Court of King's Bench of Alberta

Citation: ATB v Real Industries 333 Corp, 2023 ABKB 503

Date: 20230901
Docket: 2201 13941
Registry: Calgary

Between:

ATB Financial

Applicant

- and -

Real Industries 333 Corp, Real Enterprises 333 Corp, Hardik Patel also known as Ashwingh Patel, Sonika Patel, SGVP Gurukul Canada, Spot Ads Inc, John Doe, Mary Doe, ABC Corporation, the Toronto-Dominion Bank and the Royal Bank of Canada

Respondents

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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[1] This is an application for summary judgment based on unjust enrichment.

[2] In 2016, the Defendants Hardik and Sonika Patel opened a bank account with ATB Financial for their window covering business, Real Enterprises 333 Corporation (RE3C). RE3C is wholly owned by Real Industries 333 Corporation. Hardik Patel is the director of both of those companies and Sonika was a signing authority on the ATB RE3C bank account, along with Hardik.

[3] In November of 2022, Mr. Patel transferred approximately $77M CAD from his personal Bank of Montreal (BMO) account into the ATB RE3C account and then he and Ms. Patel

immediately dispersed those funds electronically into other (non-ATB) accounts, a number of which were held by the Patels personally.

[4] Those funds had ostensibly originated from a wire transfer from a party in India into Mr. Patel's BMO account. However, the wire transfer into Mr. Patel's BMO account had never happened. By the time this was discovered, the above transfers out of the RE3C account had been completed. In the result, ATB was left holding the bag for the roughly $77M paid out of the RE3C account.

[5] There is approximately $31M left, held in three different Toronto-Dominion (TD) bank accounts of Hardik and/or Sonika Patel, which accounts have been frozen by the TD bank. ATB is seeking partial summary judgment against the Patels and RE3C and a direction that the amounts in those TD accounts be repaid to ATB.

[6] ATB made this application under the legal doctrines of unjust enrichment and knowing receipt. ATB did not allege fraud on this application, presumably because that might make summary disposition more difficult. Respondents' counsel argued that ATB had to substantiate its fraud allegations in any event, in order to advance its arguments on unjust enrichment and knowing receipt. The Respondents say that summary judgment is not appropriate here, but also that ATB's arguments fail on their merits.

[7] The relief sought by ATB is granted, for the reasons set out below.

Background

[8] The facts are largely uncontroverted, although not uncomplicated.

[9] In August of 2022, a woman named Boskey Poladiya contacted RE3C on behalf of a company in India called Siddh Tirth Private Limited (Siddh). Mr. Poladiya was looking for a supplier of window blinds to sell to a commercial apartment developer. RE3C found Suresh TexFab Private Limited to provide the blinds and then entered into a contract with Siddh to provide approximately 152,000 sets of blinds for $35M CAD.

[10] On October 20 and 21, 2021, RE3C attempted to process two VISA transactions for $800,000 and $950,000 respectively. These were apparently payments from Mr. Poladiya to RE3C on behalf of Siddh. Both transactions were rejected by Moneris, the company which processes those credit card transaction. Mr. Patel was advised by his ATB banker, Mr. Kulak, that the amounts were too large to be processed by credit card and that he should instead be insisting on wire transfers for large amounts of money.

[11] As a result of the aborted VISA payments, the first contract between RE3C and Siddh was cancelled. They entered into a subsequent contract in November, 2022, under which Siddh agreed to purchase approximately 500,000 sets of blinds for $83M CAD. RE3C or the Patels were going to buy those blinds from Suresh for approximately $43M USD and thus realize a profit of about $25M CAD.

[12] On November 21, 2022, RE3C invoiced Siddh $83M CAD and Mr. Patel provided Siddh with his personal banking account information (the BMO account) and later, the RE3C corporate bank account information as well. On Saturday, November 26, 2022, Mr. Poladiya sent Mr. Patel a text message saying that the $83M CAD had been wire transferred into Mr. Patel's BMO account.

[13] As Mr. Poladiya was pushing for delivery of the blinds, the Patels arranged for Sonika Patel's father, Babu, who lived in India as well, to pay approximately $30M USD to Suresh so that the first shipment of blinds could be released.

[14] Once he received the text from Mr. Poladiya saying that the $83M had been wire transferred into his BMO account, Mr. Patel then transferred $77M CAD of that into the RE3C account, using mobile chequing (photos of the cheques). The Patels then immediately made hundreds of emails and other electronic transfers out of the RE3C account over the weekend of November 26-27, 2022. Some of those transfers went to other third parties but many ended up in accounts held by Sonika and Hardik Patel, including the $31M still in the TD accounts.

[15] On Monday, November 28, 2022, ATB received confirmation from BMO that the wire transfer from Siddh had never happened and that the cheques Hardik Patel had deposited into the RE3C account could not be honoured. ATB obtained the agreement of the TD bank to freeze the Patel's accounts and filed its Statement of Claim on November 30, 2022.

[16] RE3C has sued Siddh in India. Babu is out the $30M he advanced for his daughter and son-in-law. ATB, at least right now, is out the $77M that the Patels transferred from the RE3C account to various parties over the November 26-27 weekend. ATB wants the $31M sitting in the TD accounts to apply towards the $77M overdraft on the RE3C account. The Respondents contest ATB's entitlement to those funds.

The Test for Summary Judgment

[17] Unfortunately, neither party identified this initially as an application for summary judgment. The Notice of Application did not ask for summary judgment nor cite *Rule* 7.3 of the *Alberta Rules of Court*, under which that relief can be sought. The Respondents' Brief had an outline that mentioned the impropriety of summary judgment for the application but then never addressed that issue in the Brief.

[18] Even though no one had addressed in written submissions why this matter was or was not suitable for summary judgment, both counsel agreed this was intended to proceed as an application for summary judgment. The Respondents argued orally that summary judgment was not appropriate where allegations of fraud were being determined. ATB responded that it was seeking summary judgment based on unjust enrichment and knowing receipt and therefore I need not worry about dealing with a fraud case on summary disposition.

[19] *Rule* 7.3 allows a party to apply for summary judgment when "there is no defence to a claim or part of it" or when "there is no merit to a claim or part of it". The application of that test must be considered in light of *Hryniak v Mauldin*, 2014 SCC 7 (S.C.C.), where the Supreme Court of Canada recommended a culture shift in civil litigation allowing for the use of summary procedures where the judge is able to reach a fair and just determination on the merits on a motion with the material before the Court.

[20] In this case, the material before the Court included 5 Affidavits of Sarah MacDonald, the representative of ATB, the Affidavits of Sonika and Hardik Patel, the cross-examination transcript of Hardik Patel, the written Briefs of Law and the oral arguments presented in court.

[21] The Alberta test for summary judgment was settled by our Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*; 2019 ABCA 49. We first determine

whether or not it is possible to make a summary determination based on the record before the court and the nature of the disputes between the parties. The record before the court must allow me to make the necessary findings of fact and apply the law to those facts. If that can be done, proceeding by summary judgment must still be the more expeditious way, as opposed to trial, to achieve a just result; *Weir-Jones* at paras. 21, 25.

[22] The burden of proof remains on the moving party to demonstrate that there is no genuine issue requiring a trial. At paragraph 47 of *Weir-Jones*, the Court of Appeal sets out this series of considerations:

> (a) Is it possible to fairly resolve the dispute in a summary fashion based on the record available?
>
> (b) Has the moving party, here ATB, shown that there is no merit to the third party claims against him and thus no genuine issue for trial?
>
> (c) Have the non-moving parties, here the Respondents, shown that there are genuine issues for trial?
>
> (d) Am I satisfied that I ought to exercise my discretion to decide the matter in a summary fashion?

[23] A dispute on material facts, issues of credibility or the level of complexity of the case are all things that may render a matter inappropriate for determination by summary judgment; *Weir-Jones*, paras.35, 38.

[24] Our courts are certainly advised to be wary of deciding fraud cases on a summary basis. In *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378 at paragraphs 26-27, our Court of Appeal cautioned against summary determination of fraudulent conduct where credibility was a live issue. Even though this is not a prohibition, I need not explore that issue further as ATB is not pursuing this application based on its allegations of fraud. Rather, it is advancing arguments for liability based on unjust enrichment and knowing receipt, neither of which require a finding of fraudulent intent.

[25] The Respondents argue that this is really an application for a finding of fraud, disguised as a less incendiary claim of unjust enrichment or knowing receipt. Counsel for the Respondents referred me to the pleadings, most particularly to the Amended Amended Statement of Claim filed May 18, 2023, which defines the series of events set out above as the “Fraudulent Scheme”.

[26] There is no question that ATB has brought an action for fraud, as well as for conversion, unjust enrichment and knowing receipt. The same set of facts may give rise to different causes of action and thus different types of claims. This principle was discussed by our Supreme Court of Canada as follows:

> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. For example, the same act may be characterized as murder in one case and

> as civil fault in another. In *Essai sur l'autorité de la chose jugée en matière civile* (1975), Daniel Tomasin expressed this very clearly. At page 201, he wrote:
>
> It may be that under one or more provisions certain facts can be characterized differently. If the characterization chosen to attain a result has been rejected in one judgment, can a party then seek to attain the same result in reliance on a different characterization? Judging from article 1351 C.C., the answer must be in the affirmative as there is an absence [of identity] of cause between the two actions.
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> As a general rule, the same body of facts can thus give rise to as many causes of action as there are legal characterizations on which a proceeding can be based.
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> *Rocois Construction Inc v Québec Ready Mix Inc*, 1990 CarswellQue 105 (SCC) at paras.24-25

[27] There is no merger of different claims based on the same facts until judgment; *Michaud v Comeau*, 2020 NBCA 47 at para.24. In other words, if this $31M is ordered returned to ATB for application against RE3C's overdraft, ATB cannot recover that same amount again. Its overall claim, whether in fraud or another pleaded cause of action, will be for something closer to $46M.

[28] ATB using the word "fraudulent" to define a series of events does not commit it to that and only that cause of action. Those facts can be used to ground a claim for equitable relief without considering whether those same facts would constitute fraud.

[29] I am satisfied that the agreed upon facts do not engage issues of credibility and provide a sufficient record on which to adjudicate the claims of unjust enrichment and knowing receipt. It is irrelevant that this record might not be sufficient to adjudicate the alterative claims of fraud at this point. This dispute may be fairly resolved based on the available record.

Unjust Enrichment

[30] There was no dispute about the test for unjust enrichment. The following things must be established on a balance of probabilities to obtain relief under this doctrine:

1. An enrichment of the Respondents;
2. A corresponding deprivation of the Applicant; and
3. An absence of juristic reason for the enrichment.

Garland v Consumers' Gas Co, [2004] 1 SCR 629 at p.645.

[31] The Respondents maintain that none of these elements have been satisfied.

Enrichment

[32] ATB argues that the Respondents have been enriched by the series of events set out earlier. For the purposes of this application, it is Hardik and Sonika Patel who are said to be enriched because the $31M is sitting in their TD accounts. The Respondents say that RE3C might be enriched because it is the beneficiary of the $77M overdraft but that Hardik and Sonika Patel have not been enriched, at least not by ATB.

[33] It is here that the Respondents raise – for the first time but not for the last – their position that RE3C is the only proper defendant/respondent. The Respondents readily admit that RE3C

owes the amount claimed to ATB but deny that monies held by Sonika and Hardik can be applied to that debt. ATB's remedy, the Respondents argue, is a contractual claim against RE3C.

[34] However, the fact that ATB could pursue RE3C for a judgment debt based on Clause 5.1 of the Account Agreement does not obviate its ability to pursue equitable relief against other parties. Indeed, a lack of privity of contract is the most common basis for invoking equitable doctrines like unjust enrichment.

[35] *Moore v Sweet*, 2018 SCC 52, provides a ready analogy; the plaintiff there had an agreement with her ex-husband that she would pay the insurance premiums on the existing life insurance policy after they separated and in return, he would leave her as the beneficiary. But he did not. He let her keep paying the premiums and substituted his new partner as the designated beneficiary of the policy.

[36] Instead of suing her husband's estate in breach of contract, Ms. Moore pursued an unjust enrichment claim against the new domestic partner, a non-party to the agreement between her and her husband. She was not required to pursue him – even though he was the wrongdoer and Ms. Sweet was not – because Ms. Sweet was the enriched party.

[37] The Respondents insist that only RE3C was enriched at ATB's expense (in other words, that the Patels were not). The Patels may have been enriched but only at the expense of RE3C, not of ATB. It is a "repackaging" of the privity of contract argument above. Within the parameters of unjust enrichment, this does not assist the Patels because there is no requirement that the benefit be conveyed directly from the claimant to the respondent(s); *Moore v Sweet,* para.45.

[38] The Respondents also advanced an argument that they are not enriched because they still owe Sonika Patel's father, Babu, the roughly $30M he advanced to Suresh to secure delivery of the initial shipment of blinds. However, as ATB's counsel points out, an enrichment need not mean a permanent right to enjoy money received. The definition of "enrichment" is broader than that and encompasses any identifiable benefit – here, the ability to repay Babu with ATB's money and thus not have to come up with $30M themselves, whether through litigation against Siddh or otherwise.

[39] The *Garland* case expressly dismissed the idea that an assessment of enrichment involves any mathematical exercise about where a payment came from or how it was applied, presumably because that analysis is already captured in the third arm of the test. Justice Iacobucci, writing for a unanimous 7-person panel, agreed with the dissenting judgment of Borins JA in the *Garland* case, that "where there is payment of money, there is little controversy over whether or not a benefit was received"; pp.646-647.

[40] The enrichment is "morally netural"; *Peter v Beblow*, [1993] 1 SCR 980 at p.990. In other words, this is not the part of the test where we are overly concerned with how the Patels came to possess the $31M. They have it. Whether they should continue to have it requires the application of the remainder of the test for unjust enrichment test.

Corresponding deprivation

[41] Once it is established that a defendant or respondent has been enriched, the applicant must establish that he has suffered a corresponding deprivation. In *Moore v Sweet*, Justice Côté, writing for the majority, described it thus at para.43:

> In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also Peel (Regional Municipality), at pp. 789-90, and *Kleinwort Benson v. Birmingham Council* (1996), [1997] Q.B. 380 (Eng. C.A.), at pp. 393 and 400). Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (Pettkus, at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched at *the plaintiff's expense* (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at pp. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (*The Canadian Law of Unjust Enrichment and Restitution*, at p. 149).

[42] This deprivation is also morally neutral. Reasons for the deprivation are left to the last arm of the test. Further, the deprivation need not correspond empirically to the enrichment but need only be causally connected.

[43] Here, the Respondents argue that ATB has not suffered a deprivation because the overdraft on the RE3C account is authorized by the Account Agreement. They take issue with the description of this as an "unauthorized overdraft". However, that same agreement obligated RE3C to bring that overdraft current, which Mr. Patel admits (as the sole Director of RE3C) he has not done and cannot do.

[44] Here, Respondents' counsel again tried to argue that if ATB was deprived, it was deprived by RE3C, not by the Patels. This is just a different version of the privity of contract argument; that ATB's only recourse is against RE3C. That might be true in contract, but running the money briefly through a corporate account before depositing it into their own personal accounts does not change the nature of the enrichment nor of the deprivation. As already mentioned, there is no requirement, in unjust enrichment, that the benefit flow directly from one party to another. Rather, the "impoverished party looks to the one who profited"; *Moore v Sweet* at para.45.

Juristic Reason

[45] As is often the case, most of the parties' submissions centred around whether there was a juristic reason for the fact that the ATB is short $77M and the Patels are in possession of $31M generated from the ATB-supported overdraft. .

[46] This final arm of the test for unjust enrichment was summarized in *Moore v Sweet* at para.55:

> The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense — or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation. If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated in *Peter* (at p. 990), "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'."

[47] The proper approach to this part of the test is set out in *Garland*:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
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> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
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> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.
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> *Garland, supra* at p.651, paras.44-46.

Does the Account Agreement Provide a Juristic Reason?

[48] In the case at bar, counsel for the Respondents argued that the Account Agreement between RE3C and ATB dated November 9, 2022 is the contract providing the juristic reason for the enrichment because it contemplated the account being overdrawn. Below are the relevant clauses of the Account Agreement.

> Clause 2.16
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> ATB Financial may charge your Account, even if that creates or increases an overdraft, with any Cheque drawn by you, or any instrument, cheque or item cashed or negotiated by ATB Financial for you or credited or deposited to your Account for which payment is not received by ATB Financial or which is subsequently returned by reason of a forged or unauthorized or missing endorsement, or as being fraudulent or materially altered
>
> Clause 5.1:
>
> ATB Financial may provide you with overdraft protection for the Account to a maximum amount approved by ATB Financial ("Overdraft Limit"). ATB Financial may, in its sole discretion, and without prior notice to you, reduce or increase the Overdraft Limit. At any time and without prior notice, ATB Financial may reduce or terminate overdraft protection and refuse to honour any cheques or items that would overdraw or further overdraw the Account even if ATB Financial has previously permitted you to overdraw the Account. Should ATB Financial honour any cheque or item that would overdraw your Account beyond the approved Overdraft Limit, the balance may not remain in excess of the Overdraft Limit for more than thirty (30) calendar days.
>
> Overdraft interest, at a rate specified on the Rate and Fee Schedule, will be calculated (but not compounded) daily. ATB Financial may change the overdraft interest rate without prior notice to you. ATB Financial's determination of the overdraft interest rate at any time will be absolutely binding on you. All interest, upon becoming overdue, will be treated as principal and will bear compound interest at the overdraft interest rate.
>
> You agree to repay to ATB Financial the overdraft within sixty (60) calendar days of overdrawing the Account. Provided the overdraft, together with any interest and fees, has been repaid within the 60-calendar day period, you may again overdraw the Account. ATB Financial may demand payment at any time. Upon demand, you agree to pay the full amount overdrawn, together with interest owing and any applicable fees.

[49] In *Moore v Sweet*, Ms. Sweet relied on contract (the policy) and on legislation (statutory obligation) as the juristic reasons for her enrichment, both of which contemplated payment to Ms. Sweet of the policy's benefits.

[50] The *Insurance Act (Ontario)* said that the insurance company was legally obligated to pay the benefits to Ms. Sweet as the designated beneficiary. Thus, the argument went, Ms. Sweet's only recourse was against the contract-breaker, the ex-husband. Not so, said the Supreme Court of Canada. As Justice Côté said, the legislation explained why Ms. Sweet was enriched with the life insurance proceeds but it did not explain the corresponding deprivation.

[51] Similarly, the overdraft provisions of the Account Agreement might explain ATB's deprivation, but those provisions do not explain why the Patels are personally $30M richer. Failing to come within a recognized category of juristic reason, they must now explain that. In other words, we are at the "rebuttable presumption" stage of the test for unjust enrichment. *Garland* says that the Respondents may rebut the presumption of unjust enrichment by establishing that the parties reasonably expected what happened to happen and thus it cannot be said to have no lawful or juristic reason.

Do the Reasonable Expectations of the Parties Provide a Juristic Reason?

[52] Not coming within an enumerated category of juristic reasons, we must still consider whether the Respondents have a juristic reason rooted in the reasonable expectations of the parties or public policy; *Garland* at paras.45-46. Of these, only reasonable expectations were argued by counsel.

[53] The Respondents say their reasonable expectation was that the money had in fact been transferred into Mr. Patel's personal BMO account and from there, by Mr. Patel's cheque, into the RE3C account. The Respondents' expectation that the money had truly been deposited into Mr. Patel's BMO account and available for his use is based on the following:

(A) the text from Mr. Poladiya confirming that Siddh had sent the wire transfer;

(B) a family member confirming with Mr. Poladiya that the wire transfer had been sent;

(C) Mr. Patel's attempt to reach his ATB banker, Mr. Kulak, over the weekend; and

(D) Sonika and Hardik's ability to transfer money out of the ATB account elsewhere.

[54] They insist all their payments out from the RE3C account were made in good faith in reliance on the fact that no hold or stop payment kept them from doing so. The Respondents were quite adamant that ATB somehow bore the blame for failing to protect itself.

[55] ATB says that no reasonable person would expect, under these circumstances, that they actually had $83M to spend without undertaking some further inquiry. It says that the following red flags should have alerted the Patels to the suspicious nature of these transactions:

(A) This opportunity came out of nowhere for the Patels, apparently a cold call from Mr. Poladiya.

(B) While the sale was for window blinds, it was far beyond the scope of anything that RE3C had ever done before. RE3C had about $1M in annual gross revenue with its largest sale prior to this in the range of $120,000-$130,000. A call from an unknown person to broker a sale for $83M CAD with a profit of $25M for doing essentially nothing should have put the Patels on alert.

(C) The explanation given to them for their involvement was that the parties wanted to do the transaction in USD. Firstly, the BMO, ATB and TD accounts and transactions were all in CAD. Secondly, anyone can deal in any currency they want with the financial institutions in their own country. Involving a foreign actor through which to funnel this amount of money should also have alerted the Patels to a possible problem.

(D) For an $83M transaction, there is precious little documentation. The most obvious deficiency is the lack of any reliable confirmation that Siddh had sent $83M at all. The only evidence was a text from Mr. Poladiya himself, and his own assurances to the Patel family members in India that it had happened.

(E) Even though the payment was supposedly being made to RE3C by Siddh, it was deposited into Mr. Patel's personal account. One might have thought at least the payor of $83M would have been more careful to identify the proper account.

(F) The wire transfer was sent on a Friday when everyone would have known that the Patels could not confirm receipt with their bank. Although they might have been able to at least see the money in the BMO account with online banking, they did not have access to that information for reasons unknown to me. What I do is that they did not wait until they could verify the transfer – a call to a bank employee on a weekend is not due diligence in these circumstances.

(G) The Patels were warned by Mr. Kulak at ATB that the prior aborted VISA payments were suspicious.

(H) No explanation was given for why the Patels could not wait for confirmation of the wire transfer before they began transferring money, particularly to themselves.

(I) No explanation was given for why the Patels, if they were in such a hurry to spend millions of dollars, didn't direct some of that to Babu who (as was mentioned many times in argument) was a bona fide lender to them.

(J) No explanation was given for why, once they learned on Monday morning that there had been no wire transfer and so their own transfers out of the RE3C account were worthless, they did not return the money or agree to do so.

[56] I agree with ATB that, given these many red flags, it was not reasonable for the Patels to simply assume that the $83M was sitting in the BMO account and available for their use, without the need for further inquiry.

[57] As mentioned, the Respondents say that, notwithstanding these red flags, they relied on ATB's failure to place a hold on Mr. Patel's cheques to ground their assumption that everything was fine. Essentially, the Respondents are saying that another juristic reason for the enrichment of the Patels is ATB's failure to adequately protect itself from this kind of an event. They point to a number of mechanisms that could have been in place to limit immediate access to these funds which were not present. The Respondents maintain that the fact that ATB chose not to place limits on the Patels' access to funds in their corporate account makes it unfair to allow ATB to now pursue the Patels.

[58] That is an untenable argument. I note that a new Account Agreement was entered into only weeks before the transactions of November 26-27, 2022. I don't know why that agreement included no institutional protections of that kind. Whether that was a mistake or a customer benefit, the Patels can be taken to know that an NSF cheque that causes an overdraft situation must be rectified. Mr. Patel admitted as much on cross-examination. It is completely unreasonable to expect otherwise.

Constructive Trust

[59] The remedy for unjust enrichment can be the imposition of a constructive trust.

> Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.
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> *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para.43.

[60] A constructive trust is, in my view, the most appropriate and efficient remedy here as the funds transferred from the RE3C account are still available to rectify the deprivation. It is essentially the imposition of a constructive trust on the Patels which will compel them to apply those funds to the overdraft of the RE3C account. Accordingly, the funds in the TD accounts are impressed with a constructive trust in favour of ATB and directed to be paid to ATB immediately.

[61] The Respondents argued that ATB is not entitled to any equitable relief, including a constructive trust over these funds, because ATB did not come to court with clean hands. When pressed on exactly what ATB had done to dirty its hands, the Respondents pointed to the dispatch with which ATB filed its initial Statement of Claim. They also complained that the Amended Statement of Claim was not served on them for a few months after it was amended.

[62] However, the primary argument on this issue was the fact that ATB has alleged fraud in its pleadings, which counsel described as "aggressive", as well as "baseless" and "unfounded". It is true that no fraud has yet been proven but ATB has not yet been called upon to do so. We do not know, at this juncture, whether fraud will be made out. If it is not, there may very well be consequences for ATB but the act of making those allegations in a pleading cannot be characterized as resulting in "unclean hands" on the part of the claimant.

Knowing Receipt

[63] Knowing receipt is another equitable doctrine that allows a plaintiff to recover his property which has come into the possession of the defendant as a result of a breach of trust. Restitution based on a defendant's "knowing receipt" of trust property is related to, but separate from, the doctrine of unjust enrichment. It substitutes the following test:

> In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of the facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.
>
> *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805 at para.49

[64] Where, as here, the enrichment is of the recipient himself and not of an accessory, the knowledge of sufficient facts to put a reasonable person on inquiry can be constructive knowledge and need not be actual knowledge; *Citadel General* at para.48. While fraud underpins

a finding of knowing assistance, unjust enrichment underpins a finding of knowing receipt; *Gold v Rosenberg*, [1997] 3 SCR 767 at para.41.

[65] ATB says that the funds transferred out of the RE3C account were ATB's trust property. If the Patels knew or ought to have known that the money belonged to ATB, they are legally obligated to return it. That is true even if they learned of ATB's trust interest after innocently receiving the property, in which case they were obligated to return it at that point.

[66] ATB relies on the same circumstances discussed above (para.58) as evidence that RE3C knew or should have known that there was no money in the BMO account for RE3C to disperse from its own account. At my inquiry, counsel for ATB conceded that this requires something more, in terms of the Respondents' knowledge or wilful blindness, than is required for unjust enrichment.

[67] My concern with granting summary judgment on this ground is that it is not clear to me how the Patels should have known, from the outset, that this money was ATB's money and not RE3C's. If I proceed on the facts that were agreed to, I do not think ATB has proven on a balance of probabilities that RE3C received the transfer from BMO knowing it was ATB trust property.

[68] While I appreciate that there were many warning signs that should have alerted the Patels to the fact that the transfer *might not be* legitimate, that is still different than having proven any level of knowledge, even constructive, that it *was not* legitimate and therefore impressed with a trust. While the Patels were unable to prove reasonable reliance on external factors to spending the money before taking any steps to confirm the transfer (which was their burden to show), that is different than saying that ATB has proven a requisite level of knowledge for knowing receipt.

[69] Particularly in light of the success of the unjust enrichment argument on this application, I dismiss the application based on knowing receipt.

Conclusion

[70] ATB filed a Fourth Supplemental Affidavit with the total amount currently in the TD accounts. As I did not hear from Respondents' counsel on that, I will ask that the agreed-upon amount be inserted in the Order. If they cannot agree, they can notify my office. The same holds for their agreement on costs of this Application.

Heard on the 22nd day of August, 2023.
Dated at the City of Calgary, Alberta this 01st day of September, 2023.

M.H. Hollins
J.C.K.B.A.

Appearances:

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for the Applicant, ATB Financial

Ryan Henriques
for Real Enterprises 333 Corp, Hardik Patel and Sonika Patel