COURT OF APPEAL FOR ONTARIO

CITATION: Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650
DATE: 20121001
DOCKET: C53671 & C53759

Laskin and Blair JJ.A. and Brown R.S.J. (*Ad Hoc*)

BETWEEN

Enbridge Gas Distribution Inc.

Plaintiff (Respondent)

and

Michael Marinaccio, also known as Mike Marinaccio, also known as Miguel Marinaccio, also known as Micahel Marinaccio, Maria Lettizia Marinaccio, also known as Maria Mariniccio, also known as Maria Messina, Angelo Piro, Angelica Piro, Italo Tony Montaldi, also known as Tony Montaldi, also known as Italo Montaldi, Nancy Nunziatina Montaldi also known as Nancy Montaldi, also known as Nunziatina Montaldi, 1639374 Ontario Ltd., 1316679 Ontario Limited, Maverick & Associates (1991) Limited, also known as Maverick & Associates, 2132329 Ontario Ltd., 2132264 Ontario Ltd., Tera X Technologies Inc., Tarrco Construction, also known as Tarrco, Tek-Con, Mike Marinaccio Services, Tekka-Ent, Provac and 2138337 Ontario Inc.

Defendants (Appellants)

Ross Morrison and Natalie Schernitzki, for the appellant, Italo Tony Montaldi

Bryan Fromstein, for the appellant, Angelo Piro

Reid Lester and Matthew Morden, for the respondent

Heard: February 15, 2012

On appeal from the judgments of Justice Frank J.C. Newbould of the Superior Court of Justice, dated April 14, 2011 and August 22, 2011, with reasons reported at 2011 ONSC 2313 and 2011 ONSC 4962, 206 A.C.W.S. (3d) 685.

Laskin J.A.

A. OVERVIEW

[1] Piro and Montaldi appeal the summary judgment granted to Enbridge.

[2] Piro was a labourer. Montaldi was an accountant. The primary defendant, Marinaccio, was an operations supervisor for Enbridge. Enbridge, a regulated utility, frequently had to repair property it had damaged during its regular maintenance. In 2001, Marinaccio, Piro and Montaldi devised a scheme to do this repair work.

[3] According to the appellants, the scheme was to operate as follows. Piro alone would register business entities to do the work. Marinaccio's involvement would be concealed from his employer, Enbridge. However, Marinaccio would hire contractors to do the work. Montaldi would prepare the invoices to be given to Enbridge. Marinaccio would approve the invoices. Marinaccio, Piro and Montaldi would share the payments from Enbridge in predetermined percentages.

[4] The appellants and Marinaccio carried out the venture for over six years. Enbridge paid out over $6.5 million. Marinaccio has now admitted that the entire scheme was a fraud. No work was ever done. All the invoices were phoney. Marinaccio also claims that Piro and Montaldi were aware of the fraud. After the lawsuit began, Marinaccio settled Enbridge's claim against him for $1.9 million.

[5] Enbridge then moved for summary judgment against Piro and Montaldi. The motion judge, Newbould J., found that Marinaccio owed a fiduciary duty to Enbridge and that he breached his fiduciary duty by secretly profiting at the expense of his employer. The motion judge granted summary judgment against Piro and Montaldi on three separate bases: knowing assistance to Marinaccio in breaching his fiduciary duty; bribery; and unjust enrichment.

[6] On Enbridge's main claim for knowing assistance, the motion judge found Piro and Montaldi jointly and severally liable for $5,723,339.60, which was the entire amount received from Enbridge less the net settlement amount paid by Marinaccio (after deducting the costs of collection).

[7] On their appeal, Piro and Montaldi make four main arguments:

(1) Piro alone argues that the motion judge erred in finding that Marinaccio owed a fiduciary duty to Enbridge.

(2) Even if Marinaccio owed a fiduciary duty to Enbridge and he breached that duty, the motion judge erred in finding Piro and Montaldi liable for knowing assistance. They submit that to be liable for knowing assistance, they had to know that the scheme was a fraud. They contend that whether they knew at the time it was a fraud raises a genuine issue for trial.

(3) The motion judge erred in finding them liable for the tort of bribery because Enbridge did not plead bribery and did not prove the payment of a secret commission.

(4) The motion judge erred in finding them liable for unjust enrichment. They submit that as they did some work and did not know the scheme was a fraud they are entitled to keep their share of the profits.

[8] Montaldi argues two additional grounds of appeal:

(5) The motion judge erred in his calculation of the amount of the judgment.

(6) The motion judge erred in awarding compound interest.

[9] For the reasons that follow, I would dismiss both appeals in their entirety.

B. RELEVANT FACTUAL BACKGROUND

[10] Although the record before the motion judge was lengthy, the material facts are largely not disputed. Piro's and Montaldi's discovery evidence was filed, but neither filed an affidavit in response to Enbridge's motion. I am satisfied that the motion judge was entitled to dispose of this case by a summary judgment.

[11] The motion judge concisely summarized the factual background of this litigation. His summary is sufficient to put the issues on appeal in context. I therefore simply reproduce his summary taken from paras. 2, 3 and 5-10 of his endorsement:

> [2] This action arises from a business arrangement made by Piro and Montaldi with the defendant Michael Marinaccio who at the time was an employee of Enbridge. ... Marinaccio was an operations supervisor

with Enbridge with authority to retain third party contractors on behalf of Enbridge and to approve payment of invoices. Piro was a labourer who worked for various companies that did business with Enbridge and he got to know Marinaccio. Montaldi is an accountant and financial planner and sole shareholder and principal of the defendant Maverick.

[3] Enbridge often required repair work to be done on properties where Enbridge technicians had done the maintenance work such as repairing damaged landscaping. The business engaged in by Marinaccio, Piro and Montaldi that has given rise to this action was a venture under which Enbridge paid approximately $6.7 million from 2001 to 2007 for work and equipment allegedly supplied to Enbridge by four entities set up by Piro. Marinaccio and Piro each received at least 31.5% or 32.5% of this money, depending upon the year. Maverick received either 5% or 7% of the money, depending upon the year. There is a difference between the parties as to what happened to the remaining 30%. Piro and Montaldi say that it was given in cash to Marinaccio to be used to pay subcontractors and suppliers who were to do the work for the four entities set up by Piro. Marinaccio denies ever receiving the cash.

[5] The four entities set up by Piro were unincorporated. The first was Tarrco, followed by Tek-Con, Tekka-Ent and Provac. Invoices were sent out by each entity at different times. Tarrco invoices were submitted to Enbridge for a period of about 18 months from July, 2001 to January, 2003. Tek-Con submitted invoices from June, 2003 to January, 2004. Tekka-Ent submitted invoices from February to December, 2004. Provac submitted invoices from February, 2005 to October, 2007.

[6] Piro and Montaldi were aware that Marinaccio worked at Enbridge. Piro's evidence is that the businesses were registered in his name alone without Marinaccio's name appearing because he knew that

Marinaccio had a conflict of interest because of his involvement with Enbridge and that Marinaccio's name was not to appear anywhere on the record. Montaldi's evidence was that the business was to be in Piro's and Marinaccio's name but that Marinaccio told him that his name could not appear on the ownership of the company because it would be a conflict of interest with Enbridge. Marinaccio made clear that he would ensure that Enbridge did not learn about his involvement in the venture.

[7] Montaldi was the accountant for the Piro entities. He also prepared all of the invoices to Enbridge from information supplied by Piro or Marinaccio. The invoices gave Maverick as the address for the entity supplying the invoice. These invoices were not sent to Enbridge. Rather they were hand delivered to Marinaccio by either Montaldi or Piro. Both Piro and Montaldi knew that it was Marinaccio who approved these invoices on behalf of Enbridge.

[8] The total paid by Enbridge was $6,665,853.51. Montaldi received the Enbridge checks for the invoices either at the Maverick office or at a post box controlled by Montaldi, and these checks were deposited into the bank account for the entity that had invoiced Enbridge. The bank accounts for the four Piro entities were controlled by Piro and Montaldi who had the signing authority for the accounts.

[9] From these bank accounts, 5% and later 7% of the Enbridge payments were paid to Montaldi. His evidence is that these payments were for his fees for providing accounting services. That amounted to approximately $408,000. 30% of the Enbridge payments was taken out in cash and according to Piro and Montaldi was paid to Marinaccio for the purpose of paying the sub-contractors who allegedly did the work. Their evidence is that the cash was put in brown envelopes and given to Marinaccio from time to time along with the invoices. Marinaccio denies ever receiving this cash. The balance, being 63%, and later

> 61% after Montaldi's percentage was increased from 5 to 7%, was paid out equally to Marinaccio and Piro.
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> [10] Marinaccio's evidence was that no work was done by the Piro entities that had invoiced Enbridge and that the work had been done by other contractors to Enbridge. His evidence is that the invoices were phony to the knowledge of both Piro and Montaldi. Piro and Montaldi both assert that they were told by Marinaccio that the work was being done by subcontractors arranged by Marinaccio and that the 30% of the Enbridge payments made in cash to Marinaccio was for the purpose of paying those subcontractors. Their evidence is that they do not know who those subcontractors or persons were and it is admitted that Montaldi, purportedly the accountant for the Piro entities, kept no record of any of such subcontractors or persons or of amounts allegedly paid to them.

C. ANALYSIS

(1) Did the motion judge err in finding that Marinaccio owed a fiduciary duty to Enbridge?

[12] Marinaccio began working for Enbridge in 1979. He was promoted over the years. By 2001 he was an operations supervisor. He had authority to hire outside contractors to do work for Enbridge and to approve payment of their invoices. At first, he could only approve invoices of up to $2,000, but by late 2003 he could approve invoices of up to $5,000. The motion judge found at para. 20, "in this case there can be no question but that Marinaccio owed a fiduciary duty to Enbridge."

[13] Montaldi does not challenge the motion judge's finding. However, Piro does. He argues that Marinaccio was not a key Enbridge employee, but merely a mid-level manager with limited authority. Like any employee, Marinaccio owed a duty of loyalty to his employer. However, his role within Enbridge did not make him a fiduciary. At the very least, whether he owed a fiduciary duty is an issue that requires a trial. Piro attempts to buttress his argument by pointing out that the motion judge's finding of a fiduciary duty is unsupported by any analysis.

[14] I would not give effect to Piro's argument. As a starting point, the motion judge cannot be faulted for his brief treatment of the question whether Marinaccio owed a fiduciary duty to Enbridge because that question did not appear to have been a live issue before him. As the motion judge noted, Montaldi implicitly conceded that Marinaccio owed a fiduciary duty. And Piro, who now alone challenges the motion judge's finding, expressly conceded that Marinaccio owed a fiduciary duty. That express concession is evident from para. 19 of Piro's factum on the motion for summary judgment where he accepted that "it is established that Marinaccio owed a fiduciary duty to Enbridge and that his action amounted to a breach of fiduciary duty vis-à-vis Enbridge."

[15] Although we no doubt have authority to revisit an issue that was conceded before a motion judge, we should be reluctant to do so. Moreover, even if we do revisit this issue, the question whether a person owes a fiduciary duty is largely a factual inquiry. Accordingly, a trial judge's or a motion judge's finding of a

fiduciary duty is entitled to significant deference from an appellate court: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 425-426; *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, at para. 81.

[16] In this case, the motion judge's finding of a fiduciary duty deserves deference because there is evidence to support it. A fiduciary relationship may exist where the fiduciary undertakes to act in the best interests of the beneficiary, the fiduciary has the power to affect the legal or substantial interests of the beneficiary, and, as a result, the beneficiary is vulnerable to the fiduciary: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 at paras. 68-70; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at paras. 30-34. In the employment context, an employee may therefore be said to owe a fiduciary duty to his or her employer where the employee has discretionary power to affect adversely the employer's interests and the employer is vulnerable to the exercise of that power.

[17] Here, Marinaccio had discretionary power both to hire outside contractors for Enbridge and to approve the payment of invoices they submitted. Enbridge was undoubtedly vulnerable to the exercise of that power because Marinaccio used his power to defraud his employer of over $6.5 million over the course of six and a half years.

[18] I recognize the admonition of my colleague Gillese J.A. in *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 473, at para. 46:

> [O]ne cannot reason backwards from the fact that an individual is harmed by the unauthorized act of their broker, to the conclusion that they are vulnerable. Rather, the individuals and the nature of the relationship must be examined.

[19] Nonetheless, that Marinaccio had the authority, opportunity and ability to perpetrate such a large-scale fraud on his employer over such a prolonged period of time is some evidence that he possessed the hallmarks of a fiduciary duty: discretionary power over a correspondently vulnerable employer.

[20] For these reasons, I would not interfere with the motion judge's finding that during the period of the fraud, Marinaccio owed a fiduciary duty to Enbridge. In upholding this finding I should not be taken to signify that many mid-level employees of large corporations will owe a fiduciary duty to their employer. The finding in this case not only rests on its particulars facts but was largely uncontested. If the question whether Marinaccio owed a fiduciary duty to Enbridge had been more vigorously challenged, the motion judge may have taken a different view.

(2) Did the motion judge err in finding that Piro and Montaldi knowingly assisted Marinaccio in breaching his fiduciary duty?

[21] If Marinaccio had a fiduciary duty to Enbridge, unquestionably he breached that duty. He participated in an undisclosed scheme by which he induced Enbridge to unknowingly make payments to business entities in which he had an interest. He personally profited from those payments. These were acts of dishonesty, inconsistent with Marinaccio's fiduciary duty.

[22] If Marinaccio owed a fiduciary duty to Enbridge, neither Piro nor Montaldi contest that he breached this duty. However, both dispute their liability for knowingly assisting in the breach.

[23] In the recent case of *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para. 8, this court set out the components of a claim for knowingly assisting in a breach of a fiduciary duty:

> There is no dispute concerning the constituent elements of the tort of knowing assistance in breach of fiduciary duty: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; *(3) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct*; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct. The knowledge requirement for liability based on this tort is actual knowledge, which, as the Supreme Court confirmed in *Air Canada* [*Air Canada v. M & L Travel Ltd.,* 1993] 3 S.C.R. 787], at para. 38, includes recklessness and wilful blindness. As this court observed in *Keeton v. The Bank of Nova Scotia*, 2009

> ONCA 662, 254 O.A.C. 251, at para. 82, "to found liability [on knowing assistance in a breach of fiduciary duty], the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach." [Emphasis added; internal citations omitted.]

[24] This ground of appeal turns on the third component, the knowledge requirement. Piro and Montaldi submit that to be liable for knowing assistance they had to know both that Marinaccio's conduct was dishonest *and* that the scheme was a fraud. And although the motion judge found that they both knew Marinaccio acted dishonestly, and indeed they participated in that dishonesty, they did not know at the time that the entire scheme was a fraud. They claim they believed work was being done, and that Marinaccio was hiring and paying sub-contractors out of the money received from Enbridge.

[25] And yet Marinaccio says that they knew. And by the time of discovery, Piro acknowledged that the scheme was fraudulent. However, he says that he did not know that it was fraudulent at the time. Montaldi says that he never knew that the scheme was fraudulent. In the face of this conflicting evidence I accept, and Enbridge has accepted, that whether Piro or Montaldi knew at the time that the scheme was a fraud raises a genuine issue requiring a trial. Thus, if Enbridge were required to show the appellants' knowledge of the fraud, it would not be entitled to summary judgment on the basis of knowing assistance.

[26] Enbridge, however, submits that it is required to show only that Piro and Montaldi had knowledge of Marinaccio's dishonesty. It is not necessary to prove they knew that a fraud was committed, Enbridge argues, so long as they were aware that Marinaccio was dishonestly breaching his fiduciary duty by participating in the scheme. The motion judge agreed with Enbridge's position. He wrote at paras. 24-25 of his endorsement:

> [24] In this case both Piro and Montaldi knowingly assisted in the breach of Marinaccio's fiduciary obligations to Enbridge. They were aware that Marinaccio had a conflict and assisted him in taking steps to hide Marinaccio's role in the venture. They knew as well that Marinaccio was making sure that Enbridge was not aware of the venture. Montaldi was far more than an accountant for the Piro entities. He prepared the invoices, which he and Piro hand delivered to Marinaccio rather than sending them to Enbridge. The invoices directed payment to a Maverick address. He along with Piro opened bank accounts in which the Enbridge money was deposited and he arranged for wire transfers to Marinaccio as well, on his evidence, of taking cash and giving it to Marinaccio.
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> [25] The fact that Piro and Montaldi assert that they were not aware that work was not being done for which invoices were sent does not assist them. It was a breach of Marinaccio's fiduciary obligations to Enbridge to be involved in a venture that resulted in him being the recipient of money, regardless of whether the work was done. Piro and Montaldi were quite aware of that breach and took steps in furtherance of it.

[27] I agree with the motion judge. In the context of a claim for knowing assistance in the breach of a fiduciary duty, dishonest and fraudulent conduct signify a level of misconduct or impropriety that is morally reprehensible but does

not necessarily amount to criminal behaviour. The term fraudulent does not signify that an additional degree of corruption is necessary to make out the tort; it simply emphasizes the required dishonest quality of the fiduciary's act. As Buckley L.J. stated in *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1)*, [1979] 1 All E.R. 118, at p.130, cited with approval in *Air Canada*, at p. 815:

> ...I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.

In *Air Canada*, at p. 826, Iacobucci J. described the type of conduct captured by the two terms used together as "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary." By extension, liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct.

[28] Here, both Piro and Montaldi knew that Marinaccio took a wrongful risk that prejudiced Enbridge. They knew that Marinaccio worked for Enbridge. Piro knew and the motion judge found that Montaldi knew that Marinaccio had authority to retain outside contractors and to approve invoices for payment by Enbridge. Piro and Montaldi also knew that Marinaccio had a conflict of interest by participating in the scheme. They knew that he wanted to conceal his involvement in the scheme from Enbridge and they assisted him in doing so.

And they knew that he secretly profited from the scheme at the expense of Enbridge.

[29] In short, Piro and Montaldi knew that Marinaccio's conduct was dishonest, and indeed morally reprehensible, and that his conduct harmed Enbridge. They cannot escape liability by their assertion that they did not know at the time that they were participating in a fraud.

[30] I would not give effect to this ground of appeal.

[31] Piro and Montaldi accept that if they are liable for knowing assistance then the motion judge was correct to hold them jointly and severally responsible for the full amount advanced by Enbridge. As I would uphold the motion judge's finding of liability for knowing assistance, strictly speaking, it is not necessary to deal with the two other bases of the appellants' liability. For completeness, however, I will address them briefly.

(3) Did the motion judge err in finding Piro and Montaldi liable for bribery?

[32] The motion judge found Piro and Montaldi liable for bribery because of the payments they made to Marinaccio out of the money received from Enbridge.

[33] The civil tort of bribery is the payment of a secret commission. In *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.* (1989), 67 O.R. (2d) 587

(C.A.), at p. 591, Morden J.A. set out the three elements of a cause of action in bribery:

> The term "bribe" has, for the purposes of the civil law, received a wide interpretation. In *Industries & General Mortgage Co. v. Lewis*, [1949] 2 All E.R. 573 (K.B.D.), Slade J. said at p. 575:
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> > For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.

[34] Once all the elements of bribery are established, the court will presume in favour of the principal and against the briber and the agent bribed, that the agent was influenced by the bribe. The presumption is irrebuttable: see *Optech Inc. v. Sharma,* 2011 ONSC 680, at para. 23. Moreover, the motive of the person making the bribe is irrelevant: see *Ruiter Engineering,* at p. 591-592; *Barry v. Stoney Point Canning Co.,* [1917] 55 S.C.R. 51, at p. 74.

[35] The motion judge found that Enbridge had established the three elements of bribery:

> [31] The three elements cited by Morden J.A. as constituting the only elements necessary to constitute the payment of a secret commission or bribe clearly are applicable to this case. The dealings were clearly surreptitious and in the language of James L.J. constituted a fraud on Enbridge entitling Enbridge to adequate relief as the court may think right to give.
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> [32] Piro and Montaldi controlled the bank accounts and they together arranged for payment to Marinaccio of approximately $2.086 million pursuant to his 32.5% interest in two of the entities and his 31.5% interest in the other two entities. They also say they acted in paying approximate $2 million in cash to Marinaccio, representing 30% of the proceeds received from Enbridge, although Marinaccio denies receiving this money or telling them that he was paying any subcontractors. If in fact they paid this cash to Marinaccio, I find that none of this was paid by Marinaccio to any subcontractors. That was Marinaccio's evidence and neither Piro nor Montaldi have provided any evidence of any payments to any subcontractors or indeed of the existence of any subcontractors. If they did not pay the cash to Marinaccio, they have retained it for their own purposes.
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> [33] In the circumstances, the appropriate remedy under the claim for bribery is to require Piro and Montaldi to pay Enbridge the $2.086 million paid to Marinaccio and a further $2 million either paid to Marinaccio or kept by them. Thus under this heading Piro and Montaldi are jointly and severally responsible to pay Enbridge $4.086 million.

[36] Piro and Montaldi challenge the motion judge's finding on three grounds. First, they say that Enbridge did not plead a cause of action in bribery. The

motion judge, therefore, was wrong to grant judgment on a claim that was not pleaded. Second, they say that bribery was not made out because the payments to Marinaccio were not made to him as an agent of Enbridge, but as a principal of the Piro entities. Third, Piro says that the motion judge ought to have limited his damages award to $2 million, which was the amount of Piro's profit. I do not agree with any of these grounds advanced by the appellants.

[37] On the first ground, although Enbridge did not use the word "bribery" in its amended claim, it did plead all of the material facts required to establish a cause of action in bribery. More important, in its notice of motion, Enbridge expressly moved for summary judgment for bribery. Its motion was served on the appellants 14 months before it was heard, and the issue of bribery was fully argued before the motion judge. Therefore, neither Piro nor Montaldi can seriously claim that he was prejudiced by the omission of the word bribery from Enbridge's pleading.

[38] On the second ground, Piro and Montaldi admitted that they acted in concert to make secret payments to Marinaccio of approximately $2.086 million, which represented his percentage interest in the Piro entities. They have also asserted that they acted in concert in paying Marinaccio in cash a further $2 million, representing 30 per cent of the total proceeds of the fraud.

[39] Accepting their admission and their assertion, Piro and Montaldi secretly paid to Marinaccio approximately $4.086 million from the amounts invoiced to Enbridge and paid by Enbridge to the Piro entities. In other words, they paid bribes to Marinaccio amounting to $4.086 million and they kept these payments secret from Enbridge. Their motive in making these payments is irrelevant. Thus, Piro cannot escape liability by claiming that the payments were made to Marinaccio as a principal of the Piro entities and not as an agent of Enbridge.

[40] And Montaldi cannot escape liability by claiming that he did not know of the fraud or deal directly with Enbridge. Neither his reasons for transferring funds to Marinaccio nor his awareness of the fraudulent nature of the scheme has any bearing on his liability. His knowledge that Marinaccio was acting as an employee of Enbridge and his failure to disclose the payments to Enbridge are sufficient. Further, he dealt with Enbridge extensively: he prepared all of the invoices addressed to Enbridge on behalf of the Piro entities; he received Enbridge's checks at either the Maverick office or a post box he controlled; he deposited Enbridge's checks into bank accounts he controlled. The tort of bribery does not require that dealing be "direct."

[41] In his article "Remedies for the Victims of a Bribe" (1999-2000) 22 Advoc. Q. 198, at para. 198, Paul M. Perell describes the expansive nature of liability for bribery:

> The payment may be made to induce the recipient to exercise his influence in a way that favours the briber, but the motive is not determinative and *the essential factor is the secrecy*; if the payment is secret then a corrupt motive and the success of the inducement will be assumed. The secret payment is a bribe *even if the person making the payment did not intend a bribe and believed or expected that the recipient would properly disclose the payment.* [Emphasis added; footnotes omitted.]

[42] In my view, this passage is a complete response to Montaldi's claim.

[43] On the third ground, the measure of damages for bribery is generally the amount of the bribe or secret commission paid to the agent – in this case Marinaccio. Both Piro and Montaldi said that they made secret payments to Marinaccio of $4.086 million. Therefore, the motion judge did not err in awarding damages for this amount. I would not give effect to this ground of appeal.

(4) Did the motion judge err in finding Piro and Montaldi liable for unjust enrichment?

[44] Liability for unjust enrichment has three components:

- The defendant obtains an enrichment.
- The plaintiff incurs a corresponding deprivation.
- There is no juristic reason for the defendant's enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30.

[45] The motion judge held that Enbridge had established these three components:

> [35] This cause of action has undoubtedly been established. Piro and Montaldi were enriched by the amounts received by them and Enbridge is out the money. Piro admits that there was a fraud. Montaldi can point to no evidence that any work was done or equipment supplied by the four Piro entities. In the circumstances I find that no work was done and that there was no juristic reason whatsoever for the payments made by Enbridge.

[46] Piro and Montaldi submit that the motion judge erred in holding that the third component had been established because the Piro entities did some work and neither appellant knew at the time that the scheme was a fraud. Retaining the money paid by Enbridge was, therefore, not unjust. I do not accept this submission.

[47] On the first branch of the argument, Piro essentially conceded when he acknowledged the scheme was a fraud that the four entities registered in his name never provided anything of value to Enbridge. Therefore, all of the payments Enbridge made to the Piro entities represented a loss. Although Montaldi claims that the Piro entities did some work, he has no direct evidence that they did. He also failed to make any further inquiries into which sub-contractors were doing the work he alleges was done, and whether they were in fact paid by Marinaccio out of the funds allegedly earmarked for that purpose. The motion judge, thus, reasonably held that the appellants could not credibly claim a juristic reason for their enrichment on the basis some work had been done.

[48] On the second branch of the argument, the appellants contend that because they did not have knowledge of the fraud at the time, or at the very least whether they had knowledge raises a genuine issue for trial, they cannot by a summary judgment be required to disgorge the money they received from Enbridge. I do not agree with this contention.

[49] The entire scheme was a fraud, as Marinaccio claimed and Piro later admitted. That neither Piro nor Montaldi may have known it rose to the level of fraud at the time does not make out a juristic reason for their enrichment at the expense of Enbridge. Had either Piro or Montaldi been an innocent stranger to the scheme who could claim to have received the money from Enbridge lawfully, his position may have been different: see *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 51. But neither Piro nor Montaldi was an innocent stranger to the scheme. Both fully participated and assisted Marinaccio in arranging what was shown to be a fraud on Enbridge. In these circumstances, Piro and Montaldi can have no juristic reason to retain Enbridge's money. I would not give effect to this ground of appeal.

(5) Did the motion judge err in calculating the amount of the judgment?

[50] As I have said, each appellant acknowledges that if he is liable for knowingly assisting in Marinaccio's breach of fiduciary duty then he is liable to account for the full amount paid by Enbridge and not just his share of the profit.

Montaldi, however, submits that the motion judge erred in calculating the amount of the judgment for knowing assistance.

[51] In assessing Piro's and Montaldi's liability, the motion judge properly reduced the total loss incurred by Enbridge by the sum from the Marinaccio settlement. Instead of deducting the gross amount of the settlement, however, the motion judge took account of the fees and disbursements Enbridge incurred in collecting the settlement funds. Therefore, in fixing the amount of the judgment against Piro and Montaldi, he reduced the appellants' liability by the amount of Enbridge's *net* recovery from Marinaccio after legal costs. Montaldi contends that the motion judge should have instead deducted the gross amount of the settlement.

[52] Enbridge paid the four Piro entities $6,542,928.63. The Marinaccio settlement amounted to $1,948,727. The cost of collecting the settlement amounted to $1,129,138. Thus, the net recovery on the settlement was $819,589 ($1,948,727 minus $1,129,138). The motion judge granted judgment for $5,723,339.60 ($6,542,928.63 minus $819,589). Montaldi submits that he ought to have granted judgment for $4,594,201.63 ($6,542,928.63 minus $1,948,727).

[53] I do not agree with this submission. The motion judge addressed this submission at para. 19 of his supplementary endorsement. He held that

Enbridge was entitled to be compensated for its loss. Its loss had to take account of the costs of recovery on the settlement. The motion judge wrote:

> In my reasons for judgment I held that the plaintiff was entitled to its loss, being the amount paid by it to the four Piro entities, less the net recovery after the costs of collecting resulting from the Marinaccio settlement. The loss was $6,542,928.63. The gross amount collected under the Marinaccio settlement was $1,948,727. The total fees and disbursements incurred by the plaintiff in collecting that amount was $1,129,138, leaving a net recovery under the settlement of $819,589. Mr. Morrison contends that the gross amount recovered from the Marinaccio settlement should be deducted from the loss rather than the net amount after costs as there is no breakdown or calculation of this amount in the evidence. I think if Mr. Morrison seriously contended that the amounts were not spent, he could have asked for more particulars, assuming they are not contained in the two inch thick bundle of invoices provided by the plaintiff. I am prepared to accept that the amount was spent. I ordered that the net recovery after costs under the Marinaccio settlement should be deducted from the plaintiff's loss in order that there not be double recovery. To deprive the plaintiff of the cost of the recovery under the Marinaccio settlement would deprive it of a portion of its loss. The net recovery of $819,589 is to be used with the result that the loss to be paid by Piro and Montaldi is $5,723,339.60. [Footnote omitted.]

[54] I agree. I would not give effect to this ground of appeal.

(6) Did the motion judge err in awarding Enbridge compound interest?

[55] For pre-judgment interest, the motion judge awarded Enbridge compound interest (at 4.3 per cent) compounded monthly. Montaldi does not dispute the rate but submits that the motion judge erred in ordering compound interest. He

relies on s. 128(4)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C-43, which provides that pre-judgment interest shall not be awarded on interest accruing under this section. He also submits that unlike in *Bank of America v. Mutual Trust Co.,* 2002 SCC 43, [2002] 2 S.C.R. 601, a case the motion judge referenced in support of his discretion to award compound interest, there was no loan agreement specifically providing for compound interest between the parties.

[56] At para. 17 of his supplementary endorsement, the motion judge explained why he awarded compound interest:

> Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. [Internal citations omitted.]

[57] I agree. I would simply add that this court has consistently approved of the trial court's exercise of discretion to award compound interest for breach of fiduciary duty or breach of trust: see *Kooner v. Kooner*, 2006 CarswellOnt 5884 (C.A.), at para. 2; *Waxman v. Waxman*, 2008 ONCA 426, at para. 5; and *Brock v. Cole* (1983), 40 O.R. (2d) 97 (Ont. C.A.), at p. 103.

[58] I would not give effect to this ground of appeal.

D. CONCLUSION

[59] I would dismiss both Piro's appeal and Montaldi's appeal. Enbridge is entitled to the costs of the appeal, which I would fix in the amount of $40,000, inclusive of disbursements and applicable taxes.

Released: OCT 01 2012

[signature] J.A.

I agree [signature] J.A.

I agree. [signature] R.S.J. (ad hoc)