

CITATION: MacKinnon v. Ontario Municipal Employees Retirement Board, 2007
ONCA 874
DATE: 20071213
DOCKET: C46215 and C47044

COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and BLAIR J.J.A.

BETWEEN:

WYMAN MACKINNON

Plaintiff (Appellant/
Respondent)

and

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT BOARD, BOREALIS
CAPITAL CORPORATION, BOREALIS REAL ESTATE MANAGEMENT INC.,
IAN COLLIER, R. MICHAEL LATIMER and MICHAEL NOBREGA

Defendants (Respondents/
Appellant)

Mark Zigler, Jonathan Ptak and Anthony Guindon for Wyman MacKinnon, the appellant/
respondent to the Borealis Capital Corporation appeal.

Peter H. Griffin and Eli S. Lederman for the respondents, Ontario Municipal Employees
Retirement Board, Borealis Capital Corporation and Borealis Real Estate Management
Inc. and for the appellant, Borealis Capital Corporation.

R. Bruce Smith and Evan Atwood for Ian Collier, R. Michael Latimer
and Michael Nobrega, respondents in the MacKinnon appeal.

Heard: June 28, 2007

On appeal from the orders of Justice John D. Ground of the Superior Court of Justice,
dated August 16, 2006, with reasons reported at (2006), 52 C.C.E.L. (3d) 138, and
January 19, 2007.

GILLESE J.A.:

OVERVIEW

[1] Wyman MacKinnon is a member of the Ontario Municipal Employees Retirement System (“OMERS”) plan (the “Plan”). The Plan is a defined benefit pension plan for employees of municipalities and local boards throughout Ontario. It provides pension services to about 342,000 members and 900 employers. It is funded by employer and employee contributions and earnings thereon. As of December 31, 2003, it had assets in excess of \$32 billion.

[2] Patrick S. Ryan is the General Vice President of the Canadian Union of Public Employees, the collective bargaining agent for a significant number of the Plan members.

[3] MacKinnon and Ryan filed a statement of claim in which they sought, on behalf of the Plan, redress for alleged acts of serious maladministration, including breaches of trust and fiduciary duty.

[4] The defendants in this action are the OMERS Board, which administers the Plan, Borealis Capital Corporation (“BCC”), Borealis Real Estate Management Inc. (“BREMI”), and Ian Collier, R. Michael Latimer and Michael Nobrega.

[5] This appeal arises from the disposition of two motions. The first motion was brought by MacKinnon and Ryan under Rule 10 of the *Rules of Civil Procedure*. In that

motion, MacKinnon and Ryan asked to be appointed as representative plaintiffs on behalf of all Plan members. The defendants brought the second motion. In it they sought, pursuant to Rule 21 of the *Rules of Civil Procedure*, to have the statement of claim struck primarily on the ground it did not disclose a reasonable cause of action.

[6] On the Rule 10 motion, the motions judge held that Ryan was not an appropriate candidate because he was not a Plan member. However, MacKinnon was held to be suitable and he was named as the representative plaintiff.

[7] On the Rule 21 motion, the motions judge found that he was unable to determine whether the statement of claim disclosed reasonable causes of action against the various defendants. Accordingly, he granted leave to the plaintiff to deliver an amended statement of claim without prejudice to the right of the defendants to renew their motion to strike the amended statement of claim on the basis that it did not disclose a reasonable cause of action.

[8] The plaintiff filed an amended statement of claim in which he sought, among other things, the following relief: declarations that the defendants had acted negligently and committed various breaches of fiduciary and trust duties; a declaration that the individual defendants had been unjustly enriched at the expense of the OMERS pension fund (the "Fund"); an accounting for all monies improperly paid by OMERS to the other defendants pursuant to a series of agreements and transactions; an order for equitable

tracing of all monies improperly paid by OMERS to the defendants; an order that various agreements under which the monies had been paid were void by reason of illegality; and, alternatively, damages for breach of fiduciary duty and unjust enrichment, which monies were to be returned to the Fund.

[9] The defendants renewed their Rule 21 motion.

[10] By order dated August 16, 2006 (the "Order"), the motions judge struck: (1) all claims against BCC; (2) all claims against Nobrega and Collier; (3) all but two claims against BREMI; and (4) all claims against Latimer save for the claim based on his alleged participation in the negotiation of the Management Services Agreement, on which more is said later. The motions judge did not strike any claims against the OMERS Board.

[11] Paragraph 6 of the Order provides that the determination of remedies, as sought in the amended statement of claim, is reserved to the trial judge.

[12] In an order dated January 19, 2007 (the "Costs Order"), the motions judge ordered that no costs were payable in respect of the Rule 10 motion. He ordered costs of the Rule 21 motion in favour of BCC, Collier and Nobrega, payable from the Fund. BREMI's and Latimer's costs were reserved to the trial judge.

[13] MacKinnon appeals. He asks this court to set aside those paragraphs in the Order which strike the action as against the various defendants.

[14] BCC also appeals.¹ It asks the court to set aside paragraph 6 of the Order, which permits the plaintiff to pursue the remedies sought against it. BCC argues that it is an error to permit the plaintiff to pursue remedies against it in the absence of a cause of action against it remaining in the amended statement of claim.

[15] MacKinnon also seeks leave to appeal the Costs Order. He asks that his full costs of the Rule 10 and Rule 21 motions be ordered payable by the defendants or the Fund.

[16] BCC cross-appeals the Costs Order, asking that the costs ordered in its favour be made payable by MacKinnon, rather than the Fund.

[17] For the reasons that follow, I would allow the MacKinnon appeal in part and dismiss the BCC appeal. I would grant leave to appeal the Costs Order and allow the costs appeal. I would dismiss the cross-appeal on costs.

[18] For ease of reference, the following terms are used in the balance of these reasons: all of the defendants, including the OMERS Board, are the “Defendants”; all of the defendants, excluding the OMERS Board, are the “Respondents”; BCC and BREMI are the “Corporate Defendants”; and Collier, Latimer and Nobrega are the “Individual Defendants”.

¹ BCC originally sought leave to appeal to the Divisional Court. On February 1, 2007, Swinton J. granted BCC leave to appeal. In the meantime, MacKinnon brought its appeal of the Order. As the BCC appeal was related to the MacKinnon appeal, a motion was brought to transfer the BCC appeal to the Court of Appeal. By order dated March 9, 2007, the BCC appeal was transferred to the Court of Appeal to be heard with the MacKinnon appeal.

THE PRINCIPLES APPLICABLE TO A RULE 21 MOTION TO STRIKE A PLEADING

[19] The parties agree on the hurdle that must be met on a Rule 21 motion brought to strike a pleading as disclosing no reasonable cause of action: the moving party must show that it is plain and obvious that the claim could not succeed at trial (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). That is, as the motions judge properly recognized, a claim is not to be struck as disclosing no reasonable cause of action unless it is “plain, obvious and beyond doubt that the claim will not succeed”.

[20] The following principles apply to a Rule 21 motion to strike a pleading:

- a) The material facts pleaded must be deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or incapable of proof;
- b) The claim incorporates by reference any document pleaded and the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings;
- c) Novelty of the cause of action is of no concern at this stage of the proceeding;
- d) The statement of claim must be read generously to allow for drafting deficiencies;
and
- e) If the claim has some chance of success, it must be permitted to proceed.

[21] It is well settled law that the threshold for sustaining a pleading on a Rule 21 motion is not high.

THE FACTS AS PLEADED

[22] All of the following facts are taken from the amended statement of claim. In accordance with the applicable legal principles, they are deemed to be proven. Thus, even though they are allegations at this stage of the proceedings, they are set out as if they have been proven.

[23] In 1999, BCC was incorporated as a numbered company. It changed its name to Dorset Capital Inc. and then to Dorset Partners Inc.

[24] In February 2001, Dorset and OMERS announced an agreement to create BCC as a merchant bank with a mandate for “private equity, venture capital and infrastructure investments”. At that time, OMERS acquired a 27% ownership interest in BCC, after which OMERS advanced Fund assets to BCC which BCC invested in infrastructure projects.

[25] BCC had no expertise in, and did not promote itself as having expertise in, the field of real estate.

[26] At around the same time as OMERS acquired an interest in BCC, Collier and Nobrega went to work for BCC.

[27] Until 2001, Collier was the Vice President, Merchant Banking and Private Placements for OMERS. He left to become a shareholder, director and Chief Executive Officer of BCC. He became a director of BCC in February 2001.

[28] Also in 2001, Nobrega left his position with OMERS, where he was responsible for OMERS' infrastructure investments, to join BCC as an officer, director and shareholder. He became head of BCC's infrastructure platform. He was appointed President of BCC in or around August 2001.

[29] In October 2001, OMERS became the sole shareholder of Oxford Properties Group Inc. ("Oxford"), one of North America's largest commercial real estate companies. Latimer, who was Managing Director of OMERS Realty Corporation, was instrumental in OMERS' decision to acquire Oxford.

[30] In 2002, despite BCC's lack of experience or expertise in real estate management, OMERS entered into negotiations with BCC for the delegation of management of the OMERS' real estate assets, which were valued at over \$7.5 billion. Collier and Nobrega negotiated on behalf of BCC. Latimer, who was still employed by OMERS, negotiated on his own behalf and on behalf of OMERS. He arranged to have his employment transferred to BCC and to become a shareholder of BCC.

[31] In May 2002, as a result of the negotiations, BCC incorporated a single purpose corporation, BREMI, as a wholly owned subsidiary to assume the real estate management

functions. BREMI was a “mere puppet” as it was wholly owned and directly controlled by BCC and directed by the Individual Defendants.

[32] In May or June 2002, the OMERS Board and BREMI executed a five-year Management Services Agreement (the “Management Agreement”), which provided that BREMI would be the exclusive provider of management services for OMERS’ real estate assets. BCC signed the Management Agreement to guarantee BREMI’s performance. Latimer became an officer, director and shareholder of BCC around the time that the Management Agreement was executed.

[33] Under the Management Agreement, BREMI paid the grossly understated value of approximately \$11 million for OMERS’ real estate management business and agreed to manage OMERS’ real estate assets. OMERS agreed to pay \$3.7 million of BREMI’s start-up costs. OMERS also agreed to pay various fees, including asset management fees, asset acquisition fees, asset disposition fees, development management fees, minimum annual asset management fees, and incentive fees. The Management Agreement included a cancellation fee arrangement.

[34] In addition, OMERS signed buy-out agreements (the “Buy-out Agreements”) with BCC’s shareholders, including Collier, Latimer and Nobrega. The Buy-out Agreements contained imprudent “make whole” and penalty provisions in the event that the Management Agreement was terminated.

[35] Pursuant to the Management Agreement, OMERS paid BREMI or BCC approximately \$62 million in management fees for the eighteen-month period between June 2002 and December 2003. This amount far exceeded the amounts that OMERS paid to Oxford in fees when the latter managed the same assets. The fees were incommensurate with the services purported to have been rendered and grossly in excess of market rates or of the costs that OMERS would have incurred had it continued to manage its real estate assets internally. These fees resulted in excessive compensation to the Corporate Defendants and their senior officers and shareholders, including the Individual Defendants.

[36] On August 6, 2003, OMERS appointed a new CEO, Paul Haggis. Haggis assumed his duties as CEO on September 8, 2003.

[37] By November 2003, the OMERS Board had decided to terminate the Management Agreement and repatriate the assets being managed by BREMI. The costs to the OMERS Plan were enormous. In addition to the \$62 million in fees that it had paid to BREMI and/or BCC, on February 23, 2004, OMERS bought the shares of BCC that it did not already own for \$49.9 million. OMERS also paid \$5 million to each of Collier, Nobrega, and Latimer to satisfy its contractual obligations under the Buy-out Agreements and/or buy-out settlements. The buy-out settlements also guaranteed Collier, Nobrega and Latimer continuous employment. As a result, each of the Individual Defendants became CEOs of wholly owned subsidiaries of OMERS. In 2004, Nobrega was CEO of Borealis

Infrastructure Corp., Latimer was CEO of Oxford Properties Group, and Collier was CEO of OMERS Private Equity Group.

[38] In summary, the core factual allegations against the Defendants are as follows. Prior to the delegation of its real estate management functions to BREMI, those functions were performed internally by OMERS through its wholly owned and controlled companies. The decision to outsource the real estate management services was taken by an inadequately informed OMERS Board and driven by the personal compensation interests of the Individual Defendants who were current or former employees of OMERS or its affiliates and who were aware of OMERS' fiduciary role in respect of Plan members and the Fund.

[39] The OMERS Board breached its fiduciary obligations and duty of care to the Plan members by entering into the various imprudent agreements. The various agreements are void by reason of illegality and as being contrary to public policy. The fees and payments made by the OMERS Board, pursuant to those agreements, were exorbitant and constituted breaches of trust.

[40] The Corporate Defendants were unjustly enriched, having received fees and compensation that were incommensurate with the services rendered. These payments resulted in excessive compensation to the Corporate Defendants and their senior officers and shareholders, including the Individual Defendants. The Individual Defendants were

unjustly enriched, having received excessive amounts as salaries, share dividends and the proceeds of sale of their BCC shares.

[41] The plaintiff, on behalf of the Plan members, is entitled to trace the improperly advanced trust funds, whether in the form of fees, salary, dividends, commissions or the transfer of equity, to the Respondents and to require the Respondents to disgorge the funds. If any of the proceeds are not traceable, the plaintiff may obtain damages by way of equitable accounting, among other things.

THE CAUSES OF ACTION

[42] I understand the plaintiff to assert, through the amended statement of claim, the following claims.

- a) The OMERS Board acted negligently and in breach of its fiduciary and trust duties by entering into various improvident agreements (previously described) and by making exorbitant payments pursuant to those agreements. Each of the Respondents is liable for breach of fiduciary obligation at common law, as agents of the OMERS Board or as “related parties” of the OMERS Board (the “breach of fiduciary obligation” claims);
- b) The Respondents knowingly received trust property that was conveyed in breach of trust (the “knowing receipt of trust property” claims);

- c) The Respondents knowingly assisted the OMERS Board, a trustee, in breach of trust (the “knowing assistance” claims); and,
- d) The Respondents were unjustly enriched (the “unjust enrichment” claims).

[43] In my view, it is fair to say that there is some confusion as to what claims the motions judge considered in relation to each defendant and what determination was made in respect of the claims. For example, paragraph 1 of the Order strikes “all claims against” BCC. However, I see nothing in the reasons of the motions judge to indicate that he considered whether claims based on knowing receipt, knowing assistance or unjust enrichment could proceed as against BCC (or, indeed, any of the Defendants). Rather, it appears that the motions judge viewed the asserted claims to be limited to the breach of fiduciary obligation claims and that matters such as unjust enrichment related only to the remedies that had been sought. Given the sheer volume of asserted claims and the unfocused nature of the amended statement of claim, the motions judge can scarcely be faulted for this.

[44] MacKinnon argues that because the motions judge expressly stated that the remedies sought in the amended statement of claim were left for determination by the trial judge, the motions judge was implicitly permitting the claims based on knowing receipt, knowing assistance and unjust enrichment to proceed. Given that an appeal lies

from orders and judgments, not from reasons,² I have proceeded on the basis of the plain wording of the Order. Thus, for example, as paragraph 1 of the Order strikes all claims against BCC, I have assumed that the motions judge intended to strike all claims against BCC, not only those based on fiduciary and trust duties.

[45] As I explain below, although I agree with the motions judge that certain of the breach of fiduciary obligation claims ought to be struck, I am of the view that the balance of the claims must be permitted to proceed.

THE BREACH OF FIDUCIARY OBLIGATION CLAIMS

[46] The motions judge permitted all claims against the OMERS Board to proceed. That determination has not been appealed.

[47] The motions judge also permitted the claims against BREMI, based on fees paid pursuant to the Management Agreement, to proceed. In addition, he permitted the claim against Latimer, based on Latimer's alleged participation in the negotiation of the Management Agreement on behalf of the OMERS Board, to proceed. Again, no appeal is taken from these determinations.

[48] MacKinnon argues that the motions judge erred in striking out the other claims based on fiduciary obligation. He argues that the Respondents owed fiduciary

² See ss. 6(1) (a) and (b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

obligations to the Plan members: at common law; as agents of the OMERS Board pursuant to s. 22 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “PBA”) and/or the *Trustee Act*, R.S.O. 1990, c. T.23; and, as related parties pursuant to the provisions of the Federal Investment Regulations (“FIR”).³

[49] I will consider each possible source of duties for each defendant. In doing this analysis, it is important to keep in mind the alleged wrongdoing of the OMERS Board – (1) entering into improvident agreements, particularly the Management Agreement, and (2) payment of exorbitant sums due to the outsourcing of the management of the real estate assets and repatriation of the same.

1. Fiduciary Obligation based on the Common Law

BCC

[50] The motions judge correctly concluded, in my view, that there are no material facts pleaded which would support the finding that BCC owed a fiduciary or other duty to the Plan members or that the common law would recognise such a duty. BCC owed no fiduciary obligation when it negotiated agreements on its own behalf. For the same

³ Section 79 of Regulation 909, R.R.O. 1990, provides “... the assets of every pension plan shall be invested in accordance with the federal investment regulations...”. Federal investment regulations are defined as ss. 6, 7, 7.1 and 7.2 and Schedule III to the *Pension Benefits Standards Regulations, 1985*, R.S.C. 1985 (2nd Supp.), c. 32. Accordingly, the *Federal Investment Regulations* are incorporated into the regulations to the PBA.

reason, there is nothing in the making of payments by the OMERS Board that can translate into a fiduciary obligation on the part of BCC at common law.

BREMI

[51] The motions judge permitted the claim against BREMI to proceed based on the fees it received. I understand the motions judge to have permitted the claim to proceed on the basis of the PBA provisions governing agents. As I explain below, I agree with the motions judge's determination in that regard. As BREMI was not in existence when the Management Agreement was negotiated, it is not possible that a claim based on fiduciary duty could exist in relation to that matter.

The Individual Defendants

Collier and Nobrega

[52] The motions judge struck the asserted claims of breach of a fiduciary or other duty owed by Collier and Nobrega to the OMERS Board or the Plan members. I agree, for the reasons given by the motions judge. As he explains in paras. 22 through 25 of the reasons: Collier and Nobrega were former OMERS employees when the Management Agreement was negotiated; fiduciary duties owed by former employees have generally been confined to improper use of confidential information, trade secrets and customer lists, seizing corporate opportunities or improperly soliciting customers; and, while there is a bald assertion in the amended statement of claim that Collier and Nobrega misused

confidential information, there are no facts pleaded to show that they engaged in that or other similar types of activities. I would simply note that the assertion remained a bald statement, without facts to support it, despite the plaintiff having been given the opportunity to amend the statement of claim. In the circumstances, even if the intent were to assert some type of novel claim, there is no basis to interfere with the motions judge's determination.

Latimer

[53] The motions judge permitted this claim to proceed against Latimer and no appeal has been taken from this determination.

2. Fiduciary Obligation based on s. 22 of the PBA (Agents)

[54] This argument hinges on s. 22 of the PBA, the relevant parts of which read as follows:

Care, diligence and skill

22.(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the

administrator's profession, business or calling, ought to possess.

...

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

...

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

...

Payment to agent

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

[55] There is no jurisprudence on the scope of s. 22(5) of the PBA. Might the word “agent” in s. 22(5) extend to encompass BCC in respect of the performance of the Management Agreement? It is a novel argument but not one that can be said to be without any chance of success given the following: BREMI, as explained below, may be an agent in respect of management services and receipt of fees; BCC signed the Management Agreement to guarantee BREMI’s performance; BREMI is a wholly owned subsidiary of BCC; BCC received financial benefits, directly or indirectly, for the performance of that agreement; agency is a fact specific determination to be made after a consideration of all surrounding circumstances; and, the policy reasons behind s. 22, coupled with the type of close relationship that existed between BCC and BREMI, may dictate such an interpretation. The novelty of a claim is not a bar to its proceeding at this point. Accordingly, I would not strike the fiduciary claim against BCC, as it relates to the performance of the Management Agreement, which is based on s. 22 of the PBA.

BREMI

[56] Section 22(5) provides that an administrator may employ an agent to carry out “any act required to be done” in the administration of the plan or fund. The OMERS Board is the administrator and had the obligation to manage the Fund real estate assets. BREMI managed the OMERS’ real estate assets on behalf of the OMERS Board. Consequently, I agree with the motions judge that there are facts pleaded to support the claim that BREMI was an agent within the meaning of s. 22 of the PBA in relation to the

performance of the property management services (but not with respect to the negotiation of the Management Agreement).

[57] Subsection 22(8) makes agents subject to the same standards that apply to the administrator under ss. 22(1), (2) and (4). As agent, by virtue of s. 22(11), BREMI could receive no more than the “usual and reasonable fees and expenses for the services provided”. Accordingly, as the motions judge held, the claim against BREMI for breach of duty pursuant to s. 22 of the PBA must be allowed to proceed.

The Individual Defendants

Collier and Nobrega

[58] These individuals cannot be agents for the purposes of the negotiation of the various agreements. Can they be held to be agents for the purposes of the payment of fees? It does not appear possible, in my view. Section 22(5) is clear: to be an agent, the person must be employed by the administrator of the pension plan to carry out any act required to be done in the administration of the plan or fund. Collier and Nobrega were not employed by the OMERS Board at any of the relevant times nor is it alleged that they were.

Latimer

[59] There are facts to support the assertion that Latimer was an agent, within the meaning of s. 22(5) when the Management Agreement was negotiated. He was

employed by the OMERS Board at that time and allegedly assisted in the negotiation of the Management Services Agreement. Obtaining a management services agreement in respect of the OMERS real estate assets is an act required to be done in the administration of the Plan and Fund.

[60] For the sake of clarity, I would note that the breach of fiduciary obligation claim against Latimer is to proceed both at common law and pursuant to s. 22 of the PBA.

3. Fiduciary Obligation based on the Related Party provisions in FIR

[61] The FIR provides that transactions with related parties may only be entered into by the administrator where they are “required for the operation or administration of the plan” and are on terms that are “not less favourable ... than market terms”.⁴

[62] These claims against the Respondents are based on the allegation that each was a related party to the OMERS Board pursuant to FIR. The definition of related party in FIR is:

“related party”, in respect of a plan, means a person who is

- (a) the administrator of the plan or who is a member of a pension committee, board of trustees or other body that is the administrator of the plan,

⁴ FIR, s. 17.

- (b) an officer, director or employee of the administrator of the plan,
- (c) a person responsible for holding or investing the assets of the plan, or any officer, director or employee thereof,
- (d) an association or union representing employees of the employer, or an officer or employee thereof,
- (e) an employer who participates in the plan, or an employee, officer or director thereof,
- (f) a member of the plan,
- (g) where the employer is a corporation, a person who directly or indirectly holds, or together with the spouse or common-law partner or a child of the person holds, more than 10 per cent of the voting shares carrying more than 10 per cent of the voting rights attached to all voting securities of the corporation,
- (h) the spouse or common-law partner or a child of any person referred to in any of paragraphs (a) to (g),
- (i) where the employer is a corporation, an affiliate of the employer,
- (j) a corporation that is directly or indirectly controlled by a person referred to in any of paragraphs (a) to (h),

(k) an entity in which a person referred to in paragraph (a), (b), (e) or (g), or the spouse or common-law partner or a child of such a person, has a substantial investment, or

(l) an entity that holds a substantial investment in the employer.

[63] For the reasons given by the motions judge, I do not see how BCC could come within the meaning of related parties for the purposes of the impugned transactions. I do not accept the argument that because BCC invested Fund assets in infrastructure at points in time prior to those relevant in this action, that somehow BCC is a related party for the purposes of the impugned actions.

[64] The motions judge held that BREMI might fall within category (c) and allowed the claim to proceed against BREMI on that basis. As has been mentioned, no appeal has been taken from that determination.

[65] Latimer may fall within category (b) or (c) for the purposes of the negotiation of the Management Agreement, as he was an employee of the OMERS Board at that time, and the OMERS Board was the administrator with overall responsibility for investing the (real estate and other) assets of the Plan.

[66] On the facts as pleaded, I do not see how Collier and Nobrega could be seen to fall within any of the categories. As I understand the pleaded facts, Collier and Nobrega never held positions with BREMI as officers, directors or employees.

Conclusion on the Breach of Fiduciary Obligation Claims

[67] I would strike the claims against BCC for breach of fiduciary duty with the exception of the claim based on s. 22 of the PBA and which relate to the performance of the various agreements, not their negotiation. I would permit the breach of fiduciary claims against BREMI based on the common law, s. 22 and the related party provisions in FIR to proceed in relation to the performance of the management agreement. I would permit the claims against Latimer in relation to the negotiation of the Management Agreement to proceed on all bases (duties owed at common law, pursuant to s. 22 of the PBA and pursuant to the related party provisions of FIR). I would strike the breach of fiduciary obligation claims against Collier and Nobrega.

THE KNOWING RECEIPT OF TRUST PROPERTY CLAIMS

[68] To establish the knowing receipt of trust property claim, the plaintiff must prove in respect of each Respondent that (1) the Respondent received trust property for its or his own benefit, (2) with knowledge that the property was transferred (3) in breach of trust. The Respondents, as recipients of trust funds, may be strangers to the trust and need owe no duties to the beneficiaries. The knowledge requirement is satisfied if the recipient had knowledge of facts sufficient to put a reasonable person on notice or inquiry. It is immaterial whether the breach of trust was fraudulent. Liability for this type of claim is

restitution based. See *Citadel General Assurance Co. v. Lloyd's Bank of Canada*, [1997] 3 S.C.R. 805.

[69] As the factual summary set out above shows, facts have been pleaded in the amended statement of claim to support each element of these claims. (1) The Respondents each received payments from the Fund. That is, they received trust property for their own benefit. (2) The Respondents knew that the OMERS Board, as the Plan administrator, was a fiduciary and was dealing with trust fund assets. On the facts as pleaded, each of the Respondents knew or ought to have known that the impugned payments amounted to a breach of fiduciary or trust obligations that the OMERS Board owed to the Plan members. (3) The claims against the OMERS Board have been permitted to proceed. Those claims include breach of fiduciary and trust obligation by the OMERS Board by virtue of entering into the various agreements and making the various payments. By allowing these claims against the OMERS Board to continue – and no appeal has been taken from this - it is apparent that the potential exists for a finding that the OMERS Board entered into the agreements and made the payments in breach of trust.

[70] While the Respondents may defend the claims on the basis that the payments were received in good faith, for value, and without notice of the breach of trust, it cannot be said, on the facts as pleaded, that it is plain and obvious that the claims based on knowing receipt of trust property cannot succeed at trial. For example, if it is found that BREMI

was an agent and received fees in excess of those permitted by s. 22(11) of the PBA, it was a breach of fiduciary obligation for the OMERS Board to have paid such fees. As all parties were aware of the fiduciary role of the OMERS Board and the role that BREMI played in investing Fund real estate assets, that may be sufficient to amount to notice of the breach of trust.

[71] Further, the knowing receipt claims constitute causes of action on which equitable tracing orders and other remedies may be sought. Accordingly, these claims against the Respondents ought not to have been struck on the Rule 21 motion.

THE KNOWING ASSISTANCE CLAIMS

[72] A claim for knowing assistance must plead facts to support the allegation that a stranger to the trust, who had actual knowledge or was wilfully blind to the fact that the property was transferred to him or her in breach of trust, assisted in a fraudulent or dishonest breach of trust. See *Citadel General Assurance Co., supra*.

[73] Much of the reasoning given in relation to the knowing receipt claims applies also to the knowing assistance claims. There are facts pleaded that support each element of the knowing assistance claim against each Respondent. Each of the Respondents received trust property. The allegation is that each had actual knowledge or was wilfully blind to the fact that the property was being transferred to it or him in breach of trust. Each is alleged to have assisted the OMERS Board in the breach of trust through their

participation in the formation of the “illegal” agreements and their receipt of allegedly improper payments of trust funds.

[74] Thus, the claims that the Respondents knowingly assisted the OMERS Board in various breaches of trust must be allowed to proceed.

THE UNJUST ENRICHMENT CLAIMS

[75] Similarly, in my view, the claim based on unjust enrichment must be permitted to proceed in respect of all of the Respondents.

[76] In order to succeed in a claim based on unjust enrichment, the plaintiff must establish, in respect of each of the Respondents, that:

1. the Respondent was enriched,
2. the Fund suffered a corresponding detriment; and
3. there was no juristic reason for the enrichment.⁵

[77] As the summary of the facts pleaded in the amended statement of claim shows, each of the Respondents is alleged to have received money from the Fund – that is, each was enriched to the detriment of the Fund.

⁵ *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[78] What is in dispute is whether there was a juristic reason for the enrichment. A dispute, however, does not make it plain and obvious that the claim of unjust enrichment cannot succeed.

[79] Take, for example, the allegedly exorbitant fees that BREMI received for managing the OMERS real estate assets. BREMI is likely to claim that the Management Agreement is the juristic reason for those fees. However, if BREMI is the agent of the OMERS Board within the meaning of s. 22 of the PBA, s. 22(11) prevents BREMI from receiving more than “the usual and reasonable fees and expenses for the services provided”. Accordingly, if payments were made in excess of that which was reasonable, a court may conclude that BREMI could not rely on the Management Agreement as a juristic reason for those fees.

[80] Further, the Management Agreement may be void for illegality, as is alleged by the plaintiff. It may be novel to argue that illegality extends to the type of agreements in question but novelty does not prevent the claim from proceeding at this stage of the litigation.

[81] The strictures that may surround BREMI’s ability to claim legal entitlement to fees have implications for the balance of the Respondents. For example, as a wholly-owned subsidiary of BCC, there is a relationship between BREMI and BCC such that monies received by BREMI may be traceable to BCC, as the parent company, in the form

of dividends, increased share prices or otherwise. These facts lay the basis for a claim that BCC was enriched to the detriment of the Fund and it becomes an issue whether, among other things, the interposition of BREMI creates a juristic reason for that enrichment. Further, and in any event, the claim is that some of the fees paid pursuant to the Management Agreement were made directly to BCC.

[82] In respect of the enrichment of the Individual Defendants, I accept that a valid contract is a juristic reason that is fatal to a claim of unjust enrichment. However, I do not accept the submission of counsel for the Individual Defendants that there is no allegation that the agreements relied on as justifying the various monetary benefits are invalid. The amended statement of claim provides a factual basis for questioning the validity of the contracts relied on. If the various agreements are held to be void for public policy reasons, they cannot be relied on as a juristic reason for, among other things, the \$5 million payments to each of the Individual Defendants. Again, it may be novel to argue that illegality extends to pension trust funds but it cannot be said that there is no prospect of success for such a claim. The pleading makes clear that the agreements are attacked on a number of bases, including that the Individual Defendants assisted the OMERS Board in breach of trust by accepting payments that they knew were contrary to the OMERS Board's fiduciary obligations and consequently that those agreements are invalid or otherwise cannot be relied on to justify receipt of BCC shares and salaries.

[83] Accordingly, the claims based on unjust enrichment must be allowed to proceed.

