2015 ONSC 3590
Ontario Superior Court of Justice

20 Valleywood Drive Holdings Ltd. v. Stuart

2015 CarswellOnt 8527, 2015 ONSC 3590, 254 A.C.W.S. (3d) 987

20 Valleywood Drive Holdings Ltd., Plaintiff and Walter Howard Stuart, Marilyn Dianne Stuart (Also Known as Dianne Stuart), Keybase National Financial Services Inc. and Keybase Financial Group Inc., Defendants

Stinson J.

Heard: April 22, 2014
Judgment: June 3, 2015
Docket: Toronto CV-13-492116

Counsel: Antony Niksich, for Plaintiff
Jeremy Sacks, for Defendants, Keybase National Financial Services Inc. and Keybase Financial Group Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property; Restitution; Torts

Headnote

Torts --- Inducing breach of contract — Elements of tort

Plaintiff landlord leased premises to tenant W Ltd. — Defendant purchaser K Inc. entered into asset purchase agreement to purchase W Ltd.'s customer base, but specifically excluded assignment of lease — Mutual Fund Dealers Association and Ontario Securities Commission made orders that W Ltd. could not continue to carry on business and approved transfer of W Ltd.'s customer accounts to K Inc. — Agreement did not close and purchase price was not paid — W Ltd. defaulted on its lease and was petitioned into bankruptcy — Landlord brought action against K Inc. for damages on account of rental arrears based on, inter alia, inducing breach of contract — K Inc. brought motion for summary judgment dismissing action — Motion granted; action dismissed — K Inc. did not induce breach of contract between landlord and W Ltd. — While W Ltd. did breach its contract with landlord, causing landlord to suffer damages, breach was not intended consequence of asset purchase agreement — Closing of agreement was intended to be lawful and proper transaction in which interests of creditors were protected — Manner in which events unfolded did not reflect any design or intention by K Inc. to cause lease to be dishonoured by W Ltd. — K Inc. did not intend to procure breach of contract, did not cause breach of contract due to its actions, and did not target landlord.

Torts --- Interference with economic relations — Elements of tort — Use of unlawful means

Plaintiff landlord leased premises to tenant W Ltd. — Defendant purchaser K Inc. entered into asset purchase agreement to purchase W Ltd.'s customer base, but specifically excluded assignment of lease — Mutual Fund Dealers Association and Ontario Securities Commission made orders that W Ltd. could not continue to carry on business and approved transfer of W Ltd.'s customer accounts to K Inc. — Agreement did not close and purchase price was not paid — W Ltd. defaulted on its lease and was petitioned into bankruptcy — Landlord brought action against K Inc. for damages on account of rental arrears based on, inter alia, interference with economic relations — K Inc. brought motion for summary judgment dismissing action — Motion granted; action dismissed — K Inc. did not interfere with economic relations — It was incorrect to characterize K Inc.'s conduct as breach of agreement or unlawful conduct — Agreement did not close because W Ltd. could not satisfy conditions of closing — Client accounts and records were transferred to K Inc. by reason of involvement of Association to

protect customers' interests, and not as result of completion of transaction in accordance with agreement — Trustee in bankruptcy was only party with authority to accept and give proper receipt for any amount that K Inc. might be willing to pay for assets it received — K Inc. did not intend to cause harm to and did not target landlord.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

Plaintiff landlord leased premises to tenant W Ltd. — Defendant purchaser K Inc. entered into asset purchase agreement to purchase W Ltd.'s customer base, but specifically excluded assignment of lease — Mutual Fund Dealers Association and Ontario Securities Commission made orders that W Ltd. could not continue to carry on business and approved transfer of W Ltd.'s customer accounts to K Inc. — Agreement did not close and purchase price was not paid — W Ltd. defaulted on its lease and was petitioned into bankruptcy — Landlord brought action against K Inc. for damages on account of rental arrears based on, inter alia, unjust enrichment — K Inc. brought motion for summary judgment dismissing action — Motion granted; action dismissed — K Inc. received benefit that might otherwise have been available to satisfy obligations of W Ltd. under lease, which benefitted K Inc. and deprived landlord — Adherence and deference to process under Bankruptcy and Insolvency Act was juristic reason for enrichment of K Inc., which was sufficient to defeat claim in unjust enrichment — Landlord was only one of many creditors and it was more equitable to allow process under Act to unfold in normal course.

Table of Authorities

Cases considered by *Stinson J.*:

Air Canada v. British Columbia (1989), [1989] 4 W.W.R. 97, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161, 95 N.R. 1, 36 B.C.L.R. (2d) 145, 41 C.R.R. 308, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126, 1989 CarswellBC 67, 1989 CarswellBC 706 (S.C.C.) — referred to

Bram Enterprises Ltd. v. A.I. Enterprises Ltd. (2014), 2014 SCC 12, 2014 CarswellNB 17, 2014 CarswellNB 18, 366 D.L.R. (4th) 573, 2014 CSC 12, 453 N.R. 273, 48 C.P.C. (7th) 227, 1079 A.P.R. 1, 416 N.B.R. (2d) 1, 21 B.L.R. (5th) 173, *(*sub nom. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.)* [2014] 1 S.C.R. 177, 7 C.C.L.T. (4th) 1 (S.C.C.) — followed

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 1989 CarswellOnt 126, 1989 CarswellOnt 965, 69 O.R. (2d) 287 (note) (S.C.C.) — considered

OBG Ltd. v. Allan (2007), [2007] UKHL 21, [2007] 4 All E.R. 545, [2007] 2 W.L.R. 920, [2007] 19 E.G. 165, [2007] Bus. L.R. 1600, [2008] 1 A.C. 1, [2008] 1 All E.R. (Comm) 1, [2007] I.R.L.R. 608, [2007] E.M.L.R. 12 (U.K. H.L.) — considered

SAR Petroleum Inc. v. Peace Hills Trust Co. (2010), 2010 NBCA 22, 2010 CarswellNB 165, 2010 CarswellNB 166, 88 C.L.R. (3d) 44, *(*sub nom. *Sar Petroleum Inc. v. Peace Hills Trust Co.)* 318 D.L.R. (4th) 70, 74 C.C.L.T. (3d) 6, 357 N.B.R. (2d) 202, 923 A.P.R. 202, 77 C.B.R. (5th) 43 (N.B. C.A.) — followed

Stoneleigh Motors Ltd. v. General Motors of Canada Ltd. (2010), 2010 ONSC 3045, 2010 CarswellOnt 3711 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 38 — considered

s. 38(1) — considered

s. 38(3) — considered

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 49 — referred to

R. 49.02(2) — considered

R. 49.03-49.14 — referred to

R. 49.10 — considered

R. 49.10(2) — considered

MOTION by defendants for summary judgment dismissing action against them.

***Stinson J.*:**

1 These reasons concern a motion by the two Keybase defendants for summary judgment dismissing this action as against them. None of the other defendants participated in the motion: Walter Howard Stuart was never located to be served with the statement of claim; Marilyn Dianne Stuart has made an assignment in bankruptcy, and thus the action has been stayed as against her.

2 At the outset of the hearing, both sides agreed that the motion should be treated as determinative of the issue of liability of the Keybase companies, either in favour of or against them. This motion, then, will determine who wins or loses this lawsuit. The only remaining issue that remains for determination, therefore, is quantification of damages, in relation to which I informed the parties I would direct a reference to the Master, should the parties be unable to reach agreement on quantum.

3 The case involves a claim against Keybase National and its subsidiary company Keybase Financial, for damages on

account of rental arrears, and other associated costs arising from a breach of lease. (Since counsel agree that, for purposes of this motion, these two defendants should be treated as one, I shall henceforth refer to them as "Keybase".) The legal theories upon which the plaintiff bases its claim are (1) inducing breach of contract, (2) interfering with economic relations, and (3) unjust enrichment. There are no material disputes of fact, although the parties disagree as to the correct interpretation or characterization of some of the events giving rise to the dispute. In essence, the matter boils down to whether the plaintiff is able to establish that the various elements of the causes of action it advances are sustained by the facts.

Facts

4 The plaintiff is the owner of the premises located at 20 Valleywood Drive in Markham, Ontario (the "Premises"). In March 2012, the plaintiff leased the Premises to W.H. Stuart Mutuals Ltd. ("WHSM"), which at that time was a registered mutual fund dealer in Ontario (the "Lease"). The duration of the Lease was April 1, 2012 to March 31, 2015, and the Premises were to be used by WHSM as the head office for its mutual fund business.

5 Keybase is also a registered mutual fund dealer in Ontario. On May 10, 2013, after extensive negotiations, Keybase entered into an asset purchase agreement (the "APA") with WHSM for the purchase by Keybase of the WHSM customer base or book of business. In addition to the transfer to Keybase of all customer accounts and books and records of the WHSM mutual fund business, the APA contemplated that the customer account executives of WHSM would become employees of Keybase; it also required WHSM to cease to carry on business as a mutual fund company and instead to become a holding company.

6 The closing of the transaction was scheduled to take place on May 31, 2013. The purchase price to be paid was in the order of $2.2 million, subject to adjustments. The APA specifically excluded the assignment of the Lease for the Premises and certain other liabilities and contractual obligations of WHSM. Among the requirements for closing the transaction was compliance by WHSM with the *Bulk Sales Act*, R.S.O. 1990, c. B.14 ("*BSA*").

7 Following the execution of the APA, Keybase embarked upon a due diligence process. It is common ground that Keybase became aware of and had access to the financial statements of WHSM and to the contents of the Lease, and thus it was fixed with knowledge of the remaining term of the Lease and the other obligations of WHSM thereunder.

8 The mutual fund industry in Ontario is highly regulated, and involves oversight by, among others, the Mutual Fund Dealers Association ("MFDA") and the Ontario Securities Commission ("OSC"). Those two entities were aware of and needed to approve the transactions contemplated by the APA, including the transfer of the customer accounts and the account executives (who are themselves registered and regulated) to Keybase.

9 As events unfolded, the contemplated closing never occurred, and the purchase price was never paid. Instead (as has now become public, but was then confidential) by late April 2013, MFDA and OSC were (unknown to Keybase) engaged in investigating the affairs and operations of WHSM. Ultimately, the investigation revealed that, in some fashion, millions of dollars had been diverted from customer accounts at WHSM. This discovery came to light before the scheduled closing date of the APA (May 31, 2013). During the April-May 2013 period, a Hearing Panel of MFDA made a series of orders against WHSM, culminating in an order on May 31, 2013 that WHSM could no longer conduct securities related business, thus preventing it from carrying on further business for its customers.

10 These developments had several consequences. In particular, MFDA was concerned to protect the interests of the customers of WHSM, and to place them in the hands of another dealer who could see to their needs. Because Keybase was familiar with, had already negotiated for and had agreed to purchase the WHSM book of business, and was in the midst of its due diligence, the decision was taken by MFDA to approve the transfer of the WHSM customer accounts to Keybase, as soon as possible, and prior to the closing date. This was accomplished in or about the third week of May, 2013, with the co-operation and approval of all of MFDA, OSC, and Keybase, and with the tacit approval of WHSM. As a consequence, by the end of May, 2013, WHSM had ceased to operate. All of its active business operations and almost all its customer account executives moved over to Keybase. The books and records associated with the WHSM book of business were moved out of the Premises to the Keybase offices, some before and some after May 31, 2013.

11 Another consequence of the revelations of the investigation was that WHSM was unable to close the APA transaction

as contemplated. Among other things, it could (or would) not comply with the *BSA*, which was a condition of closing. A draft affidavit of compliance with the *BSA* was circulated among the lawyers who had been retained to close the transaction, but counsel for WHSM was unable to get it executed. No doubt this was due in no small measure to the discovery of the extent of the misappropriation from customer accounts and the resulting increase in the liabilities of WHSM.

12 As a result of the above-described circumstances, and with the approval and at the direction of MFDA and OSC, and the assent of WHSM, Keybase received and obtained control over WHSM's book of business — an asset for which it was prepared at one stage to pay over $2 million — without paying anything on account of the purchase price. Since May 2013, Keybase has continued to do business with customers who came to it via the WHSM book of business and has derived profits from doing so.

13 At the examination for discovery of Keybase, it was acknowledged that:

(a) without the APA, Keybase would not have received the client accounts of WHSM;

(b) Keybase started removing the client records of WHSM from the Premises on May 17, 2013. At that time, the office of WHSM at the Premises was still open;

(c) the client accounts are now the property of Keybase;

(d) Keybase took over approximately 18,000 client accounts of WHSM; and

(e) Keybase has been making money off the 18,000 client accounts acquired from WHSM since May 2013.

14 There were two other significant consequences arising from these developments. First, WHSM went out of business and defaulted on its obligations under the Lease, when it failed to pay the monthly rent due on June 1, 2013. It also, in effect, abandoned the Premises, when it ceased to carry on business there.

15 As a result of WHSM ceasing to operate and defaulting on the Lease, the Premises became vacant. Later in June 2013, the plaintiff terminated the Lease and re-entered the Premises. It subsequently succeeded in re-letting them to a new tenant. The plaintiff asserts that, as a result of the default of WHSM, it lost rental income due from WHSM in excess of $43,000 and incurred costs of mitigation of almost $54,000, for total losses of over $97,000.

16 Second, on September 18, 2013, WHSM was petitioned into bankruptcy, with a receiving order made by the Superior Court of Justice (Ontario). That receiving order appointed Ernst & Young Inc. (the "Trustee") as the Trustee in Bankruptcy of the estate of WHSM (the "Estate"). According to the Trustee's Report on its Preliminary Administration of the Estate, dated November 6, 2013, WHSM had assets of less than $62,000, unsecured claims of more than $491,000 and customer claims of over $8 million.

17 To date, almost 2 years after it assumed the WHSM book of business, Keybase has not been approached by the Trustee to pay anything on account of the purchase price, nor has it made any voluntary payment or offer to pay anything to the Estate. As well, so far at least, the Trustee has not taken any steps or commenced any proceedings to collect anything from Keybase. According to an email from the Trustee's counsel dated March 26, 2015, which was placed in evidence on this motion, "the Trustee currently does not have access to funds to specifically pursue or engage Keybase for the recovery of any proceeds of sale" relating to the APA. That email further states that the Trustee has advised "that it would engage with certain of the Estate's priority claimants to seek instructions whether these creditors would be willing fund [sic] the Trustee initiating negotiation discussions, or commencing legal proceedings, if appropriate."

18 Finally, I note that, according to counsel, up until now, no creditor of the Estate has sought to exercise the rights conferred by s.38 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*"). The material portions of that section provides as follows:

38. (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the

> estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> . . .
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

19 The plaintiff is a creditor of the Estate, and thus is in a position to take steps under s.38 of the *BIA* to seek recovery of its losses. Instead of pursuing that potential remedy, however, it has elected to pursue Keybase in this action.

Issues and Analysis

20 As noted at the outset of these reasons, the plaintiff bases its case on three theories of liablity, being (1) inducing breach of contract, (2) interfering with economic relations, and (3) unjust enrichment. The defendants deny that the facts entitle the plaintiff to relief on any of these theories.

1. Inducing Breach of Contract

21 The elements of the tort of inducing breach of contract were comprehensively reviewed by the New Brunswick Court of Appeal in *SAR Petroleum Inc. v. Peace Hills Trust Co.*, [2010] N.B.J. No. 104 (N.B. C.A.), at para 40, as follows

> (1) There must have been a valid and subsisting contract between the plaintiff and a third party.
>
> (2) The third party must have breached its contract with the plaintiff.
>
> (3) The defendant's acts must have caused that breach.
>
> (4) The defendant must have been aware of the contract.
>
> (5) The defendant must have known it was inducing a breach of the contract.
>
> (6) The defendant must have intended to procure a breach of contract in the sense that the breach was a desired end in itself or a means to an end.
>
> (7) The plaintiff must establish it suffered damage as a result of the breach.
>
> (8) If the above elements are satisfied, the defendant is entitled to raise the defence of justification.

In relation to element (6), the Court quoted with approval the comments of Lord Hoffman in *OBG Ltd. v. Allan*, [2007] UKHL 21 (U.K. H.L.), at para 43, that "the claimant must have been "targeted" or "aimed at"."

22 The plaintiff asserts that all of these elements are established in this case. Keybase concedes that elements (1), (2), (4) and (7) are made out. It disputes, however, that its acts caused the breach of the Lease and more importantly that it intended to procure a breach of contract.

23 At the heart of plaintiff's submission on inducing breach is the notion that the inevitable result of Keybase acquiring the WHSM book of business through the closing of the APA was that WHSM would be in breach of the Lease. Plaintiff asserts that Keybase wanted the assets of WHSM, but not the liabilities (and in particular, the Lease). It argues that Keybase was aware that as a consequence of selling its client base under the APA, WHSM would abandon the Premises and fail to pay rent. The removal of the WHSM books and records from the Premises, it further argues, would be a transfer of assets out of

the ordinary course of business, and thus would be a violation of the prohibition contained in the Lease against removal of assets such that the landlord would be unable to effect distraint.

24 I agree that the end result of the events I have described above was the inability of WHSM to honour its obligations under the Lease. I do not accept, however, that this was an intended consequence of the transaction contemplated by the APA, nor that this result was due to the performance of the APA. It is not an unusual aspect of an asset purchase transaction for certain obligations or liabilities of the vendor to be excluded. The *BSA* and other legal remedies protect creditors' interests against attempts by unscrupulous vendors to sell their assets without paying their debts. For example, the *BSA* expressly provides that a sale in bulk that takes place without compliance with the statute is voidable by way of an action by a creditor.

25 By its own terms, the APA contemplated compliance with the *BSA*, payment of the purchase price and the orderly transfer of the WHSM book of business. While the business and the books and records would be removed from the Premises, the vendor (WHSM) would thus be required to pay its creditors and would also have a substantial amount of cash on hand to meet its further obligations as they became due. In other words, the closing of the APA was intended to be a lawful and proper transaction in which the interests of creditors would have been protected.

26 As events unfolded, however, the transaction was never completed in the fashion contemplated by the APA. Instead, by reason of the improprieties discovered by MFDA, Keybase was required to take over the book of business prematurely, in order to provide a safe haven for WHSM's customers. Although Keybase had intended to require *BSA* compliance and to pay funds that would allow creditors' claims to be satisfied, that did not happen. While it is true that Keybase ended up with the book of business and did not pay the expected purchase price, the way in which events transpired did not reflect any design or intention by Keybase to cause the Lease to be dishonoured by WHSM. Additionally, by the time it received the transfer, Keybase was fixed with knowledge of the apparent defalcations by WHSM and the potential claims of numerous creditors. As a result, any payment it might have made to a single creditor (such as the plaintiff) might have been liable to attack as an unjust preference. The predicament in which it found (and still finds) itself was not of its own intentional creation.

27 Based on the foregoing, I am unable to find that Keybase "must have intended to procure a breach of contract" in the sense that the breach of the Lease was "a desired end in itself or a means to an end." Nor do I find that the plaintiff was "targeted" or "aimed at." Rather, I find that Keybase had no such intention, and that it intended that the APA would be completed in a fashion that would not have resulted in any breach of the obligations of WHSM, under the Lease, or otherwise.

28 As for the acknowledgement at the examination for discovery of Keybase, that, without the APA, Keybase would not have received the client accounts of WHSM, I take that as a mere recognition that the existence of the signed APA "paved the way" for MFDA's decision to effect the early transfer of the WHSM book of business to Keybase once the improprieties were discovered, since Keybase was already positioned to take over the business. I do not view that answer as altering the reality on the ground that the sale transaction was never completed as intended.

29 I am also not persuaded that it was the actions of Keybase that caused the breach of Lease. WHSM ceased to carry on business and ended up with no assets to pay its liabilities (including the rent due under the Lease) because it had breached its duties to its customers, had improperly removed assets from their accounts, and had thereby given MFDA cause to revoke its license to carry on business. As a result, it became insolvent. These were the root causes of the breach of Lease, not the actions of Keybase.

30 It follows that the cause of action for inducing breach of contract is not made out.

2. Interference with Economic Relations

31 I turn now to the allegation that Keybase interfered with the plaintiff's economic relations with WHSM.

32 In *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12 (S.C.C.), the Supreme Court of Canada clarified the tort of interference with economic relations (also known as the "unlawful means" tort). In that decision the Court held that:

(a) The unlawful means tort "captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party) (para. 23);

(b) The element of "intention" includes "an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive." The defendant is "aiming at" or "targeting" the plaintiff (para 95);

(c) The unlawful conduct "must give rise to a civil cause of action by the third party or would do so if the third party had suffered a loss as a result of that conduct" (para 76); and

(d) The rationale of the tort "focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct"; referred to as the "liability stretching" rationale (para 37).

33 The plaintiff submits that Keybase breached its obligations by failing to pay the sale price in accordance with the APA, and thus caused financial harm to WHSM. In turn, the argument continues, this gave rise to a claim by WHSM against Keybase for payment of the sale price. This conduct was tantamount to the use of "unlawful means" by Keybase. In turn, this conduct also interfered with the plaintiff's contractual relationship with WHSM, because it had the result of WHSM breaching the Lease and the plaintiff incurring damages that flowed from that breach. As a consequence, the argument concludes, the plaintiff can maintain an action against Keybase founded on the intentional tort of interference with the plaintiff's economic relations.

34 I see two flaws in this argument. First, it is premised on the notion that the transfer of the book of business from WHSM to Keybase reflected the performance of the APA, and thus the non-payment of the purchase price was a breach of the obligations of Keybase thereunder. That is not what occurred. The deal never closed, because WHSM could not satisfy the conditions of closing. The client accounts and records were transferred to Keybase by reason of the involvement of MFDA and OSC, to protect the customers' interests, and not as a result of the completion of the transaction in accordance with the APA. As a result, it is incorrect to characterize Keystone's conduct as a breach of the APA or unlawful conduct on its part.

35 It may well be that Keybase is liable to pay some amount to the Trustee on account of the value it received arising from the transfer of the book of business. So far, however, the only party in a position to negotiate a resolution of that issue (the Trustee) has taken no steps to participate in any discussions about it. It is possible that the value of the book of business was adversely affected by the discovery of WHSM's misconduct. It follows that any amount Keybase would be expected to pay would reflect both that reality as well as the costs incurred by Keybase in dealing with the unexpected problems that came with the book. In other words, the price that Keybase had agreed to pay under the APA does not necessarily represent the value of what it received, and thus some determination must be made concerning what amount should be paid at this stage. The logical first step in that determination is an indication by the Trustee that it wishes to pursue the matter.

36 As the current legal representative of WHSM's Estate, the Trustee is the only party with authority to accept and give a proper receipt for any amount that Keybase might be willing to pay for the assets it received. Since to date the Trustee has neither made a demand for or even discussed a potential payment with Keybase, I am not prepared to characterize the conduct of Keybase in so far not paying for the book of business as unlawful conduct on its part. As its answers on discovery indicate, Keybase freely admits it received some value for which it has yet to pay; until someone with authority on behalf of WHSM is willing to "settle accounts" I cannot fault Keybase for not making a payment.

37 Second, for the same reasons discussed above, I am unable to find that Keybase intended to cause harm to, or aimed at, or targeted the plaintiff. Based on the portions of the decision in *A.I. Enterprises* referenced above, this is a necessary element of this intentional tort.

38 It follows that this cause of action is not made out.

3. Unjust Enrichment

39 I turn finally to the plaintiff's claim founded upon the concept of unjust enrichment.

40 The plaintiff argues that Keybase acquired the assets of WHSM, including the books and records of WHSM located in the Premises, without obtaining the *BSA* affidavits from WHSM, and without paying the purchase price. It argues that Keybase was unjustly enriched by the value of the assets of WHSM, which had been assigned a value in excess of $2 million in the APA. Agreement. In addition, Keybase deprived the plainitff of its right to distrain the assets of WHSM for unpaid rent by removing all of the assets of value of WHSM from the Premises.

41 The plaintiff relies upon the comments of LaForest J. in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), (at para 184), where he explained that a claim for unjust enrichment does not require "giving back to someone something that has been taken from them." It is not necessary for the object of the unjust enrichment to have been owned by the plaintiff claiming unjust enrichment. In the plaintiff's submission, the fact that the plaintiff never owned the property should not preclude a claim for unjust enrichment. As La Forest J. went on to note (quoting from his decision in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.)) absent any juristic reason for the enrichment, an enrichment is 'unjust' where "a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit."

42 I accept that, as matters stand, Keybase has received and retained a benefit and holds property that might otherwise have been available to satisfy the obligations of WHSM under the Lease. To that extent, Keybase may have been unjustly enriched and the plaintiff has suffered a deprivation. That is not the end of the analysis, however. For a remedy in restitution to be available, there must be no juristic reason for the enrichment.

43 In the present case, the plaintiff is not the only party who — arguably - has suffered a deprivation by reason of the to-date unpaid-for transfer of the WHSM book of business. The plaintiff is just one of many creditors of WHSM, for whom the potential receipt by the Trustee of some payment from Keybase represents the most likely source of a possible pro-rata payment on account of their otherwise unsatisfied claims. To permit the plaintiff to be paid directly and in full out of those sale proceeds, based on a theory of unjust enrichment, would reduce the sum otherwise recoverable by the remaining creditors and would, in my view, amount to preferring the interests of one creditor over the claims of many.

44 Recognizing that WHSM is in bankruptcy and its various creditors' claims are subject to processing by its Trustee under the *BIA*, I believe that it would be a more equitable and suitable course of action to direct and allow that process to unfold in the ordinary course. A claim for payment can and should be made against Keybase by either the Trustee (on behalf of all creditors) or by a particular creditor, pursuant to leave granted under s. 38 of the *BIA* (for that creditor's own benefit in the first instance, with any surplus flowing to the Estate, to benefit other creditors). In sum, I find adherence and deference to the *BIA* process to be a juristic reason for the present (and temporary) enrichment of Keybase, sufficient to defeat a claim in unjust enrichment.

45 It follows that I find that this cause of action is not made out.

Conclusion and Disposition

46 For the above reasons, I conclude that the plaintiff's claims are not sustainable and the action should be dismissed. Had I found liability, I would have directed a reference to assess the plaintiff's damages, but I see no point in doing so now (subject to the parties' submissions otherwise).

47 As matters now stand, it is open to the Trustee (or a creditor, including the plaintiff, under s.38 of the *BIA*) to pursue a claim against Keybase for payment on account of the transfer of the book of business, or to pursue such other creditor's remedy to attack the transaction as they deem appropriate (for example, under the *BSA*).

Costs

48 At the conclusion of argument of the motion, I invited the parties to make submission as to costs, taking into account the possible outcomes. Counsel conferred and I was told they agreed that the victorious party should be awarded costs of

$12,000.

49 It subsequently emerged that counsel were not "*ad idem*" in that one side believed the costs agreement related to the summary judgment motion only, while the other side believed their agreement was for the costs of the entire proceeding, including the motion and all other steps. In light of that misunderstanding, I do not consider the parties' purported agreement as to costs to be binding.

50 Both sides submitted a Bill of Costs or a Costs Outline. Plaintiff sought total fees of $16,230, while defendants sought total fees of $19,142.50 on a partial indemnity scale. It is therefore apparent that each side invested a comparable amount of effort and expense in the litigation. Taking into account the principle of indemnity, complexity, the result achieved and the amount on issue, I would ordinarily fix defendants' fees at $17,500. Defendants argued, however, that some of their costs should be assessed on a substantial indemnity scale, in light of the offers to settle they served.

51 Each of the named defendants served an identical Rule 49 Offer to Settle on March 31, 2015, more than 3 weeks prior to argument of motion. The offers proposed the action be settled on the basis of the dismissal of the action and the payment of costs of the action and the motion in the total amount of $4,000. Since the motion was successful, the action was dismissed, and the costs recovery of the defendants will, in any event, exceed $4,000, the defendants submit they have achieved a result that is more favourable than their offer. They argue that they are entitled to substantial indemnity costs subsequent to the offers, pursuant to rule 49.10.

52 I note that rule 49.02(2) provides that "rules 49.03 to 49.14 also apply to the motions, with necessary modifications." On its face, this would mean that the costs consequences contained in rule 49.10 should be applied to motions. However, rule 49.10(2) which expressly refers to costs consequence in favour of a defendant where a plaintiff obtains a judgment less favourable than a defendant's offer, does not provide for an award of substantial indemnity costs in favour of a defendant.

53 To implement rule 49.10 in this context as urged by the defendants would be to effect a substantive change, by awarding a defendant substantial indemnity costs under that provision. As Justice Pepall stated in *Stoneleigh Motors Ltd. v. General Motors of Canada Ltd.*, 2010 ONSC 3045 (Ont. S.C.J.) (at para. 12):

> I do not believe that Rule 49.02(2) ... was intended to result in substantive changes to Rule 49.10. Additionally, given the distinction in Rule 49.10 between a plaintiff's and defendant's offer, it would not have been within the reasonable expectations of the parties that the offer ... would attract costs on a substantial indemnity scale.

I conclude that partial indemnity costs, only, should be awarded.

54 I therefore fix the defendants' costs at $17,500 for fees, plus HST of $2,275, plus disbursements of $1,980.44, for a total of $21,755.44.

Motion granted; action dismissed.

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