Court File No. CV-17-579357-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH and JASON COUCH

Plaintiffs

and

BDO CANADA LLP

Defendant

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE PLAINTIFFS

December 5, 2019

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TAB 1

2019 ONCA 525
Ontario Court of Appeal

SFC Litigation Trust v. Chan

2019 CarswellOnt 10809, 2019 ONCA 525, 147 O.R. (3d) 145, 307 A.C.W.S. (3d) 688, 71 C.B.R. (6th) 46

Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust (Plaintiff / Respondent) and Allen Tak Yuen Chan (Defendant / Appellant)

Alexandra Hoy A.C.J.O., David Brown, B. Zarnett JJ.A.

Heard: January 14-15, 2019
Judgment: June 24, 2019
Docket: CA C65247

Proceedings: affirming *Borrelli v. Chan* (2018), 58 C.B.R. (6th) 1, 2018 ONSC 1429, 2018 CarswellOnt 4302, Penny J. (Ont. S.C.J.)

Counsel: Robert Rueter, Sara J. Erskine, Malik Martin, for Appellant
Robert W. Staley, Jonathan G. Bell, William A. Bortolin, Jason M. Berall, Preet Bell, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence; Insolvency; Torts

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Forestry company used subsidiaries in British Virgin Islands ("BVI") to acquire timber in manner that circumvented Chinese ownership laws by having subsidiaries acquire rights to standing timber through suppliers and sell them to authorized intermediaries, who were required to pay suppliers so that no cash flowed through forestry company — After Chinese law permitted foreign investment in Chinese trading companies, forestry company, through subsidiaries which were wholly foreign owned enterprises ("WFOE"), ostensibly planted and purchased plantations — Forestry company engaged in wood log trading model under which subsidiary would purchase log from supplier outside China using letter of credit guaranteed by forestry company, resell logs to customer and receiving 70 per cent of payment in cash with remainder as account receivable directed to BVI standing timber suppliers, creating cash gap in that more was paid to purchase logs than was received for them — After Ontario Securities Commission ordered cease trade, number of class actions were commenced against forestry company and its directors, auditors, underwriters and consultants, and forestry company defaulted on notes and began restructuring

process under Companies' Creditors Arrangement Act — Sale process under Act failed and monitor had difficulty recovering receivables owing to forestry company, and could not verify that claimed timber holdings related to BVI model existed — Litigation trustee of forestry company brought action against CEO for damages for fraud and negligence — Trial judge allowed claim finding that CEO engaged in fraud through use of BVI and WFOE standing timber models, wood log trading cash gap and making large deposits for purchase of logs, which exceeded their value, and that he breached his fiduciary duty by causing forestry company to acquire majority interest in another company without disclosing his interest, and he awarded damages of — CEO appealed — Appeal dismissed — Plan allowed litigation trustee to advance claims made in action against CEO notwithstanding claims by noteholders and shareholders in class actions — Plan transferred to litigation trustee causes of action of forestry company against any and all third parties, which included CEO, and forestry company did not make claims in class actions asserting its causes of action or seeking damages it suffered — Distinction between company's cause of action and separate cause of action of stakeholders did not cease to exist when company became insolvent — Intercompany claims were not assigned to litigation trustee, but none of claims for which CEO was found liable were intercompany claims — Transfer of forestry company's assets to holding company and transfer of its claims against CEO for fraud and breach of fiduciary duty to litigation trust were not inconsistent.

Remedies --- Damages — Miscellaneous

Forestry company used subsidiaries in British Virgin Islands ("BVI") to acquire timber in manner that circumvented Chinese ownership laws by having subsidiaries acquire rights to standing timber through suppliers and sell them to authorized intermediaries, who were required to pay suppliers so that no cash flowed through forestry company — After Chinese law permitted foreign investment in Chinese trading companies, forestry company, through subsidiaries which were wholly foreign owned enterprises, ostensibly planted and purchased plantations — Forestry company engaged in wood log trading model under which subsidiary would purchase log from supplier outside China using letter of credit guaranteed by forestry company, resell logs to customer and receiving 70 per cent of payment in cash with remainder as account receivable directed to BVI standing timber suppliers, creating cash gap in that more was paid to purchase logs than was received for them — After Ontario Securities Commission ordered cease trade, number of class actions were commenced against forestry company and its directors, auditors, underwriters and consultants, and forestry company defaulted on notes and began restructuring process under Companies' Creditors Arrangement Act — Sale process under Act failed and monitor had difficulty recovering receivables owing to forestry company, and could not verify that claimed timber holdings related to BVI model existed — Litigation trustee of forestry company brought action against CEO for damages for fraud and negligence — Trial judge allowed claim finding that CEO engaged in fraud and breached his fiduciary duty, resulting in losses to forestry company, and he awarded damages of $2.627 billion and punitive damages of $5 million — CEO appealed — Appeal dismissed — Trial judge's factual findings appropriately underpinned his conclusion that chain of events, which resulted in loss of funds forestry company had raised, were caused by CEO's fraud and breach of

fiduciary duty — Trial judge applied appropriate legal principles to his causation analysis — Trial judge did not ignore fact that not all of businesses were fictitious and his approach credited value actually existing in subsidiaries — Since loss arising from fraud or breach of duty was established, it was CEO who bore onus of showing forestry company would have suffered same loss absent his wrongdoing, and trial judge was not required to give effect to unproven alternative causes — Trial judge did not err in considering loss of funds raised by forestry company to have been loss suffered by it as in raising money on capital markets, forestry company incurred obligations to shareholders and noteholders by doing so, and then lost money raised, all as result of CEO's conduct — Plan's release of forestry company from its obligations to creditors and equity holders did not result in windfall gain — Rules against double recovery did not apply as litigation trust had not already recovered 100 per cent of its losses — There was no basis to interfere with trial judge's assessment of damages.

APPEAL by defendant from judgment reported at *Borrelli v. Chan* (2018), 2018 ONSC 1429, 2018 CarswellOnt 4302, 58 C.B.R. (6th) 1 (Ont. S.C.J.), finding him liable for damages for fraud and negligence.

***B. Zarnett J.A.*:**

I. Introduction

1 The appellant, Allen Tak Yuen Chan, was the co-founder, chief executive officer and chairman of the Board of Directors of Sino-Forest Corporation ("SFC"), a corporation which had its head office in Ontario and whose shares traded on the Toronto Stock Exchange.

2 SFC's subsidiaries carried on an integrated forest plantation and products business with assets located predominately in the People's Republic of China ("PRC").

3 Between 2003 and the second quarter of 2011, SFC's consolidated financial statements reported rapid growth, including in assets and revenues. A significant portion of the reported assets in the second quarter of 2011 — some $2.99[1] billion — was "BVI standing timber", that, is standing timber held under what was known as the "BVI model". Sales of BVI standing timber accounted for $1.3 billion of SFC's reported consolidated revenue in 2010, and over 90% of its reported consolidated income.

4 Representing BVI standing timber as an asset with significant value on the SFC financial statements enabled SFC to raise money in the debt and equity markets - approximately $3 billion up to 2010.

5 In June 2011, a report was issued by a short seller's research company (the Muddy Waters Report) which was, to say the least, highly critical of SFC. It alleged, among other things, that SFC did not hold anything close to the full amount of the timber assets reported on its financial

statements and that it greatly overstated its revenues. SFC formed an Independent Committee to investigate. It was unable to rebut the allegations or confirm ownership of the BVI standing timber. SFC could not issue further financial statements and advised the public, following discussions with its external auditors, that prior years' financial statements should not be relied upon. The Ontario Securities Commission ("OSC") ordered that trading in SFC securities cease. SFC defaulted on its debt obligations. A number of class actions were commenced against SFC and its directors, auditors, underwriters and consultants.

6 On March 30, 2012, SFC obtained insolvency protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 *("CCAA")*. On December 10, 2012, the Superior Court sanctioned SFC's CCAA Plan of Compromise and Reorganization (the "Plan"). Under the Plan, SFC's interests in its subsidiaries were transferred to holding companies owned by SFC's creditors and its causes of action were transferred to the SFC Litigation Trust (the "Litigation Trust") constituted for the benefit of its creditors. In exchange, SFC's creditors released their claims for repayment of debts owed to them by the company.

7 In 2014, the respondent, as trustee of the Litigation Trust, commenced this action alleging that the appellant had committed fraud against, and breached his fiduciary duty to, SFC.

8 After a 48-day trial, the trial judge found that the appellant had directed a "massive fraud" in breach of his fiduciary duties to SFC, causing SFC to misrepresent its assets and their value. This enabled SFC to raise significant funds in the capital markets. SFC would not have undertaken obligations of this magnitude to lenders or shareholders, or entrusted the funds raised to the appellant and his management team, but for the appellant's fraud. The trial judge found that the appellant's conduct caused a loss to SFC. The funds raised were either directed by the appellant into fictitious or over-valued lines of business which dealt with third parties secretly related to and entities secretly controlled by the appellant, or were largely consumed by the necessity of dealing with the consequences of the discovery of the appellant's fraud and the collapse of SFC that followed. The trial judge awarded damages equal to what he found to be SFC's loss - $2,627,478.00 - as well as punitive damages of $5 million Canadian.

9 The appellant asks us to reverse the trial judgment, making the following principal arguments:

a) The respondent is only entitled to advance claims that were transferred to the Litigation Trust under the Plan. Properly interpreted, the Plan did not transfer the claims advanced in this action to the Litigation Trust.

b) The trial judge's award of damages is flawed because he did not conduct a proper causation analysis and awarded compensation for losses not of SFC, but of its stakeholders (its noteholders and shareholders). In doing so he improperly exposed the appellant to duplicate claims and created risks of double recovery.

c) The respondent's claim ought to have been rejected under the doctrine of election. When SFC transferred the assets, contracts and businesses of its subsidiaries as contemplated by the Plan (by transferring its subsidiaries' shares), there was an election to treat them as valid. Yet the respondent's claim is premised on those same assets, contracts and businesses being fraudulent and invalid.

d) The trial judge made various errors in his acceptance of evidence, including evidence based on documents that had not been translated into English and on opinions from a non-expert, which make his factual conclusions unsafe to rely upon.

10 For the reasons which follow I would dismiss the appeal. As I explain below:

a) The trial judge did not err in his conclusion that the claims advanced in the action were causes of action that had been held by SFC, had been transferred to the Litigation Trust by SFC under the Plan, and could be pursued by the respondent against the appellant.

b) The trial judge did not err in his causation analysis or assessment of damages. His determinations in that regard were not the product of legal errors and there is no basis to interfere with his factual determinations, which are subject to deference from this court.

c) There is no merit to the argument that the transfer of the shares of SFC's subsidiaries pursuant to the Plan was an election that barred the respondent from suing for damages arising from the appellant's conduct.

d) The complaints of the appellant about the trial judge's approach to certain evidence do not justify any interference with the judgment the trial judge reached. The trial judge assiduously reviewed the evidence given in a lengthy trial and his factual conclusions were supported by the record.

II. The Facts and the Trial Judge's Award

11 In addition to the facts outlined above, the following facts are important to appreciation of the issues on the appeal. I set them out based on the trial judge's findings, since on the first three issues that the appellant raises, he contends the trial judgment cannot stand even on those findings. I then deal separately, as the parties did, with the appellant's complaints about the trial judge's fact-finding.

(1) The Appellant's Role and the Nature of the Wrongdoing

12 The trial judge found that the appellant had ultimate control over nearly all aspects of SFC's and its subsidiaries' operations, directly and through a small group of individuals he directed on his management team (the trial judge referred to them collectively as "Inside Management").

13 The trial judge identified four different, but related, frauds for which the appellant was responsible and one other transaction in which there was a breach by the appellant of his fiduciary duties. I summarize these below.

(a) The BVI Model Fraud

14 The most significant fraud found by the trial judge had to do with the reporting, on SFC's consolidated financial statements, of assets held and revenue and income generated under the BVI model.

15 The BVI model involved SFC subsidiaries incorporated in the British Virgin Islands ("BVIs"). It was designed in light of restrictions at one time imposed by the PRC under which foreign entities were not permitted to have PRC bank accounts, operate or sell timber plantations, or own land use rights in the PRC.

16 To circumvent these restrictions, the BVI Model contemplated that SFC's BVI subsidiaries would acquire standing timber from third parties known as "Suppliers", who in turn would acquire it from others, typically rural or business collectives. The BVIs would sell standing timber indirectly, through authorized intermediaries ("AIs") that acted as their customers. The BVIs would not pay the Suppliers or receive payment from the AIs. Instead, the AIs and Suppliers would be directed to set off payments so that payment from an AI for the sale of standing timber rights would be rolled forward into the purchase of new BVI standing timber rights from a Supplier. Consequently, no cash would flow through the BVIs' or SFC's bank accounts in connection with the BVI standing timber and money associated with the BVI standing timber would be locked up in the PRC to be rolled forward into further BVI standing timber purchases.

17 Under the BVI model, the BVIs would not acquire actual land use rights in the PRC. Instead, they ostensibly would acquire a contractual right to the standing timber itself.

18 As noted above, significant valuable assets were reported by SFC as held, and revenue and profit-generating activity was reported as occurring, under the BVI Model. By the second quarter of 2011, SFC's consolidated financial statements showed BVI standing timber assets valued at $2.99 billion. Trading under that model was the biggest contributor to the revenues and profits shown on the statements.

19 After the Muddy Waters Report, the Independent Committee was, however, unable to locate key documents to confirm valid title to the BVI standing timber or to even determine its location. Collections of accounts receivable from AI's, which had been represented to take place with 100% success, dropped to close to 0%. Consultants retained by SFC's creditors were also unable to locate or verify the BVI standing timber assets. When the Monitor for SFC appointed under the *CCAA* made unannounced site visits to Suppliers and AIs at their registered addresses, it found, with only

one exception, little to no evidence of any operations. Those entities were later established to have undisclosed connections to the appellant and his management team.

20 The inability to locate or verify the BVI standing timber assets continued after the Plan was sanctioned by the Superior Court. Under the Plan, the rights to any such assets were transferred to entities owned by former SFC creditors; they were subsequently sold to a third party purchaser, New Plantations. The transferees had strong economic motivations to locate the standing timber assets. None of the transferees could do so.

21 The trial judge considered, among other things, expert and other evidence about the type of documents that would be required to validly show title to the reported BVI standing timber assets and evidence of the efforts taken to locate and establish ownership or valid title to the standing timber assets that had been represented on the SFC consolidated financial statements as having a value of $2.99 billion. He found that:

> a) Proper documentation to establish valid title to the assets did not exist. For example, maps, essential to establish the locations of the alleged standing timber assets, were produced by the appellant and his management team for only 1% of the claimed assets.
>
> b) Despite efforts by persons with significant motivation to locate those assets so they could be monetized, they had not been located even up to the time of trial in 2017.

22 The trial judge concluded that the BVI standing timber model was a fraud perpetrated by the appellant, that the assets reported simply did not exist, and that the transactions reported as resulting in revenue and income were paper transactions without substance. He stated:

> [551] The former assets of [SFC] have now been in the hands of New Plantations for more than a year. Even with Mr. Chan's assistance, New Plantations has not produced any evidence that it has been able to find, prove title to or monetize any purported interest in the BVI standing timber assets. It has not paid anything to EPHL [the former-creditor-owned company] under the RAPA arising out of the sale of any BVI assets. The best [the appellant] can offer in this regard is revealed in the evidence of Alvin Lim, who testified that New Plantations is "still in the process of investigation."
>
> [552] Six years have passed since the Muddy Waters Report was released and nobody, despite enormous financial incentives to do so, (incentives motivating [SFC], the bondholders, the purchaser Emerald [the former-creditor-owned company], the purchaser New Plantations and [the appellant] himself), has been able to locate, confirm ownership of, or monetize the BVI assets. When considered in the context of all the evidence, the inescapable conclusion is that [SFC] did not own the BVI assets that it claimed to own.

> [553] All of the evidence considered as a whole, leads to the inescapable conclusion that the BVI standing timber model was a fraud. The logical and reasonable inferences to be drawn from the totality of the evidence, based on a preponderance of probabilities, are that:
>
> > i) the defendant and others inside and outside [SFC] management operated an elaborate system of nominee companies ultimately controlled by [the appellant] or persons acting under his direction;
> >
> > ii) many of these nominees companies were major Suppliers of BVI standing timber;
> >
> > iii) the Suppliers and AIs were not *bona fide* arm's length sellers and purchasers of BVI standing timber;
> >
> > iv) the BVI standing timber transactions were paper transactions. [SFC] employees under the direction of [the appellant] and his cadre of Inside Management created the contracts, the supporting documents and the so-called evidence of directed payments made between the AIs and Suppliers. No consideration in fact passed between these entities;
> >
> > v) [SFC] subsidiaries did not hold title to BVI standing timber plantations;
> >
> > vi) the value of [SFC's] BVI standing timber, represented at $2.99 billion in 2011, did not exist. Because [SFC] did not own these assets, this value was nil; and
> >
> > vii) the defendant and members of Inside Management exploited weaknesses and ambiguities in the PRC forestry regulatory regime to perpetrate this fraud and to conceal it from scrutiny by [SFC], external auditors, other professional advisors, independent members of the Board and the public.

(b) The WFOE Standing Timber Fraud

23 A second fraud found by the trial judge arose within a method of doing business referred to as the WFOE standing timber model. That model was used because in 2004 the PRC gave permission for foreign investors to invest in PRC-incorporated trading companies, known as wholly foreign owned enterprises ("WFOEs"), which could acquire actual plantation land use rights, harvest timber, sell logs and standing timber directly to end users, and open PRC bank accounts. WFOEs were also permitted to plant standing timber plantations due to their land use rights.

24 Assets were acquired and activities undertaken by SFC subsidiaries which were WFOEs. These included planting forests and holding them until harvest ("planted plantations") and, in addition, ostensibly acquiring and trading in existing standing timber ("purchased plantations").

25 The trial judge found that the hallmarks of the BVI standing timber fraud were present in the purchased plantations aspect of the WFOE standing timber model. Many of the WFOE purchased plantation transactions were conducted through Suppliers controlled by the appellant and his management team. Plantation rights certificates were lacking for most of the purchased plantations. The trial judge concluded that "like the BVI standing timber, the majority of the WFOE purchased plantations were never actually owned by [SFC] and had no value": at para. 562.

(c) The Wood Log Trading Cash Gap Fraud

26 The third fraud found by the trial judge was in wood log trading activities. From 2005 to 2010, revenue from wood log trading ranged from 15% to 25% of SFC's total consolidated revenues, and a smaller percentage of SFC's consolidated profits. Under SFC's wood log trading model, an SFC BVI subsidiary would purchase logs from a Supplier outside of the PRC and pay for the logs using a letter of credit guaranteed by SFC. It would then resell the logs to a customer. However, typically only about 70% of the wood log sales accounts receivable were paid in cash by the customer. The remaining 30% was directed to BVI standing timber Suppliers, which had the effect of diverting "new" money into the BVI standing timber model.

27 The diversion of 30% of the wood-log-trading receivables to BVI standing timber Suppliers, for assets the trial judge determined did not really exist, created a "cash gap" - $239.8 million more was paid out to purchase wood logs than was received on their sale. And, after the Muddy Waters Report, substantial amounts of accounts receivable associated with the wood log trading business were not paid - the customers vanished. Many of SFC's wood log customers were found not to have been at arm's-length from the appellant.

28 The trial judge found "the preponderance of probabilities, having regard to all of the evidence, is that the wood log cash gap was a fraud orchestrated by [the appellant] with the assistance of [his management team] at [the appellant's] direction": at para. 633.

(d) The Wood Log Deposit Fraud

29 The fourth fraud found by the trial judge arose from the practice of placing deposits for the purchase of the logs. The appellant caused SFC subsidiaries to enter into wood log trading agreements requiring payment of substantial unsecured "deposits" and "advance payments" for the purchase of logs, which exceeded the value of any logs actually delivered. After the Muddy Waters Report, log deliveries ceased and, with one exception, none of the deposits or advance payments were repaid, resulting in a loss of $167.4 million. The appellant's relationship with many of the wood log suppliers was not at arm's-length.

30 The trial judge found the preponderance of evidence established that the wood log deposit transactions were a fraudulent mechanism for diversion of funds out of SFC to entities controlled by the appellant or acting under his direction.

(e) The Greenheart Transaction

31 The further transaction in which the trial judge found a breach of fiduciary duty by the appellant was referred to as the Greenheart Transaction. Between July 2007 and July 2010, the appellant caused SFC to acquire a majority interest in Greenheart Resources Holdings Limited and its majority shareholder, Greenheart Group Limited (collectively, "Greenheart"), by purchasing shares from shareholders of Greenheart, including several in which the appellant had undisclosed interests. At the time of the acquisitions, the appellant knew but did not disclose that Greenheart was in serious financial difficulties. SFC ultimately invested $202.2 million, which was more than the amount realized when the Greenheart interest was later sold.

32 The trial judge found that the appellant had committed a clear violation of his fiduciary duties through his nondisclosure. In addition to causing a loss to SFC, he made an undisclosed personal profit of approximately $38 million on the transaction.

(2) The Collapse of SFC, The Fate of the Funds Raised, The CCAA Process and Realizations on Assets

33 The events following the Muddy Waters Report and the inability of SFC to rebut its allegations had a profound impact on the company.

34 In August 2011, the OSC issued a cease-trading order over SFC's securities, alleging that SFC had engaged in significant non-arm's-length transactions, its assets and revenues had been exaggerated, and that the appellant and others appeared to be involved in the fraud.

35 SFC became unable to issue further financial statements. In December 2011, it advised it could give no assurance it would ever be able to do so. In January 2012, SFC issued a press release which stated that its "historic financial statements and related audit reports should not be relied upon".

36 By early 2012 SFC, the appellant, and others had been named in at least four class actions alleging that SFC's financial statements were materially false and misleading and claiming, on behalf of classes of debt and equity holders, damages for amounts that they overpaid when they purchased securities in reliance on the false financial statements, among other relief.

37 SFC defaulted on its debt obligations. In March of 2012, it entered into a Restructuring Support Agreement with its noteholders, who held first priority security interests over the shares of SFC's subsidiaries, which contemplated the transfer of SFC's business to those noteholders unless

a sales process revealed that the value of SFC's assets exceeded its debt. The sales process revealed that potential purchasers were only willing to pay a fraction of the quantum of the debt for the company's assets. Consequently, the sales process terminated in June 2012.

38 SFC filed for insolvency protection under the *CCAA* on March 30, 2012, and the Superior Court sanctioned its Plan on December 10, 2012. Under the Plan, SFC's assets were transferred to creditor-controlled entities and SFC's causes of action were transferred to the Litigation Trust. The Plan provided for releases of SFC and specified others. The precise terms of the Plan bearing on the issues in this appeal are more fully described in the Analysis section below.

39 The trial judge found that by the time the fraud was uncovered and "the dust settled", more than half of the almost $3 billion that had been raised by SFC on the capital markets was gone. He also found that what was left in cash by June of 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its investigation (including dealing with ongoing concealment by the appellant and his management team). He found that, to the extent that the funds raised on the capital markets had actually been invested in assets, the value of those assets was represented by the amounts realized on their sales, effected under and after implementation of the Plan.

40 Under the Plan, effective January 30, 2013, all of SFC's assets, including its interests in wholly-owned subsidiaries, were transferred to Emerald Plantation Holdings Limited ("EPHL") and then by EPHL to Emerald Plantation Group Limited ("EPGL"), a wholly-owned subsidiary of EPHL. These entities were formed for the purpose of holding SFC's assets and realizing on them to achieve recoveries for SFC's creditors, who became EPHL's shareholders.

41 Commencing in October 2014, EPGL caused the sale of the Greenheart business and then of miscellaneous assets to third parties. In 2016, EPGL caused the sale of the remaining assets to New Plantations, a third-party purchaser. The sale to New Plantations had special provisions for further payments if New Plantations was able to make any recovery on assets that were ascribed zero value in the sale, including the BVI standing timber, the BVI standing timber receivables, the wood log receivables, and the wood log deposits. The trial judge found that, at the time of trial, there had been no recoveries on, or any further payments in respect of, those assets: at paras 89 to 96.

42 The total net recoveries from the sale of assets of SFC's subsidiaries was $438.5 million.

(3) The Trial Judge's Damages Award

(a) Causation

43 The trial judge approached causation on the basis that the "but for" causation test was to be applied in a common sense, robust fashion; that causation could be inferred from evidence that connected the wrongdoing to the injury; and that inferences could be drawn against a defendant

found liable for fraud or breach of fiduciary duty who did not provide credible alternative causes for the loss.

44 The trial judge's factual findings about causation can be summarized as follows. Between 2004 and 2010, SFC raised in excess of $2.9 billion in Canada's debt and equity markets, based on the appellant's fraudulent misrepresentations of the existence and value of assets. But for the appellant's deceit, SFC would never have undertaken obligations of this magnitude to lenders and shareholders, nor would it have entrusted the money it raised to the appellant and his management team. The appellant directed much of the money raised towards fictitious or over-valued lines of business, engaged in undisclosed related-party transactions and funneled funds into entities he secretly controlled. This conduct, and the consequences of its discovery, ultimately caused the collapse of SFC. The trial judge found that SFC had suffered losses directly related to the appellant's fraud and breach of fiduciary duty.

(b) Measurement of Damages

45 The trial judge referred to the measure of tort damages for deceit and to the principles of equitable compensation. He accepted that the proper approach to measuring SFC's loss was the primary approach put forward by the respondent's expert, Peter Steger.

46 Steger's primary approach began with the $2.9 billion SFC raised in the debt and equity markets between 2004 and 2010. Subtracting the share and debt issue costs and principal debt repayments made by SFC, he calculated the net cash available to SFC from these capital raises as $2.588 billion. To this, Steger added a proxy for the minimum return that SFC should have made by investing the cash. This led to an available cash figure of $3.065 billion.

47 On the basis that SFC would have had $3.065 billion in cash available for investment in profit-generating assets, Steger considered the effect of the appellant's conduct, which saw those funds invested in subsidiaries engaged in largely fraudulent businesses. To the extent there was value in the businesses that were invested in, it was represented by the $438.5 million amount that was actually recovered by EPGL from the sales of the assets acquired from SFC under the Plan. The difference between these two figures - $2.627 billion - represented SFC's loss attributable to appellant's conduct.

48 The trial judge rejected the appellant's argument that damages could only be calculated on a "transaction by transaction" basis, both as a matter of law and because the appellant's damages expert, who criticized Steger for not conducting that analysis, did not do it himself or "hint at a methodology" to do so.

49 The trial judge considered two other damages calculations, in case Steger's primary approach was found to be incorrect. The first was an alternative approach set out by Steger, which calculated damages of $3.2 billion based on a write-down of assets methodology. He then considered a

specific loss approach, based on calculating the losses resulting from specific proven acts of fraud or breach of fiduciary duty, including the wood log cash gap fraud, the wood log deposit fraud, the Greenheart transaction, the appellant's profits on the Greenheart transaction, the cost of SFC's investigation following the Muddy Waters Report, and the appellant's remuneration. These amounts totalled $812.43 million. Deducting the net realization of $438.5 million from post-Plan sales produced an alternative specific loss compensation award of $373.9 million. However, the trial judge concluded that the primary Steger approach, rather than either of these other approaches, should be accepted.

50 The trial judge awarded punitive damages of $5 million Canadian on the basis of his finding that the appellant had abused his fiduciary position to orchestrate a large and complex fraud, resulting in billions of dollars of losses.

(4) The Trial Judge's Rejection of Specific Defences

(a) Duplication with Class Actions

51 The trial judge rejected the argument that the respondent could not recover any amounts because there was duplication between the claims made in this action and claims made in certain class actions (the "Class Actions", as defined in the Plan) that had named both SFC and the appellant, among others, as defendants. He noted that the Class Actions alleged some of the same facts as were alleged in this action and that those Class Actions had been brought on behalf of persons who acquired SFC securities (defined as common shares, notes and other securities) from 2007 to 2011.

52 The trial judge held that the claims advanced in this action were transferred to the Litigation Trust and properly advanced by the respondent because they were claims against the appellant that, prior to their transfer, could have been asserted by SFC; were not released by the Plan (under which the appellant received no release); and were not "Excluded Litigation Trust Claims" as defined in the Plan, which were not transferred to the Litigation Trust. He noted the Plan's language that claims advanced in the Class Actions were not transferred to the Litigation Trust, but held that the claims in the Class Actions were different than those in this action. The claims in the Class Actions were not for wrongs done to SFC but were claims for wrongs done to individual noteholders or shareholders; thus they were different causes of action held by different persons. Nor was there a risk of double recovery. The courts in the Class Actions could prevent that from occurring when those actions reached judgment (the Class Actions were still at the pleadings stage).

(b) No Affirmation

53 The trial judge also rejected the argument that SFC had elected to affirm the validity of all of the assets, contracts, and transactions that the respondent complained of when it transferred the shares of its subsidiaries to EPGL under the Plan, such that the respondent could not sue

and recover damages for them on the basis that they were fraudulent. He found the principle of affirmation had no application to the case.

III. Analysis

(1) Is the Respondent Precluded By The Plan from Advancing The Claims in This Action?

(a) Introduction

54 The appellant makes three arguments that the Plan did not transfer, to the Litigation Trust, the causes of action that are asserted against him by the respondent and that therefore the Plan precludes those claims from being advanced: (1) the claims are the same as, or overlap with, the claims asserted in the "Class Actions" which were not transferred to the Litigation Trust; (2) the claims constitute "Excluded Litigation Trust Claims" which were excepted from the transfer of claims to the Litigation Trust; and (3) the claims constitute "SFC Intercompany Claims" that were assigned under the Plan by SFC to EPGL and not to the Litigation Trust. (Each of the quoted terms is a defined term in the Plan).

55 The appellant's argument that the claims advanced in this action were not transferred to the Litigation Trust is an argument about the meaning of the Plan. It was common ground before the trial judge and in this court that the respondent's ability to bring these claims had to derive from the provisions of the Plan, the Litigation Trust Agreement made thereunder and the terms of the Sanction Order which approved the Plan. These defined what causes of action were transferred to the Litigation Trust and which were not. It was not suggested that the terms or effect of these three documents differed on the issues material here, and accordingly argument was chiefly directed to the terms of the Plan itself.

56 I first address the principles of interpretation to be applied to the Plan and the standard of review to be applied by this court in assessing the interpretation arrived at by the trial judge. I then address the factors bearing on the interpretation of the Plan and the precise terms of the Plan. Finally I consider whether the appellant's arguments disclose any reversible errors in the trial judge's interpretation of the Plan.

(b) The principles of interpretation

57 A *CCAA* plan of compromise and arrangement has been held to be "in substance a contract, sanctioned by the Court", to be interpreted in light of the purposes of the *CCAA*, the overall purpose and intention of the plan in question, and the principles of contractual interpretation: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.J.), at paras. 12 to 13; aff'd (2003), 46 C.B.R. (4th) 239 (Ont. C.A.), leave to appeal refused, (2004), [2003] S.C.C.A. No. 539 (S.C.C.); see also *The Catalyst Capital Group Inc. v. VimpelCom*

Ltd., 2018 ONSC 2471 (Ont. S.C.J. [Commercial List]), at para. 109, aff'd on other grounds, 2019 ONCA 354 (Ont. C.A.), applying these principles to a corporate plan of arrangement.

58 The principles of contractual interpretation include: reading the words of the document as a whole, giving meaning to all its terms; determining the parties' intentions in accordance with the words used; considering the factual matrix (the objective facts known at the time of contracting) to aid in understanding the words used; and adopting an interpretation which avoids commercial absurdity: *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (Ont. C.A.), at para. 24; *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at paras. 47-48, 57-58.

(c) The standard of review

59 This court has given deference to the interpretation of a plan by a judge who had familiarity with the plan's development through supervision of the debtor's restructuring: *Red Cross* (Ont. C.A.), at para. 2. The respondent argues that the same approach of deference should apply here as the trial judge, an experienced Commercial List judge, had the opportunity to consider the Plan in light of its purpose, terms and the factual matrix explored in a lengthy trial. This deferential approach would be consistent with viewing the Plan as "in substance a contract": *Red Cross* (Ont. S.C.), at para. 13. A trial judge's contractual interpretation is, absent extricable legal error, generally subject to appellate deference: *Sattva*, at paras. 52-55.

60 The appellant asks this court to replace the trial judge's interpretation of the Plan with its own, arguing that a correctness standard should apply. A correctness standard of appellate review applies to contractual interpretation where consistency of meaning is a primary concern and where there is no meaningful factual matrix to consider. Certain standard form contracts of adhesion are examples: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.).

61 Although a *CCAA* plan is not a standard form contract, plans often use language borrowed from other plans, giving rise to consistency concerns. Moreover, a plan is different from an ordinary contract in that it takes its force not only from the consent of parties who have been involved in its negotiation, but also from the provisions of the *CCAA* which render a plan binding on those who have not agreed to or voted for it, if the requisite majorities of creditors have done so and court approval has been obtained: *CCAA*, s. 6(1). In this respect a plan has aspects of a contract of adhesion.

62 Nonetheless, in my view a deferential standard of review should apply. *CCAA* plans are developed to fit the unique circumstances of each restructuring. The overall purpose and intention of the individual plan are important determinants of its interpretation, to be considered against the backdrop of the factual aspects of the restructuring and the events that led up to it. The types of considerations that will go into a plan's interpretation will usually be fact and context-specific and

the factual matrix will accordingly be important. The questions which arise in the interpretation of a plan will almost always be mixed questions of law and fact. All of this supports a deferential standard of appellate review, one that accords with the standard applicable generally to a trial judge's interpretation of a contract.

63 Accordingly, absent an extricable error of law, an interpretation that involves palpable and overriding errors of fact, or one that is clearly unreasonable, the trial judge's interpretation should not be interfered with.

(d) The Factual Matrix

64 The trial judge did not expressly identify which facts he considered to be the factual matrix relevant to the Plan's interpretation. But he did make significant findings about how and why the Plan came about. It is the "facts giving rise to the plan" that are important to determine its scope and meaning: *Catalyst*, at para 110. Here, those facts include: that SFC had been forced to file for *CCAA* protection because of the fraud and the consequences of its discovery; the appellant had been identified, including by the OSC, as allegedly having been involved in that fraud; it had already been determined that the assets SFC offered in the sales process were worth substantially less than the amount of its debt so that additional sources of recovery by SFC, including recoveries through litigation, would be important; and class actions by SFC stakeholders were already pending against the appellant, amongst others, in which SFC stakeholders, but not SFC itself, were advancing claims.

(e) The Purposes of the CCAA and of the Plan

65 The full title of the *CCAA* states that it is: "An Act to facilitate compromises and arrangements between companies and their creditors." "The *CCAA* has the simultaneous objectives of *maximizing creditor recovery, preservation of going-concern value where possible*, preservation of jobs and communities affected by the firm's financial distress, rehabilitation of honest but unfortunate debtors, and enhancement of the credit system generally." (emphasis added): Janis P. Sarra, *Rescue!: The Companies Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 14.

66 Creditors are a key constituency under the *CCAA*, as the approval of specified majorities of creditors is required for a plan of compromise and arrangement to be effective: *CCAA*, s. 6(1). Given the objectives of the *CCAA* and the need for creditor approval, it is reasonable to expect that the goal of a plan will be to maximize the value to be obtained from the insolvent corporation's assets, including its intangible rights such as litigation claims, so as to enhance ultimate distributions to creditors. A key barometer of a plan's acceptability is how it proposes to achieve that goal compared to what would be available through alternative insolvency processes, such as liquidation or bankruptcy.

67 The SFC Plan addressed those objectives. It provided in section 2.1 that it was "put forward with the expectation that the Persons with an economic interest in SFC ... will derive greater benefit from the implementation of the Plan and the continuation of the SFC Business as a going concern than would result from a bankruptcy or liquidation of SFC."

68 And in keeping with this expectation, the Plan described its purpose: to release SFC from the claims of "Affected Creditors"[2] ; to transfer ownership of the business of SFC to creditor-controlled entities free and clear of all claims against SFC and its subsidiaries, so as to enable the business to continue on a going-concern basis; and "to allow Affected Creditors and Noteholder Class Action Claimants[3] to benefit from contingent value that may be derived from litigation claims to be advanced by the Litigation Trustee": section 2.1.

69 The Superior Court sanctioned the Plan, finding this purpose and its implementation in the Plan to be in compliance with the *CCAA* and its objectives: *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), at para. 79.

(f) The Plan's Operative Terms

70 The Plan provided two avenues for assets of SFC to be realized upon and the proceeds distributed to creditors: (1) by the transfer of SFC causes of action to the Litigation Trust; and (2) by the transfer of the shares of SFC's subsidiaries to creditor controlled entities, EPHL and EPGL: section 6.4(h). The provisions of the Plan implementing these transfers, as well as the release provisions of the Plan, are key to assessing the appellant's arguments.

71 The Plan provided, in section 6.4(o), that SFC would establish the Litigation Trust. SFC and the trustees for SFC's noteholders would then convey to it the "Litigation Trust Claims", defined by the Plan as:

> [A]ny Causes of Action that have been or may be asserted by or on behalf of: (a) SFC against any and all third parties; or (b) the Trustees (on behalf of the Noteholders) against any and all Persons in connection with the Notes issued by SFC; provided, however, that in no event shall the Litigation Trust Claims include any (i) claim, right or cause of action against any Person that is released pursuant to Article 7 hereof or (ii) any Excluded Litigation Trust Claim. For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims transferred to the Litigation Trust shall not be advanced in the Class Actions."

72 "Causes of Action", used in the definition of Litigation Trust Claims, was given a very broad meaning, which included any claims or entitlements in law, equity or otherwise for damages or other relief.

73 However, the definition of "Litigation Trust Claims" narrowed the transfer of claims to the Litigation Trust (i) by excepting claims against certain individuals and entities who were released by the Plan and (ii) by excepting "Excluded Litigation Trust Claims" from the claims that would otherwise have been transferred to the Litigation Trust: Article 7. "Excluded Litigation Trust Claims" were defined as Causes of Action agreed, as between SFC and a subgroup of Noteholders, to be excluded from the Litigation Trust Claims: section 4.12. Section 4.12(b) of the Plan specified that certain claims against SFC's Underwriters fell within this category, except if they were claims for fraud or criminal conduct.

74 The definition of "Litigation Trust Claims" contained "greater certainty" language specifying that claims in the "Class Actions" were not transferred to the Litigation Trust. The "Class Actions" referred to in the "greater certainty" clause were defined to mean four specific actions in Ontario, Quebec, Saskatchewan and New York, brought on behalf of persons who, during defined class periods, had purchased SFC notes or shares. The Class Actions include: claims against the appellant based on allegations that he made false representations that SFC's financial statements were accurate when they in fact were materially misleading and grossly overstated SFC's assets; that the appellant's misrepresentations induced class members to buy equity or debt at inflated prices; and that he thus caused them losses. The plaintiff classes seek damages, among other things, to recover the amounts they paid or overpaid to acquire those securities.

75 Section 4.11 of the Plan set out who would benefit from any recoveries on claims transferred to the Litigation Trust. Beneficial interests in the Litigation Trust were to be held 75% by Affected Creditors [4] and 25% by Noteholder Class Action Claimants [5] .

76 In addition to their interests in the Litigation Trust, Affected Creditors also received interests in EPHL, a holding company which held the shares of EPGL, to which SFC transferred the shares of its subsidiaries (and indirectly the assets they held and businesses they carried on): sections 4.1, 6.4 and 6.6. Included among the assets transferred to EPGL were "SFC Intercompany Claims" defined to include amounts owing to SFC by any of its subsidiaries: section 4.10. The Plan provides that all obligations and agreements to which EPHL or EPGL became parties as a result of the transfer to them "shall be and remain in full force and effect, unamended": section 8.2(j).

77 All equity holders in SFC released their claims against SFC: section 4.5. Noteholder Class Action claims against SFC were released: section 4.4. Affected Creditors — comprised mainly of SFC's noteholders, whose claims had been secured by first-priority security interests over the shares of SFC's subsidiaries — released SFC from their claims for payment of principal and interest on the notes: section 4.1. Article 7 specified individuals and entities also released by the Plan. The appellant was not one of the specified individuals.

(g) Analysis of The Appellant's Plan Preclusion Arguments

78 In light of the principles of interpretation, the factual matrix, the purposes of the *CCAA* and the Plan, and the Plan's language, I turn now to the analysis of the appellant's plan preclusion arguments.

(i) No Right to Advance Claims Advanced in the Class Actions

79 The appellant argues that the claims made in the action are not Causes of Action that were transferred to the Litigation Trust because they are the same as, or overlap with, the claims made in the Class Actions. He asserts that the claims in this action on the one hand, and those in the Class Actions on the other, rely on the same or similar allegations of wrongdoing by the appellant and claim the same or similar amounts, based on the amounts that SFC raised, as debt or equity, in the capital markets. He also argues that there is an overlap in who will benefit from the claims, in that certain creditors are beneficiaries of the Litigation Trust and class members in the Class Actions. [6] The "greater certainty" language of the Plan makes it clear, he maintains, that these claims were not transferred.

80 I would not give effect to this argument.

81 The Plan, by the combination of section 6.4(o) and the definition of Litigation Trust Claims, transferred to the Litigation Trust two types of Causes of Action held by two different persons. First, it transferred Causes of Action of SFC against any and all third parties. Second, it transferred Causes of Action of the Trustees on behalf of Noteholders against any and all persons for certain matters. The respondent relies upon the first transfer only, that is, the transfer of Causes of Action that SFC had against the appellant. The trial judge did not err in concluding that the causes of action the respondent advanced in this action are Causes of Action that SFC had against the appellant. This differentiates them from causes of action of SFC stakeholders, which are being advanced in the Class Actions.

82 A wrong (such as a tort) done to a corporation is actionable by the corporation which is entitled to recover the loss it suffered. The shareholders and creditors of a corporation cannot sue for damage to the corporation, even though they are indirectly affected by it: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 59; *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (Ont. C.A.), at paras. 11-16. Similarly, an action for breach of a corporate director's or officer's fiduciary duty is an action of the corporation, whether it seeks damages or an accounting of profits: *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 41; *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481 (Ont. C.A.), at paras. 148-149 and 156, leave to appeal refused, (2019), [2018] S.C.C.A. No. 541 (S.C.C.).

83 On the trial judge's findings, the appellant was a fiduciary of SFC and he breached his fiduciary duty to it. SFC was the victim of the appellant's tort — his fraud — in that it was SFC

that was caused to record fictitious or overstated assets and revenues on its financial statements, SFC that was caused to raise money from the public and incur obligations to lenders and others that it would not otherwise have incurred, and SFC's funds, received through these activities, that were invested and lost in illegitimate businesses or consumed by the consequence of the discovery of the fraud. Leaving aside the question of how damages for these matters are assessed, the causes of action to sue for them were Causes of Action of SFC.

84 The Plan transferred to the Litigation Trust Causes of Action "that have been or may be asserted by or on behalf of ... SFC against any and all third parties...", a term which would include the appellant: section 1.1. The appellant's contention could only be correct if there were something in the Plan that restricted the meaning that would otherwise be given to that transfer language. The provision of the Plan relied upon by the appellant for this effect is the "greater certainty" clause in the definition of Litigation Trust Claims, which reads as follows: "For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims being transferred to the Litigation Trust shall not be advanced in the Class Actions". Like the trial judge, I do not read that phrase to have the meaning for which the appellant argues.

85 First, as the trial judge correctly noted, the claims made in the Class Actions are claims made on behalf of noteholders and equity holders for their causes of action arising from damages they suffered. SFC did not make claims in the Class Actions asserting SFC Causes of Action or seeking damages SFC suffered. The distinction is important and is not undermined by either the factual overlap in the claims or the fact that certain creditors are or may be both beneficiaries of the Litigation Trust and members of the plaintiff classes.

86 On the point of factual overlap, the same or similar facts may give rise to a cause of action by a shareholder and one by the corporation. The law recognizes that "...where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action *even though the corporation may also have a separate and distinct cause of action*" (emphasis added): *Hercules*, at para. 62. Shareholders and noteholders may have causes of action arising from misrepresentations made to them when acquiring securities, based on common law doctrines or under securities legislation. And where they do, they may have rights to sue for damages they personally have suffered. But the existence of those causes of action does not detract from the existence of a *separate and distinct cause of action* of the corporation, based on wrongdoing against or breach of duties owed to it, to sue for damages it has suffered.

87 As for the argument that, because creditors of SFC are Litigation Trust beneficiaries, the causes of action asserted by the Litigation Trust are or become indistinguishable from their personal rights of action, in my view this court's decision in *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11, 128 O.R. (3d) 225 (Ont. C.A.), rev'd in part on other grounds, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), stands as a complete answer to that proposition.

88 In *Livent*, it was held that the distinction between the corporation's cause of action arising from wrongs done to it to recover damages it has suffered and the separate cause of action of a corporate stakeholder to assert a personal cause of action for a wrong done to her for damages she has suffered, does not cease to apply when the corporation is insolvent and intends to distribute any recovery to its stakeholders. In other words, the separate and distinct cause of action of the corporation does not become one and the same as the stakeholders' cause of action even if the corporation's intention is to benefit its stakeholders with any recovery. Blair J.A. explained why an argument to the contrary must be rejected, observing, at para. 57, that:

> It impermissibly conflates damages sustained by the corporation with the distribution of those damages, once recovered, to creditors and other stakeholders, as part of the assets of the corporation, in the course of the proceeding under the [*CCAA*].... To conflate them is to disregard the long-recognized principle of corporate law that a corporation is a legal entity separate apart from its shareholders and stakeholders, and that the corporation alone has the right to sue for wrongs done to it. [Citations omitted.]

89 The Litigation Trust is the *CCAA* vehicle for the pursuit of SFC's corporate causes of action and the distribution of its damages, once recovered, to creditors. Thus the statement from *Livent* is equally applicable here. The Plan's stated purpose of benefiting creditors by recoveries achieved by the Litigation Trust does not affect the distinction between SFC's causes of action (pursued through the Litigation Trust) and any personal causes of action that creditors or others may pursue, including in the Class Actions. That distinction continues.

90 In addition to conflicting with well-established corporate law principles, the appellant's attempt to divorce the concept of a cause of action from the person or corporation that holds it conflicts with the language of the Plan. In defining the Litigation Trust Claims transferred to the Litigation Trust, the Plan refers to Causes of Action that have been or may be asserted on behalf of SFC and those that have been or may be asserted on behalf of the Trustees for the Noteholders. It links the Causes of Action transferred to the entity that held them. The "greater certainty" language in this definition must be read in the same way. The fact that the causes of action of shareholders' and noteholders' advanced in the Class Actions were not transferred to the Litigation Trust under the Plan has no bearing on the transfer of SFC's separate and distinct Causes of Action to the Litigation Trust, even if arising from the same or similar facts and even though creditors are beneficiaries of the Litigation Trust. SFC's Causes of Action were not being advanced in the Class Actions. The "greater certainty" language consequently does not have the effect for which the appellant contends.

91 Stepping back from the precise wording of the Plan, the appellant argues more generally that it represented a bargain that his wrongs would be pursued in the Class Actions only. I do not

accept this argument, which does not find support in the text of the Plan, read in light of the factual matrix and the purposes of the Plan and the *CCAA*.

92 The Class Actions pre-dated the Plan. If they were intended to be the sole vehicle for recovery from the appellant, it is unclear why the appellant did not receive a release from SFC or the Litigation Trust under the Plan. Moreover, when the Plan was put forward and approved, the failed sales process had already established that recoveries from assets in SFC subsidiaries would be insufficient to allow SFC to satisfy creditor claims, making other sources of recovery, including enforcement of SFC's litigation rights, important. There is no reason why rights of action of SFC against the appellant, which would continue to exist in a bankruptcy or liquidation of SFC, would be given up in this *CCAA* Plan, where the object was to maximize recoveries in a manner more advantageous than bankruptcy or liquidation. Moreover, the stated purpose of the Plan includes allowing creditors to benefit from the pursuit of contingent claims by the Litigation Trust. Morawetz J., in granting the Sanction Order approving the Plan, noted that it provided the opportunity "through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for *CCAA* protection": *Sino-Forest Corp., Re*, at para 65. When the Plan was approved, the appellant was already alleged to be one of those persons, but on the appellant's argument the opportunity Morawetz J. identified would not exist.

93 The purposes of the *CCAA* and the Plan, and the Plan's precise provisions read in light of the factual matrix, all rebut the appellant's characterization of the Plan as preventing the Litigation Trust from pursuing a claim that SFC could have pursued against the appellant for his misconduct.

94 Accordingly, the trial judge did not err in interpreting the Plan as allowing the respondent to advance the claims made in this action against the appellant notwithstanding the claims by noteholders and shareholders advanced in the Class Actions.

(ii) Excluded Litigation Trust Claims

95 The appellant's second argument is that the claims advanced in the action are Excluded Litigation Trust Claims. As noted above, that exclusion applies where there is an agreement between SFC and a category of its creditors that a particular claim is excluded from those transferred to the Litigation Trust. The Plan specifies one category of excluded claim, encompassing certain claims against SFC's underwriters. There is no similar particularization of claim(s) of SFC against the appellant which are excluded.

96 The only agreement to exclude a claim of SFC against the appellant that the appellant points to is the "greater certainty" language providing that claims advanced in the Class Actions are not transferred to the Litigation Trust. The argument is therefore just a repackaging of the appellant's first argument, as it depends for its validity on the Plan having exempted claims arising from facts

asserted in the Class Actions from those Causes of Action of SFC transferred to the Litigation Trust. As previously discussed, the Plan does not have that effect.

97 I would therefore not give effect to this argument.

(iii) SFC Intercompany Claims

98 The appellant's third argument is that the claims for which he was found liable are SFC Intercompany Claims. He argues that these were assigned under the Plan by SFC to EPHL and EPGL, rather than to the Litigation Trust.

99 I agree with the appellant that SFC Intercompany Claims were not assigned to the Litigation Trust, but I disagree that the claims for which the appellant was found liable in this action are SFC Intercompany Claims.

100 SFC Intercompany Claim is defined in the Plan as "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against any Subsidiary or Greenheart". SFC's shares in each Subsidiary and in Greenheart were transferred under the Plan to EPHL and by EPHL to EPGL. The SFC Intercompany Claims followed the same route: section 4.10.

101 Essentially, the appellant's argument is that the respondent is claiming money raised by SFC in the capital markets that was invested in its subsidiaries and lost. In his submission, a claim about funds invested in SFC's subsidiaries and not returned is an SFC Intercompany Claim, regardless of against whom it is made.

102 I disagree. In my view, reading the Plan in accordance with the interpretive principles noted above yields the conclusion that what was transferred to EPHL and then to EPGL were the debt obligations of *subsidiaries* or *Greenheart* to SFC and the rights SFC had to claim against *those entities*. This makes commercial sense in light of the words used in the definition of SFC Intercompany Claim — "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against [them]". It also makes sense in light of the fact that the shares of the Subsidiaries and Greenheart were being similarly transferred. It would not make commercial sense for EPHL and EPGL to acquire the shares in SFC's subsidiaries but to leave the subsidiaries exposed to SFC's claims against them. The concluding words of section 4.10 of the Plan make this clear: "[T]he applicable Subsidiaries and Greenheart shall be liable to [EPGL] for such SFC Intercompany Claims from and after the Plan Implementation Date".

103 SFC Intercompany Claims does not refer to claims against the appellant arising from his conduct, even though that conduct involved investing SFC's funds in the company's subsidiaries. The transfer to EPGL of SFC's claims against its subsidiaries and Greenheart did not include the transfer of SFC's causes of action against the appellant.

104 I would accordingly reject this argument.

(iv) Conclusion on Appellant's Plan Preclusion Arguments

105 I would not give effect to the appellant's arguments that the trial judge erred in concluding that the Plan transferred the claims advanced in this action to the Litigation Trust and did not preclude them from being advanced against the appellant by the respondent.

(2) Causation and Damages

(a) The Appellant's Arguments

106 The appellant argues that, even if the claims made in the action were SFC's Causes of Action, that only takes the respondent so far. As transferee of Causes of Action of SFC, the respondent can only claim amounts that would have been properly claimable by SFC. Thus the only damages that could be claimed were damages of SFC proved to have been caused by the appellant's wrongdoing. In interrelated arguments, the appellant submits that the damages that were awarded by the trial judge are not damages of SFC, nor was it appropriate to consider them as caused by the appellant's wrongdoing.

107 The appellant submits that the core of the claim is for losses incurred by debt and equity holders and that the amounts raised from them, if acquired by fraud as the respondent alleges, never belonged to SFC and therefore could not form part of SFC's loss. He argues that allowing such a claim improperly creates the risk of double recovery.

108 The appellant goes on to submit that the trial judge simply presumed the appellant to have caused everything that led to SFC's ultimate collapse. He argues that the trial judge should have: required proof that each transaction that occurred would not have occurred without the appellant's deceit; calculated, for each transaction so found, the loss resulting from it and; accounted for transactions on which there was no loss.

109 Finally, he argues that the trial judge applied incorrect principles of damages assessment. The Steger primary approach should have been completely rejected in favour of a transaction-by-transaction analysis. Even the specific loss analysis that the trial judge performed is flawed as it would, in part, award SFC damages which could only have been suffered by its subsidiaries.

110 For the reasons that follow, I would not give effect to the appellant's principal causation and damages arguments or disturb the trial judge's award of damages. Accordingly, it is unnecessary to address the appellant's arguments about whether and how the trial judge's alternative damages calculation should be adjusted.

(b) The Standard of Review

111 Causation is a question of fact, and is reviewed on a deferential standard. Absent palpable and overriding error, appellate intervention is not warranted: *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98 (S.C.C.), at para 29.

112 A trial judge's assessment of damages attracts considerable deference. It will not be interfered with absent an error of principle or law, a misapprehension of evidence, a showing that there was no evidence on which the trial judge could have reached his or her conclusion, a failure to consider relevant factors or consideration of irrelevant factors, or a palpably incorrect or wholly erroneous assessment of damages: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943 (S.C.C.), at para. 80; *Rougemount Capital Inc. v. Computer Associates International Inc*, 2016 ONCA 847, 410 D.L.R. (4th) 509 (Ont. C.A.), at para. 41.

(c) Analysis of The Appellant's Causation and Damages Arguments

(i) The Trial Judge's Factual Findings Appropriately Underpin His Causation Conclusion and Damages Assessment

113 The trial judge's causation conclusion and his assessment of damages are conceptually linked. They both are premised on five core factual findings that he made.

114 The first was that SFC's raising of money in the debt and equity markets was something which was caused by the appellant's wrongdoing, including his misrepresentation of BVI standing timber as a valuable asset. The second was that "but for Mr. Chan's deceit, [SFC] would never have undertaken obligations of this magnitude to lenders and shareholders". The third was that but for the appellant's wrongdoing, SFC would not have "entrusted this money [the funds raised on the capital markets] to [the appellant] and Inside Management." Fourth was his finding that the appellant, "rather than directing [SFC's] spending on legitimate business operations, poured hundreds of millions of dollars into fictitious or over-valued lines of business where he engaged in undisclosed related-party transactions and funnelled funds to entities that he secretly controlled": at para. 1022. Fifth was the finding, at para. 1020, regarding the impact of the fraud and its discovery:

> When the fraud was uncovered, and the dust settled, more than half of the money was gone. To the extent those funds went into the acquisition of assets, the value of those assets was realized through the EPHL sales process. What was left in cash on June 2, 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its ongoing investigation including the ongoing concealment by [the appellant] and Inside Management.

115 These five findings underlie the trial judge's conclusion that what occurred was a chain of events all flowing from the appellant's fraud and breach of duty, which resulted in the loss of the

funds that had been raised. As he put it: "[t]he loss of these funds to [SFC] was directly related to Mr. Chan's fraud and breach of fiduciary duty": at para. 1022.

116 In my view, these findings were available to the trial judge on the record. The argument that the trial judge simply presumed the appellant to be responsible for everything that led up to SFC's ultimate collapse is without foundation.

(ii) There Is No Legal Error In the Trial Judge's Causation Analysis

117 The trial judge applied the appropriate legal principles to his causation analysis. He approached the "but for" causation test on the robust common sense approach the law contemplates: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.), at para. 46; *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), at para. 34. Moreover, he was alive to the need to be satisfied that the loss was caused by the chain of events flowing from the wrongdoing after considering whether there were intervening causes that broke the chain of causation: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at paras. 9, 47, 52, and 54-57.

118 The appellant argues that the trial judge did not take into account other causes for the discrepancy between the value of SFC's assets, held by its subsidiaries, and the value of the funds invested in them. Not all of the subsidiaries' activities were found by the trial judge to be fictitious. Therefore external factors, such as climate, industry pricing etc., may have caused the losses, rather than the appellant's fraud.

119 In my view the trial judge was entitled to reject this argument. He did not ignore the fact that not all of the businesses were fictitious. He found that a loss was caused by the appellant notwithstanding that finding. His approach credited the value actually existing in the subsidiaries. And, since once a loss arising from a fraud or breach of duty is established, it is the defendant who bears the onus of showing that the plaintiff would have suffered the same loss absent the defendant's wrongdoing, the trial judge was not required to give effect to unproven alternative causes: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, 1991 SCC 27, [1991] 3 S.C.R. 3 (S.C.C.), at pp. 15-16: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at pp. 441-2.

(iii) The Trial Judge Did Not Award Compensation For Amounts That Could Not Be Legally Considered Losses of SFC

120 The appellant submits that the trial judge's analysis contains a fundamental flaw because the trial judge proceeded as though the money that SFC raised on the debt and equity markets "belong[ed] to the corporation" and its loss was a loss to SFC. This could not be, the appellant argues, since if the funds were raised "[b]ased on fraudulent misrepresentations about the nature and value of the BVI standing timber assets", as the trial judge found, the funds would have been impressed with a trust in favour of the shareholders and noteholders who advanced the funds.

Only they, not SFC, would have a right to claim for the loss of these funds. Moreover, allowing a claim for these funds would involve SFC in inconsistent positions — complaining that funds were obtained on its behalf through fraud while trying to obtain the benefit of those very funds.

121 In making the latter argument, the appellant relies on the Supreme Court of Canada's decision in *Corp. Agencies Ltd. v. Home Bank of Canada*, [1925] S.C.R. 706 (S.C.C.). In that case, an individual engaged in a fraudulent cheque kiting scheme, making unauthorized deposits into Corporation Agencies' bank account followed by equally unauthorized withdrawals. Corporation Agencies sued the bank alleging it should not have honoured the unauthorized withdrawals. Success on that claim would have given it the benefit of the unauthorized deposits.

122 In rejecting the claim, the majority of Supreme Court held, at p. 726, that the plaintiff could not accept part of the fraudulent scheme — the part that saw money deposited to its account - while relying on the fraud to dispute withdrawals that had been made pursuant to the same fraudulent scheme.

123 In my view, this case does not assist the appellant because it is distinguishable on two fundamental points. Corporation Agencies was suing a party who was not the perpetrator of the fraud and was seeking to benefit from part of the fraud at that party's expense. Here, the claim is not against an innocent party, but against the perpetrator, for damages caused by the fraudulent scheme. Nothing in the Supreme Court's decision precludes that type of claim. Moreover, in *Corporation Agencies*, the plaintiff did not establish that the monies deposited into its account were funds for which it would have to account to others: at p. 726. Here, SFC had obligations in respect of the funds raised on the capital markets, which the appellant's fraud deprived it of the ability to meet.

124 I do not have to decide if the appellant's trust characterization is correct, as it does not support his position. The trial judge found that SFC had suffered damage because it raised money on the capital markets, incurred obligations to its shareholders and noteholders by doing so, and then lost the money raised, none of which would have occurred but for the appellant's misconduct. The result was to leave SFC with the obligations it took on when it raised the funds while depriving it of the means to honour those obligations.

125 This analysis would not change if the monies raised were, as the appellant argues, "impressed with a trust in favour of the shareholders and noteholders who advanced the funds". By reason of the appellant's fraud, SFC would still have been left with obligations to its shareholders and noteholders - though trust obligations - while having been deprived of the means of honouring them. It would still have suffered damage, and accrued a cause of action to recover for that damage.

126 The trial judge did not commit a legal error by considering the loss of the funds raised to have been a loss suffered by SFC in these circumstances. Where directors cause a corporation to incur liabilities and misapply money which should have been paid to answer those liabilities, leaving the company with large liabilities and no means of paying them, the directors cause the corporation

to suffer a recognizable form of loss: *Jetivia SA v. Bilta (U.K.) Ltd. (In Liquidation)*, 2015 UKSC 23, [2015] 2 W.L.R. 1168 (U.K. S.C.), at paras. 176-178. That proposition was accepted by this court in *Livent*: at para. 349.

127 Nor is the result changed because, as the appellant argues, SFC was ultimately released by the Plan from its obligations to equity holders and creditors. The appellant submits that the release undercuts the argument that SFC was left with obligations it could not honour by reason of the appellant's conduct. I disagree. The fact that the Plan ultimately released SFC from its obligations to creditors and equity holders from whom funds were raised does not undermine the causation or damages conclusions of the trial judge.

128 The release of SFC by creditors does not result in a windfall gain. Absent the Plan, if SFC had itself pursued its claims against the appellant, it could have used any damages it recovered towards satisfying its creditors. The Plan transferred the right to pursue SFC's claims to the Litigation Trust together with the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust. Effectively, the Litigation Trust assumes and replaces SFC's obligations to creditors through its obligation under the Plan to distribute damages it recovers to beneficiary creditors. Releasing SFC's obligations to creditors and requiring the Litigation Trust to distribute damages it recovers to beneficiary creditors ensures that the obligations to creditors rests with the person that will recover the damages.

129 Similarly, the release of SFC by equity holders does not result in any windfall. Under s. 6(8) of the *CCAA*, unless all creditor claims are to be paid in full, a plan may not provide for payment of equity claims. "...(I)n enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring": *Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.) at para 56. The fact that the Plan does not provide for equity holders to benefit from the Litigation Trust thus follows the priorities set by the *CCAA* for the distribution of recoveries from the enforcement of an SFC asset.

130 It would be contrary to the purpose of the Plan, and the Litigation Trust it provided for, to give the release of SFC under the Plan the effect for which the appellant contends. The Litigation Trust was a vehicle to allow recoveries from persons whose conduct caused damage to SFC. The appellant's argument would treat the Plan as effectively having released him from being pursued for causing that damage, something the Plan did not do.

(iv) The Double Recovery Doctrine Does Not Apply

131 The appellant argues that the trial judge's assessment of damages creates the risk of double recovery from him. He argues that a judgment against him should not issue because "a defendant cannot be liable twice for the same alleged loss". Reduced to its bare essentials, the appellant's position is that the funds raised by SFC on the debt and capital markets are at the core of both

the claims in the Class Actions and the award of damages in this action. Even if separate causes of action and rights to damages exist, the damages award in this action will undoubtedly overlap with what may be awarded against him in the Class Actions.

132 I would not give effect to this argument. Since SFC has a separate and distinct cause of action and suffered a recognizable form of loss, neither the cause of action nor recovery for it can be defeated by an argument that the appellant's conduct also gave rise to causes of action in others who may seek to claim their own damages from him, even if in similar amounts.

133 The appellant invokes the rule against double recovery, but his position does not attract the rule, properly understood. The rule does not prevent a party with a claim from obtaining a judgment for 100% of its losses. The rule only prevents a party who has made a recovery on a judgment from recovering, through other actions, more than 100% of those losses. "It is not the *damage award* that amounts to satisfaction and bars a second action but the *recovery* by the plaintiff in the first action" (emphasis in original): *Treaty Group Inc. v. Drake International Inc.*, 2007 ONCA 450, 86 O.R. (3d) 366 (Ont. C.A.), at para 13. The rule has no application here, where it is raised to avoid judgment against the appellant [7] . There is no suggestion that the Litigation Trust has already recovered 100% of the losses it is entitled to claim.

134 To the extent that the appellant raises the spectre of beneficiaries of the Litigation Trust achieving double recovery in the future if they receive benefits from the Litigation Trust's collection of the judgment against him and then are successful in the Class Actions against him, this is not an objection to the judgment in this action for the reasons set out above.

135 As the trial judge noted, it is in the recovery stage of the Class Actions that any issue of double recovery would have to be raised to the extent that members of the class attempt to recover damages already recovered through the Litigation Trust. For that issue to even emerge, the appellant would first have to pay the judgment granted against him in this action and then the plaintiffs in the Class Actions would have to fail to appropriately credit any distributions they receive. Neither precondition has occurred. Speculating on whether they will is inappropriate here. The point is that the rule against double recovery does not assist the appellant in resisting the granting of the judgment under appeal.

136 As an alternative basis to his finding that the prospect of double recovery did not stand as a bar to the respondent's action, the trial judge interpreted the Plan to limit Class Action recoveries against the appellant to $150 million; thus, the overlap of claims would only be to the extent of $150 million, and not to the entirety of the respondent's claim. The appellant argues that the trial judge misinterpreted the Plan, which does not limit the Class Action claims against him.

137 Any error in the trial judge's interpretation of the Plan in this respect was immaterial. He advanced the point as an alternative only to the main point that the prospect of later recoveries in the Class Actions could not stand as a bar to the appellant's liability to pay damages in this action.

138 I would therefore not give effect to this ground of appeal.

(v) The Trial Judge Applied The Correct Principles of Damages Assessment

139 Given that the trial judge properly found causation of a recognizable form of loss to SFC, the measurement of that loss fell squarely within the trial judge's broad powers to assess damages. I see no reason to interfere with that assessment, which was based on his findings of fact and acceptance of expert evidence consistent with the chain of causation he found to exist.

140 The trial judge referred to the measure of damages for deceit. He correctly described it as the difference between the financial position of the plaintiff as a result of the fraud, including losses flowing from it even if not foreseeable at the time of its commission, and the financial position of the plaintiff as it would have been if the tort had not occurred: para 928, citing *Rainbow Industrial Caterers Ltd. v. Canadian National Railway* (1990), 67 D.L.R. (4th) 348 (B.C. C.A.), at p. 359, aff'd,1991 SCC 27, [1991] 3 S.C.R. 3 (S.C.C.). Elsewhere in his reasons he referred to the principles of equitable compensation citing, among other authorities, this court's decision in *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321 (Ont. C.A.). He noted that "equitable compensation is concerned with restoration of the actual value of the thing lost through the breach of duty, in this case [SFC's] funds raised on the capital markets" and that compensation is assessed at the date of trial and with the presumption that trust funds will be invested in the most profitable way: at paras 1007 to 1011.

141 The appellant says the trial judge erred by awarding damages based on the full equitable measure of compensation, which is only appropriate where property is owned by a beneficiary but is controlled by the fiduciary as trustee. He relies on the distinction between cases of breach of trust and those of breach of a non-trust fiduciary duty made in *Whitefish Lake Band of Indians*, at para. 54, and *Canson Enterprises*, at p. 578. In *Canson Enterprises*, the Supreme Court stated that in cases of breach of trust, "the concern of equity is that [the trust property] be restored ... or, where that cannot be done, to afford compensation for what the object would be worth", whereas in cases of breach of duty, "the concern of equity is to ascertain the loss resulting from the breach of the particular duty": at p. 578. The court went on to observe that, in determining the loss resulting from breach of a particular fiduciary duty, equity may borrow common law concepts like remoteness, intervening cause, and mitigation to avoid undue harshness: at p. 579-80, 585-586, and 588. The appellant argues that since the claim against him did not involve a breach of duty in respect of funds of SFC that he controlled, the trial judge should have assessed damages based on these common law principles.

142 I would not give effect to that complaint for a number of reasons. First, on the trial judge's findings, the appellant had control over the funds raised by SFC, which the trial judge found to have been "entrusted" to the appellant and "directed" by him into various entities to which he was related or which he secretly controlled. The trial judge properly concluded on the basis of these findings that the appellant "owed fiduciary duties towards [SFC] akin to those of a trustee": at para. 923.

143 Second, even if the principles of equitable compensation applicable where trust property is involved were not available, the trial judge's damage assessment can be justified based on the principles in *Canson Enterprises*. As I have discussed above, the trial judge properly considered causation and potential intervening acts in coming to his damages award, and remoteness does not appear to be an issue.

144 In any event, in my view the trial judge's assessment of damages was in fact primarily based on the tort measure of damages. His reference to equitable compensation principles was made primarily in relation to a point the appellant's expert made, namely that when credit was given for asset realizations, the Greenheart realization should have been adjusted to take into account what Greenheart was worth when SFC made its investment, not what it ultimately was sold for. The trial judge rejected that argument. He said: "The fact that the discovery of [the appellant's] fraud had a negative effect on the market value of the Greenheart asset is not a market risk [SFC] has to bear... It is sufficient that [SFC] suffered a loss in fact, provided the realization was not improvident": at para. 1101.

145 The trial judge's treatment of the Greenheart transaction is fully justified under the equitable principles of compensation applicable to a case where trust property is not involved. In *Hodgkinson*, the Supreme Court clarified that its observations in *Canson Enterprises* did not "signal a retreat from the principle of full [equitable] restitution" in all cases of breach of duty, as the appellant contends: at p. 443. The majority rejected the defendant investment advisor's argument that the plaintiff's loss was caused by the market rather than his breach of duty, holding that it was appropriate to place the risk of market exigencies on the defaulting fiduciary: at pp. 442, 452-3. It observed that breach of fiduciary duty can take a variety of forms, and consequently different approaches may be appropriate to remedy the harm caused by different breaches: *Hodgkinson*, at pp. 443-444. Here, as in *Hodgkinson*, there was a strong nexus between the wrong complained of, the fiduciary relationship, and the risk of market volatility that contributed to SFC's loss. The appellant's wrongdoing involved abuse of his fiduciary role and breach of the duty of loyalty to the corporation that lay at its core: at pp. 445, 452-453. This is exactly the type of case that justifies placing the risk of market fluctuations on the appellant.

146 The trial judge's reasons for rejecting the appellant's expert's proposed adjustment of the realization amount for Greenheart were also justified under a deceit measure of damages. As

the trial judge found, the appellant knew or could be deemed to have known that the discovery of his fraud would send SFC "into a tailspin": at para. 1012. The effect that had on the timing and distressed circumstances in which assets were realized can be seen as part of the chain of events flowing from the appellant's fraud: *Rainbow* (B.C.C.A.), at p. 359; *Canson Enterprises*, *at p. 565;Hodgkinson*, at pp. 445-6. This conclusion reflects the reality that as courts strive to treat similar wrongs similarly, equitable and common law paths often produce the same result: *Hodgkinson*, at p. 444-5, *Canson Enterprises*, at p. 585-6.

(3) The Doctrine of Election

147 The appellant argues that the equitable doctrine of election, also known as the rule against approbation and reprobation, prohibits a party from asserting that a transaction is valid to obtain some advantage and then turning around to assert that it is invalid to secure some other advantage. The transfer, under the Plan, of SFC's assets to EPGL (and the subsequent transfers to third-party purchasers) constituted an election to treat the assets as valid and subsisting, since the Plan deemed obligations and agreements to which EPGL became a party "in full force". The equitable doctrine of election, which he contends the trial judge erred in failing to consider, should prevent the respondent from making the inconsistent argument that the assets were fictitious, fraudulent, tainted or overvalued as a product of his fraud.

148 I would not give effect to this argument. First, the cases relied upon by the appellant deal with markedly different situations to the one at bar. As one example, in *Kin Tye Loong v. Seth* (1920), 1 C.B.R. 349 (Hong Kong P.C.), the plaintiff filed a claim in the defendant's bankruptcy for the price of goods sold and delivered, received a dividend on that claim, and compromised and released it. This conduct — consistent only with the position that a valid sale had taken place — barred a subsequent action by the plaintiff claiming that no sale in fact had taken place, that property in the goods had never been transferred, and that damages should be paid for conversion of what the plaintiff alleged were still its goods. Nothing analogous is present here.

149 Second, the language of the Plan cannot be read as elevating the nature or value of what was transferred under the Plan above what actually existed. For example, at the time of the Plan, the standing timber assets had not been located or verified and the trial judge found they were and had been fictitious. SFC's insolvency, which gave rise to the Plan, arose from, among other things, that very circumstance. In the sale to New Plantations effected by EPGL, the standing timber assets were ascribed no value unless recoveries on them were made, but none occurred. Nothing in the Plan or the steps taken under it can be read to treat the non-existent as existing, or the valueless as valuable, preventing the Litigation Trust from maintaining that the fraud alleged had occurred.

150 This court has recently explained the doctrine of election in both its common law and equitable aspects. At common law, the doctrine addresses the consequences of a party choosing between inconsistent alternatives; the choice of one alternative, for example, to affirm a contract,

forecloses later choice of an inconsistent alternative, for example, to rescind the same contract. The equitable doctrine of election precludes a party who has accepted benefits under a particular instrument, for example, a will, from refusing to accept the balance of the provisions of that instrument: See *Charter Building Co. v. 1540957 Ontario Inc.*, 2011 ONCA 487, 107 O.R. (3d) 133 (Ont. C.A.), at paras. 18-22.

151 The trial judge correctly held that there had been no election between inconsistent rights here. The transfer of SFC's assets to EPGL and the transfer of its claims against the appellant for fraud and breach of fiduciary duty to the Litigation Trust were not inconsistent. The Plan contemplated that the benefit of both would be preserved and pursued. This conclusion, reached by the trial judge upon consideration of the common law doctrine of election (the parties before us disagreed as to whether the equitable doctrine was argued before the trial judge), is equally applicable to the equitable doctrine. The Litigation Trust's acceptance of benefits under the Plan, namely the transfer of SFC's Causes of Action for fraud and breach of fiduciary duty, are not accompanied by any refusal to accept the burden of giving effect to other dispositions under the Plan, such as the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust, and the transfers of SFC's assets to EPGL, enabling the sales to subsequent purchasers. Indeed, the damages awarded by the trial judge deducted the value implied by the recovery from those sales.

152 As the trial judge noted, even where a party has elected to affirm a contract, its right to damages is not precluded. The same principle would apply here to the argument about the equitable doctrine of election. Nothing suggests that a party is foreclosed from pursuing damages when, as a result of being defrauded, its loss is mitigated by the disposition of whatever property was acquired in transactions affected by the fraud. Indeed, the measure of damages available to a party induced by fraud to enter into a transaction involves the calculation of the loss the plaintiff suffered, which usually requires a credit to be given for the actual value of the property that was acquired: Lewis N. Klar & Cameron Jefferies, *Tort Law*, 6th ed. (Toronto: Thompson Reuters, 2017), at p.815.

153 In my view, the doctrine of election is of no assistance to the appellant.

(4) Errors in Factual Findings

154 The appellant argues that the trial judge made two fundamental errors in his treatment of the evidence, which undermine his factual conclusions. First, the appellant argues that the trial judge drew the inference that the BVI standing timber model was a fraud based on one sample transaction for which the documentation had been translated into English. He goes on to argue that the inference that all of the 525 transactions conducted under the BVI standing timber model were the same as the sample transaction was impermissible for two reasons: first, fraud in numerous transactions cannot be proven by reference to one example and, second, that proceeding as the trial judge did required the conclusion that the other transactions, comprised of documents which had

not been translated into English, were substantially similar to the sample when those non-translated documents were inadmissible under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 125(2).

155 The trial judge considered the argument that one sample was not sufficient and rejected it. He stated that all of the purchase and sale contract documentation for all the transactions was in evidence and available to both parties and that trial and judicial economy dictated that unless absolutely necessary, time should not be devoted to the proof of every piece of documentation for all 525 transactions. Rather, if the defendant had wanted to quarrel with the assertion that the sample transaction was essentially the same as the rest of them, he had the raw material necessary to do that. He did not attempt to do so.

156 For the reasons given by the trial judge, and the following additional reasons, I would not give effect to the appellant's argument:

a) The requirement that fraud be proven by clear and cogent evidence does not mean, as a matter of law, that it can never be proven by inference drawn from a sample. It depends on the circumstances. Here, there was evidence from which the conclusion could be drawn that the sample was representative, beyond the evidence of the respondent himself. The appellant gave evidence that the content of certain documents was identical in each transaction and a defence witness testified as to how contracts and documents for each transaction were prepared from a "template". Additionally, the appellant did not assert that any fraud evident in the sample transaction was an isolated incident. His position was that there was no fraud, a position that appears consistent with evaluating the matter on the basis of the sample. Finally, the trial judge described the protocol the parties had followed whereby documents could be translated when required. The appellant and various experts and witnesses were fluent in the language of the documents and it was open to them to require translations of any documents that they could use to show the non-representative nature of the sample. There was evidence about some other transactions and, to the extent that it was before the trial judge, it was for him to assess in terms of the sample's representativeness.

b) The trial judge's finding of fraud was not solely based on an inference from the sample. The trial judge devoted over 200 paragraphs of his reasons to an analysis of the BVI standing timber model and why it was fraudulent, referring to evidence well beyond the sample. This included: the lack of objective evidence to support the existence of cash flows between the AIs and the Suppliers; the drop in collection of accounts receivable owing by the AIs to nil after the Muddy Waters Report; the failure to locate the BVI standing timber after the Muddy Waters Report and even until trial; the expert evidence about critical documents that were missing or deficient such as plantation certificates, maps, Forestry Bureau confirmations, sales contracts and harvesting permits; the inability of the Independent Committee to confirm the existence and operations of Suppliers and AIs; and the appellant's control over supposedly

arms-length counterparties. The trial judge made numerous findings of credibility in assessing all of that evidence, which he clearly viewed as a whole.

c) A factual finding of fraud by a trial judge who has weighed large quantities of complex evidence is entitled to deference, absent palpable and overriding error. Such an error must go to the very outcome of the case: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.), at paras. 36-38. In light of the findings of the trial judge on the record before him, the alleged errors concerning the sample would not, in any event, rise to the level that would warrant appellate interference.

157 The appellant also argues that the trial judge erred in allowing the evidence of the respondent, given by affidavit, to remain in the record where it contained opinions that could only be given by an expert. The trial judge was alive to this issue; he ruled in a pre-trial admissibility motion that the respondent's affidavit, where it deposed to matters outside his personal knowledge and contained opinions, would not be relied on as evidence but simply as a description of positions that had to be proven by admissible evidence. The trial judge did not rely on any opinions of the respondent that could only be given by an expert. The appellant's objection that the trial judge should have gone on to "redline" out offending portions of the respondent's affidavit elevates form over substance in these circumstances.

158 I would not give effect to the appellant's arguments about the trial judge's fact-finding.

IV. Conclusion

159 I would dismiss the appeal. In accordance with the parties' agreement, I would award costs of the appeal to the respondent in the amount of $100,000 inclusive of disbursements and applicable taxes.

***Alexandra Hoy A.C.J.O.*:**

I agree.

***David Brown J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 All references to currency are in USD, unless otherwise noted.

2 Affected Creditors were defined by the Plan as including persons with Noteholder Claims. A Noteholder Claim included a claim for principal and accrued interest under Notes (debt instruments issued by SFC when it raised financing on the public markets) by the owner or holder of such Note or their trustee.

3 Noteholder Class Action Claimants were persons with Noteholder Class Action Claims. These were defined as claims as Noteholders in class actions against SFC and its directors, officers, auditors or underwriters, relating to the purchase, sale or ownership of the Notes, but did not include Noteholder Claims, i.e., did not include claims for principal and accrued interest payable under the Note.

4 See note 2.

5 See note 3.

6 There is an overlap between this argument, and the appellant's argument that in assessing damages the trial judge awarded the respondent amounts that could only be claimed in the Class Actions or were duplicative of those amounts. However, I have addressed the points as distinct. One argument is essentially about the respondent's standing to assert certain claims. The other is about whether, even if he has standing, the damages actually awarded were appropriate.

7 The appellant clarified in oral argument that double recovery was raised to avoid judgment against the appellant, not to reduce any damage award made against him. Indeed, the appellant did not point to any recoveries that had been made against him.

End of Document

TAB 2

Court File No. CV- 17-11779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 20th DAY
JUSTICE CONWAY	)	OF AUGUST, 2018

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED, CLAYTON SMITH, CLJ EVEREST LTD., 1150752 ONTARIO LIMITED, CRYSTAL WEALTH MEDIA STRATEGY, CRYSTAL WEALTH MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED RESOURCE & PRECIOUS METALS FUND, CRYSTAL WEALTH MEDICAL STRATEGY, CRYSTAL WEALTH ENLIGHTENED FACTORING STRATEGY, ACM GROWTH FUND, ACM INCOME FUND, CRYSTAL WEALTH HIGH YIELD MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED BULLION FUND, ABSOLUTE SUSTAINABLE DIVIDEND FUND, ABSOLUTE SUSTAINABLE PROPERTY FUND, CRYSTAL WEALTH ENLIGHTENED HEDGE FUND, CRYSTAL WEALTH INFRASTRUCTURE STRATEGY, CRYSTAL WEALTH CONSCIOUS CAPITAL STRATEGY, CRYSTAL WEALTH RETIREMENT ONE FUND and CHRYSALIS YOGA INC.

Respondents

APPLICATION UNDER SECTION 129 OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

ORDER

THIS MOTION, made by Grant Thornton Limited ("**GTL**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**"), without security, of all of the assets, undertakings and properties of each of the Respondents except the Respondent, Chrysalis Yoga Inc. ("**Chrysalis Yoga**") (each of the Respondents except for Chrysalis Yoga being individually and collectively, the "**Crystal Wealth Group**"), for an Order, *inter alia*, approving the Fourth Report of the Receiver dated July 20, 2018 (the "**Fourth Report**") and the activities of the Receiver set out in the Fourth Report, and for other relief requested by the

Receiver in its Notice of Motion dated July 20, 2018, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Fourth Report, including the affidavit of Bruce Bando sworn July 19, 2018 (the "**Bando Affidavit**"), and the affidavit of Mark van Zandvoort sworn July 10, 2018 (the "**van Zandvoort Affidavit**"), the factum of Craig Clydesdale served August 13, 2018, and on hearing the submissions of counsel for the Receiver and such other counsel who were present, no one appearing for any other person on the service list, although duly served as appears from the affidavits of service of Miranda Spence sworn July 23, 2018 and August 16, 2018, filed,

1. **THIS COURT ORDERS** that the time for service and filing of the notice of motion and the Receiver's motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the Fourth Report and the activities of the Receiver described therein be and are hereby approved.

3. **THIS COURT ORDERS** that Confidential Appendix 1 and Confidential Appendix 3 (as defined in the Fourth Report) be and are hereby sealed until further Order of the Court.

4. **THIS COURT ORDERS** that the Receiver's methodology and proposal to make an interim distribution to investors of certain Crystal Wealth Funds, as set out in the Fourth Report, be and is hereby approved, and that the Receiver is hereby authorized to make such interim distribution to such investors.

5. **THIS COURT ORDERS** that Alberto Storelli, Brian Peoples, and Joe Harker are in contempt as a result of their failure to comply with the Order issued by this Court on December 11, 2017 (the "**December 11, 2017 Order**"), which Order required that each of them provide the Receiver and its lawyers, Aird & Berlis LLP, with certain requested but still outstanding information required by the Receiver for a proper account reconciliation and assessment of the US Real Estate LP (as defined in the Fourth Report).

6. **THIS COURT ORDERS** that, as a result of their failure to comply with the December 11, 2017 Order and the finding of contempt against them as set out in paragraph 5 above, Alberto Storelli, Brian Peoples, and Joe Harker are forthwith ordered to comply with the December 11, 2017 Order, and to pay to the Receiver costs in the sum of $10,000.

7. **THIS COURT ORDERS** that the Receiver's Interim Statement of Receipts and Disbursements through to May 31, 2018, as appended to the Fourth Report, be and is hereby approved.

8. **THIS COURT ORDERS** that the Receiver's engagement of Adair Goldblatt Bieber LLP ("**AGB LLP**") pursuant to an engagement letter dated June 11, 2018, attached as Confidential Appendix 1 to the Fourth Report, be and is hereby approved.

9. **THIS COURT ORDERS** that each of Clayton Smith, Darcy Pahl, David DenHollander, Robert Maljaars, Jeffrey Maljaars, Al Housego, and Jerry Froese be and are hereby ordered to answer the undertakings given, and the questions which were taken under advisement and which were refused, during their respective examinations by the Receiver, as follows:

(a) Clayton Smith shall forthwith answer the outstanding undertaking given, and shall answer the questions refused during his examination out of court, as set out in the charts appended as Appendix 17 to the Fourth Report;

(b) Darcy Pahl shall forthwith answer the questions refused during his examination out of court, as set out in the chart appended as Appendix 19 to the Fourth Report;

(c) David DenHollander shall forthwith answer the questions refused during his examination out of court, as set out in the chart appended as Appendix 21 to the Fourth Report;

(d) Robert Maljaars shall forthwith answer the questions refused during his examination out of court, as set out in the chart appended as Appendix 20 to the Fourth Report;

(e) Jeffrey Maljaars shall forthwith answer the questions refused during his examination out of court, as set out in the chart appended as Appendix 22 to the Fourth Report;

(f) Al Housego shall forthwith answer the outstanding undertaking given during his examination out of court, as set out in the chart appended as Appendix 23 to the Fourth Report; and

(g) on the consent of Jerry Froese and the Receiver, Jerry Froese shall forthwith answer: (i) the outstanding undertakings given during his examination out of court, being nos. 13, 18, 19, 20, 31 [production of a USB drive with the actual/native data as saved in the software], 34 [missing enclosures], 36, 41, and 42, as set out in the charts appended at Appendix 24 of the Fourth Report; and (ii) the questions taken under advisement and which were refused during his examination out of court, as set out in the charts appended as Appendix 24 to the Fourth Report.

10. **THIS COURT ORDERS** that, on the consent of the Receiver at the request of Regent Law Professional Corporation, paragraphs 162 and 164 of the Fourth Report be and are hereby amended as set out in Schedule "A" to this Order.

11. **THIS COURT ORDERS** that Craig Clydesdale be and is hereby ordered to answer the undertakings given, and the questions which were taken under advisement and which were refused at his examination held March 12 and 13, 2018, as set out at Appendix 18 to the Fourth Report, by no later than September 20, 2018, subject to the following:

(a) Mr. Clydesdale's answer to Refusal #1 shall be kept confidential by the Receiver and counsel to the Receiver, and not posted on the Receiver's website or filed with the Court; and

(b) Mr. Clydesdale shall not be required to answer Refusal #3 pending further Order of the Court.

12. **THIS COURT ORDERS** that the fees and disbursements of the Receiver for the period October 1, 2017 to May 31, 2018, as described in the Fourth Report and as set out in the Bando Affidavit, be and are hereby approved, and that the allocation of the Receiver's fees and disbursements from October 1, 2018 to May 31, 2018, as described and detailed in the Fourth Report, be and is hereby approved.

13. **THIS COURT ORDERS** that the fees and disbursements of Aird & Berlis LLP, counsel to the Receiver, for the period April 7, 2017 to May 31, 2018, as described in the Fourth Report and as set out in the van Zandvoort Affidavit, be and are hereby approved, and that the allocation of A&B's fees and disbursements in this regard, as described and detailed in the Fourth Report, be and is hereby approved.

14. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

15. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

16. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

Conway J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 2 0 2018

PER / PAR:

SCHEDULE A

Paragraph 162 of the Fourth Report shall be deemed to have been amended as follows (underlined portion reflecting amendment made to existing paragraph):

162 Also on February 23, 2018, A&B sent correspondence to Dionne indicating that it had received confirmation from Hudson Inc. that she had personally filed for bankruptcy, however, that neither DDI Corp nor DDI had filed for bankruptcy. In response, Dionne insisted that she had not executed the DDI Corporate Guarantees and requested that she be provided with the individual's name who provided same to the Receiver. A&B advised Dionne that Darren Smits ("**Smits**"), at that time of Miller Thomson LLP in Calgary, Alberta (now a lawyer of Burstall LLP), had provided the DDI Corporate Guarantees to the Receiver and that Wilson was counsel to the specific transaction. A&B further requested that the Receiver be included on all future correspondence between Smits and Dionne.

Paragraph 164 of the Fourth Report shall be deemed to have been amended as follows (underlined portion reflecting amendment made to existing paragraph):

164 Froese testified during his examination that the potential investment in Restoration Energy through a Factoring Agreement was initially put forth by Smits, who is Frontline's lawyer, and was also the lawyer to Restoration Energy, which Smits confirmed to the Receiver. Recently, the Receiver learned that Smits has left Miller Thomson LLP, and is now practicing at Burstall LLP in Calgary.

ONTARIO SECURITIES COMMISSION -and- **CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED et al.**

Applicant

Respondents

Court File No. CV-17-11779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

ORDER

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Lawyers for Grant Thornton Limited, in its capacity as Receiver and Manager of Crystal Wealth Management System Limited, Clayton Smith, Crystal Wealth Media Strategy, Crystal Wealth Mortgage Strategy, Crystal Enlightened Resource & Precious Metals Fund, Crystal Wealth Medical Strategy, Crystal Wealth Enlightened Factoring Strategy, ACM Growth Fund, ACM Income Fund, Crystal Wealth High Yield Mortgage Strategy, Crystal Enlightened Bullion Fund, Absolute Sustainable Dividend Fund, Absolute Sustainable Property Fund, Crystal Wealth Enlightened Hedge Fund, Crystal Wealth Infrastructure Strategy, Crystal Wealth Conscious Capital Strategy, Crystal Wealth Retirement One Fund, CLJ Everest Ltd., and 1150752 Ontario Limited

COUNSEL SLIP

Court File No. CV-17-11779-00CL

Date: Aug 20/18

No. On List 9

ONTARIO SECURITIES COMMISSION
vs.
CRYSTAL WEALTH MANAGEMENT SYSTEMS LTC

Title of Proceeding

Counsel for: Receiver, Steven L. Graff and Mark van Zandvoort, Ards Berlis LLP

Plaintiff(s) [ ]
Applicant(s) [X]
Petitioner(s) [ ]

Phone No. 416-863-150

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sgraff@ardsberlis.co
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Counsel for:

Defendant(s) [ ]
Respondent(s) [ ]

Phone No. _____

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August 20/18

Unopposed.

2 orders signed ① Judgment Re 1092545 BC payment to Receiver of defaulted amount under Settlement Agt of $50,000.

② Order Re approval of Receiver's 4th report, engagement by Receiver of Adair Goldblatt Bieber for litigation vs BDO, undertakings to be honoured & fees/expenses

of Receiver. While a finding of contempt requires personal service (which has not occurred yet) & is not granted in the Order, the Respondent must be aware of the importance of complying w/ orders of this court & the consequences that can flow from their failure to do so.

Conway

TAB 3

2010 ONSC 5542
Ontario Superior Court of Justice

Abdulrahim v. Air France

2010 CarswellOnt 8324, 2010 ONSC 5542, [2010] O.J. No. 4660, 194 A.C.W.S. (3d) 1090, 99 C.P.C. (6th) 266

Hussein Abdulrahim and Fadi Abedrabbo (Plaintiffs / Respondents) and Nav Canada (Defendant / Moving Party)

G.R. Strathy J.

Heard: September 26, 2010
Judgment: October 12, 2010 *
Docket: 05-CV-294746 CP, 07-CV-336943 PD2, 07-CV-337697 PD1, 07-CV-337566 PD2, 07-CV-337316 PD2, 07-CV-337678 PD3, 07-CV-337680 PD2, 07-CV-337686 PD2

Proceedings: additional reasons at *Abdulrahim v. Air France* (2011), 2011 CarswellOnt 23, 2011 ONSC 64 (Ont. S.C.J.)

Counsel: Pat Floyd, Richard Rohmer, Q.C., Jason Fenn for Nav Canada
J.J. Camp, Q.C., Joe Fiorante for Class
T. Trembley for Société Air France
E.H. Toomath for Mosregion Investments Corporation
R.B. Bell for Goodrich Corp.
J. Feiner for Airbus S.A.S.
Patrick Saul for Greater Toronto Airports Authority
T. Park for Ukraine International Airlines
Peter Durant for David Gillis, Esti Sidis
Brian Brock for Mariana Strugarova
David Boghosian (written), Catherine Virgo (written) for Elisabeta Cojocaru

Subject: Civil Practice and Procedure; Torts; Family

Table of Authorities

Cases considered by *G.R. Strathy J.*:

Abdulrahim v. Air France (2009), 2009 CarswellOnt 8104 (Ont. S.C.J.) — referred to

Abdulrahim v. Air France (2010), 2010 ONCA 403, 2010 CarswellOnt 3799 (Ont. C.A.) — referred to
Coulls v. Pinto (2007), 2007 CarswellOnt 7050, 48 C.P.C. (6th) 183 (Ont. Master) — considered
Drabinsky v. KPMG (1999), 1999 CarswellOnt 3039 (Ont. S.C.J.) — referred to
Dumoulin v. Ontario (2004), 2004 CarswellOnt 2678 (Ont. S.C.J.) — considered
Hotz v. Toronto (City) (2008), 2008 CarswellOnt 484 (Ont. Master) — referred to
Logtenberg v. ING Insurance Co. (2008), 2008 CarswellOnt 3061 (Ont. S.C.J.) — referred to
M. (J.) v. Bradley (2004), 47 C.P.C. (5th) 234, 240 D.L.R. (4th) 435, (sub nom. *M. (J.) v. B. (W.)*) 71 O.R. (3d) 171, 2004 CarswellOnt 2243, 187 O.A.C. 201 (Ont. C.A.) — referred to
Mosregion Investments Corp. v. Ukraine International Airlines (2009), 99 O.R. (3d) 49, 256 O.A.C. 293, 83 C.P.C. (6th) 317, 2009 CarswellOnt 7107 (Ont. Div. Ct.) — referred to
Northfield Capital Corp. v. Aurelian Resources Inc. (2007), 29 B.L.R. (4th) 149, 84 O.R. (3d) 748, 2007 CarswellOnt 1374 (Ont. S.C.J.) — considered
Obonsawin v. Canada (2002), 2002 CarswellOnt 2066, 26 C.P.C. (5th) 293 (Ont. S.C.J.) — considered
Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — referred to
Strugarova v. Air France (2009), 2009 CarswellOnt 4575, 82 C.P.C. (6th) 298 (Ont. S.C.J.) — referred to
Whiteoak Lincoln Mercury Sales Ltd. v. Canadian Pacific Ltd. (1982), 30 C.P.C. 136, 1982 CarswellOnt 497 (Ont. H.C.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 9 — referred to

s. 12 — considered

s. 13 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 138 — considered

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 1.04 — considered

R. 6 — referred to

R. 6.01 — considered

R. 6.01(1) — referred to

R. 6.01(1)(a) — referred to

R. 6.01(1)(b) — referred to

R. 6.01(1)(c) — referred to

R. 6.02 — referred to

R. 6.1.01 [en. O. Reg. 438/08] — referred to

R. 77 — considered

Treaties considered:

Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, ICAO Doc. No. 9740

Generally — referred to

Warsaw Convention on International Carriage by Air, 1929, C.T.S. 1941/15; 137 L.N.T.S. 11

Generally — referred to

MOTION by defendant air traffic control entity to have single liability trial for multiple actions, including class action, arising out of plane crash.

***G.R. Strathy J.*:**

(Motion for Common Liability Trial)

1 This is a motion by Nav Canada ("NAV"), pursuant to Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and rules 1.04 and 6.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for an order that there be a single liability trial, or trial one after the other as determined by the trial judge, for all actions arising out of out of the crash

of Air France flight 358 ("AFR 358") at Pearson International Airport ("Pearson") on August 2, 2005.

I. Background

2 The actions covered by the proposed order are:

(i) the "Class Action": Court File No. 05-CV-294746 CP;

(ii) the "Strugarova Action": Court File No. 07-CV-336943 PD2;

(iii) the "Mosregion Action": Court File No. 07-CV-337697 PD1;

(iv) the "Cojocaru Action" Court File No. 07-CV-337566 PD2;

(v) the "Gillis/Sidis Action": Court File No. 07-CV-337316PD2;

(vi) the "First Fawaz Action": Court File No. 07-CV-337678 PD3;

(vii) the "Second Fawaz Action": Court File No. 07-CV-337680 PD2; and

(viii) the "Haddad Action": Court File No. 07-CV-337686 PD2.

3 The titles of these various proceedings and the parties to them are set out in Schedule "A" to this endorsement. I will describe them later in these reasons.

4 In addition to these actions, there were two other significant actions, both of which have now been resolved. In Court File No. 07-CV-337545 PD2 (the "GTAA Action") the Greater Toronto Airports Authority ("GTAA") claimed against Air France and the pilots of the aircraft for property damage and environmental clean-up costs as a result of the accident. This action was dismissed by the Registrar on May 11, 2010.

5 In Court File No. 07-CV-337564 PD3 (the "Hull/Indemnity Action"), Air France claimed against GTAA, NAV, several air traffic controllers and the Attorney General of Canada for the loss of the hull of the aircraft and for all damages paid to passengers as a result of the accident. The Hull/Indemnity Action has now been settled.

6 Pursuant to previous orders of the court, there has been common case management in the Class Action, the Hull/Indemnity Action, the Strugarova Action and the GTAA Action. I was subsequently appointed to case manage the remaining actions referred to above.

7 I will begin by summarizing the claims in each action and the status of each action. I will then set out the positions taken by the parties on this motion. The moving party is NAV Canada, a defendant in the Class Action and in all the other actions. Its motion is

supported by the plaintiffs in the Strugarova Action, the Mosregion Action, the Gillis/Sidis Action and the Cojocaru Action. The respondents to the motion are the plaintiffs in the Class Action. They are supported by a number of defendants in the other actions as well as by the plaintiffs in the First Fawaz Action, the Second Fawaz Action and the Haddad Action, who are now represented by class counsel.

The Class Action

8 This action (the "Class Action") was commenced in August 2005 as a class action on behalf of the passengers on AFR 358, claiming damages for their personal and psychological injuries, and for their baggage loss. It was certified as a class action on June 1, 2006, with two principal classes: (a) passengers on board the flight; and (b) their spouses, children, and other relatives entitled to claim damages under the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*").

9 A 90 day opt-out period was set, following the mailing of notices of certification. By September 19, 2006, some 44 passengers had opted out of the Class Action. There remain approximately 285 passengers who are members of the class as well as approximately 450 members of the *FLA* class.

10 The action was commenced against: Air France and the two pilots of the aircraft; the GTAA, which operates Pearson; Airbus S.A.S. ("Airbus"), the manufacturer of the aircraft; Goodrich Corp. ("Goodrich"), the manufacturer of the emergency evacuation system and slides for the aircraft; and NAV, the provider of air traffic control and navigation services at Pearson.

11 Considering the size and complexity of the Class Action, as well as the number of defendants, it has proceeded with commendable dispatch. There has been extensive documentary and oral discovery of the defendants. Many thousands of pages of documents have been produced and there have been about 25 days of oral discovery. A number of experts have been retained by class counsel to investigate the liability issues, including pilot experts, crash investigation experts, weather and air traffic control experts, runway experts, airport safety experts and human factor experts.

12 Class counsel have also made extensive investigations to work up damages assessments and briefs on behalf of virtually every member of the class. They have retained experts to assist in the assessment of the damages, including psychiatrists, physicians, psychologists, economists and future care experts. As a result of these damages assessments, class counsel were well-equipped to engage in settlement discussions with the defendants.

13 Some measure of the work done by class counsel can be found in the more than $4 million in time docketed to the file and over $1 million in disbursements paid to date.

14 The work done by class counsel has paid off. Following discoveries, class counsel reached a settlement with Air France. Mediation with Goodrich and Airbus resulted in a settlement. These settlements were approved by Lax J. on December 2009 and an appeal of her order was dismissed by the Court of Appeal: see *Abdulrahim v. Air France*, [2009] O.J. No. 5550 (Ont. S.C.J.), aff'd 2010 ONCA 403, [2010] O.J. No. 2388 (Ont. C.A.). The class subsequently settled with GTAA and that settlement was approved by Lax J. on June 28, 2010. The total value of these settlements is $13.65 million.

15 The settlement approval orders had the result of narrowing the claim against the remaining defendant, NAV, to its several share of "Extra-Convention Damages," defined as the damages available under the law of Canada and Ontario, other than those damages recoverable under the *Montreal* or *Warsaw Conventions*. The settlement orders also:

> (a) dismissed all claims, including cross-claims by NAV against the settling defendants;
>
> (b) barred further discovery of the settling defendants;
>
> (c) restricted the claims of the representative plaintiffs against NAV to NAV's share of Extra-Convention Damages.

16 At this stage, the plaintiffs in the Class Action are basically ready for trial against NAV, now the sole defendant. The plaintiffs have requested a trial date, estimating a trial of one month in length. NAV contends that the trial will take about six months. I have been provided with no specific information that would allow me to assess the reasonableness of either one of these estimates. My overall impression, however, is that it should be possible to reach an agreement of many of the key facts and that the trial will be a battle of experts. A focused approach to this evidence could significantly reduce the length of the trial.

The Other Actions

17 Apart from the Mosregion Action, the other actions were commenced by passengers on AFR 358 who have opted out of the Class Action, in the exercise of their rights under s. 9 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*"). They will be referred to from time to time as the "Opt-Out Actions" or the "Opt-Outs".

The Strugarova Action

18 Mariana Strugarova was a passenger on AFR 358. In this action she and her husband and son (both of whom claim *FLA* damages) claim against Air France and the pilots, GTAA, NAV, Goodrich, and Airbus for personal injury and property damage. She claims that an emergency slide, which was manufactured by Goodrich, failed to deploy. As a result, she was forced to jump from the aircraft to evade the smoke and fumes in the cabin. She claims that she suffered serious injuries as a result.

19 Ms. Strugarova opted out of the Class Action. On January 16, 2009, Stewart J. issued an order, on consent of the plaintiffs in the Class Action, that:

> (i) the discoveries in the Class Action would apply to the Strugarova Action;
>
> (ii) the Strugarova Action and the Class Action would be tried together or one after the other as the trial judge may direct; and
>
> (iii) the parties to the Strugarova action may conduct additional examinations for discovery, provided that such discoveries do not delay or interfere with the litigation timetable in the Class Action.

20 Air France has taken the position that the Ontario courts do not have jurisdiction over Strugarova's claim and moved to stay or dismiss her claim. That issue was decided against Air France by Roberts J. on February 2, 2009, who held that the court does have jurisdiction. Roberts J. subsequently ordered, on the application of the plaintiffs, that the motion be re-opened: *Strugarova v. Air France* (2009), 82 C.P.C. (6th) 298, [2009] O.J. No. 3267 (Ont. S.C.J.). I have been advised that the re-hearing is to take place on December 3, 2011. It seems highly likely that, regardless of the outcome, there will be further appeals.

(b) The Mosregion Action

21 Mosregion Investments Corporation, Technopark Dmitrov Corporation, and Yury Trushin, a passenger who has not opted out of the Class Action, claim against Ukraine International Airlines, Air France and its pilots, GTAA, NAV, and Airbus, primarily for damages with respect to the loss of documents that were allegedly carried on the aircraft.

22 The claim is somewhat unusual in that it relates to documents concerning a land development in Russia, which were allegedly carried by Mr. Trushin in his baggage on a flight from Moscow to Kiev on Ukraine International Airlines and then transferred to AFR 358 for carriage to his ultimate destination in Toronto. It is claimed that the documents, which were totally destroyed, had a value of some $20 million and that the plaintiffs have incurred massive damages as a result.

23 There have been no examinations for discovery in the Mosregion action. Ukrainian International Airlines challenged service of the statement of claim and has not filed a statement of defence. An appeal is pending in the Court of Appeal, to be heard in December, from the order of the Divisional Court dismissing an appeal from the Master extending the time for service: *Mosregion Investments Corp. v. Ukraine International Airlines* (2009), 99 O.R. (3d) 49, [2009] O.J. No. 4857 (Ont. Div. Ct.). Some of the defendants have indicated that they may bring motions for summary judgment. Affidavits of documents have not been delivered and discoveries have not been held.

24 It is evident that this action raises a number of issues that are not issues in the Class Action, including whether the plaintiffs have a claim against Ukraine International Airlines, whether they have a claim against Air France, whether the conduct of the pilots was "reckless," and whether the damages in question are remote or otherwise.

(c) The First Fawaz Action, the Second Fawaz Action and the Haddad Action

25 I will address these actions together because class counsel has taken over carriage of them and there is a strongly likelihood that they will be folded into the Class Action.

26 In these three actions the plaintiffs Kassem Fawaz, Mohamad Fawaz and Abdul-Majid Haddad, who were passengers on AFR 358, claim, along with their dependents, against Air France and the pilots, GTAA, NAV, Goodrich and Airbus for their personal injuries, property damage and corresponding *FLA* damages.

27 Although they opted out of the Class Action, the plaintiffs in the three actions have now retained class counsel to represent them. Settlements have been reached in the three actions with Goodrich, Airbus and GTAA. Discussions have been taking place with Air France and its pilots and class counsel anticipates a resolution with that defendant as well. If that occurs, the actions will be reduced to claims against NAV only, in which case it is proposed to fold them into the Class Action.

(d) The Cojacaru Action

28 Maria Cojocaru, as well as her two minor children, Elisabeta and David, were passengers on the flight. She claims on her own behalf as well as litigation guardian on behalf of her children for personal injury and property damage as a result of the accident. Her husband asserts an *FLA* claim. The defendants are Air France and the pilots, GTAA, NAV and Airbus. Airbus claims that it has not been served with the statement of claim. Pleadings are not yet complete, only NAV has delivered an affidavit of documents and no discoveries have been held. It is apparent that the action has languished. A status hearing was scheduled before a Master on September 28, 2010.

(e) The Gillis/ Sidis Action

29 David Gillis and Esti Sidis were returning from their wedding trip on AFR 358. They were seated in the front row of the aircraft and claim to have suffered serious injuries as a result of the crash and evacuation. They have sued Air France, GTAA and NAV for their injuries and damages as a result of the accident.

30 The statement of claim was issued on July 26, 2007, and was served on September 9, 2008. Statements of defence have been delivered. The plaintiffs have been examined for discovery. Only NAV has delivered an affidavit of documents. None of the defendants has been discovered.

31 The plaintiffs take the position that Air France is solely liable for their damages. Air France is subject to strict liability under the *Warsaw* and *Montreal Conventions.* In the circumstances, it would appear that the measure of damages is the only issue in the case of Mr. Gillis. There may be an issue of whether the damages suffered by Ms. Sidis are recoverable as *Convention* damages.

32 Counsel for the plaintiffs has suggested a timetable that would see discoveries completed by March 31, 2011 and a mediation completed by April 30, 2011. I have not yet received submissions from the defendants on this proposal.

II. The Submissions of the Parties

(a) Submissions of NAV

33 NAV submits that my jurisdiction to make the order sought is found in s. 138 of the *Courts of Justice Act* and in rules 1.04 and 6.01 of the *Rules of Civil Procedure*. Section 138 provides:

> As far as possible, multiplicity of legal proceedings shall be avoided.

34 Rule 1.04 states the following principle:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

35 Rule 6 identifies some of the ways in which the court can give effect to that principle:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

36 Also worthy of note is s. 12 of the *C.P.A.*:

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

37 As well, s. 13 provides:

The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

38 NAV submits that a single liability trial is the only cost-effective method of dealing with these actions; it will avoid a multiplicity of trials, which will thereby reduce the overall costs to the parties, and will control the use of judicial resources. It will reduce the amount of time spent in trials, thereby benefitting the parties and the public purse. It will also ensure consistency of results: see *Hotz v. Toronto (City)*, [2008] O.J. No. 384 (Ont. Master); *Logtenberg v. ING Insurance Co.*, [2008] O.J. No. 3394 (Ont. S.C.J.). NAV points to the commonality of the parties in the actions, the common factual and legal issues, and the probability of common expert evidence on many issues. It says that the common and complex factual issues can best be addressed at a common trial. NAV notes as well that there is already an order that the discoveries in the Class Action will apply to the Strugarova Action and an order that those actions be tried together, with common production, discovery, mediation and pre-trial conference. It says that this is an implicit recognition of the practicality and value of a common liability trial. NAV says that the common liability trial can be structured in such a way as not to prejudice the Class Action plaintiffs.

39 NAV also points out that it was previously ordered that the Hull/Indemnity Action and the GTAA Action (neither of which is now extant) be subject to case management in common with the Class Action and it was contemplated that the liability trial in the Class Action would be followed by the other two.

40 NAV submits that a common liability trial will avoid duplication of expensive and time-consuming pre-trial discovery and production, will enable evidence at trial that is common to all proceedings, will reduce the time and cost of trial, and will avoid inconsistent results.

41 Most important, NAV submits that it will be prejudiced if it has to defend all the outstanding actions in separate hearings at separate times against separate parties. It submits that this creates great unfairness and inefficiency, not to mention the possibility of inconsistent verdicts.

42 NAV submits that, in addressing this issue, the first step is to determine whether the criteria in rule 6.01(1) have been met. If they are, then the court must consider whether the balance of convenience supports the order: *Coulls v. Pinto* (2007), 48 C.P.C. (6th) 183, [2007] O.J. No. 4241 (Ont. Master) at para. 20. The factors to be considered in the exercise of the court's discretion include:

> (a) whether the order will create a saving in pre-trial procedures;
>
> (b) whether there will be a real reduction in the number of trial days; and

(c) whether there will be a real saving in experts' time and witness fees.

43 NAV's submissions are supported by the plaintiffs in the Mosregion, Cojocaru, Gillis/Sidis and Strugarova actions. Counsel for Mosregion says that it is inconceivable that there could be separate liability trials in view of the potential for different verdicts. Counsel for Cojocaru points out that each trial may require upwards of 17 experts and that it would be a waste of resources if this evidence was given in separate trials. It suggests that discoveries in the Class Action could be applied to the other actions. Counsel for Cojocaru also submits that the trial judge at the common issues trial will have to hear evidence and make determinations concerning the fault of the non-settling defendants. Counsel for Strugarova says that there has already been a court order for trial together, made on consent, and that it would be unfair to redesign the playing field at this time.

(b) Submissions of Class Counsel

44 Class counsel makes the point that by international convention, embodied in Canadian law, Air France has strict liability for passenger bodily injuries incurred in the course of carriage. The same is not true with respect to psychological or emotional injury (such as post-traumatic stress disorder) unaccompanied by physical injury. As many of the passengers on the flight claim to have suffered the latter form of injury, it was considered necessary to bring other defendants into the action, to ensure that all potential damages were recoverable. This is not an issue that affects all the plaintiffs in the Opt-Out Actions, many of whom suffered serious personal injuries.

45 Class counsel's overall position is that it would be unfair and prejudicial to the class to drag it back into an expensive trial with defendants with which it has settled. Class counsel has pursued a thorough, aggressive, expensive and focused prosecution of this litigation, which has resulted in several advantageous settlements. There is one remaining defendant, NAV, and class counsel wishes to pursue an early and focused trial against that defendant. The bar order prohibits NAV from claiming over against the settling defendants, but it is trying to bring them back into the action by recruiting the support of the Opt-Outs. This will undoubtedly delay the trial and increase its duration. Counsel submits that it will deprive the class of the strategic benefits they have achieved through settlements with the other defendants.

46 Class counsel submits that this would be a perversion of the opt-out process because it will essentially permit the opt-outs to dictate the pace of the litigation - to have their cake and eat it - by opting out but continuing to call the tune of the prosecution.

47 There is another problem identified by class counsel. The position of the class on liability will not be the same as the plaintiffs in the Opt-Out Actions. The class will be taking the position that the accident was caused entirely, or largely, as a result of the fault of NAV. It will attempt to maximize the liability of NAV and downplay the fault, if any, of the settling defendants. Moreover, the liability of Air France is not an issue in the common issues trial, because it cannot be liable for Extra-Convention Damages. The plaintiffs in the other actions, of course, will focus on the fault of all defendants.

48 Class counsel's position is supported by Air France, Airbus, GTAA and Goodrich. A common theme of their submissions is that they settled the Class Action, and bar orders were made in that action, so that they could avoid the prospect of a lengthy trial. Although not specifically spelled out, part of their purpose in settling was to avoid the prospect of a lengthy and expensive trial and that benefit will be lost if they are dragged into an even lengthier trial involving multiple parties. They submit that it will discourage partial settlements in class actions if the non-settling defendants and the opt-outs can drag the settling defendants back into the proceedings.

49 Goodrich, in particular, maintains that its potential liability is discrete and has nothing to do with the Class Action, which will focus on the crash and its causes. The liability of Goodrich relates to events that occurred after the crash. Airbus, which is a defendant in only two of the actions - the Strugarova action and the Mosregion Action - says that it does not want to be dragged back into the Class Action and into other actions that have nothing to do with it.

III. Analysis

50 There is no doubt about the court's jurisdiction to make the order NAV seeks or, making use of the court's jurisdiction under s. 12 of the *C.P.A.* and under Rule 77, to make other orders and give directions concerning the conduct of this group of proceedings to bring about their efficient and cost-effective resolution.

51 There can also be no doubt concerning the general principle, expressed in the *Courts of Justice Act*, the *Rules*, and in numerous decisions of the courts, that a multiplicity of proceedings should be avoided. One of the reasons behind this principle is the public interest in the efficient use of judicial resources, and in keeping the costs and duration of legal proceedings under control.

52 I will begin by reviewing some of the principles and authorities referred to by counsel.

53 Counsel for NAV relies upon the decision of Master Glustein in *Coulls v. Pinto*, above, a decision interpreting Rule 6. The master acknowledged that the underlying purpose of the rule is to avoid multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes, and to avoid inconsistent judicial findings. He accepted the submission of counsel that the threshold question is to determine whether any of the criteria under Rule 6.01(1) have been met, namely (i) a question of law or fact in common (under Rule 6.01(1)(a)), or (ii) the relief arises out of the same transaction or occurrence or series of transactions or occurrences (under Rule 6.01(1)(b)), or (iii) any other reason why an order under Rule 6 ought to be made (under Rule 6.01(1)(c)). If those considerations are met, the court must still consider whether the balance of convenience requires the order: *Drabinsky v. KPMG*, [1999] O.J. No. 3630 (Ont. S.C.J.).

54 The master said, at para. 20, that the discretionary factors would include,:

> (i) will the order sought create a saving in pre-trial procedures, and in particular, pre-trial conferences; (ii) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time; (iii) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest; (iv) will there be a real saving in experts' time and witness fees; (v) is one of the actions at a more advanced stage than the other, and (vi) will the order result in a delay of the trial of one of the actions, and if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits a combined trial might otherwise have (*Shah v. Bakken*, [1996] B.C.J. No. 2836 (S.C.) at paras. 14-15 ("*Shah*"); adopted by O'Neill J. in *McKee v. Thistlethwaite*, [2003] O.J. No. 2850 (S.C.J.) ("*McKee*") at para. 11).

55 In that case, which did not involve a class action, the master found that the pre-conditions in Rule 6.01(1) had not been met. None of the other cases referred to by counsel for NAV was a class action.

56 Counsel for NAV also refers to the decision of Montgomery J. in *Whiteoak Lincoln Mercury Sales Ltd. v. Canadian Pacific Ltd.* (1982), 30 C.P.C. 136, [1982] O.J. No. 940 (Ont. H.C.). That was a case arising out of the Mississauga train derailment in 1979. It pre-dated the availability of class actions in Ontario and some 389 separate legal proceedings had been commenced against Canadian Pacific Limited. There were clearly common issues of fact and law involved. It was obviously a case that required a single trial and a number of the leading plaintiffs' counsel, as well as counsel of the key defendants had come to an agreement to streamline the proceedings. The order basically contemplated that some plaintiffs would take the lead in prosecuting the action

as test cases and others could elect to take a back seat. Undoubtedly the action would be prosecuted as a class action had it arisen today. It was simply a practical method of resolving the issues arising from multiple proceedings.

57 There are, on the other hand, several authorities referred to by class counsel, which relate specifically to the class action context.

58 In *Obonsawin v. Canada*, [2002] O.J. No. 2502 (Ont. S.C.J.), Epstein J., as she then was, dealt with the issue of whether an individual action could be joined, in a single proceeding, with a class action under the *C.P.A.* The individual claim was asserted by one of the plaintiffs in his personal capacity whereas the other plaintiff asserted a claim on behalf of the class. Epstein J. noted that the action included overlapping claims and therefore overlapping issues. The defendants moved to sever the claims, contending among other things that the *C.P.A.* does not permit the joinder of individual claims and class claims.

59 Epstein J. severed the individual claim from the proposed class proceeding. She noted at para. 23:

> Moreover, joinder of a class action with an individual claim is not compatible with the advancement of the objectives of class proceedings. Certainly joinder of an individual action with a class action is not consistent with the objectives of behaviour modification or access to justice. Depending on the facts of the particular case, joinder may also interfere with the type of judicial economy contemplated by class proceedings. In fact, joinder may unnecessarily complicate the class proceeding. There are therefore policy reasons why such joinder should not be permitted.

60 While the circumstances before Epstein J. were quite different from the case before me, her comments are on point. Joining the Class Action with the Opt-Out Actions will unnecessarily complicate the Class Action and will therefore interfere with judicial economy. It will also impede access to justice for the class by delaying the Class Action and increasing its cost.

61 In *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (Ont. S.C.J.), Cullity J. dealt with motions arising from a class action and a related individual action. Both actions alleged that there were toxic moulds, gases and other harmful substances in the Newmarket courthouse that were injurious to the health of those who were exposed to them. The class action was on behalf of all persons who, since 1979, had been exposed to the substances in the courthouse and who had suffered adverse consequences. The other action was an individual action by the plaintiff on her own behalf and on behalf of her family members. The defendant Ontario Realty Corporation sought an order under rule

37.15 requiring all motions in the two proceedings to be heard by a single judge. Cullity J. found, at para. 4, that such an order should be made "in the interests of efficiency and economy so as to avoid unnecessary duplication of procedures, to avoid inconsistencies in the application of legal principles and to achieve the most economical use of judicial and other litigation resources."

62 The defendant in that case also sought an order waiving its obligation to file a statement of defence in the individual action. Cullity J. declined to grant the order, stating at para. 8:

> The CPA was not intended to prevent, or impede, actions by individuals for no other reason than they are, or may be, members of a putative class in an action commenced by another party. Even if Ms Verkerk's medical condition was not as serious as the evidence indicates, she would suffer prejudice by reason of the delay in progressing with her action. The effect of the order would, as her counsel submitted, be to stay her action indefinitely. Although counsel for ORC emphasized that the order it sought could be open to review by the court at any time, or times, the general thrust of his submissions was that the Verkerk action should proceed in tandem with the class action - at least until the hearing of the motion to certify the latter - because the latter would "overshadow" it.

63 These decisions by Epstein J. and Cullity J. were referred to with approval by Ground J. in *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748, [2007] O.J. No. 850 (Ont. S.C.J.). In that case, corporate and individual plaintiffs had brought an action against the defendant claiming an oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. A separate class action, claiming similar relief, had been commenced by another individual in Ontario and there was another class action in Alberta. The defendant brought a motion requesting, among other things, that the individual action be consolidated with or tried together with the Ontario class action or that it be stayed pending the completion of the trial in the class action. Although the class action was at a preliminary stage, the plaintiffs in the individual action said that if the class action were was certified, they intended to opt out.

64 Ground J. refused to grant consolidation or trial together. He observed at para. 37:

> I think it is self evident that, in view of the different stages at which this action and the Ontario Class Action are and in view of the complexity of class proceedings, the Plaintiffs will suffer considerable delay and increased costs if the actions are to be consolidated or tried together. In addition, I accept the submissions of the Plaintiffs and Gallagher that to order consolidation or trial together is tantamount to depriving the Plaintiffs of their right to opt out of the Ontario Class Action. More

> significantly, in my view, to order consolidation of an individual claim with a class action proceeding would be contrary to the purpose and goals of the *CPA*. [Then referring to the decision of Epstein J. in *Obonsawin v. Canada*, above at paras. 23-24].

65 Ground J. also referred to the decision of Cullity J. in *Dumoulin v. Ontario*, above and concluded, with respect to the claim for a stay of the individual action, at para. 39:

> ... I accept the submissions of the Plaintiffs that the court's jurisdiction to grant a stay should be exercised sparingly and only in the clearest of cases where they [sic] would be an injustice or prejudice to the moving party if the stay is not granted. I am not satisfied that Aurelian has met this onus in the circumstances of this case at this particular time. There is no convincing evidence of injustice or prejudice to Aurelian if this action is not stayed at this time.

66 These authorities acknowledge that class actions, by their very nature, avoid a multiplicity of proceedings and that the rules concerning consolidation of ordinary actions should be applied with some caution to class actions. I therefore agree with the submission of class counsel that a class action cannot be treated as being the same as any other action for the purposes of a motion such as this. A class action is the very embodiment of the principle that a multiplicity of proceedings should be avoided. In permitting a claim to be advanced on behalf of numerous similarly-situated individuals, the class action promotes access to justice and judicial economy. At the same time, the Ontario class action regime permits freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the *C.P.A.* clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction. The statute expressly contemplates that, in spite of its size and scope, the class action will be managed so as to promote its "fair and expeditious" determination. It would be a strange perversion of the intent of the statute if those who opt out are permitted to fetter the progress of the class action. It would be even stranger if those opt-outs could sit on the sidelines and do nothing while the class action marches to the finish line and then call "time out" so they can catch up.

67 It would also pervert the purpose of a *Pierringer* settlement [1] and the bar order giving effect to that settlement (both of which are designed to facilitate the settlement of class actions), if the non-settling defendant could drag the settling defendants back into the litigation, as NAV seeks to do in this case.

IV. Conclusions

68 While I cannot say that it will never be appropriate to order a common trial of a class action and an individual action or actions, it is my conclusion that this is not a case in which it should be done. It is obviously a case for the exercise of discretion and the balancing of various factors. I have taken into account the following:

• the Class Action and the individual actions are at very different stages -the Class Action is virtually ready for trial and the Opt-Out Actions are far from it, some having serious procedural impediments in their path. There is therefore no likelihood of any reduction in pre-trial procedures and some of the pre-trial motions in the Opt-Out Actions are idiosyncratic;

• some of the Opt-Out Actions are in their infancy and delaying the common issues trial to enable those actions to catch up would unquestionably postpone the trial of the common issues in the Class Action, to the prejudice of the Class;

• the effect of the settlements in the Class Action has been to remove the liability of Air France as an issue at the common issues trial. The onus will therefore be on NAV to prove fault of the other defendants, Goodrich, Airbus, and GTAA, in order to reduce its several share of liability. The effect of consolidation would be to prejudice those defendants by subjecting them to a trial in which they will be forced to be active participants;

• a common trial will substantially increase the length of the trial in the Class Action, involving, as it necessarily must, defendants who are no longer parties to the Class Action and raising issues that have nothing to do with the Class Action, all to the inconvenience, expense and prejudice of the class who have carefully and, at no small expense, intentionally narrowed the focus of their proceeding;

• there may be some saving in experts' time and witness fees, but it needs to be kept in mind that some of those experts will have little to do with the Class Action;

• a common trial will severely prejudice the settling defendants in the Class Action, who bought peace in the expectation that they would not be exposed to the time and vast expense of a trial;

• permitting the Opt-Out Actions to dictate the course and pace of the Class Action will undermine the efficacy of the opt-out process and of class actions generally;

• while there is some possibility of inconsistent verdicts, this factor should not be given particular weight, given the strict liability of Air France and the probability that most of the opt-out claims against that defendant will likely be resolved, either by settlement or by an assessment of damages; and

• the motion comes too late in the day - had it been brought earlier, it might have been possible to structure the actions so as to avoid excessive costs and duplication, put the actions on a common timetable, and resolve motions in an expeditious manner. These options are obviously not possible at this stage.

69 There are other good reasons not to grant the relief sought. The Fawaz actions and the Haddad Action seem headed to settlement with some defendants and will likely be folded back into the Class Action as against NAV. The Mosregion Action has a claim against Ukraine International Airlines which is not a party in any other action. That action has its own procedural issues and some legal issues that are complex and unique to it. The Strugarova, Cojocaru and Gillis/Sidis actions appear to have claims that are the responsibility of Air France under the *Conventions* and those claims may well be capable of resolution or at worst an assessment of damages.

70 The Strugarova Action is somewhat an exception to the above, because there is a preexisting order that it be tried together with the Class Action. There was a specific *caveat*, however, that the action was not to interfere with the litigation timetable in the Class Action.

71 The legal landscape has changed since the order of Stewart J., given that the settlements achieved in the Class Action have not been mirrored in the Strugarova Action. As well, the Strugarova Action has become embroiled in a jurisdictional dispute that was not foreseen by the order of Stewart J. If that dispute is resolved against the plaintiff, the action will presumably be dismissed. If it is resolved in the plaintiff's favour, there would appear to be a reasonable likelihood that the claim against Air France, and perhaps other defendants, will be resolved. In that event, Strugarova's claim against NAV could well be folded into the Class Action.

72 I acknowledge that there is some potential prejudice to NAV in the event that separate trials are required. It may be forced to face more than one trial and there may be some risk of inconsistent verdicts. It seems to me that, as a practical matter, these risks have been over-stated. In those cases where this court has jurisdiction over the Opt-Out Actions, there is a probability that Air France will settle the claims for *Convention* damages, as it has done in the Class Action and as it will probably do in the Fawaz and Haddad actions. There may well be a possibility of resolving the claims against GTAA and Airbus. This could well leave most of the opt-outs with claims against NAV. If this occurs, on a timely basis, it may be possible to fold them into the Class Action or to treat the Class Action as a test case. If the Opt-Out Actions have not been resolved, either procedurally or substantively, by the time of the common issues trial, the result of that trial is likely to be a strong indicator of NAV's responsibility, if any, for the accident. It may well prove to be a guide for future settlements.

73 I therefore dismiss the motion.

74 I leave open the possibility that if there are changes in the status of any of the Opt-Out Actions (such as settlement with one or more defendants) that would cause the court to consider that action being folded into the Class Action (as will likely occur with the Fawaz and Haddad actions) or that would justify conducting the trial of that action immediately following the common issues trial in the Class Action, the issue may be re-visited. It will be up to those actions to catch up, if possible, with the Class Action. If any one of them is able to do so, and a trial procedure can be developed that will not interfere with the progress of the common issues trial, the issue can be reconsidered.

75 These actions will remain under case management. Counsel in each action, other than the Class Action, shall arrange a case conference within 30 days to review the status of the action. Counsel are encouraged to discuss procedures and timetables with in a view to expediting the progress of the action.

76 Costs of this motion, if not resolved, may be addressed by written submissions.

Schedule "A" — Proceedings

Court File No. 05-CV-294746 CP

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

HUSSEIN ABDULRAHIM and FADI ABEDRABBO

Plaintiffs

-and -

AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FRÉDÉRIC NAUD, GOODRICH CORP. and AIRBUS S.A.S.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

AND

Court File No. 07-CV-336943 PD2

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARIANA STEFANOVA STRUGAROVA, MIROSLAV PAVLOV KISSIOV, STEFAN MIROSLAVOV KISSIOV

Plaintiffs

-and -

AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FREDERIC NAUD, GOODRICH CORP. and AIRBUS S.A.S.

Defendants

AND

Court File No. 07-CV-337697 PD1

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

MOSREGION INVESTMENTS CORPORATION and TECHNOPARK DMITROV CORPORATION and YURY TRUSHIN

Plaintiffs

-and -

UKRAINE INTERNATIONAL, SOCIÉTÉ AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FREDERIC NAUD and AIRBUS S.A.S.

Defendants

AND

Court File No. 07-CV-337316 PD2

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID GILLIS and ESTI SIDIS

Plaintiffs

-and -

SOCIÉTÉ AIR FRANCE, THE GREATER TORONTO AIRPORT AUTHORITY and NAV CANADA

Defendants

AND

Court File No. 07-CV-337566 PD2

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELISABETA COJOCARU AND DAVID COJOCARU, MINORS BY THEIR LITIGATION GUARDIAN MARIA COJOCARU, MARIA COJOCARU AND EUGEN COJOCARU

Plaintiffs

-and -

AIR FRANCE, JOHN DOE #1, JOHN DOE #2, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, and AIRBUS S.A.S.

Defendants

AND

Court File No. 07-CV-337678 PD3

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

KASSEM FAWAZ, MOHAMAD FAWAZ, NADA FAWAZ, LEILA FAWAZ, MARIAM FAWAZ, MOHAMAD FAWAZ, AND IBRAHIM ALI FAWAZ

Plaintiffs

-and -

AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FRÉDÉRIC NAUD, GOODRICH CORP. and AIRBUS S.A.S.

Defendants

AND

Court File No. 07-CV-337680 PD2

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

MOHAMAD FAWAZ, NADA FAWAZ, KASSEM FAWAZ, LEILA FAWAZ, MARIAM FAWAZ and IBRABIM ALI FAWAZ

Plaintiffs

-and -

AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FRÉDÉRIC NAUD, GOODRICH CORP. and AIRBUS S.A.S.

Defendants

AND

Court File No. 07-CV-337686 PD2

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

ABDUL-MAJID HADDAD, AICHA HADDAD, MOHAMMAD HADDAD, BILAL HADDAD, MONA HADDAD, MOUZAYA BABA HADDAD, WALID HADDAD, RIDA HADDAD and ROLA HADDAD

Plaintiffs

-and -

AIR FRANCE, GREATER TORONTO AIRPORTS AUTHORITY, NAV CANADA, ALAIN ROSAYE, FRÉDÉRIC NAUD, GOODRICH CORP. and AIRBUS S.A.S.

Defendants

Motion dismissed.

Footnotes

∗ Additional reasons at *Abdulrahim v. Air France* (2011), 99 C.P.C. (6th) 254, 2011 CarswellOnt 23, 2011 ONSC 64 (Ont. S.C.J.).

1 See *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963); *M. (J.) v. Bradley* (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 (Ont. C.A.).

ANTHONY WHITEHOUSE et al. -and- **BDO CANADA LLP** Court File No. CV-17-579357-00CP

Plaintiffs Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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