**CITATION:** Locking v. McCowan, 2015 ONSC 4435
**COURT FILE NO.:** CV-14-517117 CP
**DATE:** 20150819



**SUPERIOR COURT OF JUSTICE - ONTARIO**

RE: Daniel Locking / Plaintiff

AND:

Ronald McCowan, Allen W. Weinberg, Joseph Feldman, Marc Charlebois, Laura Philp, Holyrood Holdings Limited, Samuel N. Nash, Goldman Sloan Nash and Haber LLP, Graham Rawlinson and Torys LLP

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Paul Bates and John Archibald* for the Plaintiff

*Paul H. LeVay, Samuel M. Robinson and Carlo di Carlo* for defendant Ronald McCowan

*Eric R. Hoaken, Larissa C. Moscu* for defendant Allen W. Weinberg

*R. Paul Steep and Shane C. D'Souza* for defendants Joseph Feldman and Marc Charlebois

*J. Thomas Curry and Katie Pentney* for defendants Laura Philp and Holyrood Holdings

*William E. Pepall and Jason Squire* for defendants Samuel N. Nash and Goldman Sloan Nash and Haber LLP

HEARD: June 4, 2015

*Proceeding under the Class Proceedings Act, 1992*

## SECTION 5(1)(a) - CAUSE OF ACTION

[1] This is a proposed class action by unit-holders of Partners REIT, an unincorporated real estate investment trust whose units trade on the Toronto Stock

Exchange. The unit-holders claim they sustained losses when the REIT's unit price dropped because an improper property transaction had to be set aside.

[2] Three properties owned by Laura Philp and her company Holyrood Holdings were vended into the REIT ("the Transaction") at the behest of Ronald McCowan, who was the REIT's CEO at the time. Mr. McCowan failed to disclose that he had a close business and personal relationship with Ms. Philp and, according to the plaintiff, a *de facto* ownership interest in the properties. As soon as Mr. McCowan's conflict of interest was exposed, the Transaction was set aside. In the fall-out, the REIT's unit price dropped by more than 30 per cent. Hence this proposed class action.

**The action**

[3] The plaintiff has targeted eight defendants: Mr. McCowan, Ms. Philp and Holyrood Holdings, the latter party's legal counsel Samuel Nash and Goldman Sloan Nash and Haber LLP ("GSNH") and the REIT's trustees Allen Weinberg, Joseph Feldman and Marc Charlebois. The action against Torys LLP and lawyer Graham Rawlinson (who acted for the Trust when the Transaction was rescinded) was dismissed.

[4] The claims against the remaining defendants are breach of fiduciary duty, breach of trust, and knowing assistance in the commission of these breaches.

[5] I agreed to bifurcate the certification motion and first determine whether these are viable causes of action under s. 5(1)(a) of the *Class Proceedings Act*.[1] The cause of action test under s. 5(1)(a) of the CPA is the same as the test under Rule 21.01(1)(b) of the *Rules of Civil Procedure*. The question before me is whether it is plain and obvious and beyond doubt that the following claims have no chance of success:

(i) *Against McCowan*: breach of fiduciary duty and knowing assistance.

(ii) *Against Weinberg,*[2] *Feldman and Charlebois*: breach of fiduciary duty and breach of trust.

(iii) *Against Philp and Holyrood*: knowing assistance.

(iv) *Against Nash and GSNH*: knowing assistance.

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[1] Section 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

[2] Defendant Weinberg is not opposing the s. 5(1)(a) motion.

[6] The facts as set out in the pleadings are, of course, assumed to be true for the purposes of this motion. However, an allegation that a certain duty existed or was breached (whether a fiduciary duty or a breach of trust) is not an allegation of fact but of law and must be tested to determine if it discloses a reasonable cause of action.

[7] I will shortly consider each cause of action in turn and whether it applies on the facts as pleaded to the named defendant. Before doing so, however, I will describe the key provisions of the constating document that provides the backdrop and context for this motion.

**The DOT agreement**

[8] The REIT is governed by a board of trustees pursuant to the terms of the Declaration of Trust ("DOT"). The DOT sets out a detailed (75 page) description of the organization and operation of the REIT and the rights and responsibilities of the trustees and the unit-holders. Section 2.7 provides that the terms of the DOT are binding on all unit-holders of the REIT. By purchasing a unit or accepting a certificate of purchase the unit-holder is deemed to be bound by the DOT. This point is reinforced with specific language on each unit certificate.

[9] The DOT is essentially a contractual agreement between the trustees and the unit-holders. The key provisions of the DOT that pertain herein can be summarized as follows.

[10] The preamble provides, amongst other things, that the Trust was established to provide unit-holders "with an opportunity to participate directly or indirectly in a portfolio of income-producing real property investments" which the trustees hold in trust "for the benefit of the unitholders ... in accordance with and subject to the expressed provisions of this Declaration of Trust."

[11] Under section 2.1, the trustees agree to hold and administer the trust assets "for the benefit of the unit-holders on and subject to the terms and conditions of this [DOT]."

[12] Section 2.5(1) describes the nature of the Trust:

> The Trust is an unincorporated open-ended limited purpose investment trust. The Trust is not, will not be deemed to be and will not be treated as, a partnership, limited partnership, society, syndicate, association, joint venture, company, corporation or joint stock company, nor will the Trustees or any individual Trustee or the Unit-holders or Special Voting Unit-holders or any of them or any person be, or be deemed to be, treated in any way whatsoever as liable or responsible hereunder as partners, joint venturers or as that of principal and agent or as members of a

> society, syndicate, association, partnership or limited partnership or shareholders of a corporation or other joint stock company.

[13] Sections 2.5(2) and 2.6 and 3.1 make clear that unit-holders' rights are limited to the rights that are "expressly conferred ... by this Declaration of Trust" or "specifically set forth in this Declaration of Trust."

[14] Section 10.1 describes the powers of the trustees. Subject to the provisions in the DOT, the trustees have full and exclusive power, control and authority over the trust assets and over the affairs of the trust "to the same extent as if the Trustees were the sole and absolute legal and beneficial owners of the Trust Assets."

[15] The trustee's duties and standard of care, as set out in section 10.5, are intended to be "similar to and not any greater than those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)".[3] The applicable portion of section 10.5 provides as follows:

> The Trustees, in exercising the powers and authority conferred upon them hereunder, shall act honestly and in good faith with a view to the best interests of the Trust and shall exercise that degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A Trustee will not be liable in carrying out his or her duties under this Declaration of Trust except in cases where the Trustee fails to act honestly and in good faith with a view to the best interests of the Trust or to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario) ...

[16] Section 10.8 deals with limitations of liability and provides an almost complete immunity for actions taken by trustees or officers. The only time that the trustees or officers can be found liable "to the Trust or any Unit-holder" is if they breach the obligations set out in section 10.5 – that is, if they fail (i) to act honestly and in good faith with a view to the best interests of the Trust or (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

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[3] *Business Corporations Act*, R.S.O. 1990, c. B.16.

[17] Section 10.11 is directed at conflicts of interest and sets out a disclosure protocol for trustees or officers who are parties to or have a material interest in any contract or transaction involving the Trust. If a trustee or officer fails to make the required disclosure, then under section 10.11(7)

> [T]he Trustees or any Unit-holder, in addition to exercising any other rights or remedies in connection with such failure exercisable at law or in equity, may apply to a court for an order setting aside the contract or transaction and directing that the Trustee or officer account to the Trust for any profit or gain realized.

[18] Here, as already noted, the Transaction was set aside shortly after the deal was done and all monies paid were returned to the REIT. The plaintiff, nonetheless, seeks to certify a class action to recover damages sustained by unit-holders when the REIT's unit price dropped following the rescission of the Transaction.

**Core issue**

[19] The two-part issue is this: given the provisions in the DOT (which prescribe with some precision the rights and responsibilities of trustees, officers and unit-holders) can the unit-holders sue for the losses sustained herein, and if so, are the claims against the various defendants reasonable causes of action?

**Decision**

[20] For the reasons set out below, it is not plain and obvious and beyond doubt that, in principle, the unit-holders cannot bring this action. Given the language in some of the DOT provisions, there is at least room for argument. As for the causes of action, I conclude that the breach of fiduciary duty claims against McCowan, Weinberg, Feldman and Charlebois, and the knowing assistance claims against Philp/Holyrood and Nash/GSNH must be struck. The breach of trust claims against Weinberg, Feldman and Charlebois, and the knowing assistance claim against McCowan can proceed. Whether the latter claims will pass the "some basis in fact" test under s. 5(1)(c) of the CPA and result in the certification of the related common issues remains to be seen.

**Analysis**

**(1) Breach of fiduciary duty**

[21] The plaintiff pleads that former interim CEO McCowan and trustees Weinberg, Feldman and Charlebois breached a fiduciary duty that was owed to the unit-holders. It is clear that each of these defendants owed a fiduciary duty to the REIT itself, but it is equally clear – indeed it is plain and obvious – that none of these defendants owed a

fiduciary duty to the unit-holders. On the facts as pleaded, the breach of fiduciary duty claim is not a reasonable cause of action.

[22] I will deal first with former CEO McCowan and then trustees Weinberg, Feldman and Charlebois.

***Interim CEO McCowan***

[23] Mr. McCowan was the interim CEO and thus an officer of the REIT. Section 8.10 of the DOT provides that each officer's "powers and duties" will be determined from time to time by the trustees and, in the absence of such a determination (which was the case here), the officer's powers and duties "will be those usually applicable to the office held."

[24] It is well established in the corporate context that an officer's duties are owed "to the corporation, *and only* to the corporation".[4] In the context of a publicly traded income trust such as the REIT, an officer's duties are owed to the REIT itself (technically, to the trustees in their capacity as trustees of the REIT[5]). If Mr. McCowan owed duties exclusively to the REIT and no direct duties to the unit-holders, it follows that he owed no fiduciary duties to the unit-holders.

[25] I also agree that an essential element of fiduciary duty has not been pleaded, namely the existence of "a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."[6]

[26] Counsel for Messrs. McCowan, Weinberg, Feldman and Charlebois make a further submission: that even if a fiduciary duty was owed and breached, the rule in *Foss v. Harbottle*[7] bars both the plaintiff's claim and the recovery of so-called "reflective losses." As I explain later in these reasons, I am not particularly persuaded by the *Foss v. Harbottle* submissions, at least not in the context of a cause of action analysis. I am

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[4] *BCE Inc v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at para. 66 (emphasis added). See also *Peoples Department Stores v. Wise*, [2004] 3 S.C.R. 461 at para. 43: "At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders."

[5] *Waters' Law of Trusts in Canada*, 3rd ed. (2005) at 1203-1204.

[6] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 33.

[7] The submissions relating to the rule in *Foss v. Harbottle* (1843), 67 E.R. 189 are discussed below at para. 44 *et seq*.

content to rely on section 8.10 of the DOT and the analysis set out above and conclude on this basis alone that the breach of fiduciary duty claim as against McCowan is not a reasonable cause of action.

***Trustees Weinberg, Feldman and Charlebois***

[27] I also conclude that the breach of fiduciary duty claim as against trustees Weinberg, Feldman and Charlebois is not a reasonable cause of action on the facts as pleaded. I know that Mr. Weinberg is not opposing this motion under s. 5(1)(a) of the CPA but it is still the court's obligation to determine the viability of all of the claims being advanced against all of the defendants.

[28] Section 10.5 of the DOT, which deals with the duties of the trustees, provides that "the duties and standard of care of the Trustees provided as aforesaid are intended to be similar to, and not to be any greater than, those imposed on a director of a corporation governed by the *Business Corporations Act* (Ontario)." The case law under both the federal and provincial corporation statutes is clear, however, that the director of a corporation owes a fiduciary duty to the corporation only and not to its shareholders. As the Supreme Court noted in *BCE Inc. v. 1976 Debentureholders*:[8]

> [T]he directors owe a fiduciary duty to the corporation, and only to the corporation…[I]t is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.[9]

[29] The plaintiff's allegations that trustees Weinberg, Feldman and Charlebois owe a fiduciary duty to the unit-holders would impose a legal obligation that would be "greater than" the duties imposed on a director of an Ontario corporation and thus contrary to section 10.5 of the DOT. This is reason enough for my conclusion that it is plain and obvious that the unit-holders' breach of fiduciary duty claim against the three trustees is not a reasonable cause of action and is doomed to fail.

[30] The defendant trustees also argue (as did McCowan) that, separate and apart from the section 10.5 argument, the essential elements of fiduciary duty, as summarized by the Supreme Court in *Elder Advocates*,[10] have not been established and the breach of

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[8] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

[9] *Ibid* at para. 66.

[10] *Elder Advocates of Alberta Society v. Alberta*, [2011] 2 S.C.R. 261.

fiduciary duty claim has no chance of success. As already noted, I agree with these submissions, specifically:

(i) The DOT obligates the trustees to act in the best interests of the REIT. There is no similar obligation or undertaking by the trustees to act in the best interests of unit-holders.[11]

(ii) The trustees cannot owe duties to an unknown class of persons.[12] Here, instead of a "confined" duty to a "defined class of persons", the trustees would owe fiduciary duties to an unknown number of unit-holders in the secondary market for varying degrees of time.

(iii) The alleged fiduciary's power must affect the legal or substantial practical interests of the beneficiary.[13] The interest affected must be a specific private law interest to which the person has "a pre-existing distinct and complete legal entitlement."[14] The plaintiff has no pre-existing "legal entitlement" to the price of his units appreciating in the secondary market, stemming from the DOT or otherwise. In any event, the trustees gave no undertaking with respect to the unit's market price and, like corporate directors, have no control over the market price of units trading in the secondary market.

(iv) The trustees cannot owe fiduciary duties to both the REIT and to the unit-holders because such duties may conflict. The Court of Appeal has held that a fiduciary cannot be placed in a situation where a conflict may arise.[15]

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[11] *Elder, supra* note 10 at para. 30, citing with approval *Galambos v. Perez*, 2009 SCC 48 at para. 75: "What is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her." Also see *Elder* at para. 32: "The undertaking may be found in the relationship between the parties … or under an express agreement to act as a trustee of the beneficiary's interests."

[12] *Elder, supra* note 10 at paras. 33 and 36: "[F]iduciary duties do not exist at large; they are confined to specific relationships between particular parties" … the alleged fiduciary duty must be owed to "a defined person or class of persons". A fiduciary should not be exposed to duties (and liabilities) for an indeterminate time to an indeterminate class: *NPV Management Ltd. v. Anthony*, 2003 NLCA 41, leave to appeal ref'd, [2003] S.C.C.A. No. 436.

[13] *Elder, supra* note 10 at para. 34.

[14] *Elder, supra* note 10 at para. 51.

[15] *Rose v. Rose* (1914), 22 D.L.R. 572 (Ont. C.A). The case involved a trustee who acquired shares in a trust company thereby reducing the trust's shareholdings below a majority position in the trust company. The court ruled that the situation was one that created the possibility of conflict and therefore was untenable on the part of the fiduciary.

(v) The breach of fiduciary duty claim which involves misconduct in the nature of disloyalty or dishonesty[16] has no chance of success against Messrs. Feldman and Charlebois because there is no allegation that either of them breached any duties of loyalty or honesty, pursued their own self-interest, acted for an improper purpose or knowingly assisted the alleged misconduct of others.

[31] I therefore conclude that there is no basis for the plaintiff's breach of fiduciary claim against the defendant trustees. In my view, it is plain and obvious that the breach of fiduciary duty claim as pleaded against the trustees Weinberg, Feldman and Charlebois has no chance of success and should be struck.

**(2) Breach of trust**

[32] The breach of trust claim (in essence breach of the DOT agreement) is directed at the trustees Weinberg, Feldman and Charlebois. Mr. McCowan was not a trustee and is therefore not included in this claim.

[33] It is clear from section 10.5 of the DOT that even if the three trustees do not owe fiduciary duties to unit-holders, they are nonetheless obliged (i) to act honestly and in good faith with a view to the best interests of the Trust and (ii) to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[34] The breach of trust claim against Weinberg involves only the first prong (failing to act honestly and in good faith) and the breach of trust claim against Feldman and Charlebois involves only the second prong (negligence). As already noted, there is no allegation that Feldman and Charlebois failed to act honestly and in good faith.

[35] The breach of trust claim against Weinberg is supported by the following facts as pleaded: Weinberg knew of McCowan's material interest in the properties and his control over Holyrood; Weinberg knowingly breached his duties to the plaintiff and the other unit-holders by permitting the REIT to enter into the Transaction without the required disclosure and unit-holder approval under section 10.11 of the DOT; Weinberg did so in order to preserve the relationship between his law firm GSNH and long-time client McCowan and to garner future legal work; and in doing so, Weinberg failed to act honestly and in good faith with a view to the best interests of both the REIT and the class.

[36] The breach of trust claim against Feldman and Charlebois is that they breached section 10.5 of the DOT by failing to exercise reasonable diligence in preventing self-

[16] *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335 at para. 140.

dealing by McCowan without unit-holder approval and by failing to ensure that the REIT had appropriate internal controls in place that would have prevented McGowan from engineering and executing the Transaction.

[37] The dispute here is less about whether the trustees breached section 10.5 and more about the unit-holders' right to sue the trustees for the losses sustained. I can certainly understand the trustees' submission that on reading the DOT in its entirety, and in particular the limited rights of action accorded to unit-holders in the section 10.11 conflict of interest provision, that unit-holders probably do not have standing to bring an action for damages on the facts herein.[17] But my concern is whether it is plain and obvious and beyond doubt that such is the case here.

[38] The trustees' submissions are compelling but not determinative. It is true that sections 2.5(2), 2.6 and 3.1 of the DOT provide that unit-holders' rights are limited to the rights that are "expressly conferred ... by this Declaration of Trust" or "specifically set forth in this Declaration of Trust." But it is also true that the section 10.8(1) limitation of liability provision provides that officers and trustees "will be liable to the Trust *or any unit-holders*" if they breach either of the obligations set out in section 10.5 (i.e. by acting dishonestly or negligently). The clear suggestion is that a trustee may be liable to unit-holders for breach of section 10.5 – but how would this liability be determined unless unit-holders were allowed to bring suit? The point is at least arguable.

[39] The trustees also submit that section 10.5 of the DOT excludes unit-holders from the trustee's duty of care by expressly imposing duties on trustees to the Trust and not to unit-holders. It is settled law that a trust instrument may abridge a trustee's common law duties to a beneficiary, but "there is a limit beyond which the abridgement of trustee's duties cannot go."[18] It is therefore at least arguable that a trust instrument such as the DOT cannot eliminate a trustee's duties to a beneficiary wholly and completely without eliminating the trust itself.

[40] Both sides agree that the REIT is not a traditional trust, but it is a trust nonetheless and as set out in section 2.5(2) of the DOT, the relationship of the unit-holders to the Trustees "will be solely that of beneficiaries to the Trust..." It is therefore not plain and obvious that section 10.5 excludes unit-holders as objects of the duties owed by Feldman and Charlebois simply because the DOT does not expressly state that the Trustees owe

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[17] Only Feldman and Charlebois make this submission; Weinberg, as already noted, is not opposing the s. 5(1)(a) motion.

[18] *Lewin on Trusts*, 18th ed. (2008) at 1604-1605.

duties to the unit-holders. That unitholders have *some* rights must be presumed from the nature of the trust relationship as defined in s. 2(5)(2).

[41] Nor is it plain and obvious that the section 10.9 indemnification provision bars the breach of trust claims. It is true that section 10.9(2) denies indemnification only where the trustee fails to act honestly and in good faith and the claim against Feldman and Charlebois, as already noted, is negligence. But the mere fact that these trustees may end up being indemnified by the REIT if the plaintiff's action succeeds does not mean that the action itself is unreasonable and doomed to fail.

[42] Finally, Feldman and Charlebois submit that section 10.8(1) provides a complete defence to the plaintiff's claims because it exonerates the trustees from any liability relating to a good faith decision based on the advice of a qualified adviser, namely their legal counsel (Torys). Feldman and Charlebois may well have a defence to the plaintiff's claim for breach of trust based on the wording of section 10.8(1). But the fact that a defendant may have a good defence to a claim does not mean the plaintiff lacks a cause of action.[19]

[43] In sum, I am not persuaded that it is plain and obvious that a unit-holder on the facts herein is explicitly precluded by the terms and conditions of the DOT from bringing this action.

[44] For the sake of completeness, I should deal with the defendants' *Foss v. Harbottle*[20] submissions. The rule in *Foss v. Harbottle* provides that "individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action."[21]

[45] The plaintiff offers two reasons why it is at least arguable that the rule in *Foss v. Harbottle* does not apply on the facts herein. First, because the REIT is not a corporation - it is an unincorporated, open-ended, limited purpose investment trust.[22] And, secondly,

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[19] I also agree with the plaintiff that section 10.11(7), the conflict of interest provision, adds little to the cause of action analysis. There is no allegation of conflict of interest against any of the trustees.

[20] *Foss v Harbottle* (1843), 67 E.R. 189.

[21] *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 59.

[22] Section 2.5(1) of the DOT, as already noted, makes clear that "The Trust is not, will not be deemed to be and will not be treated as … a corporation …"

because the unit-holder class members are not suing to recover losses sustained by the REIT itself. They are suing to recover losses that they sustained *qua* unit-holders – losses that an unincorporated REIT would be unable to recover via an action for damages.[23]

[46] Nor is it plain and obvious that the losses in this case are "reflective losses" as described in the case law.[24] The plaintiff makes a compelling argument that the losses claimed herein are not about the diminution in the value of the REIT's assets. Rather, they are independent losses in unit value sustained by the class of unit-holders because of the dishonest or negligent actions of the trustees.

[47] In any event, says the plaintiff, the REIT is a relatively recent business structure.[25] Whether or to what extent the rule in *Foss v. Harbottle* and the related concept of reflective loss applies to unincorporated real estate investment trusts is a matter that raises novel and complex questions that are not fully settled and should not be determined on a motion to strike. The need for a fuller evidentiary record and more comprehensive analysis has been recognized in two related decisions of the Federal Court of Australia which declined to apply the rule in *Foss v. Harbottle* to investment trusts at a preliminary stage of an action.[26]

[48] The Australian court noted that while the rule is clearly established in the case of shareholders in a company it was not yet sufficiently established in the case of unit trusts and therefore constituted a triable issue.[27] The same point was made about the concept of reflective loss in the context of an investment trust. As Perram J. noted in *Mercedes Holdings (No. 3)*:

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[23] *Quadrangle Group LLC et al v. Attorney General of Canada*, 2015 ONSC 1521 (Comm. List) at para. 21; *Johnson v. Gore Wood & Co.*, [2001] 1 All E.R. 481 (H.L.) at 503.

[24] That is, losses that reflect diminution in the value of the company's or the trust's assets and that can be recovered in an action by the company or by the trustees. See *Johnson v. Gore Wood, supra* note 23, at 503.

[25] Developed in Canada in the 1990s primarily for tax-related purposes, the publicly-traded real estate investment trust continues to grow in importance, accounting for more than half of all IPOs and more than 100 listings on the TSX. But the scope and content of its governance structure is not yet fully settled. See Gillen, "A Comparison of Business Income Trust Governance and Corporate Governance: Is There a Need for Legislation or Further Regulation?" (2006) 51 McGill L.J. 327.

[26] *Mercedes Holdings Pty Limited v. Waters (No. 2)* [2010] F.C.A. 472 at paras. 108-111; *Mercedes Holdings Pty Ltd v. Waters (No. 3)*, [2011] F.C.A. 236 at paras. 37- 56.

[27] *Mercedes Holdings Pty Ltd v. Waters (No 3)*, [2011] F.C.A. 236 at paras. 55-56.

> There are sufficient significant distinguishing features between a trust and a corporation which make it impossible to say [in a preliminary motion] that a claim based on reflective loss must inevitably fail in the case of a trust. [28]

[49] I therefore conclude that it is not plain and obvious that the rule in *Foss v. Harbottle* applies to unincorporated investment trusts and that the breach of trust claims against the defendant trustees fail to disclose a reasonable cause of action. In my view, the breach of trust claims against Messrs. Weinberg, Feldman and Charlebois clear the s. 5(1)(a) hurdle. However, as already noted, it remains to be seen whether the breach of trust claims will satisfy the "some basis in fact"/common issues requirement in s. 5(1)(c) of the CPA.

**(3) Knowing assistance**

[50] The plaintiff says that the defendants McCowan, Philp/Holyrood and Nash/GSNH knowingly assisted the following parties to commit a breach of fiduciary duty or breach of trust:

- McCowan assisted Weinberg's breach of fiduciary duty and breach of trust;
- Philp/Holyrood assisted McCowan's breach of fiduciary duty and Weinberg's breach of trust;
- Nash/GSNH assisted McCowan's breach of fiduciary duty and Weinberg's breach of trust.

[51] I have already concluded that the breach of fiduciary duty claims against McCowan and Weinberg (and the other two trustees) are not reasonable causes of action. Therefore the knowing assistance claims that remain to be considered relate to McCowan, Philp/Holyrood and Nash/GSNH assisting Weinberg's breach of trust. That is, knowingly assisting Weinberg in his decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by the conflict of interest provision in the DOT.

[52] The three elements that must be established for a claim of knowing assistance to succeed are:

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[28] *Ibid* at para. 55.

(i) an act of fraud or dishonesty[29] on the part of the trustee;

(ii) the defendant has knowledge of the trustee's dishonest conduct; and

(iii) the defendant assists the trustee in perpetrating the dishonest conduct.[30]

[53] The "knowledge" component is particularly important. In *Citadel General Assurance*[31] the Supreme Court noted that the defendant to a knowing assistance claim needs to have either actual knowledge of the fraudulent or dishonest conduct by the trustee or be reckless or willfully blind to it.[32] In *Air Canada v. M & L Travel,*[33] the Court reaffirmed that "constructive knowledge" is not enough and actual knowledge, recklessness or willful blindness is required.[34]

[54] In *Gold v. Rosenberg*[35] the Supreme Court added this:

> As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust.[36]

[55] Therefore, if words are to have meaning, "knowing assistance" means more than simply standing by or acquiescing. Assistance or participation in a breach of trust requires, at the very least, that the defendant take a positive step *to help* or *to take part in* the trustee's breach of trust.

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[29] *Citadel General Assurance v Lloyd's Bank Canada*, [1997] S.C.J. No. 92 at para. 22. The case law typically uses the term "fraud" but it is clear that fraud includes dishonesty: see *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787 at paras. 42, 44 and 46. I will therefore use the word "dishonesty" because it fits more easily with the plaintiff's allegations herein.

[30] *Air Canada, supra* note 29 at para. 37.

[31] *Citadel General Assurance, supra* note 29.

[32] *Ibid*. at para. 22.

[33] *Air Canada*, s*upra* note 29.

[34] *Ibid* at para. 39.

[35] *Gold v. Rosenberg,* [1997] 3 S.C.R. 767.

[36] *Ibid*. at para. 32.

[56] Has the plaintiff sufficiently pleaded each of the three elements? He has certainly pleaded the first element – an act of dishonesty on the part of trustee Weinberg by causing the REIT to enter the impugned transaction without the required disclosure or unit-holder approval. The plaintiff has also sufficiently pleaded the second element – actual knowledge or willful blindness on the part of the defendants McCowan, Philp/Holyrood and Nash/GSNH.

[57] The problem arises with respect to the third element – that the defendant helped Weinberg perpetrate the breach of trust. The pleading must allege and provide some detail about how the defendants McCowan, Philp/Holyrood or Nash/GSNH assisted Weinberg in his decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by section 10.11 of the DOT.

[58] As I explain below, the knowing assistance claim against McCowan discloses a reasonable cause of action but the knowing assistance claims against Philp/Holyrood and Nash/GSNH must be struck.

***McCowan***

[59] The plaintiff pleads that Mr. McCowan "knowingly assisted Weinberg's breach of trust" and supports this with the following factual allegations: Weinberg and McCowan had a solicitor-client relationship on property deals pre-dating the Transaction; Weinberg was appointed to the REIT's board of trustees on McCowan's direction; McCowan "orchestrated" the Transaction for his own benefit; McCowan issued a statement to the media denying he had any interest in the Transaction; McCowan had unilateral power and discretion; McCowan knew that Weinberg would be in breach of trust if McCowan's material interest in the Transaction was not disclosed; and Weinberg was under the influence and control of McCowan.

[60] I recognize that Rule 25.06(8) requires full particulars when fraud or breach of trust is alleged. I am satisfied, however, that the pleading of knowing assistance against McCowan is sufficiently understandable to clear the low "cause of action" hurdle in s. 5(1)(a) of the CPA. On a fair and generous reading of the pleading, there is a reasonable prospect that a court could find that McCowan persuaded, signaled or otherwise influenced Weinberg in the latter's decision to allow the Transaction to proceed without the required disclosure and approval. Putting it differently, I am not persuaded that it is plain and obvious that the knowing assistance claim against McCowan is doomed to fail.

[61] If it is any consolation to Mr. McCowan, my finding that the "cause of action" hurdle has been cleared does not preclude an argument that there is no basis in fact for the certification of the "knowing assistance" common issue under s. 5(1)(c) of the CPA.

***Philp and Holyrood***

[62] The plaintiff pleads a close relationship between Philp/Holyrood and McCowan: that they were acting in concert; that Holyrood was created by Philp and McCowan for the very purpose of selling the properties to the REIT; that Philp knew about McCowan's economic interest in the Transaction and about his intention to assume control over the REIT without paying a premium for that control to unit-holders; that Philp knew about Weinberg's obligations as a trustee and McCowan's obligation to disclose his interest; and that Philp/Holyrood was under the control of McCowan.

[63] The plaintiff further pleads that Philp/Holyrood knowingly assisted Weinberg's breach of trust by suppressing the information about Philp's relationship with McCowan and McCowan's economic interest in the Transaction.

[64] In my view, the suppression of information, without more, by a third party that otherwise has no obligations to the REIT or its trustees does not satisfy the third element in the "knowing assistance" claim. The so-called suppression of information in these circumstances does not amount to active assistance or participation on the part of Philp/Holyrood in Weinberg's decision to allow the Transaction to proceed without the disclosure and unit-holder approval required by the conflict of interest provision in the DOT. And the plaintiff was unable to cite any authority to the contrary.

[65] I therefore have no difficulty concluding that it is plain and obvious that the allegation of knowing assistance as against the Philp/Holyrood fails to disclose a reasonable cause of action. The knowing assistance claim against Philp/Holyrood is struck.

***Nash and GSNH***

[66] The defendants Nash and GSNH represented Holyrood during the course of the Transaction. The plaintiff says that Nash and GSNH knowingly assisted Weinberg's breach of trust by providing legal services to Holyrood and by withholding information from the trustees and their legal counsel about McCowan's relationship with Philp/Holyrood, and his economic interest in the Transaction.

[67] It is important to note that the plaintiff has not pleaded that Nash/GSNH acted in concert with client Holyrood and that the two conspired in some fashion to help Weinberg perpetrate his alleged breach of trust. The only allegation is that Nash/GSNH provided legal services to Holyrood and withheld information about the alleged conflict of interest from the trustees and their legal counsel. In my view, neither of these actions are enough to satisfy the third element of the knowing assistance claim.

[68] A solicitor providing legal services to his property-vendor client (even if the client is knowingly assisting Weinberg's breach of trust) is not enough to ensnare the solicitor in a knowing assistance claim. The solicitor is not assisting a trustee in breaching a trust because the client (Holyrood) is not a trustee. The solicitor is simply providing legal services to his client. It is settled law that a solicitor owes no duty to the opposite party in a commercial transaction and certainly no duty to that party's shareholders or unit-holders.

[69] The consequence of allowing the knowing assistance claim against Nash/GSNH to proceed would not only put solicitors in an intractable conflict of interest, owing simultaneous duties to their own clients, the opposite party and the opposite party's shareholders or unit-holders, but would also result in pleading and discovery that would go to the core of the relationship of confidentiality and privilege that exists between the solicitor and his or her client.

[70] Nash/GSNH cannot be sued for allegedly suppressing information that they had no obligation or capacity to disclose. In my view, the law is clear that more than the existence of an agency relationship is required to implicate a solicitor in the alleged breach of trust of another.[37]

[71] The plaintiff also argues Rule 2.02(5) of the Rules of Professional Conduct which provides that "A lawyer shall not … knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct." However, as Nash/GSHL correctly point out, rules of professional conduct as promulgated by Canadian law societies do not impose civil liability or confer private rights of actions. The distinction between the regulation of professional conduct and the law of negligence was made clear by the Supreme Court in *Galambos*:[38]

> [T]here is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the

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[37] *Air Canada, supra* note 29 at para. 41. Also see Perell, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Adv. Q. 84 at 108: "A consequence of the knowledge requirement under the doctrine of knowing assistance is that employees, agents, solicitors and banks that act as agents for trustees and fiduciaries are not unduly exposed to liability for the misconduct of others who may have been assisted by their services."

[38] *Galambos v. Perez, supra* note 11.

> conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship [case reference omitted]. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence [case references omitted].[39]

[72] I therefore agree with Nash/GSNH that if the pleaded facts do not support a recognized civil cause of action, pleading or referring to the Rules of Professional Conduct and alleging a breach of the Rules will not cure the defect.

[73] For all of these reasons, the knowing assistance claim against Nash/GSNH is struck.

**Vicarious liability**

[74] The plaintiff argues that GSNH should be held vicariously liable for Weinberg's conduct because of the following: Weinberg was appointed a trustee of the REIT at McCowan's direction shortly after McCowan acquired an interest in the REIT for the purposes of the Transaction; in his capacity as a lawyer with GSNH, and with the law firm's knowledge, Weinberg provided advice to McCowan, Philp, and Holyrood in connection with the Transaction knowing that the Transaction violated the DOT and applicable TSX requirements.[40] These facts, says the plaintiff, are sufficient to ground a vicarious liability claim against GSNH arising from Weinberg's misconduct.

[75] I have concluded that a cause of action exists under s. 5(1)(a) against Weinberg for breach of trust. Vicarious liability is typically an "in the course of employment" inquiry and is largely fact-driven. Whether these is evidence (i.e. some basis in fact) justifying the certification of a vicarious liability issue involving GSNH is best left for the common issues analysis under s. 5(1)(c) of the CPA.

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[39] *Ibid* at para. 29.

[40] TSX Company Manual, Part VI, Changes in the Capital Structure of Listed Issuers. The plaintiff submits that the Transaction was in breach of TSX Rules 604 and 611 that require unit-holder approval in cases involving a change in control or where an insider (i.e. McCowan) receives more than 10 per cent of the REIT's issued units, as happened here. I have not discussed the impact of the TSX Rules because I was able to decide this motion on the basis of the applicable rules of civil procedure and common law principles.

**Disposition**

[76] The breach of fiduciary duty claims against McCowan, Weinberg, Feldman and Charlebois do not disclose a reasonable cause of action under s. 5(1)(a) of the CPA and are struck.

[77] The knowing assistance claims against Philp/Holyrood and Nash/GSNH are also struck and the motion for certification as against these defendants is dismissed.

[78] The breach of trust claims against Weinberg, Feldman and Charlebois and the knowing assistance claim against McCowan disclose reasonable causes of action and will be considered further at the certification motion that is currently scheduled for early October, 2015.

[79] Because success was divided on the claims against McCowan, Weinberg, Feldman and Charlebois,[41] no costs will be awarded vis-a-vis these defendants. However, Philp/Holyrood and Nash/GSNH are entitled to their costs on a partial indemnity basis. If these costs cannot be resolved, Philp/Holyrood and Nash/GSNH should forward brief written submissions within 14 days and the plaintiff within 14 days thereafter.

[80] I am grateful to all counsel for their assistance.

Belobaba J.

**Date:** August 19, 2015

[41] McCowan prevailed on the fiduciary duty claim but not on the knowing assistance claim; Weinberg, Feldman and Charlebois prevailed on the fiduciary duty claim but not on the breach of trust claim. Recall, as well, that Weinberg did not oppose this s. 5(1)(a) motion.