COURT OF APPEAL FOR ONTARIO

CITATION: 1346134 Ontario Limited v. Wright, 2023 ONCA 307
DATE: 20230503
DOCKET: C69568

Fairburn A.C.J.O., Huscroft and George JJ.A.

BETWEEN

1346134 Ontario Limited and 2398094 Ontario Limited

Plaintiffs (Appellants)

and

Donald Wright

Defendant (Respondent)

AND BETWEEN

Donald Wright

Plaintiff by way of counterclaim
(Appellant by way of cross-appeal)

and

John Warren Laing, Open Access Limited, Hans Koehle, Ronald L. Feddersen, 1346134 Ontario Limited and 2398094 Ontario Limited

Defendants by way of counterclaim
(Respondents by way of cross-appeal)

Christopher D. Bredt and Lauren Daniel, for the appellants/respondents by way of cross-appeal

Steve Tenai and Max Muñoz, for the respondent/appellant by way of cross-appeal

Heard: October 5, 2022

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated May 19, 2021, with reasons at 2021 ONSC 2081.

George J.A.:

[1] This appeal arises from a series of tax shelter schemes orchestrated by Open Access Limited ("OAL"), a retirement management business run by John Warren Laing. The appellants, 1346134 Ontario Limited ("134") and 2398094 Ontario Limited ("239"), known collectively as the "Fincos", advanced loans to investors. One such investor was the respondent, Donald Wright.

[2] The Fincos commenced this action seeking repayment of their loans to Mr. Wright. Mr. Wright denies that he is obligated to repay the loans. He argues that he was provided with security, principally preferred shares held in trust, and that these were to be used to repay the loans. Mr. Wright counterclaimed against the Fincos, Mr. Laing, OAL, as well as Hans Koehle and Ronald Feddersen – who held his preferred shares in trust (the "Trustees"). In his counterclaim, Mr. Wright alleged that if the preferred shares could be used to satisfy his debt to the Fincos, but were not in fact used for that purpose, then the defendants to the counterclaim were liable for breach of trust.

[3] Deciding in Mr. Wright's favour, the trial judge held that (1) with respect to one subset of loans (the "Earlier Loans"), the Fincos' claim was statue-barred; and (2) with respect to the other subset of loans (the "Later Loans"), the return of the

preferred shares to OAL satisfied Mr. Wright's debt. Given those findings, the trial judge did not address Mr. Wright's counterclaim.

[4] The appellants submit that the trial judge erred (1) in finding that the Earlier Loans were statute-barred; (2) in finding that the Later Loans were repayable with preferred shares; and by (3) holding that the Later Loans were repaid with shares without conducting a proper trust analysis under Mr. Wright's counterclaim. Mr. Wright maintains his counterclaim by way of cross-appeal.

[5] For the reasons that follow, I would dismiss the appeal and the cross-appeal.

A. BACKGROUND

(1) The Parties

[6] Mr. Wright, a career businessman, has held chief executive officer positions at Citibank, TD Canada Trust, and Merrill Lynch Canada. At the time of trial, he chaired five company boards and sat on two others. He is, by all accounts, a highly sophisticated investor. Between 2001 and 2013, he invested $10.92 million in eight OAL tax schemes.

[7] The Fincos were created to provide loans to investors in tax shelter schemes. 134's principal was John Pada and 239's principal was Jonathan Baker; both accountants. The Fincos loaned Mr. Wright a total of $6.29 million.

[8] The cross-respondent Mr. Laing is the principal of OAL, which is also a cross-respondent. Mr. Laing operates a holding company, John Warren Laing

Financial Services (“JWLFS”), which is not a party to this action. OAL funded its operations, in part, by offering tax schemes to investors. Between 2000 and 2013, OAL operated fifteen such schemes, eight of which Mr. Wright invested in. This appeal concerns only four of those eight schemes.

(2) The Tax Schemes

[9] The OAL tax schemes relevant to this appeal functioned as follows.

[10] An investor would purchase a number of “units” in a limited partnership with OAL through a “Subscription Agreement”. The investor would become a limited partner.

[11] The limited partnership would then enter into a “Service Agreement” with OAL. This agreement allowed OAL’s business expenses to “flow through” to the investors, who claimed them as deductions on their tax returns. Essentially, the limited partnership “served” OAL by paying for its business expenses (making them its own) and it raised the funds to do so by selling to investors “units” which equaled the anticipated expenses.

[12] The investors also received common shares of OAL, though the evidence was that these shares were of minimal value. Mr. Wright testified that the tax deductions were the dominant purpose of his investment.

[13] Once an investor’s funds passed to OAL, OAL would then loan the funds to one of the Fincos, which in turn loaned the funds back to the investor. The interest

on the loan from the Finco to the investor would effectively be paid by OAL pursuant to a “Consulting Agreement”.

[14] The investor then reinvested the funds from the loan into the limited partnership, which continued to pay OAL’s business expenses. This step was crucial. As the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”) allows taxpayers to deduct business expenses only up to the amount they invested, the understanding of the parties was that by effectively investing the same money twice, investors could claim deductions of twice their actual “out of pocket” investment.

[15] In an effort to incentivize further equity financing, investors who took part in an OAL tax scheme after 2008 were assigned preferred shares in OAL directly. These preferred shares were held in trust, with the investors as beneficial owners. JWLFS was the Settlor of the trust, and two investors – Ronald Feddersen and Hans Koehle – were the Trustees. Each trust had a number of beneficiaries.

[16] The preferred shares were assigned a notional value of $1. The number of shares assigned to the investor equaled the dollar amount loaned from the Fincos. The deemed value of the preferred shares equaled the value of the loans.

[17] This change in structure of the tax scheme was initially accompanied by “Defeasance Terms”, meant to incentivise further investment by offering a route to

repay the loans. These Defeasance Terms set out that the shares held in trust could be delivered by the Trustees to repay the loans.

[18] After 2013, rather than defeasance terms, new preferred shares (assigned based on further investment) were held in trust under two "Trust Agreements", both dated April 10, 2014. Common to both the Defeasance Terms and the Trust Agreements were the Trustees' powers, notably the power to satisfy the loan-debt owed to the Fincos.

[19] Whether investors could use the preferred shares held in trust to satisfy their loan obligations to the Fincos is the central question on this appeal.

[20] At trial, it was agreed that preferred shares could be so used in at least some circumstances, but the parties differed on when and how. Mr. Wright claimed that they could be used, at his direction, to satisfy the loans at any time a demand was made for repayment, while the Fincos and their aligned parties maintained that the preferred shares were only available to satisfy the investors' loans if OAL was unable to deliver the tax-deductible business expenses for which the investors had bargained. The appellants were careful to maintain that the purpose of the tax schemes, and of the trusts and preferred shares in particular, was only to provide the opportunity to claim deductions, and in no way guaranteed that the deductions would be successful.

(3) Mr. Wright's Involvement in the Tax Schemes

[21] Between 2001 and 2011, Mr. Wright invested in eight OAL tax schemes, four of which are relevant to this appeal. In 2007 and 2011, he received the Earlier Loans from 134;[1] and in 2013 the Later Loans from 239.

[22] Mr. Wright received advice from a tax lawyer in relation to the Later Loans. He was advised that, in order to comply with the *ITA*, specifically the "General Anti-Avoidance Rule" or "GAAR", he needed to "have a *bona fide* intention to repay the loans owing to [239]. If this is not the case then it becomes more likely that the CRA could successfully challenge the arrangement." Expert evidence at trial also stated that the loans and investments had to be "at risk" to enhance the legitimacy of the scheme.

[23] Mr. Wright signed two documents in connection with each of these schemes: a "Subscription Agreement" purchasing units in the limited partnership, and a "Loan Agreement" borrowing funds from the Fincos to reinvest. Neither of these documents explicitly stated that the loans could be repaid with the preferred shares held in trust. Further, the Loan Agreements included entire agreement clauses.

[24] The Trust Agreements dated April 10, 2014 were in relation to the Later Loans. Mr. Wright was a beneficiary of these trusts, though not a party to the

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[1] The 2011 loan was a refinancing of a prior loan Mr. Wright had taken out in 2001.

agreements. The trusts granted the power to the Trustees “to arrange for the debt of any Beneficiary to [239] to be compromised and/or satisfied”.

[25] At trial, Mr. Wright testified that Mr. Laing represented that his Loans from the Fincos could be repaid using preferred shares in OAL, held separately in trust.

[26] In 2017, the Canada Revenue Agency (“CRA”) reviewed Mr. Wright’s 2013 and 2014 tax returns, on which he claimed OAL’s expenses as deductions. The CRA rejected these deductions and notified Mr. Wright by letter dated January 12, 2018.

(4) The Wind-Up of the Tax Schemes and the Commencement of Litigation

[27] By the summer of 2014, changes in Canadian accounting rules meant that the tax schemes could no longer provide their intended benefit to OAL. The loans OAL provided to the Fincos (who in turn loaned the funds back to the investors to reinvest) could no longer be treated as assets to maintain adequate regulatory capital. OAL would be overleveraged. Because of the number of assets held in the schemes, the undesirability of paying interest, and the difficulty in business dealings owing to the complexity of OAL’s capital structure, OAL decided that the schemes had to be wound up.

[28] Mr. Wright was informed of OAL’s decision to wind up by letter dated September 24, 2014. This letter, from OAL and signed by Mr. Laing, stated that “management is drawing up a plan which will be presented to you shortly.”

[29] On November 11, 2014, OAL employee Jennifer Lee sent an email to Mr. Wright's brother, Norman (who was assisting with Mr. Wright's accounting issues), advising that Mr. Wright's "investments will be settled with the exchange of preferred shares and common shares." At trial, however, she stated that this was incorrect, and had been based on a misunderstanding on her part.

[30] By letter dated April 23, 2015, Mr. Laing advised Mr. Wright that OAL's board had decided to call the outstanding partnership loans, and that a formal letter from the OAL board with more details would follow. This letter also included a handwritten note that the two should "have a chat" once the formal notification and documentation arrived.

[31] The next letter received by Mr. Wright was dated April 28, 2015. It was on OAL letterhead, signed by Corporate Secretary J. Roy Weir, and requested repayment of the Earlier Loans to 134 either by cheque dated May 1, 2015, or by way of five payments over four years with the first payment due May 1, 2015.

[32] On receipt of these letters, Mr. Wright called Mr. Laing and requested that his preferred shares be applied to the loans. Mr. Laing's response was that it was "too late".

[33] On June 16, 2015 (effective June 17), JWLFS and the Trustees executed equivalent terminations of the Trust Agreements. This was also done earlier on April 27, 2015 (effective April 28), for the Defeasance Terms relating to the Earlier

Loans. The Trustees agreed to resign and terminate the Trust Agreements (though not terminate the trusts themselves), and to "reassign" the shares held in trust to JWLFS.

[34] JWLFS then returned the preferred shares to OAL, which cancelled them on June 29, 2015. OAL advised Mr. Wright's counsel of the cancellation in September 2015.

[35] In February 2017, the Fincos demanded repayment of all of Mr. Wright's loans. He did not repay them.

[36] The Fincos commenced the present action on May 29, 2018.

[37] As mentioned, Mr. Wright counterclaimed against the Trustees, the Fincos, Mr. Laing, and OAL. The substance of his claim was that by transferring the preferred shares (of which Mr. Wright was the beneficial owner) to OAL for reasons other than to satisfy his indebtedness to the Fincos, the defendants by counterclaim were liable for breach of trust and/or breach of fiduciary duty.

B. DECISION BELOW

[38] The trial judge, first, held that the claims in relation to the Earlier Loans were statute barred. He observed that OAL had demanded Mr. Wright deliver payment of the Earlier Loans to 134 by letters dated April 23 and 28, 2015. While OAL was not 134, the trial judge found that OAL was acting as 134's agent. He noted that 134 did not conduct business of its own. Rather, it "merely acted as a buffer

between OAL and the investors". Mr. Laing, whether personally or as the directing mind of OAL or JWLFS, "maintained the type of control over 134 that an agency relationship had been created".

[39] The trial judge held that the letters of April 23 and 28, 2015 were demands for repayment that commenced the limitation period. Because the action was not commenced until May 29, 2018, the claims relating to the Earlier Loans were statute barred and therefore dismissed.

[40] The trial judge next turned to the question of whether the preferred shares could be used to repay the loans.

[41] The trial judge found that the 2014 Trust Agreements placed preferred shares in trust for Mr. Wright which could be returned to OAL to satisfy Mr. Wright's debt to the Fincos. He rejected the appellants' position that this could only be done where the scheme did not provide the opportunity to claim business expenses as deductions.

[42] He relied on the "common sense position that one would not take out a $2.00 loan to achieve a $1.00 deduction". He also pointed to various pieces of documentary evidence referring to "secured loans" and loans being "fully defeased" through exchanges of preferred shares, as well as Ms. Lee's email of November 11, 2014.

[43] The trial judge also rejected the appellants' argument that their interpretation should be preferred since it was the one that was more likely to comply with the *ITA* and succeed in offering tax deductions. He rejected the parallel between tax compliance and the presumption in favour of legality in this case, noting that "there is nothing illegal in contracting for the repayment of a loan with preferred shares as part of an investment", and any tax consequences that might arise were for CRA to decide.

[44] The trial judge concluded by relying on "the basic principles that a trust is for the benefit of its beneficiaries" and considered that the return of the preferred shares to JWLFS, and then to OAL, followed by the shares' cancellation "resulted in the shares being given to the entity to whom 239 had borrowed the funds it lent to [Mr.] Wright". The respondent's loan-debt had therefore been satisfied. He dismissed the Fincos' claim in its entirety, and accordingly held that the counterclaim did not need to proceed and so dismissed it as well.

C. ISSUES ON APPEAL

[45] The main appeal raises the following issues:

1. Did the trial judge err in finding the claims relating to the Earlier Loans were statute barred?
2. Did the trial judge err in finding that the loans were repayable with preferred shares?

(i) Did the trial judge err by overlooking the entire agreement clauses contained in the Loan Agreements?

(ii) Did the trial judge err by not undertaking a proper analysis of whether a collateral oral agreement existed?

(iii) Did the trial judge err by improperly importing a trusts analysis when looking at the terms of the Loan Agreements?

(iv) Did the trial judge err in not considering tax consequences?

3. Did the trial judge err in finding that the loans were actually repaid with preferred shares?

4. If the preferred shares were only available to repay Mr. Wright's loans in the event he did not receive tax expenses, should any damages owing be reduced by the amount of deductions rejected by CRA?

[46] Mr. Wright's cross-appeal raises the following issues:

1. Is the counterclaim statute barred?

2. Did the Trustees breach their duties?

3. If the Trustees breached their duties, are Mr. Laing and OAL liable for aiding in and/or benefitting from those breaches?

D. ANALYSIS

(1) The Earlier Loans Are Statute Barred

[47] The appellants claimed for repayment of the Earlier Loans which Mr. Wright received from 134 in 2007 and 2011. The trial judge held that the two-year limitation period, pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B,

commenced on or around April 28, 2015, when OAL, acting as 134's agent, demanded repayment of the Earlier Loans. Since the statement of claim in this action was not issued until May 29, 2018, more than two years after that demand was made, it was out of time.

[48] The appellants argue that the trial judge erred in finding that OAL was 134's agent. The existence of an agency relationship is a question of fact: *1195303 Ontario Inc. v. Glen Grove Suites Inc*., 2015 ONCA 580, 337 O.A.C. 85, at para. 82. It is therefore entitled to deference, absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[49] The appellants submit that OAL's correspondence could not have created an agency relationship for 134. It relies on *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, at para. 42, for the proposition that while agency relationships may be created by implied representation, the representation "must be that of the principal, not that of the agent." I do not view this principle as assisting 134 in this case.

[50] It was open to the trial judge to find, on the record before him, that 134 had made implied representations that OAL was acting as its agent. The loans from 134 were part of a broader arrangement by OAL to raise capital for its business. 134 was aware of and permitted Mr. Laing and OAL to act as its "point person". Mr. Laing communicated with Mr. Wright about 134's loans, including discussions

around restructuring. Mr. Laing's evidence at trial was that 134 was aware that OAL would be demanding payment of the Earlier Loans and did not object to OAL doing so. This evidence, considered together, supported a finding of an agency relationship.

[51] Apart from the trial judge's agency finding, the appellants do not challenge any aspect of the limitations analysis. Since I would not disturb the agency finding, the trial judge's conclusion that the claims in relation to the Earlier Loans are statute barred must stand.

(2) The Trial Judge Did Not Err in Finding the Loans Were Repayable with Preferred Shares

[52] The parties agree in principle that the loans to Mr. Wright were repayable using the preferred shares held in trust. They disagree on the circumstances in which this repayment through return and cancellation of shares was possible. The appellants contend that a beneficiary of the trust agreement under which the preferred shares were held could only have their loan repaid where that beneficiary did not receive tax deductible expenses which could be claimed.

[53] The trial judge found that the preferred shares were used to attract additional investments by providing for the repayment of the associated loans through those shares, and that Mr. Wright's loan was repaid.

[54] The appellants submit that the trial judge erred by holding that the Later Loans were repayable with the shares because this: (i) overlooks the entire agreement clauses of the Loan Agreements; (ii) would require an oral collateral agreement to the Loan Agreements; (iii) improperly imports a trust analysis into the terms of the loan Agreements, which should be read separately; and (iv) ignores tax consequences which are contrary to the parties' intent. The appellants also submit that the trial judge's reasons are inadequate.

Adequacy of reasons

[55] I will address first the adequacy of the trial judge's reasons. When read as a whole, and in context, the trial judge's reasons disclose what he decided and why, and allow for meaningful appellate review. As this court stated in *Levac v. James*, 2023 ONCA 73, at para. 76:

> The adequacy of reasons must be determined functionally based on whether they permit meaningful appellate review. If they do, then an argument that the reasons are inadequate fails, despite any shortcomings: *Farej v. Fellows*, 2022 ONCA 254, leave to appeal to S.C.C. requested, 40198, at para. 45. Adequacy is contextual, and includes the issues raised at trial, the evidence adduced, and the arguments made before the trial judge. In general, reasons are to be read as a whole with the presumption that the trial judge knows the record and the law and has considered the parties' arguments. [Emphasis Added].

[56] Appellate courts should prefer an interpretation that is consistent with this presumption of knowledge of the record and the law. In *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 79, Karakatsanis J., for the majority, writes that:

> Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated.

[57] As noted in *G.F.*, "even if the trial judge expresses themselves poorly, an appellate court that understands the 'what' and the 'why' from the record may explain the factual basis of the finding to the aggrieved party": at para. 71; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 52.

[58] The trial judge's reasons meet the threshold of adequacy described above. The trial judge found that the Loan Agreements did not preclude repayment of the loan through shares. He further found that the 2014 Trust Agreements placed preferred shares in trust for Mr. Wright, which could be returned to OAL to satisfy Mr. Wright's debt to the Fincos.

(i) The trial judge's conclusion does not overlook the entire agreement clauses in the Loan Agreements

[59] The appellants submit that the entire agreement clauses prevent any oral representations from affecting the later Loan Agreements. There are two obvious

problems with this argument. First, it contradicts the appellants' position that satisfaction of the loan through preferred shares was possible in at least some circumstances. Second, the Loan Agreements are silent on the method of payment once the loans are called.

[60] In any event, the trial judge did not rely on oral representations between the parties to the Loan Agreement. Rather, he relied on the parties' entire relationship. In other words, the Loan Agreements and the Trust Agreements, when read together and considered in the context of the entire commercial relationship, were sufficient to bear out that the loans could be repaid with the shares held in trust.

(ii) The trial judge's conclusion does not require an oral collateral agreement to the Loan Agreements

[61] The appellants submit that the trial judge's holdings required a finding that a collateral oral agreement had been reached. I disagree.

[62] It was not necessary to find that a separate oral agreement existed. This was only one of the possible ways to make a bridge between the Loan Agreements and the Defeasance Terms and Trust Agreements. The trial judge's reasoning focuses on the entire relationship between the parties to determine their common intent, and the meaning of the terms contained in the multiple agreements. The trial judge's reasons show that, based on the Trust Agreements, he found there to be an agreement that the Later Loans from the Fincos to Mr. Wright were

repayable through the transfer of preferred shares held in trust. In fact, certain passages of the trial judge's reasons make it clear that he rejected the collateral oral agreement approach: see Reasons, at paras. 8 and 49(a)-(b).

[63] Putting aside that this argument undermines the appellants' position that the loans were repayable with shares in some circumstances, an oral agreement was not necessary because the terms of the Trust Agreements provide the mechanism by which a loan may be satisfied by shares held in trust. The trial judge's conclusion on the scope and purpose of the trusts is borne out by the surrounding circumstances. It is anchored in his finding that the trust structures were meant to induce additional investment.

[64] Further, the Trust Agreement covering the Later Loans shares a direct origin and purpose with the Defeasance Terms, which covered the Earlier Loans. The evidence at trial demonstrated more clearly the specific purpose of the arrangement in the Defeasance Terms, which was to induce further investment by holding shares in trust for the benefit of an investor. While these shares did not explicitly secure the loans, the trial judge found that the intent of the parties in this arrangement was for the shares to be available to satisfy the loan-debt. In the circumstances of the whole arrangement, the trial judge did not find any limitation on when and how the shares could be so used.

[65] The appellants' alternative theory, that the shares could only be used to satisfy the loan-debt where the scheme failed to provide any expense which could be claimed as deductions, relies heavily on the argument that this arrangement would reduce the tax scheme's chances of success.

[66] I will address this further below, but for now it is sufficient to observe that the trial judge was entitled to rely on the lack of guarantee of tax benefits to find the appellants' limited circumstance theory lacking and less likely. It was not necessary for the trial judge to find a separate oral argument in order to reach the conclusion he did.

(iii) The trial judge did not improperly import a trust analysis in interpreting the terms of the Loan Agreements and these agreements should not be read in isolation

[67] The appellants' third argument is that the loan agreement should be interpreted separately and that, on its terms alone, the satisfaction of the loan-debt through repayment of shares was not possible. In other words, the determination of the contractual obligations between the Fincos and Mr. Wright needed to be separate because neither were parties to the Trust Agreements, and that there is no way the Trust Agreements could have amended the Loan Agreements.

[68] This argument misconceives the trial judge's conclusions. First of all, he did not find that the Loan Agreements were modified by collateral agreements.

Rather, these agreements, properly interpreted in context, allowed for “full payment and satisfaction” through the shares. The trial judge further concluded that the Trust Agreements provided the mechanism and structure for this repayment, at least as it concerned the Later Loans.

[69] The appellants’ argument also runs contrary to a long line of authority which holds that an agreement should be interpreted in its entire context and with an understanding of the surrounding circumstances. In his analysis of whether the Later Loans could be repaid with shares, it was essential that the trial judge be mindful of the complex relationship that existed between these parties. In fact, the trial judge likely would have erred had he not incorporated the Trust Agreements into his analysis. The fact that Mr. Wright was not a signatory to the agreements in no way diminishes their relevance to the Later Loans. The Trust Agreements were an essential piece of the puzzle and necessary to understand the underlying bargain of the post-2008 contributions to the tax scheme. Whether Mr. Wright was a party to the Trust Agreements matters little when he is one of the beneficiaries and the debt to the Fincos was central in the trusts’ terms.

[70] The appellants also submit that the issues related to the Trust Agreements should have been dealt with in Mr. Wright’s counterclaim for breach of trust. While a valid point to raise, it is clear that in the circumstances of this case the determination of whether the appellants should succeed in their action for the loan-debt included the determination of whether there was an amount owing. In this

way, the submission that the preferred shares satisfied the debt goes to the defence of the action, rather than the counterclaim. Therefore, once again, it was necessary to read together the Loan Agreement and the Trust Agreement, and to consider the entire relationship between the parties.

(iv) The trial judge's analysis properly considered the tax consequences

[71] The appellants' fourth argument is that the trial judge's conclusion would make it very unlikely that the scheme would succeed in providing successful tax deductions. Put another way, if the shares were effectively security for the loans, then the "at risk" rules would be infringed and the amount of deductions Mr. Wright could claim would be limited. The trial judge's conclusion and reasons, the appellants argue, ignores these consequences. The argument is that the purpose of the arrangement was to procure tax benefits, so the interpretative exercise should have been driven by the likelihood of obtaining those tax benefits.

[72] The parties' scheme was to raise funds in exchange for tax advantages. The potential success of the tax scheme therefore informs consideration of the parties' common intention. However, this is a consideration that goes to contractual interpretation, a question of mixed fact and law. I see no palpable and overriding error in the trial judge's conclusion. He found that the central bargain was that, in order to induce further investment, OAL offered investors a more advantageous

opportunity by providing for the repayment of the associated loans through preferred shares on top of potential tax benefits. On this point, the trial judge properly noted that the appellants did not guarantee the success of any claimed deductions. The trial judge considered the appellants' argument regarding tax consequences, and, in the end, reasonably found that it did not detract from nor alter his understanding of the agreement, which was that the Loans were repayable with preferred shares.

(3) The Trial Judge Did Not Err in Finding that the Loans Were Repaid with Preferred Shares

[73] After holding that the preferred shares could be used to repay the loans, the trial judge concluded that the shares did in fact satisfy the loan-debt when they were transferred back to OAL for cancellation. I see no error in this conclusion.

[74] It was open to the trial judge to find that the transfer of the shares held in trust back to JWLFS, and then back to OAL, did provide repayment of the Later Loans.

[75] It was also open to the trial judge to find that the Trustees only agreed to the termination of the Trust Agreement for the benefit of the beneficiaries. After all, the Trustees' authority specifically included the power to "(iii) to arrange for the debt of any Beneficiary to [the Fincos] to be compromised and/or satisfied".

[76] There was no evidence that the power to terminate the Trust Agreements on consent of the Settlor and Trustees was exercised in a way that extinguished the beneficiaries' interest in the preferred shares. There is no basis to presume a breach of trust on these facts.

[77] In reading the letters of termination, the respective Trust Agreements (which set out the structure of the trust) were terminated. However, the trust itself and the beneficial interest in the shares were not extinguished.

[78] After the Trust Agreements were terminated, Mr. Laing, on behalf of JWLFS, transferred the shares to OAL for cancelation. The corresponding cancellation sheets demonstrate that the transfer was not a gift, but was "FOR VALUE RECEIVED".

[79] The evidence supports the trial judge's conclusion that the shares satisfied the loan-debt.

[80] It is necessary at this stage to return to the appellants' argument that issues related to the Trust Agreements should have been dealt with in Mr. Wright's counterclaim for breach of trust. There is a fine line between determining whether the transfer and cancellation of the preferred shares were actually or effectively to Mr. Wright's benefit (therefore satisfying his loan-debt); and whether those shares should have been used to satisfy the debt (but were not which constitutes a breach of trust). The court can only consider the former in contemplating Mr. Wright's

defence. On the evidence, the trial judge found that the cancellation of the preferred shares did effectively satisfy Mr. Wright's loan-debt. I see no error in that conclusion.

(4) It Is Unnecessary to Consider If Any Damages Owing Should Be Reduced by the Amount of Deductions Rejected by CRA

[81] Given my conclusion on the first three grounds, there is no need to consider Mr. Wright's argument that any damage award should be reduced by the amount of the deductions rejected by CRA.

(5) The Cross-Appeal

[82] The thrust of Mr. Wright's counterclaim, which he maintains on his cross-appeal, is that if the transfer of his preferred shares to OAL and their subsequent cancellation, without his direction to do so, did not have an effect on Mr. Wright's loan-debt, this constituted a breach of trust. The Fincos submit that the counterclaim for breach of trust is out of time, that the preferred shares could not be used by the Trustees to repay the loan-debt, and that the Trustees acted within the scope of their powers.

[83] My conclusion that the loan-debt could be and had been satisfied by the preferred shares held in trust obviates the need to consider the merits of Mr. Wright's cross-appeal.

E. CONCLUSION

[84] For these reasons, I would dismiss the appeal and the cross-appeal.

[85] If the parties cannot agree on costs, they may file brief written submissions of no more than 3 pages in length, excluding a costs outline. Mr. Wright must file his submissions within 20 days, and the appellants within 10 days thereafter.

Released: May 3, 2023 “J.M.F.”

“J. George J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. Grant Huscroft J.A.”