# COURT OF APPEAL FOR ONTARIO

CITATION: Quantum Dealer Financial Corporation v. Toronto Fine Cars and Leasing Inc., 2023 ONCA 256
DATE: 20230414
DOCKET: C70509

Pepall, Trotter and Thorburn JJ.A.

BETWEEN

Quantum Dealer Financial Corporation and NextGear Capital Corporation

Plaintiffs
(Respondents)

Toronto Fine Cars and Leasing Inc., Diego Sebastian Diaz, also known as Diego Diaz and as Sebastian Torrez, Claudia Guillen Aracely, also known as Claudia Guillen, Garnette C. Williams, 2564523 Ontario Inc. and Jasmin Ivonne Guillen

Defendants
(Appellants)

Alistair Crawley and Mitchell Fournie, for the appellants

Ted Frankel, Christopher Selby and Aaron Cressman, for the respondents

Heard: November 2, 2022

On appeal from the judgment of Justice Andrew Pinto of the Superior Court of Justice, dated February 22, 2022, with reasons reported at 2022 ONSC 1132.

**Trotter J.A.:**

## A. INTRODUCTION

[1] The appellants were implicated in the fraudulent activities of a relative, Diego Sebastian Diaz ("Diego")[1]. On a summary judgment motion, they were found liable for the torts of knowing assistance and knowing receipt relating to Diego's wrongful conduct. The motion judge awarded $1,492,635.45 in damages.

[2] The appellants submit that the motion judge erred in drawing unwarranted inferences from the evidence, leading him to make erroneous findings of liability. In the following reasons, I explain why I accept the appellants' submissions.

[3] Properly considered, the evidence did not permit the motion judge to find that the appellants were aware of Diego's fiduciary relationship with the respondents, that they knew he breached his fiduciary duty, that they knowingly assisted him in that breach, or that they knowingly received funds from that breach. The motion judge unduly focused on the appellants' questionable expenditure of funds, rather than on whether the funds could be traced back to Diego's breach of fiduciary duty. Moreover, the appellants' liability was based largely on the mere rejection of their evidence. Overall, the motion judge's conclusions were speculative.

---

[1] For the sake of clarity in these reasons, after identifying the appellants by their full names, I will respectfully refer to them by their first names.

[4] I would allow the appeal, set aside the summary judgment against the appellants, and remit the case to the Superior Court for trial.

## B. BACKGROUND

### (1) The Parties

[5] Quantum Dealer Financial Corporation ("Quantum") and NextGear Capital Corporation ("NextGear") (the respondents) finance used car inventories.

[6] Toronto Fine Cars and Leasing Inc. ("TFC") was a used car dealership established in 2013 that carried on business in Mississauga. Diego was a director, officer, and the controlling shareholder of TFC. He came to Canada from Argentina. It is believed that he returned to South America in 2019.

[7] Claudia Guillen, along with her sister Jasmin Guillen, came to Canada from El Salvador in 1994 when they were teenagers. Claudia married Diego in 2004 and they had four young children at the time of the relevant events. When Claudia came to Canada, she trained as a law clerk and worked at a law firm that handled real estate transactions. In 2013, Claudia joined Diego at TFC. Her precise role was unclear, although she had signing authority on TFC's bank account and she was responsible for depositing cheques. She had no role in the sale of cars.

[8] Jasmin is the sole officer, director, and shareholder of 2564523 Ontario Inc. ("256"). Jasmin is married to Garnette Williams, who worked for the Toronto Transit Commission.

[9] The motion judge referred to Jasmin, 256, Claudia, and Garnette as the "Guillen Defendants", or "GD" for short. He treated them as a cohesive unit. As I explain below, their liability had to be determined individually, not collectively.

**(2) Diego's Fraudulent Conduct**

[10] In 2014, Diego and TFC entered into lending and security agreements with the respondents. Each company financed different portions of TFC's inventory.

[11] Between October 25 and 26, 2016, representatives of the respondents visited the TFC dealership. The premises appeared to be abandoned. None of the vehicles financed by Quantum were on the lot; almost all of the vehicles financed by NextGear were gone.

[12] The vehicles did not just vanish. The respondents allege that Diego sold almost all of the cars overnight, likely at deeply discounted prices. The cars were traced to the United States where they had been sold. The actual amount derived from what the parties have referred to as the "fire sale" is not known because they were cash sales.

[13] The lending and security agreements between the parties required Diego and TFC to hold all monies derived from the sale of vehicles in trust for the benefit of the respondents. However, no funds were remitted to either company after Diego and TFC liquidated its inventory. The respondents failed to recover any money from the sale of these vehicles.

[14] The respondents allege that Diego and TFC, in conjunction with the appellants, dissipated these funds through overseas and non-arm's length transactions. They further allege that the appellants helped Diego launder money through a newspaper bought by Jasmin (through 256), called *Compra Y Venta (CYV)* (which roughly translates into "Buy and Sell").

[15] The respondents commenced their action on October 26, 2018, two years after the fire sale.

**(3) Claudia and the Breakdown of the Marriage**

[16] The respondents focused a great deal of attention on Claudia. They alleged, and the motion judge accepted, that she played a key role in Diego's fraudulent activities. They allege that a sum of $175,000 that Claudia claimed to have received from the sale of the matrimonial home was actually derived from Diego's fraud. Accordingly, it is necessary to examine the marriage breakdown in more detail.

[17] According to Claudia, the couple experienced marital problems in 2015. Claudia suspected that Diego was unfaithful. She heard rumours about this from other employees at TFC. Claudia eventually hired a private investigator who discovered that Diego was having an affair with a woman who worked at NextGear. Claudia claimed to have seen explicit text messages and photos on Diego's phone. When this evidence was challenged in cross-examination, she was unable to

provide details (or paperwork) about the investigator, nor could she remember the name of the woman in question. I return to the motion judge's handling of this issue below.

[18] Claudia claimed that her marriage to Diego broke down in the summer of 2016 when she was pregnant with their fourth child. She moved into an apartment with the children in August 2016. Claudia had little to do with the business after the separation. However, on October 19, 2016, shortly before the fire sale, Diego asked her to withdraw $20,000 in cash from the TFC's account. Claudia denied knowing the reason for the withdrawal. But this was not unusual because Diego had made similar requests in the past.

[19] Initially, Diego did not wish to sell the matrimonial home. However, it was eventually sold on September 23, 2016. Claudia's share of the net proceeds was $175,000. I stress here that this transaction closed before the vehicles were liquidated in the late-October fire sale.

[20] Claudia assumed custody of the four children. According to Claudia, Diego refused to pay child support. They agreed to settle their dispute by Claudia accepting the $175,000 and not making any claims against Diego or TFC.

[21] On October 5, 2016, Claudia transferred the $175,000 to Jasmin, purportedly for safekeeping. Around this same time, Claudia transferred ownership

of her vehicle to Garnette for no consideration. She explained that she did so for insurance purposes. She continued to drive the vehicle.

[22] After separation, Claudia and Diego remained in conflict. In February or March of 2019, Claudia and her children hurriedly left the rented apartment and moved in with Jasmin and Garnette. Apparently, they live there rent-free.

**(4) What happened to the $175,000?**

[23] As noted already, the respondents allege that the funds said to be from the sale of the matrimonial home came from the fire sale. The motion judge accepted this submission. Although there was considerable evidence concerning how these funds were used, only Claudia's evidence suggested a source of the money – the sale of the matrimonial home. Documentation supported this claim.

[24] Claudia claimed that she transferred the $175,000 to Jasmin for safekeeping because the only bank accounts she had were ones shared with Diego. She wanted to keep the money out of Diego's reach in the event that he changed his mind about their post-separation arrangements.

[25] Claudia opened a bank account later that fall. Over the next year or so, Jasmin transferred the balance of the funds back to Claudia, or directed it according to her wishes. A list of the transactions from the bank account in which the money was deposited was produced on the motion. Of note, $67,000 was sent to "Ines Alejandra" in Argentina. Claudia testified that she partnered with this

woman in a business venture involving the sale of clothes to “extra-large” people. The respondents alleged, and the motion judge found, that the funds went to Diego (who hails from Argentina) or his nominee. There was no evidence to support this theory.

[26] A summary of transactions from this account (from October 16, 2016 to December 27, 2017) reveals various withdrawals, most of them described as “ordinary living expenses”. Claudia and Jasmin claimed that some of the money funded their grandmother’s dialysis treatment in El Salvador. Of note, there were very few deposits made into this account – only $4,000 in total.

**(5) The Newspaper – *CYV***

[27] The respondents alleged that *CYV* was at the heart of Diego’s scheme to launder the funds derived from the fire sale. In January 2018, Quantum learned that Diego, who was using a different name, was associated with *CYV*.

[28] Jasmin bought this business in March 2017. She swore that she had routinely advertised household items for sale and got her first job responding to classifieds posted in the newspaper. She incorporated 256 to make the purchase from its previous owner, Mario Armani. Leading up to the sale, Jasmin met with Mr. Armani in January of 2017. She told him that she had always wanted to run a business. He showed her existing customer contracts. They agreed on a purchase price of $113,000, which was payable by installments. According to Mr. Armani,

this was preferrable to shutting down the business, which he was prepared to do. When he sold the business, *CYV* had annual revenues of roughly $500,000 and expenses of $300,000.

[29] Mr. Armani trained Jasmin in how to run the business. When he arrived at a training meeting, Claudia and Diego were also present, something that surprised him. Jasmin told Mr. Armani they would help her run the business. Mr. Armani knew Diego because he previously placed TFC ads in *CYV*. Jasmin asked Mr. Armani to keep the change of ownership secret. He found this unusual, but Jasmin claimed that she did not wish to disrupt existing contracts.

[30] The respondents alleged that Diego was the beneficial owner of the newspaper and ran the business using Jasmin as the putative owner to misappropriate funds. The respondents attacked Jasmin's qualifications to run this small business, claiming that she had no prior business experience and did not conduct due diligence before purchasing the newspaper, a submission accepted by the motion judge. Although Jasmin worked as a crisis counsellor at the time, there was evidence that she had some past business experience. She worked at the Canadian Exhibition Air Show from 2001 to 2016, assisting in the production of its magazine. Jasmin testified that she was the actual owner of *CYV* and that Diego assisted her. He had business experience running TFC and helped her deal with some male customers who were not enthusiastic about dealing with women.

[31] As noted, the respondents alleged that Diego used the newspaper business to funnel the misappropriated funds to his family. In particular, Diego caused $182,233 to be transferred to Claudia, in addition to funds used to pay the children's private school tuition. They alleged that, because the business could not sustain these expenditures, the funds must have come from the fire sale.

### (6) The Appellants' Alleged Knowledge of Diego's Wrongdoing

[32] Claudia, Jasmin, and Garnette – both in their affidavits and during cross-examination – denied any knowledge of Diego's fraudulent activities involving TFC. They denied assisting in any way. They denied that they ever received money from him. Each claimed to learn of Diego's activities when they were served the Statement of Claim, more than two years after the fire sale.

## C. THE SUMMARY JUDGMENT MOTION

[33] The respondents brought a motion for summary judgment against the appellants. By this time, Diego and TFC had already been noted in default for failing to defend the action. However, the Registrar of the Superior Court refused to enter a default judgment. Consequently, the motion proceeded against the appellants, Diego, and TFC. As the motion judge noted, at para. 76: "Diego and TFC did not file a defence. These two defendants are deemed to have admitted the allegations in the plaintiffs' statement of claim."

[34] Although the parties agreed that summary judgment was an appropriate manner of resolving the dispute, the appellants submit that the motion judge erroneously exercised the fact-finding powers available to him on a summary judgment motion.

[35] The credibility of the appellants was a dominant issue on the motion. The motion judge rejected the evidence of each of the appellants and inferred liability from these findings.

[36] The motion judge rejected Claudia's evidence that the money that she claimed was the proceeds of the sale of the matrimonial home – $175,000 – actually came from that source. Instead, he found that this money came from Diego's breach of trust and fiduciary duty. He found that Claudia knew about the source of the funds because she worked at TFC. The motion judge rejected Claudia's evidence that the $67,000 sent to Argentina was in furtherance of a business venture; he surmised that the funds were secretly sent to Diego, or his nominee.

[37] The motion judge rejected Jasmin's evidence in relation to the receipt of the $175,000 and with respect to the purchase of, and her role in, *CYV*. He noted that she had no business experience and did not perform due diligence before purchasing the business. He found that Diego was running the show for the purpose of laundering the proceeds of the fire sale. He found that the revenues

and expenditures associated with the business did not support the considerable direction of funds to Claudia and her family.

[38] The motion judge rejected Garnette's evidence. He criticized Garnette's claimed lack of detailed knowledge about how Jasmin purchased the business. The motion judge disbelieved his evidence that Claudia transferred her vehicle to him solely for insurance purposes. He also found at para. 154: "I find Garnette not credible when he claims that, for altruistic reasons, and without any forewarning, he took Claudia and her four children into his home in March 2019 where Diego's family continues to live rent-free."

[39] After rejecting the evidence of the appellants, the motion judge made the following finding concerning the tort of knowing assistance, at para. 154: "I find Jasmin, Claudia and Garnette had knowledge that Diego's funds paid through the 256 Corp. were what was paying their families' private school tuitions, grocery, gas and other household expenses, and not *CYV*'s legitimate advertising profits."

[40] Similarly, with respect to knowing receipt, the motion judge concluded, at para. 156:

> Knowing receipt being an easier standard to satisfy, the facts and findings I have made in respect of knowing assistance do not need to be repeated under knowing receipt and provide a more than adequate basis to find the GD liable under the knowing receipt standard. The circumstances would cause a reasonable person to inquire into and know that Diego and TFC had engaged in wrongdoing, and that the plaintiffs' trust property was

> being misapplied and diverted to Claudia and Jasmin's families. The GD's lack of inquiry renders their enrichment unjust.

## D. ISSUES ON APPEAL

[41] The appellants challenge the motion judge's conclusions that the elements of knowing assistance and knowing receipt were established on the evidence. They submit that the evidence was incapable of establishing liability on either basis. The appellants submit that, along the way to reaching these conclusions, the motion judge drew unsupportable inferences from the evidence, engaged in conjecture, and approached some of the evidence unfairly. They also claim that the motion judge erred by impermissibly drawing adverse inferences based on the appellants' apparent failure to make proper disclosure and for breaching court orders.

[42] The respondents submit that the motion judge's decision is sound. They point to the serious credibility problems with all of the appellants. They submit that the motion judge was on solid ground in drawing adverse inferences based on the appellants' failure to make proper disclosure and their numerous breaches of court orders.

## E. ANALYSIS

### (1) Introduction

[43] As noted at the beginning of this judgment, I would allow the appeal and remit this case to the Superior Court for trial.

[44] On a summary judgment motion, the motion judge may exercise certain fact-finding powers under r. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O., Reg. 194, which provides:

> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing <u>any reasonable inference</u> from the evidence. [Emphasis added].

[45] In my view, the motion judge drew unwarranted inferences supporting liability (i.e., knowledge of and participation in Diego's wrongdoing) based on his mere rejection of their evidence. The motion judge also erred in his treatment of the evidence as a whole. To a certain extent, he considered the evidence of the "Guillen Defendants"/"GD" as a package, rather than considering whether the evidence against each of them established the torts of knowing assistance and/or knowing receipt. When he did turn his mind to the evidence of the individual

appellants, his rejection of their evidence was sometimes anchored in unwarranted assumptions about human behaviour. This was particularly the case with Claudia, who was the single most important witness in this narrative of events.

[46] I acknowledge that there were irregularities in the way that the appellants dealt with their finances. The transfer of $175,000 to Jasmin and the transfer of the vehicle to Garnette were suspicious financial moves. These events led the respondents and the motion judge to focus on the expenditure of funds. However, the fundamental focus should have been on the source of the funds. The questions to be answered were the following: were the funds connected to Diego's breach of fiduciary duty to the respondents?; were any of the appellants aware of this breach?; and did any one of them assisted Diego in his wrongdoing? Properly considered, the evidence fell short of answering these questions.

[47] It is not necessary to consider the appellants' submissions concerning the adverse inferences drawn by the motion judge. The record on appeal is unclear on whether there was a shared understanding between the parties about the use the motion judge could make of the appellants' lack of disclosure and/or breaches of court orders. Moreover, the adverse inferences drawn by the motion judge make no difference to the manner in which I would dispose of this appeal.

**(2) The Torts of Knowing Assistance and Knowing Receipt**

[48] The motion judge identified the elements of knowing assistance and knowing receipt relating to wrongful conduct. It is helpful to consider these related torts here.

[49] The elements of the tort of knowing assistance were described by this court in *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Garcia*, 2020 ONCA 412, 151 O.R. (3d) 529. As Paciocco J.A said for the majority, at paras. 31-32:

> The doctrine of knowing assistance is a mechanism for imposing liability on strangers to a fiduciary relationship who participate in a breach of trust by the fiduciary. Strangers to a fiduciary relationship who are made liable on this basis are held responsible because of their "want of probity", "meaning lack of honesty": *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at p. 812; *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 ONCA 196, 94 O.R. (3d) 401 at para. 43.
>
> Accordingly, the preconditions of knowing assistance liability have been structured to identify dishonest participation in a dishonest breach of trust. In *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409, at para. 211, van Rensburg J.A., in a dissenting opinion adopted by the Supreme Court of Canada as its reasons on appeal, 2019 SCC 30, 435 D.L.R. (4th) 379, identified the elements of knowing assistance in a fiduciary breach as:
>
> > (1) a fiduciary duty; (2) a fraudulent and dishonest breach of the duty by the fiduciary; (3) actual knowledge by the stranger to the fiduciary relationship of both the fiduciary relationship and the fiduciary's fraudulent

> and dishonest conduct; and (4) participation by or assistance of the stranger in the fiduciary's fraudulent and dishonest conduct.

[50] The knowledge requirement encompasses actual knowledge, recklessness, or wilful blindness. Crucially, a stranger's knowledge must be of the existence of a trust or fiduciary relationship and knowledge of the breach of the fiduciary duty that arises from the wrongful conduct of the fiduciary: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at pp. 811-812. With this knowledge, the stranger must assist in the fraudulent scheme: Eileen Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), at p. 132.

[51] To establish the tort of knowing assistance, it is not necessary that the stranger benefit from the breach of duty, although this may permit an inference that the person knew of the breach. As Iacobucci J. said in *Air Canada*, at p. 812: "The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference." See also Gillese, at p. 136.

[52] *Caja Paraguaya* also addressed the elements of knowing receipt. Paciocco J.A. wrote, at para. 57.

> The legal test for knowing receipt therefore requires that: (1) the stranger receives trust property (2) for his or her own benefit or in his or her personal capacity, (3) with actual or constructive knowledge that the trust property is being misapplied. In addition to actual knowledge, including wilful blindness or recklessness, requirement (3) can be met where the recipient, having "knowledge of facts which would put a reasonable person on inquiry,

> actually fails to inquire as to the possible misapplication of the trust property": *Citadel [Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805], at para. 49; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at para. 74; see also *Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford)*, 2016 ONCA 458, 131 O.R. (3d) 273, at para 62.

[53] As can be seen, the tort of knowing assistance requires a heightened level of awareness by strangers to the trust relationship, whereas knowing receipt engages a modified objective standard – knowledge of facts that would put a reasonable person on notice to inquire into the situation. As stated by my colleague Gillese J.A. in *The Law of Trusts*, at p. 137: "Receipt of property should require a lower threshold of knowledge and lead to higher standards of behaviour."

[54] There is also a strict traceability requirement of knowing receipt – it must be proved that the stranger took title to, possession of, or control over the trust property; this is because liability for this tort is based on unjust enrichment principles: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at pp. 821-825.

[55] As can be gleaned from this brief overview, the requirements of knowing assistance and knowing receipt have exacting fault requirements. But as with any other tort claim, intentional or negligence-based, the standard of proof is on a balance of probabilities.

**(3) Rejection of Evidence and Proof of Liability**

[56] The appellants' main submission is that there was no direct evidence before the motion judge to prove that they were in receipt of the funds misappropriated by Diego, or that any of them were aware of his dishonest dealings with the respondents. The motion judge erred by improperly drawing inferences of liability based largely on the rejection of the appellants' evidence. I accept the appellants' submission.

[57] In *Waxman v. Waxman*, (2004) 186 O.A.C. 201 (C.A.) leave to appeal refused [2004] S.C.C.A. No. 291, the court stated the following evidentiary principle: "Evidence that is rejected by the trier of fact has no evidentiary value and cannot be used as a basis for findings of fact": at para. 351.

[58] In *Haynes v. Haynes*, 2017 BCCA 131, 97 B.C.L.R. (5th) 63, Newbury J.A. explained the application of this principle, at para. 20:

> The fact the trial judge disbelieved the defendant did not create positive evidence that the defendant had failed to inspect the trailer or had loaded it improperly. As Gibbs J. (as he then was) pointed out in *Steinberg v. Commissioner of Taxation (Commonwealth)* (1975) 134 C.L.R. 640 (Aust. H.C.), "The fact that a witness is disbelieved does not prove the opposite of what he asserted". (At 695). Similarly, Scrutton L.J. had observed in *Hobbs v. Tinling & Co.; Hobbs v. Nottingham Journal Ltd.* [1929] 2 K.B. 1 (C.A.):
>
> > The defendants would ... be entitled to cross-examine on such facts to prove that the witness was not a credible person, and

> to employ that proof of unreliability to the evidence he had given in chief. But by destroying that evidence you do not prove its opposite. If by cross-examination to credit you prove that a man's oath cannot be relied on, and he has sworn that he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject. [At p. 21.]
>
> Both *Steinberg* and *Hobbs* were cited with approval by this court in *R. v. Tessier* (1997) 113 C.C.C. (3d) 538 at 553; see also *Walton v. Alberta (Securities Commission)* 2014 ABCA 273, *lve to app. dism'd.* [2014] S.C.C.A. No. 476, where the Court stated that "[i]t is an error for a tribunal to turn disbelief of a particular witness into positive proof of the opposite proposition." (At para. 36.) Citing R. v. O'Connor (2002) 62 O.R. (3d) 263 (C.A.), the Court in Walton added that while a witness's evidence on a particular point may be disbelieved, some positive evidence is needed to prove the contrary. [Emphasis added.]

See also *Malak v. Hanna*, 2019 BCCA 106, at para. 113. These principles apply to this case.

[59] The motion judge's reasons reveal numerous instances where he engaged in this erroneous line of reasoning. For example, he addressed Claudia's marital breakdown evidence and in the very next paragraph, presumably based on his disbelief of her evidence, made the following broad findings about all of the appellants, at para. 100:

> Many things are possible, but only a few things are probable. I find that the narrative provided by the GD is so far-fetched, internally inconsistent, and poorly documented, that the GD's version of events is very unlikely to be true. Conversely, the explanation put forth

> by the plaintiffs is more straightforward, accords with the available evidence, and common sense. The plaintiffs' explanation is that all of the events are better explained by the GD working in league with Diego on a fraudulent scheme to defeat his creditors, by flowing though trust funds to his family members including by using *CYV* to launder funds. On balance, I find that the plaintiffs' explanation of events is more likely to be the truth. [Emphasis added.]

[60] The problem with this passage is that the respondents' "explanation" was nothing more than a theory.

[61] Similarly, while addressing Claudia's account of selling the house, the motion judge rejected her evidence and then said, at para. 103:

> Once again, these events are possible, but I find them highly improbable. The GD's refrain on this motion is that they have provided *credible* explanations for their actions and are innocent bystanders of Diego's misconduct. However, I find Claudia's explanation not to be credible and reject the GD's accusation that the plaintiffs are simply coming after Diego's family members since they have been unable to execute judgment against Diego. [Emphasis in original.]

[62] With respect to the transfer of $67,000 to Argentina, the motion judge rejected Claudia's evidence on this point. He said it did not make sense, partly because Claudia and Jasmin are from El Salvador, whereas Diego is from Argentina. He said at para. 128: "Accordingly, I reject the GD's explanation that Claudia lost $67,000 on a bad business decision. I find it far more likely that she was transferring funds to Diego in Argentina, or to someone of Diego's choosing."

[63] Although it was open to the motion judge to reject Claudia's evidence on this point, it did not amount to positive proof of the theory that it was actually directed to Diego in Argentina.

[64] With respect to the outpouring of cash from *CYV*, the motion judge rejected the evidence of Jasmin and Claudia. He went on to draw the following conclusion, at para. 131: "I find that it is more likely that *CYV* must have had another source of funds, and given the evidence, I find the funds came from Diego's fire sale of the plaintiffs' property" (emphasis added).

[65] Once again, the rejection of the sisters' evidence concerning *CYV* did not amount to proof that other funds had been injected into the business, or that they came from the fire sale.

[66] There is no recognition in the motion judge's reasons that the rejection of a witness' evidence is not proof of the opposite proposition. Similarly, there is no consideration given to the role that a further finding of fabrication or concoction would be required to use the rejected evidence in the manner that he did. There is but one reference to concoction in the motion judge's reasons. As he said at para. 149:

> Earlier in these Reasons, I found that Claudia concocted the story of "the woman from NextGear" having an affair with Diego. This taints her credibility with respect to the rest of her "break-up" story with Diego. Of course, like any married couple, they may have had their share of problems, however, I find that Claudia had actual

knowledge (which includes wilful blindness or recklessness) of Diego's plans to abandon the TFC dealership and conduct a fire sale of the inventory. The findings I rely on include:

> a) Claudia actually worked at TFC and had banking authority there.
>
> b) Her claim that she could quickly sell the matrimonial home over Diego's objection, and without his assistance in a matter of weeks, is not credible. I find that she and Diego sold their home in a bid to defeat creditors.
>
> c) On October 5, 2016, Claudia transferred $175,000 to Jasmin for the non-sensical reason of "safekeeping". I do not accept that none of these funds came from the fire sale of the plaintiffs' inventory at TFC. Given the dubious explanation provided by the GD about the subsequent use of these funds, I find that they were funds traceable to the breach of the fiduciary duty. I find that the overall facts support this finding. In the alternative, I would rely on the presence of "badges of fraud" and find that the GD have not met their onus to rebut the presumption that their conduct was intended to defraud the plaintiffs. The GD's contention that the $175,000 is one and the same as the proceeds of sale of the matrimonial home rest solely on the evidence of Claudia and, to a lesser extent, Jasmin, which is a very shaky foundation given what I have found regarding their credibility.
>
> d) On October 19, 2016, Claudia withdrew $20,000 in cash from TFC's bank account (in four transactions of $5,000 each) and brought the money to Diego, and denied knowing or asking Diego the purpose of the withdrawal. She either actually knew of Diego's nefarious plan or was willfully blind

> and reckless as to his true purpose. I do not accept the GD's argument that the fire sale only occurred later on in October 2016, and that Claudia had no reason to suspect wrongdoing on Diego and TFC's part. [Emphasis added.]

[67] This passage is problematic in a number of ways. First, contrary to the opening sentence of this paragraph, the motion judge had not made a prior finding that Claudia "concocted" her allegation that Diego had an affair, although he did register his disbelief. Further, I do not understand how it was possible to draw a line between the rejection of Claudia's evidence concerning the failure of her marriage to knowledge of Diego's dishonest dealings. The rejection of her evidence about the dissolution of the marriage did not support a finding of knowledge. I will have more to say about the rejection of Claudia's evidence on this issue below.

[68] To conclude on this issue, the motion judge's conclusions on liability rely on the mere rejection of the appellants' evidence, Claudia's in particular. There was no attempt to take the next step to determine whether independent evidence could support the conclusion that the rejected evidence was fabricated or concocted for the purpose of avoiding liability.

[69] The motion judge's erroneous method of reasoning resulted in him making positive findings on the elements of knowing receipt and knowing assistance based on mere disbelief. For the reasons explained above, these findings cannot stand.

**(4) Unwarranted Findings**

[70] I accept the appellants' submission that the motion judge engaged in speculative and stereotypical reasoning as it related to some of the evidence. The most telling examples concern his treatment of Claudia's evidence about the breakdown of the marriage and the post-separation financial and living arrangements.

[71] The motion judge held that there was "no truth" to Claudia's evidence that Diego was having an affair with someone from NextGear, or that she discovered this by hiring a private investigator (para. 101). The motion judge was critical of Claudia's failure to adduce evidence from other TFC employees who might be in a position to confirm her account. To make the point, it is necessary reproduce the following lengthy excerpt, at paras. 101-102:

> The evidence of Diego's purported marital affair came from Claudia and Jasmin, and tangentially from Garnette, all part of the GD. Where was the evidence from the private investigator that Claudia hired in 2016 who supposedly revealed that Diego was having an affair with one of the women from NextGear? As the plaintiffs pointed out, Claudia could not even remember the name of the NextGear employee in question, despite Claudia claiming that she was familiar with the woman from visiting TFC. I find it highly unlikely that if "the affair with the NextGear woman" happened, that Claudia would not have the woman's name burned in her memory, or at least have the name written down somewhere. Claudia could also not remember the name of the investigator she hired, albeit she thought it may be "Ignace or Ian". I find it highly unusual for someone to hire a private

> investigator to conduct surveillance on their spouse, and then forget that investigator's name, or even the name of the investigative company. Claudia claimed the investigator showed her photos, yet she retained no copy of the photos. Her suggestion that the investigator's report contained just "photos and videos" does not accord with most investigator's practices. She claims that she got the investigator off Kijiji and that "everything was done by phone" and that the investigator requested and was paid cash. I suppose it is possible that Claudia hired a "shady" investigator with unorthodox practices which may explain all of the above; but I find, on a balance of probabilities, that there is no truth to the GD's suggestion that Diego was having an affair with someone from NextGear, or that Claudia discovered this by hiring a private investigator.
>
> I am assuming she developed relationships there. I am assuming that if Diego was carrying on with "the woman from NextGear" and Claudia was sick of hearing of this woman coming in, there would have been an employee from TFC who could have testified to this. But the court is simply left with Claudia's improbable account. [Emphasis added.]

[72] While the motion judge criticized Claudia for not adducing corroborating evidence regarding this issue, he did not address the fact that the affair was corroborated by the respondents' evidence. The representatives of both Quantum and NextGear deposed to having knowledge of the affair, although they did not know the details of the affair.

[73] In any event, whether Diego had an affair was a collateral matter. Moreover, the lawsuit was commenced two years after the critical events. The affidavits and cross-examinations came much later. By this time, TFC had long been out of business, its former staff presumably dispersed.

[74] The motion judge also approached Claudia's evidence about the settlement of her family law issues based on assumptions. As noted above, Claudia testified that she accepted a settlement of $175,000 instead of pursuing the matter of support through the court process. The motion judge held that Claudia's account made "no sense from a family law perspective" (para. 105). As he explained, at para. 106:

> Under the federal *Divorce Act*,(R.S.C., 1985, c. 3 (2nd Supp.)), and Ontario family law legislation, Claudia, as the spouse with primary care of three (soon to be four) young children, and with significantly lower income and marital assets than Diego, would have almost certainly been entitled to: (a) child support; (b) spousal support; and (d) a Net Family Property (NFP) equalization payment which would take into account the proceeds of sale of the matrimonial home, and Diego's global assets including TFC. In other words, Claudia's claim that she walked away from child support, spousal support and equalization only to get a subset of equalization (i.e. something that was already owed to her) seems highly improbable. Did Claudia, a former law clerk who worked at a law firm for 10 years, not seek legal advice? The GD ask the court to believe that Claudia, faced with an unfaithful spouse who she could barely speak with, and who she was very upset with, while bearing the burden of single-handedly raising 3 children with another child on the way, was satisfied with settling all her matrimonial claims by simply receiving her own share of the proceeds of sale. The other possibility, suggested by the plaintiffs, is far more likely, that Claudia was prepared to relinquish all her family law claims, because Diego was going to look after the family through other means, namely through the fraudulent scheme that is the subject of this action. [Emphasis added.]

[75] Although the arrangements made between Claudia and Diego may have made “no sense from a family law perspective”, the motion judge’s flaw was in imputing this specialized knowledge to Claudia. It was also based on conjecture that she settled her affairs in this way because she knew that Diego would take care of her. Moreover, this theory was at odds with the motion judge’s alternative conclusion that the $175,000 came from the fire sale. There was no evidence to support either supposition.

[76] Similarly, the evidence of Garnette came in for unwarranted criticism. Of all of the respondents, he was very much on the periphery. He was Diego’s brother-in-law. His connection to *CYV* was minimal. In sizing up his evidence, the motion judge said, at para. 153:

> I find Garnette not credible when he claims that, for altruistic reasons, and without any forewarning, he took Claudia and her four children into his home in March 2019 where Diego’s family continues to live rent-free. I also find Garnette not credible when he asserts that he did not know what his wife Jasmin paid to purchase the *CYV* newspaper from Armani. It seems incredible that a husband, on a TTC bus driver’s salary, would not ask his wife, “what is your new business going to cost our family?” I find that Jasmin, Claudia and Garnette had knowledge that Diego’s funds paid through the 256 Corp. were what was paying their families’ private school tuitions, grocery, gas and other household expenses, and not *CYV*’s legitimate advertising profits. [Emphasis added.]

[77] This passage contains assumptions for which there was no evidence. In any event, the rejection of his evidence could not, standing alone, translate into knowledge of Diego's wrongdoing.

**(7) The motion judge's ultimate findings on knowing assistance and knowing receipt**

[78] For the reasons set out above, the evidence was not capable of establishing liability for knowing assistance and knowing receipt in relation to any of the appellants. Accepting the motion judge's rejection of the appellants' evidence, this did not amount to proof of either tort. As indicated earlier in these reasons, there is no doubt that there were irregularities in the manner in which the appellants dealt with their finances. However, this did not amount to proof that the funds could be traced to Diego's wrongdoing.

[79] The same errors in reasoning led the motion judge to infer that the appellants were aware of the financial arrangements between Diego, TFC, and the respondents. The person who was more likely to know was Claudia; however, the rejection of her evidence did not form a proper basis to find liability on her part, let alone any of the other appellants.

[80] Returning to r. 20.04(2.1), on a summary judgment motion, the judge enjoys a wide discretion to weigh the evidence, evaluate the credibility of the witnesses, and draw reasonable inferences. However, for the reasons described above, a

number of critical inferences drawn by the motion judge were not reasonable, and some of his credibility findings were based on unwarranted assumptions. For these reasons, the disposition cannot stand.

## F. CONCLUSION

[81] I would allow the appeal, set aside the summary judgment against the appellants, and remit the case to the Superior Court for trial.

[82] I would award costs to the appellants in the sum of $25,000 for this appeal. I would set aside the costs award below and award the appellants $25,000 on the summary judgment motion.

Released: April 14, 2023 “S.E.P.”

“Gary Trotter J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. Thorburn J.A.”