COURT OF APPEAL FOR ONTARIO

CITATION: Sase Aggregate Ltd. v. Langdon, 2023 ONCA 554
DATE: 20230821
DOCKET: COA-22-CV-0100

van Rensburg, Miller and Nordheimer JJ.A.

BETWEEN

Sase Aggregate Ltd.

Applicant (Appellant)

and

Michelle Langdon

Respondent (Respondent)

Christine Carter, for the appellant

John Montgomery, for the respondent

Heard: January 20, 2023

On appeal from the judgment of Justice Andra Pollak of the Superior Court, dated September 6, 2022, with reasons reported at 2022 ONSC 5056.

van Rensburg J.A.:

OVERVIEW

[1] The appellant, Sase Aggregate Ltd. (“Sase”), owns and operates a gravel pit in Uxbridge, Ontario. In 2021, it discovered evidence that its pit manager, Jamie

Showers, had defrauded the company of more than $2.1 million over a period of several years.

[2] Sase brought an application seeking to recover its stolen funds not against Mr. Showers but instead against his wife, the respondent Michelle Langdon. Sase claimed that its stolen funds were used to purchase and renovate a property owned by Ms. Langdon in Uxbridge ("the Wagg Rd. Property"), and sought a constructive trust over the net proceeds from the sale of the property. It alleged that Ms. Langdon was liable based on the doctrines of knowing receipt, knowing assistance and unjust enrichment.

[3] Ms. Langdon denied knowledge of the fraud. Her evidence was that the payments that she had arranged for the purchase and renovation of the property came from legitimate sources. However, she admitted that, in the course of reviewing banking records, she had discovered that her husband had made payments totalling $177,632.38 using Sase's funds.

[4] The application judge concluded that, except for the acknowledged amount, Sase had not made out its claims, essentially because: (1) Ms. Langdon had no actual or constructive knowledge of the fraud; (2) Sase was unable to trace the rest of its funds into the Wagg Rd. Property; and (3) Ms. Langdon used legitimate sources to buy and renovate the property. Thus, the application judge concluded

that the net sale proceeds belonged to Ms. Langdon (minus the $177,632.38 Ms. Langdon admitted belonged to Sase).

[5] Sase appeals. In doing so, it submits that the application judge made a number of errors in not imposing a constructive trust over all the net sale proceeds, including:

- finding that the imposition of a constructive trust depends on the existence of a fiduciary relationship
- finding there was insufficient evidence to establish that Mr. Showers owed Sase a fiduciary duty
- finding that Sase had not properly traced its funds
- finding that Ms. Langdon did not receive Sase property or benefit from the fraud perpetrated by her husband

[6] For the reasons that follow, I would dismiss the appeal. I reach this conclusion despite some concerns. First, on the record in this case there is no question that Sase was defrauded by Mr. Showers, and the movement of money has a number of indicators consistent with money laundering.[1] Second, the application procedure was, in my view, ill-suited to the determination of the issues between the parties because there were disputed facts and questions of credibility. Third, the documentary record provided an incomplete and thus unsatisfactory

[1] At the time the application was heard both Mr. Showers and Ms. Langdon had been charged with fraud and money laundering offences. The charges have since been dropped against Ms. Langdon.

account of what happened to the fraudulently-obtained funds, and so it is impossible to know whether they might indirectly have made their way into the improvements of the Wagg Rd. Property. That said, the result in the court below was driven by the specific remedies sought by Sase, the application process that Sase initiated and pursued, and Sase's willingness to proceed without oral evidence and on a written record that was not fully developed. Against that backdrop, I see no error of law, nor any palpable and overriding error of fact, in the application judge's decision.

FACTS

[7] Sase purchased its gravel pit business from Mr. Showers and his business partners in 2012. After the sale, Mr. Showers continued to work as the pit's general manager with primary responsibility for management and operation of the pit.

[8] In December 2020, Sase discovered Mr. Showers' fraud and terminated his employment.

[9] Sase's investigation disclosed that, between May 2016 and November 2020, Mr. Showers had issued false Sase invoices to two customers, Central Gravel and Sand ("CG&S") and Jones Pools, and had deposited the payments totaling $2,115,069.55, into two bank accounts at the Bank of Nova Scotia ("BNS"). The bank accounts were in the names of two companies incorporated by Mr. Showers: Account 61002 0019615 ("Account 615") in the name of Complete Property

Maintenance Ltd. (“Complete”), and Account 61002 0043613 (“Account 613”) in the name of 2117039 Ontario Ltd. (“039 Ontario”).

[10] Sase also uncovered several other payments that were improperly diverted into the two corporate accounts.

[11] Sase alleged that, in total, Mr. Showers stole $2,134,513.82, and that the proceeds of the fraud were used by Ms. Langdon and Mr. Showers to acquire and renovate the Wagg Rd. Property. That property was purchased in Ms. Langdon’s name in March 2019 for $800,000 and was sold in September 2021 for net proceeds of $2,318,424.19.

[12] Ms. Langdon’s evidence was that the acquisition and improvement of the Wagg Rd. Property were in part funded by the proceeds of sale of an investment property she owned in Oshawa, Ontario (the “Simcoe St. N. Property”). She purchased that property in June 2017 for $575,000 and sold it in May 2020 for a net profit of $350,550.37.

[13] In March 2021, Sase obtained a Norwich order under which BNS both froze and produced statements for Accounts 613 and 615, as well as two joint accounts held by Mr. Showers and Ms. Langdon, Account No. 95182 00223 81 (“Joint Account 81”) and 95612 00214 82 (“Joint Account 82”). The bank statements show that Sase funds were funneled into a corporate account, Account 613, and from there into the joint accounts, usually Joint Account 82, and then out again, often

on the same day, to an unidentified account (MB-CREDIT CARD/LOC PAY). Notably, there was no evidence about the transfer to the unidentified account.

[14] In June 2021, after learning that the Wagg Rd. Property had been sold, Sase registered a caution on title claiming a constructive trust over the property. With Sase's agreement the sale closed in September 2021. By court order the net proceeds were placed in a lawyer's trust account pending further court order and a timetable was set for Sase's application seeking an interest in the property.

THE APPLICATION PROCEEDINGS

(1) Sase's application

[15] Sase commenced an application in October 2021, seeking various declarations, including that it had an interest in the Wagg Rd. Property because its funds, in excess of $2.1 million, could be directly traced to the purchase and improvement of the property. It claimed that Ms. Langdon (1) knowingly received funds belonging to Sase to purchase and improve the property, (2) knowingly assisted her husband in perpetrating the fraud by allowing cheques payable to Sase to be deposited into accounts under her control, and (3) was unjustly enriched by her husband's fraud. Sase sought a constructive trust over the net proceeds of the sale of the Wagg Rd. Property on the basis that its funds could be traced to the purchase and improvement the property. In other words, it sought a proprietary remedy.

[16] Before discussing what the application judge decided, I turn next to the evidence that was before her, since it is key to understanding her decision, and ultimately the disposition of this appeal.

(2) Evidence on the application

[17] The parties' evidence was provided by way of affidavit. Sase's application was supported by the evidence of Mario D'Orazio, an owner of Sase, who swore an initial affidavit and then a second affidavit in response to Ms. Langdon's affidavit.

Mr. D'Orazio's first affidavit

[18] In his first affidavit, Mr. D'Orazio provided the background facts concerning Mr. Showers' fraud and the investigation leading to its discovery. He provided the bank records obtained under the Norwich order, and corporation profile reports showing that Mr. Showers was a director and officer of Complete and 039 Ontario, and that Ms. Langdon was also an officer of 039 Ontario.

[19] Mr. D'Orazio asserted that, based on a review of the bank records, Sase was able to prove that Mr. Showers and Ms. Langdon used the Sase funds that were deposited into the BNS accounts to purchase and improve the Wagg Rd. Property. Mr. D'Orazio relied on the coincidence in timing between the payments for the purchase and renovation of the Wagg Rd. Property and the deposits of Sase funds into the subject bank accounts. He also pointed to the disparity

between Mr. Showers' income and the large sums spent on the Wagg Rd. Property. He attached a chart setting out the amounts paid to contractors and others in connection with the purchase, and improvement, and the servicing of the mortgage on the Wagg Rd. Property for a total of $1,993,928.24 (Exhibit "R" to his first affidavit).

Ms. Langdon's responding affidavit

[20] In her responding affidavit, Ms. Langdon deposed that she had no knowledge of her husband's fraud. She stated that she rarely used or accessed Joint Account 82 (into which most of the proceeds of the fraud were transferred), and that she used Joint Account 81 (which showed few transfers from the corporate accounts) for day-to-day banking. She stated that she did not know that she was an officer of 039 Ontario until she saw the D'Orazio affidavit, that she had never seen any bank statements or other banking records for that corporation and had nothing to do with the operation of the corporation's account, Account 613, and that she had ceased her involvement with Complete, which was her husband's landscaping and snowplowing business, by 2008.

[21] Ms. Langdon provided statements for all bank accounts in which she had an interest, including the two joint accounts and a personal savings account, and "Momentum Plus" accounts and a TFSA she had opened on BNS's advice to receive an inheritance after her father's death in 2017. She stated that she had

arranged for the majority of the payments for the purchase and improvement of the Wagg Rd. Property, and that most of the payments listed in Exhibit “R” to the D’Orazio affidavit were made with funds coming from legitimate and known sources that had nothing to do with the alleged theft of money. She provided details and documents tracing $1,637,232 to such sources. As noted, she acknowledged that Sase was entitled to $177,632.38 for payments made by her husband that she had not been able to trace to legitimate sources.

Mr. D’Orazio’s reply affidavit

[22] In his reply affidavit, Mr. D’Orazio noted that Ms. Langdon had not worked outside the home since 1999 and challenged some of the non-Sase sources of funds for the Wagg Rd. Property acquisition and improvement. For example, he asserted his belief that Sase funds had been used to acquire and renovate the Simcoe St. N. Property. He also pointed to other funds Ms. Langdon said she used ─ such as the repayment of a debt from Mr. Showers’ business partner ─ asserting that they were not Ms. Langdon’s personal funds, but rather her husband’s.

Tracing charts

[23] Both parties prepared “tracing charts” to assist the application judge.

[24] Sase’s chart purported to trace the cheques from CS&G and Jones Pools to the two properties purchased by Ms. Langdon. There are two parts to the chart. The first part, in relation to the Wagg Rd. Property, lists cheques dated between

January 2019 and January 2021 in the total amount of $1,039,967.85. The chart traces each cheque during that period from its deposit into Account 613, and, in most cases, transfers of the funds into Joint Account 82. Notably, the tracing ends there. The second part of the chart, in relation to the Simcoe St. N. Property, lists cheques issued from October 2016 to November 2018 that were deposited into Account 613, but provides no details of where the money went from there.

[25] Ms. Langdon, in response, prepared several charts that summarized her evidence: (1) a tracing chart in response to Sase's tracing chart, (2) a chart showing the sources of funds for the payments she made towards the Wagg Rd. Property, and (3) a chart showing the sources of deposits into her Momentum Plus accounts.

Cross-examinations

[26] The affiants were cross-examined out of court on their affidavits, however no transcripts were filed on appeal, except for a few brief excerpts from Ms. Langdon's cross-examination.

(3) The application judge's decision

[27] The application judge reviewed the evidence and the parties' positions, before setting out her conclusion at para. 22:

> I accept the evidence of Ms. Langdon that she obtained funds from entirely legitimate sources to buy and renovate the [Wagg Rd. Property]. Sase has not traced

> the allegedly stolen funds into the purchase or improvement of the Property. Further, I find that the evidence does not support the claims for knowing assistance or knowing receipt, or enrichment at Sase's expense. There is no evidence that Ms. Langdon knew of Mr. Showers' alleged theft, or that she received any property in breach of trust.

[28] The application judge went on to explain her findings.

No involvement in 039 Ontario's business

[29] The application judge rejected Sase's submission that Ms. Langdon had been involved in or had control over Account 613 (039 Ontario's account, into which most of the cheques were deposited). She noted that Sase's only evidence was a corporation profile report showing that Ms. Langdon was an officer when 039 Ontario was incorporated. The application judge accepted Ms. Langdon's evidence that she had no involvement in 039 Ontario's business and no knowledge she was an officer, evidence that had not been challenged on cross-examination or contradicted.

Explanation of source of payments relating to the Wagg Rd. Property

[30] The application judge noted that Ms. Langdon had detailed in her affidavit the sources of all payments made in relation to the Wagg Rd. Property that she could trace. In particular, Ms. Langdon had described how she arranged for each payment, specifying the original source of the funds, and how the funds went from

where they were originally deposited into Joint Account 82 (the account from which she made the payments for the Wagg Rd. Property).

[31] The application judge accepted Ms. Langdon's uncontradicted documentary evidence that, during the relevant time, she received and had access to more than $3 million in "legitimate, independent funds", including an inheritance, the repayment of a mortgage debt by Mr. Showers' former business partner, the net proceeds of sale of both the Simcoe St. N. Property and the house where she and Mr. Showers had lived for many years before moving into the Wagg Rd. Property, and the proceeds of various mortgages.

[32] Based on this evidence, the application judge found that payments totaling $1,642,725 "were funded from independent sources that she arranged, and are not connected to the funds allegedly stolen by Mr. Showers".

No fiduciary relationship

[33] The application judge noted that Sase relied on the doctrines of knowing receipt and knowing assistance, and sought a tracing remedy, and that the causes of action claimed required a finding that Mr. Showers obtained property in breach of trust or in breach of a fiduciary duty. She found there was an insufficient evidentiary foundation to support a finding that Mr. Showers was a fiduciary of Sase.

No knowing assistance

[34] The application judge rejected Sase's assertion that Ms. Langdon had used her Momentum Plus bank accounts to knowingly assist Mr. Showers in layering the transactions. The application judge found that every credit entry in the Momentum Plus accounts had been accounted for with specific documentary evidence proving the legitimate source of the funds. She concluded there was no evidence to show that Ms. Langdon knew anything about Mr. Showers' alleged improper actions and so there could be no basis to find knowing assistance.

No knowing receipt

[35] The application judge concluded that the elements of knowing receipt had not been established. She found that Ms. Langdon had no knowledge of the deposits into Account 613 or transfers from that account into Joint Account 82, or for that matter, the transfers from that account out to an unknown destination, often on the same day. The application judge further observed that, although there had been a few transfers between Joint Account 82 and Ms. Langdon's Momentum Plus account, Ms. Langdon had provided transparent particulars of every transfer of funds into that account, including from Joint Account 82, all of which came from legitimate sources. Moreover, there was "no evidence … the allegedly stolen funds were received or applied by Ms. Langdon for her own use and benefit" (other than the $177,632.38).

No unjust enrichment except as admitted

[36] The application judge concluded that there was no evidence that Ms. Langdon received any of the allegedly stolen funds, except for the $177,632.38 she could not account for. Thus, unjust enrichment was limited to that amount.

Sase had failed to properly trace

[37] The application judge found that while Sase claimed that its funds "found their way into" the payments made for the purchase and improvement of the Wagg Rd. Property, it had not provided a proper tracing analysis to support the claim. More specifically, it had not traced the funds from Joint Account 82 directly into the drafts and cheques that were used to pay for the purchase and improvement of the Wagg Rd. Property. She noted that "a tracing analysis must follow the funds through as many steps or transfers as necessary to arrive at the conclusion that they are the same funds, and were used in the way that the plaintiff claims." The application judge noted that did not happen here: the evidence produced by Sase followed the funds from the CS&G and Jones Pools cheques into Account 613, and in most instances from that account to Joint Account 82, but its tracing analysis stopped there, and there was no evidence to show that those funds were then used to fund the payments for the Wagg Rd. Property.

Conclusion

[38] The application judge concluded that the evidentiary record did not show that Ms. Langdon received funds in excess of $2.1 million that were obtained in breach of trust, as Sase claimed. Rather, the evidence showed, at most, that she had unknowingly received $177,632.38. Based on the evidentiary record, Ms. Langdon had no actual knowledge of Mr. Showers' alleged activities and no knowledge of any facts sufficient that would ground a finding of constructive knowledge.

DISCUSSION

[39] I now turn to the issues as framed by Sase.

(1) Did the application judge err in finding that the imposition of a constructive trust depends on a finding of a fiduciary relationship and in failing to impose a constructive trust?

[40] Sase's first submission is that the application judge made an error of law when she said that "the causes of action claimed require a finding that Mr. Showers obtained property in breach of trust or in breach of a fiduciary duty". Sase asserts, and I agree, that, while a breach of trust or breach of fiduciary duty is required for knowing receipt and knowing assistance, it is not an essential element for unjust enrichment.

[41] That said, I am not persuaded that the application judge misstated the law, as submitted by Sase. Her reference to “the causes of action claimed” followed a paragraph identifying Sase’s reliance on the doctrines of knowing receipt and knowing assistance. I do not, in any event, read the application judge as having required a finding of a fiduciary or trust relationship before she could impose a constructive trust. Indeed, later in her reasons the application judge accurately identified the requirements for a finding of unjust enrichment as: (1) a benefit to the defendant; (2) a corresponding detriment to the plaintiff; and (3) the absence of any juridical reason for the defendant’s retention of that benefit. The balance of her reasons demonstrate that she understood and applied the test for unjust enrichment, including finding that Ms. Langdon was unknowingly unjustly enriched by payments totaling $177,632.38 made by her husband toward the Wagg Rd. Property using Sase funds. The application judge refused to grant a constructive trust with respect to the balance because Sase had not met its burden to show that its money was used in the acquisition and improvement of the Wagg Rd. Property.

[42] Sase makes two further submissions on this ground of appeal to argue that the application judge ought to have imposed a constructive trust. Both proceed on a faulty interpretation of the applicable law.

[43] First, Sase submits that the application judge ought to have imposed a constructive trust once it proved that Mr. Showers had deposited cheques payable to Sase exceeding $2.1 into the corporate bank accounts and then transferred the

funds into a joint account, and that it would "offend the principle of good conscience" if the funds were not returned to Sase. In other words, Sase says it was enough to show that Sase funds went into an account jointly owned by Ms. Langdon and Mr. Showers. In this regard, Sase relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, where McLachlin J. (as she then was) stated, at para. 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.

[44] Sase argues that a constructive trust ought to have been imposed because this case involved "a wrongful act like fraud" and not requiring Ms. Langdon to return Sase funds would offend the principles of good conscience.

[45] There is no question that a fraud occurred. However, Sase chose not to bring legal action against the fraudster, Mr. Showers. Instead, it sued Ms. Langdon. On the evidence in this proceeding, Ms. Langdon is a stranger to the fraud. Sase seeks a return of its money by way of a proprietary remedy (a constructive trust over the Wagg Rd. Property proceeds) but it has failed to show that its money was used to buy and improve the property (except for the admitted amount). While Sase submits that it is enough to show that Sase funds went into Joint Account 82,

Sase did not seek a constructive trust over the account for good reason: no money remained in the account. In these circumstances, the application judge made no error in failing to impose a constructive trust over the Wagg Rd. Property proceeds to avoid offending the principle of good conscience.

[46] Second, Sase contends that there is no law to support the proposition that all Ms. Langdon had to do was prove that she had legitimate, independent sources of funds that she used to purchase and renovate the Wagg Rd. Property. Sase says that instead Ms. Langdon was required to prove that she provided "valuable consideration", in the sense of her own funds, and not those belonging to her husband. Sase says that the application judge erred in law in failing to consider this requirement.

[47] In support of this submission, Sase points to a passage from *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2007 BCCA 52, 278 D.L.R. (4th) 501, rev'd on other grounds 2009 SCC 15, [2009] 1 S.C.R. 504, where the British Columbia Court of Appeal, at para. 43, referred to the broad principle that "a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration".

[48] This statement, taken out of context, does not establish any general rule that would be applicable to the issues in this case.

[49] In *B.M.P*. the issue was whether a bank customer could retain a windfall credited to its bank account – a windfall that was created by the fraud of a third party. B.M.P. received a cheque, and the bank cashed it and paid the proceeds to B.M.P.'s account before discovering that the cheque was a counterfeit. It was accepted that B.M.P. was an innocent recipient of fraudulent funds and was seeking to "avail itself" of "what had been obtained by the fraud of another": paras. 2-3. However, it had no right to retain the funds unless it had given valuable consideration.

[50] In this case, to use the terminology from *B.M.P*., whether Ms. Langdon was "availing herself" of "what had been obtained by the fraud of another" was the very issue in dispute. If, like B.M.P., she was trying to retain the acknowledged proceeds of a fraud, she would have had to show that she had given valuable consideration. In this case, however, Sase had the burden of proving that Ms. Langdon had received the proceeds of the fraud – that the funds used to purchase and renovate the Wagg Rd. Property were its funds – and Ms. Langdon only needed to show that the funds were not Sase's funds to meet the evidentiary burden placed on her.

[51] Accordingly, I see no merit to Sase's arguments on this ground of appeal.

(2) Did the application judge err in law in finding that the appellant failed to provide sufficient evidence to establish that Mr. Showers owed his employer a fiduciary duty?

[52] Sase asserts that the application judge erred in concluding that it had not provided sufficient evidence that Mr. Showers owed a fiduciary duty not to produce false invoices and deposit cheques made payable to Sase into his own bank accounts. This argument, which is not material to the outcome of the appeal, can be addressed briefly.

[53] I agree with Sase that the evidence did support the conclusion that Mr. Showers' fraudulent actions were in breach of a fiduciary duty he owed to Sase. Mr. Showers was a former owner of the gravel pit, and as general manager, was responsible for its day-to-day operation. Mr. D'Orazio deposed that Mr. Showers managed all of the on-site employees and had access to client lists and contact information. In obtaining payment from customers after he had issued false invoices (cheques that were made out to Sase, and intended for its benefit), Mr. Showers not only breached his fiduciary duty, but his actions were in breach of trust. I would have no hesitation in finding that this element of the knowing receipt and knowing assistance claims were made out on the evidence.

[54] However, the application judge's finding that the appellant had not tendered sufficient evidence to establish that Mr. Showers owed his employer a fiduciary

duty is immaterial to the outcome of the appeal. The application judge rejected Sase's claims for knowing receipt and knowing assistance because the other elements of these claims ─ knowledge of the duty and the breach, receipt of its proceeds and assistance in the breach ─ had not been made out. She accepted Ms. Langdon's evidence that she was unaware of her husband's fraud and found a lack of evidence supporting constructive knowledge (findings which, while not necessarily accepted by Sase, are not challenged on appeal as palpable and overriding errors). She also accepted, on the evidence before her, that Ms. Langdon had not used or received any of the Sase funds for her own benefit (other than the innocently received $177,632.38). As detailed below, I am not persuaded that the application judge committed a palpable and overriding error in making such findings. Accordingly, I would dismiss this ground of appeal.

(3) Did the application judge err in law in finding that Sase had not properly traced the funds in and out of the joint accounts because "a tracing analysis must follow the funds through as many steps or transfers as necessary to arrive at the conclusion that they are the same funds"?

[55] Sase asserts that the application judge erred in law by finding that it had not properly traced the funds in and out of the joint accounts because "[a] tracing analysis must follow the funds through as many steps or transfers as necessary to arrive at the conclusion that they are the same funds". Sase contends that in this

case, where fraudulently-obtained proceeds were deposited into a bank account, and then mixed with the perpetrator's funds, liability in tracing is strict and there is no need to show that they are the same funds.

[56] As the point of departure, I note that the application judge's statement about the nature of tracing is correct. In the Supreme Court's decision in *B.M.P.*, the court describes tracing as follows, at para. 75:

> Tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them.

[57] Sase submitted at first instance, and continues to argue on appeal, that it met its burden by showing that the Sase funds were deposited into the corporate bank accounts and then transferred into one or more of the joint bank accounts belonging to Mr. Showers and Ms. Langdon. In this court, Sase relies on *B.M.P.* as authority that the proceeds of a fraud can be traced into mixed funds in a bank account. Sase also relies on *Re Oatway*, [1903] 2 Ch. 356. Both cases recognize that intermingling funds in a bank account is not a bar to recovery, although there is still a need to identify the subject funds. As explained in *B.M.P.*, "[a]s an evidentiary process, tracing is possible if identification is possible": at para. 79. And, as explained in *Oatway*, if money obtained in breach of trust is deposited into a bank account, "it may be followed by the equitable owner, who, as against the

trustee, will have a charge for what belongs to him upon the balance to the credit of the account": at p. 359.

[58] The problem for Sase, however, is that it is not seeking a constructive trust over the bank accounts but rather over the sale proceeds of the Wagg Rd. Property. While it could have tried to trace its funds into the joint accounts and then out again, its tracing stopped at the accounts, which were emptied by the time Sase obtained the Norwich order. The bank statements showed that, in almost every case, the Sase monies were deposited into Account 613, transferred to Joint Account 82, which at the time had a small balance of two to three thousand dollars, and then an equivalent amount was transferred out, often on the same day, to a destination account identified on the bank statement only as MB-CREDIT CARD/LOC PAY as a single transfer or occasionally in a number of transfers over several days, leaving the same small balance in the joint account. As I have already mentioned, there is no evidence about where the funds went after this.

[59] Sase's tracing was incomplete. While Sase provided a chart (Exhibit "R" to Mr. D'Orazio's first affidavit) setting out the cheques and drafts used to pay for the purchase and renovation of the Wagg Rd. Property, Sase did not trace its own funds into those payments. Rather, its tracing only showed its money being deposited into Account 613 and then in some cases transferred into Joint Account 82. As well, Ms. Langdon's evidence was that she rarely used Joint Account 82,

and Sase did not pursue the ultimate destination of the funds on cross-examination.

[60] The application judge concluded that, on this evidence, Sase's evidence was inadequate to prove its assertion that its money was used to purchase and improve the Wagg Rd. Property. In particular, she found:

> Sase has not traced the funds from [Account 82] directly into those drafts and cheques that were issued to pay for [the Wagg Rd. Property.

She also found:

> The evidence produced by Sase follows the funds from the [CS&G] cheques and the Jones Pools cheques into the 613 Account, and in most instances from that account to [Joint Account 82]. Its tracing analysis stops there. There is no evidence to show that those funds were then used to fund the payments for the Property.

[61] By contrast, in explaining the source of funds used for the purchase and renovation of the Wagg Rd. Property, Ms. Langdon provided detailed evidence, showing the original source of payments she had arranged and step-by-step how the transfer of funds occurred. In doing so, she identified non-Sase sources, described by the application judge as payments that were funded from independent sources that she arranged, and which were not connected with the funds allegedly stolen by Mr. Showers. She disclosed the involvement of her Momentum Plus accounts, explained why they were used, and although there were often multiple steps before a payment was made, she offered an explanation.

[62] I see no error in the application judge's articulation of the test for tracing funds, and in her application of the test to the evidence in this case.

(4) Did the application judge commit a palpable and overriding error in finding that Ms. Langdon did not receive Sase property or benefit from the fraud perpetrated by her husband?

[63] Sase makes two submissions in support of its assertion that the application judge erred in concluding that Ms. Langdon did not receive Sase property or benefit from her husband's fraud.

[64] First, Sase contends that Ms. Langdon received the money as soon as it was deposited into Account 613 and transferred into Joint Account 82. When the money was deposited into her accounts, Sase contends she "received the funds in her personal capacity".

[65] Second, Sase contends that Ms. Langdon benefited from the fraud. It says that, when one compares her net value before the fraud (when she owned a half interest in a matrimonial home) with what she had at the end of the fraud, the benefit to her is significant and obvious.

[66] These submissions can also be addressed briefly.

[67] With respect to the allegation that Ms. Langdon benefited when the funds were deposited into Account 613 and then transferred into Joint Account 82, the evidence was that Ms. Langdon had nothing to do with Account 613, and rarely

used Joint Account 82. Even if she could, in theory, have benefited from the deposit of monies into Joint Account 82, the evidence was that the monies were transferred from that account to an unknown destination. Notably, there was no evidence linking her to such transfers. Further, in view of the claims Sase was making and the remedy it was seeking – a constructive trust over the proceeds of sale of the Wagg Rd. Property – the benefit had to relate to the property itself. That is, Sase was required to show that its money had ended up in the property. And any benefit or enrichment was required to be a tangible benefit: "without a benefit which has 'enriched' the defendant and which can be restored to the donor in specie or by money, no recovery lies for unjust enrichment": *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality v. Ontario*, [1992] 3 S.C.R. 762, at p. 789.

[68] This is also an answer to Sase's second submission. While no doubt it is concerning to Sase that Ms. Langdon's financial circumstances seem to have greatly improved after the fraud commenced, she provided evidence that was accepted by the application judge that there were legitimate sources of money available to her and that she used those other sources to acquire and renovate the Wagg Rd. Property. Whether Ms. Langdon benefited from her husband's fraud was an issue to be determined in the context of Sase's claims and the remedy it was seeking. Specifically, the question before the application judge was not whether Ms. Langdon benefited in some way from the fraud but whether Sase had demonstrated that she had benefited in that Sase funds were used to buy and

renovate the Wagg Rd. Property. Given gaps in the evidence, it is still an open question where the stolen funds went.

[69] The evidence, such as it is, and the application judge's findings preclude the conclusion that Ms. Langdon received a benefit from the Sase funds, except for the $177, 632.38.

[70] I would accordingly not give effect to this ground of appeal.

DISPOSITION

[71] For these reasons, I would dismiss the appeal. I would award costs to Ms. Langdon. If the parties are unable to agree on costs, they may provide written submissions of no more than three pages each, exclusive of any costs outline, within 30 days.

Released: August 21, 2023 "KMvR"

"K. van Rensburg J.A."
"I agree. B. W. Miller J.A"
"I agree. I.V.B. Nordheimer J.A."