates for loan arrangements it had just made with Melnitzer. This discovery led the National Bank to apply, on Saturday, August 3, to Keenan J. for a broad Mareva-like order which had the effect of freezing all of Melnitzer's assets and appointing Coopers & Lybrand as receiver-manager of his affairs and assets.

13 On August 14, CIBC registered a Financing Statement under the *Personal Property Security Act* in an attempt to perfect an alleged security interest in the Champion Chemtech shares.

14 By this time Melnitzer had been arrested and charged under a 43-count fraud indictment. He later pleaded guilty to the charges in the indictment on December 19 and on February 10, 1992, was sentenced to 9 years in penitentiary, concurrent, on the 43 counts.

15 Having provided some largely undisputed general facts and those relating to CIBC, I now move on to an analysis of the involvement of the defendants, Grand Canyon and 808756 Ontario, in this complex web of deceit.

B. The Grand Canyon Involvement

16 Prior to the bankruptcy of Melnitzer, Grand Canyon was an investment vehicle for Melnitzer and Allan Richman. Each held 50% of the shares in the company with Richman's 50% interest being held in the name of Forward Properties, another investment company wholly owned by Richman.

17 Mr. Richman testified that in early 1990 he and Melnitzer were planning to buy what he thought would be a 20% share interest in Champion Chemtech through Grand Canyon. As he understood the deal, the cost of the shares would be $500,000 and Grand Canyon was to have title to the share purchased. Under the arrangement made with Melnitzer, each of them was to advance $250,000 into Grand Canyon's coffers and these funds were then to go out to make the $500,000 investment in Champion Chemtech shares.

18 He said that he trusted Melnitzer completely because of their long business association and relied upon him to handle the transaction in an appropriate way. He also indicated that Melnitzer said that he planned to make a personal investment in Champion Chemtech shares beyond the shares he was to purchase for the account of Grand Canyon. Mr. Richman said he received a handwritten note of instructions from Melnitzer sometime in February, 1990. Attached to it were photocopies of the front portions of 2 share certificates showing Melnitzer to be the holder of (1) 332 Chemtech Class F shares and (2) 500,000 Class G shares. Near the bottom of each certificate is a line indicating that these shares were signed by the signing officers of Champion Chemtech on February 12. The body of Melnitzer's note, which is undated, reads as follows:

> *Allan*
>
> Attached are (1) copies of Champion shares.
>
> Trustee agreement to follow.
>
> (2) statements from Theatre Corp. (3) cheque for 250,000 to GC. Please send me cheque for 500,000 payable to me personally ASAP
>
> (4) I will bill GC for 20% of legal fees at end of Feb. send to office
>
> Att'n Helen Pollock

19 Mr. Richman thought that he must have received Melnitzer's note just prior to or on February 20 because he issued a Grand Canyon cheque, dated February 20, for $500,000 payable to Melnitzer. This cheque was negotiated by Melnitzer through the Royal Bank on February 21.

20 Later, on March 9, Richman received an invoice, dated February 28, from the Cohen, Melnitzer law firm for $8,892.90, purportedly representing 20% of the legal charges for the overall Champion Chemtech share purchase. Mr. Richman also produced another cheque of Grand Canyon, dated May 29, for $8,892.90, payable to Cohen, Melnitzer and covering the above account.

21 Mr. Richman received a "Declaration of Trust" document from Mr. Melnitzer: ex. 12, tab 4. It is dated February 12 but Richman could only say that he thought he got this from Melnitzer in late February or perhaps early March. There is no receipt stamp on this document although there is, interestingly, a receipt stamp on the February 28 invoice showing it to have been received on March 9.

22 The net effect of Richman's evidence is this. He says he got the Declaration of Trust sometime after he issued the $500,000 cheque and never asked Melnitzer any further questions. He thought the Declaration of Trust protected the Grand Canyon investment. He conceded in cross-examination that he thought that the $500,000 investment was getting Grand Canyon a 20% interest in the entire Champion Chemtech company although other undisputed evidence shows that Melnitzer's total holdings (332 Class F and 500,000 Class G) only represented about 25% of Champion Chemtech's outstanding shares. Also, in cross-examination, he admitted that he had no idea where the proceeds of the $500,000 cheque actually went.

23 Some other problems should be mentioned here about the Grand Canyon investment. One must recall that the CIBC documents demonstrate, beyond challenge, the following things: (1) Melnitzer drew $2,500,000 on his CIBC line of credit on February 9, transferring that sum to the Cohen, Melnitzer trust account; (2) on February 12, Melnitzer issued a Cohen, Melnitzer cheque for $2,500,000 payable to Champion Chemtech to cover the full cost of the shares issued to him; (3) the backing sheets of the two share certificates, as shown in the records of the CIBC, indicate that Melnitzer only received the share certificates on March 2; (4) the share certificates were personally turned over to Mr. Kahnert of CIBC on March 6.

24 I will necessarily revisit these problems later in these reasons.

C. The 808756 Ontario Involvement

25 The last factual piece in the overall puzzle of this case relates to 808756 Ontario. I now attempt to sketch the contours of this piece.

26 The evidence put before me on behalf of 808756 Ontario came primarily from 3 former law partners of Melnitzer, namely, Ronald Delanghe, Russell Raikes and Kenneth McGill.

27 The gist of Mr. Delanghe's evidence was as follows. Mr. Melnitzer approached Delanghe and his other law partners in the sum mer of 1990 and offered them a golden opportunity to participate in what has become known in the lore of this case as "the Singapore Deal". He told them that he had a large investment in a Singapore property which was scheduled to be sold in mid-1993 at a guaranteed profit of gargantuan proportions. His then co-investor wished to withdraw and he invited his law partners and a few other friends to contribute investment loans up to a figure of $1,800,000 to replace and pay out the withdrawing co-investor. He asked Delanghe to act as a sort of collector for him, seeking out investors amongst the law partners and a small circle of other friends of Melnitzer in London.

28 Mr. Melnitzer told Delanghe and the others that the "funding" or collection date for the $1,800,000 had to be November 23, 1990, and that the funds were to be paid into the trust account of the Cohen, Melnitzer law firm on or before that date. Melnitzer apparently wished to be in a position to move the funds to Singapore on December 1.

29 Rather remarkably, this broad-gauged loan or investment proposal was never put in writing by Melnitzer. However, as best as I can, I draw the following terms from Delanghe's evidence: (1) the subscribing lender-investors would receive an interim interest rate of 10% per annum, payable quarterly (working out to $180,000 per annum); (2) the ultimate maturity date for the loans would be July 31, 1993, when the Singapore property was to be sold at a very large profit; (3) a bonus equal to 125% of the $1,800,000 gross loan figure was to be paid in mid-1993 along with the gross loan amount itself; this bonus works out to $2,340,000; (4) Melnitzer would provide security for the loans in the form of a "pledge" of 72% of the shares he owned in the Champion Chemtech company along with individual promissory notes and investment guarantee notes in favour of the individual lenders.

30 In the early fall of 1990, Melnitzer allegedly told his law partners that he would prefer their using a private company as the "vehicle" for the loan: this would simplify interim interest payments and the ultimate payments for him and might lead to tax advantages for the lenders.

31 He was the president and sole shareholder of 808756 Ontario and offered this company to the lenders as the investment vehicle. Delanghe said that the prospective lenders agreed to this latter suggestion about the employment of 808756 Ontario.

32 Delanghe said he prepared the notes and investment guarantees about 2 or 3 weeks before the funding date of November 23 and immediately gave them to Melnitzer for his signatures. He thought these documents were signed and given back to him by Melnitzer on or before November 23.

33 At the opening of trial, 808756 Ontario filed an exhibit book marked as ex. 8. Tab 22 of ex. 8 purports to contain photocopies of these notes and investment guarantees.

34 An analysis of the notes and investment guarantees at tab 22 creates some immediate concerns about the manner in which this entire loan transaction was carried out. Mr. Delanghe explained that the investment guarantee note represented the actual loan advance of each lender whereas the promissory note represented the bonus of 125%. Yet the notes and guarantees in tab 22 are a confusing mixture which, at the very least, raises serious questions about *when* they were prepared and the *haste* with which they were prepared.

35 The following is a summary table I have prepared of these notes and guarantees included at tab 22:

Lender	Investment Guarantee	Promissory Note
	Amount/Date	Amount/Date
Jaimie Watt	$ 25,000 undated	$ 31,250 undated
Iva Klouda	$100,000 undated	$125,000 Nov. 30
Barry Parker	--	$562,500 Nov. 30
		$450,000 Dec. 1
Kenneth McGill	$150,000 Nov. 30	$187,500 Nov. 30
Fletcher Dawson	--	$125,000 Nov. 30
Paul Vogel	$ 50,000 Dec. 1	$ 62,500 Nov. 30
Ronald Delanghe	$75,000 Nov. 30	--
Bonnie Delanghe	$500,000 - $125,000 Nov. 30	--
Totals	$1,025,000	$1,543,750

36 There are innumerable discrepancies and inconsistencies in these documents: (1) if the guarantees represent the face amount of the advances, they only add up to a total advance of $1,037,500 and not $1,800,000; (2) the total of the promissory notes amounts to $1,531,250, a figure well below the 125% bonus on $1,800,000; (3) On Mr. Watt's promissory note the amount of the note is written in words as "one hundred and twenty-five thousand" and in figures as "31,250"; (4) there is no consistency in the execution date on the documents: 3 of the guarantees are undated along with 1 note; the rest are signed on either November 30 or December 1; (5) no guarantees appear for Barry Parker and Fletcher Dawson; (6) no notes appear for Ronald and Bonnie Delanghe; (7) seemingly, Barry Parker received *two notes* for the respective amounts of $562,500 and $450,000 when it must have been intended that he was to sign a note and guarantee for these amounts; (8) if, as Delanghe claims, he got all of these documents back from Melnitzer by November 23, why did he apparently fail to notice these serious discrepancies and missing documents and not do something to correct the situation immediately?

37 The balance of Delanghe's evidence was an attempt to demonstrate that the investment vehicle, 808756 Ontario, had, in fact, been put into operation on or before the funding date of November 23 and that, therefore, 808756 Ontario became the lawful holder of a pledge of the Chemtech shares under a Declaration of Trust document allegedly signed by Melnitzer on November 23.

38 He claimed that the partners had, "several weeks" before November 23, consulted an accountant, Morey Watson, of Deloitte Touche, who advised them on the form of the transfer of the loans from the individual lenders to the corporate entity. He also claimed that, well before November 23, the lenders had agreed to use 808756 Ontario. The result was that the company was effectively transferred from Melnitzer to the lenders on or before the November 23 collection date.

39 Delanghe went on to identify a series of resolutions, subscriptions and share certificates at tabs 4-21 of ex. 8 under which he claimed the transfer took place. These documents appear to show that, on November 23, a series of resolutions were signed under which (a) Melnitzer resigned as president and gave up his shares (b) Ronald Delanghe was appointed as president,

Barry Parker as vice-president, Kenneth McGill as secretary and Iva Klouda as treasurer and (c) each of the lenders became subscribing shareholders in the restructured shares of the company for payments equivalent to the loans they had agreed to advance Melnitzer.

40 Once again, a close examination of the subscription records (tab 10) reveals inconsistencies and discrepancies, both internally and when compared with other documents: (1) they all purport to indicate that signatures were affixed on November 23; this is puzzling when one considers, for example, that other evidence reveals that Mr. Watt had not committed himself to participate until early December; (2) both the Vogel and Watt subscriptions are unsigned; (3) the McGill subscriptions are in three documents with Margaret McGill a subscriber in two of them; (4) the Delanghe subscriptions are in 3 documents with another Delanghe — Gail Delanghe — introduced in one of them and her document is unsigned.

41 It may be pointed out that some of the subscription records are either inconsistent with the share allotment resolution included at tab 11 or with the investment guarantees and promissory notes already referred to and included at tab 22. For example, we know from other evidence that Mr. Watt paid his advance on December 7 (tab 23) yet his unsigned subscription at tab 10 is dated November 23. Also, Margaret McGill appears amongst the subscribers on *two* of the signed subscriptions yet there are no investment guarantees or promissory notes in her name. In short, these various documents in ex. 8 — signed and unsigned, dated and undated — are a chaotic mess at best.

42 Mr. Delanghe went on to explain other critically important features of the alleged utilization, in November, of the corporate vehicle for the loans. He said that he had collected all but Watt's contribution by November 23 and that the monies were placed in the Cohen, Melnitzer trust account at the CIBC on that day. On the same day the law firm issued a cheque to cover the $1,800,000 advance to Melnitzer personally. He rather airily explained the failure of the $1,800,000 to go through the bank account of 808756 Ontario by stating that he had received "verbal" authorization from the lenders to do this, adding that the law firm was receiving the funds for the company.

43 Mr. Delanghe next moved on to identify and discuss two other documents, namely, (1) a Declaration of Trust document, signed by Melnitzer and dated November 23 (tab 3), and (2) an agreement between 808756 Ontario and Melnitzer, purportedly signed by Melnitzer on November 23 but not signed at all by the company (tab 20). Mr. Delanghe said that he thought Kenneth McGill, another partner at Cohen, Melnitzer, had prepared these and he also thought that McGill might have witnessed Melnitzer's signatures on both. In fact, there are *no witnesses* to Melnitzer's signatures on either of these documents.

44 As I have said already, Delanghe described the Declaration of Trust document as a "pledge" document. It reads this way:

> **Declaration of Trust**
>
> I hereby declare that 239 Class F shares and 360,000 Class G shares in the capital of Champion Chemtech Limited registered in my name are held by me as nominee of 808756 Ontario Inc., and I hereby agree to deal with the said 239 Class F shares and the said 360,000 Class G shares in accordance with written instructions received from 808756 Ontario Inc. subsequent to August 31, 1993 save and except if the trust hereby created no longer exists.
>
> I hereby undertake and agree to pay to or to the order of the said 808756 Ontario Inc. all dividends, including stock dividends or other distributions, whether of capital or income, that may from time to time be payable on the said Class F shares and the Class G shares of Champion Chemtech Limited.
>
> DATED as of the 23rd day of November, 1990
>
> "J.M. Melnitzer"
>
> Julius H. Melnitzer

45 Mr. Delanghe could not say who received this document, or exactly when, but he was confident that the firm must have received it after the notes and guarantees and probably on or before November 23. In any event, he was firm that his pledge or collateral security document was "worked out" a few weeks before November 23.

46 The agreement document (between Melnitzer and 808756 Ontario) represents a strange and rather anomalous part of the overall picture. Its recitals state, first, that 808756 Ontario "wishes to acquire beneficial title to 239 Class F and 360,000 Class G shares" in Champion Chemtech, a number which worked out to 72% of Melnitzer's gross shareholding. The agreement is couched in the language of a share purchase with the company being called "purchaser" throughout the document. The last paragraph of the agreement states that the "purchase price for the shares" is $1,799,900, thus tying the agreement to the gross loan amount.

47 There are 2 serious difficulties with this so-called agreement: (1) it was only signed by Melnitzer and (2) there is a perplexing clause in the body of it reading as follows:

> The Vendor shall on even date herewith execute and deliver to the Purchaser a declaration of trust in the form of the declaration of trust attached hereto as Schedule A.

48 Unfortunately, the copy of this document produced by 808756 Ontario as tab 20 has no Schedule A attached to it and no original of the document was produced at trial. Of course, the Declaration of Trust document marked as tab 3 was produced but Delanghe attempted to distance this latter document from the agreement even though it is also dated November 23 and seems the only logical candidate for characterization as the Schedule A document.

49 Mr. Delanghe was strongly pressed in cross-examination on the interrelationship of these two documents. He insisted the agreement was being negotiated as part of the roll-over of the deal to 808756 Ontario in an effort to protect the 10% interim interest payments under the loans as dividends of the company.

50 He then went on to claim that, at some unknown point, this agreement was abandoned but that the Declaration of Trust continued as a "stand-alone" pledge notwithstanding its obvious linkage to the concededly abandoned agreement which, as noted, was only signed by Melnitzer.

51 In the final portion of Delanghe's evidence he identified two financing statements which were registered under the PPSA on the strength of the Declaration of Trust document above. The first of these registrations was made on August 22, 1991, against the name "Julius H. Melnitzer". The second was registered on August 29 against the name "Herman J. Melnitzer".

52 He also acknowledged here that at the end of July in 1991, just before the whistle was blown on Melnitzer's fraudulent activities, he received two large personal cheques from Melnitzer — both postdated to August 31, 1991. As he recalled them, one was payable to himself for $3,500,000 and the other was payable to 808756 Ontario for an accelerated full payout of the $1,800,000 loan, including the bonus and interest. Other evidence was later put into the trial record which showed some deficiencies in Delanghe's recollection of these cheques. In fact, the cheque payable to Delanghe personally was for $1,600,000 and the second cheque was payable to another numbered company *931755 Ontario Limited*, for $5,000,000: see ex. 24, a statement by Iva Klouda to the R.C.M.P.

53 Kenneth McGill, also called by 808756 Ontario, gave important evidence in this case. It must be said at the outset that his evidence collided with that of Delanghe in several ways but its total impact was to shed light in some dark corners.

54 Mr. McGill joined Cohen, Melnitzer in 1988 along with Delanghe and became a partner in 1989. He became an investor in the Singapore Deal to the tune of $150,000.

55 Mr. McGill was a specialist in corporate and commercial law. He started his evidence by saying that the original structure of the loans to Melnitzer was changed in the fall of 1990 to provide for the insertion of 808756 Ontario between the individual investors and Melnitzer. The original Minute Book of 808756 Ontario was introduced at the opening of his evidence and he confirmed that he had done all of the resolutions, share transfer documents and even the agreement and Declaration of Trust already identified by Delanghe. In his examination in chief, he, like Delanghe, was confident that all the documentation relating to the roll-over of the deal to the company was done before or contemporaneously with the November 23 funding date.

56 He did, however, make 2 startling revelations in chief which impact on the entire case put forward by the company.

57 The first such revelation related to incidents which occurred on the evening of Monday, August 5, at Cohen, Melnitzer law office. It is to be remembered that this was *after* the frauds were discovered and Melnitzer had been charged.

58 Mr. McGill said he was at the office on this night with most of his partners. During their discussions a phone call was apparently received from a London lawyer who was representing Melnitzer in respect of the criminal charges. Mr. McGill could not remember who answered the phone but his recollection was that whoever answered told the assembled partners that Melnitzer was at the criminal lawyer's office and was prepared to sign any documents which needed to be signed for the Singapore Deal. Mr. McGill says that the result was that he and another partner Russell Raikes, went over to the criminal lawyer's office with the Minute Book of 808756 Ontario with them.

59 Mr. McGill says that, before they left the Cohen, Melnitzer office, he thinks he tabbed a few pages of "organizational resolutions" in the Minute Book which he somehow discovered had not been signed by Melnitzer after the company was incorporated in 1988.

60 He says that when they got to the other office they met the criminal lawyer who told them that Melnitzer was in another room. They then gave the Minute Book to this lawyer, who, in turn, left the room to attend upon Melnitzer elsewhere in the office. He claims that the lawyer returned in a few minutes with the Minute Book and that the so-called organizational resolutions were signed. They then left the lawyer's office with the Minute Book and returned to their own office. He claims that they never saw Melnitzer during this visit and was adamant Melnitzer did not then sign any of the Minute Book documents relating to the Singapore Deal or any other documents such as the agreement or Declaration of Trust.

61 The second of these revelations related to numbered company, 931755 Ontario, which had not been mentioned in the evidence of Delanghe although, clearly, he had received a post-dated cheque from Melnitzer in favour of that company for $5,000,000 at the end of July.

62 During his testimony about the Minute Book of 808756 Ontario McGill was confronted by a spate of resolutions apparently signed on April 25-26, 1991, which seemed to transfer the company back into the hands of Melnitzer. These resolutions and associated transfer documents were in disarray but their net effect, leaving aside deficiencies, was to make Melnitzer the sole shareholder and officer once again.

63 Mr. McGill's explanation for this strange turn of events was that, in about the month of March, 1991, Melnitzer approached him and the other lenders and indicated he wanted 808756 Ontario back for other purposes and thus it was decided that 931755 Ontario would be incorporated to take over the role of the other company.

64 The Minute Book for the new company was produced for the first time during McGill's evidence. It shows that the company was incorporated on May 1 and the organizational resolutions show McGill as president and secretary. The Minute Book shows many draft and unsigned documents, including some draft, unsigned promis sory notes between the companies, but it was conceded that this company had not got off the ground. Mr. McGill really had no explanation as to why so many of the transfer documents in the 808756 Ontario Minute Book were dated on either April 25 or 26 when the new company was not incorporated until May 1.

65 Because of the late production of the Minute Books and the rather startling revelations in McGill's evidence in chief, McGill was subjected to searching cross-examination. His confidence about when the roll-over resolutions and related documents for 808756 Ontario were signed quickly evaporated.

66 He was strongly pressed about some correspondence between two accountants and the Cohen, Melnitzer firm in November and December, 1990. It will be recalled that Delanghe had given evidence that the law firm had consulted with Morey Watson of Deloitte Touche several weeks before the funding date of November 23, leaving the clear implication that his advice had been acted upon.

67 Ex. 29 was an advisory letter from the accountant, Morey Watson, to Delanghe, dated November 19, 1990, containing a complex and convoluted proposal as to how a private company could take over the Melnitzer loans. Mr. McGill conceded that Watson's advice was regarded as impractical and was not acted upon.

68 Mr. McGill also identified a December, 1990 exchange of letters between himself and a new accountant, Garth Howes of Ernst & Young. Mr. McGill's letter to Howes, dated December 7, (ex. 30) outlines the general contours of the roll-over to 808756 Ontario but it is compellingly clear from this letter that the transaction had not been carried out by the date of the letter.

69 The beginning portion of the letter reads as follows:

> Further to our discussion in connection with the captioned matter, I would put forth the following for your information and comment:
>
> 1. I propose to use 808756 Ontario Inc. as Investco.
>
> 2. The company was incorporated December 9th, 1988 and has been an inactive shell ever since.
>
> Currently the G.L. is the holder of 100 common shares in the capital of 808756 Ontario Inc. and is the sole director, shareholder and officer thereof.

70 The letters "G.L." used in this passage refer to a nickname or acronym which Melnitzer's partners used in describing him in this period — the "Great Leader". It is obvious from this passage and what follows that the roll-over to 808756 Ontario was a mere concept in early December and had not been implemented on paper or otherwise.

71 Later in the letter he asks Howes for advice on whether Melnitzer should remain a shareholder or not. Then, he discloses to Howes a plan to acquire about 10% of a Canadian-controlled private company, presumably meaning Champion Chemtech.

72 At p. 2 of the letter McGill makes reference to what can only be the planned purchase by 808756 Ontario of shares in Champion Chemtech:

> The question I have is whether the G.L. should remain a shareholder or should he transfer his shares to one of the new shareholders. This point arises again subsequently.
>
> 808756 Ontario Inc. will then acquire more (but only slightly more) than 10% of a Canadian controlled private corporation.
>
> There will be a trust agreement restricting the voting of the shares held by 808756 Ontario Inc. in the Canadian controlled private corporation.
>
> Particulars of the Canadian controlled private corporation are not yet available, but will be forwarded to you immediately upon the information becoming available.
>
> What is the impact of holding not less than 10% of the Canadian controlled private corporation?

73 The letter later talks about a "shareholder agreement" between the shareholders of 808756 Ontario to set out their rights inter se — something that was concededly never prepared or executed at any time.

74 Mr. Howes' reply to McGill, dated December 10, (ex. 31) reviews McGill's proposals and answers some of McGill's concerns. He says, for example, that Melnitzer probably should not continue as a shareholder. Also, he discusses the pros and cons of the proposed purchase of shares in the so-called Canadian-controlled private company. It is clear that he has some grave concerns about the viability of this proposal from a tax perspective.

75 In cross-examination, McGill was clearly physically distressed by the dates of these letters and their contents. He seemed at a loss to explain how they could have been written in December when he thought his memory otherwise told him that the 808756 Ontario roll-over had been completed in all aspects by not later than November 23, 1990.

76 His distress heightened when, in cross-examination, he was presented with his statement, dated August 2, 1991, given to R.C.M.P. investigators during their investigation of Melnitzer (ex. 25), and another similar statement (ex. 26) given by Barry Parker, one of the other investors.

77 In his statement, McGill clearly states at p. 3 that the roll-over to 808756 Ontario was not done until after the accountant, Garth Howes, was brought into the picture:

> I then contacted Garth Howes at Ernst & Young, a friend of mine and asked him to advise on the transaction. We had 2 or 3 meetings on the matter and finally decided to structure the transaction by means of a corporate structure. At least one letter was received from Mr. Howes who was also present at least one meeting with a group of the proposed shareholders.

78 He also acknowledged, at p. 4 of the statement, that he prepared the agreement with respect to the Chemtech shares and the attendant Declaration of Trust. This passage also contains a devastating admission that he had seen the Champion Chemtech shares, knew that they contained a broad prohibition against transfers or pledging and had told his partners about this prohibition:

> I do not recall how the decision to take the Champion Chemtech shares as security arose. I believe it originated in discussions between Julius Melnitzer and Ron Delanghe as the first time I heard about it I believe was in Mr. Delanghe's office with Julius being present. Julius agreed to give us the shares as security as long as it did not involve going to the other shareholders in Champion Chemtech Inc.
>
> I met with Julius in his office one afternoon and he told me how many shares he had and how many should be put into trust for us. Julius did the calculations because, as he stated, he always trusted his own numbers more than anyone else's. I prepared an agreement between the parties and a trust declaration. I reviewed the share certificates of Champion Chemtech Inc. and the shareholder's agreement which Marlene McGrath of our offices had as she was involved in the acquisition by Julius of his position in that company. I was aware and made Julius, Ron Delanghe, Barry Parker, Iva Klouda and I believe Fletcher Dawson all of whom were involved in the transaction also aware that what Julius proposed to do with the shares was not provided for in the existing shareholder's agreement (between Champion Chemtech & Julius) as I read it. However, because of the fact we were dealing with Julius Melnitzer we all chose to ignore this matter. The agreement between Champion Chemtech and shareholders did not allow for the shareholder to pledge the shares.

79 The statement of Parker was also put to McGill. The following passages in it are pertinent:

80 (1) *At p. 8:*

> BP: I think the first meeting was before the money went in. and then we went to another accountant and I know the other guy got involved after the money had been paid into the law firm. And the deal ... then a company was set up to properly, at that point, even though it was after the fact, secure our investment and to document this whole matter.

81 (2) *At p. 11*:

> RP: When did this company actually get formed? Was it after the money had already been invested in the fall of 1990?
>
> BP: Yah. The paper work got done later on — it would have been in early 1991.

82 Mr. McGill conceded in cross-examination that his memory was better in August, 1991, when he gave his statement to the R.C.M.P. He thought that anything in that statement was true and accurate. He felt that, in light of that statement and the correspondence with Howes, he must be mistaken about the "time-frame" of the events incidental to the preparation of the roll-over documents into 808756 Ontario.

83 I now proceed to deal with the many legal issues which arise in this case.

II. Resolution of the Issues

A. The Claim of CIBC

84 Messrs. Angeletti and Wallace, counsel for CIBC, presented 2 alternative arguments in favour of their position that CIBC held a prior interest in the shares over other claimants: (1) their first argument was based on constructive trust principles and the equitable doctrine of tracing; (2) their alternative position was that the CIBC held a perfected security interest in the shares under the PPSA and that this security interest remains valid to the present time.

85 These arguments are complex and I propose to consider each of them in detail.

86 It is undisputed that on February 9, 1990, Melnitzer drew $2,500,000 on his credit line with the CIBC and placed this sum in his law firm's trust account at the same bank. Then, on February 12, he issued a certified trust cheque for the same sum and delivered it to Champion Chemtech in payment for 500,000 Class G and 332 Class F shares.

87 Mr. Angeletti argued that because this transaction was based on a fraudulent scheme on Melnitzer's part, a constructive trust arose on February 9. At that time an unjust enrichment and deprivation occurred for which there was no juristic reason. Assuming the trust is imposed, he submitted that this is a case where the equitable doctrine of tracing enables the court to trace the funds and declare a proprietary interest in the shares.

88 In broad outline, Mr. Angeletti is relying on a network of 6 principles or rules of law in support of his position:

1. The constructive trust is an equitable remedy, granted to prevent unjust enrichment.

2. There are 3 elements to the remedy: (a) unjust enrichment (b) a deprivation (c) the absence of any juristic reason for the enrichment.

3. The constructive trust must be the appropriate remedy in the circumstances.

4. In Canada at least, it is not necessary to show a fiduciary relationship between the parties.

5. The equitable rules of tracing allow the beneficiary to trace into substituted property.

6. If 2 or more parties claim a beneficial interest in the property, the rule is that the first in time has priority.

89 With all respect for the remarkably well-developed structure of Mr. Angeletti's argument, I cannot agree that the CIBC has shown there has been an unjust enrichment and that a constructive trust should be imposed on the shares.

90 Since 1978, the Supreme Court of Canada has released a series of landmark judgments outlining and refining the limits of the equitable remedial doctrine of constructive trust: see *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289; *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [hereinafter *Pettkus*]; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321.

91 It is now clear in Canada that the principle of unjust enrichment is fully recognized as a general basis for liability along with tort, contract and so on. The constructive trust is an equitable remedy which may be granted in order to prevent the unjust enrichment of a person.

92 The history of the evolution of the doctrine of constructive trust is usefully reviewed in Professor Fridman's *Restitution*, 2nd ed. (1992), at pp. 434-446. He says this at pp. 436-437:

A doctrine that was designed to deal with misbehaving express trustees eventually was employed to prevent others who were con sidered to be fiduciaries even though they were not express trustees from making use of their positions and the opportunities made available by their occupation of those positions to gain an advantage for themselves when they ought to have been using their situation, knowledge, and abilities and exploiting their opportunities for the benefit of those in respect of whom they were fiduciaries. Equity spun the web of constructive trust around such persons and constrained their freedom to act for themselves to the detriment of those to whom they owed duties of fidelity. Among those who were treated in this way were agents, solicitors, bankers, directors of companies, who were regarded in equity as owing fiduciary duties to their principals, clients, customers, and corporations ...

The constructive trust thereby became an important tool in the armoury of the law. In Canada, it came to be recognised and accepted as more than just a relationship that could be imposed by the law on parties not originally trustee and beneficiary. It was turned into a method whereby, whenever an unjust enrichment occurred, the situation could be rectified by using the constructive trust as a remedy to enforce the recovery of that enrichment from the defendant. For this to happen, it was necessary that situations where a fiduciary profited for himself rather than the person properly entitled to the advantage in question should be considered to be instances of unjust enrichment. [Footnotes omitted.]

93 Professor Fridman points out the broadened and perhaps uniquely Canadian version of the constructive trust had its seeds in the judgment of Laskin J. in *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371 where he held, at p. 392 D.L.R., that money awarded to the plaintiff on the ground that the ex-employees had exploited an opportunity that came to them only because of their position as senior officials of the plaintiff company could be viewed "as an accounting of profits, or, what amounts to the same thing, as based on unjust enrichment".

94 From this holding the Supreme Court moved on in such cases as *Rathwell, Pettkus* and *Sorochan* to deal with the proprietary rights of husband and wives, and then cohabiting men and women, and established a fresh set of principles along with a method whereby the women in question could obtain a share in the wealth achieved through joint efforts during the period of cohabitation.

95 In a now famous statement in *Rathwell, supra*, Dickson J. explained the requirements to be satisfied before an unjust enrichment could be said to exist in this fashion at p. 306 D.L.R.:

... for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

96 The later case of *Pettkus, supra*, made it clear that the principle and its remedial adjunct, the constructive trust, would not be confined to matrimonial or related cases. As he said at p. 276 D.L.R.:

The 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.

97 The facts of this case disclose that Melnitzer and the CIBC had a contractual debtor-creditor relationship going back at least to 1984. The evidence shows an almost endless series of credit lines being granted to Melnitzer under contractual arrangements of the parties. Those lines were undergirded by pledges of shares and other forms of security and it is conceded that almost all of these various forms of security were fraudulently created by Melnitzer and were worthless.

98 The $2,500,000 advanced by CIBC on February 9, 1990, was actually part of a credit line negotiated and concluded in July, 1989 when Melnitzer's credit limit was raised from $3,150,000 to $7,150,000: see ex. 7, tab 79. When Melnitzer made his July 21, 1989 application for a $4,000,000 increase in his line of credit he disclosed that he wished to use $2,500,000 to buy the Champion Chemtech shares. The internal bank records show that the immediate security for the loan was the pledging of $16,239,000 in shares of Melfan Investments and Vanguard Trust together with the usual overdraft lending agreement: see ex. 6, tabs 3 and 4. The ostensible purpose of the increase was to enable Melnitzer to buy out his father's last share in Melfan Investments for $1,500,000 and to purchase a $2,500,000 interest in Champion Chemtech.

99 Mr. Kahnert stated that the CIBC placed no specific lending value on the Champion Chemtech shares until after the disclosure of Melnitzer's fraud in August, 1991. The internal assessment officer of the bank, K.R. Willoughby, who wrote up the background approval for the loan increase (ex. 6, tab 3), said this at p. 7 of his report:

> Although we are not placing any significant value on the shares, we are confident in Melnitzer's investment activities and his business sense, and that the investment should prove lucrative for Melnitzer.

100 The fact of the matter is, however, that the bank insisted in its commitment that Melnitzer assign the Champion Chemtech shares as additional security, when they were purchased, as part and parcel of the increase in the credit line.

101 Mr. Melnitzer was permitted by CIBC to draw down the $2,500,000 on February 9 on the strength of its existing security package which had been in place since July, 1989. It only received possession of the shares on March 6, 1990, and the follow-up hypothecation agreement and power of attorney on May 19.

102 Mr. Angeletti argued that all 3 requirements for an unjust enrichment were established on the facts. The deprivation was the ad vance of the $2,500,000 and the corresponding enrichment was the receipt of the moneys by Melnitzer, traceable into the shares. The third element — no juristic reason for the enrichment — was, he argued, also made out because there was simply no intervening legal justification for the enrichment.

103 There are, I think, a multiplicity of factual and legal reasons why CIBC has failed to meet the requirements for an unjust enrichment and consequential constructive trust relief. First, while Melnitzer was arguably enriched on February 9 I cannot see that CIBC suffered a true deprivation. The fact of the matter is that the February 9 advance was part of a contractual commitment by the bank that went back 6 months in time. Also, the CIBC got exactly what it expected in the form of possession of the Champion Chemtech shares within a matter of 1 month, backed up by the hypothecation agreement and power of attorney. The CIBC is essentially trying to argue that a fraud which had occurred incidental to the credit commitment in July, 1989 and, for that matter, cascading back in time through to 1984, should somehow be compressed into a neat and small time capsule on February 9 and lead to an unjust enrichment finding. Fraud there was well prior to February 9 but I cannot conclude there was a true deprivation on and after February 9. The designated purpose of the $2,500,000 advance was fulfilled through Melnitzer's purchase of the shares on February 12 and the CIBC actually received a possessory security interest in these shares which was contemplated under the contractual loan commitment going back as far as July, 1989. The fact that the CIBC later gave up possession of the shares on July 4, 1991, does not change the picture in February, 1990.

104 The second reason why the CIBC position must be rejected arises under the third requirement for unjust enrichment, namely, that there was no juristic reason for the enrichment.

105 In *Rathwell*, as I have noted, Dickson J. explains that juristic reasons would include "a contract or disposition of law". Here the evidence shows that there was a contractual debtor-creditor relationship between Melnitzer and the CIBC at all times. Both parties maintained their commercial lending arrangements over the years with their eyes fully open and each of them obviously saw the arrangement as commercially advantageous. The fact that Melnitzer provided fraudulent security documents to the CIBC throughout the years does not, per se, vitiate ab initio the contractual explanation for the flow of loan advances and the counter-flow of interest and capital repayments. In my view, then, the contractual nature of the relationship between the parties provides a "juristic reason" for the advance to and enrichment of Melnitzer such that the CIBC cannot satisfy the third essential requirement for an unjust enrichment finding.

106 There is support for my finding on this point both in the case authorities and scholarly commentaries. Professor Fridman, in his work on *Restitution, supra*, neatly summarizes the point I make this way at p. 441:

> A further requirement for the imposition of a constructive trust in such instances is that there be no juristic reason for the enrichment. Therefore, where the relationship between the parties was that of debtor and creditor under a contract between them, the granting of a constructive trust would have entailed setting aside the contract. This would seriously

infringe the efficacy of contracts as a whole. Hence, there was a good juristic reason for denying the application of the constructive trust doctrine.

107 Professor Hayton's article, "Constructive Trust: Is the Remedying of Unjust Enrichment a Satisfactory Approach?", Youdan ed., *Equity, Fiduciaries and Trusts* (1989), is to the same effect. He says this at p. 215:

> Voidable transfers of property need to be distinguished from voidable loan transactions intended merely to create a debtor/creditor relationship. In the former case, the plaintiff has a proprietary right sufficient to justify tracing, though, it seems, with priority depending on the rules for mere equities as opposed to full equitable interests. In the latter case, the plaintiff has an *in personam* claim, so that on the bankruptcy of the defendant debtor the plaintiff only has a personal claim having no priority over other creditors. [Footnote omitted.]

108 It may be pointed out here that not only does the CIBC have an *in personam* claim against Melnitzer but it has already asserted that claim. At the time of Melnitzer's sentencing, on February 10, 1992, Maloney J. issued a compensation order in the CIBC's favour for $8,392,629.10 under s. 725(1) of the *Criminal Code* (ex. 7, tab 81). That order is unaffected by Melnitzer's bankruptcy so that, to that extent, it puts the CIBC claim in a somewhat preferred position vis-à-vis Melnitzer's general body of creditors.

109 The most recent authoritative statement of the issue at stake is found in the *LAC Minerals* case, *supra*. There, the Supreme Court ended up concluding, in a closely divided decision, that there was no unjust enrichment but that the defendant had committed a breach of confidence, justifying the imposition of a constructive trust on the property in dispute. In the course of the dispositive judgment of La Forest J., that learned justice made it clear that, when a restitutionary claim had been made out, the trial court must move on to decide whether the constructive trust is "the appropriate remedy" in all the circumstances of the case. He said this at p. 51 D.L.R.:

> I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be.
>
> . . . . .
>
> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but the right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter, supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; *a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property*. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy.
>
> (Emphasis added)

110 This holding of La Forest J. is of critical importance in cases such as the present one where the assertion of the proprietary remedy is made in a commercial contract framework.

111 Even if I had held that the CIBC had made out a valid unjust enrichment claim, I would hold that the facts of this case do not support the imposition of a constructive trust remedy.

112 La Forest J.'s holding dictates caution, generally, in using the constructive trust vehicle in restitutionary cases. He also points to a concern about the appropriateness of the given plaintiff receiving what amounts to a priority interest otherwise accorded to a secured creditor in a bankruptcy. Here, if I awarded the constructive trust remedy, the CIBC would be given, retrospectively, a priority property interest over the other property-interest claimants as well as the general creditors of Melnitzer.

113 There are many evidentiary factors, I think, which would make it unjust and inappropriate to grant the remedy here.

114 (1) There is the debtor-creditor relationship of the parties, going back to 1984.

115 (2) There is the fact that the CIBC has its normal contractual remedies and has already asserted these by obtaining a compensation order.

116 (3) The CIBC took a valid security interest in the shares through the possessory pledge of the shares. The later release of the shares on July 4, 1981, cannot change the fact that security was given for the advance on February 9.

117 (4) The CIBC and its officials were lax to the point of negligence over a period of 7 years in their dealings with Melnitzer. Let me identify some of the indefensible carelessness on the part of the CIBC:

118 a) Mr. Kahnert admitted that, as far back as November, 1985, the bank was concerned about Melnitzer's holdings in Vanguard Trust but really made no independent inquiry. At this time the Vanguard stock was pledged to the bank to support a line of credit of $1,320,000 and the reality was that Melnitzer's true holding in this stock was almost worthless.

119 b) The same point can be made about Melfan Investments, the Melnitzer family investment company in Montreal. From 1984 onwards, Melnitzer was able to bamboozle a myriad of CIBC officials into thinking that this was a hugely successful private company. He was also able to make them believe that he had a substantial stake in this company with his father.

120 By September, 1988, the bank was putting a value of $11,742,000 on Melnitzer's alleged interests in Vanguard and Melfan. There is no evidence in the CIBC records showing that the CIBC ever took the trouble, at any time, to check with the other principals of these companies to ascertain Melnitzer's true interests. Always, the bank relied on Melnitzer's word and their "belief" in his worth and character along, in some instances, with some forged letters or records of third parties, such as Melnitzer's accounting firm, Marcus & Associates.

121 By mid-1990, Melnitzer had charmed Kahnert into believing that Melfan had $4,500,000 worth of term deposits at the Bank of Montreal: see ex. 6, Tabs 27 and 55. These term deposits were supposed to support a new Melnitzer loan commitment made on April 12, 1990. Mr. Kahnert admitted, in cross-examination, that he tried to contact the Bank of Montreal about these deposits and that Melnitzer himself put roadblocks in his path during his abortive inquiries. Yet he never followed up, in these suspicious circumstances, with reasonable efforts to get direct proof that the deposits existed.

122 c) There is also the case of the Champion Chemtech shares. Kahnert admitted he saw the warning notice of the face of the two share certificates on March 6, 1990, and acknowledged that he asked Melnitzer to produce the shareholders' agreement. Yet, once again, he let the matter drop without further inquiries.

123 d) In the early spring of 1991 Melnitzer was being pressed by some of his creditors and was attempting to increase his credit lines with CIBC and other banks. In late March, Kahnert prepared a financial statement on Melnitzer's net worth (ex. 6, tab 41). Rather incredibly, it showed his gross assets at *$66,750,000* and his net worth at $55,350,000 making him, on paper, one of Canada's richest men. He admitted that he relied, virtually totally, in preparing this statement, on Melnitzer's word and on scraps of paper provided by Melnitzer: see, for example, ex. 7, tab 78.

124 There are figures in the "assets" column of this statement which literally boggle the mind yet there is essentially no evidence in the record that CIBC did any reasonable check of the figures set out in it. I have no doubt that a due diligence check of the figures produced by Melnitzer in March, 1991, would have brought a quick end to Melnitzer's frauds. But the bank had blinded itself in its desire for Melnitzer's business and plunged on with a new credit line for him.

125 e) The final credit line granted to Melnitzer shows the height — or nadir — of the bank's folly.

126 The first step was Melnitzer's proposal that he exchange blue-chip IBM stock for the already pledged Vanguard and Champion Chemtech shares. This proposal was included in Melnitzer's credit application of April 25, 1991, and was approved by the bank on the next day.

127 The share exchange was to occur after July 2 if Melnitzer complied with other terms of the April 26 credit commitment: see ex. 6, tab 28 (April 26 CIBC credit commitment letter, p. 3).

128 Finally, on July 4, Kahnert met Melnitzer in Toronto and the share exchange took place: the CIBC now had a forged IBM share certificate (ex. 6, tab 56) purporting to represent 98,435 shares having a worth of $11,098,054 in exchange for the Champion Chemtech shares.

129 Mr. Kahnert once again admitted that CIBC did nothing to check the authenticity of this share certificate even though a simple call to the transfer agent would have shown it to be a forgery and of no value.

130 The last chapter of the CIBC's corporate naïveté and blindness occurred on July 19 when it increased Melnitzer's line of credit to $20,000,000 on the basis of Melnitzer's pledge of shares in IBM, Canadian Pacific, Exon, McDonald's and BCE Inc. having an alleged value of $29,413,647.

131 The forged share certificate for these shares were turned over to the bank in late July and, in turn, the bank released all of the earlier securities it was holding, including the Melfan shares and guarantees. Mr. Kahnert acknowledged that the bank had done no checking on the validity of these share certificates prior to Melnitzer's arrest on August 4.

132 I am acutely appreciative of the reasons which led the Supreme Court to forge a new path for the principle of unjust enrichment and its corollary remedial mechanism, the constructive trust, in family cases or family-like cases. *LAC Minerals* provides an example of a commercial situation where the uniqueness of the Williams mining property dictated the imposition of a constructive trust after an equitable cause of action had been established. The facts of the case at hand fall squarely on the other side of the line and do not justify the use of the constructive trust.

133 My final point here relates to the use of equitable tracing rules as a basis for the imposition of the constructive trust. My reading of the applicable cases and commentaries leads me to conclude, in any event, that these tracing rules could not be used to trace the $2,500,000 advance into the Champion Chemtech shares.

134 The equitable rules are admittedly somewhat technical and vague in their scope and effect but one such rule is that tracing should not be permitted where the claim arises out of a debtor-creditor relationship. The rule is set out in *Kerr on Fraud and Mistake*, 7th ed. (1952) at p. 587:

> It should be noted that equity does not any more than commonlaw permit tracing where the relationship is merely that of debtor and creditor. Thus an agent who takes a bribe may be liable to account for it to his principal, but he does not hold that money on trust for his principal and the principal can only claim to be a creditor for the amount of the bribe and cannot trace the money.

135 Professor Hayton makes essentially the same point in his article, *supra*, at p. 209, footnote 23, where he says: "Normally, no tracing remedy will lie where there is a loan, since there will be a mere debtor-creditor relationship, the lender retaining no proprietary interest". Melnitzer, here, admittedly gave a possessory security interest to the CIBC with the delivery of the shares on March 6, 1990, but he came back into possession on July 4, 1991, and, on the evidence, continued in personal possession until the receivership order of August 3: the shares were found in later August in a personal documents envelope kept by Melnitzer in the Cohen, Melnitzer law firm's vault.

136 The rule may appear harsh but there is logic and common sense behind it. A contract based on fraud is *voidable* not void, and the tracing order, if allowed, would often permit one creditor to gain an unfair advantage over the general body of creditors of a bankrupt after the bankruptcy has intervened. See, also *Lister & Co. v. Stubbs* (1890), 45 Ch. D.1 (C.A.); *Daly v. Sydney Stock Exchange Ltd.* (1986), 160 C.L.R. 371 (Aust. H.C.); *Westpac Banking Corp. v. Markovic* (1985), 82 F.L.R. 7 (Aust. S.C.).

137 Mr. Wallace conceded that the CIBC registration of its financing statement, based on possession of the Champion Chemtech shares could not be relied upon. This registration (ex. 6, tab 67) was made on August 14, 1991 against the name, "Julius H. Melnitzer". In making this concession Mr. Wallace admitted 2 things: (1) that the registration was against the wrong

name, because Melnitzer's birth certificate from Germany showed his legal name as "Hermann Julius Melnitzer" (ex. 2); (2) that, in any event, the order of Keenan J. dated August 3, 1991, prohibited such registration and prevented any creditor from improving its position in terms of priorities after August 3.

138 His position was, however, that the registration defect did not matter because the CIBC received a perfected security interest in the shares through continuous possession on and after March 6, 1990, and that this possessory security interest was not lost on July 4, 1991, when the exchange of shares occurred between Kahnert of the CIBC and Melnitzer.

139 This argument put forward by Mr. Wallace has several interlocking parts and requires careful analysis. His starting point is s. 22 of the PPSA, reading as follows:

> [Perfection by possession or repossession]
>
> 22. Possession or repossession of the collateral by the secured party, or on the secured party's behalf by a person other than the debtor or the debtor's agent, perfects a security interest in,
>
> (*a*) chattel paper;
>
> (*b*) goods;
>
> (*c*) instruments;
>
> (*d*) securities;
>
> (*e*) negotiable documents of title; and
>
> (*f*) money,
>
> but only while it is actually held as collateral.

140 As to that section, Mr. Wallace says that, clearly, the CIBC became a perfected holder of a security interest on March 6, 1990, when Kahnert received the shares as additional collateral for the $2,500,000 advance. Mr. Wallace candidly admitted that the last clause of s. 22 — "but only while it is actually held as collateral" — appears to be a serious stumbling block for his client's security interest after July 4, 1991, when Kahnert exchanged the shares for the forged IBM share certificate. He submitted, however, that Melnitzer's fraud caused his client to give up *physical* possession of the shares and that, in equity, the court should deem the client's legal possession to be continuous because, otherwise, the court would be permitting the PPSA to be used as an "instrument of fraud". Mr. Wallace made reference here to s. 72 of the Act:

> [Application of principles of law and equity]
>
> 72. Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

In support of this point, he relied on 2 cases, namely, *Carson Restaurants International Ltd. v. A-1 United Restaurant Supply Ltd.* (1988), 8 P.P.S.A.C. 276 (Sask. Q.B.) and *Key State Bank v. Voz* (1989), 9 P.P.S.A.C. 37 (Ont. Dist. Ct.).

141 The *Carson Restaurants* case involved an extraordinarily convoluted fact situation relating to conflicting registered security interests against the chattels of a franchised restaurant business incorporated under the name Yorktown Restaurant & Deli Ltd. The entirely innocent party was A-1 which received a purchase-money security interest from the restaurant company but which, unfortunately, registered against the slightly wrong corporate name, Yorktown Restaurant Supply Ltd. A-1 later amended its financing statement but, in the interim, a financing statement had been registered by the franchisor, Carson Restaurants. Grotsky J. found that one Dennis Skuter was the evildoer of the piece. Skuter was the sole controlling force of both

Carson Restaurants and the Yorktown Restaurant Company. He had knowledge of the A-1 interest and had even fraudulently intervened to cause A-1 to delay asserting its rights. Thus, Grotsky J. applied the Saskatchewan Act's equivalent of s. 72 to prevent Carson Restaurant from asserting its security interest ahead of that of A-1. He said this at p. 286:

> Well over 100 years ago in *McCormic v. Grogan*, (1869-70) L.R. 4 H.L. 82 at p. 97, Lord Westbury is reported as follows:
>
> > The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the *Statute of Frauds*, and in this manner, also, it deals with the *Statute of Wills*.
>
> Fraud is not here alleged against Mr. Skutor. Notwithstanding, the principles enunciated by Lord Westbury commend themselves to me on the facts material to this application. To permit Carson to take advantage of A-1 in the circumstances outlined, would be to permit it, through Skutor, to use the Act as an instrument to defeat a claim of which he was not only aware, but which he deceitfully delayed by his representations to A-1 when it was pursuing its security interest against Yorkton Restaurant & Deli Ltd. on or about July 18, 1987.

One can hardly quarrel with the result arrived at in the *Carson Restaurants* case. However, close examination of the facts reveals that Grotsky J. pierced the corporate veil of the Carson Restaurants company to prevent its controlling mind, Skutor, from using the statute and registration as instruments of fraud.

142 The *Key State* case presents another highly unusual factual situation. Here, one Voz had a possessory security interest in a car but lost possession when the R.C.M.P. seized the vehicle under the Customs Act as a result of prior illegalities committed by the owner of the car in bringing it into Canada. A priority contest developed between Voz and the U.S. Key State Bank.

143 In these circumstances, Vannini D.C.J. held that Voz had priority because his perfected possessory interest, which was prior in time, was not defeated by an *involuntary* loss of possession through the Customs' seizure. In effect, Judge Vannini deemed Voz's possessory interest to have continued on and after the seizure because he did not intend to give up his rights nor did the Customs officials treat him as having lost such rights.

144 In my view, these cases cannot assist the CIBC here. The *PPSA* permits perfection of carefully defined security interests by possession as a limited alternative to the registration system otherwise provided for in its provisions: see ss. 22-23. The last line of s. 22 makes it clear that once possession is gone, the security interest is gone: "but only while it is actually held as collateral". This language is broad and makes no exceptions for losses of possession arising from fraud. Even assuming that Vannini J.'s ruling in *Key Bank* was correct in deeming possession to continue where the physical loss occurred through an involuntary act such as a lawful seizure under Customs legislation, I cannot conclude that what occurred here was in any way analogous to such a seizure.

145 Mr. Wallace also relied heavily during argument on application of the rule in *Re Condon; Ex parte James*, [1874-80] All E.R. 388 (C.A.). There can be no doubt that the rule in *Ex parte James* is a well-established rule of equity which, in appropriate situations, can aid an innocent but aggrieved party in a bankruptcy context. There are, however, two insuperable difficulties with its application to this case. First, it is my view that its application here would contravene the injunction in s. 72 itself that the principles of law and equity cannot be applied if "inconsistent with the express provisions of this Act". Section 22's language is absolute in the sense that it expressly states that a possessory security interest is only perfected so long as the collateral is "actually held" by the secured party. I really cannot imagine clearer and more imperative language than that. Section 72 was enacted to fill in the gaps of the PPSA in the sense of supplementing and augmenting its purposes when a specific provision, or provi sions, was silent on an interstitial point. However, the Act, in s. 22, is not silent but commanding and I do not see how I can ignore its express dictate by a specious resort to a clearly inconsistent rule of equity. As it seems to me, the drafters of the PPSA did not intend to have its perfection-of-interests system overridden or emasculated by an endless series of ad hoc

rulings in individualized settings. Respect must be maintained for the perfection system no matter how harsh its application may appear to be in a given isolated case.

146 In any event, I do not feel that the facts of this case support the invocation of *Ex parte James*. *Ex parte James* was a case where an execution creditor made a mistake of law in paying back funds already recovered prior to the bankruptcy to the trustee. James L.J. said this at p. 390:

> As to the other point the principle that money paid voluntarily with a knowledge of the facts, but under a mistake of law, cannot be recovered, must not be pressed too far. A trustee in bankruptcy is in truth an officer of the court. The moneys in his hands are trust moneys, and when the court finds the certain moneys in his hands really belong in equity to some one else, the court ought to do equity just as anyone else would be bound to do, and to order the money to be paid to the persons entitled to it.

147 From this passage, the rule of *Ex parte James* has evolved. In essence, the rule says that a trustee in bankruptcy, as an officer of the court, should do the fullest equity and, even if the trustee had a legal right to certain property, the Bankruptcy Court will not permit the trustee to exercise that right if it would be inconsistent with natural justice to do so. It has been called a "prerogative of mercy" reposing in the Bankruptcy Court to alleviate cases of unusual hardship in which a strict regard for legal or even equitable rights would work a manifest injustice; see, also, *Re McDonald* (1971), 16 C.B.R. (N.S.) 244 (Ont. S.C.). I cannot view the facts surrounding the pledge and later release of the Champion Chemtech shares as justifying the application of this extraordinary equitable relief in favour of CIBC. The CIBC had its eyes open in July, 1991, when it chose to exchange the Champion Chemtech shares for the ostensibly more valuable IBM shares. In failing to make any inquiry at that time, it made a business judgment for its own reasons and, as it seems to me, it should be called to account for that judgment and not permitted to cry wolf after the fact.

B. The Claim of Grand Canyon

148 Mr. Leach, counsel for Grand Canyon, relied heavily on the Declaration of Trust document, dated February 12, 1990, (ex. 12, tab 4) which Allan Richman received from Melnitzer. This document reads as follows:

> **DECLARATION OF TRUST**
>
> I hereby declare that 66.4 Class F shares and 100,000 Class G shares in the capital of Champion Chemtech Limited registered in my name are held by me as nominee of GRAND CANYON PROPERTIES LTD., and I hereby consent to the transfer of 66.4 of the said Class F shares and 100,000 of the said Class G shares to GRAND CANYON PROPERTIES LTD. at any time upon its direction.
>
> I hereby authorize and direct you to pay to or to the order of the said GRAND CANYON PROPERTIES LTD. all dividends, including stock dividends or other distributions, whether of capital or income, that may from to [sic] time be payable on the said Class F shares and Class G shares of Champion Chemtech Limited.
>
> DATED the 12th day of February, 1990.
>
> "J. Melnitzer"
> ---
> Julius H. Melnitzer

149 He argues that the Declaration of Trust gave Grand Canyon an equitable ownership interest in 20% of the shares purchased by Melnitzer from Champion Chemtech and that this vested equitable interest is prior to any other claim on this percentage of the shares.

150 Mr. Leach's argument is premised on the following evidence. Sometime in early 1990 Melnitzer made a proposal to Richman that they use their jointly controlled company, Grand Canyon, to invest $500,000 in shares of Champion Chemtech.

Mr. Richman agreed and authorized Melnitzer to make the purchase on behalf of the company and handle the legal work required to complete the transaction. Then, on February 20, Richman, following Melnitzer's handwritten instructions in ex. 14, issued a Grand Canyon cheque for $500,000 payable to Melnitzer personally to cover the apparent purchase price. Later, Richman received the Declaration of Trust purportedly confirming the purchase and 20% share interest in the share certificates which had been issued in Melnitzer's name.

151 In my view there are serious evidentiary and legal weaknesses in Mr. Leach's submission.

152 It is an indisputable fact that Melnitzer did *not* use the Grand Canyon funds to purchase the Champion Chemtech shares. The uncontroverted evidence shows, as I have noted earlier, that Melnitzer drew down $2,500,000 from his credit line with CIBC on February 9, 1990, and had this sum placed in the Cohen, Melnitzer trust account on that day. This transaction was followed, on February 12, by Melnitzer's issuance of a Cohen, Melnitzer certified trust cheque for $2,500,000 to Champion Chemtech to pay the full share purchase cost of 500,000 Class G shares and 332 Class F shares.

153 Mr. Richman thinks he must have got ex. 14 (the undated note of instruction from Melnitzer) around February 20 because he issued a cheque, dated February 20, to Melnitzer for $500,000 representing the proposed Grand Canyon investment in the Champion Chemtech shares. As to when he later received the Declaration of Trust itself, he could only say in examination in chief that he thought it was received in late February. In cross examination, he conceded he might have received it sometime in early March. There was no date stamp on the Declaration and he was obviously relying on unaided memory in giving these estimates of the time of receipt.

154 There is other evidence in the record which throws considerable doubt on when this Declaration was created or delivered to Richman. If the Declaration had been executed by Melnitzer on February 12, as it purports to be, one may legitimately ask why he did not attach the Declaration to his note to Richman. After all, he had attached photocopies of the front sides of the 2 share certificates to this note.

155 There is, as well, evidence in the CIBC's Document Brief which raises further questions. Mr. Kahnert testified that he received the 2 original share certificates from Melnitzer on March 6. This evidence must be accurate because it is supported by a receipt letter from Kahnert to Melnitzer of March 6 (ex. 6, tab 18) as well as an internal CIBC memorandum (ex. 6 tab 19).

156 This CIBC Document Brief also contains, at tabs 16 and 17, 2 true photocopies of the actual original share certificates received from Melnitzer on March 6. These photocopies show that Melnitzer only received the originals on March 2: he has signed the originals on their backing sheets confirming actual receipt of the share certificates on that date.

157 On all of this confusing and sometimes conflicting evidence, I am not persuaded, on a balance of probabilities, that the Declaration was executed by Melnitzer prior to March 6, the date when Mr. Kahnert came into possession of the share certificates as additional security for the CIBC loan facility to Melnitzer. The burden of persuasion on this issue is on Richman and his evidence was too vague to persuade me that the Declaration actually came into existence before the shares were actually pledged to the CIBC.

158 In any event, there are other compelling reasons why the Grand Canyon Declaration cannot pass muster as creating an equitable interest in the shares.

159 It must be remembered that Melnitzer purchased the Champion Chemtech stock on February 12, 1990, when he turned over the certified trust cheque to Champion Chemtech. It is clear that when Melnitzer got the Grand Canyon cheque for $500,000 from Richman, on or shortly after February 20, the share purchase was already complete and that no part of the Grand Canyon funds were used by Melnitzer to complete the purchase.

160 I conclude that Melnitzer perpetrated a callous fraud on his old friend and business associate, Richman, when he approached him in early 1990 and suggested that they each put $250,000 into the coffers of Grand Canyon and then use the resultant $500,000 to invest in Champion Chemtech. On the evidence there can be no doubt that Melnitzer planned to defraud Richman of his $250,000 with the story that he would use the combined monies to purchase Champion Chemtech stock. When

Melnitzer received the Grand Canyon cheque on or about February 20, he had already used the CIBC loan advance to buy the stock and he simply pocketed the proceeds of the $500,000 Grand Canyon cheque. The secret as to what was done with the $500,000 remains with Melnitzer who did not testify in this proceeding. Most clearly, these funds were not used to purchase the Champion Chemtech stock.

161 It is long-settled law that a lawful trust may only be set up where three "certainties" exist, namely, certainty of intention, certainty of subject-matter and, finally, certainty of objects: see Waters, *Law of Trusts in Canada*, 2nd ed. (1984), at Chapter 5, pp. 107-117.

162 On the facts of this case, the Declaration of Trust document cannot pass the first certainty of intention. It is clear that Melnitzer had no intention, at any time, of creating a trust in favour of Grand Canyon under the Declaration or otherwise. What he really intended to do was to defraud Richman of $250,000 and re-capture his own $250,000 which he had contributed to the coffers of Grand Canyon as part of the fraudulent scheme. At no time did Melnitzer ever intend to grant Grand Canyon a true interest in the Champion Chemtech shares nor did he intend to create a true trust with this document.

163 Since Melnitzer had no intention to create a trust, this document is void and of no effect. Regrettably, a fraudulent scheme must defeat the trust argument of the dupe. It is an irony of this case that one of Melnitzer's few straightforward intentions was reflected in his dealings with the CIBC regarding the Champion Chemtech shares after he got his credit line increased in July, 1989. At that time he indicated that one of the reasons for the increased line was to purchase these shares and it was agreed that, when he did, he would pledge the shares as part of the security package in favour of the CIBC. He followed his agreement with the bank on this one transaction but in July, 1991, also defrauded the bank by exchanging the forged IBM share certificate for the sound Champion Chemtech shares.

164 Thus, the Grand Canyon claim under this Declaration of Trust document must inevitably fail. This document was created as part and parcel of a planned share purchase which never took place and which Melnitzer never intended to take place. In the result, it is worthless and cannot be enforced.

The Claim of 808756 Ontario Inc.

165 Mr. Grace, counsel for 808756 Ontario, argued that his client held a valid PPSA security interest in 72% of the Champion Chemtech shares under the Declaration of Trust document purportedly signed by Melnitzer on November 23, 1990 (ex. 8, tab 3). He pointed to 2 financing statements registered by his client on August 22 and 29 respectively, each of which purported to perfect the security interest in question (ex. 8, tabs 26-27).

166 I propose to deal with the technical facial position of these registered security instruments under PPSA before moving on to more substantive questions about the Declaration itself.

167 The August 22 financing statement named "Julius H. Melnitzer" as debtor, the second named "Herman J. Melnitzer" as debtor. The reason for the second registration was that rumours were apparently floating through the London legal community after August 22 that Melnitzer's first name was not Julius, as was commonly believed, but Herman.

168 Melnitzer was born in Germany on October 5, 1947. He came to Canada in childhood and settled in Quebec for several years before coming to Ontario. His German birth certificate shows his full name to be "Hermann Julius Melnitzer". His later Canadian citizenship shows his name to be "Herman J. Melnitzer". The second "n" in Hermann has disappeared in the Canadian citizenship certificate.

169 Mr. Grace conceded that the August 22 registration is bad because Melnitzer's name on it — " Julius H. Melnitzer" — conformed neither with his original German birth certificate nor his Canadian citizenship certificate. However, he argued that the second registration must be held valid because Melnitzer's name on it exactly conforms with the Canadian citizenship certificate.

170 The PPSA is somewhat vague on the subject of the correct name of a debtor for registration purposes. Section 46(4) says this about errors in general:

(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

171 On the other hand, s. 16(1) of O. Reg. 372/89, passed under the PPSA, specifies this:

16.-(1) The name of a debtor who is a natural person shall be set out in the financing statement to show the first given name, followed by the initial of the second given name, if any, followed by the surname.

172 One might have thought that the *Change of Name Act*, R.S.O. 1990, c. C.7 might be helpful on the question of correct names but it, too, seems wanting in some respects. Section 2 of this Act, reads, in part, this way:

2.-(1) For all purposes of Ontario law,

(*a*) a person whose birth is registered in Ontario is entitled to be recognized by the name appearing on the person's birth certificate or change of name certificate, unless clause (c) applies;

(*b*) a person whose birth is not registered in Ontario is entitled to be recognized by,

(i) the name appearing on the person's change of name certificate, if the person's name has been changed under this Act or a predecessor of it, or

(ii) in all other cases, the name recognized in law in the last place with which the person had a real and substantial connection before residing in Ontario,

. . . . .

173 It might be said that s. 2(1)(*a*) above provides a useful guide for persons born in Ontario by saying that the name on the Ontario birth certificate is recognized for "all purposes of Ontario law". However, for a person like Melnitzer, born out of Ontario, one is directed to the law of the last place with which the person had a real and substantial connection. This rule is of no real assistance because I have no evidence before me as to Melnitzer's legally recognized name in Quebec, where he resided for many years before coming to Ontario in young adulthood.

174 Mr. Grace argued, relying on *Re Takhtalian* (1982), 2 P.P.S.A.C. 90 (Ont. S.C.), that, for foreign-born citizens, it should be sufficient to use the name of the debtor on his Canadian citizenship certificate.

175 While, perhaps, a respectable argument can be made for the position that, in the case of foreign-born persons, their original birth-certificate name should be used, I think, on balance, that it is practical and rational to opt for the name on a Canadian citizenship certificate, if one exists. The entire subject of correct names on a registration should probably be revisited by the legislature to staunch the flow of cases into the courts: see such cases as *Re Weber* (1990), 73 O.R. (2d) 238, 1 P.P.S.A.C. (2d) 36 (Ont. S.C.); *Re Lambert* (1991), 2 P.P.S.A.C. (2d) 160 (Ont. Bktcy.) and *Re Haasen* (1992), 8 O.R. (3d) 489 (Ont. Bktcy.).

176 Since, then, the August 29 registration contains the correct name of the debtor in accordance with Melnitzer's Canadian citizenship certificate, I conclude that it is facially free from disabling defects.

177 I now move on to consider more substantive questions about the Declaration.

178 The balance of Mr. Grace's argument was an attempt to show that the Declaration constituted a free-standing security interest which was protected by the registration under the PPSA.

179 I am afraid that I must reject the complete thrust of Mr. Grace's able submissions. I have concluded that the loans advanced to Melnitzer by the 8 or so individual investors were made in circumstances of almost total blind faith in the integrity, financial acumen and worth of Melnitzer. The blind faith was disastrously misplaced, as subsequent events have shown.

180 In original form, there is little doubt that the structure of the total investment commitment was to be by way of individual loans as backed up by the promissory notes and investment guarantees. However, 808756 Ontario has totally failed to convince me that even this first stage of the investment structure was properly put in place before November 23, 1990. I have already pointed to the general disarray and discrepancies within the promissory notes and guarantees at ex. 8, tab 22. Similar problems exist with virtually all of the corporate records of 808756 Ontario included in ex. 8. A simple example suffices: at tab 9, one finds a resolution of the Board purporting to authorize the transfer of Melnitzer's shares to Delanghe. This resolution is jointly signed by Delanghe, McGill and Barry Parker as directors; the date of execution is shown as November 23. Yet Parker's later statement to the R.C.M.P. confirms that these corporate records were signed in 1991 and did not exist in November.

181 808756 Ontario bears the burden of proof on the issue of the legitimacy of the alleged transaction which it says led to 808756 Ontario becoming the investment vehicle for the $1,800,000 on or before November 23, 1990. I conclude that it has failed to meet this burden.

182 I found the evidence of both Delanghe and McGill singularly unpersuasive and unhelpful on this issue, save where their evidence tended to satisfy me that the company's position was untenable and incredible.

183 Delanghe gave me the impression of one who was playing fast and loose with the truth in an effort to buttress the theory that 808756 Ontario had actually been put into existence as the true investment vehicle by November 23. What he did not tell me was more revealing that what he told me. I regret that I can only conclude he lied in attempting to say that 808756 Ontario was put in place before the $1,800,000 in loans went into Melnitzer's hands.

184 These events only took place in late 1990 and the Cohen, Melnitzer partners, including Delanghe, have always had control of the relevant records. Delanghe could not have been confused about these events or their sequence. He had to know that the efforts to transfer the loans advances to the company were only in an embryonic stage as of late December, 1990, and that the documents, such as they were, were being signed in 1991. Also, he had to know about the second company, 931755 Ontario, which was only incorporated on May 1, 1991. He received a cheque from Melnitzer payable to this company on July 31, 1991 for $5,000,000 yet he conveniently had a memory lapse about this company's very existence.

185 At one point in cross-examination he rather desperately attempted to justify the direct payment of the loans into the Cohen, Melnitzer trust account, without passing through 808756's account, by saying that he had verbal authorization to do so. This was nonsense. These moneys went where they did because all of the lenders were in thrall of Melnitzer and were essentially unconcerned about security for their loans.

186 McGill began his evidence in as confident a mood about the legitimacy of the 808756 Ontario lending vehicle as Delanghe. His attitude changed quickly when confronted with the corporate minute books for 808756 Ontario and 931755 Ontario along with the R.C.M.P. statements and his own exchange of correspondence with the second accountant, Garth Howes.

187 The final nail in the coffin for the 808756 Ontario lending theory is reflected in the sad spectacle of a group of Melnitzer's ex-partners meeting on August 5 and agreeing to send two of their number — Raikes and McGill — over to see Melnitzer at another lawyer's office in an effort to rectify deficiencies in corporate records by backdating certain documents.

188 I find it almost unimaginable that a group of ex-partners of a lawyer who they have just learned has defrauded them and others of millions of dollars would send emissaries to that man to have him sign corporate documents of any kind. The events described by McGill have the appearance of events occurring in a second-rate imitation of a John LeCarré spy novel. We are told by McGill that he and Raikes never saw Melnitzer at the other office but that they passed on the 808756 Ontario Minute Book so that he could merely sign and backdate to 1988 a few insignificant early "organizational resolutions".

189 This evidence has no ring of truth whatsoever. Why bother having Melnitzer sign a few insignificant resolutions under the cover of secrecy and through the intermediary, Melnitzer's criminal lawyer?

190 I am driven to conclude that more than mere organizational documents were signed that night. The strong possibility is that many important corporate documents, including the Declaration of Trust document, was passed to Melnitzer that night for his signature. In any event, I am satisfied beyond doubt that someone attempted in the spring and summer of 1991 to backdate a whole raft of corporate and other records to create the appearance that Melnitzer had gone into a debtor-creditor relationship with 808756 Ontario by November 23, 1990, and that 808756 Ontario therefore held a valid stand-alone pledge of the Champion Chemtech shares. This after-the-fact attempt to create an untrue picture of Melnitzer's legal obligation with respect to the repayment of the $1,800,000 was an act, or set of acts, of deception and undoubted desperation.

191 Leaving aside the course of deception involved in backdating so many corporate records, the Declaration document itself could have no life of its own in any event. It was clearly not a stand-alone security pledge of shares.

192 In his evidence, Delanghe tried to say that, before November 23, 1990, this document somehow shifted from being part of the Champion Chemtech share-sale agreement between Melnitzer and 808756 into a separate stand-alone pledge of these shares. I am satisfied that evidence was untrue. This document was definitely not signed in 1990 at all and was part of someone's efforts in 1991 to remake the Declaration into something it was never intended to be. Paragraph 1 of the share agreement says this about the Declaration:

> 1. The Vendor shall on even date herewith execute and deliver to the Purchaser a declaration of trust in the form of the declaration of trust attached hereto as Schedule A.

Nothing can be clearer than this language in showing that the Declaration was part and parcel of the share agreement and enjoyed no life apart from an agreement which was never alive itself. Certainly, counsel for 808756 Ontario did not suggest that there was a *second* Declaration of Trust document.

193 It may also be said about this so-called stand-alone pledge that it probably is not a valid security pledge under the PPSA. Mr. Wallace neatly took this point during argument by referring to the definition of "security interest" in s. 1(1) of the Act:

> "security interest" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation, the interest of a transferee of an account or chattel paper; ("sûreté")

194 Mr. Wallace pointed out that this Declaration makes no reference to a specific debt, an interest rate or any repayment date. Some, of course, of the riddles inherent in this document are answered by looking at the share-sale agreement and that latter document never got off the ground. As this Declaration reads, it is quite difficult to see how it creates an interest in personal property that secures payment or performance of an obligation within the statutory definition. What it more obviously seems to do is create an ownership interest of sorts in favour of 808756 with a rider that the ownership is postponed until after August 31, 1993. This document is very similar to the Grand Canyon Declaration of Trust, reproduced earlier, with the exception of the peculiar language limiting 808756 Ontario's ownership powers until after August 31, 1993. On its own terms, then, I am not persuaded that it creates a security interest within the PPSA.

195 There are two other equally compelling reasons why this Declaration and its attendant financing statement of August 29 cannot be enforced.

196 First, the freezing order of Keenan J. made on August 3, 1991, effectively prevented 808756 Ontario, or any other creditor, from improving its priority position thereafter.

197 Paragraph 9 of this order made Coopers & Lybrand the receiver of the "assets, undertakings and businesses of Melnitzer" and prevented, by necessary implication, any secured or unsecured creditor from improving its position after August 3.

198 It is true that no specific provision of the order expressly addresses the question of attempted steps to perfect security interests after August 3 but the entire tenor of the order leads to that conclusion. For example, paragraph 6 reads as follows:

> THIS COURT ORDERS that the Royal Bank of Canada, Canadian Imperial Bank of Commerce, Toronto-Dominion Bank, Bank of Montreal, Canada Trustco, Scotia McLeod Inc. and Cohen, Melnitzer be and they are hereby restrained from transferring, accepting instructions for transfer, cashing or issuing any cheques or negotiable instrument or otherwise dealing with any property whether real or personal and any assets of any nature of kind whatsoever of the defendants Melnitzer, Melfan Investments and Melissa in their possession save and except with the permission of and by Order of this Honourable Court.

And paragraph 15 reads this way:

> THIS COURT ORDERS that the Receiver may from time to time pass its accounts and pay the balances in its hands as this Court or the Master may direct and for this purpose the accounts of the Receiver are hereby referred to the Master of the Ontario Court (General Division) and at the time of the passing of such accounts, the Master shall fix the remuneration of the Receiver. The fees and disbursements of the Receiver shall be a first charge on all the undertakings and assets of Melnitzer and Melfan Investments. Prior to the passing of the accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts from the monies in its hands against its fees for services rendered either monthly or at such longer intervals as it deems appropriate and such amount shall constitute advances against its remuneration when fixed.

199 There is no doubt that by the return date for continuation of Keenan J.'s order on August 9, all interested parties were aware of the order and its terms, including the Cohen, Melnitzer firm members and others who invested in the Singapore Deal.

200 The 2 financing statements of 808756 Ontario were registered by another law firm, McCarthy, Tétrault, but it cannot be seriously argued that the McCarthy, Tétrault firm were not, in turn, acting as agents for the Cohen, Melnitzer group who were reinstated under paragraph 6. *Form cannot override substance.*

201 I conclude that the registrations were effected by the Cohen, Melnitzer group who were restrained by this paragraph of the order from "otherwise dealing with any property whether real or personal and any assets of any nature" of Melnitzer. In any event, I conclude that 808756 Ontario rights came into "conflict" with those of other creditors on August 3 when the Receiver, Coopers & Lybrand, took over control of the assets of Melnitzer and, under the rule laid down in *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 4 P.P.S.A.C. 314 (Ont. C.A.), 808756 Ontario's then unperfected interest is prevented from acquiring a higher status by later acts such as the August 29 registration.

202 A final reason for invalidation relates to the common prior knowledge of the investor group that the Champion Chemtech shares could not be transferred, pledged or otherwise dealt with by Melnitzer without the consent of the other shareholders.

203 It was conceded at trial that Melnitzer had not obtained a prior approval for any form of dealing with these shares. Thus, leaving aside whatever else may be said negatively about the Declaration, it was plainly issued in violation of the shareholders agreement and the investor group, along with 808756 Ontario, must be fixed with knowledge that it was created in violation of the agreement's express terms and conditions. Mr. McGill, both in cross-examination and in his prior statement to the R.C.M.P., acknowledged that the investor group was well aware of the prohibitions and simply took a chance, based on a misguided faith in Melnitzer's integrity and business acumen.

204 The question, then, arises whether the Declaration could be relied upon by 808756 in any event, having regard to its creation in *knowing* violation of the constitutive terms and conditions of the shares: clearly, Melnitzer knew of its frailties and so, also, did the recipients of its alleged benefits.

205 There are apparently conflicting decisions of the Ontario Court of Appeal and House of Lords bearing on this issue and I must address them.

206 *Hunter v. Hunter*, [1936] A.C. 222 (H.L.) is a complicated case whose principles tend to be rather difficult to discern. In *Hunter*, two companion actions were brought by shareholders in a private company to challenge the right of Lloyds Bank to take security on company shares, have the shares transferred into its nominees' names and then sell such shares in purported

satisfaction of its claim. The shareholder whose shares were pledged advised the bank that there was a stringent transfer limitation in the articles of association of the company but the bank pressed on with its insistence on taking the shares as security. Later, as part of an effort to shore up its position, the bank insisted on the shares being registered in its nominees' names and, ultimately, the shares were sold to pay down the debt. This case is complicated factually and its difficulties are compounded because one of the two closely connected actions ended in the Court of Appeal. Also, the House of Lords was divided even though all five sitting judges agreed upon the result.

207 The House seems to have agreed that (1) there was no effective sale of the shares because the restrictions in the articles had not been observed and (2) the shareholder was not estopped from claiming rectification of the share register in his favour and (3) the shareholder could seek redemption of the shares under the original pledge of the shares as security.

208 The decision of the House is fact-driven *in extremis* although it is fair to say that 4 members of the House concluded that a valid sale of the shares could only be concluded by following the articles, and not otherwise.

209 It is interesting to note what another English judge — Vaisey J. — said about *Hunter* in *Hawks v. McArthur*, [1951] 1 All E.R. 22 (Ch. D.).

210 *Hawks* was a case of a director of a private company, who had been asked to resign and sold his shares in the company in separate blocks to 2 remaining officers. The company's articles contained the usual strict provisions restricting the transfer of shares and it was clear these provisions had not been complied with. Later, a third party obtained a judgment and charging order against the retiring director and a priority contest developed between the 2 officers who had purchased the shares and this third party. Vaisey J. distinguished *Hunter* by saying, at p. 27, that,

> ... in *Hunter v. Hunter*, the sale was by a mortgagee. That essential difference is emphasized in *Re Hafner*, in which BLACK, J., in the court of first instance in Ireland, considered that the fact that *Hunter v. Hunter* was dealing with a sale by a mortgagee was of the first importance ... [Citations omitted.]

211 I remain skeptical about the legitimacy of Vaisey J.'s attempt to distinguish *Hunter* on the basis of Lloyds Bank being a mortgagee. In the end, Vaisey J. concluded that an equitable interest in the shares had passed to the 2 purchasers which was enforceable as prior in time and equity to that of the party with the charging order. His rationale for his holding also appears at p. 27:

> On general principles, in such circumstances as those of the present case where a man who has an interest in shares in a company receives something for the sale of those shares and executes under seal a transfer of those shares for that purpose, I cannot bring myself to suppose that *Hunter v. Hunter* constrains me to hold that everything done in that transaction is a complete nullity ... The one thing, however, which seems to me to be important is that they paid Mr. McArthur the money, and I cannot bring myself to suppose that they got nothing by their bargain and that the whole property in the shares remained in Mr. McArthur, notwithstanding the transfers which had been executed and the money which he received. [Citations omitted.]

212 *Re M.C. United Masonry Ltd.* (1983), 40 O.R. (2d) 330 saw the Ontario Court of Appeal grapple with a similar case. Here, an accounting firm entered into a rough written agreement with its client, M.C. United, under which it received a guarantee of payment of past and future fees and a pledge of shares in another company as security. The accounting firm actually received possession of the pledged shares. Later, M.C. United went bankrupt and the inevitable contest developed between the trustee and the accounting firm because the letters patent of the company contained a restricted-transfer proviso which had not been complied with. Houlden J.A. concluded that (1) the transfer by pledge of the shares created an equitable interest in favour of the accounting firm and (2) the pledge constituted a valid and prior possessory security interest under s. 22 of the PPSA. In so doing, he drew the following rule from the *Hawks* case, *supra*, at p. 336 of his judgment for the court:

> ... if shares in a corporation are transferred without complying with restrictions on transfer, the *transferee acquires an equitable interest* in the shares: *Harrold v. Plenty*, [1901] 2 Ch. 314; *Hawks v. McArthur et al.*, [1951] 1 All E.R. 22. (Emphasis added)

213 In my view, none of these cases cited to me are strongly helpful in assessing the legitimacy of the alleged pledge of shares through the Declaration of Trust document. Whatever its origins, the Declaration of Trust document was created in circumstances where the full investor group and their alleged investment vehicle, 808756 Ontario, were fully apprised by Mr. McGill, one of their members, that the Declaration would be void if no consent, as called for, was obtained from the other shareholders of Champion Chemtech. Nevertheless, they cynically and deliberately took a chance and forged ahead. As McGill recorded Barry Parker's reaction, "if we have to worry about that, we'll have far bigger problems". Evidentiary factors of that negative character were lacking in the *M.C. United* and *Hawks* cases.

214 It is quite clear from these cases that, at best, 808756 Ontario could only acquire an "equitable interest" in the shares because there was a failure to comply with the restrictions on transfer: see *Re M.C. United*, supra, at p. 336. To me the *conduct* of the investor group must be a decisive factor in deciding whether the declaration could have any force. As the ancient axiom of equity says, "One who seeks equity, must do equity". It would be a travesty of justice to breathe life into this Declaration in the circumstances in which 808756 Ontario, through its own witnesses, asserts that it was created. 808756 Ontario must be fixed with bad faith and unclean hands through the mouth of its own witness, McGill, and cannot be allowed to enforce this document in a court exercising equitable jurisdiction.

III. Consequential Relief

215 I have found the claims of CIBC, Grand Canyon and 808756 Ontario all must fail as a result of fatal defects in their equitable or security-interest positions.

216 This leaves the question outstanding as to who now has title to the Champion Chemtech shares and whether any other interests arise in the shares or their proceeds, if they are disposed of.

217 The answer to this question is, fortunately, easy. In virtue of the bankruptcy of Melnitzer, as reflected in my granting of a Receiving Order on September 26, 1991, the shares must be held to be vested in the Trustee in Bankruptcy, Peat Marwick Thorne Inc., for the benefit of the general creditors.

218 The Trustee's title must be subject to a priority charging order in favour of Coopers & Lybrand to reflect the proviso in Keenan J.'s order of August 3, 1991, which protected the unsatisfied fees and disbursements of that firm as Receiver of the assets of Melnitzer. If any issue arises as to quantum of the first-charge entitlement of Coopers & Lybrand, I will, of course, remain seized of this action for resolution of that or related issues.

219 I may be spoken to on costs and any other ancillary matters within the next 30 days at a time convenient to all counsel.

Order accordingly.

TAB 2

2016 BCCA 350
British Columbia Court of Appeal

BNSF Railway v. Teck Metals Ltd.

2016 CarswellBC 2250, 2016 BCCA 350, [2016] B.C.W.L.D. 6386, [2016] B.C.W.L.D. 6418, [2017] 3 W.W.R. 112, 20 E.T.R. (4th) 24, 270 A.C.W.S. (3d) 447, 89 B.C.L.R. (5th) 274

BNSF Railway Company (Appellant / Plaintiff) And Teck Metals Ltd., 6317057 Canada Ltd., and Canadian National Railway Company (Respondents/ Defendants) And Canadian National Railway Company (Third Party)

BNSF Railway Company (Appellant / Plaintiff) And Teck Metals Ltd. (Defendant) And 6317057 Canada Ltd. and Canadian National Railway Company (Respondents / Defendant) And Canadian National Railway Company (Third Party)

Bauman C.J.B.C., Newbury, Bennett JJ.A.

Heard: June 22, 2016
Judgment: August 15, 2016
Docket: Vancouver CA42889, CA43452

Proceedings: reversing *BNSF Railway v. Teck Metals Ltd.* (2015), 13 E.T.R. (4th) 26, 2015 CarswellBC 1751, 2015 BCSC 1082, E.M. Myers J. (B.C. S.C.)

Counsel: R. DeFilippi, for Appellant
T.G. Keast, Q.C., R.R. Lee, for Respondents

***Newbury J.A.*:**

1 The plaintiff BNSF Railway Company ("BNSF") appeals two orders — one made by Mr. Justice Myers in chambers on June 24, 2015, striking out BNSF's prayer for a constructive trust as "bound to fail" under Rule 9-5(1)(a); and the second, made by Mr. Justice Dley on February 10, 2016, dismissing BNSF's application to amend its pleadings to refer to "substantive" or "institutional" constructive trust rather than simply to "constructive trust". Dley J. found that issue estoppel precluded BNSF from raising the issue of constructive trust again; he therefore found it unnecessary to address the question of the availability of substantive constructive trust on its merits.

2 It is settled law that an application made by a defendant to have a plaintiff's pleadings struck is brought on the basis that the action(s) asserted therein cannot succeed *as a matter of law*. The chambers judge considers only the plaintiff's pleadings, and assumes them to be true. The threshold to be met by the plaintiff is a low one; an order striking out pleadings is made only in "plain and obvious" cases. (See *Attorney General of the Duchy of Lancaster v. London & North Western Railway*, [1892] 3 Ch. 274 (Eng. C.A.); *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2011 BCCA 149 (B.C. C.A.) at para. 9.) Courts are enjoined not to rule out pleadings merely because the cause of action asserted is novel. If the claim is arguable, or can be amended to be so, it should be permitted to proceed: see *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at para. 21.

3 The defendants' success in having portions of the plaintiff's Amended Notice of Civil Claim struck out in this case depended on the drawing of absolute lines and the adoption of unequivocal rules of law by the chambers judge — a rule that the substantive constructive trust has been wholly superseded in Canada by the remedial constructive trust developed here in the 1980s and 1990s; a rule that constructive trust may be imposed only in two situations and not otherwise; a rule that every constructive trust

takes effect on the date of judicial pronouncement; and a rule that a plaintiff must in its pleadings, and without the advantage of evidence or findings of fact, demonstrate that a monetary award would be inadequate or inappropriate and point to "identifiable property" to which it contributed, before it may seek a declaration of constructive trust founded on a valid cause of action.

4 As will be explained below, it is my view that none of these generalities is an immutable rule and that, as suggested by the majority in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), the existence of constructive trust as a remedy in two types of situations does not negate the availability of the substantive constructive trust in other circumstances. Notwithstanding the prevalence in Canada of the remedial constructive trust, it is open to a Canadian court to recognize a substantive constructive trust; to do so outside the categories of breach of fiduciary duty and unjust enrichment; and to declare a constructive trust retrospectively. Further, there are circumstances in which a plaintiff may satisfy the two criteria for the finding of a constructive trust — i.e., demonstrate that a monetary award would be inadequate and identify property to which the plaintiff contributed in some manner — in the course of discoveries or trial, or be able to trace its funds into a mixed account or elsewhere, *once the defendant's liability has been established*. Thus it may be incorrect to rule, before any facts have been found, that a constructive trust is "bound to fail" on the basis that the two criteria have not been satisfied in the plaintiff's pleading.

5 Accordingly, I am of the opinion that the appeal from the first order below should be allowed. It follows in my view that the second order must also be set aside.

Factual Background

6 The facts of the case as pleaded in the plaintiff's Amended Notice of Civil Claim dated January 3, 2014 may be briefly stated. The action arises in the context of a series of agreements assembled by the predecessor of the defendant Teck Metals Ltd. ("Teck"), formerly known as Cominco Ltd. ("Cominco"). The agreements provided for the transportation of lead and zinc concentrates mined at Cominco's Red Dog mine in Alaska, down the coast to the terminal facility of Vancouver Wharves Ltd. in North Vancouver, and then by rail to the Cominco smelter near Trail for processing. The route, or network, was divided into three "legs" for which Cominco entered into three separate transportation agreements:

- Leg 1 — from the terminal facility in North Vancouver to the point (or "interchange") where the track of B.C. Rail Ltd. (now known as 6317057 Canada Ltd. and referred to in the court below as "BCOL"), connected with the track of the defendant Canadian National Railway Company ("CN"). Vancouver Wharves was responsible for handling this leg and subcontracted with BCOL to transport the concentrates.

- Leg 2 — from the CN interchange in North Vancouver to New Westminster. Cominco contracted with CN to carry out transporting the concentrates over this segment.

- Leg 3 — from New Westminster to Cominco's refining facilities near Trail. Cominco retained the plaintiff BNSF to transport the concentrates over this segment, and to supply rail cars for the entire network. According to the notice of claim, BNSF was not to be responsible for the charges of inter-switching carriers such as BCOL or CN and there was no tariff, agreement or request for services in effect between BNSF and either of BCOL or CN for this segment.

7 Evidently, the network went into operation in July 1990. From then until March 31, 2005 BCOL performed the first segment and billed Vancouver Wharves Ltd. for it. Vancouver Wharves included BCOL's charges in its bills to Cominco (or its subsidiary, Cominco Alaska Inc.). However, BNSF alleges that BCOL *also* billed BNSF for the first leg and that BNSF paid those bills "by mistake", in an amount totalling some $14,021,375.55.

8 Effective April 1, 2005, CN acquired BCOL's rail operations and facilities and began transporting the concentrates over both Leg 1 and Leg 2. BCOL was dissolved on July 5, 2005. Shortly before that date, CN stopped issuing bills to Cominco for Leg 2 and began to bill BNSF directly, ostensibly under the authority of the *Railway Interswitching Regulations*, SOR/88-41. BNSF pleads that it also paid those bills by mistake, to the tune of some $3,822,310.53. As stated in its notice of claim:

> (a) BNSF was under no legal obligation, pursuant to the Cominco/BNSF Transportation Agreement or otherwise, to pay or absorb the charges for the [BCOL or CN] Switching Services;

(b) Notwithstanding the absence of any legal obligation, BNSF, because of ignorance, mistake or forgetfulness, accepted the invoices it received from [BCOL or CN], paid them, did not forward them or seek reimbursement from Cominco.

9 Evidently, BNSF realized its mistake(s) some years later. On February 10, 2010, it brought this proceeding against Cominco, BCOL and CN. BNSF proposed seeking the restoration of BCOL as a corporation for purposes of the litigation, but CN agreed to perform or pay any judgment BNSF might obtain against BCOL. Thus CN is now effectively the primary defendant.

The Pleading

10 BNSF claims that BCOL 'had and received' the $14,021,375.55 and that CN had and received the $3,822,310.53. The claim for money had and received is a longstanding cause of action that is now subsumed under the rubric of restitution. (See generally Maddaugh and McCamus, *The Law of Restitution* (looseleaf) at §4.200.10.) More importantly for our purposes, BNSF claims that BCOL and CN hold the payments received by them, in trust for BNSF. It asserts that each of BCOL and CN was enriched by such payments, and that there was no juristic reason for BNSF to have made the payments or for the defendants to retain them. By implication, it also asserts that it suffered a detriment.

11 These three assertions, of course, constitute the elements of unjust enrichment, the plaintiff's second cause of action. Under the heading "Legal Basis", the notice of claim states:

> [1] Money paid by reason of ignorance or mistake, or through excusable forgetfulness, may be recovered back as money received to the use of the plaintiff.
>
> [2] A claim on an implied promise is appropriate where there has been a payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it. A request may be implied where the defendant has notice of the payment being made for him, and does not dissent.
>
> [3] The elements of unjust enrichment are established if the plaintiff can demonstrate the existence of an enrichment or benefit in the defendant's hands, a corresponding deprivation or expense on the part of the plaintiff, and the absence of any juristic reason for the enrichment.

12 Under the heading "Relief Sought", BNSF's pleading continues:

> 3. The claim of BNSF against [BCOL] is for:
>
> (a) an order directing [BCOL] to pay the amount of $14,021,375.55 to BNSF, being money payable by [BCOL] to BNSF for money had and received by [BCOL] for the use of BNSF;
>
> (b) **an order declaring that [BCOL] held and continues to hold the amount of $14,021,375.55 in trust;**
>
> (c) **an order declaring that BCOL was and is a constructive trustee and held and continues to hold the amount of $14,021,375.55 in trust for BNSF;**
>
> (d) **an order declaring that BNSF was and remains the beneficial owner of the amount of $14,021,375.55 paid by BNSF to BCOL;**
>
> (e) further, or in the alternative, an order directing an accounting of, for the period July 1, 1990, to March 31, 2005;
>
> (i) the amount billed by BCOL to Vancouver Wharves for the BCOL Switching Services:
>
> (ii) the amount paid by Vancouver Wharves to BCOL for the BCOL Switching Services;

(iii) the amount paid by BNSF to BCOL for the BCOL Switching Services.

(f) an order for the payment by [BCOL] to BNSF of an amount found to be due to BNSF on the taking of such accounts;

(g) interest at such rate and for such period as this Honourable Court shall think fit;

(h) further, or in the alternative, interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; ....

and against CN:

[4]

(a) an order directing CN to pay the amount of $3,822,310.53 to BNSF, being money payable by CN to BNSF for money had and received by CN for the use of BNSF;

(b) **an order declaring that CN held and continues to hold the amount of $3,822,310.53 in trust;**

(c) **an order declaring that CN was and is a constructive trustee and continues to hold the amount of $3,822,310.53 in trust for the benefit of BNSF;**

(d) **an order declaring that BNSF was and remains the beneficial owner of the amount of $3,822,310.53 paid by BNSF to CN;**

(e) further, or in the alternative, an order directing an accounting of, for the period April 1, 2005, to September 30, 2007:

(i) the amount paid by BNSF to CN for the BCOL Switching Services and the CN Switching Services;

(g) an order for the payment by CN to BNSF of the amount found to be due to BNSF on the taking of such accounts;

(h) interest at such rate and for such period as this Honourable Court shall think fit[.]

The portions shown in bold above were the paragraphs successfully challenged by the defendants in their application under Rule 9-5(1)(a) before the first chambers judge. (I note that, strictly speaking, constructive trust is not a *cause of action*, but BNSF did not take up this point.)

13 The position taken by CN and BCOL at the hearing of the application was that a constructive trust may be imposed in only two situations — to remedy wrongful conduct such as breach of trust or fiduciary duty (not asserted here), or to remedy an unjust enrichment. In respect of the second category, the defendants did not contend that unjust enrichment could not be made out in this case. Rather, they said, if that threshold were reached, a "*remedial* constructive trust" (my emphasis) would be available only if the plaintiff could establish (a) that a monetary award would be inadequate and (b) the existence of a "link" between the "contribution that founds the action and the property in which the constructive trust is claimed." It is said the pleading did not assert a factual basis for either such requirement.

14 The defendants submitted that CN is "Canada's largest railway" and that a monetary award would be clearly sufficient should judgment be granted in BNSF's favour. As well, CN asserted in its notice of application:

> ... there is no factual basis alleged by BNSF and no legal rationale provided in the [notice of claim] for any link between the monies paid by BNSF and any property of BCOL and CN in which the trust is claimed. In fact, BNSF simply claims a constructive trust in an amount of money which simply reinforces the fact that a monetary award is not only adequate but the only appropriate remedy.

As was the case in *Sun Rype, Pro-Sys* and *Watson* (which were cases involving class certification but applied the same test to be applied here) it is plain and obvious that the claim for a constructive trust could not succeed at trial and should be struck.

The striking of the claim of constructive trust will have a significant impact on the trial in terms of the limitations defences available to BCOL and CN and the any related postponement position of BNSF and the onuses related thereto. [At paras. 32-4.]

The Chambers Judge's Reasons

15 Myers J. began his reasons by referring to the "plain and obvious" threshold for striking a claim as disclosing "no reasonable claim" under Rule 9-5(1)(a). After briefly reciting the facts, he noted that, as counsel for BNSF had acknowledged, the significance of the constructive trust claim in this instance related to the matter of limitation periods. By pleading constructive trust, the chambers judge observed, BNSF was hoping to obtain the benefit of s. 3(3) of the *Limitation Act*, R.S.B.C. 1996, c. 266. It provides for a 10-year limitation period in respect of an action:

> (c) against a trustee for the conversion of trust property to the trustee's own use;
>
> (d) to recover trust property or property into which trust property can be traced against a trustee or any other person; [or]
>
> (e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor ... .

The Act defines "trust" to include "... a constructive trust, whether or not the trustee has beneficial interest in the property, and whether or not the trust arises only because of a transaction impeached".

16 Under s. 6(1) of the *Limitation Act*, the running of time for an action "to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use" is postponed until the beneficiary becomes aware of the act of the trustee on which the action is based. In addition, the better-known provisions in s. 6(4) contemplate postponement where "relief from the consequences of a mistake" is being sought. At this stage of the litigation, it is not clear which of the forgoing provisions BNSF is likely to seek to invoke.

17 The chambers judge turned immediately to the decision of the Supreme Court of Canada in *PIPSC v. Canada (Attorney General)*, 2012 SCC 71 (S.C.C.) [hereinafter Professional Institute]. There the Court recalled that since its decision in *Soulos, supra*, there have been "two grounds on which a court can impose a constructive trust" — namely, breach of an equitable obligation and unjust enrichment. This case fell into the second category. The chambers judge continued:

> In several decisions, the Court has made it clear that in cases of unjust enrichment, a constructive trust is imposed only in limited circumstances. A plaintiff must show there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. It must also establish that a monetary remedy would be inadequate. This was described in *Kerr v. Baranow*, 2011 SCC 10. [At para. 11.]

18 These two requirements, the chambers judge noted, had been re-affirmed in two more recent judgments of the Supreme Court, *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.). Both involved alleged contraventions of the *Competition Act*, R.S.C. 1985, c. C-34, and came to the Court on appeals from certification orders made under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 and set aside by this court on appeal. In both, the Supreme Court of Canada invoked *Kerr v. Baranow* [2011 CarswellBC 240 (S.C.C.)] and found that the plaintiffs' claims for the repayment of allegedly illegal charges were purely monetary. Since the pleadings did not "explain" why a monetary award would be inappropriate or inadequate, and did not demonstrate a link to specific property, the Court struck out the references to constructive trust.

19 BNSF argued, however, that the constructive trust it sought was not a "remedial" one, but a "substantive" or "institutional" one — although neither of those words appeared in its pleading. In its submission, each payment it made by mistake to BCOL or CN was subject to a constructive trust that arose *at the time of each such payment* and indeed "automatically" at each such point, without the exercise of any judicial discretion. BNSF sought a declaration, which counsel described as a declaration of "status", to that effect.

20 The chambers judge referred to *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99 (B.C. C.A.), where Mr. Justice Lambert for the Court described two types of constructive trust:

> A substantive constructive trust must be distinguished from a remedial constructive trust. In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. ... In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which, when the order is made, creates a constructive trust by one of the parties in favour of another party.
>
> [At 108; emphasis added.]

Lambert J.A. did not find it necessary to deal with the distinction further because a monetary remedy was appropriate and available in that case.

21 Substantive constructive trusts had also been referred to by this court in connection with a motion to strike in the *Sun-Rype* case: see 2008 BCCA 278 (B.C. C.A.), ("*Sun-Rype 2008*"), a decision that was not appealed further. As the chambers judge observed, the plaintiffs there had argued that their claim in constructive trust was subject to s. 3(3) of the *Limitation Act*, while the defendants responded that s. 3(3) applied only to *substantive* constructive trusts. The Court ruled that s. 3(3) applied to both types of constructive trust.

22 The chambers judge in the case at bar found, however, that BNSF's argument failed on two bases. First, he found that nothing in the pleadings indicated a "serious breach" of trust, as he inferred from *Sun-Rype 2008* was necessary for para. (c) or (d) of s. 3(3) of the *Limitation Act* to have any possible application. Second, he found that the more recent decisions of the Supreme Court of Canada in *Kerr v. Baranow*, *Professional Institute*, *Sun-Rype* and *Pro-Sys* had clearly stated the circumstances in which "constructive trusts" are available. They did not, he said, allow for a "separate concept of the substantive constructive trust, subject to a different set of principles." (At para. 20.) In his words:

> Most tellingly, in *Sun-Rype* the Supreme Court dismissed the constructive trust claims. It is true that decision was an appeal of the certification issue and not the appeal from the Court of Appeal's decision relied on by the plaintiff here .....; nevertheless, I find it impossible to conclude, as argued by the plaintiff, that the Supreme Court ignored another type of constructive trust that would have been available to the plaintiffs and was argued by the plaintiff in prior proceedings in the case. That is tantamount to saying that had the magic phrase "substantive constructive trust" been uttered, a different result would have followed.
>
> There is no factual basis pleaded to establish any proprietary nexus to the funds being claimed. There is no issue of collectability in this case because CNR has agreed to stand behind any judgment that might be awarded against BC Rail [BCOL] and the plaintiff has not argued that CNR does not have the financial wherewithal to pay the full amount claimed. There is nothing pleaded to establish the inadequacy of a monetary remedy. If no constructive trust was allowed in *Pro-Sys* or *Sun-Rype*, I see no basis to allow it here.
>
> [At paras. 21-2; emphasis added.]

In the result, he struck out the portions, highlighted above, of BNSF's pleading that referred to constructive trust.

On Appeal

23 BNSF asserts in its factum that the chambers judge erred as follows:

> (a) by holding that the recent developments of the law of discretionary remedial constructive trusts expunged or supplanted the longstanding principles governing substantive constructive trusts;
>
> (b) by characterizing the underlying claim of BNSF (or the only possible claim available to BNSF) as one seeking, as a remedy, a discretionary remedial constructive trust;
>
> (c) by considering the pleadings of BNSF as if the remedy sought was a discretionary remedial constructive trust, in contrast to a declaration of the respective rights and obligations of the actors to the mistaken payments;
>
> (d) by concluding it was plain and obvious that the claim of BNSF as pled was bound to fail.

Overview of Constructive Trust

24 I do not propose to undertake a comprehensive review of the English law relating to the substantive, or institutional, constructive trust. Academic writers seem to agree that this type of trust developed in an *ad hoc* fashion from the 17th century. D.W.M. Waters, M.K. Gillen and L.D. Smith, the authors of *Waters' Law of Trusts* (4th ed., 2012), note that the types of obligations enforced by means of this trust "reflected the whole spectrum of remedies that were available in the equity jurisdiction", although they were mainly concerned with what we would call fraud (very broadly defined), mistake and fiduciary relationships. (At 480.) Such trusts were invoked, for example, where necessary to preclude employees from retaining secret profits made by abusing their positions; to prevent the *Statute of Frauds* from being used to effect a fraud; or for ensuring that a stranger who intermeddled with a trust or assisted in a breach of trust would be required to account for any profits so obtained. The authors go on to state:

> Effectively ... English courts did not seriously examine what the constructive trust as a concept was *for*, and, without the direction that this inquiry would have given, they fell into describing what the position of a person is *like*, who is vested with property the benefit of which he is obligated to hold for another. It was like the express trust; there was a trustee and a beneficiary, there was trust property and duties with regard to that property which fell upon the trustee. The name, constructive trust, *described* the existence of an independent obligation; it neither created that obligation, nor was it itself a remedy. This was the approach taken to the constructive trust and it has survived to the present day in the more traditional common law jurisdictions of the Commonwealth. [At 481.]

25 In the twentieth century, however, courts in the U.K. began to take notice of the American trend, sparked by the publication of the 1937 *Restatement on Restitution*, towards the recognition of a "new head of restitutionary obligation". (*Waters'*, at 484.) Beginning in the 1960s, the English Court of Appeal invoked the constructive trust in new situations to redress unconscionable or inequitable conduct. These cases culminated in *Hussey v. Palmer*, [1972] 3 All E.R. 744 (Eng. C.A.), to which I will return below.

26 In Canada, the development of the *remedy* of "constructive trust" began when the Supreme Court first turned to it as a proprietary device that could resolve, at least in some cases, the injustice inherent in the common law of matrimonial property. (See, e.g., *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), *Gissing v. Gissing* (1970), [1971] A.C. 886 (U.K. H.L.), and the dissenting judgment in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.).) Again, I do not propose to embark on an exposition of the voluminous academic and judicial writing on this subject in the 1980s and 1990s. I refer the reader to D.W.M. Waters, "The Constructive Trust in Evolution: Substantive *and* Remedial", (1990-91) 10 *Est. & Tr. J.* 334; *Waters' Law of Trusts*, *supra*, at ch. 11; Maddaugh and McCamus, *supra*, at §5:200; a case comment by Professor A.J. McClean on *Becker v. Pettkus* in (1982) 16 *U.B.C. L. Rev.* 155; M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and a Remedy of Constructive Trust", (1988) 26 *Alta. L. Rev.* 407; David M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors", (1989) 68 *Can. B. Rev.* 315; John L. Dewar, "The Development of the Remedial Constructive Trust",

(1982-4) 6 *Est. & Tr. Q.* 312; Leonard I. Rotman, "Deconstructing the Constructive Trust", (1999) 37 *Alta. L. Rev.* 133; Stuart Hoegner, "How Many Rights (or Wrongs) Make a Remedy? Substantive and Unified Constructive Trusts", (1997) 42 *McGill L.J.* 437; and more recently, John Greiss, "Causes of Actions Supporting a Constructive Trust", (2011) 38 *Advoc. Q.* 249.

27 The process began in earnest when Laskin J. (as he then was) dissented in *Murdoch*, forsaking "the often unconvincing search for a mythical common intention" to create property rights justifying an *in rem* remedy to Mrs. Murdoch. His approach was adopted by two others in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.). There, Dickson J. (as he then was), with Chief Justice Laskin and Spence J. concurring, reasoned:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment ... [At 455.]

28 Dickson J. also observed that in cases of this kind, the plaintiff must demonstrate a "causal connection" between his or her contributions (whether financial or otherwise) and the acquisition or existence of the disputed assets. That requirement had been met in *Rathwell*:

> Analyzing the facts from the remedial perspective of constructive trust, it is clear that only through the efforts of Mrs. Rathwell was Mr. Rathwell able to acquire the lands in question. Assuming, *arguendo*, that Mrs. Rathwell had made no capital contribution to the acquisitions, it would be unjust, in all of the circumstances, to allow Mr. Rathwell to retain the benefits of his wife's labours. His acquisition of legal title was made possible only through "joint effort" and "team work" as he himself testified; he cannot now deny his wife's beneficial entitlement. [At 461.]

29 Finally, in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), the minority view became that of the majority and the availability of a constructive trust as a remedy for unjust enrichment was put beyond doubt. I need quote only this paragraph from Dickson J.'s reasons:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise .... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the change in needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armory .... [At 847-8.]

(See also *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.) at 47-50.)

30 In the case at bar, of course, the plaintiff has pleaded unjust enrichment as well as money had and received, as its causes of action. Counsel for the plaintiff acknowledged that the constructive trust that has developed in Canada as a remedy for unjust enrichment requires a "causal link" or "nexus" between the contribution or payment on which the action is based and the property in respect of which the constructive trust is claimed. Mr. DeFilippi argued, however, that the *substantive* constructive trust is alive and well in the U.K. and has not been "expunged" or supplanted in Canadian law, despite its rarity in this country. More to the point, counsel says this type of constructive trust is available, and indeed arises 'automatically', in the law of restitution when money has been paid to a defendant by mistake. Thus, he submitted, the imposition of such a trust does not involve the exercise of any judicial discretion — which Mr. DeFilippi seems to associate with the application of the two criteria mentioned above. Thus he submits that no "nexus" with identifiable property is necessary and that BNSF need not show that damages would be inadequate or inappropriate, in order to succeed on the basis of (substantive) constructive trust in this case.

Money Paid under Mistake of Fact

31 Before turning to the trust issues raised by this appeal, it may be useful to advert briefly to the treatment accorded by the common law to claims for money had and received where the money has allegedly been paid under a mistake of fact. The starting point is a decision of Lord Mansfield in *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (Eng. K.B.) (which as seen above, was cited by the Court in *Becker v. Pettkus*). As Maddaugh and McCamus write (§4:200.10), Lord Mansfield described "money had and received" as money that "*ex aequo et bono* the defendant ought to refund." The authors describe the writ as a purely common law one, but with some proprietary features:

> ... so long as the plaintiff's money has not passed into currency or become indistinguishably and inseparably mixed with other money prior to its receipt by the defendant, the plaintiff may utilize a claim in money had and received in order to assert a proprietary interest. The plaintiff does not recover the specific money from the defendant, rather the plaintiff is awarded a personal judgment for the equivalent value. As a consequence, the plaintiff is treated like any general creditor and the judgment is not accorded any special priority in the event of the defendant's bankruptcy. Although such a claim for money will typically be made against the initial payee, it may also be asserted against a third party who has received the money from the payee and who, like the payee, is not a *bona fide* purchaser, on the ground that legal title to the money rests with the plaintiff and not with either of the other parties. However, once the money has been received by the defendant, it matters not that the plaintiff can no longer identify the property or that it has been dissipated; the plaintiff's proprietary basis for the claim having been established at the time the money came in through the defendant's hands, an action for money had and received will lie. [At 4-5 to 4-6.]

32 A later case, and still the seminal English authority, is *Kelly v. Solari* (1841), [1835-42] All E.R. Rep. 320 (Eng. Exch.). There, Parke, B. suggested that in cases of money paid "under the influence of a mistake", it is "against conscience to retain it". Similarly, Rolfe B. stated:

> ... wherever [money] is paid under a mistake of fact and the party would not have paid it if the fact had been known to him, it cannot be otherwise than, unconscientious to retain it.

Kelly v. Solari continues to be authoritative in the U.K.: see for example *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.); *Norwich Union Fire Insurance Society Ltd. v. W.H. Price Ltd.*, [1934] A.C. 455 (New South Wales P.C.); *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica*, [2001] UKPC 50 (Jamaica C.A.); *Derby v. Scottish Equitable plc*, [2001] EWCA Civ 369 (Eng. & Wales C.A. (Civil)); and generally *Goff & Jones, The Law of Restitution* (7th ed., 2007), ch. 4.

33 Canadian courts have also adopted and followed *Kelly v. Solari*. In *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.), the Supreme Court rejected the proposition that the right to recover money paid under a mistake of fact should be limited to situations in which it would be against conscience for the recipient to retain it. Rather, the Court said:

> With respect, I do not think that the interpretation placed upon the words of Parke B. in *Kelly v. Solari* is correct. He did not purport to limit the right to recover money paid under a mistake of fact to cases in which it would be against conscience for the recipient of the money to retain it. What he did say was that where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it". In other words, given the circumstances [outlined in *Royal Bank of Canada v. Huber*, [1972] 2 W.W.R. 338], it is against conscience for the recipient to keep the money paid.
>
> [At 159; emphasis added.]

34 The Court also noted that the notion that the action for recovery of money paid under mistake of fact was founded on "equitable" grounds (see, e.g., *R. v. Bank of Montreal* (1907), 38 S.C.R. 258 (S.C.C.) at 280) had been rejected by some English

courts subsequent to *Kelly*. By the time *Storthoaks* was decided, the writ was regarded instead as based on an implied contract to pay, quasi-contract being a common law doctrine. (See 160-2.) The Supreme Court did not purport to resolve this debate, suggesting that the matter was still "not finally determined" in the U.K. In *Storthoaks* itself, the Court agreed that it should be open to the defendant to avoid an obligation to repay monies it had received by mistake, on the ground that it had materially changed its circumstances as a result of its receipt of the money. (A similar result obtained *in Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (U.K. H.L.).)

Recent U.K. Cases.

35 Returning to the U.K., Maddaugh and McCamus observe that the reluctance of English courts to adopt the prevention of unjust enrichment or "some similar unifying principle" governing substantive constructive trusts has resulted in the fact that in England this type of trust is "usually regarded as a residual category: one which is called into play where the court desires to impose a trust and no other suitable category is available." (At §5:200, citing Hanbury and Martin, *Modern Equity* (18th ed., 2009) at 323.) As stated by Edmund Davies L.J. in *Carl-Zeiss-Stiftung v. Herbert Smith & Co* (1968), [1969] 2 Ch. 276 (Eng. C.A.):

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. [At 300.]

36 In an apparent attempt to provide a unifying concept, Lord Denning suggested in *Hussey v. Palmer* that the constructive trust is to be imposed "whenever justice and good conscience require it". In *Hussey*, an elderly woman was suing for the repayment of what she considered a loan to her daughter and son-in-law for the construction of a bedroom extension to their house to accommodate the mother. In the course of his reasons for finding a constructive trust, Lord Denning said this:

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and therefore, much encouraged. Thus we have repeatedly held that, when one person contributes toward the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.
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> [At 1289-90; emphasis added.]

37 A few years later, *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1979] 3 All E.R. 1025 (Eng. Ch. Div.) was decided. It concerned a New York bank that had been instructed to pay some $2 million to "M", another New York bank, for the account of the defendant, a bank in England. The plaintiff made the payment through the New York clearing house system, but later the same day, mistakenly made the payment *a second time* to M for the defendant's account. A few days later the defendant petitioned for winding-up on the basis of insolvency. There was evidence that if the plaintiff had to prove as a creditor in the winding-up, it could not hope to recover the whole of the amount paid by mistake.

38 The plaintiff sued in England, claiming a declaration that at the time the mistaken payment was made, the defendant had become a trustee for the plaintiff of the entire sum, which it sought to trace and recover. The defendant argued that the plaintiff was not entitled in equity to trace and recover the payment because, *inter alia*, under English law the equitable right of tracing depended on the existence of an initial fiduciary relationship arising from a consensual arrangement that was lacking in the

circumstances of the case. Alternatively, it was argued that the law of New York applied and that such an equitable right was not part of the substantive law of that state, "but merely the result of its remedial or procedural law."

39 Goulding J. drew together various strands from American law and developments in other areas of trust law in the U.K. to affirm a connection between money paid by mistake on one hand and equitable principles and remedies such as a constructive trust and tracing on the other. In terms of American authorities, he referred in particular to an article by Professor Scott and the American Law Institute's *Restatement of the Law of Restitution*. (At 1034-6.) In terms of English law, he relied on the well-known decisions of *Sinclair v. Brougham*, [1914] A.C. 398 (U.K. H.L.) and *Diplock v. Wintle*, [1948] 2 All E.R. 318 (Eng. C.A.) as supporting the conclusion that "the equitable remedy of tracing is in principle available, *on the ground of continuing proprietary interest, to a party who has paid money under a mistake of fact*." (At 1033; my emphasis.) He rejected the argument that all the defendant's assets had been held on a *statutory* trust since the winding-up petition had been filed in accordance with the *Companies Act*. He found that the mistaken payment had never belonged to the defendant beneficially. In his analysis:

> The answer, in my judgment, is short and simple. It is common ground that if (as I have decided) there is a right in English law to trace money paid by mistake, it rests on a persistent equitable proprietary interest. Moreover, as I have already indicated, the right to trace given by New York law is, in my judgment, on the evidence, likewise founded on such a proprietary interest... If I am right, therefore, under whichever law the plaintiff's title ought to be founded, the assets (if any) in the defendant's hands properly representing the plaintiff's money at the commencement of the winding up, did not belong to the defendant beneficially and never formed part of its property subject to the statutory trust. ... There may be, of course, the special cases where the conduct or inaction of a party who has paid money by mistake similarly makes it inequitable for him to recover it to the prejudice of third parties, but nothing in the facts pleaded and proved in the present case discloses any such situation.
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> [At 1033-4; emphasis added.]

40 In the end, the Court ruled, the plaintiff was entitled in equity, under both U.S. and U.K. law, to attempt to trace the mistaken payment. An inquiry was directed "as to what has become of that sum and what assets (if any) in the possession or power of the defendant, now represent the said sum or any part thereof or any interest or income thereof." (At 1040.) *Chase Manhattan* has been followed in Canada: see *Harper v. Royal Bank* (1994), 114 D.L.R. (4th) 749 (Ont. Div. Ct.) and in New Zealand (see *Liggett v. Kensington* [1993] 1 N.Z.L.R. 257). See also *Goldcorp Exchange Ltd., Re* (1994), [1995] 1 A.C. 74 (New Zealand P.C.) at 103.

41 The last English case to which I shall refer is *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669 (U.K. H.L.). It concerned a dispute as to whether compound interest could be awarded on the liability of a municipal council under an interest-swap agreement declared by legislation to be void. In the absence of fraud, such interest could be awarded in the U.K. against a trustee who is accountable for profits made from its position. The funds had been paid into a mixed account of the Council but the plaintiff argued that the equitable interest had remained vested in the plaintiff.

42 A majority of the House of Lords, *per* Lord Browne-Wilkinson, rejected this argument. In the course of his reasons, he enunciated four principles, two of which are relevant to this case:

> (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.
>
> (iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property. [At 705.]

43 After a review of various well-known authorities, including again *Sinclair v. Brougham* (which the majority overruled), his Lordship came to *Chase Manhattan*. He disagreed with the notion that where money is paid under a mistake of fact, the recipient

is constituted a trustee. There was no "existing equitable interest", he said; and it was incorrect to refer to the conscience of a person receiving a payment who was ignorant of the payor's mistake. (At 714.) In his analysis:

> ... the judge found that the law of England and that of New York were in substance the same. I find this a surprising conclusion since the New York law of constructive trusts has for a long time been influenced by the concept of a *remedial* constructive trust, whereas hitherto English law has for the most part only recognized an institutional constructive trust: See *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391at 478-480. In the present context, that distinction is of fundamental importance. Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it; the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equity obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. Thus for the law of New York to hold that there is a remedial constructive trust where a payment has been made under a void contract gives rise to different consequences from holding that an institutional constructive trust arises in English law.
>
> However, although I do not accept the reasoning of Goulding J., *Chase Manhattan* may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the monies .... The judge treated this fact as irrelevant ... but in my judgment, it may well provide a proper foundation for the decision. Although the mere receipt of the monies, in ignorance of the mistake, gives rise to no trust, the retention of the monies after the recipient bank learned of the mistake may well have given rise to a constructive trust: see *Snell's Equity*, p. 193; Pettit, *Equity and the Law of Trusts*, 7th ed. (1993) p. 168; *Metall und Rohstoff AG v. Donaldson, Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391, 473-474.
>
> [At 714-5; emphasis added.]

44 The authors of *Waters'* observe that Lord Browne-Wilkinson's proposition that a constructive trust cannot arise until the conscience of the trustee is affected, has caused a certain amount of debate, because "it suggests that an 'affected conscience' is both necessary and sufficient for the creation of an equitable interest under a trust. This simply is not the case." The authors continue:

> An affected conscience is not necessary, because trust interests can be enforceable against a totally innocent donee or heir who knows nothing of the source of the property. Nor is an affected conscience sufficient: a personal claim cannot be made into a trust simply by the addition of knowledge. The best way to understand this requirement is to remember that Lord Browne-Wilkinson *rejected* a proposition which many would accept: namely that where legal title is in one person and equitable title is in another, there is a trust. Instead, his terminological choice was that the word "trust" — whether constructive or express — could not properly be applied to a relationship unless it contains *both* the proprietary elements of the trust (the separation of title, as it is usually called), *and* the personal elements (such as the obligations of loyalty and property management). This all-encompassing approach to the word "trust" in the phrase "constructive trust" would guarantee that such trusts would arise rarely; but it also reflects the very traditional view that whatever is true of trusts in general is also true of constructive trusts. [At 482-3.]

Substantive Constructive Trust in Canada

45 Returning to Canadian authorities, counsel referred us to *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), where the majority, *per* Cory J., referred at 81 to the evolution of the "remedial constructive trust doctrine" in the matrimonial law context and then continued:

> Under the traditional English view the constructive trust was regarded as a substantive institution very similar to an express trust. It was only applied in very narrow circumstances. In *Pettitt v. Pettitt*, ... and *Gissing v. Gissing*, ... the House of Lords emphasized the need for courts to find an actual or presumed intention on the part of the parties before they could

reallocate property interests pursuant to trust doctrine. In discussing trust doctrine the House of Lords used the phrase "implied, resulting or constructive trust" without making any distinction among the three. At the same time, however, the Court of Appeal had granted judicial recognition to a "new model" constructive trust that could be imposed, in the words of Lord Denning M.R. in *Hussey v. Palmer*, ..."whenever justice and good conscience require it".

In the United States, on the other hand, the constructive trust had long been recognized not as an institution, but as a broad restitutionary device that could be invoked in a wide variety of situations to compel the transfer of property to a claimant by the defendant in order to prevent the unjust enrichment of the title holder. As stated in Scott, *The Law of Trusts*, vol. 5 (4th ed. 1989), at p. 304:

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

[At 82-3; emphasis added.]

46 The dissenting justices in *Rawluk* — McLachlin J. (as she then was), La Forest and Sopinka JJ. — also contrasted the traditional English view of constructive trust with the remedial constructive trust, but found it unnecessary to decide whether the latter had superseded the former:

> In Canada, we have not followed the traditional English view of the constructive trust as a limited doctrine applying in limited, clearly defined cases. Rather, we have moved toward the American view of the constructive trust as a general equitable remedy for unjust enrichment. This development is of relatively recent standing. ....
>
> The new concept of constructive trust now prevailing in Canada differs from the traditional English concept in two respects. The first is its foundation in the concept of unjust enrichment....
>
> The second main difference between the traditional English concept of trust and the doctrine now accepted in Canada is the remedial nature of the Canadian doctrine. The trust is not viewed as an institution but as a remedy, as a means of compelling a person to surrender an unjust enrichment ...
>
> While some writers suggest that the development of a remedial constructive trust in Canada has, for all purposes, eliminated the presence of "institutional" constructive trusts (see for example McClean,[*supra*].... [O]ther authors argue that the constructive trust that is used to remedy unjust enrichment is not the only type of constructive trust (see, for example, Paciocco, [*supra*]). Because the facts in the present case involve allegations of unjust enrichment (and thus the type of constructive trust used to remedy unjust enrichment), it is not necessary for the purpose of this appeal to decide if other types of constructive trusts have been abolished. The discussion which follows focusses on an analysis of constructive trusts as developed in response to unjust enrichment.
>
> Although the constructive trust is remedial, that is not to say that the remedial concept of constructive trust does not give rise to property interests. When the court declares a constructive trust, at that point the beneficiary obtains an interest in the property subject to the trust. That property interest, it appears, may be taken as extending back to the date when the trust was "earned" or perfected. In *Hussey v. Palmer*, in a passage referred to by Dickson J. in *Rathwell v. Rathwell* and relied on by the Court of Appeal in this case, Lord Denning postulated that the interest may arise at the time of declaration or from the outset, as the case may require. Scott views the trust as being in force from the outset, with a discretion in the court as to whether it should be enforced: Scott, op. cit., s. 462.2. Another American scholar regards it as coming into existence only on an order being made, but having retrospective operation: Bogert, *The Law of Trusts and Trustees* (2nd ed., 1979) s. 472.
>
> The significance of the remedial nature of the constructive trust is not that it cannot confer a property interest, but that the conferring of such an interest is discretionary and dependent on the inadequacy of other remedies for the unjust enrichment in question. The doctrine of constructive trust may be used to confer a proprietary remedy, but does not automatically presuppose a possessory property right. Thus, even where the tests for constructive trust are met — unjust enrichment, corresponding deprivation, and no juridical justification for the enrichment and justification — the property interest does

not automatically arise. Rather, the court must consider whether other remedies to remedy the injustice exist which make the declaration of a constructive trust unnecessary or inappropriate.

[At 101-4; emphasis added.]

47 At p. 107, McLachlin J. also noted that in Canada, "at least in the context of unjust enrichment, [constructive trust] is not a doctrine of substantive property law, but a remedy" and thus "cannot be regarded as arising automatically when the three conditions set out in *Becker v. Pettkus* are established. Rather, the court must go on to consider what other remedies are available to remedy the unjust enrichment in question and whether the proprietary remedy of constructive trust is appropriate."

48 Seven years later, in *Soulos*, however, McLachlin J., now speaking for the majority, took a more positive view of substantive constructive trusts. It will be recalled that in *Soulos*, a real estate agent had breached his fiduciary duty to his client in buying the property for himself (through his wife), but by the time the client sued, the value of the property had declined. Thus it could not be said that the fiduciary had been "enriched". The Ontario Court of Appeal had ordered that the property be conveyed to the plaintiff nevertheless, and a further appeal was dismissed by the Supreme Court of Canada. For the majority, McLachlin J. referred to the defendant's argument and commented:

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

[At para. 17; emphasis added.]

She noted that the English jurisprudence had not identified any "satisfactory limiting or unifying conceptual theory for constructive trust", although the existence of a fiduciary relationship was often found in the case law. She then continued:

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

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".

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 [*supra*] 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) ...

[At paras. 20-2; emphasis added.]

49 McLachlin J. went on to observe that the law of constructive trust in the common law Canadian provinces "embraces" situations in which English courts have traditionally found constructive trusts, as well as situations of unjust enrichment that were the subject of the recent Canadian jurisprudence. Indeed, she said, the notion of unjust enrichment did not explain all situations in which the constructive trust has been applied. At para. 29, she found that (as had been suggested by various authors, including Professor McClean, *supra*), "good conscience" was the "unifying concept" relied upon by many courts in England, New Zealand and Canada. Again in her words:

> 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.
>
> 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 goal is but a reasoned, incremental development of the law on a case-by-case basis.
>
> The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.
>
> . . .
>
> Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Pettkus v. Becker*, *supra*. However, since *Pettkus v. Becker* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.
>
> [At paras. 34-9; emphasis added.]

50 Sopinka J., dissenting, was of the view that recent case law in Canada was "very clear that a constructive trust may *only* be ordered where there has been an unjust enrichment", citing passages in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.).

51 If we were to draw a line immediately after *Soulos*, then, it would be correct to state that, paraphrasing the majority, the extension and development of the remedial constructive trust in Canada have not eliminated the institutional or substantive constructive trust from Canadian law, nor precluded it from being used in "circumstances where its availability has long been recognized." Further, if it is "against good conscience" for the payee of a mistaken payment to retain it, and if the payor in such a case has a "persistent equitable proprietary interest" (see *Chase Manhattan* at 1033), it would not seem out of the question

that a Canadian court would permit a plaintiff to trace such monies (i.e., assert an equitable process) on the basis that that they remained the property of the plaintiff in equity. As Maddaugh and McCamus state at the outset of their discussion of "Proprietary Relief" in chapter 10 of *The Law of Restitution*:

> The discussion thus far has offered an account of the modern principles upon which mistaken payors will be allowed to recover, in an *in personam* judgment, the value of monies paid under a mistake in a claim which has its historical origins in the common law action for money had and received. A payor who is entitled to such relief may also be able to gain the advantages of equitable proprietary relief through the imposition of a constructive trust or an equitable lien on the monies paid. [At §10:600.]

Post-Soulos

52 The question then becomes whether newer cases such as *Professional Institute*, *Sun-Rype* and *Pro-Sys* are to be read as overruling the clear statement of the majority in *Soulos* that the constructive trust is imposed "not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which 'in good conscience' they should not be permitted to retain." Put another way, is the constructive trust in Canada now restricted to cases of breach of fiduciary duty and unjust enrichment despite the clear statements in *Soulos* that the law of constructive trust "embraces the situations in which English courts of equity traditionally found a constructive trust as well as situations of unjust enrichment recognized in recent Canadian jurisprudence"? (At para. 25.)

53 I would answer this question in the negative. In *Professional Institute*, the Court acknowledged at para. 145 the statement in *Soulos* that a constructive trust "may be imposed where good conscience so requires". The Court found no fiduciary obligation applicable to the government in its management of the subject pension plans and noted that the appellants had not argued that the government had breached any other equitable obligation owed to members of the plan. In the end it was unnecessary to consider a substantive constructive trust. In *Sun-Rype*, the claim for a "*remedial* constructive trust" foundered on the lack of referential property and any explanation as to why a monetary remedy would be inappropriate or insufficient. (See para. 41.) In *Kerr v. Baranow*, Cromwell J. for the Court also seemed to restrict his comments to the remedial constructive trust. (See paras. 50, 55.) None of these cases dealt with substantive constructive trusts, nor purported to overrule or disagree with the suggestion made in *Soulos* that the "ancient and eclectic" institution of the substantive constructive trust has not been 'expunged' in Canada by the development of its remedial counterpart.

54 The chambers judge in the case at bar commented that it was impossible to believe the Supreme Court of Canada in *Pro-Sys* and *Sun-Rype* had "ignored" another type of constructive trust that would have been available to the plaintiffs. (At para. 21.) But it does not appear that any argument was made to the effect that *substantive* constructive trusts were being sought. It is unlikely, in my view, that the Court intended to overrule *Soulos* without referring to it. It is more likely that in *Pro-Sys* and *Sun-Rype*, the Court was making the assumption that in Canada, "constructive trust" without more is generally taken to mean a *remedial* constructive trust. In my opinion, then, the constructive trust sought by the plaintiffs and dealt with by the Supreme Court of Canada in the recent cases cited by the chambers judge were of the *remedial* variety — hence the need for BNSF to amend its notice of claim in this case.

55 I conclude that *Soulos* remains good law in Canada and that it is open to a court, "where good conscience so requires" (*Soulos*, at para. 34), to develop the law in this area on an incremental or a case-by-case basis beyond the constraints of the two categories of breach of fiduciary duty and unjust enrichment.

56 Even if I were wrong on this point, unjust enrichment has of course been pleaded in this case.

The Two Criteria

57 We have seen that it was on the basis of the requirement for a "proprietary nexus" and on the basis that BNSF had not shown that a monetary award would be inadequate (a longstanding rule of equity, which generally prefers to act in *personam)*, that the chambers judge ruled that BNSF's claim for a constructive trust was 'bound to fail'. These two conditions were re-affirmed in 2011 in what is now the leading Canadian case, *Kerr v. Baranow*, *supra*, from which the chambers judge quoted:

The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. ... 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). ...

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).

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 plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.). [At paras. 50-52.]

58 In *Pro-Sys*, Rothstein J. quoted para. 50 of *Kerr* and continued:

In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient"... As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck.

[At para. 92; emphasis added.]

(See also para. 41 of *Sun-Rype*.)

59 The two criteria were also applied in *Michelin Tires (Canada) Ltd. v. R.*, 2001 FCA 145 (Fed. C.A.), a case that proceeded on an agreed statement of facts. There the Federal Court of Appeal ruled that overpayments made by Michelin Tires in respect of federal sales tax did not give rise to a constructive trust because the claimant was unable to identify "property in the hands of the defendant that is identifiable as the property, or its proceeds, that was transferred by or obtained from the plaintiff without a juristic reason, or that the defendant could not otherwise retain in good conscience." Evans J.A., speaking for the Court, emphasized that constructive trust "attaches to *specific assets of the defendant that represent the enrichment*; it is not a charge on the defendant's general assets for the amount of the plaintiff's claim." (At para. 19; my emphasis.) He also referred to *Westdeutsche* and *Chase Manhattan*, observing:

....despite its new-found flexibility as an equitable remedy, the constructive trust has not shed all of the limitations that flow from its proprietary character. Thus, Lord Browne-Wilkinson did not suggest in *Westdeutsche Landesbank, supra*, that Goulding J. had erred in *Chase Manhattan, supra*, when he ordered an inquiry into whether the mistaken payment could be identified in the defendant's assets. Such an inquiry would only have been ordered if Goulding J. had thought that tracing was still required to determine the availability of a constructive trust.

> Accordingly, since Michelin provided no evidence that its overpayment could be traced, the remedy of a constructive trust is not available to it on the basis of the agreed facts. As a result, it is not necessary for me to consider the soundness of the premise of the appellant's argument, namely that the constructive trust claimed here is not subject to the six-year limitation period because it is an equitable remedy.
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> [At paras. 25-26; emphasis added.]

See also *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at paras. 229-31.

60 No judicial authority of which I am aware suggests that the two criteria do not apply to substantive constructive trusts as well as remedial ones, although it has been pointed out that in matrimonial cases such as *Pettkus* and *Sorochan*, a less strict view of the criteria is often taken: see Litman, *supra*, at 456-60. Outside the matrimonial context, these requirements — particularly the "proprietary nexus" — are a consistent theme. In *Atlas Cabinets*, for example, Lambert J.A. referred to "the acts of the parties in relation to some property" that may give rise to a substantive constructive trust. (At 108.) In *Chase Manhattan Bank*, it will be recalled, the Court directed an inquiry as to what assets were in the possession of the defendant representing the funds in question — essentially whether they could be traced. In *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), McLachlin J. stated that for a constructive trust to arise, "the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution." (At 995.) The requirement that a monetary remedy be inadequate or inappropriate is obviously related.

Meeting the Criteria

61 Accepting that a plaintiff must be able to "identify" property, or proceeds thereof, to which the plaintiff contributed and which the defendant received, at what point must that condition be met? Must it be met before the trial and indeed before examinations for discovery and disclosure of documents, as the defendants imply? The same questions arise with respect to the adequacy of a monetary award — can it (and must it) be determined on an application of Rule 9-5(1)(a) as a question of law solely on the basis of the plaintiff's pleadings? Is it liable to be struck out as "bound to fail" before any findings of fact have been made?

62 I acknowledge that in both *Sun-Rype* and *Pro-Sys*, the Supreme Court seemed to require that the plaintiffs' pleadings provide an "explanation" of why a monetary award would be inadequate and be in a position to point to "referential property" over which the trust is sought. Both cases, of course, involved allegations that purchasers had been 'overcharged.' The trial judge in *Sun-Rype* had found that there was a basis for a "sufficient nexus" because the overcharges "formed part of [the defendant's] profits. Short of tracing the physical bills, this would be as direct a link to the trust property as one might hope to establish." (See 2010 BCSC 922 (B.C. S.C.) at para. 37) In contrast, Mr. Justice Donald in his dissenting reasons had observed:

> Any proceeds of the alleged overcharge would, over the class period, have long been put into the defendants' businesses to pay expenses, distribute dividends, invest in plants and equipment, and so on, so that there is no discrete fund identifiably connected to the overcharges. Casco [Corn Products International Inc.] says there is no *corpus*, specific property, capable of forming a trust... [2011 BCCA 187 at para. 35.]

63 On the final appeal, the defendants cited this court's decision in *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357 (B.C. C.A.) "for the requirements of a constructive trust". Rothstein J. did not comment directly on these submissions, but said he agreed with the argument that it was plain and obvious the "direct purchaser claim in constructive trust has no chance of succeeding." (At para. 40.)

64 *Tracy* bears some similarity to *Chase Manhattan* in that the plaintiffs in both cases were given the opportunity to attempt to trace the funds in question (referred to in *Tracy* as the "Unlawful Finance Charges"). This court reasoned:

> ... it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants farther up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The

process by which the plaintiffs may 'follow' the Charges up the chain is tracing — the "process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property". (*Per* Millett L.J. (as he then was) in *Boscawen v. Bajwa*, [1995] 4 All E.R. 769 (C.A.) at 776.) Although tracing is available both at law and in Equity ... the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (*The Law of Tracing* 1997)) that the establishment of this proprietary right, which he refers to as the "proprietary base", is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship: see *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 at para. 57.

Of course, it may be difficult to identify the funds or other property into which the claimed Charges have been transformed or with which they have been mingled; and the process will come to a halt in certain conditions, including where the balance in an account has fallen below the amount being traced. ...

Should the plaintiffs succeed in identifying the Charges or their proceeds farther up the chain, on the other hand, they will be entitled to elect a proprietary remedy in the form of a constructive trust: Maddaugh and McCamus at 7-27 to 7-28.

[At paras. 41-3; emphasis added.]

65 There is a substantial body of law aside from *Tracy* that recognizes the right of a plaintiff to "elect" between different remedies (here I use the term loosely) — for example, between a constructive trust and a damage claim. Most notably, in *Lac Minerals*, *supra*, the plaintiffs sought a constructive trust in respect of a mining property acquired by the defendant from a third party either due to a breach of fiduciary duty owed to the plaintiff or an abuse of confidential information confided to the defendant by the plaintiff. As noted by Maddaugh and McCamus at §5:200.60.50, La Forest J. articulated a series of guidelines to be considered by a court in choosing between a proprietary remedy of constructive trust and a personal remedy such as an accounting of profits. Joined on this point by Wilson and Lamer JJ., he ruled that it was not necessary to establish a "special relationship" (as suggested by previous cases) between the parties; nor need the constructive trust be limited to cases of a property interest. (At 676.) He continued:

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

[At 678-9; emphasis added.]

66 La Forest J.'s reference to the fact that a right to a constructive trust "can only arise once a right to relief has been established" is important for our purposes. It suggests that it may be inappropriate to strike out a claim to proprietary relief prior

to the determination of the cause of action itself. The same may be true in respect of the requirement that damages provide an inadequate remedy: why should this question be decided before the exact parameters of the claim (and, perhaps, the defendant's liability) have been determined?

67 In *Tracy*, this court suggested that where damages and constructive trust are sought as alternative remedies, the plaintiffs need not elect between the two until they are able to make an "informed choice" prior to the pronouncement of final judgment. (See para. 49 and see *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), *aff'd.* [2004] O.J. No. 1765 (Ont. C.A.), *lve. to app. ref'd.* [2005] 1 S.C.R. xvii (note) (S.C.C.).) Similar reasoning was employed by Myers J. in *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 (B.C. S.C.). After a review of the authorities, he concluded that generally, "a plaintiff is required to make the election when it has adequate information to allow it to make an informed choice. That does not entail a judgment of the court quantifying the alternative remedies." (At para. 214.)

68 I know of no reason why the same approach would not be taken to the question of whether a monetary remedy would be adequate where a constructive trust is also pleaded. Aside from the consideration that all the facts are not known until the evidence is in, the facts may change during the litigation. A defendant may find itself in bankruptcy or insolvent, making a monetary award against it much less "appropriate" than a proprietary one. (This, of course, depends on the interpretation of the word "trust" in s. 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.) The defendants in the case at bar purported to forestall any argument that a monetary remedy would be inadequate by reminding the chambers judge that CN is a large company, but it does not follow that CN will be perpetually solvent. In any event, it is arguable that the court should not be required to reach a determination as to whether the conditions for constructive trust have been met at the early stages of the proceeding in this case. Put another way, it is not "plain and obvious" that the plaintiff would as a matter of law be unable to satisfy the two prerequisites for a constructive trust should it succeed in establishing unjust enrichment. These conditions require evidence and factual findings. They cannot at this stage be said to be bound to fail *as a matter of law*.

Limitations Act

69 There are many reasons why a plaintiff might legitimately prefer a constructive trust to a monetary remedy. Goff and Jones, *supra*, describe some of them:

> The beneficiaries of trust or the fiduciary's principal may be anxious to persuade the court that the stranger is a constructive trustee for more than one reason. First, the stranger may not be able to defend himself by pleading that the claim is statute-barred. Secondly, constructive trustee will be liable to pay interest, which may be at a higher rate than the rate of the court's special account. Thirdly, trustees are jointly and severally liable for all the loss suffered by the trust. Fourthly, they cannot defend themselves by saying that any loss is too remote. Fifthly, the court may be more ready to exercise its discretion to order an account of profits made from the exploitation of a fiduciary position; ... Sixthly, the trust property may have increased in value. Seventhly, R.S.C., Ord. 11, r. 1(1)(t) specifically permits the service of a writ outside the jurisdiction against the defendant as constructive trustee. [At §33-028.]

70 In the case at bar, the defendants contend there is no real possibility of an insolvency or bankruptcy on the part of CN (although that is not something of which judicial notice could be taken). There is an argument that given the defendant's refusal to repay the monies allegedly paid in error, the plaintiff is being denied the right to earn interest or other income on more than $18 million that has allegedly been wrongly retained over many years. The moral quality of the defendants' acts in refusing to repay an amount equal to the erroneous payments may or may not be found to be "conscious wrongdoing". Most important is the fact that if no trust were found to exist, the plaintiff might be denied all or much of its overpayment by virtue of the operation of the *Limitation Act*. BNSF may be confined to recovery over only six years under s. 3(5), as opposed to the ten-year period in s. 3(3) (subject to any postponement under s. 6(1).)

71 I note that in their Response, the defendants have taken the position that a six-year limitation is applicable. In their factum, they observe that in *Sun-Rype*, the "Casco" defendants argued that the only reason the plaintiffs were seeking a constructive trust was to avoid, or 'side-step', the shorter limitation period on claims in unjust enrichment. They suggested this was not a

proper reason to grant an equitable or proprietary remedy. The Supreme Court did not comment directly on this point, but did strike the constructive trust claim. The defendants here say that the Court must have agreed with Casco's position.

72 The 'side-stepping' argument is hardly new: see *Waters'* at 1309-1321 and William Swadling, "Limitation", in Peter Birks and Arinna Pretto, eds., *Breach of Trust* (2002). Those authors recount that prior to the introduction of modern limitations statutes, courts of equity generally did not impose limitation periods but instead recognized the defence of laches. As a result, they were often confronted with claims brought by plaintiffs who had remedies at law but wished to avail themselves of the superior procedures available in equity. Complex rules evolved to distinguish between different types of trusts and transactions that could legitimately engage equity and those that could not. The authors of *Waters'* suggest, however, that in Canada, the modern limitations statutes have resolved the problem by treating all types of 'trust' similarly. Thus they write:

> In 1975, adopting the report of the Provincial Law Reform Commission, British Columbia adopted a *Limitation Act* which constituted a completely new statement of limitation legislation provisions. The position of trustees and trust beneficiaries is crisply and comprehensively set out. However, there is another important feature associated with this Act. It represents a departure from the historic rule in England and the other Canadian common law jurisdictions; the Act gives "trustees" of every description, whatever the nature of the breach of trust, the protection of a limitation period. Whether the trustee is alleged to have committed a fraudulent breach of trust or any act of fraud, or to have converted trust property to his own use, the right of action against him is extinguished ten years after it arises. A person in possession of trust property wrongly distributed to him, and a person into whose hands the trust property can be traced are also given the ten-year protection, as is the personal representative when the claim is for a share of the estate. The Act is careful to provide that time shall not commence to run until the beneficiary "becomes fully aware" of the trustee's fraud in relation to the trust property, or, so far as other acts of breach are concerned, he knows enough that a reasonable person, being advised, would realize he has an action and the prospect of success. The limitation period for all other breaches of trust is six years ...
>
> [At 1318-9; emphasis added.]

73 The 'side-stepping' argument was made by the defendants in *Sun-Rype 2008*, but without apparent success. Under the heading "Side-Stepping of the Limitation Period", this court wrote:

> The defendants also submit that the plaintiffs' claim for a constructive trust is simply an attempt to "piggy-back" a claim in equity (for a remedial constructive trust) on common law claims based on the same underlying facts for the sole purpose of taking the benefit of the extended limitation period that applies to breaches of trust under s. 3(3) of the Act. The defendants submit that the court should not countenance this thinly disguised attempt to "side-step" the limitation periods in the Act. They say that, historically, such side-stepping was not permitted and they refer to an article by W.J. Swadling, "Limitation", in Birks and Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002), at 323-34 in that regard.
>
> It does not appear that the side-stepping argument was raised before the trial judge. In our view, it is simply a reformulation of the defendants' argument that the plaintiffs' claim in this case does not sound in trust and, thus, does not fall under s. 1 and s. 3(3) of the Act. We have already dealt with that submission at length.
>
> To the extent that the side-stepping argument is directed at the potential for plaintiffs to make a claim for a remedial constructive trust as a ruse to avoid a limitation period which would otherwise be applicable under the Act, it is open to defendants to apply to strike the action under Rule 18A on that basis, to strike the pleadings under Rule 19(24) or to request the trial judge to deny a remedial constructive trust at the conclusion of the trial on the basis that it is not the appropriate remedy.
>
> [At paras. 85-7; emphasis added.]

74 It is unfortunate the Supreme Court did not deal directly with Casco's argument regarding the *Limitation Act* in *Sun-Rype*, but as already noted, the Court was not asked to consider substantive constructive trust in that instance, or in *Pro-Sys*. There is extant a decision of this court (*Sun-Rype 2008*) that did not react with moral outrage to the idea of 'side-stepping' the shorter limitation period by means of a constructive trust. Further, the academic literature referred to above suggests that trusts of all

kinds are intended to be subject to the ten-year limitation period in our 'modern' Act. *Thus far*, no reason has been shown why the plaintiff should not be able to attempt to invoke those provisions in this case. It will be for the defendants to persuade the court, on the evidence and after full argument, as to the applicable limitation period; and it will be for the plaintiff to persuade the court as to any postponement available to BNSF.

75 At the end of the day, the question is whether it is "plain and obvious", on the plaintiff's pleading alone, that constructive trust could not be successfully advanced under s. 3(3). I am not persuaded this is so.

When Does a Constructive Trust Take Effect?

76 Having drawn distinctions to this point between remedial and institutional constructive trusts, I should note a feature they have in common — the fact that it is not necessarily the case that a constructive trust — *including a remedial one* — takes effect from the date of the court's order. Indeed Maddaugh and McCamus suggest that with respect to *remedial* constructive trusts, the court retains the authority to make the order retroactive or delay its coming into force. (At §5:200.70.) On this point they cite *Rawluk*, where the Court held that the property in question was impressed with a (remedial) constructive trust in favour of the wife and that her proprietary interest had existed at the time she separated from her husband. Cory J. for the majority stated:

> It is important in this regard to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. [At 91.]

In support, he cited this passage from A.W. Scott and W.F. Fratcher, *The Law of Trusts*, vol. 5 (4th ed., 1989):

> It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It rises when the duty to make restitution arises, not when that duty is subsequently enforced. [At 323-4.]

Cory J. commented that this principle was "not inconsistent" with the remedial characteristics of the doctrine of constructive trust.

77 McLachlin J. for the minority stated that "When the court declares a constructive trust, at that point the beneficiary obtains an interest in the property subject to the trust", but added that "That property, it appears, may be taken as extending back to the date when the trust was 'earned' or perfected." (At 103, citing *Hussey*.)

78 This court's decision in *LeClair v. LeClair Estate* (1998), 159 D.L.R. (4th) 638 (B.C. C.A.), is sometimes understood to establish that every (remedial) constructive trust takes effect as of the date of the court's order. However, the Court in *LeClair* acknowledged the passage I have noted from *Rawluk*. What the Court decided in *LeClair* was that a finding of unjust enrichment was necessary before a court could impose a constructive trust to remedy same. (At 648.)

79 Maddaugh and McCamus write that going forward, the unresolved issue is whether, as Waters ("The Constructive Trust in Evolution", *supra*, at 361) writes, the court should have a discretion as to when an *in rem* right such as a constructive trust should take effect. The authors conclude:

> We would argue that the court should indeed retain the power to shape the constructive trust remedy to fit the particular situation before it. The declaration that a claimant is a constructive trustee does not necessarily entail the granting of a proprietary remedy. Where third parties may be prejudiced — say through the taking of a security interest on the property in question between the date of the unjust enrichment and the date of judgment or, should the defendant be insolvent, through the removal of the property from the bankrupt's estate — a court may choose to award *in personam* relief. Additionally the court should have the power to impose a constructive trust effective only as of the date of the judgment or as of some other date subsequent to the date of unjust enrichment on grounds of avoiding a preference to the claimant over innocent third parties. We agree with Lord Browne-Wilkinson when he states: "A remedial constructive trust ... is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court." [At 5-41.]

"Serious Breach"

80 The remaining objection raised by the chambers judge to the plaintiff's submission was that:

> ... there is nothing in the Notice of Civil Claim indicating a "serious breach", which the Court of Appeal seemed to regard as a necessary element for a substantive constructive trust. There is no conduct or relationship between the parties alleged that could impress each payment with a trust at the time it was made, as argued by the plaintiff. [At para. 19.]

The chambers judge here was referring to *Sun-Rype 2008*, where this court recounted the legislative history of the *Limitation Act*. The legislation had been developed to a great extent by the British Columbia Law Reform Commission in its *Report on Limitations: Part 2 — General* (Ministry of the Attorney General, 1974). It in turn had considered the *Report of the Ontario Law Reform Commission on Limitation of Actions* (Department of the Attorney General, 1969) and the New South Wales' *Report of the Law Reform Commission: Being the First Report on the Limitation of Actions* (New South Wales Government Printer, 1967).

81 The Court at para. 53 of *Sun-Rype 2008* noted that these reports had been written at a time when there was *no* limitation period barring beneficiaries from suing a trustee for breach of an express trust, on the basis that the property held by the trustee was always regarded as belonging to the beneficiary. (As noted earlier, equity did not generally impose limitations but did recognize the defence of laches.) A debate ensued as to whether all claims or only some claims against trustees should be subject to a limitation period at all and if so, what that period should be. The British Columbia Law Reform Commission adopted the Ontario approach recommending a 10-year limitation for what it called all "serious breaches" of trust. Its *specific* recommendation was then encapsulated in what are now paras. (a) to (e) of s. 3(3) of the Act, reproduced earlier in these reasons. Those *are* the "serious breaches"; for any other breach of trust, the Commission recommended a six-year "catch-all". (See s. 3(5) of the Act.)

82 It is not clear whether the chambers judge intended to say that BNSF had not pleaded a "serious breach" or whether he intended to say that the plaintiff had not pleaded a breach falling within any of paras. (a) to (e) of s. 3(3). If a constructive trust were imposed, it appears to be arguable that the defendants' refusal to repay the monies they received by mistake would fall within para. (c) or (d).

Summary of Conclusions

83 At the end of what I fear is a rather unfocused analysis, I summarize my conclusions as follows:

> 1. Monies paid by one person to another under a mistake of fact can give rise to an action for money had and received. [1] The court normally orders the recipient to repay the amount so received: *Kelly v. Solari*; Maddaugh and McCamus, at §4:200.10; *Chase Manhattan*. There is longstanding authority for the proposition that where the defendant receives the funds, it cannot "in good conscience" retain them.
>
> 2. There is English authority for the imposition of a (substantive) constructive trust, whether arising at the time of the erroneous payment as suggested in *Chase Manhattan* or when the defendant becomes aware of the mistake, as suggested by the majority in *Westdeutsche*. Hence the name "institutional": see *Snell's Equity* (29th ed., 1990) at 193; Pettit, *Equity and the Law of Trusts* (7th ed., 1993) at 168; *Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.* (1989), [1990] 1 Q.B. 391 (Eng. C.A.) at 473-4. According to *Westdeutsche* , this trust arises by operation of law and the court simply declares the date on which it arose.
>
> 3. In Canada the term "constructive trust" usually connotes the modern remedial constructive trust that was initiated in cases such as *Becker v. Pettkus*. This type of constructive trust is a judicial remedy that *for the most part* takes effect on the date of the court's order. Also *for the most part* it is imposed in two types of claim — breach of fiduciary duty and unjust enrichment: *Kerr v. Baranow* at paras. 50-53; *Sun-Rype* at para. 41; *Pro-Sys* at paras. 90-92.

4. *Soulos* suggests that the constructive trust continues to be available in Canada in the various types of circumstances "where its availability has long been recognized" by English courts and where necessary to "hold persons in different situations to high standards of trust and probity and prevent them from retaining which in good conscience they should not be permitted to retain." (At paras. 21, 17.)

5. In my view, the Court's comments in *Soulos* regarding the substantive constructive trust have not been overruled even though in most instances, the broad doctrine of unjust enrichment may be invoked to impose a (remedial) constructive trust and it will be unnecessary to revert to the older institution. (See Maddaugh and McCamus at 5-27.)

6. Contrary to the plaintiff's submission, all constructive trusts (whether remedial or institutional) require that the plaintiff show a monetary award would be inadequate or inappropriate, and identify property or proceeds thereof to which the plaintiff's labour or money contributed. The 'process' of tracing is available to enable a plaintiff to determine whether the second condition can be met. There is no evidence to which we have been referred that indicates the funds are or are not traceable in this case, but a court does not refer to evidence in deciding an application under Rule 9-5.

7. There is clear authority for the proposition that the availability of a constructive trust need not be decided on the basis of pleadings. Being dependent on facts found at trial, the issue can be resolved once the plaintiff is able to make an "informed choice" prior to final judgment being pronounced: *Tracy*; *Waxman*; *Lac Minerals*.

8. While a remedial constructive trust usually takes effect from the date of the order, the court has a discretion to declare that a constructive trust of either kind operates retrospectively — e.g., from the date the defendant becomes aware of the plaintiff's mistake: see *Westdeutsche*; *Rawluk*; Maddaugh and McCamus at §5:200.70, or even from the date of the defendant's receipt of a mistaken payment (*Chase Manhattan*).

9. If the plaintiff is able to come within one of the subparagraphs of s. 3(3) of the Limitation Act, it is not necessary for it to show a "serious breach" as an *additional* element.

To the extent that the chambers judge assumed or held otherwise, I conclude, with respect, that he was in error.

84 I acknowledge that at the end of the day, many of these conclusions may prove to be of only academic interest in this case. However, as has already been noted, the test for the application of Rule 9(5)(1) is a low one and requires that the cause or causes of action pleaded be bound to fail as a matter of law. The court's function under the Rule is not to predict what facts will ultimately be found or what relief will ultimately be granted; but to eliminate hopeless cases while preserving the full armory of the law — including equity. (See the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 4.)

The Second Ruling

85 With respect to the second chambers order from which this appeal is taken, I agree with the plaintiff's submissions that it should be set aside, even though the decision of Dley J. may have well have been correct on the assumption that the first order was correct. I am of the view that the plaintiff should be permitted and encouraged to amend its pleadings to refer explicitly to the substantive constructive trust (if it still wishes to pursue same), and to indicate, as best it can at this stage, why it anticipates that a monetary award might be inadequate and to describe 'identifiable' property it seeks to become the subject of a constructive trust. If it is not able to identify such property at this time, it should seek the right to trace same in the event it succeeds in obtaining a declaration of constructive trust on the basis of unjust enrichment.

Disposition

86 In the result, I would allow the appeals, set aside both orders and order that the plaintiff be permitted to amend its pleadings so as to clarify, to the extent possible, exactly what it is seeking.

***Bauman C.J.B.C.*:**

I AGREE:

***Bennett J.A.*:**

I AGREE:

Appeal allowed.

Footnotes

1 More recently, money paid under a mistake of *law* has also been claimable: see *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.).

TAB 3

2018 ONCA 60
Ontario Court of Appeal

DBDC Spadina Ltd. v. Walton

2018 CarswellOnt 1571, 2018 ONCA 60, 288 A.C.W.S. (3d) 75, 33 E.T.R. (4th) 173, 419 D.L.R. (4th) 409, 56 C.B.R. (6th) 173, 78 B.L.R. (5th) 183

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

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)

E.A. Cronk, R.A. Blair, K. van Rensburg JJ.A.

Heard: June 2, 2017
Judgment: January 25, 2018
Docket: CA C62822

Proceedings: reversing *DBDC Spadina Ltd. v. Walton* (2016), 2016 ONSC 7011, 2016 CarswellOnt 19251, 42 C.B.R. (6th) 239, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons to *DBDC Spadina Ltd. v. Walton* (2016), 2016 CarswellOnt 15044, 2016 ONSC 6018, 40 C.B.R. (6th) 230, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Shara N. Roy, for Appellants, DBDC Spadina Ltd. and those corporations listed on Schedule A hereto
Rosemary A. Fisher, B. Sarsh, for Respondents, Christine DeJong Medicine Professional Corporation and Dennis and Peggy Condos
Mark Dunn, for Inspector / Manager, Schonfeld Inc.
A. Blumenfeld, for Respondents, Gideon and Irene Levytam

***R.A. Blair J.A.*:**

BACKGROUND

1 This appeal arises out of a complex multi-million dollar commercial real estate fraud perpetrated by Norma and Ronauld Walton over the course of several years.

2 The appellants and the respondents are all victims of the fraud. Underlying the issues on appeal is a contest between them over who ranks in priority to whom in claiming against the proceeds remaining from the sale of certain properties acquired as part of the fraudulent scheme.

3 In substance, the fraudulent scheme worked in this fashion: the Waltons convinced the appellants and respondents, and others, to invest "equally" with them in equal-shareholder, specific-project corporations that would acquire, hold, renovate and maintain commercial real estate properties in the Toronto area. Instead of investing any significant funds of their own, however,

the Waltons moved their investors' monies in and out of the numerous corporations, through their own "clearing house" — Rose & Thistle Group Ltd. — in a shell game designed to avoid their obligations and to further their own personal interests.

4 The appellant corporations, known as the DBDC Applicants, are owned and controlled by Dr. Stanley K. Bernstein. Through them, Dr. Bernstein invested approximately $111 million with the Waltons, in 31 projects, between September 2010 and June 2013. In each instance, the individual DBDC applicant entered into an equal shareholding agreement with the Waltons with respect to the specific-project corporation that was to acquire and hold the particular property. The corporations into which the DBDC Applicants' monies were to be invested are known as the "Schedule B Companies". These investments took the form of equity (approximately $2.6 million), shareholder loans ($78.5 million) and mortgages ($29.5 million). [1]

5 The respondent, Christine DeJong Medicine Professional Corporation ("DeJong"), is owned and controlled by Dr. Christine DeJong. She and her husband, Michael DeJong, invested approximately $4 million with the Waltons — Dr. DeJong through DeJong, and Michael through his own corporations. Those investments were made in equal shareholder arrangements in substantially the same form as those entered into between the Waltons and the DBDC Applicants. The specific-project corporations established for the purposes of the DeJong investments are included in the group of companies known in the proceedings as the "Schedule C Companies". The properties acquired by the Schedule C Companies are collectively known as the "Schedule C Properties".

6 The individual respondents, Dennis and Peggy Condos, and Gideon and Irene Levytam, made similar, but smaller investments in the same fashion. Their interests are also in relation to certain of the Schedule C Companies and the Schedule C Properties those companies acquired. The Condos' claim is in relation to a $160,000 investment in one company. The Levytams claim a net investment of $337,000. Prior to the oral hearing of the appeal, the DBDC Applicants and the Levytams settled and the Levytams did not participate further in the appeal.

7 None of the agreements contemplated third-party investors in the projects. None permitted the investors' monies to be used for anything other than the purposes of the specific-project investment.

8 The decision under appeal involves parts of Judgments and Orders made by Newbould J. on September 23, 2016. It comes at the back end of a lengthy and complex oppression remedy application commenced by the DBDC Applicants against the Waltons and Rose & Thistle, in October 2013, pursuant to Ontario's *Business Corporations Act*, R.S.O. 1990, c. B. 16. Various Schedule C Companies were subsequently added as respondents.

Appointment of the Inspector

9 In an endorsement dated October 7, 2013, Newbould J. concluded that the Waltons' conduct was oppressive and unfairly prejudicial to the DBDC Applicants' interests in the Schedule B Companies. He appointed Schonfeld Inc. as an Inspector over the Schedule B Companies.

Appointment of the Inspector as Manager

10 After an initial review by the Inspector of the affairs of the Schedule B Companies and the conduct of the Waltons, Newbould J. confirmed his view that the Waltons' conduct had been oppressive, and on November 5, 2013 appointed Schonfeld Inc. as Manager of the Schedule B Companies (and the Schedule B Properties held by them), thereby taking control of the Schedule B Companies away from the Waltons.

The Proceedings Before D.M. Brown J.

11 In July, 2014, after further review by the Inspector/Manager — referred to in more detail below — the DBDC Applicants applied to D.M. Brown J. (as he then was), at a hearing in the same proceedings, for various forms of relief. The range of relief claimed evolved over the course of the hearing. As Brown J. noted, this flowed from the clearer, but still incomplete, picture emerging from the expanded scope of the Inspector's role following the October 2013 Order and its subsequent investigations

(at paras. 213-217). By the end of the hearing — as outlined by Brown J. in his reasons (at paras. 214 and 240-243) — the relief sought by the DBDC Applicants included the following:

(a) declarations that the DBDC Applicants were entitled to constructive trusts where their funds could be traced directly into the purchase of, or the discharge of an encumbrance, with respect to a Schedule C Property;

(b) damages as against the Waltons personally for civil fraud and fraudulent misrepresentation;

(c) damages against the Schedule C Companies, jointly and severally, for all losses suffered by the DBDC Applicants in respect of funds advanced to the Schedule B Companies; and

(d) damages in the amount of $23.6 million against the Schedule C Companies, jointly and severally, for net proceeds diverted from the Schedule B Companies and received by the Schedule C Companies.

12 The application was opposed by the Waltons.

13 At the same time, DeJong (and other related companies controlled by the DeJongs) brought a cross-motion asking for the approval of a settlement it had reached with the Waltons, and opposing the DBDC Applicants' constructive trust claim with respect to 3270 American Drive, a Schedule C Property owned by the Schedule C Company, United Empire Lands Ltd., in which DeJong had invested. Numerous Schedule C investors, including Dr. DeJong, Dennis Condos and the Levytams, filed affidavits in support of the Waltons' position and in opposition to the Applicants' claims.

14 On August 12, 2014, Brown J. [2014 CarswellOnt 10936 (Ont. S.C.J. [Commercial List])] released his decision. He gave full and detailed reasons in the course of which he made findings of fact almost universally against the Waltons and in favour of the DBDC Applicants and Dr. Bernstein. In the end, he concluded, at para. 15, that:

[T]he Waltons did not use the funds advanced to them by the [DBDC] Applicants as their contracts required but, instead, the Waltons mis-used and mis-appropriated most of the funds advanced to them, diverting some of the funds to their own personal benefit and the benefit of their Schedule C Companies. [Emphasis added.]

15 It bears repeating that the Schedule C Companies were the specific-project corporations with respect to which the Waltons and other investors — including DeJong, the Condos and the Levytams — had entered into equal shareholder agreements in substantially the same form as those entered into between the DBDC Applicants and the Waltons with respect to the Schedule B Companies.

16 The Inspector gave evidence at the hearing. Brown J. accepted the Inspector's evidence with respect to the "net transfer" of funds from Schedule B Companies to Rose & Thistle and from Rose & Thistle to Schedule C Companies, and made the following findings of fact: [2]

(i) the Waltons directed the transfer of a net $23.6 million from the Schedule B Companies' accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

(ii) during the same period, the Waltons directed transfers of a net $25.4 million from the Rose & Thistle account to the Schedule C Companies;

(iii) in almost all cases, some of or all the amounts advanced to the Schedule B Companies by the DBDC Applicants were transferred almost immediately to the Rose & Thistle account; and

(iv) those transfers of funds from the Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the DBDC Applicants and the Waltons. These agreements required that each Schedule B Company, and the funds advanced to it, be used only to purchase, renovate and refinance the specific property owned by the Schedule B Company.

17 Ms. Walton's expert witness at the hearing had criticized the net transfer analysis as unhelpful on the ground that it presented only a "snapshot" tracing which, while accurate in itself, did not reflect the history of transfers into and out of Rose & Thistle and any Schedule C Company, and therefore lacked precision. Brown J. rejected this evidence. He concluded that condemning the Inspector's tracing analysis on this basis "amounted to nothing more than chipping away at the edges of inter-company transfers which the Waltons should never have made [in the first place]" (at para. 161).

18 In addition to his findings respecting the "net transfer" analysis, Brown J. also found, at paras. 96 and 186-187, that:

(i) the pooling or co-mingling of funds, as described above, was a critical breach of the contractual and fiduciary obligations which the Waltons owed to the DBDC Applicants and Dr. Bernstein;

(ii) the DBDC Applicants were not aware that the Waltons were withdrawing funds from the Schedule B Companies' bank accounts for any purpose other than the costs of the relevant associated properties;

(iii) the DBDC Applicants did not know that funds from Schedule B Companies were transferred or diverted to the Rose & Thistle "clearing house" bank account because the Waltons, in particular Ms. Walton, deliberately hid those transfers from the Applicants;

(iv) the Waltons deliberately did not tell the DBDC Applicants that they were using funds advanced by the Applicants for their own personal purposes and benefit and for the benefit of the Schedule C Companies which they owned or controlled; and

(v) throughout the proceedings, Norma Walton "presented herself to the Court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of the Schedule B Companies, Rose & Thistle or the Schedule C Companies" (emphasis added).

19 In the result, Brown J.:

• awarded the DBDC Applicants constructive trusts over eight Schedule C Properties into which the DBDC Applicants could trace Schedule B funds, including the property at 3270 American Drive (which was specifically opposed by DeJong);

• appointed Schonfeld Inc. as Receiver/Manager over the Schedule C Properties and any proceeds of sale thereof, and over the bank accounts of the Schedule C Companies;

• dismissed the DeJong request for approval of the settlement with the Waltons, finding in fact that the proposed settlement constituted an improper and unfair attempt to prefer DeJong over other creditors of the Waltons, including Dr. Bernstein;

• granted the DBDC Applicants a tracing order permitting them to trace their funds into and out of the various Schedule B Companies' accounts, the Rose & Thistle accounts, the Waltons' personal accounts, and others, and into the Schedule C Companies owning the Schedule C Properties;

• deferred the issues of the quantum of the DBDC Applicants' claim for damages as against the Waltons, and the DBDC Applicants' $22.6 million claim against the Waltons in respect of the Schedule C Companies for unjust enrichment, to be determined at a later time; and

• left undetermined the DBDC Applicants' claims for joint and several damages against the Schedule C Companies.

20 Appeals by Ms. Walton and DeJong from Brown J.'s Judgment and Orders were dismissed by this Court on September 17, 2015.

21 This brings us to the proceedings leading to the present appeal.

The Decision Under Appeal

22 On June 3, 2016 Newbould J. (the "Application Judge")[3] heard the motion and application for deferred relief, as well as the claims for joint and several damages against the Listed Schedule C Companies, sought by the DBDC Applicants. The relief requested was framed at this point as: (i) a claim for damages against the Waltons personally, in the amount of $66,951,021.85, plus interest; and (ii) a claim for damages in the amount of $22,680,852 as against certain of the Schedule C Companies (the "Listed Schedule C Companies"), on a joint and several basis, based on the concepts of "knowing assistance" and "knowing receipt" in relation to a breach of fiduciary duty.

23 At the same time, the Application Judge heard: (i) a counter-application by the Waltons claiming damages as against Dr. Bernstein personally for diminishing the value of their equity in the Schedule B and C Companies by bringing the Inspector and Manager/Receiver motion; (ii) an application by DeJong for constructive trust claims in relation to certain Schedule C Companies and Properties (or the proceeds of sale of those properties) respecting which DeJong had made investments in the form of equity or shareholder loans; and (iii) an application by the Condos and Levytams for entitlement to sale proceeds as investors in one of the Schedule C Companies (Cecil Lighthouse Ltd.).

24 On September 23, 2016, the Application Judge released the decision under appeal. He:

- awarded the DBDC Applicants damages in the amount of $66,951,021.85, plus interest, as against the Waltons personally, for fraudulent misrepresentation, deceit (civil fraud), and breach of fiduciary duty, and declared that the damage award would survive bankruptcy;

- dismissed the DBDC Applicants' claim for joint and several damages against the Listed Schedule C Companies, concluding that Norma Walton was not the controlling mind of the Listed Schedule C Companies and therefore, that they could not be liable for knowing assistance or knowing receipt arising out of her breach of fiduciary duty;

- granted DeJong constructive trusts in the aggregate amount of $2,176,045.57 against four properties owned by four of the Listed Schedule C Companies into which the DeJongs had invested;

- awarded costs against the DBDC Applicants in favour of DeJong, the Condos and the Levytams, further particularized in a Costs Endorsement dated November 28, 2016; and

- dismissed the Waltons' counter-application for damages.[4]

25 The Application Judge did not determine the claims of the Condos or the Levytams, and he did not deal with the DBDC Applicants' claim for unjust enrichment as such.

26 I have read the thorough dissenting reasons of my colleague, van Rensburg J.A., and will address her concerns from time to time throughout these reasons. I pause here, however, to touch briefly on one aspect of her reasons.

27 My colleague devotes considerable time to developing what she characterizes as the DBDC Applicants' "late-breaking claims for damages against the Listed Schedule C Companies". As I understand it, she does so to emphasize that the record on which liability for damages is sought to be established was created in the context of oppression remedy proceedings in which the Listed Schedule C Companies were not parties and that there are no new or additional facts to support their participation in Ms. Walton's breach of fiduciary duty.

28 Respectfully, for purposes of resolving the appeal, I do not think much turns on when or how the knowing receipt and knowing assistance claims arrived to be dealt with by the Application Judge, and I do not propose to examine the record on this point in any more detail than I have done above. Suffice it to say, I take a different view of it than my colleague does, not only with regard to the extent of DeJong's participation in the proceedings prior to the hearing before the Application Judge, but also with respect to what issues were before Brown J. and either deferred or not dealt with by him and with respect to the need for the Listed Schedule C Companies to have been made parties (which Brown J. rejected) before they were.

29 These differences have little significance for the outcome of the appeal, in my opinion. No one took the position before the Application Judge, or before this Court, that the DBDC Applicants' claim for joint and several damages against the Listed Schedule C Companies, based on knowing assistance and knowing receipt, was not properly raised at the hearing before him. [5] Nor has it been asserted that the evidence adduced before Brown J. and the findings of fact made by him could not be relied upon at the hearing. Indeed, the Application Judge himself relied upon them to a great extent.

30 More importantly, much of what underlies our disagreement with respect to the outcome of the appeal are the differing approaches we take to the utility and sufficiency of what the net transfer analysis demonstrates and does not demonstrate, not the context in which it was developed.

31 The net transfer analysis remains evidence for what it is. No one disputes it established a net transfer of $23.5 million out of the Schedule B Companies (both Brown J. and the Application Judge made that finding). I conclude this evidence is valuable in assessing the Listed Schedule C Companies' knowing assistance in Ms. Walton's breach of fiduciary duty and in establishing damages. My colleague takes a different view. I agree that the net transfer analysis was not intended to, and does not, establish the flow of Schedule B Companies' funds into any particular Listed Schedule C Company account. [6] My colleague concludes this is fatal to the knowing assistance claim. For the reasons set out below, I disagree.

32 As I see it, the resolution of these differences does not depend on the history of the evolution of the DBDC Applicants' claims.

The Schedule C Companies at Issue on Appeal

33 In referring to the "Listed Schedule C Companies" above, I am referring to a remaining subset of the Schedule C Companies against which the DBDC Applicants continue to pursue their claim for joint and several damages. The list includes some of, but not all, the Schedule C Companies that own Schedule C Properties against which Brown J. awarded constructive trusts in favour of the DBDC Applicants. It also includes the Schedule C Companies that acquired the four Schedule C Properties over which the Application Judge granted constructive trusts in favour of DeJong. For ease of reference, I will refer to those four Schedule C Companies collectively, where appropriate, as "the DeJong Companies".

34 The Listed Schedule C Companies, and the Schedule C Properties they hold, are set out on Annexe A to these reasons.

THE ISSUES ON APPEAL

35 The issues to be determined on the appeal are whether the Application Judge erred:

(a) in holding that the Listed Schedule C Companies are not jointly and severally liable to the DBDC Applicants on the basis of knowing assistance and/or knowing receipt;

(b) in granting DeJong constructive trusts over the Listed Schedule C Properties in question; and

(c) in awarding costs against the DBDC Applicants.

36 For the reasons that follow, I would allow the appeal.

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 (S.C.C.), 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 (S.C.C.), 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. 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 (Ont. C.A.), at para. 8, and again in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650, 355 D.L.R. (4th) 333 (Ont. C.A.), 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 fiduciary duties to the DBDC Applicants, there are three overarching questions to be answered:

(i) Was Norma Walton the directing and controlling mind of the Listed Schedule C Companies for purposes of the transactions through which her fraud was perpetrated, such that her knowledge and conduct in that regard may be attributed to the Companies as their knowledge and conduct?

(ii) If the answer to that question is "yes", does it follow that the knowledge and participation requirements for knowing assistance have been met with respect to those Listed Schedule C Companies utilized by Ms. Walton in the course of perpetrating her scheme?

(iii) If the answer to the foregoing question is "yes", are the Listed Schedule C Companies nonetheless able to avoid joint and several liability in damages on the basis that knowing assistance liability, having its roots as an equitable doctrine, ought not to apply here?

44 My answer to the first and second questions is "Yes" and to the third is "No". I say that for the following reasons.

(3) Application of the Criteria

(a) Fiduciary Considerations

45 As the Application Judge concluded, there is no issue in the present case that Ms. Walton owed a fiduciary duty to the DBDC Applicants and Dr. Bernstein, or that she fraudulently breached that duty. At para. 47 of his reasons, he found that:

> There is no question that Ms. Walton knowingly breached her fiduciary obligations to the [DBDC Applicants] and that she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take. Her activity in so doing was fraudulent and dishonest.

46 No one contests this finding. Indeed, at the hearing before the Application Judge, the Schedule C investors all relied upon the same submission, and the same type of relationship on their part. DeJong continues to do so in asserting its claim for a constructive trust in the Listed Schedule C Properties that were the subject of its cross-motion.

47 The Application Judge's finding is well-supported on the evidence. Ms. Walton owed a fiduciary duty to Dr. Bernstein and the DBDC Applicants arising out of their contractual relationship, viewed in the context of their overall relationship and the manner in which the co-investments strategy was to be carried out.

48 A contractual relationship does not necessarily give rise to fiduciary duties, obviously, but it may, depending on the nature of the relationship and the overall relationship between the parties. In *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81 (Ont. C.A.), at para. 74, this Court reiterated the criteria for a fiduciary relationship, as set out by the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at p. 136, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 462, and *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 66: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and (iv) there exists an express or implied undertaking by the fiduciary to act in accordance with the duty of loyalty reposed in him or her.

49 Here, the nature of the responsibilities and duties (and opportunities) created by the contractual structure, together with the nature of the factual relationship as it developed, put Ms. Walton in that category. It was the discretion and power left to her under the contracts that created the opportunities for her to utilize the various corporations that she *de facto* or otherwise controlled and the vulnerability of the DBDC Applicants (and the DeJongs and others) to the very things that happened.

50 It is true that Dr. Bernstein, through the DBDC Applicants, made his contributions directly to the Schedule B Companies (for the most part) rather than handing the money over to Ms. Walton, but given the contractual and corporate structuring of the investments program, it was tantamount to doing that very thing. As Brown J. found, at para. 161, "The [Waltons] had complete control over all of the funds." [8]

51 The liability of the Listed Schedule C Companies — the "strangers" to the fiduciary relationship in this scenario — therefore turns on a determination of the third and fourth requirements for knowing assistance: their actual knowledge of the fiduciary relationship and the fraudulent breach, and their participation or assistance in the breach itself. The resolution of those issues depends primarily on whether Ms. Walton acted as the directing and controlling mind of the Schedule C Companies in question, such that her actions may appropriately be attributed to them for these purposes.

(b) The Application Judge's Decision

52 The Application Judge dismissed the DBDC Applicants' claim on the basis that Ms. Walton was not the directing and controlling mind of the Listed Schedule C Companies, and accordingly that her knowledge and conduct could not be taken to be their knowledge and conduct for the purpose of the knowing assistance claim. He did not focus, therefore, on the participation element.

53 The Application Judge arrived at this decision because of the provisions in the Schedule C shareholder/investment agreements entered into between the Waltons and the Schedule C investors. Under those agreements:

(a) the Waltons and the investors were each to be 50% owners of the shares and each held 50% of the positions on the board of directors;

(b) the company into which the investments were to be made was to be used solely for the property to be purchased;

(c) the Waltons were to be responsible for the management, supervision and renovation of the property, as well as finance, bookkeeping, and "all active roles required to complete the Project";

(d) any significant decisions that differed from the project plan required more than 50% shareholder approval; and

(e) if the parties disagreed on how to manage, supervise and complete construction of the project, there was to be mandatory mediation and arbitration.

54 The Application Judge went on to conclude, at paras. 51-53:

> Thus, in so far as the Schedule C Companies are concerned and their investors, Ms. Walton may have acted as if she was the sole decision maker in the Schedule C Companies, but she was not. She and her husband were 50% owners with the right to exercise 50% of the significant decisions. There is no evidence that the other investors were aware of the fraudulent conduct of Ms. Walton.
>
> . . .
>
> It would be contrary to the Schedule C investor agreements to hold that Ms. Walton could cause the Schedule C investors to be a party to her fraudulent dealings with Dr. Bernstein. Thus I cannot find that the Schedule C Companies are liable to the [DBDC Applicants] for knowing assistance. [Emphasis added.]

55 Respectfully, I do not think this conclusion is sustainable either in law or in fact on this record.

56 The error of law arises in two respects. First, the Application Judge failed to recognize that, for purposes of attribution and determining whether a person is the controlling mind and will of a corporation with respect to a particular transaction or series of transactions, the formal governing structure established by the contractual and corporate documentation is not dispositive. What matters is the factual reality of the situation and whether Norma Walton was acting "within the field of operation assigned to [her]" and "carrying out [her] assigned function[s]" with respect to the corporations at the time she used them as vehicles to perpetrate her fraud: see *R. v. McNamara*, [1985] 1 S.C.R. 662 (S.C.C.), at pp. 685, 714.

57 Secondly, the Application Judge mistakenly focused on whether it was appropriate to hold that "Ms. Walton could cause the Schedule C investors to be a party to her fraudulent dealings with Dr. Bernstein." Respectfully, that was not the right question. The pertinent question was whether Ms. Walton had caused the Schedule C Companies *to participate in her fraudulent dealings*.

58 The errors of fact, or of mixed fact and law, consist of the Application Judge's failure to find, on this record: (i) that Ms. Walton's position as the sole active director, officer and manager of the Listed Schedule C Companies, for all practical purposes, and her conduct and knowledge with respect to them, met the legal test for the directing and controlling mind of those companies; and (ii) that the Listed Schedule C Companies participated in the fiduciary breach. I turn to these issues now.

(c) Norma Walton Was the Directing and Controlling Mind Of the Listed Schedule C Companies For These Purposes

59 A corporation is an abstract legal entity and has no mind or will of its own. Consequently, for civil and criminal purposes, its mind or will is found in the natural person or persons acting as the directing mind or will of the corporation: the "ego" or "alter ego" of the corporation; the centre of the corporate personality. This theory of corporate "identification" or "attribution" was first developed by Viscount Haldane L.C. in *Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1915] A.C. 705 (U.K. H.L.), at pp. 713-714, a case involving civil fault and negligence. It was explored at length in the criminal context by Estey J. in *Canadian Dredge*, at pp. 677-685, and has been found to be "equally applicable in a civil action" in Canada: *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (Ont. C.A.), at para. 55, leave to appeal refused, [1986] S.C.C.A. No. 29 (S.C.C.).

60 The corporate identification doctrine was aptly summarized — in the civil context, but with the acknowledgement that the alter ego doctrine applies "with no divergence of approach" in civil and criminal matters — by Nourse L.J. in *El Ajou*, at pp. 695-696:

> This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane LC in *Lennards Carrying Co. Ltd v. Asiatic Petroleum Co Ltd*:
>
> > 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'
> >
> > The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett J:[9] 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasize that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point . . .
> >
> > Decided cases show that, in regard to the requisite status and authority, the formal position, as regulated by the company's articles of association, service contracts and so forth, though highly relevant, may not be decisive. Here Millett J adopted a pragmatic approach. In my view he was right to do so. [Emphasis added; citations omitted.]

61 The Application Judge quoted from the foregoing passage in *El Ajou*. However, he stopped at the words "Their minds are its mind; their intention its intention; their knowledge its knowledge." Significantly, he appears to have overlooked the emphasis placed by the court on the importance of identifying "the natural person or persons having *management and control in relation to the act or omission in point*" (emphasis added), and the recognition that "the formal position", as established in the corporate and other related documentation, "though highly relevant, *may not be decisive*" (emphasis added). As Iacobucci J. put it in *"Rhone" (The) v. "Peter A.B. Widener" (The)*, [1993] 1 S.C.R. 497 (S.C.C.), at p. 521, "[t]he courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity". See also *Meridian Global Funds Management Asia Ltd. v. The Securities Commission*, [1995] 2 A.C. 500 (New Zealand P.C.), at p. 507.

62 This omission appears to have led the Application Judge to accept the "formal position" set out in the terms of the Schedule C Company shareholder agreements as dispositive of whether Ms. Walton was the controlling and directing mind of those corporations. The passage from his reasons, cited in para. 54 above, confirms that to be the case.

63 In reality, however, no one other than Ms. Walton did anything or made any decisions respecting the flow of funds that were utilized for the acquisition, management, construction and financing of the Schedule C Properties. That under the formal corporate documentation and shareholder/investor agreements the investors were 50% shareholders and, with the Waltons,

directors of the Listed Schedule C Companies, and were contractually entitled to be consulted on "significant decisions that differed from the project plan", is of little import when in the here and now the Waltons were fraudulently ignoring their obligations to the investors and were keeping them in the dark, and when the investors — based on their trust of the Waltons and the terms of their agreements — were leaving all management matters to the Waltons.

64 Had the Application Judge not adopted the approach that he did, he would have appreciated that, on any view of the evidence in these proceedings — including, it seems, even her own — Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies for purposes of the acquisition, construction, renovation, financing and management of the Schedule C Properties held by the Schedule C Companies and, more particularly, with respect to the transfer of source funds from the investors and, in some cases, the re-casting of corporate shareholding structuring necessary to effect those purposes. Respectfully — "adopt[ing] a pragmatic approach", to borrow the expression employed in *El Ajou* — it is not open on this record to hold that Ms. Walton was not the alter ego and directing and controlling mind of the Listed Schedule C Companies, acting within "the field of operations delegated to her" and as the "primary representative . . . through whom [the corporation] act[ed], sp[oke] and [thought]" for these purposes: *Canadian Dredge*, at p. 682; *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305 (Ont. C.A.), at p. 317.

65 Even the Application Judge's own findings reflect his acknowledgement that, as a factual matter, Ms. Walton was acting as the sole decision-maker for the corporations. He found, at para. 51, that "Ms. Walton may have acted as if she was the sole decision maker in the Schedule C Companies, but she was not." Further, he noted, at para. 71, that Ms. Walton "managed the day to day affairs of the business" and that "the investment of DeJong was under the complete control of the Waltons."

66 That Ms. Walton not only acted as if she were the sole decision maker in the Schedule C Companies but was in fact and reality that sole decision maker, is amply founded in the record, and in the previous findings in the same proceedings made by Brown J. and by the Application Judge himself:

(a) Ms. Walton was a director of each of the Schedule C Companies and, from all accounts, the only active director and officer.

(b) As found by Brown J. in the earlier portion of these same proceedings:

(i) The Schedule C Companies were owned and controlled by the Waltons;

(ii) Norma Walton presented herself to the court, through her affidavits and through her submissions, as the person who was in charge of the entire enterprise, whether it be the operation of the Schedule B companies, Rose & Thistle or the Schedule C Companies [emphasis added];

(iii) Neither Ronauld Walton nor the Chief Financial Officer of Rose & Thistle had come forward to say that the improper transfers of monies out of the Schedule B Companies were the result of directions or orders given by someone other than Norma Walton (from which he inferred that they were not); and

(iv) Ms. Walton "simply did as she saw fit irrespective of her legal obligations" and "ignored the contractual language that bound her".

(c) The shareholder agreements respecting the Schedule B Companies (in which the DBDC Applicants were involved) and the Schedule C Companies (in which the Respondents were involved) all provided that the Waltons were to be responsible for the management, supervision and renovation of the projects.

(d) Ms. Walton deposed before Brown J. that she was managing the jointly-owned portfolio of the companies, and that she used Rose & Thistle "as a clearing house account to smooth cash flow across the portfolio".

While the specific reference to "the jointly-owned portfolio of companies" was to the Schedule B Companies in which the Waltons and Dr. Bernstein each held a 50% interest, Ms. Walton also acknowledged that the funds Dr. Bernstein was

advancing to the Schedule B Companies were being pooled amongst those companies, then transferred to Rose & Thistle and also to the Schedule C Companies.

The Schedule C investors — including the DeJongs, the Condos and the Levytams — were unaware this was occurring and did not provide any direction or input in these actions.

(e) The Application Judge himself accepted the findings of Brown J., including the finding that in many cases the funds invested by the DBDC Applicants had been transferred to the Schedule C Companies and that the Schedule C Companies were "controlled" by the Waltons.

(f) The Application Judge noted that he could not determine into which companies Schedule B money went, "[i]n light of the way in which Ms. Walton transferred money around" between the Schedule B and C corporations. [Emphasis added.]

67 In the face of the foregoing, it was a palpable and overriding error on the part of the Application Judge, respectfully, to find that Ms. Walton was not in fact and reality the directing and controlling mind of the Schedule C Companies. The corporate documentation and contractual framework had little, if any, bearing on how the Schedule C Companies, and the Listed Schedule C Companies in particular, operated, except to provide Ms. Walton with her entrée to the corporate levers necessary to work the Waltons' scheme.

68 In those circumstances, her knowledge and conduct can be attributed to the corporations. Ms. Walton exercised complete management and control over all relevant actions executed by the Schedule C Companies. To paraphrase from *El Ajou*, for these purposes her mind was their mind; her intention, their intention; her knowledge, their knowledge. She was the person through whom the corporations *acted*, spoke and thought for these purposes: *Canadian Dredge*, at p. 682. In short, her perpetration of the scheme was their participation in the scheme.

(d) Application of the Canadian Dredge Criteria

69 The Respondents argue that, even so, this is insufficient to fix the Listed Schedule C Companies with Ms. Walton's knowledge and fraudulent conduct for purposes of establishing civil responsibility, because the criteria set out in *Canadian Dredge* — albeit in the context of criminal responsibility — have not been met. At pp. 713-714 of that decision, Estey J. said:

> [I]n my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

70 Before turning to these criteria, I think it is useful to recognize the setting in which they are being considered. The case law has applied *Canadian Dredge* in the criminal and civil contexts without discrimination. In my view, it does not follow, however, that the criteria need be applied in a rigid, identical, fashion in all circumstances. The burden of proof is less onerous in civil cases. This particular civil case involves a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims. In these circumstances, it makes sense that, of the *Canadian Dredge* criteria, (b) and (c) at least may be approached in a less demanding fashion than would be the case were *mens rea* for purposes of establishing criminal responsibility in play.

71 Contrary to the view expressed by my colleague, I do not think it is the case in such circumstances that the claimant must necessarily show "evidence of each company's individual benefit from the scheme" (at para. 234). As noted earlier, and as I shall explain more fully below, liability for knowing assistance is fault-based rather than receipt-based and does not require the defendant to have obtained a benefit from the defaulting fiduciary's breach. To apply criterion (c) of *Canadian Dredge* — "by design or result partly for the benefit of the company" — too strictly therefore makes little sense, as it would risk muddying the distinction between the two categories of claim.

72 In addition, as I develop below, there are sound policy reasons for not adopting the narrower view favoured by my colleague. This is consistent with the approach recently taken by the Supreme Court of Canada in *Livent*. The Court declined

to adopt a rigid application of the *Canadian Dredge* criteria in the context of a civil case, emphasizing that the corporate identification doctrine is one having its roots in policy considerations: see *Livent*, at paras. 100-104.

73 In my view, policy considerations support a more flexible approach in complex and large, multi-corporation, multi-party fraud cases such as the present one, for the reasons I set out below. I do not think, in these circumstances, that it matters whether the flexibility is applied at the criteria-application phase or the overall-equitable consideration stage of the analysis.

(i) Acting Within the Assigned Field of Operation

74 *Canadian Dredge* confirms that the attribution of an employee/manager's conduct or knowledge to a corporation does not turn on whether the individual was acting "within the scope of his or her employment" or was "off on a frolic of their own" in the tortious sense of vicarious liability. The test is whether the directing mind "is acting within the scope of his [or her] *authority . . . in the sense of acting in the course of the corporation's business*", or with "*reference to the field of operations delegated to the directing mind*", or "*within the scope of the area of the work assigned to him [or her]*" (underlining in original; italics added): at pp. 684-685.

75 Here, for all the reasons articulated earlier in this decision leading to the conclusion that Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies, she falls squarely within that category of individual.

76 In her capacity as the person "in charge of the entire enterprise", Ms. Walton was acting well within the field of operations delegated to her by the shareholder agreements of the Schedule B and C Companies, their corporate structures (she was a director and officer), and the conduct of the parties. It was her responsibility to complete the transactions by which the Schedule C Properties were acquired by the Schedule C Companies, to manage the projects, and to arrange for the necessary financings and re-financings. That she breached the shareholder agreements by not obtaining the necessary consents from the investors and by not providing accurate and timely information, that she breached her fiduciary obligations to the DBDC Applicants and Dr. Bernstein by misusing and misappropriating the funds they invested in the Schedule B Companies, that she breached her obligations to the Respondents as well in relation to their investments in the Schedule C Companies, and that she perpetrated her fraud on both the Applicants and the Respondents by betraying their trust and exercising the corporate powers left to her — none of these considerations detracts from the reality that in fact and in law she was acting within the field of operations and the area of corporate management delegated and assigned to her. Her fraudulent actions in directing the flow of monies in and out of the various corporations were carried out within the framework of her delegated responsibilities.

77 The first *Canadian Dredge* criterion is met.

(ii) Fraud/Benefit of the Corporation

78 The second and third *Canadian Dredge* criteria may be considered together. They require that the action taken by the directing mind not be totally in fraud of the corporation and that, by design or result, it be partly for the benefit of the corporation. In my view, as noted earlier, their application may be approached in a broader fashion in circumstances such as these, than would be the case in a criminal law context.

79 That said, I am satisfied the actions of Ms. Walton do meet those requirements, nonetheless. The Listed Schedule C Companies were not totally defrauded and, indeed, benefitted at least partly from Ms. Walton's actions.

80 Although some of their investors' monies were misapplied and misused in breach of Ms. Walton's fiduciary duties — as were the investments of the DBDC Applicants — the Listed Schedule C Companies nevertheless acquired properties, as they were intended to do and as part of the investment arrangements. As a result of Ms. Walton's net transfer of at least $23.6 million from the Schedule B Companies to Rose & Thistle and the net transfer of $25.4 million from Rose & Thistle to the Schedule C Companies, the latter acquired funding necessary for their ongoing operations; Brown J. accepted the Inspector's conclusion that the DBDC Applicants' investments in the Schedule B Companies "[were] a major source of funds for the [Schedule C] Companies". The record shows that each of the Listed Schedule C Companies either received from or transferred to Rose & Thistle monies or monies-worth, during the relevant period. Given the co-mingling of funds, it is not possible to trace the

complete path of all these transactions; however, Ms. Walton herself acknowledged that Rose & Thistle was the "clearing house" for the movement of funds as between the Schedule B Companies, Rose & Thistle, and the Schedule C Companies.

81 My colleague suggests that a *specific* benefit flowing to each Listed Schedule C Company must be identified in order to affix the companies with Ms. Walton's knowledge for purposes of knowing assistance. As I mentioned briefly earlier in these reasons, there are sound policy reasons, in my view, for not adopting a narrow approach on this, and other, issues relevant to this appeal. My colleague's approach, in effect, incorporates a tracing requirement into the knowing assistance claim, collapsing the distinction between knowing assistance and knowing receipt where corporate actors are used to assist in breach of fiduciary duty. To do so would mean that justice could not properly be done in many cases of massive, multi-corporation, multi-party fraud because — as this case demonstrates — the fraudulent co-mingling of funds renders it impossible to accomplish that task with the degree of precision required for knowing receipt, unjust enrichment or constructive trust.

82 My colleague's approach is also influenced by her view that the Listed Schedule C Companies are, themselves, victims of the fraud. If that were the case, it may be a consideration in determining whether liability may be avoided on overall "equity" grounds, discussed further below. However, I do not think it has much bearing on the "directing and controlling mind" analysis or on the analysis of whether the Listed Schedule C Companies in fact assisted and participated in the fraudulent breach of fiduciary duty. In addition, as I shall explain later, I do not view the Listed Schedule C Companies as being "victims" of the fraud; rather, their investors are the victims of the fraud.

83 In my view, the foregoing factors are sufficient to meet the second and third *Canadian Dredge* criteria, for purposes of establishing that Ms. Walton was the directing and controlling mind of the Listed Schedule C Companies, in the circumstances of this civil fraud case.

(iii) The Listed Schedule C Companies Participated in or Assisted Ms. Walton's Fraudulent Conduct

84 It flows from the foregoing that the participation/assistance requirement for the claim of knowing assistance has been met as well.

85 Ms. Walton crafted and choreographed a scheme to enable her and her husband to stay ahead of their obligations to provide 50% of the funding for the acquisition of the properties and to otherwise enrich themselves personally at the expense of their investors. Focusing on Dr. Bernstein's circumstances, Brown J. described the fraud, at para. 278, as "the system created by the Waltons to circulate and mis-use the [DBDC] Applicants' funds". Unbeknownst to DeJong, the Condos and the Levytams, it was created to circulate and misuse their funds as well.

86 Ms. Walton utilized the Schedule C Companies as actors in the process of orchestrating her shell game through the Rose & Thistle "clearing house" account. Funds were co-mingled, when they were supposed to be kept project-specific. Investors' funds (of both the DBDC Applicants and the Respondents) were diverted from their intended project or projects to finance the acquisition or operations of other projects, or to benefit the Waltons personally. Sometimes this was done on the pretext that the Waltons had made their contributions through a phantom "equity" increase in the value of the property previously acquired by them. Sometimes it was done on the pretext that their contributions had been made in the form of assignment or purchaser agency fees, or management fees, or construction and maintenance costs. [10] On other occasions, Ms. Walton arranged for the investors to receive preferred shareholding positions in different corporations, purportedly in exchange for investments made in other investment projects (without revealing that those earlier investments had already been lost).

87 With two possible exceptions, the record shows that each of the Listed Schedule C Companies either received monies directly from or transferred monies directly to Rose & Thistle during the relevant period, and were therefore engaged as corporate actors in an arrangement that, at the end of the day, resulted in a net transfer of over $23 million *from* the DBDC Applicants and a net transfer of over $25 million *to* the Schedule C Companies.

88 The two possible exceptions are St. Clarens Holdings Ltd. and Emerson Developments Ltd., the owners of adjoining properties at 777 St. Clarens Ave. and 260 Emerson Ave. in Toronto. Nonetheless, the record demonstrates that these two corporations were also engaged as actors in the overall fraudulent scheme.

Participation by St. Clarens/Emerson

89 Although title to the two properties was taken in the names of the two corporations, respectively, the purchase involved a single transaction. In July, 2013, a Walton numbered company entered into an agreement of purchase and sale with the owners of the two properties. It is said that an $80,000 deposit was paid at the time, although the source of those funds is not clear from the record. In October, 2013, the Walton numbered company assigned the agreement of purchase and sale to Rose & Thistle. Rose & Thistle agreed to pay an "assignment fee" of $225,000 and to reimburse the Walton company for the $80,000 deposit.

90 On November 18, 2013, the Waltons and DeJong entered into the standard type of 50/50 shareholder/management agreement described earlier in these reasons with respect to the St. Clarens/Emerson properties. That agreement stated that the Waltons had previously entered into an agreement of purchase and sale regarding the properties, and had previously provided an $80,000 deposit along with due diligence fees of approximately $50,000 related to the purchase. A "Capital Required" document associated with the purchase indicated that there was a "Purchaser agency fee" of $225,000 included as part of the purchase costs. Dr. DeJong swore that this fee was never discussed with or disclosed to her. The Application Judge accepted this evidence.

91 The St. Clarens/Emerson transaction closed on November 26, 2013 with Rose & Thistle apparently assigning the original agreement of purchase and sale to the purchasing corporations. Apart from the possible $80,000 deposit provided initially by the Walton numbered company — whether those funds came from the Rose & Thistle clearing house account is not known — the Waltons made no further contributions to the $665,000 shareholder loan they were required to contribute. DeJong advanced its $665,000 to St. Clarens Holdings and those funds were used to pay the balance due on closing for both properties of $252,397.91.

92 How the remainder of the DeJong advance was used is not known either. While it is not completely clear from the record whether Ms. Walton caused the $225,000 "Purchaser agency fee" — or, "assignment fee" as it was initially characterized in the assignment agreement — to be made in cash to Rose & Thistle or to the Walton numbered company, at the very least it is clear that St. Clarens Holdings assumed an accrued liability for the purchaser agency fee and accepted responsibility to reimburse the Waltons for the $80,000 deposit.

93 The Application Judge found that "the payment of $225,000 was clearly deceitful and in breach of the fiduciary duties owed by them to DeJong." This finding was undoubtedly open to him on the record.

94 The point of dwelling on the St. Clarens/Emerson transaction is not to analyse whether the corporations "benefitted" from the fraudulent scheme. Indirectly they benefitted because they acquired the properties in the course of the scheme. Perhaps they benefitted from the payment of the agency fee, which may or may not have represented a justifiable expense; we do not know. DeJong suffered a loss because, *vis-à-vis* DeJong, the undisclosed fee constituted a deceitful breach of the Waltons' fiduciary duties to it.

95 The point of dwelling on the St. Clarens/Emerson transaction is to show that, even though the purchasing Listed Schedule C Companies may not have either received monies directly from or transferred monies directly to Rose & Thistle, the transaction permitted Ms. Walton to skim off the $225,000 unbeknownst to DeJong. It illustrates yet another way in which Ms. Walton engaged the Listed Schedule C Companies as actors in her overall fraudulent undertaking in breach of her fiduciary obligations to both the DBDC Applicants and DeJong.

96 Improper as they were, each of these transactions — together with all the other in-and-out transactions — required a corporate act of one form or another. As the directing mind of the Listed Schedule C Companies for these purposes, Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants.

Additional Arguments Raised Against Finding Participation/Knowledge

97 For purposes of the "participation" and "knowledge" analyses, it matters little, in my view, that the DBDC Applicants are unable to demonstrate the receipt of any *particular* Schedule B Company funds by any *particular* Listed Schedule C Company (other than the funds with respect to which Brown J. previously granted constructive trusts). It is therefore of little significance that the "net transfer analysis" was not intended to, and does not, establish such a connection.

98 My colleague places considerable emphasis on these points. As she puts it, at para. 185 of her analysis, for example, the net transfer analysis was "never intended to be used for the purpose of establishing a claim by the DBDC Applicants against the property of other defrauded investors", and, at para. 195, "[t]he net transfer analysis does not show where the money went after it was transferred into Rose & Thistle, or that any of the 'net' money ended up in any particular Walton-controlled account (including any Listed Schedule C Company account)".

99 Respectfully, these concerns are misplaced in the context of a claim for knowing assistance.

100 First, as I have emphasized, they conflate knowing assistance with knowing receipt. If it were necessary to demonstrate the *receipt* of funds by the defendant in order to establish a claim for knowing *assistance*, there would be no need for the knowing assistance remedy. The claim of "knowing assistance" is designed to capture circumstances where "knowing receipt", unjust enrichment, or a constructive trust on some other basis cannot be established, but where a fault-based remedy is appropriate to compensate for the defendant's knowing assistance in the perpetration of a fraudulent and dishonest breach of fiduciary duty. This is one of those cases. In addition, as mentioned above, there are sound policy reasons for not importing a tracing requirement as a necessary component of the knowing assistance claim.

101 Secondly, while the net transfer analysis may not have been suitable for purposes of tracing Schedule B Company funds into particular Listed Schedule C Company accounts, it clearly established a net *outflow* from the Schedule B Companies' accounts of $23.6 million. Both Brown J. and the Application Judge made that finding. This is relevant for all the various reasons recited above, as well as for the measure of the DBDC Applicants' damages.

102 Nor do I share the view that the Listed Schedule C Companies were not participants in Ms. Walton's fraudulent breach because they were victims of the same fraudulent scheme and were merely used by Ms. Walton as "conduits" or "pawns" in the perpetration of that scheme, without the demonstration of receiving any benefit themselves.

103 My colleague acknowledges that "the Listed Schedule C Companies may have participated in Ms. Walton's overall fraudulent scheme, in the sense that they were used by her in the 'shell game' to co-mingle investor funds, and to avoid making her own contributions" (at para. 231). She acknowledges that "knowing assistance does not require a defendant to have received a benefit" for these purposes (at para. 234). Yet, she concludes that "the net transfer analysis does not provide the evidence that they participated in her breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for knowing assistance" (at para. 231), and that "the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance" (at para. 234).

104 This approach conflates the Companies with their investors and preferred shareholders, however. It also overlooks the finding that Ms. Walton was the controlling and directing mind of the companies and that her intentions and conduct were theirs. The Listed Schedule C Companies are not defrauded victims of Ms. Walton's fraudulent scheme; their investors and preferred shareholders are the defrauded victims. And, as noted above, they did "benefit" generally from the perpetration of the overall fraud. The Companies acquired the properties they were created to acquire. They received the funds enabling them to do so. As Brown J. found, the DBDC Applicants' investments were used to fund their ongoing operations and provided "a major source of funds for the Walton Schedule C Properties/Companies" (at para. 269). It was the way in which the investors' funds (the DBDC Applicants', as well as those of DeJong and others) were fraudulently co-mingled and moved amongst the entire portfolio of properties and projects that constituted the fraud. However, it was fraud perpetrated on the investors, not on the Listed Schedule C Companies.

105 Ms. Walton's breach of fiduciary duty to the DBDC Applicants was to cause the funds they invested in the Schedule B Companies to be diverted out of those Companies for her own personal use. That the Schedule C investors or the Schedule C Companies were also the objects of a similar co-mingling and diversion of their funds, is not important for the "participation" and "knowledge" requirements of the knowing assistance analysis, in my view. For the Listed Schedule C Companies to be found liable on that basis, it need not be shown that they assisted directly in acts involving the diversion of Schedule B Companies' funds *into* the Listed Schedule C Companies' accounts. It need only be shown that they knowingly assisted in Ms. Walton's fraudulent and dishonest scheme to divert monies *out of* the Schedule B Companies' accounts. It is the overall fraudulent scheme, and the Listed Schedule C Companies' knowing assistance in the perpetration of that "shell game" that provides the prism through which liability for this claim must be determined. The policy considerations respecting cases such as this, referred to above, support this analysis, in my view.

106 It is not an answer to say that a similar claim for joint and several damages might be asserted against the Schedule B Companies on the same basis. No one is asserting such a claim in these proceedings. And, although the Schedule C investors were also victimized in the scheme, it must be remembered — as found by Brown J., and accepted by the Application Judge — that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies*. It is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses.

107 DeJong and the other Respondents raise an additional argument. They submit that the fact they had no knowledge of the scheme or breaches personally, or in their capacities as lenders to or shareholders of the Schedule C Companies, shields the Listed Schedule C Companies from liability for knowing assistance. However, it is the knowledge of the *corporation* that is relevant to the establishment of liability, not the knowledge of the corporation's creditors, shareholders, or its directors or officers other than the directing mind. As noted above, the issue is not whether the co-investors were co-opted into participating in the scheme; the issue is whether the Schedule C Companies knowingly assisted Ms. Walton in carrying out the scheme.

108 This principle is illustrated by both *Canadian Dredge* and *El Ajou*.

109 In *Canadian Dredge*, the corporation was found to be criminally liable on the basis that the knowledge and conduct of its directing minds were attributed to it for that purpose, notwithstanding that innocent investors might be penalized: see p. 694. At p. 685, Estey J. noted that:

> Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition. [Emphasis added.]

110 If the existence of an express prohibition forbidding a directing mind to do an act is not sufficient, by itself, to avoid corporate criminal responsibility, the breach of a shareholder agreement on the part of the directing mind cannot be sufficient to avoid corporate civil responsibility. The fact that Ms. Walton was carrying out the transactions for a corrupt purpose, and not advising her co-investors of the details, does not, in my view, affect the attribution of her intentions and actions to the Listed Schedule C Companies: see *Meridian Global*, at p. 511.

111 In *El Ajou*, a civil case involving corporate liability for knowing receipt, the owners of the corporation were completely unaware of the fraud perpetrated by the director, who had *de facto* management and control in respect of the fraudulent transaction. Nonetheless, the corporation was found to be liable.

112 The Respondents seek to distinguish *El Ajou* on the basis that it applied "knowing receipt" as opposed to "knowing assistance", and that constructive knowledge is sufficient to ground liability for the former while actual knowledge is required for the latter. In my view, *El Ajou* is not distinguishable on that basis. There is nothing to suggest that the knowledge the court was attributing to the corporation in that case was constructive knowledge. Rather, what was imputed to the corporation was the *actual* knowledge of the directing mind. As Nourse L.J. noted, at p. 695, the person found to be the directing mind of the corporation (a Mr. Ferdman) "freely admitted *that he knew* [of the fraudulent transactions in question]" (emphasis added).

This is the language of actual knowledge, not that of constructive knowledge. Constructive knowledge arises when a person has knowledge of circumstances that would indicate certain facts to a reasonable person, or knowledge of circumstances that would put an honest and reasonable person on inquiry: see *Air Canada*, at p. 812; *Citadel General*, at para. 22. It was the actual knowledge of Mr. Ferdman that was attributed to the corporation as its knowledge.

(e) The Requirements for "Knowing Assistance" are Met Here

113 For all these reasons, I am satisfied that the DBDC Applicants have established the necessary components for a claim of knowing assistance in a breach of fiduciary duty: (i) Ms. Walton owed a fiduciary duty to the DBDC Applicants; (ii) she breached that duty; (iii) the Listed Schedule C Companies, as strangers to the fiduciary relationship, had actual knowledge of both the fiduciary relationship and the fraudulent and dishonest conduct of the fiduciary, because in the circumstances Ms. Walton's mind was their mind, her intent their intent, and her knowledge their knowledge; and (iv) for similar reasons, the Listed Schedule C Companies participated in or assisted Ms. Walton's fraudulent and dishonest conduct.

C. JOINT AND SEVERAL LIABILITY FOR DAMAGES

114 The Respondents make an additional argument, based on equitable grounds. They submit that to give effect to the claim for damages based on knowing assistance in the circumstances of this case would be to:

> [Stretch] the bounds of equity in ways not contemplated by the goals of restitutionary proprietary remedies. That is particularly so in the face of investors that actually put funds into these particular Schedule C Companies.

115 The argument is misconceived in this context, however. It conflates a claim for damages with a claim for a proprietary remedy and, in particular, the claim for knowing assistance with the claim for knowing receipt. As I shall explain more fully, "knowing assistance" is not a remedy grounded in the principles of restitution or proprietary remedies. The DBDC Applicants are not seeking, at this stage, a restitutionary or proprietary-based remedy in respect of any of the Schedule C Properties (over and above the constructive trusts earlier granted by Brown J. with respect to certain of those Companies). They seek only a remedy in damages.

116 Brown J. granted the DBDC Applicants a tracing order against the Listed Schedule C Companies to further the evidence available to support their claim for unjust enrichment. By the time the issue came before the Application Judge, however, the DBDC Applicants had decided to forego the tracing exercise and any claim to a proprietary interest in the Schedule C Properties held by those companies. Instead, they asserted only their claim for damages on a joint and several basis for knowing assistance and/or receipt.

117 As noted earlier in these reasons, liability for knowing assistance — unlike knowing receipt — does not depend upon the receipt of property, and the measure of recovery does not depend upon the value of any property obtained by the stranger as a result of the breach of the fiduciary's obligations. Whereas the essence of liability for knowing receipt is unjust enrichment, the gravamen of liability for knowing assistance is simply knowing participation or assistance in the breach in furtherance of the defaulting trustee or fiduciary's fraudulent and dishonest conduct: *Gold v. Rosenberg*, at para. 41; *Citadel General*, at paras. 46-47.

118 La Forest J. addressed this dichotomy in *Citadel General*, underscoring the importance of distinguishing between the knowing assistance and knowing receipt claims, and their underpinnings. After referring to a passage from the judgment of Millett J., the judge of first instance in the *Agip (Africa) Ltd.* case, La Forest J. said, at paras. 46-47:

> In other words, the distinction between the two categories of liability is fundamental: whereas the accessory's liability is "fault-based", the recipient's liability is "receipt-based". In an extrajudicial opinion, Millett J. described the distinction as follows:
>
> > . . . the liability of the accessory is limited to the case where the breach of trust in question was fraudulent and dishonest; the liability of the recipient is not so limited. In truth, however, the distinction is fundamental; there is no similarity

between the two categories. The accessory is a person who either never received the property at all, or who received it in circumstances where his receipt was irrelevant. His liability cannot be receipt-based. It is necessarily fault-based, and is imposed on him not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud. [Footnotes omitted.]

"Tracing the Proceeds of "Fraud" [(1991), 107 L.Q.R. 71], *supra*, at p. 83.

The same view was expressed by the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64, at p. 70: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not." These comments are also cited with approval by Iacobucci J. in *Gold*, *supra*, at para. 41. [Emphasis added.]

119 In a scholarly article written prior to his appointment to the bench, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty" (1998) 21 Advocates' Q 94, at p. 107, Paul M. Perell put it this way:

To be liable for knowing assistance, the stranger must have actual knowledge of the trustee's or fiduciary's dishonest or fraudulent act but, beyond being shown to have participated in that design, the third party . . . need not necessarily be shown to have acted in a fraudulent or dishonest fashion. And the stranger need not have taken or held any property. [Emphasis added.]

120 The Respondents argue that they were innocent investors who had no knowledge of Ms. Walton's fraudulent and dishonest ways, and that in the contest between two sets of equally innocent victims of the Waltons' fraud it would not be equitable to grant an award of damages in favour of the DBDC Applicants, thereby placing Dr. Bernstein and his companies, as judgment creditors, in a more advantageous position over them as shareholders of the Listed Schedule C Companies or as creditors. The Application Judge appears to have accepted this contention, noting at para. 51 of his reasons that "[t]here is no evidence that the other investors were aware of the fraudulent conduct of Ms. Walton", and stating, at para. 52 that:

The issue raised by the [DBDC Applicants] is not a contest between Dr. Bernstein and the Waltons. It is a contest between Dr. Bernstein and the investors in the Schedule C Companies who suffered from the same misconduct as did Dr. Bernstein. Ms. Walton knowingly breached her fiduciary obligations to the Schedule C Companies and the Schedule C investors.

121 That is not the point, however. As noted earlier, it is the knowledge of the Listed Schedule C Companies — the "strangers" to the fiduciary relationship in this case — rather than the knowledge of their investors or shareholders that is relevant in assessing the claim for knowing assistance. And, to repeat the words of Millett J., cited with approval in *Citadel General*, at para. 46, liability for knowing assistance "is necessarily fault-based, and *is imposed on [the knowing accessory] not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud*" (emphasis added).

122 It is because of the distinction between the underpinnings of the knowing assistance and knowing receipt claims that the knowledge requirement is different — actual knowledge, for knowing assistance; constructive knowledge, for knowing receipt. But it is also for this reason, in my opinion, that discretionary considerations pertaining to the application of a trust-imposed proprietary remedy are of considerably less significance when the claim of the knowing assistance plaintiff arises, as it does here, in damages.

123 While I need not go so far as to say that a court may never exercise a discretion to decline a remedy where the four criteria for establishing liability for knowing assistance have been met, I find it hard to conceive of a case where — in the face of a defendant's participation or assistance in a fraudulent and dishonest scheme perpetrated by a fiduciary and with actual knowledge of both the fiduciary relationship and the fraudulent and dishonest scheme — a court would do so. It is the role of equity and the courts to guard against such an outcome and not to sanction such conduct.

124 It is true here that the Schedule B Companies' money cannot be directly traced into the Listed Schedule C Companies (with the exception of those against which Brown J. awarded a constructive trust). However, these Listed Schedule C Companies

transferred money to and from Rose & Thistle as a part of the scheme orchestrated by the Waltons or assumed liability in favour of Rose & Thistle as part of the scheme. As well, it is worth repeating that the Schedule C Companies were significant net beneficiaries in the flow of funds emanating from the pooling and co-mingling of the various investors' monies.

125 Because I do not view the Listed Schedule C Companies as themselves victims of the fraud, I see no basis for excusing them from "fault" on the ground that they were simply caught up in, and used, as part of the wrongdoer's wrongful scheme. They remained, nonetheless, participants and actors in the perpetration of that scheme. Nor do I think it significant, as my colleague notes, that the DBDC Applicants have adopted the practical choice of pursuing only those Schedule C Companies that may have assets against which to recover. While reasons relating to the likelihood of recovery under a judgment or order may explain why proceedings are taken against certain parties, those reasons should not be confused with reasons underlying liability giving rise to the judgment. In the result, I do not see any overriding "equitable" considerations that militate against application of the knowing assistance remedy in the circumstances of this case.

126 For these reasons, I am satisfied that, once it is determined that the Listed Schedule C Companies knowingly participated in the fraudulent and dishonest breach of fiduciary duty by the Waltons, the DBDC Applicants are entitled to an award of damages against them as knowing accessories to the breach. As I have explained above, the Listed Schedule C Companies did so because Ms. Walton's knowledge and actions are to be attributed to them as their own.

127 The appropriate measure of damages in the circumstances is the loss caused to the DBDC Applicants by the dishonest fiduciary's fraudulent scheme arising from the participation and assistance of the Listed Schedule C Companies in that scheme. That is because liability for knowing assistance is fault based and is measured by the loss flowing from the fault. As Perell summarized it in the article cited earlier in these reasons, at p. 113:

> One very significant difference arising from the different rationales is that the beneficiary's recovery from knowing receipt may be less than the recovery from knowing assistance. This follows because, under the doctrine of knowing receipt, the defendant's liability is measured by his unjust enrichment while, under the doctrine of knowing assistance, the defendant's liability is measured by the plaintiff's injury consequent to the trustee's misconduct. The plaintiff's injury may exceed the defendant's benefit. [Emphasis added.]

128 In this case, the loss is measured by the net transfer to the Schedule C Companies, globally, of $22.6 million.

129 Once it is established that the Listed Schedule C Companies are each liable for knowingly assisting Ms. Walton in the global scheme in breach of her fiduciary obligations to the DBDC Applicants, it follows in the circumstances that the Listed Schedule C Companies are jointly and severally liable for the losses sustained: see *Enbridge Gas*, at para. 31. In that case, this Court upheld the trial judge's finding that the defendants were jointly and severally liable for the full extent of the losses sustained by Enbridge even though the defendants played different roles in assisting in the fraud and received unequal portions of the misappropriated funds. I see no basis for departing from that same line of reasoning.

130 While the DBDC Applicants are entitled to an award of damages in the amount of $22.6 million against the Listed Schedule C Companies, they are not entitled to make a double recovery. The net transfer analysis was prepared in relation to the Schedule B and Schedule C Companies. Brown J. awarded constructive trusts in favour of the DBDC Applicants against eight Schedule C Properties, for a total of $8,128,325 (of which, we are advised, the amount of $1,192,150 has been recovered). The constructive trusts were awarded in cases where the Inspector was able to trace funds from a Schedule B Company, through Rose & Thistle, and into a Schedule C Company, and the Schedule C Company used those funds in respect of a Schedule C Property. Those funds were necessarily part of the larger $23.6 million (less a $1 million reduction for management fees) that was transferred out of the Schedule B Companies.

131 It follows, therefore, that any amounts actually recovered by the DBDC Applicants pursuant to the constructive trusts awarded by Brown J. must be applied in reduction of the damage award. I understand the DBDC Applicants to accept that conclusion.

132 In the result, I would give effect to the ground of appeal respecting the DBDC Applicants' claim for damages against the Listed Schedule C Companies on a joint and several basis, subject to the foregoing caveat.

D. THE DEJONG CLAIM FOR CONSTRUCTIVE TRUSTS

133 The Application Judge granted constructive trusts in favour of DeJong over four Schedule C Properties owned by the four DeJong Companies in the following amounts:

3270 American Drive (United Empire Lands Ltd.) $769,543.60

324 Prince Edward Drive (Prince Edward Properties) $741,501.97

777 St. Clarens Avenue (St. Clarens Holdings Ltd.)/ 260 Emerson Avenue (Emerson Developments Ltd.) $665,000.00

Total $2,176,045.57

134 These properties have since been sold, and the Manager holds the proceeds from their sale. The DeJong constructive trust against 3270 American Drive ranks subsequent to the constructive trust earlier granted by Brown J. in favour of the DBDC Applicants. It exhausts the funds currently held by the Manager from the sale of that property. The amounts granted as constructive trusts in favour of DeJong respecting the remaining three properties also exhaust the funds available from their sale. On that basis, the DeJongs would thus recover more than 50% of their lost investments. [11]

135 The DBDC Applicants contest these constructive trust dispositions. They submit that the Application Judge erred in granting the constructive trusts in favour of DeJong, arguing that:

(a) there was no unjust enrichment at the expense of the DeJong Companies resulting from the misappropriation of the DeJong investments;

(b) the diverted DeJong investments could not be linked to the acquisition, preservation, maintenance or improvement of any property owned by a DeJong Company;

(c) DeJong had other available remedies as against the Waltons and the DeJong Companies; and

(d) the interests of other creditors and third parties would be adversely affected by the award of a proprietary remedy in priority to all other claims.

136 The Application Judge did not grant constructive trusts over the properties owned by the DeJong Companies on the basis of unjust enrichment. In the case of 3270 American Drive, this was because the equity funds advanced by DeJong for the purchase of that property were diverted elsewhere and not used for that purpose (it was Dr. Bernstein's investments that were improperly diverted and used to purchase 3270 American Drive, leading to the granting of a constructive trust in the DBDC Applicants' favour over the property). In the case of 324 Prince Edward Drive, 260 Emerson Avenue and 777 St. Clarens Avenue, the DeJong monies were utilized, in part, for the purchase of the respective properties, but this did not constitute an unjust enrichment because the funds were intended to be used for that purpose.

137 Instead, the Application Judge granted constructive trusts in favour of DeJong against the foregoing properties as a remedy for breach of fiduciary duty. In doing so, he relied upon the well-accepted principle that a constructive trust remedy is not restricted to circumstances in which there has been an unjust enrichment, but may be imposed as well "to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain", and can "aris[e] on breach of a fiduciary relationship": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at paras. 17 and 19.

138 However, in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), the Supreme Court of Canada revisited the factors to be taken into account by a court when imposing a constructive trust as a remedy for breach of fiduciary duty. Speaking for the majority on this point, Cromwell J. held at para. 227 that "a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain." [12] Concurring on this point, Deschamps J. affirmed, at para. 78, that "[i]t is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property."

139 The decision whether to impose a constructive trust is discretionary, and there is no question that a judge of first instance is entitled to considerable appellate deference in the exercise of that discretion, absent an error in principle. Respectfully, I have come to the conclusion that the Application Judge erred in principle in two respects when he imposed a constructive trust in favour of DeJong in these circumstances: first, in his failure to apply the *Indalex* principle that the fiduciary's wrongful acts must give rise to an identifiable asset; secondly, in his failure to give effect or consideration to the interests of other creditors and third parties, and to the fact that DeJong had other remedies available to it.

(1) The Application Judge Failed to Apply Indalex

140 Drawing upon the Court's earlier decision in *Soulos*, Cromwell J. in *Indalex*, at para. 228, reiterated the four conditions that must be present before a remedial constructive trust may be ordered for breach of fiduciary duty:

> (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 obligations 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.

141 Referring to (2) above, Cromwell J. went on to add, at para. 230:

> To satisfy the second condition, it must be shown that the breach *resulted in* the assets being in [the wrongdoer's] hands, not simply . . . that there was a "connection" between the assets and "the process" in which [the wrongdoer] breached its fiduciary duty. [Underlining added; italics in original.]

142 Here, the confusion arises because, while part of the DeJong investments were wrongfully diverted by Ms. Walton from the DeJong Companies to other uses (that could not be identified because of the pooling and co-mingling of funds), significant portions of the investments were used for precisely the purposes for which they were intended: they were utilized in the acquisition of the four DeJong Properties identified above. In short, the wrongdoing *vis-à-vis* DeJong did not give rise to the acquisition of those assets, although overall there may have been "a connection" between them and "the process" through which the wrongdoing took place.

143 The Application Judge does not appear to have taken these considerations into account in arriving at his decision to impose a constructive trust in favour of DeJong, yet they posed a clear impediment to the court's ability to do so in the circumstances, in my view. It is not enough to say that DeJong monies were used in the acquisition of the properties (the monies were intended to be used for that purpose). Nor is it sufficient to say for purposes of imposing a proprietary remedy — as the Application Judge does — that Ms. Walton breached her fiduciary obligations to DeJong by wrongfully transferring monies *out of* the DeJong Companies (the wrongful transfer did not give rise to an identifiable asset); or that the Waltons failed to comply

with their agreements to provide capital for the acquisitions (those failures, similarly, did not result in the acquisition of the properties); or that they failed to comply with their obligations to manage the properties (a failure to manage would not generally give rise to a proprietary claim); or, simply, that the breach of fiduciary obligation led to the loss of the DeJong investments (the breach did not lead to the loss of the properties in question).

(2) The Application Judge Failed to Consider the Circumstances

144 The DBDC Applicants submit as well that in an insolvency context (as is the case here) the availability of other remedies and the adverse impact of imposing a proprietary remedy on other creditors and parties need to be taken into account in determining whether to impose a constructive trust. The Application Judge did not do so, they argue.

145 There are other creditors in the proceedings. A summary of the proposed payments accepted to date in the Claims Process indicates that the Receiver/Manager has accepted approximately $60,000 in secured claims (principally from the Canada Revenue Agency) and approximately $205,000 in unsecured claims. [13] These claims are dwarfed by the claims at issue in these proceedings: Dr. Bernstein and the DBDC Applicants claim approximately $66 million against the Waltons and an included $22.6 million against the Listed Schedule C Companies; approximately $4 million is claimed by DeJong; and $160,000 by the Condos. [14] The claims by Dr. Bernstein and the DBDC Applicants themselves similarly dwarf the DeJong and Condos claims.

146 It is significant that DeJong and the Condos did not advance their funds directly on the acquisition of the properties. They advanced their monies to the Schedule C Companies, either as equity investments (the Condos in Cecil Lighthouse; DeJong in United Empire Ltd.), or as shareholder loans (DeJong in respect of Prince Edward Properties, St. Clarens Holdings and Emerson Developments). [15] They each have remedies in those respective capacities.

147 With a minor exception concerning the St. Clarens and Emerson companies, the Waltons' shares in the DeJong Companies have been cancelled, leaving DeJong as the overwhelming majority shareholder of United Empire, Prince Edward Properties, St. Clarens and Emerson. Those corporations owned the Schedule C Properties against which DeJong is claiming constructive trusts, and whose proceeds from sale are currently being held by the Manager. DeJong remains an unsecured creditor on the basis of its shareholder loans, and may well have a personal remedy against the Waltons. Granting a constructive trust over the properties, as a remedy for breach of fiduciary duty, would enable DeJong to leapfrog over other creditors in its capacity as a lender by obtaining a proprietary remedy not available to other creditors.

148 Although the Application Judge did not refer specifically to the relevance of other creditors or other remedies available to DeJong, I am not prepared to assume that he ignored them, experienced Commercial List judge that he was. Indeed, I suspect that these factors were the very ones driving his decision. He would well have recognized that the claims of the DBDC Applicants would overwhelm those of DeJong in an insolvency competition. Although the DBDC Applicants' outstanding losses exceed $66 million and their recovery has been limited to only approximately $13 million, they have nonetheless made *some* recovery. DeJong will recover very little in a priorities contest among creditors.

149 In my view, however, it is not enough to say, simply, that, because different groups of investors have been victims of an overall fraudulent scheme involving the acquisition of various commercial properties, and one group of investors is entitled to a constructive trust against certain of those properties to which their funds can be traced, the other group of investors is in equity entitled to a proprietary remedy against those or other properties in order to achieve some similar recovery in an attempt to be equitable. I do not see the foregoing factors as justifying the imposition of a proprietary remedy, for the benefit of the latter group of investors/creditors and to the prejudice of others, where the fiduciary breach did not directly relate to the acquisition of the properties in question.

150 For these reasons, I conclude that the granting of constructive trusts in favour of DeJong over the properties owned by the DeJong Companies cannot stand.

E. THE COSTS AWARD

151 Given my conclusions with respect to the joint and several damages award and the constructive trust issues, it follows that the costs award below will need to be reconsidered.

DISPOSITION

152 For the foregoing reasons, I would allow the appeal and set aside the parts of the Judgments and Orders of the Application Judge, dated September 23, 2016, holding that the Listed Schedule C Companies are not jointly and severally liable to the DBDC Applicants, granting constructive trusts in favour of DeJong, and awarding costs against the DBDC Applicants in favour of DeJong, the Condos and the Levytams. In their place I would order that:

(a) the Listed Schedule C Companies are jointly and severally liable to the DBDC Applicants in the amount of $22,680,852, subject to the provision that any amounts recovered by the DBDC Applicants on account of the constructive trusts ordered by Brown J. in relation to Schedule C Properties shall be applied in reduction of that amount;

(b) the respondent Christine DeJong Medicine Professional Corporation is not entitled to constructive trusts over the properties known as 3270 American Drive, Mississauga, Ontario; 324 Prince Edward Drive, Toronto, Ontario; 777 St. Clarens Avenue, Toronto, Ontario; and 260 Emerson Avenue, Toronto, Ontario; and

(c) leave be granted to appeal the costs portion of the Judgments and Orders and the costs order, and that the costs order be set aside and remitted for reconsideration in view of the foregoing dispositions.

153 If the parties are unable to agree on the costs below, and because the Application Judge has since retired, the parties may make succinct written submissions to this Court respecting those costs within 30 days of the receipt of this decision.

154 This has been a contest between innocent victims of a fraud. I do not think this is an appropriate case for costs on the appeal.

E.A. Cronk J.A.:

I agree.

***K. van Rensburg J.A.* (dissenting):**

OVERVIEW

155 I have had the opportunity to read the detailed and thoughtful reasons of my colleague, Blair J.A. With respect, and for the reasons that follow, I am unable to agree with his proposed disposition of the DBDC Applicants' appeal.

156 I agree that Norma Walton was in breach of the fiduciary duties she owed to the DBDC Applicants, a point of departure that was not disputed by anyone on the appeal. And I agree with my colleague's conclusion, and that of the Application Judge, that the DBDC Applicants are unable to establish the liability of the Listed Schedule C Companies for knowing receipt.

157 Where I part company with my colleague, is in his conclusion that the Listed Schedule C Companies participated in or assisted Ms. Walton in the breach of her fiduciary duties to the DBDC Applicants, and in awarding damages of $22.6 million against these ten companies.

158 In my opinion, liability for knowing assistance in this case cannot be made out. It accepts, as evidence of both the Listed Schedule C Companies' participation in Ms. Walton's breach of fiduciary duty, and the measure of the appellants' damages, the "net transfer analysis", a summary of cash transfers that was performed by the Inspector at an earlier stage in the oppression proceedings against the Waltons, for an entirely different purpose. It equates a Listed Schedule C Company's participation as a victim in Ms. Walton's "shell game" to participation in a breach of fiduciary duty. It imputes to the Listed Schedule C Companies Ms. Walton's conduct and intent, where her actions defrauded them, and were for her own personal benefit. And it uses as a measure of damages the sum of $22.6 million, which does not correspond with any proven benefit to or harm caused by any

Listed Schedule C Company, but is simply the net amount transferred in a three-year period from the Schedule B Companies to Rose & Thistle (without regard for its source or whether any of the funds ended up in a Listed Schedule C Company).

159 A judgment for $22.6 million against the Listed Schedule C Companies would enable the DBDC Applicants to share as unsecured creditors in the proceeds of sale of each of ten Schedule C Properties, after satisfying the constructive trust claims they have made out against some of the properties. This judgment, which purports to reflect the collective losses of the 29 DBDC Applicants, will overwhelm the claims of the investors in the ten Listed Schedule C Companies, who were victims of the Waltons in the same way as the appellants. As my colleague notes, this is a "priorities dispute", however, the effect of a judgment for damages in their favour is that the DBDC Applicants will receive the lion's share of the net proceeds of sale of properties to which, except for the funds that have been traced and in respect of which they have already been awarded constructive trusts, they made no contribution.

160 I cannot agree with this result. In my view, the "participation" element of the fault-based claim of knowing assistance is not made out on this record. And, in this case of first impression for our court - where a claim of knowing assistance in a breach of fiduciary duty is made by one group of defrauded investors against another similarly situated group - there is no reason to expand the equitable claim of knowing assistance beyond its proper bounds.

161 I would therefore dismiss the DBDC Applicants' appeal after concluding that they are not entitled to judgment for $22,680,852 or for any amount against the Listed Schedule C Companies for knowing receipt or knowing assistance in Norma Walton's breaches of fiduciary duty to the DBDC Applicants.

OUTLINE OF THESE REASONS

162 I will begin my discussion by identifying two general concerns that will serve to inform later parts of my analysis.

163 First, the knowing receipt and knowing assistance claims were late-breaking add-ons to the oppression proceedings against the Waltons. I do not agree that they were, as the DBDC Applicants contend, part of the "deferred relief" that was already before Brown J. It is important to recall what was at issue and determined in the earlier proceedings to ensure that the Listed Schedule C Companies are not simply carried along as part of the collective wrong of the Waltons against the DBDC Applicants, and so that the focus, as it should be, is on whether any or all of the Listed Schedule C Companies was a knowing participant in Ms. Walton's breaches of the fiduciary duties she owed to the DBDC Applicants. As such, I find it necessary to review the proceedings leading up to the decision under appeal.

164 Second, since the DBDC Applicants' claims against the Listed Schedule C Companies depend on the court's acceptance of the "net transfer analysis", its purpose and limitations must be understood. The net transfer analysis served a specific function in the oppression proceedings, to demonstrate the Waltons' fraud on the DBDC Applicants. I will explain why it was never intended to serve as the basis for personal claims against the Listed Schedule C Companies, and why, in my view, it is ill-suited to this purpose.

165 After addressing these two related contextual points, I will turn to the two claims on appeal. I will explain briefly why I agree with my colleague that the DBDC Applicants cannot succeed in their claim of knowing receipt. I will then turn to knowing assistance and explain why I am unable to agree that the Listed Schedule C Companies are liable for having knowingly assisted in Ms. Walton's breaches of the fiduciary duties she owed to the DBDC Applicants.

THE EVOLUTION OF THE DBDC APPLICANTS' CLAIMS AND THE LATE-BREAKING CLAIMS FOR DAMAGES AGAINST THE LISTED SCHEDULE C COMPANIES

166 The point of departure is that the DBDC Applicants and the Listed Schedule C Companies (and their investors) were all victims of the fraud perpetrated by the Waltons. [16] The DBDC Applicants are 29 investment companies controlled by Dr. Bernstein that, in turn, invested in the 34 single-purpose Schedule B Companies, which were to acquire, hold and maintain

commercial real estate properties. Dr. Christine DeJong and her husband, Michael, and Dennis and Peggy Condos and other investors did the same, through their personal investment companies, investing in the ten Listed Schedule C Companies. [17]

167 As my colleague describes the scheme, at para. 3, instead of investing their required 50% in the investment companies, the Waltons moved money among the accounts of the investment companies and their personal accounts, using as a clearing house the bank account of their wholly-owned company Rose & Thistle, in "a shell game designed to avoid their obligations and to further their own personal interests".

168 The contest throughout the proceedings, except for the recent chapter that is the subject of this appeal, was exclusively between the DBDC Applicants and the Waltons. The proceedings, commenced in 2013 as an oppression application, sought to establish the Waltons' fraud and to obtain an accounting and recovery of the monies they advanced and lost. As such, the respondents were the Waltons, Rose & Thistle and Eglinton Castle Inc. (the "Walton respondents"). The Schedule B Companies (in which Dr. Bernstein, through the DBDC Applicants, invested with the Waltons) were listed in a schedule to the Notice of Application and named as respondents to be bound by the result (hence their definition as "Schedule B Companies"). And 16 properties into which the Waltons were alleged to have diverted the DBDC Applicants' money (including their home on Park Lane Circle) were identified in a schedule to the Notice of Application (hence their definition as "Schedule C Properties"). Other parties who may have invested in those properties (including the DeJongs, the Condos and the Levytams) were not parties to the proceedings, as the DBDC Applicants only sought to trace their funds into the Waltons' interests in such properties.

169 When the case came before Brown J. in July 2014 (with reasons released August 12, 2014), it was a chapter in the "on-going litigation between Dr. Bernstein and the Waltons concerning the need for the respondents to account for funds, and to be held accountable for funds, invested by Dr. Bernstein and his companies with them" (Brown J. Reasons, at para. 2). None of the Schedule C Companies were parties to the proceedings at this point, [18] although the court considered a motion by Dr. DeJong's corporations seeking relief in respect of one Schedule C Property, 3270 American Drive, Mississauga, in which they had invested, including seeking approval of a settlement agreement with the Waltons.

170 Brown J. considered the evidence, including the Inspector's reports and "net transfer analysis" (discussed below) and, after rejecting almost all of the Waltons' evidence contending that the DBDC Applicants' funds had been used for legitimate purposes, he concluded that the Waltons were liable to the DBDC Applicants for damages for breach of contract, "unlawful misappropriation" and unjust enrichment. Because the measure of damages for each cause of action would be different, Brown J. deferred the assessment of damages to another day for further argument.

171 Brown J. also granted constructive trusts in respect of eight Schedule C Properties into which the Inspector had traced money from the DBDC Applicants. This relief was opposed by the Waltons, who filed and relied on the affidavits and statements of Dr. DeJong and 30 other investors, attesting to the value of their investments in five Schedule C Properties. [19] Brown J. appointed the Inspector as Receiver or Manager with power to sell the Schedule B Properties and the Schedule C Properties. At para. 271 he stated:

> . . . While at this point of time the tracing analysis has not progressed to the stage to enable the granting of specific, fixed amount constructive trusts over the other Schedule C Properties, the evidence justifies the appointment of a receiver over all Schedule C Properties in order to sell them and deal with the competing claims against the proceeds of sale, including the Applicants' strong claims of constructive trusts over the remaining Schedule C Properties.

172 Brown J. ordered the Schedule C Companies that owned the Schedule C Properties to provide the manager with full access to their books and records, so that "a full tracing of the [DBDC Applicants'] funds [could] occur" (at para. 278). Until that point, the Inspector/Manager did not have access to any Schedule C Company accounts.

173 Brown J. also appointed the Inspector as the Waltons' receiver noting, at para. 231, that the appointment was necessary to ensure that the Waltons could not dispose of their Schedule C property "until proper consideration [could] be given to [the DBDC applicants'] claims and the respective interests of all creditors of the Waltons."

174 Brown J. anticipated that the DBDC Applicants, armed with the Receiver's additional powers, would seek to trace their funds into additional Schedule C Properties, apart from the ones in which constructive trusts were already awarded, and that the Receiver, after selling the properties, would deal with the claims. He left the issue of priority of claims between creditors in respect of the proceeds of disposition of a Schedule C Property to be addressed in the claims process *for that Property.* He refused to enforce the settlement agreement between the Waltons and the DeJongs and concluded that "the legal entitlement, if any, of the DeJongs, as preferred shareholders, to the proceeds from the sale of 3270 American Drive should be dealt with in the claims process for that property" (at paras. 263, 271 and 289).

175 The DBDC Applicants contend that the attendance before Newbould J. in June 2016 was for "deferred relief". This is true, but only in the sense that Brown J. had deferred the determination of the DBDC Applicants' damages against the Waltons. There was no deferred relief in respect of the Listed Schedule C Companies, because they were not yet parties to the litigation and no claims for damages had been asserted against them when the matter was before Brown J. While Brown J. granted a motion to amend the Notice of Application, it was not until the Notice of Application was amended by Newbould J. that the Listed Schedule C Companies were joined as parties, a cause of action was pleaded, and damages were claimed against them. [20]

176 In his reasons dated September 23, 2016, Newbould J. concluded, at para. 32, that the Waltons committed civil fraud and fraudulent misrepresentation that caused Dr. Bernstein to invest his funds into the Schedule B Companies. He awarded damages of $66,951,021.85 plus interest against the Walton respondents. In granting an order that the judgment would survive bankruptcy under ss. 178(1)(d) and (e) of the *Bankruptcy and Insolvency Act*, Newbould J., relying on certain of Brown J.'s earlier findings, concluded, at para. 35, that the "liability of the Waltons arose from their fraud while acting in a fiduciary duty to Dr. Bernstein", as well as from their fraudulent misrepresentation that caused them to obtain property (at para. 36).

177 As for their remedy in relation to the Schedule C Properties, instead of quantifying their unjust enrichment claim against the Waltons by conducting a further tracing as Brown J. had envisaged, the DBDC Applicants sought to add the Listed Schedule C Companies as respondents to the proceedings, and to advance claims for damages against them based on knowing receipt and knowing assistance in the Waltons' breach of fiduciary duty.

178 The claims against the Listed Schedule C Companies were not pursued in the conventional manner through an action, with pleadings and documentary and oral discovery. Rather, the claims were added to the oppression proceedings, and set out in a proposed Third Fresh as Amended Notice of Application (at paras. 1(jj), 2 and 3(rr) to (ccc) and (kkk) to (uuu)). The amendments allege, under "Unjust Enrichment," that the Waltons, in breach of their fiduciary duties, diverted and misappropriated the DBDC Applicants' funds, and that "various Walton-owned companies", including the Listed Schedule C Companies, were knowing recipients of funds obtained as a result of the Waltons' breaches of fiduciary duty against them".

179 Under the heading "Knowing Assistance", the DBDC Applicants allege that the Listed Schedule C Companies had actual knowledge of (or were reckless or wilfully blind to) the Waltons' breaches of fiduciary duty owed to the DBDC Applicants, and that they jointly assisted in the breaches. They assert, as part of their knowing assistance claim, that *each Listed Schedule C Company received property from the DBDC Applicants* as a result of the Waltons' breach of fiduciary duties, having knowledge that the property was transferred in breach of a fiduciary duty.

180 The claim is for $22.6 million jointly and severally against the Walton respondents and the Listed Schedule C Companies, or in the alternative for an order awarding specific damages against each of seven of the Listed Schedule C Companies. [21]

181 The record on which the DBDC Applicants seek to establish the Listed Schedule C Companies' liability for damages was created in the context of oppression proceedings involving the Waltons, at a time when the Listed Schedule C companies were not parties. The DBDC Applicants did not advance any new evidence to support the participation of these added respondents in Ms. Walton's breaches of her fiduciary duties, which is essential to any finding of knowing assistance. Rather, they relied on evidence already before the court about the Waltons' fraud, certain findings of Brown J., and especially the net transfer analysis.

182 Thus, instead of pursuing the further tracing that Brown J. had anticipated would follow his appointment of the Waltons' receiver, the DBDC Applicants claimed damages against the ten Listed Schedule C Companies, with a view to sharing in the proceeds of sale of their ten properties. The net proceeds now in the hands of the Receiver against which the DBDC Applicants seek to share as unsecured creditors are:

3270 American Drive, owned by United Empire Lands Ltd.: $656,362 (after full payment of the DBDC Applicants' constructive trust claim);

324 Prince Edward Drive, owned by Prince Edward Properties Ltd.: $580,623;

777 St. Clarens Avenue, owned by St. Clarens Holdings Ltd.: $431,603;

260 Emerson Avenue, owned by Emerson Developments Ltd.: $172,376;

24 Cecil Street, owned by Cecil Lighthouse Ltd.: $812,510;

0 Luttrell Avenue, owned by Bible Hill Holdings Inc.: $6,235 (subject to a DBDC Applicants' constructive trust);

2 Kelvin Avenue, owned by 6195 Cedar Street Ltd.: $11,497 (subject to a DBDC Applicants' constructive trust);

30 and 30A Hazelton Ave., owned by Atala Investments Inc.: $17,942;

66 Gerrard Street East, owned by The Old Apothecary Building Inc.: $86,480; and

346 Jarvis Street, Suite F, owned by 1780355 Ontario Inc.: $0 (already subject to a DBDC Applicants' constructive trust).

183 This chapter of the proceedings is, as my colleague points out, a priorities dispute. The DeJongs were investors in the Schedule C Companies that acquired the first four properties listed above. The Condos invested in the company that acquired the Cecil Street property. The DBDC Applicants are unable to trace their funds into these properties, so they are seeking damages against the individual companies. The only way they can share in the proceeds of properties in which they have been unable to trace their own funds is as unsecured judgment creditors of the Listed Schedule C Companies, which requires that they establish liability for knowing receipt or knowing assistance. Both causes of action, for their success, depend almost entirely on the court's acceptance of the net transfer analysis, to which I now turn.

THE NET TRANSFER ANALYSIS

184 The DBDC Applicants rely on the "net transfer analysis" as a cornerstone of their knowing assistance claim: both as evidence of the participation of the Listed Schedule C Companies in Ms. Walton's breaches of her fiduciary duties and for the amount of their damages. My colleague accepts the net transfer analysis in concluding that the *Canadian Dredge* test is met (at paras. 80 and 83), as the point of departure for determining the participation of the Listed Schedule C Companies in the fraudulent scheme (at paras. 84 and 87), and as the measure of the DBDC Applicants' damages for knowing assistance (at para. 128).

185 As I will explain, the net transfer analysis was never intended to be used for the purpose of establishing a claim by the DBDC Applicants against the property of other defrauded investors and, as I see it, it does not provide the foundation for their claim for knowing assistance.

186 The net transfer analysis is based on a summary of cash transfers between Schedule B Company accounts and Rose & Thistle that was attached as a schedule to the Inspector's fourth interim report. The analysis is dated December 31, 2013 and covers transactions between September 2010 and October 2013. The Inspector acknowledged that it was not intended to account for all of the dealings between the various accounts from inception, and stated in his fifth report that "the tracing charts . . . [were] intended to provide a snapshot of activity at a particular point of time" and "funds transferred to or from the relevant company outside of the time period [were] not captured" (Brown J., at para. 159).

187 The cash transfer summary shows that, cumulatively, Rose & Thistle received $23.6 million more from the Schedule B Companies' accounts than it transferred to such accounts. This is the "net transfer" amount.

188 The Inspector also looked at cash transfers between Rose & Thistle and all of the other Walton-controlled accounts other than Schedule B Company accounts. These 54 accounts the Inspector and Brown J. referred to as both "Walton Accounts" and "Schedule C Company Accounts".

189 The Schedule C Company accounts included Norma Walton's personal account (into which the Inspector identified a net transfer of $5.4 million from Rose & Thistle), Walton Advocates (into which the Inspector traced a net transfer of $1.6 million from Rose & Thistle), and several Rose & Thistle accounts (into which the Inspector traced a net transfer of more than $6.4 million). The Schedule C Company accounts also included those of the single-purpose investment companies set up by the Waltons (other than the Schedule B Companies), including the accounts of eight of the ten Listed Schedule C Companies. [22]

190 The net transfer analysis showed that, during the same three-year period, cumulatively and on a net basis, the amount of $25.4 million was transferred into the Walton-controlled accounts (other than the Schedule B Company accounts) from Rose & Thistle.

191 Taking the largest 53 advances by the DBDC Applicants to the Schedule B Companies, the Inspector examined the activity in the relevant Schedule B Company bank account immediately following the advance and looked for any contemporaneous transfer of funds from the relevant Schedule B Company account to the Rose & Thistle bank account. Then he examined the Rose & Thistle bank account to ascertain what activity occurred following the receipt of funds transferred in from the Schedule B account, and in particular, whether there was any contemporaneous transfer of funds from the Rose & Thistle account to a Schedule C Company account (Brown J., at para. 17). The Inspector noted that, while funds could be traced directly in seven instances to the purchase of specific Schedule C Properties, in most cases monies were intermingled.

192 Before Brown J. the DBDC Applicants relied on the net transfer analysis to obtain proprietary remedies against certain Schedule C Properties. Brown J. recognized that the net transfer analysis supported the conclusion that the DBDC Applicants had a strong claim for unjust enrichment *against the Waltons in respect of the Schedule C Properties* (at paras. 227, 231, 264 and 268). He granted constructive trusts over those properties where the Inspector established that soon after the transfer of money from a Schedule B Company account, a Schedule C Property was purchased, that is, where the Schedule B monies were traced into a Schedule C Property. [23]

193 Brown J.'s findings based on the net transfer analysis are summarized by my colleague at para. 16, as follows:

(i) the Waltons directed the transfer of a net $23.6 million from the Schedule B Company accounts to a bank account belonging to Rose & Thistle during the period from October 2010 to October 2013;

(ii) during the same period, the Waltons directed transfers of a net $25.4 million from the Rose & Thistle account to the Schedule C Companies;

(iii) in almost all cases, some or all of the amounts advanced to the Schedule B Companies by the DBDC Applicants were transferred almost immediately to the Rose & Thistle account; and

(iv) those transfers of funds from the Schedule B Companies to Rose & Thistle constituted breaches of the agreements between the DBDC Applicants and the Waltons.

194 The net transfer analysis does not, as the DBDC Applicants contend, "demonstrate that $22.6 million of the funds misappropriated from the DBDC Applicants were diverted to the use and benefit of the Schedule C Companies" (DBDC Applicants' Factum, at para. 57). There are a number of reasons why I conclude that the net transfer analysis does not support the claims against the Listed Schedule C Companies.

195 First, the $22.6 million amount consists of the net amount transferred from Schedule B Company accounts to Rose & Thistle (less $1 million credited to the Waltons for proper expenses). Except as has been accounted for by constructive trust, the net transfer analysis does not show where the money went after it was transferred into Rose & Thistle, or that any of the "net" money ended up in any particular Walton-controlled account (including any Listed Schedule C Company account).

196 Contrary to what is pleaded by the DBDC Applicants, the $22.6 million does not represent the extent to which any Schedule C Company or even the Schedule C Companies as a whole, were enriched by the DBDC Applicants' monies diverted from the Schedule B accounts.

197 Second, although the net transfer analysis also indicates that Schedule C Company accounts received a net transfer of $25.4 million, this is simply the net amount that was transferred from Rose & Thistle to all 54 Walton-controlled accounts, other than the Schedule B Company accounts. It does not identify the source of the money coming from Rose & Thistle into a Schedule C Company Account. Without a proper tracing, no particular Schedule C Company account can be said to have received the benefit of Schedule B Company monies. Where a tracing has occurred, a constructive trust have been awarded.

198 My colleague states, at para. 80, that as a result of these net transfers, the Schedule C Companies acquired funding necessary for their ongoing operations and he refers to Brown J. accepting the Inspector's conclusion that "the [DBDC] Applicants' investment in the Companies was a major source of funds for the Walton Companies." At the time this finding was made by Brown J., however, the Inspector did not yet have access to the Schedule C Company accounts, and therefore did not consider the funds invested by others, such as the DeJongs and the Condos, into the Schedule C Properties, transfers between the Schedule C Company accounts, and the movement of funds between such accounts and Rose & Thistle. Even if it could be said that the Walton or Schedule C Companies as a whole acquired funding for their operations, this tells us nothing about what was happening in the account of any specific Schedule C Company, including all of the Listed Schedule C Companies (which of course had also received funds from their investors).

199 As I see it, the central problem with using the net transfer analysis as a basis for a claim against the Listed Schedule C Companies, is that it treats all Walton-controlled accounts in the same way, and as a collective, when the investors in the Listed Schedule C Companies (which are only a subset of the Walton-controlled companies or accounts) were equally victims of the Waltons' fraud. The Waltons used a number of corporate entities to perpetrate their fraud on the appellants and the respondents — the corporate entities were the pawns in their "shell game." Some were entirely Walton-controlled, and others were investment companies set up in the same way as the DBDC Applicants' Schedule B Companies, to be co-owned by investors. The DBDC Applicants point to the net funds that were transferred from Rose & Thistle to all Schedule C Company accounts as a collective, but then target only ten such companies, the ones with valuable property and other defrauded investors, for the purpose of their knowing assistance claim.

200 My colleague, at para. 106, considers it significant "that net funds of $23.6 million *flowed out of the Schedule B Companies* into Rose & Thistle, and net funds of $25.4 million *flowed out of Rose & Thistle into the Schedule C Companies.*" He concludes that "it is the DBDC Applicants, not the Schedule C Companies, that suffered the net losses".

201 In my view, the net transfers into and out of Rose & Thistle do not assist in establishing the liability of the Listed Schedule C Companies. Because it was designed to show the DBDC Applicants' losses, the net transfer analysis sets up, on one side of the ledger, the accounts of the DBDC Applicants' Schedule B Companies, and on the other, the 54 other Walton-controlled accounts. It stands to reason that the DBDC Applicants suffered the net losses, when compared to all of the Walton-controlled accounts. The DBDC Applicants invested much more than the Waltons and more than any other investor. If the Waltons failed to make their capital contributions and were siphoning money to their own personal accounts as well as moving investor money around, it follows that the amount transferred to Rose & Thistle by the Schedule B Companies would be more than the amount paid out by Rose & Thistle to such companies.

202 The DBDC Applicants invoke the net transfer analysis as a measure of their collective losses against the Listed Schedule C Companies as a subset of the 54 Schedule C Companies. In fact, the net transfer analysis shows that, when the DBDC

Applicants' Schedule B Companies are considered individually, at least nine of them were *net beneficiaries* of transfers from Rose & Thistle.[24] And, when the Schedule C Companies are considered individually, an amount going into a Schedule C Company account could as easily have been money from another Schedule C Company account. The money cannot be traced from a Schedule B Company account.

203 At paras. 57 to 59 of his reasons, the Application Judge identified the shortcomings in the net transfer analysis where he stated:

> [Referring to the example of 6195 Cedar Street Ltd.], there is no proof where Rose & Thistle obtained the money that was transferred to 6195 Cedar Street Ltd. It may have come from one of Dr. Bernstein's companies. It may not have. It may have come from investors in the Schedule C Companies whose money was transferred to Rose & Thistle. The report does not state where the money came from. The same can be said for all of the Schedule C Companies that the applicants seek a judgment against for knowing receipt of trust funds. Moreover, the schedule was as of a point in time and whether the balance changed over time is not known as no analysis was done.
>
> What happened to the money transferred to the Schedule B and C Companies by Rose & Thistle is not in evidence. On the hearing before Brown J., the applicants were able to establish that Dr. Bernstein's funds went into several Schedule C Properties and a constructive trust was ordered in favour of the applicants in respect of those properties. No constructive trust was ordered with respect to the property of the Schedule C Companies that the applicants now seek a judgment against, which I take to be recognition that the applicants did not have evidence that their money went into those properties. In paragraph 13 of his formal judgment of August 12, 2014, Brown J. ordered that the applicants were permitted to trace funds provided by the applicants into and through the accounts of the Schedule B Companies into the Schedule C Companies. However the applicants did not undertake any such tracing. *The applicants have not established that it was the applicants' money that was received by the Schedule C Companies in question.*
>
> In light of the way in which Ms. Walton transferred money around, I could not without a tracing analysis hold that Dr. Bernstein's money ended up in the Schedule C Companies against which the applicants now seek a judgment. [Emphasis added.]

204 I agree entirely with these comments. In my opinion, not only does the net transfer analysis fail to establish the receipt by the Listed Schedule C Companies of DBDC Applicants' funds for the purpose of knowing receipt, it also cannot support the claim against them for knowing assistance. Yet, the DBDC Applicants rely on the net transfer analysis as evidence of the Listed Schedule C Companies' participation in Ms. Walton's breach of fiduciary duties and as the measure of their damages. I turn now to the substance of their claims.

A. THE KNOWING RECEIPT CLAIM

205 My colleague concludes, and I agree, that the DBDC Applicants have failed to make out a claim for knowing receipt. "Knowing receipt" here refers to the receipt by the Listed Schedule C Companies of monies belonging to the DBDC Applicants that were entrusted to Ms. Walton's control, and diverted in breach of her fiduciary duties.

206 At paras. 56 to 59 of his reasons, the Application Judge rejected the knowing receipt claim after referring to and rejecting the net transfer analysis, which was relied on by the DBDC Applicants. Without a tracing analysis he could not find that the DBDC Applicants' money (other than what was already accounted for by constructive trust) ended up in the Listed Schedule C Companies.

207 In their appeal to this court, the DBDC Applicants continue to assert that knowing receipt was made out. They contend that the Application Judge made a palpable and overriding error in concluding, on a balance of probabilities, that the Listed Schedule C Companies did not knowingly receive funds misappropriated from the DBDC Applicants. Importantly, they continue to rely on the net transfer analysis as providing such evidence (see paras. 65 to 71 of their factum).

208 The rejection of the DBDC Applicants' knowing receipt claim recognizes that the net transfer analysis does not demonstrate the receipt of their funds by the Listed Schedule C Companies. As my colleague notes, the DBDC Applicants have been unable 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" (at para. 38).

209 In my opinion, just as the net transfer analysis cannot demonstrate receipt by a Schedule C Company of any DBDC Applicants' monies, it cannot provide support for the claim of knowing assistance. Yet, as I will explain, acceptance of the net transfer analysis is essential if the DBDC Applicants are to establish the "participation" and damages elements of this claim.

210 I turn now to the knowing assistance claim.

B. THE KNOWING ASSISTANCE CLAIM

(1) Elements of the Equitable Wrong

211 The elements of knowing assistance in a breach of fiduciary duty were described by this court in *Harris v. Leikin Group Inc.* [2011 CarswellOnt 14269 (Ont. C.A.)], at para. 8, as: (1) a fiduciary duty; (2) a fraudulent and dishonest breach of the duty by the fiduciary; (3) actual knowledge by the stranger to the fiduciary relationship of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) participation by or assistance of the stranger in the fiduciary's fraudulent and dishonest conduct.

(2) The Fraudulent and Dishonest Breach of Ms. Walton's Fiduciary Duties to the DBDC Applicants

212 The point of departure in determining the liability of the Listed Schedule C Companies for knowing assistance is to identify the breaches of fiduciary duty in which they are alleged to have participated or assisted.

213 The Application Judge accepted, at para. 34, that the diversion of funds out of the Schedule B Companies by the Waltons for their own purposes was in breach of their fiduciary duties, and, at para. 47, that when she knowingly took a risk with the money belonging to the Schedule B Companies that she had no right to take, Ms. Walton's activity was fraudulent and dishonest. My colleague has explained how the duties would have been owed by Ms. Walton to the DBDC Applicants, notwithstanding that the relationship was contractual, an analysis I am prepared to accept.[25] The existence and dishonest breaches of the fiduciary duties owed by Ms. Walton to the DBDC Applicants are not contested on appeal.

214 It is particularly important in this case, where the alleged participants were also victims of the Waltons' fraud, to keep the focus on the specific breaches of fiduciary duty in which they are alleged to have participated, rather than the overall fraud in which the Waltons were engaged. The overall fraudulent scheme involved Ms. Walton's breaches of her fiduciary duties to *both* the DBDC Applicants and the respondents (as my colleague notes at paras. 76, 80, 85 and 95). For the purpose of the wrong of knowing assistance, however, the focus must be on the breach of fiduciary duties owed to the DBDC Applicants, otherwise the risk is that Ms. Walton's use of the Listed Schedule C Companies in the "shell game" will be considered sufficient to mark them as participants for the purpose of the knowing assistance claim.

215 My colleague's analysis of what the Listed Schedule C Companies are alleged to have done as "participants" focuses on their involvement in the overall fraudulent scheme, including as victims of that scheme. This leads him to conclude, at para. 68, that Ms. Walton's "perpetration of the scheme was their participation in the scheme." In order for the Listed Schedule C Companies to be liable as accessories to that breach, they must have done something to participate in the breach of fiduciary duty which is, as the DBDC Applicants have pleaded, and the Application Judge found, the diversion of their funds out of the Schedule B Companies for the Waltons' personal use. It is to the element of participation that I now turn.

(3) The Listed Schedule C Companies Did Not "Participate" or "Assist" in Ms. Walton's Breaches of Fiduciary Duty to the DBDC Applicants

216 Liability for knowing assistance in a breach of fiduciary duty is fault-based. It requires an intentional wrongful act on the part of the "stranger" or accessory, to knowingly assist in the fraudulent and dishonest breach of fiduciary duty. Participation in a breach of fiduciary duty for the purpose of knowing assistance requires that the accessory "participated in or assisted the fiduciary's fraudulent and dishonest conduct": *Enbridge Gas Distribution Inc. v. Marinaccio* [2012 CarswellOnt 12100 (Ont. C.A.)], at para. 23.

217 All of the knowing assistance cases cited by the parties involved specific harmful conduct by the "stranger" that assisted in the breach of fiduciary duty or breach of trust. In *Air Canada v. M & L Travel Ltd.* [1993 CarswellOnt 568 (S.C.C.)], the accessory stopped payment of trust funds, opened an account and attempted to transfer the funds into the new account. In *Enbridge Gas Distribution Inc. v. Marinaccio*, the accessories prepared invoices, opened bank accounts, arranged for wire transfers and accepted cash. In *Agip (Africa) Ltd. v. Jackson* [(1990), [1992] 4 All E.R. 451 (Eng. C.A.)], the accessory concealed a self-interested transaction, and played the role of a disinterested arms' length vendor. And in *Locking v. McCowan*, 2016 ONCA 88 (Ont. C.A.) (a pleadings case), the accessory was alleged to have set up company structures and controlled the fraudulent movement of money out of the payee companies.

218 By contrast here, the DBDC Applicants do not point to any conduct by any or all of the Listed Schedule C Companies as their participation in the Walton breach of fiduciary duty — except to repeat the same allegation as in respect of knowing receipt: "the Schedule C Company Respondents received property from the Applicants as a result of the Waltons' breach of their fiduciary duties owed to the Applicants", and that they "each received this property from the Applicants having knowledge that the property was transferred in breach of a fiduciary duty": Third Fresh as Amended Notice of Application, at paras. 3(ttt) and (uuu). [26]

219 While my colleague does not make the finding sought by the DBDC Applicants — that each Listed Schedule C Company received their property — he is nevertheless satisfied that participation is made out. With respect, I disagree.

220 First, as I have already noted, my colleague's focus is on the overall fraud, and not the diversion of the DBDC Applicants' funds to the Waltons' personal use. At para. 57 of his reasons, he characterizes the pertinent question as whether Ms. Walton "caused the Schedule C Companies to participate in her fraudulent dealings". He answers the "participation" question at para. 86, by saying that Ms. Walton "*utilized the Schedule C Companies as actors* in the process of orchestrating her shell game through the Rose & Thistle "clearing house" account", and he then describes how she co-mingled and diverted the funds of both the DBDC Applicants and the Listed Schedule C Companies, using various pretexts. Again, at para. 95, he refers to the Listed Schedule C Companies as actors in Ms. Walton's "overall fraudulent undertaking in breach of her fiduciary obligations to both the DBDC Applicants and DeJong".

221 The Listed Schedule C Companies may have "participated" in the general sense in the Waltons' fraudulent scheme or arrangement when money was moved to and from their accounts, in the same way money was moved to and from the Schedule B Company accounts. The actions of the Listed Schedule C Companies were the same as those of the Schedule B companies — they were conduits and used as part of the Waltons' shell game. All of the victims of Ms. Walton's fraud, including the Listed Schedule C Companies, may well have been *used by her* in the overall fraud, but, in my view, that does not equate to their participation in the dishonest breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for damages.

222 Second, in finding participation, my colleague relies on the net transfer analysis to point to the collective benefit of the Waltons' arrangement to the Schedule C Companies. In his view, the Schedule C Companies were "significant net beneficiaries", they acquired properties as intended and they "benefitted at least partly from Ms. Walton's actions" (at paras. 79, 80 and 124). He states, at para. 80, that, based on the net transfers of monies from the Schedule B Companies to Rose & Thistle and from Rose & Thistle to the Schedule C Companies, "the latter acquired funding necessary for their ongoing operations" and he refers to Brown J.'s acceptance of the conclusion that the DBDC Applicants' investments in the Schedule B Companies "[were] a major source of funds for the [Schedule C] Companies" (which as I have noted was a finding made without reference to the Schedule C Company accounts).

223 With respect, I disagree with the acceptance of the net transfer analysis to support a finding of participation. The net transfer analysis only establishes that the *collective* of the 54 Walton-controlled accounts (consisting of all accounts controlled by the Waltons other than those of the Schedule B Companies) benefitted from the Waltons' overall fraud, during the three-year period considered by the Inspector. It does not prove that any one or more of the ten Listed Schedule C Companies received a benefit or that this enabled them to acquire properties (except where constructive trusts were already imposed). Nor does the net transfer analysis demonstrate that any Listed Schedule C Company participated in Ms. Walton's diversion of the DBDC Applicants' funds.

224 Third, even when my colleague considers the individual Listed Schedule C Companies (at paras. 87 to 96), he does not identify any evidence of their "participation" or "assistance" in the breach of fiduciary duty to the DBDC Applicants. Instead he refers to transfers from their accounts to and from Rose & Thistle, saying that, with two possible exceptions, each "either *received from or transferred to* Rose & Thistle monies or monies-worth during the relevant period", and that this both meets the test for the second and third elements of *R. v. McNamara* [1985 CarswellOnt 96 (S.C.C.)] and for the participation/knowing assistance requirement (at paras. 80, 83, 84, 95 and 96). I respectfully disagree.

225 Prince Edward Properties Ltd. is the Listed Schedule C Company in respect of which there was a net transfer from its account *to* Rose & Thistle of $520,850 during the three-year period covered by the net transfer analysis. Only $100 was transferred the other way. There is no evidence that it benefited from or participated in the diversion of the DBDC Applicants' funds (or even that it was a beneficiary of the Waltons' overall fraud). There is no evidence of net Schedule B Company monies being transferred into this Listed Schedule C Company account, or that they were used to acquire its property, 324 Prince Edward Drive.

226 The two exceptions referred to by my colleague are St. Clarens Holdings Ltd. and Emerson Developments Ltd., where there is no evidence of *any* transfer of funds between their accounts and Rose & Thistle account, let alone any evidence of a transfer of the DBDC Applicants' funds into these entities. In fact, as the respondents point out, since the Schedule C Properties, 777 St. Clarens Avenue and 260 Emerson Avenue, were acquired after the Inspector was appointed, and the Waltons had no access to the DBDC Applicants' funds, no DBDC Applicant monies could have found their way into these Schedule C Companies, or been used to acquire their properties.

227 My colleague acknowledges that there is no evidence of any transfer between Rose & Thistle and these companies, and, at paras. 90 to 93, he describes how they were defrauded by Ms. Walton. He concludes that Ms. Walton's acts in defrauding these Listed Schedule C Companies "engaged the Listed Schedule C Companies as actors in her overall fraudulent undertaking", that "each of these transactions" required a corporate act, and that "Ms. Walton's acts were their acts, and the Companies accordingly participated in or assisted Ms. Walton in her breach of fiduciary duties to the DBDC Applicants" (at para. 96). With respect, I disagree that participation is made out here. It would mean that being a defrauded entity, as part of a larger fraud, can constitute knowing assistance in the fraudster's breach of fiduciary duty to another fraud victim.

228 Even in the case of the seven Listed Schedule C Companies where the net transfer analysis shows a net transfer of monies from Rose & Thistle to their individual accounts during the relevant period (United Empire Lands Ltd., Bible Hill Holdings Ltd., 6195 Cedar Street Ltd., Cecil Lighthouse Ltd. and The Old Apothecary Building Inc., Atala investments Inc. and 1780355 Ontario Inc.), this is not evidence of that company benefiting from, or in any other way participating in, Ms. Walton's breach of fiduciary duty, which is her diversion of funds from the DBDC Applicants. As we have seen, the net transfer analysis does not take into account monies that were invested directly from the Schedule C Company investors, including the investors in the Listed Schedule C Companies, or transfers between Schedule C Company accounts.

229 The only benefit that is demonstrated here is a "net benefit" to the Schedule C Companies as a collective, from the transfer of Rose & Thistle monies. I have already identified what I view as the limits of the net transfer analysis. Even if more money flowed from Rose & Thistle into a Listed Schedule C Company than what that company paid to Rose & Thistle, this is not evidence that the Listed Schedule C Company benefited from or participated in the specific breach of fiduciary duty, which was the diversion of the DBDC Applicants' funds from their intended purpose.

230 The actions my colleague relies on for the Listed Schedule C Companies' participation, are that the Listed Schedule C Companies received and paid monies to Rose & Thistle (and in some cases were simply defrauded by the Waltons). In my view, this conduct does not rise to the level of knowing assistance by the Listed Schedule C Companies in a breach of a fiduciary duty any more than it would engage the Schedule B Companies in such a breach. They were not participants acting in their own right to further a breach of fiduciary duty. They were *used by* the Waltons as part of a fraudulent scheme. In this regard the Schedule B companies and the innocent investor Schedule C Companies are on an equal footing.

231 As such, while the Listed Schedule C Companies may have participated in Ms. Walton's overall fraudulent scheme, in the sense that they were used by her in the "shell game" to co-mingle investor funds, and to avoid making her own contributions, the net transfer analysis does not provide the evidence that they participated in her breach of fiduciary duty to the DBDC Applicants so as to attract personal liability for knowing assistance. Nor is there any other evidence of their participation. In my opinion, the DBDC Applicants' claim against the Listed Schedule C Companies should fail for this reason alone.

(4) The Knowledge Element

232 As the authorities such as *El Ajou v. Dollar Land Holdings plc.* [(1993), [1994] 2 All E.R. 685 (Eng. C.A.)] instruct, "it is necessary to identify the natural person or persons having management and control *in relation to the act or omission in point*" (at p. 695). Here, the determination of whether Ms. Walton's fraudulent intent is to be attributed to a Listed Schedule C Company depends on the wrongful act the company committed. Because of my conclusion on the participation issue, I do not propose to say anything about my colleague's discussion of the knowledge element, except to indicate that I take issue with two points: the result of applying the three *Canadian Dredge* criteria for the corporate identification doctrine in this case, and my colleague's suggestion that the second and third criteria should be approached "in a less demanding fashion".

233 One of the reasons that my colleague specifically addresses whether each Listed Schedule C Company received a benefit is to meet the requirements of *Canadian Dredge* for attaching liability to a corporation for the fault of its directing mind. As he notes, at para. 69, *Canadian Dredge* instructs that where a corporation's alleged wrongdoing involves fraud by its directing mind, the court must be satisfied that (i) the directing mind was acting within her assigned field of operation, and that her actions (ii) were not totally in fraud of the Listed Schedule C Company, and (iii) were by design or result partly for the benefit of the corporation.

234 My colleague's analysis shows that there are difficulties meeting these requirements in this case (even if the alleged wrong was participation in Ms. Walton's overall fraud) because the scheme was for the Waltons' personal benefit and defrauded the Listed Schedule C Companies, and because the evidence of each company's individual benefit from the scheme is questionable. While it is true, as my colleague notes, that knowing assistance does not require a defendant to have received a benefit, the issue of benefit is relevant here because Ms. Walton's conduct was in fraud of the very entities sought to be made liable for knowing assistance, and there is no other act of participation alleged. And, the overall "net" benefit to the Schedule C Companies is central to the DBDC Applicants' claim. Without a tracing of Schedule B Company money into their accounts, there is no evidence that any of the Listed Schedule C companies benefited from the diversion of the DBDC Applicants' funds by Ms. Walton.

235 My colleague suggests, at para. 70, that the second and third criteria of *Canadian Dredge* should be approached in a less demanding fashion, because this is a civil case, where the burden of proof is less onerous, and because of the nature of the case (a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims).

236 With respect, I disagree. When the *Canadian Dredge* criteria have been accepted and applied in civil cases, this has occurred without relaxing the criteria for finding a corporation is liable for a wrong, when its directing mind is acting fraudulently (see, for example, *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* [1985 CarswellOnt 146 (Ont. C.A.)], at p. 493 and *Golden Oaks Enterprises Inc. (Trustee of) v. Lalonde*, 2016 ONSC 5313, 133 O.R. (3d) 513 (Ont. S.C.J.), at paras. 127-131).

237 I do not accept that the adoption of a less demanding standard is warranted here. As I see it, neither the civil burden of proof nor the nature and extent of the fraud would justify a less rigorous approach if the Listed Schedule C Companies are to be fixed with responsibility for the conduct of their director, Ms. Walton. [27] Knowing assistance in the breach of a fiduciary duty is a serious wrong that requires actual and not constructive knowledge by the participant. The investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty. The rationale for the claim is that the participant's 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": *Air Canada v. M & L Travel Ltd*, at p. 812. I see no justification in the circumstances of this case to lessen the requirement for knowledge before one victim of a fraud is tagged with the conduct of a fraudster. The conduct here was in fraud of the Schedule B Companies and their investors, the DBDC Applicants, *and* the Listed Schedule C Companies and their investors, and was for the personal benefit of the Waltons.

(5) The Damages Award of $22.6 Million is Arbitrary and Not a True Measure of Damages for Knowing Assistance

238 Finally I turn to the question of damages. I disagree with my colleague's conclusion that the measure of damages for knowing assistance in this case is $22.6 million, and that the Listed Schedule C Companies are liable jointly and severally for this amount.

239 Under the doctrine of knowing assistance, "the defendants' liability is measured by the plaintiff's injury consequent to the trustee's misconduct": see the P. Perell article, cited by my colleague at paras. 119 and 127. This is because the wrong is in acting as an accessory to the principal breach, and the accessory is liable jointly and severally *with the principal wrongdoer.* This is why the accessories in the *Enbridge Gas* case acknowledged that, if liable, the damages would be the full amount paid by Enbridge as a result of the principal's scheme and not just their share of the profit (at para. 50).

240 Here, instead of asserting that the Listed Schedule C Companies are liable together with the Waltons for the $66.9 million amount awarded as damages for breach of fiduciary duty, the DBDC Applicants claim $22.6 million, which they say is the portion of that amount "which the Schedule C Company respondents knowingly assisted the Waltons in diverting to the benefit of the Schedule C Companies". My colleague accepts this measure of damages when he states, at para. 128, that "the loss is measured by the net transfer to the Schedule C Companies, globally, of $22.6 million.

241 In my view, the $22.6 million amount, which is based on the net transfer analysis, is not a true measure of the damages for which the Listed Schedule C Companies could be liable to the DBDC Applicants for knowing assistance. It does not correspond with the loss caused by the actions of the fiduciary, or even with the loss caused by, or benefit to, some or all of the Schedule C Companies. It is simply the net amount transferred between the Schedule B Company accounts and Rose & Thistle (less $1 million credited to the Waltons).

242 And even if it could be assumed that all of the $22.6 million transferred to Rose & Thistle was a net gain to the Schedule C Companies, this is simply the amount by which all of the Walton-controlled accounts, other than the Schedule B Company accounts, would have benefited. As we have seen (at para. 189 above), it includes over $12 million of net transfers to Ms. Walton personally, to "Walton Advocates", and to other Rose & Thistle companies.

243 Two of the Listed Schedule C Companies (Emerson and St. Clarens) received no funds from Rose & Thistle under the net transfer analysis, and one (Prince Edward) transferred considerably more money to Rose & Thistle than it received (see paras. 225 and 226). Even considered as a collective, the Listed Schedule C Companies received only the net amount of $4,367,204 from Rose & Thistle, according to the net transfer analysis.

244 Finally, if the net amount transferred from the DBDC Applicants to Rose & Thistle to the Schedule C Companies could be a proper measure of damages, the $22.6 million figure includes and therefore double counts the amounts the DBDC Applicants were awarded for their constructive trust claims (a total of $8,128,325: Brown J. at para. 264). The constructive trusts resulted from a tracing of DBDC Applicants' funds into specific Schedule C Properties with reference to the transfers shown on the net transfer analysis. These diversions of funds into specific Schedule C Properties have already been accounted

for, and would need to be deducted from the $22.6 million damages award.[28] I say this, not because I view the $22.6 million amount as a proper measure of the DBDC Applicants' damages against the Listed Schedule C Companies, individually or as a collective, but to further emphasize that it is an arbitrary and purely convenient number that emerges from the net transfer analysis, an analysis that was never intended to inform a claim for knowing assistance.

(6) Equity Does Not Support the Knowing Assistance Claim

245 My colleague recognizes that knowing assistance is an equitable doctrine, however he rejects the argument that equity should not intervene in this case. In my view, there are important equitable concerns here that should prevent the court from finding the Listed Schedule C Companies liable for damages for knowing assistance.

246 First, the Listed Schedule C Companies would be subject to an award of damages that is based on equitable grounds when they themselves are victims of the same fraudulent conduct. The liability of the stranger in a knowing assistance claim is fault-based. To the extent that any "fault" could be found here, it results from being caught up in or used as part of the wrongdoer's fraudulent scheme.

247 Second, the Listed Schedule C Companies are tagged with damages based on the full extent to which all of the Walton-controlled companies (that is all the Schedule C Companies) benefited. The DBDC Applicants have chosen to proceed only against the ten Listed Schedule Companies for the full amount of the "net transfer" from Rose & Thistle to all of the Walton-controlled or Schedule C Companies. The DBDC Applicants contend that they have limited their relief to these companies "based on the work of the receiver/manager and for efficiency" (DBDC Applicants' Factum, at para. 16). This is not a satisfactory explanation — the reality is that these are the only entities that have assets or proceeds worth pursuing. Even if the full $22.6 million could be accepted as a measure of their loss from the conduct of the Schedule C Companies (if it were assumed that all of the net monies flowing into the Schedule C Companies came from the DBDC Applicants, which as I stated earlier is not supported on the evidence), this includes over $12 million of net transfers to Ms. Walton personally, to "Walton Advocates", or to other Rose & Thistle companies. To place the entire burden of the claim on the ten Listed Schedule C Companies, overwhelming the claims for losses of the investors in those companies, in my view, would be an unjust result.

248 Finally, I conclude that the knowing assistance remedy should not be utilized in these exceptional circumstances — where one group of defrauded investors seeks to obtain judgment sounding in knowing assistance against another group that has been defrauded in a similar manner. The DBDC Applicants were able to trace certain funds into the purchase of Schedule C Properties, including five of the Listed Schedule C Company properties and to obtain a constructive trust that gives them priority over the proceeds of sale of such properties. I agree with my colleague that the remedy of constructive trust, as argued by DeJong, is not available as a matter of law, and that the Application Judge erred in giving DeJong priority over the proceeds of four properties on that basis. That said, there is no question that DeJong's money went into the purchase of these properties (and indeed the Application Judge found, and my colleague accepts, that its advances were as shareholder loans, and that it is a creditor for the full amounts it claims). In my view, it would be unfair for DeJong's claims to its advances, which can be traced, but not in a way that would justify a constructive trust, to be obliterated by a damages claim of $22.6 million by the DBDC Applicants, without any evidence that their funds were used in any way (except where a tracing has occurred) to acquire these properties. This result alone is such that the equitable claim of knowing assistance should be denied in this case.

CONCLUSION

249 For these reasons, I would dismiss the appeal of the DBDC Applicants with respect to the knowing receipt and knowing assistance claims. I would allow their appeal of the DeJong constructive trust awards essentially for the reasons outlined by my colleague. In the circumstances, however, my proposed disposition would result in the priorities over the Listed Schedule C Properties being determined by the Receiver without regard to any claim to such proceeds by the DBDC Applicants, except to the extent of their constructive trusts.

Schedule "A" — Companies

1. Dr. Bernstein Diet Clinics Ltd.

2. 2272551 Ontario Limited

3. DBDC Investments Atlantic Ltd.

4. DBDC Investment Pape Ltd.

5. DBDC Investments Highway 7 Ltd.

6. DBDC Investments Trent Ltd.

7. DBDC Investments St. Clair Ltd.

8. DBDC Investments Tisdale Ltd.

9. DBDC Investments Leslie Ltd.

10. DBDC Investments Lesliebrook Ltd.

11. DBDC Fraser Properties Ltd.

12. DBDC Fraser Lands Ltd.

13. DBDC Queen's Corner Inc.

14. DBDC Queen's Plate Holdings Inc.

15. DBDC Dupont Developments Ltd.

16. DBDC Red Door Developments Inc.

17. DBDC Red Door Lands Inc.

18. DBDC Global Mills Ltd.

19. DBDC Donalda Developments Ltd.

20. DBDC Salmon River Properties Ltd.

21. DBDC Cityview Industrial Ltd.

22. DBDC Weston Lands Ltd.

23. DBDC Double Rose Developments Ltd.

24. DBDC Skyway Holdings Ltd.

25. DBDC West Mall Holdings Ltd.

26. DBDC Royal Gate Holdings Ltd.

27. DBDC Dewhurst Developments Ltd.

28. DBDC Eddystone Place Ltd.

29. DBDC Richmond Row Holdings Ltd.

Schedule "B" — Companies

1. Twin Dragons Corporation

2. Bannockburn Lands Inc. / Skyline - 1185 Eglinton Avenue Inc.

3. Wynford Professional Centre Ltd.

4. Liberty Village Properties Ltd.

5. Liberty Village Lands Inc.

6. Riverdale Mansion Ltd.

7. Royal Agincourt Corp.

8. Hidden Gem Developments Inc.

9. Ascalon Lands Ltd.

10. Tisdale Mews Inc.

11. Lesliebrook Holdings Ltd.

12. Lesliebrook Lands Ltd.

13. Fraser Properties Group

14. Fraser Lands Ltd.

15. Queen's Corner Corp.

16. Northern Dancer Lands Ltd.

17. Dupont Developments Ltd.

18. Red Door Developments Inc. and Red Door Lands Ltd.

19. Global Mills Inc.

20. Donalda Developments Ltd.

21. Salmon River Properties Ltd.

22. Cityview Industrial Ltd.

23. Weston Lands Ltd.

24. Double Rose Developments Ltd.

25. Skyway Holdings Ltd.

26. West Mall Holdings Ltd.

27. Royal Gate Holdings Ltd.

28. Royal Gate Nominee Inc.

29. Royal Gate (Land) Nominee Inc.

30. Dewhurst Development Ltd.

31. Eddystone Place Inc.

32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

Schedule "C" — Properties

1. 3270 American Drive, Mississauga, Ontario

2. 0 Luttrell Ave., Toronto, Ontario

3. 2 Kelvin Avenue, Toronto, Ontario

4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario

5. 1 William Morgan Drive, Toronto, Ontario

6. 324 Price Edward Drive, Toronto, Ontario

7. 24 Cecil Street, Toronto, Ontario

8. 30 and 30A Hazelton Avenue, Toronto, Ontario

9. 777 St. Clarens Avenue, Toronto, Ontario

10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario

11. 66 Gerrard Street East, Toronto, Ontario

12. 2454 Bayview Avenue, Toronto, Ontario

13. 319-321 Carlaw, Toronto, Ontario

14. 260 Emerson Ave., Toronto, Ontario

15. 44 Park Lawn Circle, Toronto, Ontario

16. 19 Tennis Crescent, Toronto, Ontario

17. 646 Broadview Avenue, Toronto, Ontario

Appeal allowed.

Annexe "A" — Listed Schedule C Companies/Properties

	Schedule C Company	*Corresponding Schedule C Property*
1.	United Empire Lands Ltd.	3270 American Drive, Mississauga, Ontario
2.	Bible Hill Holdings Inc.	0 Luttrell Ave., Toronto, Ontario
3.	6195 Cedar Street Ltd.	2 Kelvin Avenue, Toronto, Ontario
4.	Prince Edward Properties Ltd.	324 Prince Edward Drive, Toronto, Ontario
5.	Cecil Lighthouse Ltd.	24 Cecil Street, Toronto, Ontario
6.	Atala Investments Ltd.	30 and 30A Hazelton Avenue, Toronto, Ontario
7.	St. Clarens Holdings Ltd.	777 St. Clarens Avenue, Toronto, Ontario
8.	The Old Apothecary Building Inc.	66 Gerrard Street East, Toronto, Ontario
9.	1780355 Ontario Inc.	346 Jarvis Street, Suite F, Toronto, Ontario
10.	Emerson Developments Ltd.	260 Emerson Ave., Toronto, Ontario

Footnotes

1 The mortgages are not directly at issue in these proceedings.

2 Brown J.'s findings remain operative because they were made in the same oppression remedy proceedings involving the same parties and the same issues; he had simply postponed a decision on the matters now under appeal, which were subsequently heard by Newbould J. following Brown J.'s appointment to this Court.

3 Brown J. had been appointed to this Court in the interim.

4 The Waltons filed a Notice of Appeal from the orders of the Application Judge. Their appeal was dismissed for delay on March 20, 2017.

5 These same observations apply with respect to the counter-application of DeJong for constructive trusts, which was asserted for the first time before the Application Judge.

6 Other than those relating to Schedule C Properties against which constructive trusts were ordered.

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 (S.C.C.), at paras. 30-36, per Iacobucci J. (dissenting, but not on this point); *Citadel General ; Barnes v. Addy* (1874), 9 Ch. App. 244 (Eng. C.A.); *Agip (Africa) Ltd. v. Jackson* (1990), [1992] 4 All E.R. 451 (Eng. C.A.) ; *El Ajou v. Dollar Land Holdings plc.* (1993), [1994] 2 All E.R. 685 (Eng. C.A.).

8 In general, my colleague accepts the foregoing analysis, but suggests there are difficulties in asserting a claim through the Schedule B Companies because their losses were caused by the fraudulent actions of an insider, Ms. Walton, and that the claim could be met with an *ex turpi causa* defence: see *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 (S.C.C.), varying 2016 ONCA 11 (Ont. C.A.). The DBDC Applicants are the claimants, however, and their controlling and directing mind is that of Dr. Bernstein. There is no fraud on the part of Dr. Bernstein to be attributed to the DBDC Applicants. In these circumstances, there is little likelihood an *ex turpi causa* defence would arise, in my opinion. Nor was it argued.

9 The judge of first instance in *El Ajou*.

10 Brown J. found that the Waltons had proved only $1 million in management fees and construction costs, out of a total $30 million they had claimed.

11 Even with full recovery on the constructive trusts granted in their favour, the DBDC Applicants (and Dr. Bernstein) will have recovered about 28% of their $81.6 million in lost investments ($81.6 million, less $11.8 million recovered prior to the hearing before the Application Judge, less $2.99 million in equity already returned, less $8.1 million in constructive trusts, assuming no overlap).

12 McLachlin C.J. and Rothstein J. concurred with Cromwell J. In separate reasons, Deschamps J. (Moldaver J. concurring) agreed with Cromwell J.'s reasoning on this point. LeBel J. (Abella J. concurring) dissented.

13 This is excluding the DeJong claims accepted against St. Clarens Holdings and Emerson Development.

14 The claim of the Levytams has been resolved.

15 The Application Judge found that, if he had not granted constructive trusts, he would have held that the DeJong advances with respect to those companies were made by way of shareholder loans. That characterization is supported by the record, and I accept it.

16 My colleague suggests that, while the investors in the Schedule C Companies were victims of Ms. Walton's fraudulent scheme, the Schedule C Companies were not victims. I respectfully disagree. The Waltons were in breach of their fiduciary duties to the Schedule B Companies when they diverted funds from these specific-purpose corporations (Brown J., at paras. 261 and 264). To the extent they engaged in the same conduct in relation to the Listed Schedule C Companies, the Waltons were in breach of their fiduciary duties to these parties as well. As such, the investors, and the single-purpose investment companies they were investing in, were all victims of Ms. Walton's fraudulent scheme.

17 Christine DeJong Medicine Professional Corporation invested in United Empire Lands Ltd., Prince Edward Properties Ltd., St. Clarens Holdings Ltd. and Emerson Development Ltd., while the Condos and the Levytams invested in Cecil Lighthouse Ltd. The other investors in the remaining Listed Schedule C Companies did not participate in the proceedings, which is not surprising considering the small amount of net proceeds generated by the sale of these Listed Schedule C Company properties.

18 In fact, according to Dr. DeJong, the fact of the proceedings became known to the DeJongs and various other investors only after some 20 orders had already been made in the proceedings.

19 The investors whose affidavits and statements were filed by the Waltons were not parties to the proceedings in their own right. Only DeJong participated in the proceedings, making submissions at the hearing before Brown J., seeking to uphold a settlement with the Waltons and opposing the relief sought in respect of the Schedule C Properties. See para. 263 of Brown J.'s reasons.

20 See the Order of Newbould J. dated September 23, 2016, paras. 3,4, and 5 and Appendix A. I respectfully disagree with my colleague's summary (at para. 11) of the relief claimed by the DBDC Applicants when they were before Brown J. At para. 241 of his reasons, Brown J. referred to an amended draft judgment the DBDC Applicants put before the court containing several paragraphs of relief in relation to the Schedule C Properties, including the claims referred to by my colleague, which were for joint and several liability of the Walton respondents and the Schedule C Companies/Properties for net proceeds diverted from the Schedule B Companies. However, there is no other reference in Brown J.'s reasons to any claim for any amount of money by the DBDC Applicants against the Schedule C Companies, or to an amendment of the application to permit such a claim to be made.

21 The specific claims are against 1780355 Ontario Inc., 6195 Cedar Street Ltd., Atala Investments Ltd., Bible Hill Holdings Inc., Cecil Lighthouse Ltd., The Old Apothecary Building and United Empire Lands Ltd., in amounts that correspond with the "net transfers" from Rose & Thistle to each company account between October 2010 and October 31, 2013, less any constructive trust amount already awarded.

22 The Listed Schedule C Companies St. Clarens Holdings Ltd. and Emerson Developments Ltd. are not included in the net transfer analysis.

23 Brown J. found that the following amounts of the DBDC Applicants' funds were used to purchase or discharge encumbrances on Schedule C Properties: 14 College St.: $1,314,225; 3270 American Drive: $1.032 million; 2454 Bayview: $1.6 million; 346E [346F] Jarvis St.: $937,000; 44 Park Lane Circle: $2.5 million; 2 Kelvin Street: $221,000; 0 Trent [0 Luttrell]: $152,900; and 26 Gerrard Street: $371,200. He granted constructive trusts in favour of the DBDC Applicants in respect of each of these properties for the proportionate share of the purchase price that these amounts represented at the date of purchase and for any proportionate share of the increase in value to the date of realization (at paras. 264-267).

24 Bannockburn Lands Inc., Cityview Industrial Ltd., Dupont Developments Ltd., Leslie Lands, Liberty Land, Northern Dancer Lands Ltd., Queen's Corner Corp., Tisdale Mews Inc. and Twin Dragons Corporation.

25 Brown J. found that Ms. Walton was in breach of the fiduciary duties she owed as a director of the Schedule B Companies. The problem with asserting a claim through these entities however is that because their losses were caused by the fraudulent actions of

an insider, the claim could be met with a defence of *ex turpi causa*. See, for example, *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11 (Ont. C.A.), appeal allowed in part, 2017 SCC 63 (S.C.C.).

26 My colleague suggests that I have conflated knowing assistance with knowing receipt by requiring a benefit to have been received by a Listed Schedule C Company before knowing assistance is made out. While knowing assistance and knowing receipt are distinct wrongs, in this case the DBDC Applicants themselves rely on the same alleged fact — the diversion of their monies into the Listed Schedule C Properties — to support both claims. No other form of "participation" is alleged.

27 In *Livent*, in any event, the Supreme Court of Canada expressed the view that courts retain the discretion to refrain from applying the corporate identification doctrine where, in the circumstances of the case, it would not be in the public interest to do so (at para. 104). There is no policy reason for the corporate identification theory to apply to impose liability on the Listed Schedule C Companies for Ms. Walton's fraudulent breaches of fiduciary duty to the DBDC Applicants.

28 This is not a question of double recovery, which my colleague seeks to address at para. 130. Rather, the Listed Schedule C Companies could not have been the beneficiaries of amounts already accounted for by their tracing into specific properties in the constructive trust claims, and the inclusion of these amounts in their damages would double count such amounts.

TAB 4

1997 CarswellOnt 1489
Supreme Court of Canada

Soulos v. Korkontzilas

1997 CarswellOnt 1489, 1997 CarswellOnt 1490, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 100 O.A.C. 241, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 212 N.R. 1, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 71 A.C.W.S. (3d) 194, 9 R.P.R. (3d) 1, J.E. 97-1111

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited, Appellants v. Nick Soulos, Respondent

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

Heard: February 8, 1997
Judgment: May 22, 1997
Docket: 24949

Proceedings: affirming (1995), 84 O.A.C 390 (Ont. C.A..); reversing (1991), 4 O.R. (3d) 51 (Ont. Gen. Div.); additional reasons at (1991), 4 O.R. (3d) 51 at 71 (Ont. Gen. Div.)

Counsel: *Thomas G. Heintzman, Q.C.* , and *Darryl A. Cruz* , for the appellants.
David T. Stockwood, Q.C. , and *Susan E. Caskey* , for the respondent.

McLachlin J. **(La Forest, Gonthier, Cory and Major JJ. concurring):**

I

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

II

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

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

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

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

III

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

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

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

IV

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

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

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

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with

a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

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

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

V

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) . Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

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

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which ... the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations ... on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1981), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra* .

19 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.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. 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: *Becker v. Pettkus, supra* .

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Becker v. Pettkus* 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.* 156 at p. 170, describes the ratio of *Becker v. Pettkus* as "a modest enough proposition". He goes on: "It would be wrong ... to read it as one would read the language of a statute and limit further development of the law".

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

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

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

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

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

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

states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B. C.A.) , at p. 90, cited by Litman, *supra* , the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

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

VI

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

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

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

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

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)*, [1968] 2 Ch. 276 (Eng. C.A.) . Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (U.S. 1919), at p. 380:

> A constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee* . [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 112 Sol. Jo. 521 (Eng. C.A.) ; *Binions v. Evans*, [1972] Ch. 359 (Eng. C.A.) ; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (Eng. C.A.) . In *Binions* , referring to the statement by Cardozo J., *supra* , Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In *Hussey* , he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

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

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

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

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" (1995), 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 *Goldcorp Exchange Ltd., Re*, [1994] 2 All E.R. 806 (New Zealand P.C.) , the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 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 (S.C.C.) , at 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 useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

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.

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.

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

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

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

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

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

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

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Becker v. Pettkus, supra* . However, since *Becker v. Pettkus* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

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

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

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) , a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own

policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who 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 *Becker v. Pettkus, 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. 167-70:

> 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 *Becker v. Pettkus, 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 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

46 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.

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

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

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

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms, supra, per* La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpins the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

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

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

***Sopinka J.* (dissenting) (Iacobucci J. concurring):**

53 I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

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

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

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

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

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

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages — his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

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

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

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may *only* be ordered where there has been an unjust enrichment. For example, passages in *LAC*

Minerals, supra , set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 . There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker* , [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker, supra* , set out a two-step approach. *First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment* . In *Hunter Engineering Co. v. Syncrude Canada Ltd.* , a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "*The principle of unjust enrichment lies at the heart of the constructive trust* ": see *Pettkus v. Becker* , at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

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

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

62 Citing only *Pettkus, supra* , specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "The requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a *requirement* for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

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

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *LAC*

Minerals . In *LAC Minerals* , La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

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

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

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) ; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.) . McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

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

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

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

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

In *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.) , at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty *does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract* ; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages

awarded here be viewed as an accounting of profits or, what amounts to the same thing, *as based on unjust enrichment* , I would not interfere with the quantum. [Emphasis added.]

Reading and *Canadian Aero Service Ltd.* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *MacMillan Bloedel Ltd.* involved unjust enrichment, contrary to McLachlin J.'s assertion.

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

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

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

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

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

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

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

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

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

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

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

Was There Unjust Enrichment?

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

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

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

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

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the

purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. H.C.) . In *Lee* , a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

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

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

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

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

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

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

Appeal dismissed.

Pourvoi rejeté.

ASTRAZENECA CANADA INC.
Plaintiff

and

SAMEH SADEK et al
Defendants

Court File No. CV-18-602745-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial Court

Proceeding commenced at Toronto

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