

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ross v. 0999079 B.C. Ltd.*,
2021 BCSC 1165

Date: 20210615
Docket: S1956635
Registry: Prince George

Between:

Gerald Duncan Ross and Deborah Faith Ross

Plaintiffs

And

0999079 B.C. Ltd. and Tina Wendy Mehrassa

Defendants

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

In Chambers

Counsel for plaintiffs appearing by
teleconference:

R.J. Stewart, Q.C.

Defendant appearing on her own behalf by
teleconference:

T.W. Mehrassa

Appearing for the defendant 0999079 B.C.
Ltd. by teleconference:

J. Mehrassa

Place and Date of Hearing:

Prince George, B.C.
March 9 & 10, 2021

Place and Date of Judgment:

Prince George, B.C.
June 15, 2021

[1] The plaintiffs Gerald Duncan Ross and Deborah Faith Ross pursuant to a Notice of Application filed January 18, 2021 seek declarations relating to and judgment against the defendants for breach of trust.

[2] The defendants are opposed to this relief.

Background

[3] After a Trial Management Conference held on January 7, 2021 the Honourable Madam Justice Church pronounced default judgment in Supreme Court of British Columbia action no. 1853006 against JTM Home Solutions Ltd. (“JTM”), 0804889 BC Ltd. (“889”), and John Mehrassa, with damages to the plaintiffs to be assessed. She also made the following orders:

- (i) A summary trial application in action no.1956635 brought pursuant to Rule 9-7 of the Civil Rules of the Supreme Court of British Columbia will be heard commencing February 1, 2021.
- (ii) That the defence of the defendants, 0999079 B.C. Ltd. (“999”) and Tina Wendy Mehrassa, in Supreme Court of British Columbia action no. 1956635, which action is consolidated with this action for trial purposes, shall be limited to and is to be determined by the court’s determination of whether trust funds were transferred by 0804889 BC Ltd. to 0999079 BC Ltd.
- (iii) That the summary trial is to be conducted based on affidavits, examination for discovery questions and answers of John Mehrassa and Tina Wendy Mehrassa from official transcripts, as set out in the agreed statement of facts which is attached hereto to Schedule A;

...

[4] The background facts of this application can be summarized based on the agreed statement of facts attached as Schedule A to the order made on January 7, 2021 by the Honourable Madam Justice Church.

[5] The plaintiffs reside at 13145 Buckhorn Lake Road in the City of Prince George, Province of British Columbia and are husband and wife.

[6] The defendant John Mehrdad Mehrassa owns and controls JTM as well as the defendant 889. JTM is not a licensed builder under the Home Owner Protection Act but 889 is.

[7] The defendant Tina Wendy Mehrassa owns the defendant company 999.

[8] Tina Wendy Mehrassa is the wife of John Mehrdad Mehrassa.

[9] On November 20, 2016, the plaintiffs' home located at 13145 Buckhorn Lake Road (the "Home") was destroyed by fire.

[10] At the time of the fire the Home was subject to a mortgage with Computershare Trust Company of Canada (the "Mortgagee").

[11] At the time of the fire the Home was insured by Optimum West Insurance Company ("Optimum").

[12] Optimum agreed to provide \$444,877.82 towards the rebuilding of the Home (the "Project").

[13] On March 27, 2017 the plaintiffs entered into a written contract with 889 to rebuild the Home (the "Contract"). The Contract specified that the Project would be completed to occupancy on August 30, 2017.

[14] The Contract specified the following payment schedule:

- i. 30% upon permit approval;
- ii. 30% at lock up;
- iii. 30% at occupancy and final inspection; and
- iv. 10% holdback for 45 days.

[15] A building permit was issued for the rebuilding of the Home by the Regional District of Fraser-Fort George on April 24, 2017.

[16] Optimum issued a cheque for \$133,463.34 upon permit approval, pursuant to the payment schedule set out in the Contract. The cheque was endorsed by the Mortgagee and the plaintiffs in favour of 889 and was given to Mr. Mehrassa on or about May 15, 2017 (the “First Payment”).

[17] In 2017, 889 had a bank account with TD Canada Trust at their Massey Drive branch in the City of Prince George account no. 5212621 (“621”).

[18] The First Payment was deposited by Mr. Mehrassa into 621 on May 15, 2017. The First Payment was an advance and not a payment on account of work done on the Home. The balance in 621 prior to the deposit of the First Payment was approximately minus \$5,400.

[19] In 2017, 999 had a bank account with TD Canada Trust at their Massey Drive branch in the City of Prince George account no. 5212958 (“958”).

[20] On May 15, 2017, 889 transferred from its account 621 the amount of \$130,000 to 999, without the consent of the plaintiffs.

[21] The defendant 999 did not do any work for the plaintiffs and there were no contractual dealings between 999 and the plaintiffs.

[22] The funds held in 999’s account number 958, including the First Payment, were used or distributed by 999 to pay various payees some of whom were not owed money on account of the project to rebuild the Home.

[23] Upon inspection of the Home on July 14, 2017 by Eugene Brischuk who was acting as an insurance adjuster for Optimum determined that the lock up stage had been achieved and pursuant to the payment schedule in the Contract a second cheque in the amount of \$133,463.34 was issued by Optimum and made out to the Mortgagee, the plaintiffs in favour of 889 (the “Second Payment”).

[24] The Second Payment was deposited by 889 into their bank account 621 on August 8, 2017. On the same day, 889 transferred \$133,000 from its bank account 621 to 958 which is the bank account of 999 where the First Payment was deposited.

[25] On August 8, 2017 the balance in 621 before the deposit of the Second Payment was approximately minus \$6,000.

[26] On August 8, 2017 the balance in 958, prior to the transfer to it by 889 was \$140.

[27] On and after August 8, 2017 funds in 958 including the Second Payment, were paid or disbursed by 999 at the direction of Mr. Mehrassa. These funds were used to pay various payees many of whom were not owed money on account of the project to rebuild the Home.

[28] On November 30, 2017 the balance of funds in 958 was \$46.31.

[29] The Home did not achieve occupancy status by August 30, 2017 as required by the Contract.

[30] Three builder's liens were filed against the Home on behalf of unpaid subcontractors.

[31] After August 2017 no further advances of money were paid to 889 under the terms of the Contract because the Home did not reach occupancy.

Position of the Parties

Plaintiffs

[32] The plaintiffs seek a declaration that trust funds were paid to 889 by the plaintiffs and deposited into 889's bank account 621 on May 15, 2017 and August 8, 2017.

[33] The plaintiffs also seek a declaration that the transfer by 889 of these funds to the bank account of 999 was a breach of trust.

[34] The plaintiffs seek judgment against the defendants for breach of trust with damages to be assessed pursuant to the Trial Management Conference order of the Honourable Madam Justice Church made on January 7, 2021.

[35] The plaintiffs argue that 889 is a fiduciary by virtue of either a *per se* relationship of agency, or an *ad hoc* determination of fiduciary relationship.

[36] The plaintiffs argue that in the circumstances of this case 889 was the agent for the plaintiffs and a trust or fiduciary relationship arose on a *per se* basis. This is because the agency is based on the Contract which named 889 as the contractor who was given discretion to apply funds in a manner required to complete the Contract. 889 had the discretion to hire subcontractors, supply materials, labour or services and knew that if the subcontractors were not paid they could file a builder's liens against the plaintiffs' land title.

[37] The plaintiffs argues that an *ad hoc* determination of fiduciary relationship can be made on the circumstances of this case.

[38] In *Galambos v. Perez* 2009 SCC 48 the court discussed a three-part test for identifying new categories of fiduciary relationships at para. 83:

It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387) and, while making no comment on whether it was broad enough to embrace all fiduciary obligations, he endorsed Professor Weinrib's description of a fiduciary relationship as one in which the principal's interest can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to them" (p. 384). The influential guidelines set out by Wilson J. in *Frame*, at p. 136, for identifying new categories of fiduciary relationships include that the fiduciary have scope for the exercise of some discretion or power, the exercise of which affects the beneficiary's legal or practical interests. In *Norberg*, McLachlan J. noted that a fiduciary must be entrusted with such power in order to perform his or her functions (p. 275).

[39] The plaintiffs argue that 889 as the contractor has scope for the exercise of discretion or power by virtue of the fact that the money placed in its hands was to be applied in its exercise of discretion over the means and methods of work on the Home.

[40] The plaintiffs further argue that 889 could unilaterally exercise that power or discretion so as to effect the plaintiffs' legal or practical interests because if 889 did not pay the subcontractors, builder's liens would be filed against the Home.

[41] The plaintiffs say that they were particularly vulnerable to any misuse by 889 because funds were given in advance to 889.

[42] The plaintiffs argue that when 889 transferred funds provided to it on behalf of the plaintiffs to the bank account of 999 this was a breach of trust because 999 was not a party to the Contract nor did 999 do any work in relationship to the Home. 999 used funds transferred to it by 889 for other purposes not related to the plaintiffs' or the rebuilding of their Home.

[43] The plaintiffs argue that the payment schedule in the Contract is a system of funding for the plaintiffs' project. The plaintiffs say that it is clear on the evidence that the First Payment was not a payment for work done but rather it was to take the project to lock up. At lock up the Second Payment would be made to take the project to occupancy.

[44] The plaintiffs disagree with Mr. Mehrassa that the First Payment and Second Payment were "earned money".

[45] The plaintiffs argue that Mr. Mehrassa who is the owner and directing mind of 889 is liable for breach of trust by virtue of his control over 889. A breach of trust by 889 was at Mr. Mehrassa's initiative.

[46] The plaintiffs argue that Mr. Mehrassa instructed Mrs. Mehrassa to use funds deposited into the bank account of 999 on behalf of the plaintiffs for purposes unconnected with the rebuilding of their Home.

[47] The plaintiffs further argue that Mrs. Mehrassa willingly acquiesced to Mr. Mehrassa's directions regarding funds in the bank account of 999.

[48] The plaintiffs argue that "Every person who knowingly becomes an active party to an improper disposition of trust property, or knowingly receives trust property and deals with it in a manner inconsistent with the trust, is liable for the breach of trust: *Scott and Scott v. Riehl and Schumak*, [1958] B.C.J. No. 122, at para. 13.

[49] The plaintiffs note that during the Examination for Discovery of Mrs. Mehrassa on July 13, 2020 she gave the following answers to questions 90 - 92:

90. Q: so in respect of 999's account, transfers would have come from 889?

90. A: Yes, as far as I know.

91. Q: All right. Now, 999 had no contractual relationship with the Ross's; correct?

91. A: Correct.

92. Q: I mean, there was no contract between 999 and the Ross's to do anything for them?

92. A: No, because I was the owner of that company and I did nothing-- work for them, I did not work for them.

[50] Mrs. Mehrassa went on to give the following answer to question 117:

117. Q: Who did you take directions from?

117. A. John told me, pay this person, then I would pay them.

[51] The plaintiffs argue that Mrs. Mehrassa knew that funds transferred into the bank account of 999 were funds paid to 889 on account of the Contract.

[52] The plaintiffs argue that Mr. Mehrassa transferred trust funds advanced from 889 to 999 which was a stranger to the Contract and in doing so breached any fiduciary obligation he owed to the plaintiffs. The plaintiffs argue that Mr. Mehrassa who was the controlling mind of 889 in directing 889 to do a wrongful thing is also liable for this breach: *Scott* at para 11.

[53] The plaintiffs further argue that Mrs. Mehrassa is responsible for any breach of trust or fiduciary relationship because she either had knowledge of the breaches or was reckless or willfully blinded in respect of those transactions: *Halsbury's Law of Canada HTR-75* "types of constructive trustees and fiduciaries".

[54] The plaintiffs note that the defendants consented to the terms of the Trial Management Conference Order made on January 7, 2021, limiting their defence overall in this case to their proposition that no trust funds were transferred by 889 to 999.

[55] If a breach of trust occurred judgment for damages should be against 999 and Mrs. Mehrassa.

[56] If no breach of trust is proven then the claim in action No. 1956625 should be dismissed.

Defendants

[57] The defendants agree that the First Payment was provided to 889 without work being done. The defendants argue that the First Payment was used on the Home.

[58] The defendants argue that the plaintiffs are wrong in accusing them of spending trust funds. The defendants argue that the Second Payment was made at the lock up stage of the project so it was earned money.

[59] The defendants argue that the plaintiffs' view that the Second Payment was to take them to the occupancy stage does not make any sense. If that was the case there would be no need for the third payment pursuant to the Contract.

[60] The defendants argue that when they received the Second Payment they had completed the specified work to get the project to lock up and therefore that money was already earned and is not trust funds.

[61] The defendants point out that the Contract was with the plaintiffs and not Optimum.

[62] The defendants argue that Mrs. Mehrassa did not misappropriate any funds.

[63] The defendants concede that some of the monies went to other things which were not part of the project however they say these were honest mistakes and the work was done. The defendants received 60% of the payments pursuant to the Contract and 60% of the work was done because the lock up stage was achieved.

Decision

[64] The parameters of this hearing were fixed by the Honourable Madam Justice Church after a Trial Management Conference attended by counsel for the plaintiffs as well as Mr. Mehrassa.

[65] Madam Justice Church ordered that this summary trial was to be conducted based on affidavits, examination for discovery questions and answers of Mr. Mehrassa and Mrs. Mehrassa from official transcripts, as set out in the agreed statement of facts which was attached as Schedule A to that order.

[66] Madam Justice Church also ordered that Mrs. Mehrassa and 999's defence shall be limited to the courts determination of whether trust funds were transferred by 889 to 999.

[67] There is no dispute that the First Payment and Second Payment were deposited into 889's account 621 on May 15, 2017 and August 8, 2017 respectively, and that virtually all of those funds were then transferred on those same dates to 999's account 958. Pursuant to the order of Justice Church the only issue to determine is whether these Payments constituted trust funds.

[68] The Contract was presented to the plaintiffs by Mr. Mehrassa.

[69] The completion of the Home was to be by August 30, 2017. Based on all the evidence that did not occur.

[70] The parties to the Contract were 889 and the plaintiffs however the Contract was amended by the parties to include that the purchase price of the Home would be paid in full by Optimum.

[71] Mr. Mehrassa during his submissions argued that when 889 received the Second Payment there was 60% of the work done however there is no evidence before me that that is the case.

[72] The payment schedule in the Contract states when certain payments will be made however it does not state that at the lock up stage 60% of the total work on the Home needed to be completed.

[73] Eugene Brischuk in his 1st affidavit made on June 27, 2018 deposes to a meeting on November 23, 2017 he had with Mr. Mehrassa at para. 15:

John Mehrassa arrived after I had made my initial observations and I asked him why the house was incomplete: he blamed sub trades, and insisted it was not his fault. I reminded John Mehrassa that the contract had required that the home of the plaintiffs was to be to occupancy by August 31, 2017. I told him we are past that date and the home is only 1/3 done. John Mehrassa shrugged his shoulders and explained that he will “get on” this project. I informed John Mehrassa that he needed to pay the plaintiffs the monthly rental being paid by the plaintiffs from December 1 onwards, and he agreed to do this.

[74] Mr. Brischuk further deposed to a meeting he had with Mr. Mehrassa on December 29, 2017 at para. 18:

John Mehrassa came to my office to speak to me on December 29th, 2017. In that conversation, John Mehrassa admitted to me that he had received the two instalments totaling \$266,926.68. He admitted to me that “the money is gone and was used to pay off other debts”.

[75] I have no evidence properly before me contradicting anything that Mr. Brischuk deposed to.

[76] 999 had no contractual relationship with the plaintiffs nor did it do any work on the Home. After the First Payment was transferred to 999's bank account those funds were used to pay off various debts most of which did not pertain to the Project.

[77] After the Second Payment was transferred to 999's bank account those funds were used to pay off various debts most of which did not pertain to the Project.

[78] The evidence establishes that the First Payment and the Second Payment which were provided to 889 to build the Home were transferred to 999 and used for other purposes.

[79] The plaintiffs did not consent to any of the funds from the First Payment or the Second Payment being transferred to 999.

[80] 999 was not involved in any way with the Project: it was not a supplier, worker or subcontractor and 889 had no contractual dealings with 999 related to the Project: Agreed Statement of Facts para. 36.

[81] Three builder's liens were filed against the plaintiffs' land title on behalf of unpaid subcontractors: Agreed Statement of Facts para. 44.

[82] In *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24 the Court in discussing the general requirements for the imposition of a fiduciary duty stated the following at para 33:

Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui que trust, executor-beneficiary, solicitor-client, agent-principal, director- corporation, and guardian-ward or parent-child,. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.

[83] The plaintiffs argue that 889 was their agent. In *Penderville Apts. Development Partnership v. Cressey Development Corp.* (BCCA), [1990] B.C.J. No. 278 the Court in discussing the word agent stated the following at p. 6:

... As Halsbury puts it in the 3d. ed., Vol. I, at p. 147:

The word “agent in addition to meaning a person employed to create contractual relations between two parties is used in at least two other senses. Further, it is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other’s alter ego and not merely as a conduit pipe between the principal and the third-party. Thus a solicitor is his client’s agent for the purpose of instituting or continuing legal proceedings on his behalf. Similarly where a person (not being a servant) is permitted by the owner of the vehicle to drive it, while the owner retains possession thereof, the driver is the owner’s agent for the purpose of rendering the owner civilly liable for driver’s negligence or breach of duty in driving. Generally, wherever one person lawfully delegates to another his common law or statutory duties, that other person is in law his agent for the purpose of rendering the principal civilly liable for the defaults of the agent. Thus a person who carries out an extra hazardous operation for another is his agent for that purpose, as a contractor employed by a local authority to perform any of the functions which it may properly so delegate.

[84] In this case by virtue of the Contract 889 was named as the contractor who was given the discretionary power to acquire a building permit, purchase materials or services and contract with subcontractors to achieve lock up, occupancy and final inspection on the Home.

[85] 889 was permitted by the plaintiffs to acquire a building permit on their behalf and enter into agreements with subcontractors. Builder’s liens were registered against the title of the Home because of the defaults of 889 and Mr. Mehrassa.

[86] Based on the circumstances of this case 889 was the agent for the plaintiffs.

[87] A critical aspect of a fiduciary relationship is an undertaking of loyalty. The fiduciary undertakes to act in the interests of the other party: *Galambos* at para. 69.

[88] In discussing the undertaking of a fiduciary the court in *Galambos* stated the following at para. 77:

The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of the relationship at issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[89] Given the nature of the category of the relationship at issue that being a principal and agent relationship I find that 889 and the plaintiffs were in a *per se* fiduciary relationship. In addition 889's fiduciary undertaking is implied based on the category of relationship between 889 and the plaintiffs and the circumstances of this case.

[90] When 889 transferred the First Payment and the Second Payment to 999 it was for the purpose of paying unrelated accounts which only benefited the defendants. This was a breach of trust on the part of 889 and in my view based on all the circumstances of this case the First Payment and the Second Payment were trust funds held by 889 on behalf of the plaintiffs.

[91] I have found that a *per se* fiduciary relationship existed between 889 and the plaintiffs based on the traditional category of agent-principal.

[92] I am also satisfied that a *per se* fiduciary relationship existed between 889 and the plaintiffs based on the traditional category of trustee-cestui que trust.

[93] I am satisfied that the funds were trust funds, 889 was trustee of those funds, 889 was in a fiduciary relationship with the plaintiffs and the transfers of the funds from 889 to 999 were each a breach of trust.

[94] *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Carswell, 2012) cites its definition of "trust" from G.W. Jeeton and L.A. Sheridan, *The Law of Trusts*, 10th Ed. (London: Barry Rose Law Publishers 1993):

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by

law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries of other objects of the trust (p.3).

[95] Waters' offers the following passages distinguishing express and constructive trusts:

An express trust arises out of the intention of the settlor; a constructive trust comes into existence, regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he owes performance of his obligation (p. 478).

...

Every trust is built on an obligation relating to particular property held by the trustee, and every constructive trust is built on such an obligation arising by operation of law. If the obligation was a voluntarily undertaken obligation to hold for another's benefit, we will find an express trust. If it was a voluntarily undertaken obligation to convey the property, then this will be converted into a kind of constructive trust if the obligation was one that was specifically enforceable, or if the other party has fully performed his side of the bargain (p. 558).

[Emphasis added]

[96] In this case, the plaintiffs and 889 were the only parties to the Contract, however, Optimum was the sole party that controlled the disbursement of all funds. Optimum approved JTM as the contractor. Optimum reviewed and endorsed the Contract. Optimum issued the cheques for both the First Payment and Second Payment (collectively the "Funds") after being satisfied the respective terms of the Contract had been satisfied by 889.

[97] On April 24, 2017 Mr. Brischuk of Optimum reviewed the building permit and caused a cheque to be issued by Optimum made out to the plaintiffs, the Mortgagee, and 889 for \$133,463.34. The cheque was endorsed by the plaintiffs and the Mortgagee and delivered to 889 as the First Payment pursuant to the Contract.

[98] Trusts are concerned with "title" to the trust property. In our case the property are the Funds dispersed by Optimum. While the plaintiffs and the Mortgagee endorsed the cheque for the First Payment, it was solely 889 that took legal title of the funds by depositing the cheque into account 621. The plaintiffs and the

Mortgagee retained beneficial interest in the Funds. The Funds were to be used exclusively to advance the Project to the next stage.

[99] The Contract provided for a schedule of payments in four installments. In my view, the Contract makes clear 889's obligation to use, or convey, each installment of the trust funds exclusively for the Project.

[100] On July 14, 2017, Mr. Brischuk inspected the Home and took photographs. He was satisfied the Project had reached stage two ("lock up") and caused a cheque to be issued by Optimum made out to the plaintiffs, the Mortgagee, and 889 for \$133,463.34. The cheque was again endorsed by the plaintiffs and the Mortgagee and delivered to 889 as the Second Payment.

[101] Again 889 took legal title of the trust funds by depositing the cheque in account 621. The plaintiffs and the Mortgagee retained beneficial interest in the trust funds for the advancement of the Project to the next stage of construction. However, stage two was never completed.

[102] The Contract described when each stage was considered completed and when funds would in turn be disbursed. Optimum advanced the Funds to 889 for the sole use of completing the Project by the deadline. 889 had an obligation to "convey" the Funds for that purpose, enforceable under the Contract. In addition, the other parties (Optimum, the plaintiffs and the Mortgagee) had each fulfilled their side of the bargain.

[103] On November 23, 2017, Mr. Brischuk again inspected the property. While there had been work done since his last inspection, the Home was not at the stage of occupancy. Mr. Brischuk had conversations with Mr. Mehrassa, however, Optimum did not release any further funds for the Project as 889 had not fulfilled their obligation to reach stage three.

[104] The legal title of the Funds were advanced to 889 to fulfill the Contract and complete the Project to build the Home. The plaintiffs and the Mortgagee retained beneficial interest in the Funds. The Funds constitute trust funds.

[105] As trustee of those Funds, 889 had fiduciary obligations to the plaintiffs and the Mortgagee as beneficiaries. This is not a case where funds were comingled with other funds in the same account to advance multiple projects. The Funds were almost entirely transferred to an outside entity unrelated to the Project on the same days they were deposited. 999 had no contractual relationship with the plaintiffs, the Mortgagee or Optimum, nor did they provide any work or services on the Project.

[106] When 889 transferred the Funds to 999, some of those funds were used to pay unrelated accounts which only benefited the defendants. This was a breach of trust on the part of 889.

[107] As a result, stage three was never reached and three builder's liens were filed against the plaintiffs' land title on behalf of unpaid subcontractors: Agreed Statement of Facts para. 44.

[108] Having found that the Funds were trust funds, the plaintiffs are entitled to the relief they claim. However, for the sake of completeness it is clear based on the Examination for Discovery evidence of Mrs. Mehrassa she was the owner and controlling mind of 999. Mrs. Mehrassa and 999 did not have any contractual dealings with the plaintiffs.

[109] Mrs. Mehrassa took her directions in accepting the Funds and paying unrelated accounts from Mr. Mehrassa. I infer based on all the evidence that Mrs. Mehrassa was aware that the funds were to be used to complete the Home. Mrs. Mehrassa and 999 are liable for 889's breach of fiduciary duty in transferring trust funds to 999 for the benefit of the defendants: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787.

Conclusion

[110] In conclusion I make the following orders:

- a) The Funds were trust funds.

- b) The transfer of Funds by 889 to 999 on May 15, 2017 and August 8, 2017 respectively, was a breach of trust;
- c) The plaintiffs shall have judgments for damages against the defendants for breach of trust, with damages to be assessed; and
- d) The plaintiff shall have their costs of this application and this action and prejudgment interest pursuant to the *Court Order Enforcement Act*.

“The Honourable Mr. Justice Tindale”