IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *University of British Columbia v. Moscipan,* 2024 BCSC 307

Date: 20240223
Docket: S121193
Registry: Vancouver

Between:

University of British Columbia

Plaintiff

And

Miroslaw Moscipan in his personal capacity and as Executor of the Estate of Wanda Barbara Moscipan, deceased, and Brian Moscipan

Defendants

Before: The Honourable Justice M. Taylor

Reasons for Judgment

Counsel for UBC:	R. McGowan Hunter Parsons
The Defendants appearing in person:	M. Moscipan
Place and Dates of Hearing:	Vancouver, B.C. September 11, 15, 2023 October 17, 2023
Place and Date of Judgment:	Vancouver, B.C. February 23, 2024

Introduction

[1] This is a summary trial application by the plaintiff, University of British Columbia ("UBC"). UBC seeks a monetary judgment against the defendant Miroslaw Moscipan as executor of the estate of Ms. Wanda Barbara Moscipan, deceased (the "Estate") arising from alleged fraud and wage theft by Ms. Moscipan and against the defendant Mr. Moscipan in his personal capacity ("Mr. Moscipan") for alleged knowing receipt of the proceeds of Ms. Moscipan's fraud.

[2] The claim against the defendant Brian Moscipan, the son of Mr. and Ms. Moscipan, was discontinued on February 21, 2020.

[3] The defendants take the position, first, that this matter is not suitable for summary trial and, second, that if the application is to be heard on a summary trial basis it should be dismissed on the merits.

Background

[4] During the period between 1997 and 2011, Ms. Moscipan was an administrator employed in a dual role by UBC and Vancouver Coastal Health Authority ("VCHA"). UBC and VCHA are two separate legal entities which share certain organizational and staffing overlaps in the medical field. The principal UBC claim is that Ms. Moscipan used her role as a trusted employee of UBC and VCHA during that period to defraud and steal from UBC (in addition to defrauding and stealing from VCHA, which was the subject of a separate action).

[5] Ms. Moscipan died in July 2012. Mr. Moscipan, her husband, is the executor of Ms. Moscipan's estate and a defendant in this proceeding both as executor of the Estate and in a personal capacity. The defendants were self-represented at the hearing. Due to Mr. Moscipan's challenges with the English language, Brian Moscipan provided assistance to his father at the hearing (with the consent of UBC counsel) and was very capable in that role.

[6] Prior to her death, Ms. Moscipan was employed by UBC, initially in 1997 as an Administrator and later as a Site Manager for the Department of Obstetrics and

Gynaecology at UBC. Before 1997, Ms. Moscipan had previously been employed in an administrative position by VCHA, commencing in or about 1987. After joining UBC in 1997 and thereafter up to 2011, Ms. Moscipan was jointly employed by both VCHA and UBC. While in that dual role, Ms. Moscipan had substantial administrative autonomy in the Department of Obstetrics and Gynaecology and significant control, oversight and management of the financial affairs of the doctors who worked for both UBC and VCHA.

[7] In 2011 a new UBC department head, Dr. Geoffrey Cundiff, became suspicious about some of Ms. Moscipan's behaviour. In February 2011, Dr. Cundiff requested that UBC conduct an audit of Ms. Moscipan's activities during the period of her dual employment dating back to 1997, which was completed that year (the "Audit").

[8] The conclusion in the Audit report was that Ms. Moscipan had engaged in various fraudulent actions, including stealing money from a dormant bank account to which Ms. Moscipan had exclusive access known as the Gynaecological Professional Staff Fund (the "GPSF Account"), and into which moneys from both UBC and VCHA had been previously paid. The Audit report also concluded that Ms. Moscipan had engaged in wage theft from UBC arising from her receiving without authority 180% of a full-time equivalent ("FTE") salary (100% from UBC and 80% from VCHA), when she was actually entitled to a salary from UBC only on a 20% FTE basis, and forging the signatures of her supervisors to give herself unauthorized pay raises over a series of years. Following the conclusion of the Audit, UBC terminated Ms. Moscipan for cause in late 2011.

[9] VCHA and UBC subsequently brought separate actions against the defendants. UBC commenced this action against Ms. Moscipan in early 2012 (the "UBC Action"). UBC obtained freezing orders and also conducted a brief examination for discovery of Ms. Moscipan before she died in July 2012.

[10] In the separate action commenced by VCHA (the "VCHA Action"), VCHA alleged that Ms. Moscipan had stolen funds from the GPSF Account and that she

had used some of these funds to pay off the mortgage on the Moscipan family home located at 3328 Tennyson Crescent, North Vancouver, British Columbia (the "Tennyson Property"). During that time, Ms. Moscipan was the sole owner of the Tennyson Property. However, in March 2011, Ms. Moscipan transferred a half interest in the Tennyson Property to Mr. Moscipan for no consideration, which resulted in them holding the property as joint tenants. Following her death, Mr. Moscipan became the sole registered owner of the Tennyson Property. VCHA alleged in the VCHA Action that Mr. Moscipan had knowingly received certain amounts of the stolen funds and had participated in the fraudulent conveyance of the Tennyson Property.

[11] In 2015, VCHA and UBC sought to have their two actions heard together, which the defendants successfully opposed on the grounds that it would be unfair to them as self-represented defendants. Accordingly, UBC and VCHA agreed that the VCHA Action would proceed first to trial, followed by the UBC Action. The trial in the VCHA Action was held in 2017, with an appeal decided in 2019.

[12] Following completion of the trial of the VCHA Action, Justice Marchand (as he then was) found in *Vancouver Coastal Health Authority v. Moscipan*, 2017 BCSC 2339 [*VCHA (BCSC)*] that Ms. Moscipan had committed fraud and stolen funds from VCHA through the GPSF Account. In a judgment which referenced without deciding the UBC Action, Justice Marchand concluded in part:

> [1] Wanda Moscipan was a long-term and trusted employee of the Vancouver Coastal Health Authority ("VCHA") and the Faculty of Medicine at the University of British Columbia ("UBC"). She worked as an administrator in the Departments of Obstetrics and Gynaecology at both. According to the VCHA, the VCHA was responsible for 80% of her salary and UBC was responsible for 20% of her salary.
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> [2] Between 2003 and 2011, Ms. Moscipan stole and/or defrauded over $500,000 from the VCHA, primarily by having busy physicians sign blank cheque requisitions which she subsequently completed to direct the requested cheques to an account she controlled. The account was known as the Gynaecological Professional Staff Fund ("GPSF"). She is also alleged to have defrauded UBC of a substantial sum of money - but that is the subject of a separate action.
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> […]

> [49] The evidence was clear and uncontested that Ms. Moscipan committed the tort of conversion by taking the funds of the VCHA and using them for her own benefit.
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> [50] The evidence was also clear and uncontested that Ms. Moscipan committed the tort of civil fraud by knowingly making false representations which caused medical staff of the VCHA to authorize payments to the GPSF, or to Ms. Moscipan personally, and resulted in a substantial loss to the VCHA.

[13] Justice Marchand further found Mr. Moscipan liable to VCHA for his knowing receipt of the proceeds of Ms. Moscipan's conversion and fraud, which he based on constructive knowledge:

> [75] Ms. Moscipan was obviously adept at fooling people close to her regarding financial matters. She fooled her close colleagues at UBC and the VCHA for many years, to the point that it took several audits conducted over a year or more for UBC and the VCHA to uncover the extent of her conversion and fraud. Given Ms. Moscipan's obvious skill at deceit, I have concluded that she also fooled Mr. Moscipan. I must, however, move on to consider whether Mr. Moscipan's subjective belief that his wife had legitimate alternative sources of income was objectively reasonable: *Cambrian Excavators Ltd. v. Taferner*, 2006 MBQB 64 at paras. 51-52.
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> […]
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> [79] After carefully considering all of the evidence, I have concluded that Mr. Moscipan is liable to the VCHA for his knowing receipt of the proceeds of Ms. Moscipan's conversion and fraud. My finding is based on Mr. Moscipan's constructive rather than actual knowledge of Ms. Moscipan's actions.

[14] In *VCHA (BCSC)*, Justice Marchand granted judgment against the Estate in the amount of $574,646.51, which was the sum she had taken from GPSF Account. Justice Marchand also found Mr. Moscipan liable for knowingly receiving $246,073.23 of proceeds of Ms. Moscipan's conversion and fraud against VCHA and voided the transfer of the Tennyson Property in March 2011 as a fraudulent conveyance.

[15] Mr. Moscipan appealed the trial judgment. In *Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17 [*VCHA (BCCA)*], the Court of Appeal upheld Justice Marchand's finding that Mr. Moscipan had knowingly received proceeds of Ms. Moscipan's conversion and fraud against VCHA, but reduced the amount that Mr. Moscipan had knowingly received to $130,295.74. The Court of Appeal in *VCHA*

(BCCA) also upheld Justice Marchand's finding that the transfer of the Tennyson Property was a fraudulent conveyance, but varied the order to make the transfer void only as against the creditors of Ms. Moscipan's estate, including UBC and VCHA. I will address the relevance of the Court of Appeal's ruling more fully below.

Issues

[16] There are three issues to be determined on this application:

1. Whether this application is suitable for summary trial;
2. Whether UBC can rely upon the doctrine of issue estoppel to assert that the findings of fact from the VCHA Action are determinative of certain matters on this application; and
3. Whether Ms. Moscipan committed wage theft against UBC and, if so, whether UBC is entitled to restitution on that basis.

Analysis

1. Suitability for summary trial

[17] UBC seeks to have this application resolved by summary trial. The defendants argue that the case is unsuitable for summary trial.

[18] Under Rules 9-7(11) and 9-7(15) of the *Supreme Court Civil Rules*, a court has the discretion to deny an application to proceed by summary trial if the court finds one or more of the following factors to be applicable (*Foreman v. Foster*, 2001 BCCA 26 at paras. 17–22):

(a) The issues are not suitable for disposition (R. 9-7(11)(b)(i));

(b) The application will not assist the efficient resolution of the proceeding (R. 9-7(11)(b)(ii));

(c) On the whole of the evidence, the court is unable to find the facts necessary to decide the issues of fact or law (R. 9-7(15)(a)(i)); or

(d) It would be unjust to decide the issues, particularly where there is an absence of cross-examination.

[19] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court of Appeal reviewed the principles to be applied in deciding the threshold issue of suitability for summary trial. The factors to be considered by the court include the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to conventional trial, and the course of the proceedings to date.

[20] Taking into account all the foregoing factors my view is that this matter is suitable for disposition by summary trial. In making this determination, I have considered the full procedural history in this matter. On July 29, 2022, I initially dismissed an earlier UBC application and found that it was not suitable for summary trial at that time (the "First Summary Trial Application"). My principal reason for making that earlier finding was that UBC had not adduced evidence on the First Summary Trial Application from three key witnesses who had a direct supervisory relationship with Ms. Moscipan and whose evidence I considered central to determining the nature of the employment relationship. These witnesses were Maureen Conlon, Dr. Lou Benedet and Dr. Robert Liston.

[21] Following my decision on the First Summary Trial Application, UBC engaged a private investigator to locate the three witnesses. UBC discovered that Dr. Benedet had unfortunately passed away on March 1, 2017, but did successfully locate Ms. Conlon and Dr. Liston. Although Ms. Conlon and Dr. Liston had retired long before UBC commenced its initial application, and both now reside on Vancouver Island, UBC was able to obtain affidavits from them, which were filed on October 26, 2022 and served on the defendants on October 28, 2022. These affidavits contained substantial material new evidence concerning the nature and terms of UBC's employment relationship with Ms. Moscipan.

[22] UBC applied for leave to file this second summary trial application (the "Second Summary Trial Application"), based on the fresh evidence from Ms. Conlon

and Dr. Liston, in addition to the other affidavits previously filed. On December 15, 2022, I granted leave to proceed with a summary trial hearing, principally on the basis that UBC had now filled the prior evidentiary gap, and seized myself on request of the parties. In that ruling, to ensure procedural fairness, I also granted the defendants the right to conduct cross-examinations on all affidavits and a reasonable amount of time to complete those cross-examinations (and to retain counsel if they so chose).

[23] In light of the material new evidence adduced by UBC, and the further submissions of the parties, my view is that this Second Summary Trial Application is indeed now suitable for summary determination. In reaching this conclusion, I have taken into account the following factors:

- The central figure in this proceeding, Ms. Moscipan, is unfortunately long deceased. As a result, one of the main advantages of a live trial, namely the *viva voce* evidence of key witnesses, is not available with respect to Ms. Moscipan. Instead, the best evidence that would be available from Ms. Moscipan in a live trial is the transcript of her discovery in 2012. This transcript is equally available to the Court on this summary trial application, with the result that a live trial would create no advantages with respect to testing Ms. Moscipan's evidence;

- UBC was able to obtain affidavits from all the other key witnesses relating to Ms. Moscipan's employment at UBC who remain alive and their evidence is therefore available to the Court on this application. In my decision of December 15, 2022, I gave the defendants ample rights and time to conduct cross-examinations on any and all of the UBC affidavits and UBC made the affiants available for cross-examination. Despite being offered this opportunity, the defendants declined to conduct any cross-examinations. At the subsequent hearing of the Second Summary Trial Application on the merits, the defendants did not give a compelling reason why they had declined to proceed with cross-examinations, apart from asserting that they

were self-represented and did not feel comfortable doing so. They also asserted that their preference was to cross-examine in a live trial setting, without reasonably explaining why that would be any more preferable for them than cross-examining on the affidavits.

In my view, it would not be fair to UBC to enable the defendants to rely on their own strategic inaction as an argument for deferring this matter to trial, with prejudicial consequences on UBC. The law is clear that where a respondent fails to make use of pre-trial procedures and frustrates the proper functioning of a summary trial, they run the risk that the court will grant judgment relying on the evidence it does have: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32:

> [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:
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> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion.
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> [Emphasis added.]

- I also emphasize that there is very little admissible affidavit evidence filed by the defendants that contradicts or calls into direct question the credibility or reliability of UBC's witnesses concerning Ms. Moscipan's employment status

and wage theft; the UBC evidence was therefore essentially uncontradicted. Given that Ms. Moscipan is no longer available as a witness, this is not a case in my view where a serious conflict in witness credibility necessitates a live trial;

- As I will address more fully below, some of the UBC claims on this application can also separately be efficiently resolved by the application of the doctrine of issue estoppel with reference to conclusive findings of fact already made by courts in the VCHA Action. Since the defendants cannot in law re-litigate those issues, a live trial would serve no purpose in that respect, nor would it advance the rights or interests of the defendants;

- The remaining factual issues, relating to the nature of Ms. Moscipan's employment relationship with UBC and VCHA and the extent to which she was allegedly overcompensated, are in my view relatively narrow and not overly complex;

- UBC has had to endure a considerable delay in obtaining a remedy in this action, as it has now been over 12 years since Ms. Moscipan's termination and over eight years since the judicial determination (on Mr. Moscipan's application) that UBC could not proceed to trial with the UBC Action at the same time as the VCHA Action. Necessitating a live trial would create considerable further delay, which in my view is not justifiable under the circumstances or fair to UBC;

- Given the advancing age of the key witnesses (many of whom are now retired) a further delay creates the risk that some of these witnesses may be unable to testify or possibly deceased by the time a live trial might proceed;

- A determination of the remaining issue estoppel and wage theft issues in this case by summary trial would fully and finally determine the defendants' liability to UBC, with the result that no further litigation on the merits of the

claim will be necessary (apart from the issue of costs and ancillary enforcement remedies); and

- The defendants have not drawn my attention to any compelling prejudice they will suffer if this matter is resolved on a summary trial basis, as opposed to being resolved at a live trial.

[24] For all the above reasons, I find that this matter is suitable for summary trial.

2. Issue Estoppel

[25] UBC relies upon the doctrine of issue estoppel to assert that certain findings of fact and law made by the trial judge and Court of Appeal in the VCHA Action are determinative of the following matters in this action, namely:

(a) Ms. Moscipan stole $56,436.95 from UBC using the GPSF Account, and the Estate is required to make restitution to UBC in that amount;

(b) Ms. Moscipan's transfer of title to the Tennyson Property in March 2011 is void as against UBC and UBC is entitled to execute any judgment pronounced in this action against Ms. Moscipan's interest in that property prior to the conveyance; and

(c) Mr. Moscipan is liable to UBC for knowing receipt of the proceeds of Ms. Moscipan's fraud, and he is required to make restitution to UBC in the amount of $15,073.55.

[26] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada described cause of action estoppel and issue estoppel:

> [20] The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 1894 CanLII 72 (SCC), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding

> relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): [citation omitted].

[27] The Court in *Danyluk* at para. 24 explained that issue estoppel applies where the question said to be previously decided was “distinctly put in issue and directly determined by the court” at the previous hearing.

[28] Issue estoppel arises where:

> (a) the first decision was final;
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> (b) the first decision involved a determination of the same question sought to be controverted in the second proceeding; and
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> (c) the parties to the decision, or their privies, were the same persons as the parties to the proceeding in which estoppel is raised.
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> See *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at pp. 267-268.

[29] Issue estoppel may apply to separate and distinct causes of action where common issues of fact or law were decided in the first action (*Grdic v. The Queen*, [1985] 1 S.C.R. 810 at para 32):

> An estoppel, however, can apply also to a single issue which may arise between two parties who, although litigating for the second time regarding issues related factually to their first case, face each other in an altogether new cause of action (citation omitted).

[30] Even if the elements of issue estoppel are established, the judge nonetheless retains a discretion not to apply the doctrine on the basis it would work an injustice to do so: *Danyluk* at para. 62.

[31] In my view the three elements of the test for issue estoppel in *Angle* are met in this case, and the application of the doctrine would not work an injustice.

[32] The first element is clearly met because the decision of the Court of Appeal in the VCHA Action was final and the defendants did not file a further appeal to the Supreme Court of Canada.

[33] With respect to the second element, it is my view that the findings of Justice Marchand in *VCHA (BCSC)*, as affirmed or modified by the Court of Appeal in *VCHA (BCCA)*, are determinative with respect to the three matters I have set out above in this action for the following reasons:

- The reasons for judgment of Justice Marchand and the Court of Appeal are admissible in this action as conclusive evidence of the findings and conclusions made in that proceeding: *Evidence Act*, R.S.B.C. 1996, c. 124 at s. 26;

- Justice Marchand found that Ms. Moscipan committed the torts of civil fraud and conversion by taking funds through cheques to the GPSF Account and using them for her own benefit by knowingly making false representations that caused medical staff to authorize payments to the GPSF Account: *VCHA (BCSC)* at paras. 48–53. To the extent that UBC was a joint account holder with VCHA of the GPSF Account after 2009, findings of fraud and conversion with respect to Ms. Moscipan's withdrawal of funds from that account are obviously equally applicable on liability to both UBC and VCHA;

- Justice Marchand also found expressly that after October 2009, 56.7% of the funds stolen by Ms. Moscipan belonged to VCHA and 43.3% belonged to UBC. This finding, along with the express finding of theft of $56,436.95 from UBC, was affirmed by the Court of Appeal in *VCHA (BCCA)* at paras. 80-82:

> [80] The evidence at trial shows that up until October 2009 the only monies deposited into the GPSF Account were the monies stolen from VCHA. Therefore, up to October 2009, the funds in the GPSF Account were impressed with a trust solely in favour of VCHA. Between February 2005 and October 2009, Ms. Moscipan paid $110,557.40 on Mr. Moscipan's Visa from cheques drawn on the GPSF Account. Mr. Moscipan testified there was nobody else who used his Visa card, he knew what

> he was spending on his Visa and that Ms. Moscipan paid down his Visa every month. The evidence thus establishes that the $110,557.40 paid towards Mr. Moscipan's Visa was impressed with a trust in favour of VCHA, and that he received those funds for his own use and benefit. It is a specific sum of money traceable directly to Mr. Moscipan, and in my view, satisfies the principles regarding receipt as set out in *Citadel* and *Gold*.
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> [81] The evidence further indicates that subsequent to October 2009, an additional $34,811.89 was paid from the GPSF Account on Mr. Moscipan's Visa. An examination of the GPSF Account shows that as of October 2, 2009, the balance of the GPSF Account was $23.39. Commencing on October 2, 2009, Ms. Moscipan deposited into the GPSF Account $56,436.95 stolen from UBC, and $66,956 stolen from VCHA. The VCHA funds therefore constituted 56.7% of the funds in the GPSF Account when the additional payments were made on Mr. Moscipan's Visa after October 2009. I would award VCHA an additional $19,738.34, representing 56.7% of the remaining funds paid on Mr. Moscipan's Visa after October 2009.
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> [82] In the result, therefore, I would set aside the award against Mr. Moscipan in the amount of $246,073.23, and substitute an award of $130,295.74.
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> [Emphasis added.]

I emphasize that, in the above passage, the Court of Appeal expressly found or affirmed that: (1) Ms. Moscipan had stolen $56,436.95 from UBC deposited into the GPSF Account; and (2) that VCHA was entitled to 56.7% of the $34,811.89 in funds paid on Mr. Moscipan's Visa from the GPSF Account after October 2009. The logical corollary of these findings was that UBC (the other source of the funds in the GPSF Account) was entitled to the remaining 47.3%, which amounts to the $15,073.55 claimed by UBC;

- The Court of Appeal in *VCHA (BCCA)* also upheld Justice Marchand's finding that the stolen funds were impressed with a trust and that the estate of Ms. Moscipan was directly liable to creditors with respect to these funds. These findings are findings with respect to the identical questions that UBC seeks to have resolved on this application;

- With respect to UBC's entitlement to execute any judgment pronounced in this action against Ms. Moscipan's interest in the Tennyson Property, the

Court of Appeal upheld Justice Marchand's finding of a fraudulent conveyance and concluded that Mr. Moscipan holds the property subject to whatever claims which might be forthcoming from Ms. Moscipan's creditors (which include UBC):

> [105] Accordingly, in the circumstances of this case, Ms. Moscipan's transfer of the Tennyson Property to herself and Mr. Moscipan as joint tenants and the subsequent transfer to him alone on Ms. Moscipan's passing, are not to be set aside. Mr. Moscipan remains the registered owner of the property. He, however, holds the property subject to whatever claims which might be forthcoming from Ms. Moscipan's creditors. They are entitled to attach her interest in the property as if the conveyances had not taken place.
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> [106] VCHA will be entitled to bring execution proceedings against the Tennyson Property. In those proceedings the trial court will need to determine whether Mr. Moscipan at the time of the original transfer of the Tennyson Property in March 2011 in fact owned a beneficial interest in the property.
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> Ms. Moscipan's creditors are, of course, not entitled to execute against property other than that which was owned legally and beneficially by Ms. Moscipan.
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> [Emphasis added.]

[34] The foregoing passage in my view conclusively resolves the manner in which a judgment creditor such as VCHA and UBC is entitled to enforce a judgment as against the Tennyson Property and it is the same question sought to be resolved by UBC on this application.

[35] The third element of the issue estoppel test is also met in my view. The defendants in the UBC Action are the same defendants as in the VCHA Action. While it is true that UBC was not technically a named party in the VCHA Action, these two actions were always closely factually connected due to Ms. Moscipan's dual role and, indeed, the only reason why a joint trial involving the plaintiffs in both actions did not occur at the same time was due to the successful application by the defendants to sever the two trials. Having taken the position at the time that the two actions should proceed sequentially not simultaneously, it would be unfair in my view for the defendants to now take the position that they are not bound by rulings on

issues in the VCHA Action directly relating to UBC, merely because the UBC Action is being tried later in time.

[36] I also note that in *Foreman v. Niven*, 2009 BCSC 1476 at paras. 26-28, Justice Savage found that a privity of interest could be sufficient to meet the third element of the test, even where the parties were not identical:

> [26] To be a privy the authorities suggest that there must be privity of blood, title, or interest. In this case only the latter applies. As noted above, the concept of privity of interest is elastic and not easily defined. In this case, however, during the relevant period of time when Chambers acted on the opportunity Niven was Chambers' agent. A principal and agent may be privies: *Canam Enterprises Inc. v. Coles,* [2000] O.J. No. 4607 (C.A.) at para. 23, reversed on other grounds [2002] S.C.J. No. 64.
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> [27] Niven was also a witness at the earlier proceeding. He testified on behalf of Chambers. His testimony was found to support that of Chambers. He also testified as to the reasons why the financing application was rejected by Highland. The Court in the Chambers Actions made important findings on both matters. A witness has been held to be a privy: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 at page 144, *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237 at p. 242.
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> [28] In my view there is a privity of interest between Niven (and by extension the Niven Group and Highland) and Chambers in the Chambers Action as it applies to two issues. The claims made here are either the same claims or fundamental to the claims that were made or could have been made in the Chambers Action. As regards mutuality, in my view both the Niven Group and Highland would have been damnified had the Court come to contrary findings.

[37] Further, in *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*, 47 D.L.R (4th) 431 (B.C.S.C.) at para. 35, Chief Justice McEachern found a privity of interest between two different plaintiffs in separate actions, both of whom were claiming against a single defendant for the same fraudulent transactions:

> Lastly, I would decide, if it were necessary so to do, that the doctrine of privity, if it applies at all, is broad enough to embrace both Ms. Gaspari and the present plaintiff within its grasp. Both were creditors of Holdings, both had the same interest in the debtor's assets, both were damnified by the fraudulent lease and transfers and both, along with all other creditors, were entitled to share in the results of the earlier litigation each according to his rank as a creditor. Privity would be less than rickety - it would be no chair at all - if it could not sustain the weight of both or all the creditors of a fraudulent transferor.

[38] The foregoing authorities are relevant to this application. In the case at bar, it is clear that both UBC and VCHA shared a privity of interest in the funds fraudulently removed from the GPSF Account and redirected as proceeds into the Tennyson Property. Both were damnified by the conversion and fraud committed by Ms. Moscipan, as well as Mr. Moscipan's knowing receipt of the proceeds. This in my view is sufficient to meet the third element of the issue estoppel test.

[39] Accordingly, the elements of the test for issue estoppel have been met. The defendants also suggested no reasons why I should exercise my discretion not to apply the doctrine of issue estoppel on the basis it would work an injustice to do so, and I see none. To the contrary, as explained above, it would be unfair to UBC in my view to require it to re-litigate identical issues expressly decided by the courts in the VCHA Action merely because the defendants had previously succeeded in obtaining an order to have the two actions tried separately, which also resulted in substantial delay for UBC in having its claim heard on the merits. Such an approach would unnecessarily duplicate judicial resources, encourage a multiplicity of proceedings and create a significant risk of inconsistent judicial findings.

[40] UBC shall therefore have judgment in its favour on the three above-named claims on the basis of the application of the doctrine of issue estoppel.

3. Wage Theft

[41] UBC seeks judgment in the amount of $594,680.26 against the Estate for alleged wage theft by Ms. Moscipan.

[42] In support of this claim, UBC argues:

(a) Ms. Moscipan was entitled from at the latest 2001 (and arguably back to 1998) to receive only 20% of her total salary from UBC, with the other 80% to be paid by VCHA. Despite that arrangement, UBC argues, Ms. Moscipan fraudulently submitted timesheets to UBC for 100% FTE salary, while separately collecting 80% FTE salary from VCHA (for a total of 180% FTE);

(b) Ms. Moscipan forged signatures of her UBC supervisors and placed digital signatures of her supervisors on pay increase forms without authorization to award herself wrongful increases to her salary; and

(c) As a result of the foregoing wage theft, Ms. Moscipan wrongfully induced UBC to pay $594,680.26 that she was not entitled to receive, and the Estate is required to make restitution to UBC in that amount.

[43] In support of this claim, UBC adduced affidavit evidence from the following fact witnesses, among others:

- Maureen Conlon, Director from 2000 to 2012 of Business and Finance of the UBC Department of Obstetrics and Gynaecology and the Department of Obstetrics and Gynaecology at British Columbia Women's Hospital;
- Dr. Robert Liston, head of the UBC Department of Obstetrics and Gynaecology from 2000 to 2010;
- Dr. Geoffrey Cundiff, head of the UBC Department of Obstetrics and Gynaecology from 2010 to 2020 and regional head for the VCHA from 2012 to 2021; and
- Johann Boulter, Associate Director of the UBC Department of Internal Audit from 2005 to 2017.

[44] These affidavits were mutually consistent and contained no obvious contradictions. I also emphasize again that the defendants were given the right and ample time to cross-examine any or all of the UBC affiants but declined to do so. Accordingly, the evidence in these affidavits stands as essentially uncontradicted.

[45] In my view, the evidence in these affidavits, considered in conjunction with the other evidence filed on the application, is ample support for UBC's position that Ms. Moscipan did in fact commit wage theft. I will briefly review the relevant portions of this evidence.

[46] Maureen Conlon, one of Ms. Moscipan's two supervisors, deposed in relevant part as follows:

(a) Ms. Moscipan was employed up to her termination in 2011 by VCHA and UBC as an Administrator and Site Manager in a salary sharing arrangement between VCHA and UBC. Commencing in 2000 and up to 2010, Ms. Moscipan reported directly to Ms. Conlon and Dr. Liston;

(b) Shortly after starting her role with UBC in 2000, Ms. Conlon and Dr. Liston met with Ms. Moscipan. During that meeting, Ms. Moscipan verbally confirmed to Ms. Conlon that she had a dual role employment arrangement in which VCHA was responsible for paying 80% of her salary and UBC was responsible for paying 20% of her salary;

(c) Starting in late 2000, Ms. Conlon and Dr. Liston had regular meetings with Ms. Moscipan. During those meetings, Dr. Liston asked Ms. Moscipan to become a full-time employee of UBC. Ms. Moscipan told Ms. Conlon and Dr. Liston during those meetings that she did not want to resign from her employment with VCHA due to seniority and benefits, and expressed her desire to continue with her dual role with VCHA and UBC;

(d) At no time during the meetings in 2000 or thereafter did Ms. Moscipan inform Ms. Conlon that she was receiving a 100% FTE salary from UBC while also receiving 80% FTE from VCHA;

(e) In June 2001, Ms. Conlon again asked Ms. Moscipan to confirm that VCHA would continue to pay 80% of her salary and that UBC would pay 20% of her salary. Although there was no formal written contract confirming this arrangement, Ms. Conlon did make contemporaneous handwritten notes and sent a letter to Ms. Moscipan confirming this understanding, which was not contradicted by Ms. Moscipan;

(f) During their subsequent meeting in July 2001, Ms. Moscipan confirmed that UBC paid 20% of her salary and VCHA paid 80% of her salary. At no time

during that meeting did Ms. Moscipan inform Ms. Conlon that she was already receiving a 100% FTE salary from UBC while also collecting a 80% FTE salary from VCHA;

(g) Ms. Moscipan never at any time over a 10-year period disclosed to Ms. Conlon that she was receiving a 180% FTE salary from UBC and VCHA;

(h) At no time did Ms. Conlon ask Ms. Moscipan to work more than a single full-time job, and at no time did Ms. Conlon observe Ms. Moscipan doing the work of an employee working 180% of a full-time position. During Ms. Conlon's involvement with UBC, she observed Ms. Moscipan working part-time hours for UBC;

(i) Ms. Moscipan told Ms. Conlon that the UBC component of her salary was paid by an account administered by the Dean's office in the UBC Faculty of Medicine. Ms. Moscipan administered access for the UBC Faculty of Medicine accounts. Since Ms. Conlon was not an employee of UBC, she did not have access to the records for that account.

[47] The fact that Ms. Moscipan did not contradict or seek to correct Ms. Conlon's written and verbal understanding of the 80/20 arrangement in 2001 or for 10 years thereafter is at a minimum strong circumstantial evidence that Ms. Moscipan had an intent to deceive, as she was clearly aware as of 2001 that UBC had no understanding it was paying her 100% FTE salary instead of 20% FTE salary. In *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261 at para. 32, Justice Holmes (as she then was) referenced the doctrine in *Derry v. Peek* (1889), 14 App. Cas. 337 that a fraudulent misrepresentation may be made by non-disclosure or inadequate disclosure of material facts and "can be made by blameworthy or cunning or strategic silence". Justice Holmes stated:

> [32] A half-truth may thus amount to a fraudulent misrepresentation, such as where a person is asked a question and gives a selective answer that is literally true but omits important facts which significantly colour the true statement. In *Freeman v. Perlman* (1999), 65 B.C.L.R. (3d) 97, 1999 BCCA 40 at ¶13, Madam Justice Rowles referred to the long-established authority of

> *Tapp v. Lee* (1803), 3 Bos. & P. 367, 127 E.R. 200, and noted that "a negative statement which is deceptively benign could be both treacherous and effective" (¶13).

The foregoing doctrine is in my view applicable to Ms. Moscipan's strategic silence in this case.

[48] Ms. Conlon's affidavit evidence was fully consistent with the evidence of Dr. Liston who, as head of the UBC Department of Obstetrics and Gynaecology from 2000 to 2010, was a direct supervisor for Ms. Moscipan along with Ms. Conlon. Dr. Liston deposed as follows:

(a) After his appointment in 2000, he met with Ms. Moscipan and learned that she had a dual employment arrangement with VCHA and UBC, in which VCHA paid 80% of her salary and UBC paid the other 20% of her salary;

(b) Dr. Liston found Ms. Moscipan's employment arrangement to be unusual. During his initial meeting with Ms. Moscipan in 2000, she confirmed that 80% of her salary was paid by VCHA and the other 20% was paid by UBC. Ms. Moscipan confirmed the details of that arrangement during numerous subsequent meetings with Dr. Liston;

(c) Dr. Liston repeatedly asked Ms. Moscipan to become a full-time UBC employee (i.e. 100% FTE). This obviously gave Ms. Moscipan many opportunities to advise Dr. Liston that she was already being paid a full-time salary by UBC but she failed to do so. Instead, deceptively, Ms. Moscipan turned down Dr. Liston's offers and told Dr. Liston instead that she did not want to lose the seniority benefits that she had with VCHA (which was at best a half-truth);

(d) At no time did Ms. Moscipan express concern to Dr. Liston about the amount that she was being paid by UBC or the amount of work that she was doing for UBC. At no time did Ms. Moscipan request a salary increase or otherwise ask to earn more money for her UBC-related work;

(e) During his time as head of the department, Dr. Liston observed Ms. Moscipan working part-time hours for UBC. At no time did Dr. Liston ask Ms. Moscipan to work full-time hours for UBC or any additional hours beyond her 20% FTE arrangement.

(f) Ms. Moscipan never asked Dr. Liston for a raise and never expressed any concerns about the 20% FTE salary that she earned from UBC. Ms. Moscipan never asked Dr. Liston for more money for her UBC-related work.

(g) Further, Dr. Liston deposed that he did not authorize Ms. Moscipan's timesheets or merit-based pay increase forms and at no time did he knowingly sign or authorize Ms. Moscipan to affix his electronic signature to any timesheets or merit-based pay increase forms. This evidence, in conjunction with Ms. Moscipan's admissions in her examination for discovery which I will describe below, is compelling evidence in my view that none of Ms. Moscipan's pay increases were duly authorized by UBC, and that in fact all of them were a direct result of Ms. Moscipan forging the signatures of her direct supervisors.

[49] Dr. Cundiff, who replaced Dr. Liston in 2010, also deposed in his affidavit:

(a) that he also did not agree to increase Ms. Moscipan's pay as a result of her employment performance;

(b) that in the November 2011 meeting where Ms. Moscipan was terminated for cause, Ms. Moscipan attempted to justify being paid 180% of the salary of a FTE on the basis that she worked hard, but she acknowledged that her supervisors during the relevant period, including Dr. Cundiff, were unaware of the amount that she was being paid. During that meeting, Ms. Moscipan also acknowledged to Dr. Cundiff that she had forged Dr. Cundiff's signature to obtain pay raises.

[50] Ms. Moscipan's admissions to Dr. Cundiff were further evidence that she knew subjectively that UBC was unaware she was being paid 100% FTE and also that she had forged the signature of a direct supervisor to covertly obtain a pay raise.

[51] Johann Boulter, former Associate Director of the Department of Internal Audit at UBC, deposed that she was responsible for investigating the fraud committed by Ms. Moscipan and administering the Audit. Ms. Boulter deposed that she calculated that Ms. Moscipan caused UBC to pay $594,680.26 more than she was entitled to during the relevant pay period based upon receiving 100% FTE salary rather than 20% FTE salary, the unauthorized pay increases and related excess benefits. Ms. Boulter attached a copy of the 2012 Audit report to her affidavit and also a spreadsheet created during the Audit which set out in detail the overpayments from August 24, 1998 to November 23, 2011.

[52] The defendants did not file any conflicting affidavit evidence to contradict Ms. Boulter's affidavit evidence or the Audit report, nor did they cross-examine Ms. Boulter with respect to the calculations. Ms. Boulter's evidence on the quantum of the wage theft was therefore uncontradicted.

[53] The UBC affidavit evidence is compelling evidence on its own of wage theft. However, in addition to this evidence, Ms. Moscipan made a number of important admissions in her examination for discovery on June 19, 2012 which in my view support the credibility and reliability of the evidence in the affidavits of Ms. Conlon and Dr. Liston. Specifically:

(a) Ms. Moscipan admitted that she ceased to be a full-time employee of UBC in March 1998 and was not again a full-time employee of UBC until November 2010, which is consistent with the UBC evidence. She testified:

> Q: Did you ever become a full-time employee of UBC?
>
> A: I was, as I say, initially at – in September of 1996 until, I think, 1998 March. And then in November of 2010 I became a full-time employee when I went on medical leave.

The foregoing admission that she ceased being a full-time employee of UBC in March 1998 was inconsistent with the position of the defendants that she was employed 100% FTE with UBC from 1997 to 2011.

(b) Ms. Moscipan further testified that she considered herself to be a VCHA employee working in the UBC Department of Obstetrics and Gynaecology, which is not consistent with her being 100% FTE at UBC:

> Q: And did VCH and UBC, then, have two different payroll systems?
> A: Yes, but our staff were all UBC. I was the only VGH employee.

(c) Ms. Moscipan testified that she understood that her salary was being paid in part by UBC, and the other part by VCHA;

(d) Ms. Moscipan testified that she did not keep daily time logs to keep track of the number of hours that she worked on a daily basis. This was not helpful to the assertion of the defendants that she was working more than 100% FTE;

(e) Ms. Moscipan admitted that she submitted falsified timesheets to earn 100% FTE from UBC without authorization from UBC. She sought to justify this in her testimony by stating that she "felt that [she] was doing two jobs" for UBC and VCHA;

(f) Ms. Moscipan admitted that she did not inform anyone at UBC that she decided to falsify timesheets to earn 100% FTE;

(g) Ms. Moscipan admitted that, in May 2008, she signed a UBC performance review document in which she represented to UBC that "her UBC salary is to be reviewed .2 FTE to fairly compensate her for the work she devotes to UBC's business" at a time when she was already submitting timesheets to earn 100% FTE from UBC. Again this in my view evidenced the use of a half truth or strategic silence as a positive effort to deceive;

(h) Ms. Moscipan admitted that at no time did she draw anyone's attention to the fact that she was receiving 180% FTE from UBC and VCHA;

(i) Ms. Moscipan admitted that she had access to the electronic signatures of supervising doctors, and applied those signatures to documents without their knowledge or consent, including to documents that provided "merit increases" to her UBC salary; and

(j) Ms. Moscipan admitted that she did not receive consent from any supervisors concerning her unauthorized use of their electronic signatures to give herself merit increases to her UBC salary.

[54] All the foregoing was in my view strong and comprehensive evidence in support of UBC's wage theft claim.

[55] In response to the UBC claim, the defendants argued as follows:

1) That there was no documentary evidence of a written employment agreement reflecting the 80/20 arrangement alleged by UBC and accordingly that UBC had failed to prove that 80/20 arrangement;

2) That the UBC staff appointment forms reflected that Ms. Moscipan was working full-time after 1998;

3) That the 20% part-time arrangement with UBC was an unauthorized and unilateral amendment to her prior full-time arrangement;

4) That not all of Ms. Moscipan's pay increases were attributable to her fraud, as some may have been attributable to across-the-board increases for all employees; and

5) That Ms. Moscipan was in fact working 180% FTE between the two jobs. In support of this argument, the defendants noted that after her termination UBC and VCHA advertised for two full-time positions to replace her.

[56] While I credit the defendants as self-represented litigants for the quality of their argumentation, I am nonetheless not persuaded by these arguments for the following reasons:

1) The lack of a written employment agreement in evidence is not decisive in the context of this case. Given that 26 years have elapsed since Ms. Moscipan commenced working with UBC in 1997, it is not surprising that many employment records are now unavailable. However, evidence of an employment agreement is not strictly necessary in this case because UBC adduced strong affidavit evidence from Ms. Moscipan's two direct supervisors during the 2000-2010 period who confirmed the 80/20 aspect of Ms. Moscipan's employment arrangement. This affidavit evidence was uncontradicted on the application, and indeed was largely confirmed by Ms. Moscipan's own admission on discovery that she was a part-time employee at UBC after 1998. In this respect, I emphasize Ms. Moscipan's further admission on discovery that she did not inform anyone at UBC that she had decided to falsify timesheets to earn 100% FTE from UBC, nor did she draw the attention of her supervisors to the fact that she was receiving 180% FTE from UBC and VCHA. This admitted deceitful behavior is in my view strong evidence that she was aware that she did not have a formal 100% FTE arrangement with UBC and was actively seeking to hide the true nature of her compensation from her UBC supervisors;

2) The defendants point to UBC staff appointment forms in the late 1990s that do not contain check marks beside "part-time" in support of the argument that Ms. Moscipan became a full-time employee in 1998 and remained a full-time employee until her termination in 2011, or at least that there was ambiguity on the issue that should be resolved in their favour. However, as helpfully noted by legal counsel for UBC, a closer examination reveals that the evidence does not support the defendants' argument. Specifically:

    a) The first staff appointment form, dated September 30, 1997, states that Ms. Moscipan was a "new hire" on a "full-time" basis for a fixed term starting on September 15, 1997 and ending on March 31, 1998 for an "annual" salary of $40,000;

b) The second staff appointment form, dated August 12, 1998, states that Ms. Moscipan was a "re-hire" (as opposed to an "extension" of existing full-time employment, which was an option on the form) to be paid on a "hourly" basis at $21.93 per hour for a term starting June 6, 1998 to June 15, 1999. This was a reflection of Ms. Moscipan's change of employment status (as admitted in her discovery evidence) from full-time to hourly;

c) The remaining staff appointment forms up to 2002 stated that Ms. Moscipan's employment was an "extension" of existing employment (i.e. the employment term that started on June 6, 1998 in the second appointment form) to be paid on a "hourly" basis at $21.93 per hour for a term starting June 16, 1999 to June 30, 2000. Thus she was extended from 1998 for the same part-time, hourly position for a series of fixed terms, culminating in an open-ended "ongoing" term starting on January 1, 2002. Contrary to the defendants' argument, this was not consistent with the conclusion that she was full-time 100% FTE.

3) The argument that there was an unauthorized amendment to Ms. Moscipan's employment agreement is undermined by Ms. Moscipan's own admission that she ceased to be a full-time employee of UBC in March 1998. Thus, even if there was such an amendment to the agreement it was clearly an amendment to which she consented at the time. The defendants argue that this amendment may have also violated UBC internal policy at the time but, even if it did (and there was insufficient evidence adduced by the defendants in my view to establish that proposition), Ms. Moscipan clearly had the opportunity to avail herself of that policy at the time and chose not to do so. The time to make that argument would have elapsed many years ago and Ms. Moscipan had ample time to assert that position when she met with Ms. Conlon and Dr. Liston many times over subsequent years.

4) The defendants' argument that not all of Ms. Moscipan's pay increases were attributable to her fraud (as opposed to across-the-board increases for all employees) was not supported by any compelling evidence; in my view it amounted to speculation and little more. In this regard, I note the principle that where fraud or breach of fiduciary duty is established (as it clearly has here by Ms. Moscipan's own admission that she was forging the signatures of her supervisors to obtain her raises) and reasonable efforts have been made to determine the amount of the loss (as UBC has done by undertaking an extensive Audit) the burden to disprove the amount of the loss falls on the defendant (*581257 Alberta Ltd. v. Aujla*, 2013 ABCA 16 at para. 48, referring to *Huff v. Price* (1990), 76 D.L.R. (4th) 138, 1990 CanLII 5402 (B.C.C.A.):

> [48] The general principle as stated in *Huff v Price* is that the onus is on the plaintiff to establish the amount of the loss. However, once the fraud or breach of fiduciary duty is established, and the plaintiff has shown that it has made all reasonable efforts to determine the amount lost, then the evidentiary burden shifts to the defendant to disprove the amount of the loss and the cause of the loss.

This burden to disprove the amount of the loss arising from Ms. Moscipan's breach has not in my view been met by the defendants.

5) The argument that Ms. Moscipan was in fact working 180% FTE was completely unsupported by the available evidence, including in particular the evidence of Dr. Liston and Ms. Conlon, who both testified that Ms. Moscipan was working part-time not full-time for UBC.

I also emphasize that in a discovery of Mr. Moscipan dated January 15, 2020, Mr. Moscipan made the following admissions which in my view undermined the argument that there was evidence that Ms. Moscipan was working 180% FTE:

> (a) Ms. Moscipan's typical workday routine was to leave the family home in North Vancouver around 8:30 a.m., travel 30 minutes each way between her home and office, and return home between 6:00 p.m. and 7:00 p.m.

> Taking into account the commuting time, this is evidence of a normal work day and not a significantly or unusually extended work day;
>
> (b) Mr. Moscipan did not have any first-hand knowledge of the terms of Ms. Moscipan's joint employment with UBC and VCHA; and
>
> (c) after Ms. Moscipan was terminated for cause by UBC, she refused to talk to him about the circumstances leading to her termination. Thus Mr. Moscipan in fact had very little first-hand knowledge about Ms. Moscipan's work arrangements and hours, and certainly insufficient knowledge to support the allegation that she was working 180% FTE.

[57] Further, the evidence that UBC and VCHA advertised for two full-time positions to replace Ms. Moscipan's position after her termination is circumstantial at best without further supporting evidence. For example, it does not account for the possibility that organization needs and priorities might have changed at UBC and VCHA, particularly in light of the Audit and its implications, or that the demands of these positions had expanded after Ms. Moscipan's departure. Again, the defendants had the opportunity to cross-examine UBC witnesses about these organizational issues but declined to do so, with the result that their argument is largely speculative based on the available evidence.

[58] Taking into account the foregoing I am satisfied that UBC has proved the following facts on a balance of probabilities:

1) that Ms. Moscipan was contractually entitled from 2000 to 2011 to receive only 20% of her total salary from UBC (and not 100% FTE salary), with the other 80% to be paid by VCHA;

2) that Ms. Moscipan falsely and repeatedly submitted timesheets to UBC during the foregoing time period asserting that she was entitled to 100% FTE salary from UBC while separately collecting 80% FTE salary from VCHA (for a total of 180% FTE salary);

3) that Ms. Moscipan forged signatures of her UBC supervisors and placed their digital signatures on her pay increase forms, without their knowledge or authorization, to award herself wrongful and unjustified increases to her salary; and

4) that Ms. Moscipan caused UBC to pay to her $594,680.26 more than she was entitled to during the foregoing time period based upon receiving 100% FTE rather than 20% FTE, the unauthorized pay increases and related excess benefits.

[59] In my view, the foregoing findings are sufficient to support UBC's claim of civil fraud. The tort of civil fraud consists of four elements: (a) a false representation by the defendant; (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (c) the false representation caused the plaintiff to act; and (d) the plaintiff's actions resulted in a loss: *Bruno Appliances and Furniture, Inc. v. Hryniak*, 2014 SCC 8.

[60] In this case all four elements are met:

(a) Ms. Moscipan made false representations to Ms. Conlon and Dr. Liston that she was earning a salary from UBC based on 20% FTE while secretly and dishonestly causing UBC to pay her a salary based on 100% FTE. She also submitted a series of falsified time sheets and merit pay increases, which caused UBC to overpay her;

(b) Ms. Moscipan expressly admitted in her examination for discovery that she had failed to advise her supervisors about receiving pay for 100% FTE and also fraudulently using the electronic signatures of her superiors, without their

consent, to advance falsified timesheets and applications for merit-based pay increases;

(c) as a result of Ms. Moscipan's misrepresentations, UBC was induced to make the alleged overpayments; and

(d) UBC suffered a loss, as reflected in the Audit report.

[61] UBC also founds its claim under the doctrine of unjust enrichment arising from, in particular, money had and received and money paid to the defendants' use. In *Moore v. Sweet*, 2018 SCC 52 at para. 37, the Supreme Court of Canada set out the applicable analysis:

> [37] Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason (*Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.
>
> [38] This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*, at para. 32). As observed by McLachlin J. in *Peel* (at p. 788):
>
> > The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[62] In my view the test for unjust enrichment is met in this case. As a direct result of Ms. Moscipan's wage theft, Ms. Moscipan and subsequently the Estate was unjustly enriched and UBC suffered a corresponding deprivation. As there is no compelling evidence that Ms. Moscipan was working more than 20% FTE for UBC or

that her salary increases were not induced by fraud, I conclude that the enrichment and deprivation were without juristic reason.

[63] As a result of Ms. Moscipan's wage theft, Ms. Moscipan (and consequently the Estate after her death) was enriched by the amount of $594,680.26. It would therefore be unjust for the Estate to retain property derived from funds that were fraudulently obtained by Ms. Moscipan.

[64] The defendants argue that UBC was contributorily negligent in failing to detect Ms. Moscipan's activities earlier. However, in *VCHA (BCSC)*, Justice Marchand explained at para. 48 that contributory negligence is not a defence to the tort of civil fraud:

> [t]hough the physicians who authorized the cheques which were paid to the GPSF [Account] or Ms. Moscipan did not take the care they should have, particularly given that the money at issue was not theirs, contributory negligence is not a defence to either the tort of conversion or civil fraud [citations omitted].

[65] I conclude that the Estate must make restitution to UBC in the amount of $594,680.26 on account of Ms. Moscipan's fraud and wage theft.

Order

[66] On the UBC application, the following orders are granted:

1. The Second Summary Judgment Application is suitable for summary trial determination;

2. The Estate is required to make restitution to UBC in the amount of $56,436.95 arising from Ms. Moscipan's theft of funds from the GPSF Account;

3. Ms. Moscipan's transfer of title to the Tennyson Property in March 2011 is void as against UBC and UBC is entitled to execute any judgment pronounced in this action against Ms. Moscipan's interest in that property prior to the conveyance;

4. Mr. Moscipan is liable to UBC for knowing receipt of the proceeds of Ms. Moscipan's fraud, and is required to make restitution to UBC in the amount of $15,073.55; and

5. the Estate must make restitution to UBC in the amount of $594,680.26 on account of Ms. Moscipan's fraud and wage theft.

[67] The parties are granted leave to speak to the issue of costs and any ancillary orders that may be necessary for enforcement purposes.

"M. Taylor J."