COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357

Date: 20100721
Docket: CA037366

Between:

Gracia Tracy (Represented *Ad Litem* by Michelle Grant) and Lexine Phillips

Respondents
(Plaintiffs)

And

Instaloans Financial Solutions Centres (B.C.) Ltd., Instaloans Financial Solution Centres (Vernon) Ltd., 864556 Alberta Ltd. (formerly known as Instaloans Financial Solution Centres (Mgmt.) Ltd.), 803759 Alberta Ltd., (formerly known as Instaloans Financial Solution Centres (Kelowna) Ltd., 853604 Alberta Ltd. (formerly known as Instaloans Financial Solution Centres (Payroll) Ltd.), 1070056 Alberta Ltd. (formerly known as Instaloans (B.C.) Ltd.), Image (Topco) Enterprises Inc., Image (Topco) Enterprises Limited Partnership, Tim Latimer and Marc Arcand

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, July 29, 2009
(Tracy *v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2009 BCSC 1036 (CanLII), 2009 BCSC 1036,
Vancouver Registry, Docket L051076)

Counsel for the Appellants: R.G. McLennan, S.W. Chambers

Counsel for the Respondents: P.R. Bennett, M.W. Mounteer

Place and Date of Hearing: Vancouver, British Columbia, May 21, 2010

Place and Date of Judgment: Vancouver, British Columbia, July 21, 2010

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal concerns the propriety of a constructive trust granted, or at least approved of, as a restitutionary remedy in a class action against the operators of a "payday loan" business in British Columbia between 1998 and 2005. The defendants were found to have contravened the prohibition against illegal interest in s. 347(1) of the *Criminal Code,* R.S.C. 1985, c. C-46, and to have been unjustly enriched thereby. An appeal from those findings, which took the form of answers to various common questions, was dismissed. A later judgment, the one now under appeal, stated in answer to the remaining common questions that the defendants were jointly and severally liable for damages for unconscionable acts under two provincial statutes, and that they held the "benefits" wrongfully received by them on a constructive trust for the plaintiffs. The defendants contend that the court below erred in failing to apply the correct "test" for a constructive trust and in granting inconsistent remedies.

[2] The appeal raises issues of principle and practice that are still new in Canada, at least outside the realm of family law where, prior to statutory reforms responsive to *Murdoch v. Murdoch* 1973 CanLII 193 (S.C.C.), [1975] 1 S.C.R. 423, constructive trusts were resorted to as a means of effecting restitution. In the family context, the property subject to such trusts – property to which the claimants had contributed money or services – was easily identifiable. Here, in contrast, the unjust enrichment claims arise from thousands of loan transactions in which interest fees and charges were paid by thousands of individual customers. The "property" in question consists of money that has evidently travelled through various 'mixed' accounts up a corporate 'ladder' and may or may not be identifiable (i.e., traceable) into other accounts or assets in the hands of persons still to be determined. Even if the constructive trust was properly granted, the plaintiffs have not yet decided whether they wish to pursue the restitutionary remedy, or wish instead to pursue damages. As these reasons will show, whilst the collection of damages may be difficult in this case, the process of tracing necessary for the imposition of a constructive trust over funds wrongfully received by the defendants at the upper end of the Instaloans corporate chart also poses substantial challenges – challenges not reflected in the order made by the court below.

Background of the Litigation

The 'Main' Reasons

[3] The trial judge's 'main' reasons, issued after a summary trial in January 2008, were issued May 29, 2008 and are indexed as 2008 BCSC 669 (CanLII), 2008 BCSC 669. At paras. 9-14, she described the corporate structure within which the Instaloans business had been carried on by the defendants from 1998 until the sale of the business to Rentcash Inc. in 2005 (the "Class Period"):

> The head office companies, which provided staff and management for the Instaloans business, included Instaloans Financial Solution Centres Ltd., Instaloans Financial Solution Centres (Mgmt.) Ltd., Image (Topco) Enterprises Inc. as general partner of Image (Topco) Enterprises Limited Partnership, and Instaloans Financial Solution Centres (Payroll) Ltd. (the "Head Office Companies").

> The Storefront Lenders paid fees to the different Head Office Companies over time; between December 1998 and February 2000, the Storefront Lenders transferred "head office fees" to Instaloans Financial Solution Centres Ltd. for management services. In February 2000, Instaloans Financial Solution Centres (Mgmt.) Ltd. was incorporated and assumed the management responsibilities of the Instaloans business. The employees of the Instaloans business became employees of Instaloans Financial Solution Centres Ltd. and the Storefront Lenders no longer employed anyone directly. The Storefront Lenders transferred money to Instaloans Financial Solution Centres (Mgmt.) Ltd. as "head office fees" and "payroll service fees" to Instaloans Financial Solution Centres Ltd. In approximately 2002, Instaloans Financial Solution Centres (Payroll) Ltd. assumed employment of the employees and the financial statements of the defendants indicate that the Storefront Lenders stopped paying "payroll service fees" and "head office fees" and began paying a single fee "contract services" to Instaloans Financial Solution Centres Ltd. That company in turn paid "payroll fees" to Instaloans Financial Solution Centres (Payroll) Ltd. and "management fees" to Instaloans Financial Solution Centres (Mgmt.) Ltd. In July 2004, Image (Topco) Enterprises Limited Partnership was appointed the exclusive manager of the Instaloans business pursuant to a written administration services contract. After July 2004, some of the contract services fees were paid to Image (Topco) Enterprises Limited Partnership, Instaloans Financial Solution Centres (Mgmt.) Ltd., and Instaloans Financial Solution Centres (Payroll) Ltd. In total, the Storefront Lenders transferred approximately $23.6 million to the Head Office Companies during the Class Period.
>
> The fees paid pursuant to the administration services agreements from the Storefront Lenders to the Head Office Companies were calculated as either 100% of the net operating income of the Storefront Lenders or a reasonable amount to be agreed by the parties. In the result, the fees were calculated to transfer all profits earned by the Storefront Lenders to the Head Office Companies.
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> On approximately April 21, 2005, the Instaloans business and the assets of the Instaloans defendants were sold to Rentcash Inc. The proceeds of sale (approximately $35.1 million) were transferred to a company called Image (OS) Enterprises Inc., the limited partner of Image Topco Enterprises Limited Partnership.
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> As of January 31, 2006, the Storefront Lenders ceased operations and no longer have any assets or liabilities. The Head Office Companies have assets of less than $800,000 and liabilities of $3.4 million (primarily owed to related entities).
>
> The individual defendants, Tim Latimer ("Latimer") and Marc Arcand ("Arcand"), were officers and directors of each of the corporate defendants and controlled each of the corporate defendants and the Instaloans business during the Class Period. They incorporated the Storefront Lenders to carry on the Instaloans business in British Columbia. Before they incorporated the Storefront Lenders, Latimer and Arcand knew that they could not legally charge or collect interest in excess of the 60% maximum annual rate described by s. 347(1) of the *Criminal Code*. They also knew that they could not profitably provide payday loans using the Instaloans business model and charge only interest at a rate of 60%. They say that they have personally received some $5.6 million from the B.C. operations of the Instaloans business. They say that the B.C. operations account for 17.52% of Instaloans' $32 million (before tax) national revenue. The plaintiffs say that they expect that the amounts received by Latimer and Arcand are actually far in excess of the amounts admitted. [Paras. 9-14; emphasis added.]

The Court made no further findings as to the present location or 'ownership' of the "Unlawful Finance Charges" (i.e., the interest, fees and charges in excess of the annual

interest rate of 60% per annum specified in s. 347 of the *Code*) received by the defendants between 1998 and 2005. I am not aware of whether Image (OS) Enterprises Inc. is a corporation controlled by or related to the personal defendants.

[4] In answer to common issues in the action, the trial judge found that the finance fees charged by the corporate defendants (defined as the "Instaloans Defendants" in the pleadings) and paid by the plaintiffs constituted interest at a criminal rate contrary to s. 347(1) of the *Code*; that the Instaloans Defendants had been unjustly enriched by collecting such fees; that Messrs. Latimer and Arcand, the principals of the corporate defendants, had been unjustly enriched "by the payments by class members of interest at a criminal rate in respect of their class loans"; that the receipt of interest at a criminal rate by the "Storefront Lenders" (defined at para. 6 of the main reasons to mean those companies that had carried on the payday loan business directly with customers in British Columbia) constituted an unconscionable act or practice within the meaning of s. 4 of the *Trade Practices Act*, R.S.B.C, 1996, c. 457 (the "*TPA*") and s. 8 of the *Business Practices and Consumer Protection Act,* R.S.B.C. 2004, c. 2 (the "*BPCPA*"); that the Instaloans Defendants and Messrs. Arcand and Latimer had conspired to "implement a scheme to provide those loans to the class members in order to earn profits on the class loans at an unlawful rate of interest"; that the defendants were jointly and severally liable for damages to the class members who suffered loss or damage as a result of the illegal conspiracy; and finally, that Messrs. Latimer and Arcand were jointly and severally liable for the acts of the Instaloans Defendants in advancing loans on terms contrary to s. 347(1). (I have attached a copy of the order as a schedule to these reasons.)

[5] Near the end of her main reasons, the trial judge referred to the three remaining common issues – (g)(i) and (ii) and (j) – i.e., whether the defendants hold in trust for the plaintiffs the "benefits" received by the defendants as a result of their unjust enrichment; whether they are liable to account for those benefits and all profits earned therefrom; and whether they are liable for damages as a result of unconscionable acts contrary to the *TPA* and *BPCPA*. She quoted from her own judgment in *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213 (CanLII), 2006 BCSC 1213, 273 D.L.R. (4th) 255, *aff'd.* 2007 BCCA 231 (CanLII), 2007 BCCA 231, 278 D.L.R. (4th) 193, where she had discussed the availability of a constructive trust in cases of unjust enrichment. In *Kilroy* she had noted the four "conditions" suggested for constructive trusts "based on wrongful conduct" at para. 45 of *Soulos v. Korkontzilas* 1997 CanLII 346 (S.C.C.), [1997] 2 S.C.R. 217 (to which I will return below), and the following passage from Waters, Gillan and Smith, *Waters' Law of Trusts in Canada* (3rd ed., 2005):

> If a defendant is required to make restitution of an unjust enrichment, this can be achieved in different ways. The defendant might be required to pay a sum of money measured by the value of the defective transfer; or he might be required to return the enrichment *in specie*. This second possibility is usually activated by the constructive trust. So there are two steps. The liability in unjust enrichment is established by the proof of the three elements of the cause of action. There then follows a second inquiry, into how restitution should be made. The same issue arises where a defendant is required to disgorge the profits of a wrongful act. He could be ordered to pay a sum of money, or he could be declared to be a constructive trustee of the gain. [At 469; emphasis added.]

[6] As well, she had noted the following passage from *Peter v. Beblow* 1993 CanLII 126 (S.C.C.), [1993] 1 S.C.R. 980:

> … the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.* 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property". Or to quote Dickson J., as he then was, in *Pettkus v. Becker* 1980 CanLII 22 (S.C.C.), [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. [At 987; emphasis added.]

[7] As in *Kilroy*, the trial judge in the case at bar was not able to determine at the time she released her main reasons whether a constructive trust would be the "only meaningful remedy available to [the plaintiffs]." Other questions could be expected to arise – if a constructive trust were appropriate, for example, from what date should it be imposed; and should the timing of the coming into existence of the trust be adjusted to take the interests of third parties into account? In connection with the defendants' (or more properly, the Storefront Lenders') contraventions of the two consumer protection statutes, she said she had "no basis to determine damages, or whether a damage award is appropriate." (Para. 74.) She therefore requested more detailed submissions from the parties regarding what particular orders should be made and why, explaining:

> While I am satisfied that the court will provide a remedy where defendants have been unjustly enriched at the plaintiffs' expense, I am not satisfied of the particular form that the relief should take in this instance. I note the two stage process referred to by Professor Waters and others and request the parties to appear before me with more detailed submissions regarding relief: specifically, what particular order(s) should be made and why. This may require further evidence. It may require detailed evidence from the defendants. It is the defendants who know what they received, what they did with it, and whether they can satisfy a monetary judgment. If such an accounting cannot be obtained without a constructive trust, that may be a reason to order a constructive trust. Again, I request that the parties address me further on this issue. [At para. 70; emphasis added.]

[8] The defendants appealed the order of May 29, 2008. Before the appeal was heard, the plaintiffs made at least two applications in the court below seeking information and documents relating to the defendants' respective assets and the carrying on of the Instaloans business, injunctive relief to restrain their dealing with their assets, and related orders. In oral reasons issued July 11, 2008, the trial judge observed that the defendants were under an "ongoing obligation" to produce relevant documents and that the plaintiffs were permitted to conduct further examinations. She could not determine, however, whether the interrogatories being pursued by the plaintiffs were relevant, and still required further submissions "with respect to the remedy for unjust enrichment." In her words:

> Neither party has addressed this issue in sufficient detail. So, for example:

1. What factors should the court consider in determining the appropriate remedy for unjust enrichment?

2. Is the defendant required to produce evidence of its use/disposition of the assets? Or is an order of constructive trust required before the plaintiff can pursue this issue?

3. In what circumstances is a monetary judgment adequate? If it is/isn't here, why?

> This is not meant to be an exhaustive list .... Until I receive the submissions, I am not able to determine this application because the parties have not yet addressed the factors and evidence to be considered by the court in determining the particular form of remedy for unjust enrichment in the circumstances of this case. [At paras. 16-17.]

It appears no order was made at the conclusion of this application.

The 'Remedy' Reasons

[9] Evidently, no further evidence was adduced by either party in response to the trial judge's questions. In February, 2009, however, the plaintiffs applied to have common issues (g) and (j) determined by the Court. On July 29, 2009, the trial judge issued reasons that she 'recalled' two days later as having been issued in error. Revised reasons, which are the reasons to which I will refer and which were contained in the Appeal Record, were issued on July 31, but were dated July 29, 2009. They are indexed as 2009 BCSC 1036 (CanLII), 2009 BCSC 1036.

[10] The trial judge began by noting that having been unjustly enriched, the defendants were "required to restore the benefit which justice does not permit them to retain", citing *Peel (Regional Municipality) v. Canada*; *Peel (Regional Municipality) v. Ontario* 1992 CanLII 21 (S.C.C.), [1992] 3 S.C.R. 762 at 788. She said that although the individual defendants "may have sufficient assets to satisfy a monetary judgment", they had adduced no evidence to suggest they were in a position to do so and that:

> Where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed, a constructive trust is an appropriate remedy: *Peter v. Beblow* ... [At para. 5.]

[11] The Court was satisfied that a monetary judgment was inadequate in this case (para. 6) and that there was a link "between the contribution that founds the action and the property in which the constructive trust is claimed". The defendants' use of the funds to "fund other ventures" and the sale of the Instaloans business were not seen as fatal. The defendants had submitted that the mere fact they "might not" pay a monetary judgment did not make a constructive trust appropriate; but the trial judge said that argument placed an "inappropriate emphasis" on certain aspects of the Supreme Court of Canada's decisions in *Peter v. Beblow* and *Lac Minerals Ltd. v. International Corona Resources Ltd.* 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574. In particular, La Forest J. had stated in *Lac Minerals*:

> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise

> once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. ... [At 678; emphasis added.]

[12] The trial judge continued in the case at bar:

> Here, the proprietary right has been made out. The defendants themselves do not suggest that the plaintiffs' claims could be satisfied by a personal monetary award. A declaration of constructive trust is appropriate in all of the circumstances of this case. [At para. 12; emphasis added.]

She also rejected the argument that third party interests might be adversely affected by the declaration of a constructive trust, observing that the principles applicable to tracing would protect the interests of innocent third parties. With respect to timing, she found nothing to suggest that any point(s) in time other than when the defendants received the fees and charges in question would be appropriate. (Para. 14.)

[13] Turning finally to the question of whether the defendants were liable for damages under the *TPA* and *BCCPA*, the trial judge said she was satisfied the plaintiffs "would be" entitled to damages for all amounts paid in excess of the criminal rate of interest (i.e., the "Unlawful Finance Charges"). (Para. 17.) She concluded by referring to the issue of election of remedy:

> To reiterate, I am satisfied that the answer to common issues (g)(i) and (ii), and (j) is yes, i.e., the plaintiffs are entitled to a remedy in the form of a constructive trust and in the form of damages under the *TPA* or *BCCPA*. As I stated in the [main reasons] at para. 20, "I accept the plaintiffs' argument that they need not make their election as yet, and that although they cannot receive double recovery, they are entitled to refrain from making an election until they are able to gauge which remedy is effective, particularly on the summary trial of common issues in a class proceeding." [At para. 18; emphasis added.]

[14] The trial judge's order of July 29, 2008 provided in material part:

> 1. The following Common Issues in this class proceeding are determined as follows:
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> g. If the answer to (d) or (f) is yes:
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> i. Do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit to those Defendants? and
>
> ii. Are those Defendants liable to account to those Class members for the benefit they received from them and all profits earned therefrom?
>
> Answer: Yes to both (i) and (ii).

> j. If the answer to (h) or (i) is yes, are those Defendants [i.e., the Storefront Lenders] liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trades Practices Act*, R.S.B.C. 1996, c. 457 ("*TPA*") s. 22(1) and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*") ss. 105 and 171?
>
> Answer: Yes.

Post-Trial Applications

[15] As mentioned above, the defendants appealed the 'main' judgment, but that appeal was largely unsuccessful. This court held that it had not been necessary to decide common issues (k) and (l), dealing with the tort of conspiracy, and allowed the appeal to the extent of stating in answer to them that it was unnecessary to decide. (See 2009 BCCA 110 (CanLII), 2009 BCCA 110; *lve. to app. refused* [2009] SCCA No. 194.)

[16] Later in 2009, the plaintiffs appeared before Madam Justice Griffin in chambers seeking the right to pursue further discovery of the defendants, focusing on evidence of their assets and "evidence as to what happened to the money earned by the defendants' Instaloans business, received from the class members." They argued that such evidence was necessary to allow them to make an informed choice between monetary damages and a proprietary remedy. The defendants resisted on the basis that the plaintiffs were not entitled to further discovery since the case had proceeded to trial and that their motion was "premature", at least until a tracing order had been made.

[17] Griffin J. rejected these objections for reasons issued December 10, 2009 and indexed as 2009 BCSC 1699 (CanLII), 2009 BCSC 1699. She stated in part:

> I conclude that the plaintiffs' application is not premature, and they do not need some other form of "tracing order" to be entitled to the discovery they seek regarding the use of the monies from the Instaloans business.
>
> As to the defendants' point that discovery regarding their assets is more in the nature of an examination in aid of execution, I do not see this as a valid objection in the circumstances of this case. This is a class proceeding where the common issues have been determined in favour of the plaintiffs. The plaintiffs are akin to judgment creditors in that they have succeeded in findings of liability, which will result in significant damages, whatever remedy they ultimately elect.
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> The defendants have been found to be co-conspirators who are jointly and severally liable to the plaintiffs. Under Rule 42A, the plaintiffs would have broad-ranging discovery rights post-judgment, including the right to determine the nature of the defendants' assets prior to and post-judgment. I see no prejudice to the defendants by allowing the plaintiffs to pursue additional discovery now, rather than waiting for the plaintiffs to elect the form of judgment, given that the defendants have been found liable to the plaintiffs on the common issues. [At paras. 28-30.]

Griffin J. ordered the defendants to answer various interrogatories and produce various documents relating to their assets, and the individual defendants to submit to discovery. The defendants had already been ordered prior to trial to provide financial statements to the plaintiffs.

On Appeal

[18] The defendants now appeal the trial judge's 'remedy' order of July 29, 2009. They advance four grounds of appeal in their factum, namely that the court below erred:

> (a) in law, by failing to properly apply the test for granting the extraordinary remedy of a constructive trust;
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> (b) in law, by failing to apply the test for granting the remedy of accounting;
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> (c) in law, by imposing a reverse onus on the individual Defendants to "prove" they could satisfy a monetary judgment of an unspecified amount;
>
> (d) alternatively, in law, by issuing judgment for two alternative remedies, awarding a constructive trust in addition to an award of damages under the *Trade Practice Act,* R.S.B.C. 1996, c. 457 ("TPA") and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA").

(Mr. McLennan for the defendants stated the grounds of appeal somewhat differently in oral argument, and raised additional questions in passing.) The defendants sought an order setting aside the Court's affirmative answers to common issues g(i) and (ii), or alternatively, an order requiring the plaintiffs to "elect forthwith which remedy they seek to pursue."

Preliminary Matters

[19] I begin by noting a misunderstanding that seems to have arisen between the parties as a result of how the 'remedy' order was framed. As the grounds of appeal imply, the defendants have proceeded on the basis that the trial judge in fact imposed a constructive trust on the "benefits" unjustly received by them, and awarded damages (in an amount not specified) against them for breach of the two provincial statutes. In fact, this does not appear to be what the trial judge intended, given her reference to the plaintiffs' right of election between the remedies, and to the fact the plaintiffs required more time and information to "gauge" which would be appropriate. Unfortunately, the necessity for the Court to answer common questions rather than to impose particular relief, created this ambiguity. I will proceed, however, on the basis that what the trial judge meant was that the plaintiffs were in a position to elect between damages on the one hand and on the other, a constructive trust and an accounting ancillary thereto.

[20] Another point requiring clarification is that although the order refers to a constructive trust and an accounting in respect of the "benefit" the defendants received as a result of the unjust enrichment, the reasons make it clear the trial judge was referring to the Unlawful Finance Charges and not to the entire amounts paid by the plaintiffs in respect of their payday loans. I did not understand the plaintiffs to challenge this proposition.

"The Tests" for a Constructive Trust: Pettkus, Peter and Soulos

[21] The defendants' first ground of appeal is that the trial judge did not properly apply "the test" for granting the extraordinary remedy of a constructive trust. This test, or more properly, these tests, have been evolving over the past few decades as the doctrine of unjust enrichment has also evolved. In the 1970s and 1980s, Canadian courts produced a number of well-known cases, most of them in the family law area, expanding the

constructive trust beyond the “substantive institution” employed by Equity to enforce fiduciary obligations or to redress fraud or mistake relating to property. More recently, the constructive trust has been applied to impose a “remedial obligation” designed to ensure that wrongdoers may not retain benefits received by them contrary to good conscience to the detriment of another. Whereas the underlying principle had traditionally been that the claimant was and had always been the beneficial owner of the trust property (see *Western Trust Co. v. Wah Sing* (1920) 56 D.L.R. 584 (Sask. C.A.) at 588-9), this is not the case where the constructive trust is used to effect restitution for unjust enrichment. As Professor Waters explained in *The Law of Trusts in Canada* (3rd ed., 2005):

> The constructive trustee is required to make specific restitution of that which he ought to restore to another. We may call this the duty to admit another’s claim, if we will, provided we understand we are merely describing the effect of imposing upon him the obligation to restore what he should not have, and enforcing that obligation through the availability of a restitutionary remedy. The constructive trustee does not owe the fiduciary obligations of loyalty which are always undertaken voluntarily.
>
> Again Professor Scott [*Scott on Trusts* (3rd ed., 1967)] puts the difference between the institution and the remedy into a nutshell when he says, “[The unjustly enriched person] is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee.” What compels him is the obligation to make restitution of an unjust enrichment. [At 473-4.]

[22] In Canada, the three leading cases are *Pettkus v. Becker* 1980 CanLII 22 (S.C.C.), [1980] 2 S.C.R. 834 and *Peter v. Beblow, supra,* in the family law area, and *Soulos v. Korkontzilas*, *supra*, in the commercial area. It will be recalled that in *Pettkus*, the majority of the Supreme Court of Canada imposed a constructive trust in the aftermath of the termination of a common law relationship between Mr. Pettkus and Ms. Becker. During their cohabitation, Ms. Becker had contributed labour and earnings to a successful beekeeping business operated by Mr. Pettkus. In the absence of a common intention that the two would share the savings amassed by Mr. Pettkus from the business, a resulting trust could not be found. The majority of the Court, *per* Dickson J. (as he then was), stated that “[t]he principle of unjust enrichment lies at the heart of the constructive trust” and enunciated the three elements of unjust enrichment that are now almost trite law – an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment. (At 848.) Each of these criteria was met in *Pettkus* and the proprietary remedy seemed to flow almost automatically. Dickson J. reasoned:

> ... As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.
>
> I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Madam Justice Wilson noted, "the parties lived together as husband and wife, although unmarried for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre during the lean years, but worked side by side with him for fourteen years building up the beekeeping operation which was their main source of livelihood".
>
> Madam Justice Wilson had no difficulty in finding that a constructive trust arose in favour of the respondent by virtue of "joint effort" and "teamwork", as a result of

> which Mr. Pettkus was able to acquire the Franklin Centre property, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same. [At 849-50; emphasis added.]

In the result, Ms. Becker was held to be entitled to a one-half interest in Mr. Pettkus' lands and beekeeping business. (See also *Sorochan v. Sorochan* 1986 CanLII 23 (S.C.C.), [1986] 2 S.C.R. 38, where the Court discussed the constructive trust remedy at greater length at paras. 19-35, suggesting that a claimant's reasonable expectation of an interest in property, and the longevity of the parties' relationship, were relevant to the appropriateness of a constructive trust.)

[23] In *Peter v. Beblow,* the Court consolidated its approach to determining when a constructive trust is an appropriate remedy for unjust enrichment. McLachlin J., as she then was, for the majority emphasized that for a constructive trust to arise, "the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution." (At 995; my emphasis.) She disapproved the idea of dividing cases of unjust enrichment into two categories – family and commercial – for the purpose of determining when a constructive trust is appropriate. (Cf. Cory J.A., as he then was, in *Murray v. Roty* reflex, (1983), 147 D.L.R. (3d) 438 (C.A.), at 444.) In her analysis:

> Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him or her a special link to the property, in which case a constructive trust arises.
>
> For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases. [At 997; emphasis added.]

Summarizing her conclusions, she stated:

> ... it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: *per* La Forest J. in *Lac Minerals*. [At 999; emphasis added.]

The Court's insistence on the insufficiency of a monetary award as a condition to the granting of a constructive trust accords with the longstanding principle that Equity generally prefers to act *in personam*: see M.M. Litman, *The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust*, (1988) 26 *Alta. L. Rev*. 407, at 454.

[24] *Soulos* was a case of breach of duty by a real estate broker to his principal in connection with an opportunity to purchase a commercial building. The broker told his

principal the property was no longer available, and bought it for himself. The principal sued the broker to have the property conveyed to him on the basis of constructive trust. The property held special value to him because of the identity of its tenant, and he abandoned his claim for damages when the market value of the property decreased. The facts, then, were those of a classic breach of fiduciary duty for which a constructive trust has traditionally been available in Equity: see, e.g., *Keech v. Sandford* (1726) 25 E.R. 223; *McDonald v. McDonald* 1892 CanLII 7 (S.C.C.), (1892) 21 S.C.R. 201; *Canadian Aero Service Ltd. v. O'Malley* 1973 CanLII 23 (S.C.C.), [1974] S.C.R. 592. However, the trial judge was of the view that constructive trust was now available only in cases of unjust enrichment. Since the plaintiff had not suffered any damage or "deprivation", he ruled it would be "disproportionate and inappropriate" to use such a remedy in this instance.

[25] On appeal, the Supreme Court of Canada took the opportunity to broaden the law as to when a constructive trust is appropriate, agreeing with the Ontario Court of Appeal that the remedy was not limited to cases of unjust enrichment. After reviewing some of the academic literature and some Commonwealth cases, the Court, *per* McLachlin J., as she then was, observed that "good conscience is a theme underlying constructive trust from its earliest times." She continued:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker, supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.
>
> The process suggested is aptly summarized by McClean*, supra*, at pp. 169-70:
>
> > The law [of constructive trust] may now be at a stage where it can distil from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.
>
> [At paras. 43-4.; emphasis added.]

[26] McLachlin J. noted that whereas in *Pettkus v. Becker* the Court had explored the prerequisites for a constructive trust based on unjust enrichment, *Soulos* required the Court to explore the prerequisites for a constructive trust based on wrongful conduct. She identified four conditions which should generally be satisfied in the latter category:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [At para. 45.]

(As many commentators have pointed out, the reference to an "equitable obligation" seems to have been intended to encompass more than "fiduciary duty".) Applying these conditions in *Soulos*, the Court confirmed that the defendant broker had been under an equitable obligation in relation to the property at issue; that he had acquired the property in breach of his duty to the plaintiff; that a constructive trust was "required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty"; and that there were no factors that made the imposition of a constructive trust unjust.

[27] The case at bar is of course one of unjust enrichment. Although arguably it is also one involving a "wrongful act" – i.e., the defendants' contravention of the *Criminal Code* – it is possible to read *Soulos* as meaning that different criteria should be applied to each category and that the two are distinct. At the same time, the four *Soulos* conditions overlap considerably with the two enunciated in *Peter v. Beblow*. We may assume the broad concept of "equitable obligation" is met by a finding of unjust enrichment; the second *Soulos* requirement that the assets were received by the defendant as a result of "agency activities" may be seen as one type of "direct link" that accords with the second *Peter* requirement; and the third *Soulos* condition may be seen as a broader version of the "insufficiency of damages" requirement in *Peter*. Only the fourth *Soulos* condition, the absence of factors that would make a trust remedy unjust, is missing from the "pre-requisites" specified in the earlier family law cases. The defendants in the case at bar relied on this requirement to argue that the imposition of a constructive trust, which they characterize as an "extraordinary" remedy, would cause significant prejudice to third parties who have been paid by the defendants over the years for goods or services by means of revenues received in the course of the Instaloans business.

[28] I agree with the trial judge that this argument is answered by the fact that the beneficiary of a constructive trust (like that of any other trust) cannot assert his or her proprietary interest against a person who came into possession of the property (here, funds) *bona fide* and for value. However, in referring to the constructive trust as a "discretionary" or "extraordinary" remedy, counsel for the defendants also raised the role of "the equities" or "good conscience" generally in determining the appropriateness of a constructive trust. In *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd*. 2000 BCCA 458 (CanLII), 2000 BCCA 458, a commercial case not involving unjust enrichment, these factors were discussed by Mr. Justice Lambert in concurring reasons. He quoted the following passage from *Soulos*:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies

> are flexible; their award is based on what is just in all the circumstances of the case. [At para. 68 of *Ellingsen,* citing para. 34 of *Soulos*; emphasis added.]

Lambert J.A. went on to summarize the principles applicable to remedial constructive trusts as follows:

> The principles applicable to this case are contained in the passage I have just quoted from the reasons of Madam Justice McLachlin in *Soulos v. Korkontzilas*. A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties. [At para. 71; emphasis added.]

[29] Notwithstanding the fact that equities of this kind were not referred to expressly in the formulation of "the test" for a constructive trust remedy in *Pettkus* or *Peter v. Beblow*, I doubt the Supreme Court intended to jettison a consideration of the "equities" or "good commercial conscience" in cases of unjust enrichment, whether in or outside the family law area. In a 1990 matrimonial case, *Rawluk v. Rawluk* 1990 CanLII 152 (S.C.C.), [1990] 1 S.C.R. 70, for example, the majority of the Supreme Court of Canada (*per* Cory J.) referred to fairness as the "fundamental equitable principle" underlying the remedy of constructive trust in such cases. (Para. 54.) In dissent, McLachlin J. also observed that a constructive trust "cannot be regarded as arising automatically when the three conditions in *Pettkus v. Becker* are established" (referring, presumably to the three elements of unjust enrichment), and that the court must go on to consider whether other remedies are available and whether a constructive trust is appropriate. (Para. 87.) Thus there may be instances in which the two criteria in *Peter* or the first three criteria in *Soulos* are met, but the granting of a constructive trust would not be found to be appropriate in all the circumstances. I will return to this factor as it applies to this case, later in these reasons.

The "Proprietary Link" in this Case

[30] The defendants' primary argument is that the "threshold" requirement referred to in *Peter v. Beblow* – a "nexus between the contribution [here one may substitute "Unlawful Finance Charges"] and the property" – was non-existent in this case. In their submission, the trial judge found only that the plaintiffs had paid fees in excess of the criminal interest rate and erred in reasoning that by virtue of this fact, there was a direct link between "the contribution that founds the action and the property in which the constructive trust is claimed." (Para. 6.) They say that although this finding may have been sufficient to satisfy the 'deprivation' element of unjust enrichment, it did not satisfy the second requirement enunciated in *Peter v. Beblow* for the imposition of the proprietary remedy. In their submission, "No specific property is at issue here which could form the basis of a trust. Indeed, money or monetary compensation is what is being sought" by the plaintiffs.

[31] This argument seems to combine two points – first, that the subject-matter of the proposed trust, i.e., money, is inappropriate to found a constructive trust; and second, that the connection between the Unlawful Finance Charges and the defendants (or more properly, the Storefront Lenders) was insufficient for that purpose. In my view, the first

point must fail: it is clear from the authorities that funds, or accounts, are a proper subject for a constructive trust. As the plaintiffs note, Equity has since at least the 19th century permitted beneficiaries of trusts to assert proprietary interests in respect of funds and any property into which they have been transformed, by means of following (at law) or tracing (in law or in Equity). Recent examples of proprietary remedies granted in respect of funds followed into mixed or "co-mingled" accounts include *Waxman v. Waxman* 2002 CanLII 49644 (ON S.C.), [2002] O.J. No 2528, 25 B.L.R. (3d) 1 (Ont. S.C.), ***aff'd***. [2004] O.J. No. 1765 (C.A.), which contains an extensive analysis of the Canadian law relating to tracing; supplemental reasons at 2002 O.J. No. 3533, which discuss the timing of discovery and tracing orders; and *Ruwenzori Enterprises Ltd. v. Walji,* 2004 BCSC 741 (CanLII), 2004 BCSC 741, ***aff'd***. 2006 BCCA 448 (CanLII), 2006 BCCA 448. In the latter case, Hall J.A. for this court noted *Foskett v. McKeown*, [2001] A.C. 102, where the House of Lords rejected the suggestion made in *obiter* by Sir George Jessel M.R. in *In re Hallett's Estate; Knatchbull v. Hallett* (1880) 13 Ch.D. 696 that in cases of a "mixed substitution", the beneficiary was confined to a lien. Lord Millett stated in *Foskett*:

> In my view the time has come to state unequivocally that English law has no such rule. It conflicts with the rule that a trustee must not benefit from his trust. I agree with Burrows that the beneficiary's right to elect to have a proportionate share of a mixed substitution necessarily follows once one accepts, as English law does, (i) that a claimant can trace in equity into a mixed fund and (ii) that he can trace unmixed money into its proceeds and assert ownership of the proceeds. [At 131; emphasis added.]

No principled reason was suggested to us as to why a restitutionary constructive trust should be any different in this regard from other types of trust.

[32] The second part of the defendants' submission requires consideration of whether funds or other property held by the defendants can be shown to be sufficiently connected to the Unlawful Finance Charges to satisfy the requirements for a constructive trust. The Storefront Lenders collected the Unlawful Finance Charges directly from customers; the trial judge found that those defendants "collected approximately $61 million in revenue during the Class Period. Of that, finance charges accounted for the vast majority, something in excess of 90%." (Main reasons, para. 8.) However, the connection between the Unlawful Finance Charges and the other defendants is more attenuated, given that the funds were apparently then paid as fees, or otherwise transferred to, and then expended and reinvested by, other entities up the corporate ladder during the Class Period.

[33] The trial judge found that there was a sufficient connection to ground a finding of unjust enrichment against all the defendants. This finding was upheld. But whether it was also sufficient to establish a connection that meets the criteria for the imposition of a constructive trust *vis à vis* the defendants other than the Storefront Lenders is in my opinion doubtful. However, if the plaintiffs successfully establish a proprietary entitlement to the Unlawful Finance Charges in the hands of the Storefront Lenders, they may trace those funds from there into the hands of other defendants, and even into the hands of third parties – subject always to the rules of court and the limitations of the tracing process. The plaintiffs would then be entitled to assert a constructive trust against the holder(s) of the funds or other property without the exercise of any further discretion by the court. (See *infra,* para. 43.)

Inadequacy of Damages

[34] Another argument advanced by the defendants and related to "the test" for imposing a constructive trust, is that the trial judge failed to consider whether a damage award would adequately compensate the plaintiffs, and instead focussed on whether such an award would be an "effective" remedy for them. In their analysis, the only "property" at issue in this case is money and it is therefore clear that a monetary judgment would be equal to (and therefore adequate to make restitution for) the fees and charges illegally paid by the plaintiffs to the defendants in the course of the Instaloans business. They note that this case is very different from *Lac Minerals* where the uniqueness of the (mining) property in question, and the "virtual impossibility" of valuing it, led the Court to impose a constructive trust in respect thereof. (See 675.) In the case at bar, in contrast, the trial judge is said to have erroneously assumed that the "legal test", and indeed the "sole test", in determining whether a constructive trust should be imposed, was whether the plaintiffs were likely to be able to collect on a money judgment. This error is said to have appeared more clearly in the trial judge's original 'recalled' reasons.

[35] Again, I cannot agree with the defendants' submission. First, I understand "collectability" as used by the trial judge to refer not only to whether the defendants have the funds to pay a money judgment, but also to the difficulty the plaintiffs will have in enforcing a monetary judgment where assets may have passed into the hands of unknown persons. In these circumstances, a proprietary remedy would obviously be helpful. Second, as the plaintiffs point out, the Supreme Court of Canada has expressly approved "collectability" or "solvency" as a consideration properly relevant to the granting of a constructive trust. In *Peter v. Beblow,* McLachlin J. stated at para. 31 that "the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions ...", citing *Lac Minerals*. As we have seen, La Forest J. had suggested in that case that "among the most important" of the reasons to grant proprietary remedy rather than an award of damages is to ensure that the plaintiff will "receive the priority accorded to the holder of a right of property in a bankruptcy." (Para. 677.)

[36] This is not to suggest that where a proprietary link is absent, a constructive trust can be imposed solely in order to give a claimant priority over funds or other property that would otherwise become part of the estate of an insolvent or bankrupt person: see *Barnabe v. Touhey* 1995 CanLII 1672 (ON C.A.), (1998) 26 O.R. (3d) 477 (C.A.) at 479; Maddaugh and McCamus, *The Law of Restitution* (looseleaf), at 5-30 to 5-32; *Muschinski v. Dodds* [1985] HCA 78, 60 A.L.J.R. 52 at 65; *Ellingsen, supra,* at para. 36, *per* Donald J.A. In the case at bar, the fact the defendants were enriched by the collection of illegal interest from the plaintiffs obviously eliminates that concern. This will be so in most instances of unjust enrichment, where the claimant has been deprived of the very property by which the defendant has been enriched.

[37] This brings us back to the question of the "equities" and the interests of third parties in this case. Some commentators have questioned the fairness of providing the claimant in an unjust enrichment case with a proprietary interest that will prevail over the interests of ordinary creditors. Those creditors may be relying on a title or security registration system (as was argued in *Ellingsen*) and may have no reason to suspect the invalidity of the defendant's title to a particular asset. The imposition of a trust may also be seen to work an injustice as between creditors in some instances. Thus Professor Paciocco in "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors," 68 *Can. B. Rev.* 315 noted in 1989:

> Goff and Jones have warned ... that [the rules regarding tracing into mixed funds] emerged in context of the equitable tracing remedy in order to prefer the beneficiaries to the bankrupt trustees' general creditors. Moreover, they emerged in the context of what were "pure proprietary claims". It has to be wondered whether they are truly appropriate in the context of remedial constructive trusts in the commercial context where concern for creditors may constitute a reason why such rules should not be employed. Dobbs has suggested that to allow the imposition of a remedial constructive trust in the absence of true identifiability is to work a preference for no good reason. Why should the law presume that the funds of the general creditors are dissipated before the funds of the constructive trust beneficiary? [At 337.]

The author does conclude, however, that the "non-risk taking plaintiff" in an unjust enrichment action would normally have a higher claim to the property than general creditors, who have accepted the risk of being "simple debtors" of the defendant. (See also Leonard I. Rotman, "Deconstructing the Constructive Trust", (1999) 3 *Alta. L. Rev.* 133, at 165-170.)

[38] In the present case, the analysis is perhaps less difficult, assuming that the granting of a constructive trust falls under the "broad umbrella of good conscience" (*Soulos,* para. 48). Here the plaintiffs assert a trust in order to pursue the very funds (and any funds or other assets into which they have been transformed) they paid to the defendants and the defendants received in contravention of the *Criminal Code*. Their claims are therefore qualitatively different from those of general creditors or other persons dealing with the defendants in the normal course. The unjust enrichment here is not only a private wrong, but arises from a criminal offence in respect of which it is in the public interest that neither the wrongdoers nor their ordinary creditors be permitted to retain the benefit.

Reverse Onus?

[39] Another ground of appeal asserted by the defendants was that the trial judge effectively applied a reverse onus in determining the appropriateness of a constructive trust – that she started from the proposition that due to the finding of unjust enrichment, the plaintiffs were "automatically entitled" to a constructive trust unless the defendants were able to prove that another remedy "would not only be adequate or appropriate, but also permit collection on a money judgment by the plaintiffs." The defendants submit in their factum:

> The Supreme Court of Canada, in relation to constructive trusts as a remedy for unjust enrichment, makes explicit that it is the *plaintiff* which must establish the necessary elements for a constructive trust to be ordered, such as a direct link to the property which is to be subject to the trust.

[40] As we have seen above at para. 3, the trial judge in her main reasons referred to evidence of the business operations of the Instaloans defendants and the progress of revenues from the Storefront Lenders through the "Head Office Companies", through the sale of the business to Rentcash Inc., to Image (OS) Enterprises Inc. during the Class Period. She requested further submissions and evidence from the parties, observing at para. 70 that "It is the defendants who know what they received, what they did with it, and whether they can satisfy a monetary judgment." It seems to me that she was simply recognizing that it lay within the defendants' power to adduce evidence that might forestall

the obvious inference arising from what evidence the trial judge did have – in particular, the facts that the Storefront Lenders had ceased operations and no longer had any assets or liabilities, and that the Head Office Companies had liabilities far in excess of their assets. In other words, the plaintiffs had already adduced evidence from which the inadequacy of a monetary judgment could be inferred, and the trial judge was simply giving the defendants another opportunity to counter that evidence. Since they failed to do so, the obvious inference was drawn.

Tracing

[41] I conclude, then, that the trial judge considered the correct legal "tests" in approving a constructive trust as a restitutionary remedy for the defendants' unjust enrichment. As mentioned above, however, it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants farther up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The process by which the plaintiffs may 'follow' the Charges up the chain is tracing – the "process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property". (*Per* Millett L.J. (as he then was) in *Boscawen v. Bajwa* [1995] 4 All E.R. 769 (C.A.) at 776.) Although tracing is available both at law and in Equity (see Maddaugh and McCamus, *supra*, at chapters 6 and 7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (*The Law of Tracing* (1997)) that the establishment of this proprietary right, which he refers to as the "proprietary base", is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship: see *Citadel General Assurance Co. v. Lloyds Bank Canada* 1997 CanLII 334 (S.C.C.), [1997] 3 S.C.R. 805 at para. 57.

[42] Of course, it may be difficult to identify the funds or other property into which the claimed Charges have been transformed or with which they have been mingled; and the process will come to a halt in certain conditions, including where the balance in an account has fallen below the amount being traced. (See generally Maddaugh and McCamus, *supra,* at Chapter 7, and Smith, *supra,* at Chapter 8.) As the Court stated in *McTaggart v. Boffo* (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.):

> Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:
>
> a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
>
> b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice. [At 458.]

[43] Should the plaintiffs succeed in identifying the Charges or their proceeds farther up the chain, on the other hand, they will be entitled to elect a proprietary remedy in the form of a constructive trust: Maddaugh and McCamus at 7-27 to 7-28. (An alternate proprietary remedy that would usually be available is the equitable lien, but the plaintiffs have not

pursued that option.) Both Waters (3rd ed., at 487) and Smith (at 357) agree that the imposition of a constructive trust over the traced assets is not a discretionary exercise requiring judicial approval once the right to a trust has been initially established – as has occurred in this instance in respect of Unlawful Finance Charges collected by the Storefront Lenders.

"Double Remedies" and the Question of Election

[44] It will be recalled that common issues (g) and (j) in this class proceeding were as follows:

> (g) If the answer to (d) or (f) is yes:
>
> (i) do those defendants hold the benefit they have received as a result of this unjust enrichment in trust for those class members who provided that benefit to those defendants? And
>
> (ii) are those defendants liable to account to those class members for the benefit received from them and all profits earned therefrom?
>
> (j) If the answer to (h) or (i) is yes, are those defendants liable for damages to those class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trade Practice Act*, R.S.B.C. 1996, c.457 ("*TPA*") s. 22(1) and the *Business Practices and Consumer Protection Act, S.B.C. 2004, c.2 ("BPCPA")* s. 105 and 171?

[45] The trial judge answered "yes" to these questions in the 'remedy' order now under appeal. The defendants submit that it contravenes the principle, which both parties accept, that a plaintiff can obtain a judgment for damages (here, for unconscionable acts under provincial consumer protection legislation), or restitution in the form of a proprietary remedy, but not both: see *Island Records Ltd. v. Tring Int'l. PLC* (1996) 1 W.L.R. 1256 (Ch. Div.) at 1258, *United Australia Ltd. v. Barclay's Bank Ltd*. [1941] A.C. 1 (H.L.), *Tang Man Sit v. Capacious Investments Ltd*. (1996) 1 .C. 514 (J.C.P.C.), and *Sandell Developments Ltd. v. Boivin* 1986 CanLII 1045 (BC S.C.), (1986) 2 B.C.L.R. (2d) 261 (B.C.S.C.). In the latter case, Hinds J., as he then was, discussed the rule that "a party who has elected to pursue one of two inconsistent rights, cannot later pursue the other; but a party may pursue two alternative remedies up to the time of judgment, at which time an election of remedy must be made." (At 265.) The defendants contend that by making the order appealed from, the trial judge contravened this principle, there being nothing (the defendants say) to suggest that damages and the constructive trust were granted in the alternative.

[46] As I have already mentioned, the trial judge's reasons indicate that such was not her intention. In the last paragraph thereof, she reiterated that although the defendants could not receive double recovery, they were entitled to refrain from making an election until they were able to "gauge which remedy is effective, particularly on the summary trial of common issues in a class proceeding." (Para. 18.) Unfortunately, this was not reflected in her order.

[47] The procedural implications of this entitlement were discussed in the Canadian context in the supplemental reasons in *Waxman v. Waxman, supra*. Under the heading "The Proper Tracing Sequence", the Court rejected the argument that having failed to call evidence at trial relevant to the tracing of certain assets, the plaintiffs should not be

allowed to “cure the deficiency by gathering information and tracing in stages.” The Court noted that if parties were required to call such evidence at trial, the cost and length of litigation would be greatly increased. The defendants were ordered to submit to cross-examination and discovery regarding their assets in order to permit the plaintiffs “to recover misappropriated trust funds after legal or equitable rights have been conclusively proved at trial.” (Para. 44.)

[48] Similarly in *Island Records*, the Court noted that where a plaintiff claims in the alternative damages or an accounting of profits, the practice in England is to have a “split trial”, the first stage trying the issue of liability and the second, if liability is established, trying the question of assessment of damages and the calculation of profits. Lightman J. continued:

> ... As a concomitant with this practice, there has likewise developed the practice of limiting discovery at the first stage to documents relevant to the issue of liability and excluding documents relevant only to the second stage. In this way the burden of discovery at the first stage is reduced, and the invasion of confidence necessarily involved in discovery is postponed and (if liability is not established) entirely obviated: see *Baldock v. Addison* [1995] 1 W.L.R. 158. (It may be noted that this practice was, in appropriate cases, adopted by the courts of Equity in the nineteenth century: see *Benbow v. Low* (1880) 16 Ch.D. 93, 98 and *Fennessy v. Clark* (1887) 37 Ch.D. 184.) The price at which this cost and time saving is achieved is that the plaintiff will not before judgment at the first stage on the issue of liability have the benefit by means of discovery or otherwise of the information otherwise available on which the plaintiff is able to make an informed election as to remedy between an assessment of damages and an account of profits. The question which arises is whether in this situation (as in the case of a motion for judgment where likewise the plaintiff is deprived of the opportunity to obtain such information before judgment) in the course or at the conclusion of the hearing the plaintiff must elect between the two remedies or is entitled first to sufficient information to make an informed election. [At 1258.]

[49] In my opinion, the same reasoning should apply in cases where damages and constructive trust are sought as alternative remedies. I see no error in the trial judge’s conclusion that the plaintiffs need not elect between the two until they are able to make an informed choice. (Whether every plaintiff in a class action must concur in the election or not is a question that counsel have evidently not yet addressed.) As long as the plaintiffs make their election before final judgment is issued – and the order appealed from is obviously not a final order – it seems to me the defendants can have no objection. I need not decide whether, if the plaintiffs do not succeed in obtaining complete restitution by means of tracing, they may then revert to seeking damages. I do note Professor Smith’s suggestion in *The Law of Tracing, supra,* that only full recovery by one route (*in personam* or *in rem* relief) will eliminate the other. However, this point was not raised by counsel in the case at bar and it is not necessary, at least at this time, to resolve it.

Accounting

[50] The remaining ground of appeal may be dealt with in short order. It is based on the notion that an accounting may be ordered only to enforce “equitable” or “fiduciary” duties. Historically, accounting was available both at law and in Equity to enforce personal monetary obligations (as opposed to effecting compensation for breach of such obligations). Equitable accounting normally secured the performance of equitable duties – thus as noted in Waters (*supra*, at 476), in the old language of Equity, a defendant was

said to be “liable to account as a constructive trustee” for profits earned from property of the beneficiary. Gradually, the common law remedy was superseded by the more flexible equitable remedy and the latter is now used for restitutionary purposes. As noted by Maddaugh and McCamus, *supra*:

> ... It is commonly said that the equitable remedy [of accounting] had a number of procedural advantages over that developed at common law with the result that what remained of the common law claim was in due course superseded by the equitable remedy. An equitable accounting came to be available in a broad range of situations, only some of which pertain to the law of restitution. Thus, an equitable accounting is broadly available to secure the performance of equitable duties such as those owed by the trustee to the beneficiaries, or by a mortgagee who has taken possession to the mortgagor. Additionally, the remedy was made available by equity in aid of the enforcement of a legal right such as that of the principal to require an accounting from an agent or upon the dissolution of a partnership or in cases where the accounting was thought to be unduly complicated for common law procedures. As well, the remedy may be granted as incidental to some other form of equitable relief such as an injunction granted to secure the observance of a legal or equitable obligation. ... [*A*t 5.44; emphasis added.]

Since an accounting is an obvious remedial measure where restitution for unjust enrichment is ordered, I agree with the trial judge that an order for an accounting was appropriate in this case. I assume that since the accounting ordered in this instance extended to profits earned on the “benefit” received by the defendants, it was intended as ancillary to the constructive trust.

Disposition

[51] In conclusion, I would allow the appeal only to the extent of refining the terms of the order appealed from, so as to clarify the points referred to at paras. 19 and 20 and in the “Tracing” section of these reasons. I would revise the operative portions of the ‘remedy’ order to read as follows:

> 1. The following Common Issues in this class proceeding are determined as follows:
>
> g. If the answer to (d) or (f) is yes:
>
> i. do those Defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit to these Defendants? and
>
> ii. are those Defendants liable to account to those Class members for the benefit they received from them and all profits earned therefrom?
>
> Answer:
>
> i. The Storefront Lenders hold any Unlawful Finance Charges they have received as a result of the unjust enrichment, in trust for those Class members who paid such Charges to them. The Plaintiffs may trace such Charges into the hands of other Defendants by means of and subject to the rules of equitable

tracing. To the extent such tracing is successful, the Plaintiff shall be entitled to elect, prior to the issuance of final judgment, to assert a constructive trust over such Charges or the other property into which they may have been transformed in the hands of such other Defendants. Failing making such an election as aforesaid, the Plaintiffs shall be confined to the recovery of damages under this Order.

ii. Yes, ancillary to the constructive trust if such is elected in accordance with this order.

j. If the answer to (h) or (i) is yes, are those Defendants [the Storefront Lenders] liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the *Trade Practices Act*, R.S.B.C 1996, c. 457 ("*TPA*") s. 22(1) and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), ss. 105 and 171?

Answer:

Yes, if the Plaintiffs do not elect to assert a constructive trust in accordance with (g) or are confined to recovery of damages on failing to make the election as stated therein.

[52] In all other respects, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Neilson"

I Agree:

"The Honourable Mr. Justice Groberman"

SCHEDULE A

THIS COURT ORDERS that:

1. The following Common Issues in this class proceeding are determined as follows:

   a. Do the finance charges charged by the Instaloans Defendants constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code* either in whole or in part?

   Answer: Yes

   b. If the answer to (a) is yes, then do the standard form agreements pursuant to which those finance charges have been collected from class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1) of the *Criminal Code*?

   Answer: Yes

   c. If the answer to (a) is yes, then has the collection by the Instaloans Defendants of those finance charges in accordance with the terms of the standard form agreements on which the payday loans have been advanced by Instaloans to class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by class members to and the receipt by the Instaloans Defendants of interest at a criminal rate, contrary to s, 347(1) of the *Criminal Code*?

   Answer: Yes

   d. If the answer to (c) is yes, have the Instaloans Defendants been unjustly enriched by the collection of those finance charges from the class members?

   Answer: Yes

   e. If the Instaloans Defendants have received a payment of interest at a criminal rate from class members in respect of the class loans, then:

      i. were the class loans advanced by the Instaloans Defendants to the class members at the direction and for the benefit of Latimer and Arcand?

      ii. were the finance charges received by the Instaloans Defendants paid in whole or in part to Latimer and Arcand? and

      iii. did Latimer and Arcand direct the transfer, use, or otherwise have the benefit of the finance charges collected by the Instaloans Defendants from the class members?

   Answer: Yes to all

   f. If the answer to any one of (e) (i) to (iii) is yes, then have Latimer and Arcand been unjustly enriched by the payment by class members of interest at a criminal rate in respect of their class loans?

   Answer: Yes

   h. If the answer to (b) or (c) is yes, does the provision by the Instaloans Defendants of the class loans to class members on terms that offend s. 347(1) of the *Criminal Code*, or

the receipt by the Instaloans Defendants of interest at a criminal rate in respect of those class loans, constitute an unconscionable act or practice within the meaning of s. 4 of the *TPA* and s. 8 of the *BPCPA*, irrespective of whether the factors set out in ss. 3(a) through (d) of those sections are present in any individual case?

Answer: Yes with respect to Instaloans Financial Solution Centres (Kelowna) Ltd., Instaloans Financial Solution Centres (Vernon) Ltd., Instaloans Financial Solution Centres (B.C.) Ltd., and Instaloans (B.C.) Ltd. (the "Storefront Lenders").

i. If the answer to any one of (e) (i) to (iii) is yes, then does such conduct of Latimer and Arcand constitute unconscionable acts or practices within the meaning of s. 4 of the *TPA* and s. 8 of the *BPCPA*, irrespective of whether the factors set out in ss. 3(a) through (d) of those sections are present in any individual case?

Answer: No

*k. If the answer to (b) or (c) is yes, then did the Instaloans Defendants, Arcand and Latimer (or any combination thereof) conspire to implement a scheme to provide those loans to the class members in order to earn profits on the class loans at an unlawful rate of interest?

Answer: Yes

*I. If any or all of the Defendants conspired to provide class loans to the class members at an unlawful rate of interest, then are those Defendants jointly and severally liable for damages to those class members who have suffered loss or damage as a result of that illegal conspiracy?

Answer: Yes

m. If the answer to (b) or (c) is yes, then are Latimer and Arcand jointly and severally liable for the acts of the Instaloans Defendants, or any of them, in advancing class loans on terms that offend s. 347(1)(a) of the *Criminal Code* or receiving interest in respect of the class loans at a criminal rate contrary to s. 347(1)(b) of the *Criminal Code*?

Answer: Yes