COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Armstrong v. Lang,*
2011 BCCA 205

Date: 20110420
Docket: CA037738

Between:

A. Gordon Armstrong, Jeff Burghardt, Geoffrey Crampton, Lynda Cranston, Robert L. Heinkel, Peter Lusztig, Chris Mazurkewich, Janet Pau, R.M. Louise Simard, Peter Speer and John Van Luven as Trustees of the Healthcare Benefit Trust

Respondents
(Plaintiffs)

And

Margaret Lang also known as Margaret Maaren

Appellant
(Defendant)

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson

On appeal from: Supreme Court of British Columbia, November 27, 2009,
(*Armstrong v. Lang*, 2009 BCSC 1634, Vancouver Registry No. S070332)

Counsel for the Appellant: D. Crane

Counsel for the Respondent: M. Morgan
L. Cook

Place and Date of Hearing: Vancouver, British Columbia
February 16, 2011

Place and Date of Judgment: Vancouver, British Columbia
April 20, 2011

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurring Reasons in the result by:
The Honourable Mr. Justice Chiasson (page 14, paragraph 30)

Concurred in by:
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This is an appeal from an order that an amount owed by the appellant to the respondents for reimbursement of long term disability benefits survives the appellant's bankruptcy under s. 178(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. That provision states:

> Debts not released by order of discharge
>
> 178(1) An order of discharge does not release the bankrupt from
>
> …
>
> (d) <u>any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity</u>. [Underlining added.]

The chambers judge concluded that the amount owing arose out of misappropriation or defalcation while the appellant was acting in a fiduciary capacity. Fraud and embezzlement were not alleged.

Background

[2] The appellant, Margaret Lang, is a retired registered nurse. For a period of 12 years ending in 2002 she received long term disability (LTD) benefits from the respondents following a workplace injury. The benefits were paid under a group plan (the "Plan") that included LTD benefits, established through the Healthcare Benefit Trust by the Health Employers Association of British Columbia to provide certain group health and welfare benefits for employees of participating healthcare employers. The respondents are the trustees of the Plan: they engaged insurance companies for benefits administration, including payment of the appellant's benefits and all communication with her. The Plan is in evidence but the terms of the trust agreement are not part of the record. The respondents appear to have accepted that the appellant met the criteria for payment of LTD benefits for a total disability throughout the period from the accident until her retirement in 2002.

[3] The appellant submitted a claim for Workers' Compensation Board (WCB) benefits following her injury in 1990. The record of benefit payments filed by the respondents indicates that the WCB accepted that the appellant was totally disabled temporarily and partially disabled thereafter. The WCB paid the appellant compensation on that basis and those amounts were offset to reduce the amount of the LTD benefits otherwise payable by the respondents. Occasionally over the years, adjustments in WCB compensation amounts resulted in overpayments which were repaid by the appellant or offset against continuing benefit payments.

[4] The appellant contested the WCB's denial of an injury-related permanent total disability and she pursued a long drawn out appeal process. Eventually, after Workers' Compensation Appeal Tribunal decisions in 2004 and 2005, she received a retroactive award of WCB compensation in the amount of $170,336.04 (the "Overpayment") overlapping the LTD benefits received from the respondents. She accepts that she was required to repay this Overpayment to the respondents.

[5] The appellant did not reimburse the respondents and there was no response from the appellant and her counsel to repeated requests from the respondents, reminding the appellant of her repayment obligation and asking for information about the WCB award. The respondents were notified of the award by the appellant's employer who in turn was informed by the WCB.

[6] In February 2007, the respondents obtained a default judgment against the appellant for the Overpayment, plus interest and costs. Two weeks later the appellant made an assignment into bankruptcy, showing the Overpayment as an unsecured debt. Her unsecured assets were minimal and there was no recovery by the respondents.

[7] The appellant was discharged from bankruptcy in April 2008. In June 2009, the respondents applied for an order pursuant to s. 178(1)(d) that the debt survive the bankruptcy. The chambers judge granted the order and this appeal followed.

[8] In brief reasons, the chambers judge followed *Re Skelly*, 2007 BCSC 736, 32 C.B.R. (5th) 162. He rejected a submission that *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 significantly changed the law relating to *ad hoc* fiduciary duties after *Skelly* was decided.

The Issues

[9] The appellant submits that the chambers judge erred:

1) in finding that s. 178(1)(d) applied in the absence of any evidence that the debt *arose* from alleged misappropriation or defalcation;
2) in holding that the appellant had been guilty of misappropriation or defalcation; and
3) in holding that the appellant was acting in a fiduciary capacity when she incurred the debt to the respondents.

Discussion

[10] The respondents submit that the relevant provisions of the plan are:

> **2(a) Benefits Payable**
>
> Integration with other disability income:-
>
> In the event a Disabled Employee is entitled to any other income as a result of the same Sickness that caused him or her to be eligible to receive Benefits from the Plan, the Benefits from the Plan shall be reduced by one hundred (100) per cent of such other disability income.
>
> Other disability income shall include but is not limited to:
>
> Any amount payable under any Workers' Compensation Act or law or any other legislation of similar purpose; ...
>
> 6. Third Party Responsibility
>
> In any case where an Employee's Disability has been caused in whole or in part by some wrongful or unlawful act or omission of some person or persons other than the Employee, and/or his Employer, or a person covered under the Workers' Compensation Act of British Columbia, and the Employee, as a result of any claim made or which could be made by the Employee receives or would have been entitled to receive a sum or sums of money to compensate the Employee for loss of earnings then:-

> (a) in the event of his receipt of such sum or sums of money, he or she shall forthwith notify the Trustees of the amount of and the date upon which he received same, and shall pay to the Trustees the whole or such portion thereof as the Trustees in writing direct to offset Benefit payments made or to be made to him or her hereunder,
>
> OR
>
> (b) in the event he or she has for any reason neglected or failed to make any such claim or claims for loss of earnings, the Employee may be required by the Trustees to make such claim or claims or authorize the Trustees to make the same in the name of and for and on behalf of the Employee and to receive the proceeds of such claim or claims and to apply them to indemnify the Trustees for their costs and expenses in making such claim or claims and to offset the Benefit payments made or to be made to him or her hereunder.
>
> Should any Employee fail to comply with the provisions of this Section C.6, the Trustees may refuse to make any or any further Benefit payments to him or her until he or she has complied therewith.

[11] The respondents rely on provision 2, benefits payable, and provision 6, third party liability. The third party liability provision is a standard subrogation clause, common to insurance policies. It sets out detailed obligations of an employee in connection with the pursuit of third party tort claims and reimbursement. In contrast, the benefits payable provision 2 simply states that benefits "shall be reduced" by the full amount of other disability income. A careful reading of provision 6 clarifies that it has no application to the appellant's WCB award which does not depend on third party liability; it refers to the *Workers' Compensation Act* but only to exclude employers and employees covered and protected from tort claims under the workers' compensation scheme. Provision 2 is the applicable provision and does not address reimbursement for overpayments directly. The appellant accepts that a right of reimbursement is implied.

[12] During the course of oral submissions, we referred counsel to *Napier v. Hunter*, [1993] A.C. 713, which extensively reviewed the evolution of the English law of subrogation over a period of 250 years. *Napier* involved fall-out from the ill-fated venture of Lloyd's syndicates in underwriting policies that sustained huge losses on U.S. asbestos claims. The plaintiff "names" were members of the Outhwaite syndicate. They were partially insured against those losses by stop loss insurers

who paid the names the limits of their policies. The names were self insured for deductibles and amounts in excess of the stop loss limits. The names sued Outhwaite, the managing agent of their syndicate, for negligence in writing the asbestos policies on the names' behalf without adequate reinsurance cover. Those proceedings were settled for £116 million, paid to the names' solicitors.

[13] The Law Lords addressed two issues raised on those facts: first, the amount payable to the stop loss insurers by way of subrogation and, second, were the stop loss insurers entitled to be paid the amount due to them by way of subrogation out of the damages held by the names' solicitors. It is the second issue that concerns us here. The Law Lords were all of the view that the stop loss insurers were entitled to be paid their subrogated interest from the damages through an equitable proprietary interest enforced by an equitable lien on the funds held by the solicitors. As the stop loss insurers had paid the names on the stop loss policies before the Outhwaite proceedings were settled, their proprietary interest attached to the funds immediately on their receipt by the solicitors. If the respondents' claim is analogous to subrogation and *Napier* applies, it is relevant to each of the issues advanced by the appellant.

i. Did the debt or liability "arise" out of misappropriation or defalcation while acting in a fiduciary capacity?

[14] The appellant contends that s. 178(d)(1) requires that the misappropriation or defalcation "arise" from the transaction in which the funds creating the debt or liability are received. In other words, the breach of duty must be linked to the receipt of the funds.

[15] On the *Napier* analysis, the law of subrogation makes that link. Having indemnified the appellant for her wage loss, the respondents were entitled to be repaid that indemnity when the appellant received the WCB award in payment for the same earnings loss indemnified by the respondents. The appellant was not entitled to receive more than a full indemnity. *Napier* decided that the right of reimbursement is recognized through an equitable proprietary interest of the

respondents in the WCB award immediately on its receipt by the appellant. In my view, the respondents' equitable proprietary interest "arose" from the WCB payment that created the repayment liability as it was an interest of the respondents that attached to the award on receipt. The breach was the failure to recognize that interest and make reimbursement forthwith.

ii. Misappropriation or Defalcation

[16] The chambers judge concluded that the appellant's default in repayment was a "misappropriation or defalcation". He followed *Skelly* in relying on this Court's judgment in *Smith v. Henderson* (1992), 64 B.C.L.R. (2d) 144 at para. 26, 10 B.C.A.C. 249 (C.A.) for the conclusion that "a defalcation while acting in a fiduciary capacity does not necessarily entail a dishonest or wrongful act." Dorgan J. in *Skelly* noted that the Ontario Court of Appeal had reached the opposite conclusion in *Simone v. Daley* (1999), 43 O.R. (3d) 511 at para. 52, in holding that "some element of wrongdoing or improper conduct on the part of the fiduciary in question in the sense of a failure to account properly for monies or property entrusted to the fiduciary" was required. The Alberta Court of Appeal followed *Smith* in *Confederation Life Insurance Co. v. Waselenak*, [1998] 5 W.W.R. 712, 210 A.R. 241 (Q.B.), aff'd 2000 ABCA 136. The Manitoba Court of Appeal followed *Simone* in *Ross & Associates v. Palmer*, 2001 MBCA 17 at para. 24, 153 Man. R. (2d) 147.

[17] This Court in *Valastiak v. Valastiak,* 2010 BCCA 71, 3 B.C.L.R. (5th) 1 recently revisited the issue. Chief Justice Finch preferred the reasoning in *Simone* and considered that *Smith* should be narrowly confined. He said, at para 31:

> [31] In my respectful view, the reasoning in *Simone* is persuasive in relation to the meaning of "misappropriation". I would not be prepared to apply *Smith* more broadly than what it expressly decided in relation to the meaning of the word "defalcation". I would limit its authority to the proposition that either negligence or incompetence is "sufficient to bring the liability under the expression 'defalcation while acting in a fiduciary capacity'". I would, therefore, construe "misappropriation" in its ordinary sense to connote some element of wrongdoing, improper conduct or improper accounting.

The chambers judge did not have the benefit of this Court's later judgment in *Valastiak*. In light of that decision, "misappropriation" requires wrongdoing and "defalcation" requires a minimum of negligence or incompetence.

[18] None of these cases considered subrogation jurisprudence. Only *Waselenak* of the five appellate decisions involved facts with potential subrogation implications. The facts of *Waselenak* were very close to the case at bar, involving a claim by an insurer for repayment of disability benefits under its policy after the insured employee was compensated for the same loss of earnings by a workers' compensation payment. The judge at first instance found that the repayment liability to the insurer survived the bankruptcy because it involved a defalcation while acting in a fiduciary capacity. The judge concluded that defalcation did not require a finding of wrongdoing and the insured had a fiduciary relationship with the insurer. He relied for the fiduciary duty analysis on the principles laid down in *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574 and *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377. The judge's decision was upheld by the Alberta Court of Appeal in brief memorandum reasons. *Napier* was not cited and there was no reference to subrogation cases.

[19] The English subrogation cases culminating in *Napier* support the conclusion in *Waselenak*. If the interest of the insurer is properly characterized as an equitable proprietary interest then the insured has only a bare legal interest in the funds in her hands and she has an equitable obligation to account to the insurer for its beneficial ownership. In *Napier*, the funds had not been dispersed and they were still in the hands of the insureds' solicitors. Consequently the interests of the stop loss insurers could be adequately protected by an equitable lien on those funds. There was no issue of fraud, misappropriation, or defalcation. Nonetheless, Lord Templeman observed (at p. 738):

> Where the insured person has been paid policy moneys by the insurer for a loss in respect of which the insured person recovers damages from a wrongdoer the insured person is guilty of unconscionable conduct if he does not procure and direct that the sum due to the insurer shall by way of subrogation be paid out of the damages.

[20] In *Valastiak*, quoted above, misappropriation is stated as requiring "some element of wrongdoing, improper conduct or improper accounting." Here there is no evidence of the appellant's actual disposition of the WCB award. The facts in evidence are simply that she was fully aware of her obligation to repay the Overpayment and she disposed of the funds in knowing breach of that obligation. On those facts I think that Lord Templeman's view of the conduct as unconscionable is appropriate. Her failure to account was at a minimum "improper accounting" and a breach properly characterized as a misappropriation.

[21] The question then is whether *Napier* should be applied and the respondents' interest in the Overpayment properly characterized as an equitable proprietary interest. *Napier* has been referred to in several Canadian authorities. In *Colonial Furniture Company (Ottawa) Ltd. v. Saul Tanner Realty Ltd.* (2001), 52 O.R. (3d) 539 (C.A.), a complex multi-party fire loss action, the Court held that a property insurer's subrogated interest in damages recovered by the insured for its property loss in a fire was an interest held in trust by the insured for the insurer with priority over the claims of other creditors to an equitable set-off in the same litigation. Rosenberg J.A. referred to the opinions of Lord Templeman and Lord Browne-Wilkinson in *Napier* and concluded, at paras 20 to 22:

> [20] Similar statements, that the insured is trustee for any advantage obtained over and above full compensation, were made more recently in *Lord Napier v. Hunter*, [1993] A.C. 713, [1993] 1 All E.R. 385 (H.L.). For example, at p. 738 A.C. Lord Templeman said the following:
>
> - I am not prepared to treat authorities which span over two centuries in a cavalier fashion. The principles which dictated the decisions of our ancestors and inspired their references to the equitable obligations of an insured person towards an insurer entitled to subrogation are discernible and immutable. They establish that such an insurer has an enforceable equitable interest in the damages payable by the wrongdoer ... Equity will not allow the insured person to insist on his legal rights to all the damages awarded against the wrongdoer and will restrain the insured person from receiving or dealing with those damages so far as they are required to recoup the insurer under the doctrine of subrogation.
>
> ...

> - In order to protect the rights of the insurer under the doctrine of subrogation equity considers that the damages payable by the wrongdoer to the insured person are subject to an equitable lien or charge in favour of the insurer.
>
> [21] Similarly, Lord Browne-Wilkinson held at p. 749 that the basis upon which equity enforced rights of subrogation was not merely a personal obligation of the insured to account to the insurers for benefits received from third parties but "a proprietary right in the damages recovered".
>
> [22] All of this supports the view taken by the Court of Appeal in *Lewenza* that as a result of subrogation the claims sought to be set off do not exist in the same right. Once the insured has been fully compensated the insured holds the judgment and any amounts received from the third party in trust for the insurer. There is no obvious reason why in those circumstances the Court of Appeal was wrong to prefer the insurer's equitable rights arising out of subrogation over the creditor's right to equitable set-off. As the respondent points out, the inability of the appellant in this case to set off does not deprive it of the benefit of the trial judgment. It can demand payment from Bond's or take whatever other steps are available to it in execution of that part of the judgment in its favour.

[22] *Napier* was also quoted extensively and relied on by Mason J. in *Grebely v. Economical Mutual Insurance Co.*, 1999 ABQB 97, 239 A.R. No. 109. In that case, property insurers applied to remove the insured's lawyers as counsel pursuing an action against third parties for damages which potentially included the insurers' subrogated interest. The insurers and the insured disputed the extent of the coverage in separate litigation and no payments had been made under the policies. The application to remove the insured's counsel was refused on the ground that no interest of the insurers could arise until the insurers had paid the losses. Mason J. noted that the question of an insurer's proprietary interest in an insured's right of action had been left open in *Napier*. He also observed (at para. 19), referring particularly to the opinions of Lord Goff of Chieveley and Lord Browne-Wilkinson, that the Law Lords were not prepared to find the insured to be a trustee of the monies or damages recovered. The insurer's right was limited to an equitable proprietary right capable of being supported by an equitable lien. I agree that the Law Lords did not go so far as to characterize the subrogation relationship as one of trust although some of the earlier cases did express the relationship in those terms.

[23] *Napier* has also been noted in passing by Binnie J., dissenting, in *Somersall v. Friedman*, 2002 SCC 59 at para. 108, [2002] 3 S.C.R. 109. The case involved unrelated issues of potential subrogated rights in circumstances where the insured had not yet been indemnified under underinsured motorist coverage underwritten by the insurer. The issues raised here were not addressed.

[24] The tension in the law of subrogation arises from the intersection of contractual and equitable elements of the jurisprudence. The insurance relationship is primarily one of contract as Madam Justice Newbury has emphasized in *Warrington v. Great-West Life Assurance Co.* (1996), 24 B.C.L.R. (3d) 1, 139 D.L.R. (4th) 18 (C.A.). That case concerned the characterization of the obligation of a disability insurer to pay benefits under a policy as sounding either in contract or fiduciary duty. Newbury J.A. concluded that the insurer's duty was contractual but as the contract was one of utmost good faith, an award of $10,000 in damages could be upheld for the insured's mental distress occasioned by the insurer's breach of contract in delayed payment of benefits.

[25] *Warrington* is consistent with the general view that the insurance relationship is primarily one of contract. The hesitation of the Law Lords to characterize the subrogation obligation as one of trust in *Napier* reflects that primacy. Nonetheless, equity does intervene to protect the insurer's subrogated interest at least to the extent of recognizing a proprietary interest capable of supporting an equitable lien. The application of the subrogation principle in insurance law rests on the fundamental understanding that insurance is a contract of indemnity from which the insured is not entitled to profit: *Castellain v. Preston* (1883), 11 Q.B.D. 380 (C.A.) at 386. A contract that permits an insured to make a profit from a fortuitous accident offends public policy. Whether the relationship between the respondents and the appellant is properly regarded as one of insurance, it is clearly one of indemnity under which the appellant was only entitled to be paid for earnings loss in excess of WCB benefits. In my view, the subrogation rights of the respondents are essentially indistinguishable from those of an insurer.

iii. Fiduciary Capacity

[26] The Law Lords in *Napier* were reluctant to describe the subrogation relationship between insured and insurer as fiduciary and it was unnecessary to go that far to give the insurer effective relief on the facts of that case. The issue must be addressed here in light of the s. 178(1)(d) requirement that the debtor must be "acting in a fiduciary capacity". According to *Napier*, the insurer's cause of action against the insured for reimbursement is a common law action for money had and received. At the same time, the insurer's claim is recognized in equity as granting the insurer an equitable proprietary interest in the funds. Are the duties of the insured with respect to those funds fiduciary?

[27] *Galambos* is the most recent Supreme Court of Canada overview of the law of fiduciary duty. Cromwell J. outlined that fiduciary duties may be analyzed in two categories, *per se* duties where the fiduciary character arises out of the general relationship between the parties such as solicitor-client or trustee-beneficiary and *ad hoc* relationships where the duty may be located in the particular characteristics of the relationship. *Ad hoc* fiduciary duties involve two essential elements. There must be an undertaking that the fiduciary will act in the best interests of the other party and the fiduciary must have a unilateral discretionary power to affect the other party's legal or practical interests. Here the appellant does not dispute her obligation to repay the Overpayment which satisfies the element of undertaking. The respondents had a beneficial interest in the Overpayment funds as an equitable proprietary interest while the funds were in the appellant's hands. She had possession of the funds and a bare legal interest. That gave her a discretionary power to deal with the funds in a manner that put them beyond the respondents' reach in equity. The respondents were obviously vulnerable to that exercise of discretionary power.

[28] In my view, the *Galambos* requirements were met and the appellant was acting in a fiduciary capacity when she received the WCB award and dealt with those funds to the respondents' prejudice. The characterization of the subrogation

relationship as fiduciary is an *ad hoc* exception to the more general rule that the relationship between insurer and insured is contractual rather than equitable, as discussed in *Warrington.*

Conclusion

[29] In the result, I conclude that the appellant's liability to the respondents is one arising out of misappropriation while acting in a fiduciary capacity and it therefore survives the appellant's bankruptcy. I would dismiss the appeal accordingly.

"The Honourable Mr. Justice Mackenzie"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[30] I have had the privilege of reading a draft of the reasons for judgment of Mr. Justice Mackenzie. I agree with his conclusion that this appeal should be dismissed, but prefer to reach that conclusion without recourse to the law of subrogation.

Background

[31] The appellant's employer's labour relations association entered into a trust agreement with the respondents for the provision of health and welfare benefits, including long term disability benefits, pursuant to a Plan. This was done in accordance with the terms of the collective agreement between the association and the union that represented the appellant. A term of the appellant's employment was the provision of long term disability benefits. As a condition of her employment, the appellant was obliged to become a member of the Plan. This Court does not have a copy of the trust agreement, the collective agreement or the appellant's application for membership in the Plan, which means it cannot characterize with accuracy the legal relationship between the parties.

[32] In accordance with provision 2 of the Plan, "benefits payable", in the event that the appellant was "entitled to any other income as a result of the same Sickness that caused [her] to be eligible to receive Benefits from the Plan", the benefits under the Plan were "reduced by one hundred (100) per cent of such other disability income" (emphasis added). Other disability income includes Workers Compensation Board ("WCB") payments received by the appellant.

[33] When the appellant applied for long term disability payments under the Plan she was obliged to and did disclose the fact that she had made a claim for benefits from the WCB.

[34] In the letter confirming the approval of her long term disability benefits claim under the Plan the appellant was advised that she should inform the administrator of the Plan if she received disability income "from any other source ... since it may affect the amount of your [Plan] benefit" and that if there were an overpayment of Plan benefits she "will have to refund [it] to the Plan". It is clear from the correspondence that the refund was to the Trust. In fact, the appellant did refund money to the Trust as a result of the receipt of some WCB benefits.

[35] The appellant received a lump-sum retroactive payment from the WCB which she did not reveal to the Plan administrator. After considerable efforts to obtain information, the respondents sued and took default judgment against the appellant. Two weeks later she declared bankruptcy. The respondents contended successfully at trial that the appellant's obligation to them survived the bankruptcy.

Discussion

[36] For ease of reference I repeat s. 178(1)(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

> Debts not released by order of discharge
>
> 178(1) An order of discharge does not release the bankrupt from
>
> …
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

Misappropriation or defalcation

[37] I agree with the comments of Mackenzie J.A. concerning this Court's decision in *Velastiak v. Velastiak*, 2010 BCCA 71, 3 B.C.L.R. (5th) 1: "'misappropriation' requires wrongdoing and 'defalcation' requires a minimum of negligence or incompetence".

[38] The scheme of the Plan was clear. Members were not to receive benefits from the Plan if they were entitled to the payment of benefits for the same disability from another source. Members were obliged to advise the Plan administrator if they

received other benefits and their payments under the Plan were reduced accordingly. If, as was the situation in this case, receipt of other benefits was potential in that the WCB claim still had to be processed, any eventual overpayment had to be refunded to the respondents.

[39] The respondents hold and administer the Trust for the purpose of providing benefits to the members of the Plan. The Plan sets out the benefits and limitations on benefits for the members. Arguably, the appellant, who was being paid benefits under the Plan, was obliged to pursue her WCB claim because it represented an entitlement to other income as referred to in provision 2 of the Plan. That is, if she had such an entitlement it reduced her payments under the Plan and, in her case, required a refund. She, like the other members of the Plan, could recover only her real loss.

[40] The appellant clearly knew she was required to repay the Trust any amount she received from the WCB that resulted in an overpayment of benefits to her by the Plan. In that sense, she was pursuing the WCB claim for the benefit of the Trust.

[41] As my colleague sets out at paras. 3-4 of his reasons, the appellant received a retroactive award of WCB compensation in the amount of $170,336.04 overlapping benefits received from the Trust. The appellant accepts she was required to repay this overpayment to the Trust, but she did not inform the Plan administrator about the retroactive award, did not respond to repeated requests from the Plan administrator inquiring about the award and did not refund the overpayment. Within two weeks of the respondents obtaining default judgment against her for the overpayment, the appellant declared bankruptcy. Her only significant debt was the judgment.

[42] In summary, the appellant pursued a claim to obtain money, the receipt of which she knew would oblige her to refund payments made under the Plan; in that sense, money which she knew she was not entitled to keep. Having obtained the money from the WCB she did not inform the Plan’s administrator. When the

respondents pursued her, which, in my view, was a responsible action given the responsibilities of the trustees, the appellant declared bankruptcy.

[43] The appellant very purposely kept money which she was aware she was required to repay. In my view, to use the words of the Chief Justice in *Velastiak*, the appellant's actions involved "some element of wrongdoing, improper conduct or improper accounting". The misappropriation requirement of s. 178(1)(d) is satisfied.

Fiduciary capacity

[44] As my colleague notes, the Supreme Court of Canada recently addressed fiduciary duty in *Galambos v. Perez*, 2009 SCC 48. He identifies two essentials of an *ad hoc* fiduciary duty: an undertaking that the fiduciary will act in the best interests of the other party and the fiduciary must have a unilateral discretionary power to affect the other party's legal or practical interests. In my view, the appellant meets both requirements.

[45] In order to maximize the funds available for benefit payments under the Plan, it was in the best interest of the Trust and the members of the Plan, that the members pursue their entitlement to other benefits. By reason of provision 2 of the Plan, the letter confirming approval by the Plan of the appellant's claim for benefits and the actual pursuance by the appellant of her WCB benefits, the appellant was obliged to proceed effectively with her WCB claim in the best interests of the Trust. She had no legitimate, personal interest in doing so, because the result legally could inure only for the benefit of the Trust due to the repayment obligations in effect to prevent double recovery.

[46] Effective pursuance of the WCB claim was wholly within her power. The respondents had no ability to do so. The practical interests of the trustees were subject completely to the appellant's discretion. Payment of some or all of the money received from the WCB to the Trust as a refund of its overpayment was entirely in her hands.

[47] In my view, the appellant had a fiduciary duty effectively to pursue her WCB claim and on receipt of money in response to that claim to refund any overpayment to the Plan.

Conclusion

[48] For these reasons, I also would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Saunders"