COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *England Securities Ltd. v. Ulmer,*
2023 BCCA 241

Date: 20230612
Docket: CA48432

Between:

England Securities Ltd., doing business as
The England Group

Appellant
(Plaintiff)

And

Darcy Ulmer and
Churchill International Property Corporation

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2022 (*England Securities Ltd. v. Ulmer*, 2022 BCSC 1102, Vancouver Docket S194049).

Counsel for the Appellant:	I.G. Nathanson, K.C. K.K. Strong
Counsel for the Respondents:	D.P. Church, K.C. I. Schildt E. Dolinsky
Place and Date of Hearing:	Vancouver, British Columbia April 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 12, 2023

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals the dismissal of its action against the respondents, its former employee and his new employer, for breach of fiduciary duty. The appellant also appeals an award of double costs to the respondents flowing from an unaccepted offer to settle. Held: Appeal dismissed. The trial judge did not misapprehend any evidence or fail to consider relevant evidence in determining that the former employee did not have sufficient authority and discretionary power to owe the appellant a fiduciary duty. The absence of such discretion or power negates the existence of a fiduciary duty, regardless of whether the appellant was financially vulnerable or had legal or practical interests to protect. The judge made no error in principle in awarding double costs against the appellant, given that the respondents' second settlement offer ought reasonably to have been accepted, it substantially exceeded the appellant's recovery at trial, and there was no financial disparity between the parties.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Introduction

[1] The appellant, England Securities Ltd. doing business as The England Group ("TEG"), appeals the dismissal of its action against the respondents for breach of fiduciary duty. TEG also appeals an award of double costs to the respondents flowing from an unaccepted offer to settle.

[2] The respondent, Darcy Ulmer, is a former employee of TEG. TEG was engaged in the business of purchasing revenue-producing properties and the syndication of those properties to investors. TEG ceased active operations by the end of 2015. In January 2016, Mr. Ulmer accepted employment with the respondent Churchill International Property Corporation ("Churchill"), a company that was engaged in a similar business. For a period of time in 2016 and 2017, Mr. Ulmer was employed by both TEG and Churchill.

[3] TEG's action against the respondents centred on the allegation that Mr. Ulmer, while still employed by TEG, used confidential information about TEG's financial advisors and investors to market Churchill investments. TEG alleged that Mr. Ulmer owed a fiduciary duty to TEG, and that his conduct in using the

confidential information to secure economic advantage for himself and Churchill was dishonest and a breach of his fiduciary duty.

[4] The trial judge found that the nature of Mr. Ulmer's employment with TEG did not create a fiduciary relationship, and he dismissed the action.

[5] On appeal, TEG alleges that the trial judge misapprehended the evidence and failed to consider relevant evidence in finding that Mr. Ulmer did not owe a fiduciary duty to TEG. TEG also alleges that the trial judge erred in principle in awarding double costs by (1) misconceiving TEG's theory of damages in assessing the reasonableness of its decision to refuse the offer, and (2) concluding without evidentiary support that TEG had engaged in high-handed conduct.

[6] The respondents emphasize the high level of deference to be accorded to the impugned findings of the trial judge. They say that TEG has not identified any error of law or principle, or any palpable and overriding error of fact, by the trial judge. The respondents argue that instead, TEG is attempting to retry its case on appeal.

Factual background

Mr. Ulmer's employment with TEG

[7] TEG was established by Kevin England in 1986. Mr. England was the sole shareholder, director and officer of TEG. Between 1986 and 2005, TEG invested in, and syndicated, a number of properties. After 2005, TEG did not acquire any further properties but rather maintained its existing portfolio. TEG's business model involved marketing its investment products through investment advisors. Advisors were promised "trailer fees" comprised of a portion of the profit that TEG would otherwise receive on the sale of a property if certain financial targets were met.

[8] In 2011, Mr. Ulmer began working for TEG. Mr. Ulmer and Mr. England had become acquainted as a result of their individual struggles with addiction. Mr. Ulmer held Mr. England in high regard and credited him for assisting Mr. Ulmer in his recovery. Both were actively involved in the governance of a society that operates

an addiction recovery community, Baldy Hughes Therapeutic Community and Farm in Prince George (“Baldy Hughes”).

[9] When Mr. Ulmer first started at TEG, his job was categorized as “Special Projects”, and his employment duties focused on work that benefitted the society that operated Baldy Hughes. After a short time, Mr. Ulmer transitioned to the position of “Investor Relations Manager”, which he held until the end of his employment with TEG. Mr. Ulmer’s job duties did not involve marketing or client recruitment. Instead, his role was to communicate with the existing investors and their advisors regarding the status of their investments.

[10] In or about 2014, Mr. England decided to wind down the active operations of TEG in anticipation of his own retirement. Between 2014 and mid-2015, TEG sold the real estate that constituted its investment portfolio, and the sale proceeds were paid out to TEG’s investors in accordance with the syndication contracts. After the sale of TEG’s properties, Mr. Ulmer’s employment duties were directed towards the distribution of funds and explaining the tax implications of the distributions. He also communicated with investment advisors regarding these issues and the issuance of trailer fees.

Mr. Ulmer’s move to Churchill

[11] In early 2015, Mr. Ulmer, aware that Mr. England intended to wind down TEG, began discussions with Philip Langridge, the owner of Churchill, about employment opportunities with Churchill. Churchill’s business was similar to TEG’s, but Churchill focused its marketing efforts on high-net-worth individuals, as opposed to investment advisors. Mr. England was aware of, and encouraged, Mr. Ulmer’s discussions with Churchill.

[12] TEG’s theory at trial was that Mr. Ulmer’s discussions with Churchill exposed that he was a key employee at TEG, and that he used his relationship with TEG investors to market himself to Churchill. In notes that Mr. Ulmer prepared for a meeting with Churchill, Mr. Ulmer described himself as part of TEG’s “inner circle”. The notes reflected Mr. Ulmer’s plan to market his “relationship with [the] TEG

investor list" to Churchill. At Churchill's request, Mr. Ulmer prepared a job description of his anticipated role at Churchill. The job description referred to "investor relations", "business development", and "old and new investors and the financial service community". The document was later appended to Mr. Ulmer's employment agreement with Churchill.

[13] The Churchill website described Mr. Ulmer as "part of the Executive Team" at TEG. In describing his role at TEG on his LinkedIn profile, Mr. Ulmer stated that he "manages all Investor Relations processes and procedures" and "acts as primary contact for all Investor and Financial Advisor correspondence and communications".

[14] Mr. Ulmer started working for Churchill in 2016 in the position of "Vice President". His duties included business development. As of January 2016, TEG was still in the process of winding down operations. Mr. Ulmer continued as a part-time employee of TEG throughout 2016 and part of 2017 to assist in the winding down process. TEG did not require Mr. Ulmer to sign a confidentiality or non-competition agreement.

Discussions between TEG and Churchill in 2015 and 2016

[15] At some point in 2015, Mr. England and Mr. Langridge started discussions about Churchill's potential acquisition of TEG's investor-contact list. As part of the agreement, Churchill also sought Mr. England's endorsement of Churchill investment products to TEG investors. The discussions continued throughout 2016.

[16] On December 7, 2016, Mr. Langridge sent an email to Mr. England, copied to Mr. Ulmer, attaching a draft agreement. The draft agreement provided that Churchill would pay Mr. England a contingency-based fee equal to 49% of the carried interest earned by Churchill on real estate syndications with TEG-sourced clients. It also provided that Mr. England would endorse and promote Churchill as an honest, professional, and capable real estate operator. In his reply email of December 9, 2016, also copied to Mr. Ulmer, Mr. England simply stated "Thanks Philip".

[17] In his evidence at trial, Mr. England testified that he was deliberately vague in his response to Mr. Langridge as he had not yet made up his mind whether to sign the agreement. Mr. England said he later telephoned Mr. Ulmer to convey the news that he would not be entering an agreement with Churchill. Mr. Ulmer denied that he received such a call from Mr. England. Mr. Ulmer said he interpreted Mr. England's December 9, 2016 email to indicate that an agreement had been reached.

Mr. Ulmer's communications with TEG investors and advisors

[18] The focus of TEG's breach of fiduciary duty allegations at trial was on communications between Mr. Ulmer and TEG investors and advisors in the years 2015 to 2017 in which Mr. Ulmer promoted Churchill products.

[19] On two occasions in 2015, Mr. Ulmer was contacted by potential investors in his capacity as Investor Relations Manager with TEG. On both occasions, Mr. Ulmer advised the investors that TEG had no new products to offer, and he recommended that they contact Churchill. On a third occasion, in December 2015, one of TEG's investment advisors arranged a lunch meeting with Mr. Ulmer and Churchill's Chief Financial Officer.

[20] In 2016, Mr. Ulmer promoted Churchill investments with TEG advisors on four occasions in the course of discussions about trailer fees. Starting in January 2016, Mr. Ulmer discussed Churchill investments with another TEG advisor, Tom McLean. Mr. McLean indicated that he wished to speak to Mr. England as part of his due diligence on Churchill. On December 7, 2016, Mr. England emailed Mr. McLean, copying Mr. Ulmer, to provide his "full endorsement" of Churchill products.

[21] On January 4, 2017, Mr. Ulmer sent an email from his TEG email account to his Churchill email account that attached three lists of TEG investor-contact information. Mr. Ulmer subsequently emailed approximately 140 of TEG's former investors to promote Churchill products. Mr. Ulmer testified that he believed he was authorized to use the TEG investor-contact list in this manner because an agreement had been reached between Mr. England and Churchill.

The notice of civil claim

[22] In late 2018, Mr. Ulmer and Mr. England had a falling out over governance issues at Baldy Hughes. The falling out was relevant to the respondents' defence at trial that the action was brought for improper purposes, and also, to a limited extent, to the issue of costs. For the purposes of determining the issues that are raised on appeal, it is unnecessary to review the circumstances of the falling out in any detail.

[23] TEG filed its notice of civil claim in April 2019. The sole cause of action pleaded was breach of fiduciary duty. The facts pleaded in support of the alleged breach of fiduciary duty concerned Mr. Ulmer's conduct in delivering the investor-contact list to his personal email. Mr. Ulmer was alleged to have taken this confidential information "furtively and dishonestly". The notice of civil claim further alleged that Churchill participated in and knowingly assisted Mr. Ulmer's breach of fiduciary duty.

The trial judgment on liability: 2022 BCSC 1102 ("Liability Judgment")

[24] The trial judge separately addressed TEG's allegations of breach of fiduciary in the years 2015 and 2016, which focused on Mr. Ulmer's periodic communication with individual TEG investors and advisors, and in the year 2017, which focused on Mr. Ulmer's use of TEG's investor-contact list to market Churchill products.

[25] In relation to the respondents' alleged breaches of fiduciary duty in 2015 and 2016, the trial judge noted that the allegations were not included in the notice of civil claim "and do not form part of the claim": at para. 66. He concluded, in any event, that Mr. Ulmer's communication with advisors and potential investors in these years did not constitute a breach of fiduciary duty.

[26] The trial judge characterized Mr. Ulmer's discussions with the investors who contacted him in 2015 as Mr. Ulmer providing truthful information to a person seeking to invest in products that TEG was not offering. This did not, in the view of the trial judge, constitute a breach of any duty. Similarly, the trial judge held that Mr. Ulmer's conduct in attending the lunch with the TEG investment advisor in December 2015 was not a breach of fiduciary duty. The advisor had a long-standing

relationship with Churchill, and there was no evidence that Mr. Ulmer breached any confidence in attending the lunch: at paras. 68–70.

[27] As to Mr. Ulmer's communication with TEG investment advisors in 2016, the trial judge drew the inference from the evidence, including the evidence of Mr. England's endorsement of Churchill to Mr. McLean, that Mr. England did not object to Mr. Ulmer marketing Churchill products to TEG's former advisors. The trial judge further held that the advisors were, in any event, professionals employed at major banks or investment houses who were easily found by a simple Google search: paras. 75–81.

[28] In relation to Mr. Ulmer's use of the TEG investor-contact list in 2017, the trial judge first addressed a critical factual dispute over whether Mr. England had, as he maintained, telephoned Mr. Ulmer to advise that he would not be entering an agreement with Churchill. The trial judge carefully reviewed the relevant evidence, including: the vagueness of Mr. England's response to Mr. Langridge's email appending the draft agreement; the timing of Mr. Ulmer's use of the client-contact list; the fact that Mr. Ulmer emailed the list to himself in a manner that left a detectible paper trail; and the nature of the relationship between Mr. Ulmer and Mr. England: at paras. 114–128. On the totality of the evidence, the trial judge rejected Mr. England's testimony that the telephone call had occurred. He concluded that Mr. England did not advise Mr. Ulmer that there was no agreement with Churchill. Therefore, Mr. Ulmer's conduct in sending the investor contact list to himself was "not furtive or dishonest": at paras. 129–131.

[29] The trial judge then turned to the question of whether Mr. Ulmer owed a fiduciary duty to TEG. It was common ground that the employee–employer relationship is not a traditional category of fiduciary relationship. The issue to be resolved was whether the particular employment relationship between Mr. Ulmer and TEG created "an *ad hoc* fiduciary relationship": at para. 133. The trial judge approached this issue in accordance with the principles set out by the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24

[*Elder Advocates*] at paras. 27–36. No issue is taken on appeal with his statement of the relevant legal principles.

[30] The trial judge observed that the fact that an employee has access to confidential information does not, on its own, create a fiduciary relationship: at para. 138. He reasoned that an employee will not owe fiduciary duties to an employer unless the employee is "imbued with a high level of control or authority or is a 'key' employee". This requires an inquiry into the employee's "actual functions and powers": at para. 140.

[31] The trial judge found that Mr. Ulmer's self-description of his role at TEG on his public LinkedIn profile and in the notes that he prepared for his meeting with Churchill were irrelevant to the analysis of Mr. Ulmer's alleged status as a fiduciary. This was because these statements were made in the job application context, and were in the nature of self-promotion. The judge found that the statements did not assist in determining Mr. Ulmer's actual functions at TEG: at paras. 141–143.

[32] The trial judge addressed each of the hallmarks of a fiduciary relationship discussed in *Elder Advocates*. He found that:

(1) Mr. Ulmer "did not have any particular discretion or power within his role" at TEG, and his functions after 2015 were "primarily administrative": at paras. 145, 148;

(2) Mr. Ulmer did not have power or discretion to affect or bind TEG's legal or practical interests, either before or after December 31, 2015, and, furthermore, TEG had no products to sell and therefore no practical interests to protect: at paras. 150–151;

(3) TEG's circumstances after 2015 "were the opposite of vulnerable", as it had earned and banked its profits and was in the process of wrapping up final administrative tasks: at paras. 160–161;

(4) Mr. Ulmer did not provide any undertaking, express or implied, that he would act in TEG's best interests after the end of 2015: at paras. 173–179.

[33] In the result, the trial judge concluded that Mr. Ulmer did not owe fiduciary obligations arising from his employment with TEG. TEG's claim was therefore dismissed: at paras. 180–185.

The trial judgment on costs: 2022 BCSC 1888 ("Costs Judgment")

[34] Following the dismissal of TEG's action, the respondents sought an award of double costs for steps taken following the delivery of offers to settle. The respondents made two formal offers to settle:

(1) On April 1, 2021, they delivered an offer to settle in the amount of $60,000 plus costs incurred to that date at Scale "B" (the "First Offer");

(2) On September 7, 2021, they delivered an offer to settle in the amount of $100,000 plus costs (the "Second Offer").

[35] The First Offer included a calculation of the fees received by Churchill from TEG's former investors, which totalled $44,486.

[36] The trial judge cited R. 9-1(5)(b) and R. 9-1(6) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], for the principles that governed his discretion to award double costs in these circumstances. He referred to the applicable case law, including *Hartshorne v. Hartshorne*, 2011 BCCA 29. No issue is taken on appeal with the judge's statement of the relevant law.

[37] The trial judge found that it was reasonable for TEG to refuse the First Offer. At the time it was delivered, examinations for discovery had not taken place and TEG had not had the opportunity to test the veracity of the respondent's calculation of fees that Churchill received from TEG investors: para. 26(a). However, by the time the Second Offer was delivered, pre-trial procedures were complete and the respondent's calculation of fees had been verified: para. 26(b).

[38] The trial judge rejected TEG's submission that on its theory of damages, an award of damages at trial could have significantly exceeded the Second Offer. He noted that TEG's trial submissions on damages were not "linked to any ascertainable or understandable figure": at para. 29.

[39] The trial judge concluded that TEG ought reasonably to have accepted the Second Offer at the time it was made: at para. 42. He found that the offer:

> [30] …represented more than twice the gross fees (not profit) achieved by Churchill. It was not a "nuisance" offer. It recognized the risk of the defendants losing on liability.

[40] The trial judge concluded that there was insufficient evidence to make a finding that TEG acted in a high-handed manner in pursuing the action. However, he found there was "some basis" for a finding that TEG may have been more intent on pursuing the action than receiving fair compensation for any wrong it had suffered: at paras. 38–40. While the trial judge seemingly accepted that such conduct may be a relevant factor under R. 9-1(6)(d) of the *SCCR* ("any other factor the court considers appropriate"), in this case it played only a "minor part" in the determination of an appropriate costs order: at para. 40.

[41] The trial judge awarded the respondents one set of double costs, at Scale B, for all steps taken in the action after September 7, 2021, in addition to regular costs up to the date of the delivery of the offer.

Issues on appeal

[42] On appeal, TEG alleges the following errors by the trial judge:

(1) He misapprehended or failed to consider relevant evidence in concluding that Mr. Ulmer was not a fiduciary;

(2) He erred in law in awarding double costs to the respondents by:

(a) Holding that TEG's theory of damages was not linked to any ascertainable or understandable figure and that the basis for any assessment of damages was theoretical;

(b) Considering as a factor that there was "some basis" for a finding of high-handed conduct after having concluded that the evidence did not support such a finding; and

(c) Concluding in the absence of any factual foundation that TEG may have been more intent on pursuing a trial than in receiving fair compensation.

Analysis

Standard of review

[43] The existence of an *ad hoc* fiduciary relationship is primarily a question of fact to be determined by examining the specific facts and circumstances of the relationship at issue. Absent an error of law or a palpable and overriding error of fact, a trial judge's conclusion that a fiduciary duty did not exist must be upheld on appeal: *Galambos v. Perez*, 2009 SCC 48 at paras. 48–49. Where it is alleged that a trial judge misapprehended evidence, appellate intervention is warranted only if the misapprehension is palpable and overriding: *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 43, citing *Bayford v. Boese*, 2021 ONCA 442 at para. 28.

[44] An award of costs, including a decision to award double costs, is discretionary in nature. An appellate court may only interfere with the award if it is shown that "the trial judge has made an error in principle or if the costs award is plainly wrong": *Hartshorne* at para. 23, quoting *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

Did the trial judge err in the Liability Judgment in finding that Mr. Ulmer did not owe TEG a fiduciary duty?

Legal framework

[45] It is common ground on appeal, as it was at trial, that the employment relationship between Mr. Ulmer and TEG did not fall within a traditional category of *per se* fiduciary relationships that give rise to fiduciary duties because of their "inherent purpose or their presumed factual or legal incidents": *Galambos* at para. 36; *Elder Advocates* at para. 33. Instead, the question for the trial judge was whether an *ad hoc* fiduciary duty arose from the specific factual circumstances of the relationship.

[46] The test to be applied in considering the existence of *ad hoc* fiduciary duties has been developed in a series of judgments of the Supreme Court of Canada, culminating in *Elder Advocates*. While no issue is taken with the trial judge's statement of the legal test, a brief review of the relevant principles will provide helpful context to the arguments advanced by TEG on appeal.

[47] The starting point of the analysis is the judgment of Wilson J., in dissent, in *Frame v. Smith*, [1987] 2 S.C.R. 99. At p. 136, Wilson J. proposed that relationships giving rise to fiduciary obligations could be identified by reference to the presence of three characteristics:

1) The fiduciary has scope for the exercise of some discretion or power.
2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[48] Justice Wilson's dissent in *Frame* was adopted by the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at pp. 598–599 and 645–646, as a helpful guide to the identification of new fiduciary relationships.

[49] In *Elder Advocates* at para. 29, McLachlin C.J., for the Court, observed that the characteristics listed in *Frame* are useful in understanding the source of fiduciary duties, but they are not a "complete code" for identifying new fiduciary duties. She held that an *ad hoc* fiduciary relationship arises where the claimant shows:

> [36] …in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[50] It is clear from *Elder Advocates* (at para. 28) and *Galambos* (at paras. 67–68) that vulnerability alone is insufficient to support the existence of a fiduciary duty. In *Galambos*, Cromwell J. explained that while a focus of fiduciary law is protecting against abuses of power within relationships characterized by vulnerability, it is putting the matter too broadly to assert that the role of fiduciary law is protection of the vulnerable. Instead, "the fiduciary principle monitors the abuse of a loyalty reposed" within the context of a specific relationship: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 406, quoted in *Galambos* at para. 67. The important consideration is the extent to which vulnerability "arises from the relationship": *Galambos* at para. 68.

[51] It flows from this that fiduciary law concerns relationships "in which one party is given a discretionary power to affect the legal or vital practical interests of the other": *Galambos* at para. 70. In *Galambos*, Cromwell J. noted that this power can be "quite broadly defined" and can arise from different legal sources or circumstances: at para. 84. He went on to state that:

> [84] … While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.
>
> [Emphasis added.]

[52] In applying the test for *ad hoc* fiduciary duties in the employment law context, the fundamental issue is the degree of discretionary power over its interests that the employer has granted to the employee: *Consbec Inc. v. Walker*, 2016 BCCA 114 at para. 41; *Can. Aero v. O'Malley*, [1974] S.C.R. 592 at 610. The hallmarks of a fiduciary relationship must be established based on evidence going to the alleged fiduciary's role. Job titles are not determinative; rather, the court must examine the employee's actual job functions and responsibilities: *Authentic T-Shirt Company ULC v. King*, 2016 BCCA 59 at para. 26. Ordinarily, employees entrusted with the level of power and control over their employer's interests necessary to ground a fiduciary duty will occupy senior management positions: *Barton Insurance Brokers Ltd. v. Irwin*, 1999 BCCA 73 at para. 27. However, in certain "relatively rare" circumstances, a lower level employee who is entrusted with sufficient discretionary power to be a "key employee" or "the whole show" could be a fiduciary: *Barton* at paras. 28 and 40.

Discussion

[53] The errors alleged by TEG on the first ground of appeal relate to the trial judge's finding that Mr. Ulmer did not owe fiduciary duties to TEG. TEG says that in reaching this conclusion, the trial judge misapprehended evidence and/or failed to consider relevant evidence. TEG's various arguments can be summarized in two points:

(1) Mr. Ulmer's self-description of his role at TEG in the documents in evidence at trial was material and cogent and ought to have led the trial judge to conclude that Mr. Ulmer was a key employee and core member of the management team.

(2) In finding that TEG was not vulnerable to Mr. Ulmer's exercise of discretion and had no practical interests to protect, the trial judge failed to consider the evidence of ongoing negotiations between TEG and Churchill with respect to the acquisition of the investor-contact list. This evidence showed that TEG had substantial goodwill to protect, and was

vulnerable to Mr. Ulmer's unilateral decision to squander that goodwill by using the investor-contact list for personal advantage.

[54] TEG's approach to these issues on appeal consists largely of an attempt to have this Court retry the case and substitute our view of the correct inferences to be drawn from the evidence for that of the trial judge. While TEG alleges that the trial judge misapprehended evidence, it does not identify a single example of such a misapprehension. Instead, TEG reviews the evidence that it considers favourable to its case, and invites this Court to find that evidence more persuasive than the trial judge found it to be. This is not, of course, this Court's proper role.

[55] In my view, this ground of appeal can be disposed of on the simple basis that the trial judge found as a fact that TEG did not grant sufficient authority and discretionary power to Mr. Ulmer in his employment functions to give rise to fiduciary duties: Liability Judgment at paras. 145–149. This is a finding that is supported by the evidence reviewed by the trial judge at paras. 36–37 and paras. 145–149. The evidence in support includes that:

(1) Mr. England was the sole shareholder and director of TEG, and he did not delegate any of his power to Mr. Ulmer (para. 146);

(2) Mr. Ulmer's only employment duties after 2015 were primarily administrative: providing information to investors and advisors about tax treatment and trailer fees and getting forms signed (para. 148);

(3) Mr. Ulmer was responsible for drafting quarterly circulars for investors, but he was not allowed to publish them without the prior approval of Mr. England and TEG's Chief Financial Officer ("CFO") (paras. 37, 145);

(4) Mr. Ulmer could not authorize payment of any amount without the co-signature of Mr. England or the CFO (para. 37); and

(5) No TEG employees reported to Mr. Ulmer, and he had no power to hire or fire employees (para. 37).

[56] The trial judge did not misapprehend or ignore the evidence relied upon by TEG to support a finding that Mr. Ulmer was a key employee and a fiduciary. He fairly summarizes this evidence in the Liability Judgment, and explains his reasons for rejecting it. The trial judge was not required to base his conclusions about Mr. Ulmer's role at TEG on Mr. Ulmer's self-description in the notes he prepared for his interview with Churchill, or on his LinkedIn profile. Instead, the trial judge was required to make factual findings about Mr. Ulmer's actual job functions and responsibilities based on the totality of the evidence. The judge examined the evidence and concluded that Mr. Ulmer had not been entrusted with discretionary power giving rise to fiduciary duties. I see no reversible error in the trial judge's approach to this issue, or his factual conclusions.

[57] In its arguments on appeal, TEG focuses on statements made by the trial judge in the Liability Judgment to the effect that TEG was the "opposite of vulnerable" after it ceased doing business (para. 160), and "had no 'practical' interests to protect" (para. 151). TEG says that in making these findings, the trial judge ignored material evidence concerning the ongoing negotiations between TEG and Churchill in relation to TEG's investor-contact list. That evidence, TEG says, clearly established that it had a significant interest to protect—the value of the substantial goodwill built up over decades with TEG investors. Further, TEG was vulnerable to Mr. Ulmer's misuse of TEG's confidential information for his own, and Churchill's, benefit.

[58] It is unnecessary to resolve these arguments. Even assuming that the trial judge erred in concluding that TEG was not vulnerable and had no interests to protect, that vulnerability did not arise from any power or discretion granted to Mr. Ulmer in his employment with TEG. The trial judge's factual findings that Mr. Ulmer exercised primarily administrative functions in his employment with TEG and that he had no discretion or power are, in my view, dispositive of TEG's appeal of the Liability Judgment. The absence of discretion or power negates the existence of a fiduciary duty: *Galambos* at para. 84.

[59] On the trial judge's findings, the most that could be said is that Mr. Ulmer, along with any other employee of TEG still working for the company after it ceased active operation, had access to confidential information about TEG's investors and advisors. As the trial judge noted, the fact that an employee has access to confidential information does not, on its own, create a fiduciary relationship: Liability Judgment at para. 138. An employee's use of confidential information may be governed by contractual duties or a duty of confidentiality. However, the only issue in this case was whether Mr. Ulmer owed *fiduciary* duties. As such, I would not accede to this ground of appeal.

[60] In his submissions on appeal, Mr. Ulmer placed significant emphasis on the trial judge's "key" factual finding that Mr. Ulmer honestly believed he had the authority to use the investor-contact list as of January 2017, and thus his conduct in doing so was not furtive or dishonest. If Mr. Ulmer did owe a fiduciary duty, this could potentially be relevant to the question of whether it was breached. However, in light of my conclusion that the trial judge did not err in finding that Mr. Ulmer was not a fiduciary, it is unnecessary to resolve this issue.

Did the trial judge err in the Costs Judgment in awarding double costs?

[61] TEG's first submission is that the trial judge erred in finding that its theory of damages was "theoretical", and "not linked to any ascertainable or understandable figure". TEG argues that this alleged error influenced the trial judge's assessment of whether it was unreasonable for TEG to reject the respondents' two formal offers. In fact, TEG says, it provided the trial judge with authority for the proposition that where there is no evidence of the market value of a lost asset, the owner may claim the loss of subjective value. Further, this loss can be claimed regardless of whether the owner ever intended to use the asset: *Cancer Control Agency of British Columbia v. Fisher Scientific*, [1989] B.C.J. No. 213 (S.C.). TEG says that on this theory, it could reasonably have expected to receive a damage award that substantially exceeded the settlement offers, given TEG's financial investment in developing its client lists.

[62] I see no error in the trial judge's conclusion that the Second Offer was one that TEG ought reasonably to have accepted. In this case, there was evidence of the market value of the lost asset, namely the profits derived by Churchill through use of the asset. The Second Offer was in an amount that substantially exceeded the fees Churchill earned from using TEG's investor-contact lists. In effect, the offer would have given TEG the remedy of disgorgement. While it was open to TEG to advance an alternative theory of damages, the trial judge was accurate in observing that TEG's trial submissions on damages were not linked to an ascertainable or understandable figure. This was relevant to the question of whether TEG ought, reasonably, to have accepted the Second Offer. TEG's belief that it could secure an unquantified but more generous award of damages than disgorgement did not shield it from the costs consequences of an unaccepted offer.

[63] TEG's second submission is that the trial judge erred in holding that there was "some basis" in the evidence for a finding of high-handed conduct on the part of TEG despite his conclusion that the evidence was insufficient to support such a finding.

[64] This aspect of the trial judge's analysis is somewhat ambiguous. The trial judge "concede[d]" that there was insufficient evidence to make a finding of high-handed conduct, while at the same time listing the evidence that could support such an inference: Costs Judgment at para. 38. Regardless, to the extent that the trial judge considered TEG's motives in pursing the action in awarding double costs, this played only a "minor part" in the analysis: Costs Judgment at para. 40. Reading the trial judge's reasons as a whole, it is evident that the trial judge concluded that an award of double costs was warranted primarily on the basis of the criteria listed in R. 9-1(6)(a)–(c) of the *SCCR*: the Second Offer was one that ought reasonably to have been accepted, it substantially exceeded TEG's recovery at trial, and there was no financial disparity between the parties. TEG has not demonstrated any error in principle in this analysis.

[65] I conclude, accordingly, that there is also no merit to TEG's second ground of appeal.

Disposition

[66] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"