Citation: Loeppky et al v Taylor McCaffrey LLP et al, 2023 MBCA 101
Date: 20231215
Dockets: AI22-30-09728;
AI22-30-09865

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

B E T W E E N :

CORNELIUS P. LOEPPKY, KAREN G. LOEPPKY, CORNELIUS P. LOEPPKY in his capacity as Trustee of THE CORNELIUS LOEPPKY FAMILY TRUST, CONNOR BRIDGES in his capacity as Trustee of THE CORNELIUS LOEPPKY FAMILY TRUST and THE CORNELIUS LOEPPKY FAMILY TRUST	)	***F. J. Trippier*** *and* ***I. Vakurova*** *for the Appellants*
(Plaintiffs) Appellants	)	
- and -	)	
TAYLOR MCCAFFREY LLP, NORMAN K. SNYDER, N.K. SNYDER LAW CORPORATION, LARRY SVEINBJORN JOHNSON and RAYMOND ALAN HILDEBRAND	)	***D. G. Giles*** *and* ***A. W. Challis*** *for the Respondents L. S. Johnson and R. A. Hildebrand*
(Defendants) Respondents	)	
- and -	)	
DUBOFF EDWARDS HAIGHT & SCHACHTER LAW CORPORATION, NEIL J. DUBOFF and NEIL J. DUBOFF LAW CORPORATION	)	*Appeals heard:* ***May 2, 2023***
(Defendants)	)	*Judgment delivered:* ***December 15, 2023***
- and -	)	

Taylor McCaffrey LLP, N. K. Snyder and N. K. Snyder Law Corporation *for the Respondents*

CONNOR BRIDGES and KWB CHARTERED PROFESSIONAL ACCOUNTANTS INC.)
)
)
(Third Parties))

On appeal from 2021 MBQB 208

CAMERON JA

Introduction

[1] This appeal examines the duties owed by lawyers, who also act as depositaries/escrow agents, to those whose property or funds they hold in their custody, and the circumstances under which fiduciary duties arise. It also examines the liability of corporate officers to parties with whom the corporation enters contracts of sale.

[2] The plaintiffs in this case are Cornelius Loeppky (Loeppky), his wife, Karen Loeppky (together, the Loeppkys), The Cornelius Loeppky Family Trust (the trust) and Connor Bridges, a trustee of the trust (collectively, the plaintiffs). The defendants in this case are Taylor McCaffrey LLP, Norman K. Snyder (Snyder), N.K. Snyder Law Corporation (together, Taylor McCaffrey), Raymond Hildebrand (Hildebrand) and Larry Johnson (Johnson) (collectively, the defendants). The plaintiffs appeal the judgment of the trial judge dismissing their action against Taylor McCaffrey for breach of contract, breach of duty of care and breach of fiduciary duty, and their claim against Hildebrand and Johnson for inducement of breach of contract.

[3] As well, the plaintiffs appeal the order of double costs awarded to Taylor McCaffrey and the award of solicitor and client costs to Johnson and Hildebrand.

[4] For the reasons that follow, I would dismiss the substantive appeals against the defendants, as well as the appeal against the award of double costs to Taylor McCaffrey. I would allow the appeal of the order that the plaintiffs pay solicitor and client costs to Johnson and Hildebrand and replace it with an order of double costs.

Background

[5] Through their holding company, Coren Holdings Ltd. (Coren), the plaintiffs owned 50% of the shares of an incorporated hog farming operation, the Niverville Swine Breeders Ltd. (NSB). The other 50% of the shares were owned by The Puratone Corporation (Puratone), an agribusiness specializing in the cultivation of hogs.

[6] Hildebrand had worked at Puratone and its predecessor for many years, including as chief financial officer (CFO) until 2004, chief operating officer (2004-2008) and chief executive officer (2008-2012).

[7] Johnson was the CFO at Puratone from 2004-2013.

[8] NSB was a profitable business that consisted of three hog barns. Hogs were born and raised to market weight in two of the barns, and weanlings were raised to market weight in the third. Puratone provided NSB with breeding stock, genetic material, weanlings, feed, veterinary services, transportation services, marketing services, administration services,

insurance, legal services and financial services beyond day-to-day bookkeeping (see paras 33, 35). Although the plaintiffs argued otherwise, the trial judge found that NSB never operated independently from Puratone. In my view, he made no error in so finding.

[9] Loeppky managed the NSB barns until the plaintiffs sold Coren's 50% interest in NSB to Puratone in 2006.

[10] The terms of the sale of Coren's shares in NSB (the share purchase transaction) were negotiated by Loeppky on behalf of Coren. Johnson negotiated on behalf of Puratone. After the terms of the transaction were reached, the matter was referred to counsel.

[11] Snyder, a lawyer with Taylor McCaffrey LLP at the time, was Puratone's counsel for the share purchase transaction. Different counsel from Taylor McCaffrey LLP had previously acted for Loeppky. Therefore, Snyder referred Loeppky to Neil Duboff (Duboff), a lawyer with another law firm, for independent legal advice. Thereafter, Duboff represented Loeppky for the share purchase transaction.

[12] During the course of negotiations of the share purchase transaction documents, Duboff advised Loeppky that there was concern that the assets of NSB could be charged or sold and he tried to get Puratone to provide additional security. When this request was refused, Loeppky instructed Duboff to proceed with the transaction.

[13] At the trial, the plaintiffs claimed that the advice they received from Duboff regarding the share purchase transaction was negligent and in breach of his fiduciary duties. Those claims were dismissed and the plaintiffs have not appealed that decision.

The Share Purchase Transaction

Offer to Purchase

[14] On June 7, 2006, Loeppky accepted an offer by Puratone to purchase Coren's shares in NSB, as well as an outstanding shareholder loan owed to Loeppky by NSB, for a total purchase price of $2.4 million. The terms of the sale were that $200,000 was to be paid at the close of the transaction and $2.2 million was to be paid in two installments of $1.1 million each, due on the fifth and sixth anniversaries of the transaction.

The Share Purchase Agreement

[15] The share purchase agreement embodied the terms of the offer to purchase. Part of the share purchase agreement provided that Puratone was to pledge all of its existing shares in NSB, including the ones that it had purchased from Coren, to the plaintiffs for such period of time as any portion of the purchase price remained outstanding as security for payment of the balance of the purchase price. In other words, it pledged 100% of the shares in NSB.

The Promissory Note

[16] A promissory note was entered into for the outstanding amount. It provided, among other things, that so long as the principal sum remained

outstanding, Puratone (i) shall not allow the debt to equity ratio of NSB to exceed 2.5:1 without obtaining the consent of the plaintiffs; (ii) shall not authorize or otherwise permit NSB to amalgamate with any other corporation unless it obtained written consent of the plaintiffs; and (iii) shall use its reasonable best efforts to provide copies of internally prepared quarterly unaudited financial statements of NSB to the plaintiffs.

[17] The promissory note also included a number of events of default including if, in the reasonable opinion of the plaintiffs, a material adverse change occurred in the financial circumstances of Puratone. It provided that, in the event of a default, "the [p]rincipal [s]um with accrued interest shall, at the option of the [plaintiffs], become immediately due and payable."

The Consulting Agreement

[18] In lieu of interest for the outstanding indebtedness, a consulting agreement was entered into wherein Puratone would pay the plaintiffs jointly $121,000 per year for the first five years from May 31, 2006, and $60,500 in the sixth year in equal monthly installments.

The Pledge Agreement

[19] Pursuant to the pledge agreement, Puratone granted the plaintiffs a security interest in the purchased shares as security for the payment of its indebtedness to the plaintiffs. Acting as agent for the plaintiffs, Taylor McCaffrey LLP was named the depositary of the share certificates owned by both Coren and Puratone.

[20] The pledge agreement also contemplated events of default. If a default occurred, the plaintiffs were entitled to all the pledged shares and share certificates (including Puratone's) and could sell them or retain them in satisfaction of the indebtedness.

[21] Relevant to this case, events of default included (i) if Puratone breached or failed to perform any of its covenants, agreements or obligations made pursuant to any of the agreements made between the parties; and (ii) if any change occurred in the financial condition of NSB which would result in the debt to equity ratio becoming greater than 2.5:1.

[22] Until an event of default occurred, Puratone beneficially owned the pledged shares and it was entitled to enjoy the voting rights and other rights and privileges of the pledged shares and to receive and retain any cash dividends paid thereon.

The Events Post Agreement

[23] Between 2007 and 2012, a number of factors came together to cause significant adverse conditions in the hog industry, described at trial as "the perfect storm." These factors included "reduced demand, the high Canadian dollar relative to the US dollar, country of origin labelling, China reducing pork imports and the reluctance of North American consumers to buy pork with Swine Flu (H1N1) prevalent in the economy" (at para 221).

[24] The impact of the perfect storm caused Puratone to lose $4.7 million in 2007 and suffer combined losses of $39.1 million in 2008 and 2009.

[25] By March 2008, Puratone's primary lender, the Bank of Montreal (BMO), had transferred Puratone's accounts to a special management unit.

[26] In 2008 and 2009, Puratone arranged for financing through the Manitoba Agricultural Services Corporation (MASC) program established to support the hog industry (the MASC loans). Specifically, on May 6, 2008, MASC lent Puratone $2.5 million. NSB provided an unconditional guarantee to this loan. On August 11, 2008, MASC approved an additional loan to Puratone in the amount of $2.5 million. This loan was secured by Puratone providing a second mortgage on the NSB barns, as well as increasing the NSB guarantee to $5 million.

[27] Also in 2008, the Canadian Imperial Bank of Commerce (CIBC), with which NSB had maintained an operating line of credit in the amount of $1 million, began demanding repayment. BMO agreed to provide an overdraft lending account to NSB for that amount (the BMO loan). As security for that loan, NSB provided an unlimited guarantee of the indebtedness of Puratone to BMO and Puratone guaranteed $1 million in relation to indebtedness from NSB to BMO.

[28] Taylor McCaffrey acted on behalf of Puratone with respect to the MASC loans and the BMO loan.

[29] In August 2011, at the request of Puratone, the plaintiffs agreed to extend repayment of each of the $1.1 million installments, respectively, for one year consecutively. Taylor McCaffrey drafted the extension agreement.

[30] In July 2012, Puratone advised the plaintiffs, by way of letter, that its primary lenders required it to suspend the consulting payment for that month, but they hoped to be in a position to resume payments for August.

[31] In September 2012, Puratone made an application under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which led to it being sold to Maple Leaf Foods Inc. The proceeds of the sale were insufficient to satisfy the secured creditors, so there were no funds to pay either the unsecured creditors or the shareholders of Puratone.

The Decision of the Trial Judge

[32] At trial, the plaintiffs argued that Taylor McCaffrey "breached [its] fiduciary duties, contractual duties and duty of care to the plaintiffs" that were owed "pursuant to the express contractual terms of the [a]greements, the assumption of [its] role as depositary, agent and escrow agent" (at para 48) and the previous solicitor and client relationship between them.

[33] They asserted that, in March 2008, Taylor McCaffrey was aware of, and failed to advise them of, the adverse financial conditions of NSB and Puratone, that it later arranged the MASC loans without the plaintiffs' knowledge or consent in contravention of the share purchase agreement, and that it was in a conflict of interest, of which it failed to advise the plaintiffs.

[34] Importantly, the plaintiffs also argued that Taylor McCaffrey acted in breach of its fiduciary duty by facilitating a fraudulent transaction when acting for Puratone regarding the MASC loans. They alleged that causing NSB to guarantee those loans assisted in undermining the plaintiffs' security in the pledged shares.

[35] Regarding Johnson and Hildebrand, the plaintiffs argued that they induced a breach of contract by failing to obtain the plaintiffs' consent to the MASC loans, thereby breaching the promissory note and the pledge agreement. Part of their argument was that the NSB guarantees of the MASC loans should have been included in NSB's balance sheet. If they had been included, it would have demonstrated that NSB had exceeded the 2.5:1 debt ratio. They submitted that failure to obtain their consent in this regard constituted a breach of contract.

[36] Furthermore, the plaintiffs maintained that Johnson and Hildebrand "undertook loan transactions which were effectively fraudulent conveyances which stripped NSB's assets for the benefit of Puratone" during a time when Puratone was "facing imminent insolvency" and that they intentionally withheld information about the extent of Puratone's financial difficulties.

[37] In dismissing the claims against Taylor McCaffrey, the trial judge found that it was not in a fiduciary relationship with the plaintiffs, rather, that it was in a special agency agreement defined by the language of the pledge agreement (see paras 287, 291-93). Absent being served with notice of default, its obligation was to hold the pledged shares until the indebtedness was paid in full (see paras 278, 309). He held that there was no obligation to monitor the financial health of Puratone or NSB or to independently notify the parties of an event of default (see paras 275, 295). He found that any obligations resulting from the fact Loeppky had previously retained Taylor McCaffrey as solicitors were met (see para 276-77).

[38] The trial judge dismissed the suggestion that Taylor McCaffrey facilitated a fraud (see paras 271-72, 310). That finding has not been appealed.

[39] In dismissing the claims against Johnson and Hildebrand, the trial judge found them to be credible witnesses, accepting much of their testimony. This led him to conclude that, despite his evidence to the contrary, Loeppky was aware of the negative condition of the hog industry through his frequent visits to Puratone, during which he was given NSB and/or Puratone's financial statements (see paras 221-22). He also found that Johnson did advise Loeppky of the MASC loans (see para 301). He observed that, as directors, Johnson and Hildebrand owed a fiduciary duty to Puratone and that the actions they took were in keeping with their statutory duty under section 117(1) of *The Corporations Act,* CCSM c C225 [the *Act*] (see paras 321, 323) and with the belief that Puratone could survive the adverse market conditions (see para 332). He found that they acted in good faith and did not seek any personal benefit from any of the transactions (see paras 333, 338), and that none of the creditors or any of the other shareholders were favoured (see para 332).

[40] The trial judge then considered the essential elements of the tort of inducing a breach of contract, finding that they had not been made out.

[41] Finally, his finding that Johnson told Loeppky about the MASC loans led him to conclude that the first element of fraud, a false representation, had not been met (see paras 345-46). The plaintiffs do not appeal the trial judge's finding dismissing the claim of fraud against Johnson and Hildebrand.

Grounds of Appeal

[42] While the plaintiffs list numerous grounds of appeal in their notice of appeal, factum and oral argument, they argue that the trial judge erred in his assessment of the duties and obligations owed by Taylor McCaffrey to the plaintiffs and in his application of the law regarding the tort of inducement of breach of contract with respect to Johnson and Hildebrand. They also argue that he erred in his findings of causation and in his provisional assessment of damages.

Claims Against Taylor McCaffrey

The Positions of the Parties

[43] The plaintiffs argue that the trial judge erred by failing to find that Taylor McCaffrey owed a fiduciary duty to them and that he erred in his application of the principles of contractual interpretation regarding the pledge agreement. In oral argument, they clarified that the driving ground of the appeal was the failure by the trial judge to find a fiduciary relationship between Taylor McCaffrey and the plaintiffs.

[44] It is the plaintiffs' position that Taylor McCaffrey was a fiduciary by the terms of the pledge agreement. They argue that the previous solicitor and client relationship between them and Taylor McCaffrey changed to an agency, a recognized per se fiduciary relationship, upon the execution of the pledge agreement. They bolster their argument by noting that the pledge agreement referred to Taylor McCaffrey as an escrow agent, something they submit carries more duties than that of a depositary, and that the pledge

agreement specifically stated that Taylor McCaffrey was to act as agent for the vendors, which they were.

[45] The plaintiffs assert that Taylor McCaffrey breached its fiduciary duty when it failed to advise them the moment it became aware that Puratone was in financial difficulty. They argue that Taylor McCaffrey further breached its duty when it acted for Puratone regarding the MASC loans, the guarantees of which, they state, caused NSB's debt to equity ratio to be exceeded without their consent. They submit that the guarantees effectively amalgamated NSB with Puratone without their consent. They argue that all of the above constituted a default under the pledge agreement and that Taylor McCaffrey failed to advise them or take any steps to disclose the resulting conflicts and withdraw as depositary.

[46] Taylor McCaffrey submits that the foundational question is whether the trial judge erred in his assessment of the duties and obligations owed by it to the plaintiffs, and whether those duties were breached. It contends that the trial judge did not err when he found that it met its duties as a depositary as outlined in the pledge agreement and that, even if there were additional duties imposed on a solicitor acting as a depositary, those were fulfilled.

Analysis

Standard of Review

[47] The plaintiffs do not assert that the trial judge misstated the law. Rather, they argue that he erred in his factual findings and the application of the facts to the law when interpreting the share purchase transaction agreements. They submit that the standard of review is therefore one of

palpable and overriding error (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55; and *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 10, 28). I agree.

[48] As well, the British Columbia Court of Appeal has recently set out the standard of review for the finding of an ad hoc fiduciary relationship in *England Securities Ltd v Ulmer*, 2023 BCCA 241 (at para 43):

> The existence of an *ad hoc* fiduciary relationship is primarily a question of fact to be determined by examining the specific facts and circumstances of the relationship at issue. Absent an error of law or a palpable and overriding error of fact, a trial judge's conclusion that a fiduciary duty did not exist must be upheld on appeal: *Galambos v. Perez*, 2009 SCC 48 at paras. 48–49. Where it is alleged that a trial judge misapprehended evidence, appellate intervention is warranted only if the misapprehension is palpable and overriding . . ..

Terms of the Pledge Agreement Related to the Duties of the Depositary

[49] I agree with the assertion of Taylor McCaffrey that, in determining whether it breached any fiduciary, agency, solicitor and client or contractual duties to the plaintiffs, it is necessary to determine exactly what those duties were. This involves examining the provisions of the pledge agreement and the law regarding the responsibilities of a depositary/escrow agent and those of a solicitor who acts in such a role.

[50] Below is a summary of the relevant provisions in the pledge agreement setting out Taylor McCaffrey's duties:

- In the preamble, clause D states that, once the pledge agreement is executed, Puratone agrees to deliver to Taylor McCaffrey, as

agent for the plaintiffs, the certificates representing the pledged shares.

- Section 3 states that Taylor McCaffrey agrees to act as agent of the plaintiffs to hold the pledged shares and to act on their behalf in accordance with the provisions of the pledge agreement.

- Section 5 allows that, in the event of a default, the plaintiffs may declare all indebtedness immediately due and the plaintiffs may cause the pledged shares to be sold in accordance with *The Personal Property Security Act*, CCSM c P35 [the *PPSA*] or, upon notice by the plaintiffs, Taylor McCaffrey shall deliver the share certificates to them.

- Section 8 states that, in determining whether an event of default has occurred, Taylor McCaffrey is entitled to rely conclusively on written notice to that effect by either party.

- Section 13 describes the terms and conditions governing Taylor McCaffrey's duties as depositary. Of note to this case, section 13(c) provides that, "except for its acts of gross negligence or wilful misconduct, [Taylor McCaffrey] shall not be liable for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law". Section 13(e) states that Taylor McCaffrey shall have no duties except those expressly set out in the pledge agreement.

- Section 15 provides, in part, that, if Taylor McCaffrey receives instructions that are, in its opinion, in conflict with the pledge agreement, it may refrain from taking any action until directed otherwise in writing by both the parties or by court order.

- Section 16 states that, if Taylor McCaffrey is no longer willing to act as "escrow agent", any substitute depositary must be a practicing lawyer in Manitoba.

- Section 17 addresses conflicts of interest. It provides that the parties acknowledge that Taylor McCaffrey is counsel to Puratone and may continue to provide legal services to it as long as to do so does not place Taylor McCaffrey in a conflict of interest. If a conflict arises, Taylor McCaffrey may withdraw as depositary and continue to act on behalf of Puratone.

The Duties of Escrow Agents and Depositaries

[51] The pledge agreement appears to use the terms "escrow agent" and "depositary" interchangeably. There is little jurisprudence dealing with the role, responsibilities and duties of an escrow agent. A review of the caselaw involving escrow agents supports the trial judge's finding that such duties are normally set out in the escrow agreement (see for example, *Canerector Inc c 169889 Canada Inc*, 2008 QCCS 228; *Philip Services Corporation v Inch Hammond Professional Corporation*, 2006 CanLII 37601 (ONSC); and *McCarthy Tetrault v LC Holdings Ltd*, 1992 CarswellOnt 876 (Ct J (GD))).

[52] In *Superintendent of Bankruptcy v Business Development Bank of Canada*, 2019 MBCA 72, Pfuetzner JA explained (at para 22):

> The term "escrow" generally refers to a contractual arrangement whereby property or documents are held by a third party pending the fulfillment of certain conditions, after which the property or documents will be delivered to the person specified in the contractual arrangement. . . . Possible legal relationships that could be created include an agency, a bailment or a trust . . ..

[53] In *Stikeman Elliott LLP v 2083878 Alberta Ltd*, 2019 ABCA 274, the Court held that "[t]he escrow agent's key role is collecting escrow funds and paying them to the appropriate party" (at para 57).

[54] Similarly, a depositary is described as a "person with or to whom something is lodged in trust", a "person entrusted with something of value, especially an agent in an exchange offer" or as a "person who or business that keeps assets or securities on behalf of a client" (Kevin P McGuinness, *The Encyclopedic Dictionary of Canadian Law*, vol 1 (Toronto: LexisNexis, 2021) sub verbo "depositary").

The Escrow Agent as a Fiduciary

[55] In *Blanco et al v Canada Trust Co et al*, 2003 MBCA 64, Freedman JA, writing on behalf of the Court, reinforced that escrow agents have, in some instances, been held to be fiduciaries and, when they act contrary to the terms of the governing contract, they have been held liable for breach of such duties, even though the conduct is not "malicious, oppressive, high-handed or egregious" (at para 34).

[56] More closely related to this case, in *Lombard Financial Group, Inc v Davies & Co*, 2005 ABQB 387, the facts were described by the trial judge as follows (at para 1):

> Bernard Davies ("Davies"), Barrister and Solicitor with Davies & Co., told Geoffrey and Lis Saxton that their company, Lombard Financial Group Inc. ("Lombard"), would have to give Lynn Rowntree ("Rowntree") an option to purchase 500,000 of its shares in White Gold Ventures Ltd. ("White Gold"), at 5 cents per share, in order to induce him to be part of the new joint business opportunity to become known as Cash Canada. Lombard agreed. As a result, Davies & Co. prepared the Option Agreement between Lombard and Rowntree, and was appointed custodian. Davies then co-signed a loan for Rowntree, which allowed Rowntree to exercise the option to purchase the Lombard shares.

[57] One of the issues in that case was whether Davies & Co., as custodian, owed a fiduciary duty to Lombard. The trial judge found that Davies misrepresented the requirement of an inducement for Rowntree (see para 118). He accepted expert evidence that "the responsibilities of the custodian under this particular Option Agreement were those of a trustee" (at para 133) (emphasis added) and that the custodian was a fiduciary. In reaching this conclusion, the trial judge rejected the defendants' argument that the role of a custodian was akin to that of an escrow agent, which imposed lesser obligations than that of a trustee or a fiduciary (see para 136).

[58] Nonetheless, an escrow agent is not always a fiduciary. Contrary to the plaintiffs' submission, an escrow agent is not a per se or traditionally recognized category of fiduciary relationship like that of solicitor and client. Merely using the term "agent" is not enough to impose fiduciary duties (see Mark Vincent Ellis, *Fiduciary Duties in Canada* (Toronto: Thomson Reuters,

2004) vol 1 (loose-leaf updated 2023, release 11) ch 3, pt I at section 3:1, pt II at section 3:8), online: WL Can (date accessed 12 December 2023).

[59] For example, in *Plant Technology International Inc v Peter Kiewet Sons Co*, 2002 CarswellOnt 6100 (ONSC), a claim for breach of fiduciary duty was unsuccessful. The escrow agent in that joint venture case was an American lawyer. Kiewet alleged that the lawyer who acted as escrow agent owed it a fiduciary duty. On the facts of that case, the Court disagreed, finding that the escrow agent complied with his duties under the contract when he received the expected monies into his trust account and then followed the instructions for disbursing them. He was not required to delve deeply into the source of the funds or the relationships among the various parties.

[60] To summarize, the key obligation of escrow agents is to abide by the terms of the governing contract. Whether or not an escrow agent is a fiduciary is a highly fact-driven determination. When an escrow agent has been found to be a fiduciary under the terms of the governing contract and has failed to abide by its terms, even if not to their benefit or done in an improper manner or with malicious intent, they have been held liable for breach of fiduciary duty. However, if they are not a fiduciary, then failure to abide by the terms of the governing contract would give rise to damages for breach of contract or the tort of negligence.

[61] I would also suggest that an escrow agent, who is the custodian of property and who has been found to be an ad hoc fiduciary, would have, at minimum, a fiduciary duty to the beneficial owner(s) to preserve the property and deliver it up in accordance with the terms of the contract. This is analogous to the basic, minimal fiduciary duty imposed upon a bare trustee

(see discussion in *Stewart v 6551450 Manitoba Ltd et al*, 2023 MBCA 72 at paras 79-80). As indicated, any other duties, fiduciary or merely contractual, will be a fact-driven question requiring a construction of the relevant agreements.

Duties of a Solicitor Acting as Escrow Agent

[62] Caselaw evidences that the duties of lawyers are the same, regardless of whether they act as counsel or as an escrow agent, to the extent that they are governed by the rules of professional conduct (see *Beetham et al v Markessini et al*, 1997 CanLII 23621 at paras 6, 8 (NBCA (in Chambers)). Just because a lawyer receives funds from someone for their client, does not mean that they automatically become an escrow agent (see *Brunt v Yen*, 2008 CanLII 31807 at para 8 (ONSC)). Failing to adhere to an escrow arrangement can constitute conduct unbecoming and amount to professional misconduct, akin to failing to comply with trust conditions (see *MacKay v Law Society of Saskatchewan*, 2021 SKCA 99 at paras 36, 102-3). A lawyer acting as an escrow agent is bound by the rules of professional conduct to act in accordance with them and where there is a conflict with the client's instructions, the rules of professional conduct prevail (see *888394 Ontario Inc v Cornwall Centre Road Properties Inc*, 2009 CanLII 55281 at para 20 (ONSC)).

[63] The Law Society of Manitoba, *Code of Professional Conduct*, (Winnipeg: Law Society of Manitoba, 2011), has specific provisions for lawyers dealing with a client's property. For example, they must deal with it carefully and prudently (see r 3.5-2), inform clients if they receive property on their behalf (see r 3.5-3), and promptly identify (see rr 3.5-4 to 3.5-5) and

account for the property (see r 3.5-6). If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction (see r 3.5-7).

[64] It is trite to say that lawyers cannot act in a conflict of interest (see r 3.4-1).

Taylor McCaffrey Did Not Owe a Fiduciary Duty to the Plaintiffs

[65] While Taylor McCaffrey was previously in a solicitor and client relationship with the plaintiffs, the fact that it acted as depositary for them does not automatically transform the relationship into a per se fiduciary relationship. As earlier stated, the terms of the relationship are determined by the governing contract. There being no per se fiduciary relationship in this case, I next consider the trial judge's determination that an ad hoc fiduciary relationship did not exist.

[66] Applying *Frame v Smith*, [1987] 2 SCR 99, a leading case in the determination of whether an ad hoc fiduciary relationship exists, the trial judge found that (i) Taylor McCaffrey did not exercise discretion or power over the plaintiffs (see para 298); (ii) the plaintiffs were not vulnerable in that Taylor McCaffrey was unable to exercise its power or discretion to affect the plaintiffs' legal or practical interest (see para 299); and (iii) Loeppky was not vulnerable, as he was a capable business person who was aware of the adverse financial circumstances of Puratone and of the MASC loans, and the plaintiffs were represented by independent legal counsel (Duboff) (see paras 300-302).

[67] In my view, the above findings made by the trial judge were reasonably available to him on the evidence. I am not convinced that the trial

judge erred in his review of the facts or his interpretation of the pledge agreement in reaching the conclusion that Taylor McCaffrey was not in an ad hoc fiduciary relationship with the plaintiffs such that it owed them a duty to disclose Puratone's financial circumstances, the existence of or the terms of the MASC loans, or that Puratone allegedly committed acts of default. The plaintiffs were aware that NSB's assets could be used as security by Puratone before they signed the agreements and they were aware of and consented to Taylor McCaffrey continuing to act as counsel for Puratone.

[68] Furthermore, there is no evidence that Taylor McCaffrey acted in conflict or breached the rules in the *Code of Professional Conduct*. It held the pledged shares as required by the pledge agreement.

[69] Finally, in arguing that Taylor McCaffrey owed a fiduciary duty to them, the plaintiffs relied on *R v Shead (RGS)*, 1996 CanLII 18269 (MBQB). In that case, Shead, a managing lawyer at a law firm, was criminally charged with 15 counts of fraud relating to business dealings with a fraudulent property dealer. In some instances, he acted as an escrow agent. In convicting Shead, the trial judge found that he deliberately chose to ignore his obligations as escrow agent when he paid off the fraudulent property owner first. In my opinion, *Shead* has limited relevance to this case. While it confirms that escrow agents owe duties to stakeholders, it does not explore the differences between the criminal and civil liability of escrow agents.

[70] In sum, the trial judge made no extricable error of law or palpable and overriding error of fact or mixed fact and law in finding that Taylor McCaffrey did not breach any fiduciary duty owed to the plaintiffs.

Taylor McCaffrey Did Not Breach Its Contractual Duty to the Plaintiffs

[71] The main ground of appeal here is that the trial judge made a palpable and overriding error in applying the principles of contractual interpretation to the facts when determining the duties and obligations owed by Taylor McCaffrey. The plaintiffs argue that the trial judge erred by failing to consider the pledge agreement as a whole, placing excessive weight on the surrounding circumstances, engaging in a retrospective analysis and failing to give due consideration to portions of evidence from Taylor McCaffrey.

[72] As earlier indicated, the trial judge found that Taylor McCaffrey's duties under the pledge agreement were limited to holding the pledged shares and delivering them when called on to do so in accordance with the terms of the pledge agreement (see paras 292, 309). I agree.

[73] After having extensively reviewed the pledge agreement, its terms and the evidence of the parties, I am unconvinced that the trial judge made any palpable and overriding error in his interpretation of it. The trial judge was aware that Taylor McCaffrey was acting as depositary for the plaintiffs. Nothing in the pledge agreement indicates that Taylor McCaffrey received a notice of default by either of the parties, which was required to be disclosed to Taylor McCaffrey pursuant to section 8 of the pledge agreement. The guarantees provided by NSB did not constitute, by themselves, events of default and were contemplated during the negotiations of the parties. Finally, a review of the pledge agreement does not disclose any contractual obligation on Taylor McCaffrey to monitor or report to the plaintiffs on the financial health of Puratone or NSB.

[74] In the result, I am not convinced that the trial judge erred in the manner suggested when he found that Taylor McCaffrey did not breach its duties to the plaintiffs.

The Claims Against Johnson and Hildebrand

Inducement of Breach of Contract

[75] The essential elements of the tort of inducement of breach of contract were canvassed by Freedman JA in *Johnson v BFI Canada Inc et al*, 2010 MBCA 101 [*Johnson*]. The most comprehensive of the tests that he reviewed is found in *SAR Petroleum et al v Peace Hills Trust Company*, 2010 NBCA 22 [*SAR Petroleum*], where Roberston JA stated (at para 40):

> . . . I have settled on eight elements: (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 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; and (8) if these elements are satisfied, the defendant is entitled to raise the defence of "justification".

[76] In *Johnson*, Freedman JA noted that, while in some cases the defence of justification appears to be subsumed within another element, whatever way the tort is described, justification is a defence to the claim (see para 54).

[77] In *Levi v Chartersoft Canada Inc*, 1994 CanLII 16702 (MBQB) [*Levi*], Beard J (as she then was) summarized the principles of justification, in circumstances where a president of a company had terminated an employee, as follows (at para 28):

> . . .
> 1. If a servant is acting bona fide and within the scope of his employment, he is not liable in tort for procuring or causing a breach of contract by his employer;
>
> 2. If a servant is not acting bona fide, he cannot be held liable unless the plaintiff can establish that the dominating purpose of his actions was to deprive the plaintiff of the benefits of the contract; and
>
> 3. No presumption of intent can flow from mere knowledge, by the servant, that the legal rights of the plaintiff will be violated by his actions in bringing about the breach of the contract because of his concomitant obligation to the corporation.

The Decision of the Trial Judge

[78] In applying the test set out in *Johnson*, the trial judge found that the first element of the tort was not met as there was no "valid and subsisting contract between Loeppky and Johnson/Hildebrand as a third party" (at para 341). This led him to reach a number of other erroneous conclusions in applying the test. However, relevant to the defence of justification, he found that "Johnson's and Hildebrand's actions were not for personal gain, but to keep Puratone as a viable commercial entity" (*ibid*).

[79] In the result, he dismissed the claim of inducing a breach of contract.

The Positions of the Parties

[80] The plaintiffs submit that, while the trial judge correctly stated the law of inducement of breach of contract, he erred in its application when he failed to understand that the "third party" whose breach was induced was Puratone. They also argue that the trial judge erred in considering whether Johnson and Hildebrand intended to cause them harm, rather than procure a breach of contract, and that he erred in determining that the defence of justification applied.

[81] Johnson and Hildebrand agree that the trial judge wrongly applied the legal test for inducing a breach of contract. However, they submit that the facts that he found do not ground a claim of inducement of breach of contract. Based on the full record and the factual findings made, they ask that this Court come to the necessary conclusions required to dispose of this appeal.

Analysis

[82] Regarding standard of review, when the trial judge stated that Johnson and Hildebrand were not in a contractual relationship with the plaintiffs, he misapprehended the law as to what would constitute a third party. There is no question that the third party in this case was Puratone. In my view, the trial judge's error in this regard constituted an error of law to be reviewed on the standard of correctness (see *Housen* at para 8). This error caused him to make a number of significant subsequent errors that tainted a large portion of his analysis. The significance of the error is sufficient to overturn the trial judge's ruling.

[83] The question is whether this Court should come to the necessary conclusions required to dispose of the appeal based on the evidentiary record, as was done in *Johnson* (see para 3).

[84] Section 26(1) of *The Court of Appeal Act*, CCSM c C240, provides this Court with jurisdiction to give any judgment which ought to have been pronounced and make such further order as is deemed just. Section 26(2) allows (in part) the Court to draw inferences of fact and, if satisfied that it has all the material necessary for finally determining the matter, to give judgment accordingly.

[85] In *Martens v The Manitoba Public Insurance Corporation*, 2021 MBCA 102, this Court emphasized that, where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record. Citing *Brar v Brar et al*, 2018 MBCA 87 at para 45, the Court emphasized that "[a]ppellate courts are reluctant to put the parties through the time and expense of a new trial where it is unlikely to result in a better or different evidentiary record" (at para 147).

[86] In this case, there was a lengthy trial wherein the trial judge made credibility findings which were unfavourable to Loeppky and favourable to Johnson and Hildebrand. Those findings were reasonably available to him and are not seriously disputed on appeal. In addition to the *viva voce* evidence, the documentary record is voluminous and there is no basis to believe that a new trial would result in a better evidentiary record.

[87] Accepting the credibility findings of the trial judge and upon an extensive review of the record, I am of the view that it is practical and in the

interests of justice for this Court to make a final determination of the matter, rather than send it back for a new trial.

[88] In reaching my conclusions, I am careful to note, as is pointed out by Johnson and Hildebrand, that the plaintiffs' consolidated statement of claim asserts that it was the execution of the security agreements with MASC and BMO that caused Puratone to breach the promissory note, the share purchase agreement and the pledge agreement and that only those transactions ground the claim of inducement of breach of contract.

[89] As earlier indicated, the trial judge made a number of factual findings, including that Loeppky was aware of the negative condition of the hog industry, that he was provided with the financial statements of Puratone and that Johnson advised Loeppky of the two MASC loans. He also found that Johnson and Hildebrand's actions were in keeping with their statutory duties as directors under the *Act*, with the belief that Puratone could survive the adverse market conditions, and they acted honestly and in good faith to address Puratone's financial problems. All of these findings were available to the trial judge on the evidence.

[90] Applying *SAR Petroleum* and *Levi*, I would find that there was a valid and subsisting contract between the plaintiffs and Puratone, which Johnson and Hildebrand were aware of. Neither the security given by NSB for the MASC loans nor the BMO loan breached the share purchase agreement, the promissory note or the pledge agreement.

[91] Furthermore, despite the plaintiffs' argument that the guarantee of the MASC loans put NSB offside the 2.5:1 debt to equity ratio, the expert evidence accepted by the trial judge was that the guarantees to the MASC

loans should not have been included in NSB's balance sheets as they were contingent liabilities. Therefore, NSB did not go over the specified debt to equity ratio.

[92] In my view, there was no breach of any of the agreements between the plaintiffs and Puratone as a result of the MASC or BMO loans.

[93] However, even if a breach of contract had occurred, the application of the law of justification, as stated in *Levi*, to the facts, as found by the trial judge, leads to the conclusion that the actions taken by Johnson and Hildebrand were bona fide, within the scope of their employment, and taken purely with the best interests of Puratone and NSB in mind. Pertinent to the defence of justification in this case is that Johnson and Hildebrand were acting only in their capacity as officers and directors of Puratone. That is, they had a fiduciary duty to act in Puratone's best interests (see section 117(1)(a) of the *Act*).

[94] Promoting the financial health of NSB was also in Loeppky's best interest, given that the trial judge rejected his contention that he would have simply been able to take over the NSB barns and profitably run them himself absent Puratone's support and regardless of NSB's legal commitments to Puratone.

[95] In the result, I am of the view that the tort of inducement of breach of contract has not been made out.

Causation and Damages

[96] Given the above findings, I need not consider the plaintiffs' claims that the trial judge erred in his assessment of causation or his assessment of provisional damages.

Costs

Standard of Review

[97] The applicable standard of review of orders of costs was neatly described by Pfuetzner JA in *Nash v Nash*, 2019 MBCA 31 (at para 42):

> Appellate courts will very rarely intervene in costs awards. A judge's decision on costs has been described as "quintessentially discretionary" (*Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 126), and as being generally "insulated from appellate review" (*Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 49). However, a costs award can be set aside on appellate review "if it is based on an error in principle or is plainly wrong" (*ibid*; see also *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 27; and *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd*, 2009 MBCA 22 at para 14).

Relevant Legislation

[98] In granting trial costs in Manitoba, the factors to consider are governed by r 57.01 of the *Court of King's Bench Rules*, Man Reg 553/88, which provides, in part:

> **Factors in discretion**
> **57.01(1)** In exercising its discretion under section 96 of *The Court of King's Bench Act* [CCSM c C280], to award costs, the

> court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
>
> > (a) the amount claimed and the amount recovered in the proceeding;
> >
> > (b) the complexity of the proceeding;
> >
> > (c) the importance of the issues;
> >
> > (d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;
> >
> > (d.1) the conduct of any party which unnecessarily complicated the proceeding;
> > . . .
> > (h) any other matter relevant to the question of costs.
> > . . .
>
> **Authority of court**
> **57.01(6)** Nothing in this Rule affects the authority of the court,
> > . . .
> > (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or
> >
> > (c) to award all or part of the costs on a lawyer and client basis.

Double Costs Award to Taylor McCaffrey

[99] At the costs hearing, Taylor McCaffrey requested double costs for two solicitors. It underscored that, while the plaintiffs did not plead fraud against it, they clearly made unsubstantiated allegations in their brief and closing submissions that Taylor McCaffrey was involved in the facilitation of a fraudulent transaction. It also justified its position on the basis that the plaintiffs had rejected two separate formal offers, each in the amount of $250,000, that had been made to them prior to trial.

[100] The plaintiffs agreed that costs on tariff were appropriate. However, they disputed any order of double costs in favour of Taylor McCaffrey, claiming that its refusal to go to discovery and filing a summary judgment motion, which it subsequently abandoned, contributed to the costs of the proceedings. The plaintiffs submitted that such a large order of costs would be punitive and have a chilling effect on them.

[101] The trial judge considered that the settlement offer of $250,000 was greater than the provisional damages that he would have awarded. However, he rejected Taylor McCaffrey's argument that double costs were required for a second counsel (from the same firm) who had to be retained for the trial when its first counsel was elevated to the bench. Therefore, he ordered double costs for the first counsel and tariff costs for the second counsel. In total, he ordered costs in favour of Taylor McCaffrey of $418,808.82, with interest at a rate of 3.5% per annum.

[102] Given the deferential standard of review, I am not convinced that the plaintiffs have demonstrated reviewable error regarding the award granted by the trial judge. The circumstances surrounding the litigation included that the trial was lengthy and complex, the plaintiffs were requesting up to $16 million in damages and received none, two offers were made and rejected and, while not pleaded, they made unsubstantiated claims of the facilitation of a fraudulent transaction. These are all considerations which the trial judge was entitled to take into account and support the order he made.

Solicitor and Client Costs Award to Johnson and Hildebrand

[103] At the costs hearing, Johnson and Hildebrand requested solicitor and client costs. They based their claim, in the main, on the fact that the plaintiffs

had made unproven allegations of fraud against them. In support of their submissions, they provided caselaw indicating that such unfounded allegations will often, although not always, justify such an award. Corollary to their argument, they added that unfounded allegations that impugn the professional integrity and trustworthiness of another party deserve censure.

[104] Alternatively, Johnson and Hildebrand argued that the trial judge should exercise his discretion and order an amount above tariff. In this regard, they placed emphasis on the need for costs to bear some relationship to expenses actually incurred by a successful litigant, which, in this complex case, were substantial.

[105] Finally, Johnson and Hildebrand emphasized that they had made an offer to settle to the plaintiffs well over a year before the commencement of the trial, which was rejected. That offer, made in January 2018 and discontinued in January 2019, was simply that the plaintiffs file a discontinuance on a without-costs basis.

[106] The plaintiffs argued, among other things, that awards of solicitor and client costs are to be rare and exceptional and should only be ordered where the conduct of the parties is unconscionable. They argued that not all unsuccessful attempts to prove fraud will result in such an order, as not all attempts will amount to reprehensible, scandalous or outrageous conduct.

[107] In awarding solicitor and client costs, the trial judge stated that he found that the allegations of fraud had no foundation in fact. As well, he emphasized that he did not accept Loeppky's evidence.

Solicitor and Client Costs

[108] The leading case on solicitor and client costs is *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9. There, the Supreme Court of Canada confirmed that solicitor and client costs are generally awarded where there has been "reprehensible, scandalous or outrageous conduct" (at para 26) by one of the parties. Unsuccessful attempts to prove fraud or dishonesty do not "inexorably" (*ibid*) lead to the conclusion that an award of solicitor and client costs is appropriate since not all attempts will be correctly considered to amount to such conduct. However, where a party has access to information to conclude that the other party was merely "negligent and neither dishonest nor fraudulent" (*ibid*), such costs are appropriate.

[109] An important case regarding the requirement of reprehensible conduct is *Manitoba Keewatinowi Okimakanak Inc v McIvor*, 2007 MBCA 134 [*McIvor*]. That case involved an unproven allegation of fraudulent misrepresentation in an employment law dispute. On appeal, the plaintiff, MKO, argued that the trial judge erred in awarding elevated costs on the basis of the unproven allegation of fraud.

[110] After considering the deferential standard of review, Steel JA, writing for the Court, stated that unproven allegations of fraud typically must be coupled with inappropriate conduct that occurred during the litigation before an order of solicitor and client costs would be appropriate (see para 8). Her review of the reasons of the trial judge led her to conclude (at para 9):

> Having correctly cited the law, the trial judge held that MKO's allegations were "not being frivolously advanced or pursued" (unreported (14 February 2007), Winnipeg CI 02-01-30057 (Man. Q.B.) at para. 11). He held that "[t]here was no clear evidence

> uncovered during the course of the proceedings sufficient to cause MKO to withdraw any of its allegations" (*ibid*.) and that MKO's trial conduct was not "reprehensible, scandalous or outrageous" (*ibid*.). Further, he found that "nothing that was done by MKO suggested any deliberate attempt to mislead or to withhold information" (at para. 8). He refused to make an award of solicitor-client costs.

[111] She concluded that the only rationale for the trial judge ordering elevated costs was that the defendant alleged damage to his reputation. She stated, "No doubt there was damage to his reputation given the nature of the allegations, but if that is to be recognized in an award of costs as opposed to an award of damages, it must be linked with some form of inappropriate conduct on the part of MKO during the course of the litigation" (at para 12).

[112] In that case, the defendant argued that elevated costs could be sustained on the basis that, if MKO had investigated more diligently, the information would have revealed that the allegations were, at most, negligent representation and could have been considered to be "any other matter relevant to the question of costs" as found in r 57.01(1)(h) of the *Court of Queen's Bench Rules* in force at the time (at para 13).

[113] Justice Steel disagreed. She found that the trial judge held exactly the opposite in that case, finding that he was unable to conclude that there were any steps in the proceeding that were improper, vexatious or unnecessary (see para 14). In the result, she overturned the award of elevated costs on the basis that they could not "stand alongside the [trial] judge's findings of fact" (at para 15).

[114] On the other hand, there are cases where dishonesty or fraud has been alleged, but not proven, and elevated costs, as opposed to solicitor and

client costs, have been upheld. For example, in *Tregobov v Paradis et al*, 2017 MBCA 60, the Court confirmed that an unproven allegation of fraud "is a relevant factor to take into consideration in deciding whether to impose elevated costs" (at para 23). In that case, in addition to the unproven allegation of fraud, elevated costs were upheld on the basis that the manner in which the plaintiff proceeded with her case was not proportional (see para 25).

[115] In *Bibeau et al v Chartier et al*, 2022 MBCA 2, at issue was a land development agreement where the judge awarded elevated costs to the defendants. After reviewing the jurisprudence, Simonsen JA, writing for the Court, stated, "Unproven allegations of fraud or misconduct that do not rise to the level of reprehensible, scandalous or outrageous conduct can nonetheless lead to an award of elevated costs" (at para 92).

[116] After finding that the judge erred in principle when he considered the pre-ligation conduct of the defendants, Simonsen JA conducted a fresh analysis of the issue. In the result, she imposed solicitor and client costs in favour of the corporate defendants where the claim involved unproven allegations of misconduct wholly devoid of merit made without any foundation (see para 107). Noting that the claims against the defendants, while weak, was not wholly devoid of merit, she awarded double costs (see paras 109-10).

Application of Law of Solicitor and Client Costs to This Case

[117] In my view, the trial judge erred in principle in awarding solicitor and client costs. A review of the submissions regarding costs reveals that Johnson and Hildebrand heavily relied on the unproven allegations of fraud in making their request. The oral reasons of the trial judge demonstrate that,

at the forefront of his mind when making the award of solicitor and client costs, was that fraud had not been proven and that he, therefore, had no other choice but to make such an award. However, somewhat similar to the situation in *McIvor*, he did not find that any steps in the proceeding were improper, vexatious or unnecessary. In fact, he made findings to the opposite.

[118] For example, after quoting comments made by this Court to the effect that a person's "professional integrity and trustworthiness ought not to be sullied by allegations of contemptuous conduct that have no foundation in fact" (*J-Sons Inc v NM Paterson & Sons Limited*, 2003 MBCA 156 at para 26), the trial judge said that he "did not find that Mr. Loeppky had done so."

[119] Adding to the confusion, the trial judge then found that there was insufficient evidence to make out the allegations of fraud, but stated to plaintiffs' counsel, "I understand why you [made the allegations] now better than I did when I was reading your brief." He then stated, "but the fact is that is what I am stuck with." After stating that he could not see any other way around ordering solicitor and client costs, he then stated that Johnson and Hildebrand's reputations were sullied. Finally, he told plaintiffs' counsel that he did not blame him for bringing the allegations, but emphasized that he had no choice but to order solicitor and client costs, given that the allegations of fraud were unproven.

[120] In short, the reasons of the trial judge indicate that he felt legally obligated to impose solicitor and client costs despite finding that Loeppky had not made unfounded allegations impugning the professional integrity and

trustworthiness of Johnson and Hildebrand, and that he understood why the allegations were made.

[121] In my view, the comments made by the trial judge are confusing, but the error is clear. As earlier discussed, a finding of no fraud does not automatically lead to an order of solicitor and client costs where the conduct is short of being reprehensible, scandalous or outrageous. The trial judge erred in failing to consider this factor and seems to have found the opposite.

[122] I would also add that, to the extent that the trial judge granted solicitor and client costs based on his negative credibility findings regarding Loeppky, there is jurisprudence to the effect that merely trying a credibility issue does not amount to reprehensible, scandalous or outrageous conduct meriting an award of solicitor and client costs (see *Toronto-Dominion Bank v Grande Caledon Developments Inc*, 1998 CanLII 593 (ONCA)). "The vigorous pursuit of an unsuccessful claim does not by itself justify an award of costs on an elevated scale. Moreover, adverse findings of credibility do not justify an award of substantial indemnity costs" (Mark M Orkin & Robert G Schipper, *Orkin on the Law of Costs*, 2nd ed (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2023, release 7), ch 2, pt XVII at section 2:132, online: WL Can (date accessed 12 December 2023).

[123] An error having been made, I will now assess the matter of costs afresh.

[124] In my view, an order of double costs is appropriate in this case. My reasons for doing so include that this was lengthy, complex and expensive litigation—the amount of damages claimed by the unsuccessful plaintiffs was just over $16 million and they received no award, unproven allegations of

fraud had been made against Johnson and Hildebrand and an offer to settle (albeit not generous) had been made and rejected.

Decision

[125] In the result, I would dismiss the plaintiffs' appeal of the dismissal of their claims against each of the defendants. I would also dismiss their appeal against the costs awarded to Taylor McCaffrey. I would vacate the order of solicitor and client costs awarded to Johnson and Hildebrand and substitute an order of double costs at the trial level.

[126] I would award costs on a tariff basis to Taylor McCaffrey on the substantive and costs appeals. On the substantive appeal, I would award one set of costs jointly to Johnson and Hildebrand. I would award the plaintiffs costs on a tariff basis regarding their appeal of the award of solicitor and client costs.

Cameron JA

I agree: Beard JA

I agree: Mainella JA