CITATION: Y.R.C.C. NO. 890 v. RPS Resource Property Services, 2011 ONSC 732
DATE: 20110119
DOCKET: 05-CV-295767PD2

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
YORK REGION CONDOMINIUM CORPORATION NO. 890	*Bruce R. Jaeger*, for the Plaintiff
Plaintiff	
– and –	*Catherine Francis*, for the Defendant Royal Bank of Canada
RPS RESOURCE PROPERTY SERVICES LTD., WILLIAM GARLAND, KARYN GARLAND, KANDIAH SIVANESWARAN, BRETT MATUS, ERIC SCHRAIBMAN, RICHARD TAYLOR, JAMES WILSON, W.H. BOSLEY & CO. LTD. AND ROYAL BANK OF CANADA	William Garland – In Person
Defendants	
	HEARD: June 1, 2, 4, 7 and 8, 2010

L. A. PATTILLO J.

Introduction

[1] This is a claim by the Plaintiff, York Region Condominium Corporation No. 890 for damages against the Defendants RPS Resource Property Services Ltd. ("RPS") and William Garland ("Garland") for breach of fiduciary duty, breach of trust, conspiracy, fraud and breach of

their obligations under the *Condominium Act 1998*, S.O. 1998, c. 19., and against the Defendant Royal Bank of Canada (the "RBC") for breach of contract, negligence and conversion.

[2] The Plaintiff's claims against the remaining Defendants have been resolved.

Facts

[3] The following are the facts from the agreed statement of facts filed by the parties and as found by me from the evidence.

(i) York Condominium Corporation #890

[4] The Plaintiff is a condominium corporation created pursuant to the *Condominium Act*, R.S.O. 1980, Chapter 84, as amended, for the purpose of managing and administering the property and assets of the condominium located at 4300 Steeles Avenue East, and known as the Pacific Mall.

[5] The Pacific Mall is a retail mall which was conceived in the early 1990's as a result of the large influx of Chinese immigrants to the Greater Toronto area. The idea was to create a retail mall in which Chinese immigrants could purchase individual units from which they could operate their own independent businesses in a mall environment. The Pacific Mall was built in 1996/97.

[6] Initially the Pacific Mall had in excess of 700 units, but as a result of units being combined, there are now approximately 400 stores in the Pacific Mall.

[7] The Plaintiff is run by a Board of seven directors elected by the unit owners. The officers of the Plaintiff, the president, secretary and treasurer, are directors. The Board meets monthly and reports to the unit owners at an annual meeting or more often, if required. From the beginning, the Board has overseen the operations of the Pacific Mall and set policy. The day to day operations of the Pacific Mall have been run by a property management company.

[8] The Plaintiff's yearend financial statements are audited by the Plaintiff's external audit firm and approved by the Board and the unit owners.

[9] Initially, in September 1997, the Plaintiff entered into an agreement with a company called Living Properties Inc. to manage the Pacific Mall on a day to day basis and to carry out the policies of the Board. The Plaintiff had a banking relationship with the Bank of East Asia which had a branch in the Pacific Mall. The Plaintiff had two bank accounts in its name at the Bank of East Asia, an operating trust account and a reserve account. The entire Plaintiff's operating revenues and expenses went through the operating trust account. Living Properties, as the property manager, had signing authority on the accounts up to $100 and above that two directors of the Plaintiff were required to sign any cheques.

(ii) RPS

[10] RPS is an Ontario corporation which originated out of a joint venture between Daniels Associates Consultants of Canada Inc. and Bosley Property Services in 1986 or 1987 to manage Bosley's property management business. RPS was incorporated on August 15, 1988, and continued the operations of Bosley Property Services. RPS carried on the business of property management for commercial, residential and condominium clients. At all material times, Garland

was the controlling mind of RPS. He was the president and major shareholder of RPS from its inception until July, 2004.

(iii) RPS & RBC

[11] From its inception, RPS banked at the RBC as a result of a prior, long standing relationship between Garland and RPS. RPS opened and operated a number of current bank accounts at the RBC in connection with its business for its own account and on behalf of its clients. As at July, 2005, when RBC closed all of RPS' accounts, RPS had 14 accounts with RBC.

[12] The relationship between RPS and RBC was governed by a Financial Services Agreement dated June 1, 2000. The Financial Services Agreement sets out the terms under which RBC may keep accounts and process instruments for RPS and provide other services to it. It covers a number of matters, including overdrafts, account verification and charge backs. The only dealings that RPS had with RBC over the entire course of the relationship were in respect of the operation of the bank accounts. RPS never had a loan or overdraft facility with RBC.

[13] One of the services RBC provided to RPS was access to what was initially telephone banking but which subsequently evolved to become internet banking. When RPS opened a new account, it could be accessed, along with its other accounts, through the internet by use of an access code which was provided to RPS by RBC.

(iv) The Plaintiff and RPS

[14] In 2002, a majority of the Plaintiff's Board became dissatisfied with the performance of Living Properties as Pacific Mall's property manager. As a result, the Plaintiff terminated its services and hired RPS. On October 9, 2002, the Plaintiff entered into a Management Agreement with RPS. RPS officially began its duties as property manager for the Plaintiff effective December 1, 2002.

[15] The Management Agreement with RPS provided for a term of one year plus a further two year extension upon mutual agreement. Under the heading "Management Assistance And Duties" the Management Agreement set out a number of the duties to be performed. In particular, paragraph (a)(i), headed "Corporation Funds" provided, in part:

> To collect and receive on behalf of the Corporation all monies payable pursuant to the Act, the Declaration and By-Laws by the Owners or others and to deposit the same forthwith in an operating account to be opened with a Canadian Chartered Bank or Trust Company and maintained by the manager in the sole name of the Corporation and as the Board may from time to time direct.
>
> (i) Disbursements
> To pay the utility accounts and to pay all other accounts not exceeding $2,000.00 properly incurred by or on behalf of the Corporation and to prepare cheques for signature by the signing officers of the Corporation for all accounts exceeding $2,000.00.

[16] When RPS became the property manager for the Plaintiff, it proposed and the Plaintiff agreed that the Plaintiff's operating bank account be changed from the Bank of East Asia to RBC. The Plaintiff's reserve fund remained at the Bank of East Asia.

[17] On November 22, 2002, Mr. Kandiah Sivaneswaran, PRS's senior accountant, sent a fax to RBC requesting that a current account be opened under the name of YCC 890 (Pacific

Mall). Account number 100-791-3 was subsequently opened by RBC as an RPS account in respect of the Plaintiff (the "Account").

[18] The banking resolution for the Account is signed by Garland and dated November 28, 2007. Among other things, it appoints RBC as the banker for RPS and authorizes the "President, Treasurer, Secretary, Director, President (RPS) Senior Accountant. (RPS - President/Senior Accountant can sign up to $100.00). The President, Secretary, Treasurer or Director can sign over $100.00" to withdraw or order transfers of funds from the Account by any means.

[19] The signature card for the Account is dated November 29, 2002. The name of the Account was typed in as RPS Resource Property Services Ltd. under which in handwriting was written "YCC 890/RPS Resource Property Services Ltd." The signature card lists the names and signatures of Garland – President, Sivaneswaran – Senior Accountant, Edwin Wung, YRCC #890 President, David Wong, YRCC #890 Treasurer, Michael Hang Chee Lee and Lance Gau, Directors. Under the heading "Sundry Information" on the signature card is written in handwriting: "President, Treasurer, Secretary, Director, President (RPS), Senior Accountant (RPS – President/Senior Accountant can sign up to $100.00). The president, secretary, treasurer or director can sign over $100."

[20] On November 28, 2002, the Plaintiff's Board executed a resolution which gave Garland and Sivaneswaran signing authority to a maximum of $100. Any cheque in excess of $100 required the signature of any two directors of the Plaintiff. There is no evidence that a copy of this resolution was ever provided to the Bank.

[21] On September 28, 2004, RBC received a fax from RPS advising it of the names and positions of the new directors of the Plaintiff.

[22] Subsequent to December 1, 2002, all of the receipts from the Pacific Mall were deposited by RPS into the Account and all expenses were paid from it. When the expense was greater than $100, RPS prepared the cheque and provided it for signature to two directors along with vouchers containing back up information.

[23] On a monthly basis RPS would provide the Plaintiff's Board, in advance of the Board meeting, with a detailed written report containing an agenda; the property manager's report; detailed monthly financial statements together with copies of the RBC bank statements for the Account for the period in question. The bank statements were addressed to RPS.

(v) Garland's Sale of RPS

[24] As noted, Garland was the president and major shareholder of RPS from its incorporation until July 2004. In May 2004, Garland agreed to transfer control of RPS to Mr. Brett Matus in exchange for taking over RPS' debt. Matus had prior experience in the property management business. Matus, in turn, got his friend Eric Schraibman, who was a painting contractor, involved in the transaction.

[25] On July 2, 2004, corporate documents were signed transferring 80% of the shares of RPS to Matus. Garland retained 20%. Matus became the president, secretary and sole director. When the transaction was completed on or about November 1, 2004, the shares of RPS were owned 30% by Matus, 30% by Schraibman, 20% by Garland and 20% by Sivaneswaran. Schraibman became the president, secretary and sole director of RPS.

[26] After Matus reached his agreement with Garland in May 2004, he became involved in the business. When he subsequently got Schraibman involved, Schraibman joined RPS full time in order to learn the business and meet the clients. Prior to November, 2004, neither Schraibman nor Matus were privy to the day to day financial dealings of RPS. At all times Garland retained signing authority for RPS and its bank accounts. All of the accounting continued to be done by Sivaneswaran.

[27] On November 19, 2004, Sivaneswaran advised Schraibman and Matus by email that $408,000 had to be deposited to the Plaintiff's Account by the following week. When they inquired further, they were told by Sivaneswaran that RPS had borrowed the money from the Plaintiff and it had to be paid back. In the absence of satisfactory answers from either Garland or Sivaneswaran, Schraibman resigned as an officer and director of RPS and relinquished his shares in the company on November 23, 2004. Matus relinquished his shares in RPS on the same date. Neither Schraibman nor Matus received or had any involvement in or dealing with RPS' trust monies in the Account.

(vi) The Plaintiff Terminates RPS

[28] In January 2005, as a result of a number of concerns that the Plaintiff's then President and its other directors had concerning RPS' services, the Board terminated the Management Agreement with RPS. The Plaintiff re-hired Living Properties, who took over the management of Pacific Mall in the middle of February 2005.

[29] Mr. Selwyn Pais, the Controller for Living Properties, was involved in the transition of the Pacific Mall's management back to Living Properties. One of the initial problems he encountered was a cash flow issue which, based on the Plaintiff's operations, should not have

been a problem. Mr. Pais had difficulty getting any information from RPS. As a result, on February 1, 2005, he requested financial information in writing from RPS including the bank statements for the Account with reconciliation as of January 31, 2005. In the absence of a response, further written requests were made. Solicitors for both the Plaintiff and RPS got involved. Eventually, on February 28 and March 1, 2005, Mr. Pais received some but not all of the information he requested from RPS.

[30] Based on the financial information which was received from RPS, Mr. Pais determined, among other things, that between February 4, 2004 and November 2004, a net amount of $370,381.47 had been transferred out of the Account by internet transfer to other bank accounts at RBC. The transfers were noted on the RBC bank statements for the Account by the notation "WWW" and by RPS in the general ledger for the Plaintiff as "Prepaid Expenses". Mr. Pais reported his findings to the Plaintiff's Board by memorandum dated June 3, 2005.

[31] Also on June 3, 2005, Mr. Pais wrote to the RBC and advised that certain transfers from the Account in 2004 totalling $370,381.47 had not been authorized by the Plaintiff. The letter provided particulars of the transfers, including the dates, amounts and the account numbers where the monies had been transferred to.

[32] Following receipt of the letter, RBC determined that the transfers were made into other RPS' accounts at the RBC, including RPS' general account, its payroll account and its trust account 2 as well as two other client trust accounts.

[33] On July 5, 2005, RBC closed all of RPS's bank accounts at RBC.

[34] RPS ceased carrying on business in August 2005.

(vii) RPS' Actions

[35] It is clear from the documents produced in the action that RPS began utilizing money from its client trust accounts as early as 2001. The unaudited financial statements for RPS for the year ending July 31,2001, prepared by Grant Thornton, LLP show on the balance sheet, under current liabilities an item entitled "Due to client trust accounts" in the amount of $320,195.00. For the year ending July 31, 2002, the amount due to client trust accounts is shown on the balance sheet as $196,709.00. For the year ending July 31, 2003, the amount due to client trust accounts is again shown as $196,709.00. The last financial statements done by Grant Thornton are for the year ending July 31, 2004, and are in draft form. They show the amount due to client trust accounts to be $564,951.00.

[36] Sivaneswaran testified that when he first joined RPS in 2000, it was RPS' practice whenever it or Daniels Associates, Garland's other company, needed money, to take an advance from the client accounts and then return the monies at a later time when RPS or Daniels had money. Sivaneswaran said that the decisions as to which account would be accessed and how much money would be taken were always made by Garland.

[37] RPS began taking trust money from the Account in 2003 and utilizing it for its own operational purposes or to pay back other clients. The money was withdrawn from the Account from time to time and placed in another RPS account at RBC by internet transfer carried out by Sivaneswaran. It was shown on the Account's monthly bank statement provided by RBC by the notation "WWW". Sivaneswaran posted the amount withdrawn to the Plaintiff's books as a pre-paid expense. The total amount withdrawn in 2003 was in excess of $400,000.00.

[38] Throughout 2003, RPS also transferred money back into the Account from time to time by internet transfer. Prior to the end of 2003, RPS ensured that all of the monies it took from the Account during the year had been returned in order that when the Plaintiff's auditors audited its 2003 financial statements, there would be no discrepancy between what RBC confirmed was the Account balance at the end of the year and what the Plaintiff's banking records for the Account showed.

[39] RPS' use of the Account to fund its operations and re-pay clients continued in 2004. Between February and October, 2004, RPS transferred by internet transfer a total of $408,381.47 from the Account to its operating account and payroll account, one of its trust accounts and two client accounts at RBC. In November 2004, RPS transferred into the Account $38,000.00, leaving a shortfall of $370,381.47 as was subsequently determined by Mr. Pais in early 2005, when he was finally able to obtain some financial information from RPS.

[40] Sivaneswaran's email to Messrs. Schraibman and Matus on November 19, 2004, that $408,000.00 was required for the Plaintiff was an attempt by Garland and Sivaneswaran to obtain the money necessary to deposit into the Account before the Plaintiff's yearend to avoid detection by the Plaintiff's auditors. The failure to deposit that money together with the Plaintiff's decision to terminate RPS's services in early January 2005 very shortly led to Mr. Pais' discovery of the misappropriated money.

Liability

1. RPS

[41] By transferring monies from the Account to other accounts held by it at RBC, either for its own benefit or the benefit of other clients, RPS was in breach of its Management

Agreement with the Plaintiff, as amended by the Board's banking resolution of November 28, 2002. RPS had no authority to deal with any of the Plaintiff's funds in the Account over $100 without the signature of the president, secretary, treasurer or a director of the Plaintiff.

[42] I am also of the view that RPS' actions in wrongfully transferring the Plaintiff's funds from the Account for its own purposes constituted conversation of the Plaintiff's property: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 (S.C.C.).

[43] More importantly, by transferring the monies from the Account for its own use, RPS committed a clear breach of trust. Section 115(1) of the *Condominium Act, 1998*, supra, provides, in part, that a person who receives money on behalf of or for the benefit of a condominium corporation shall hold the money in trust for the performance of the condominium corporation's duties and obligations.

[44] Apart from s. 115 of the *Condominium Act, 1998*, it is clear from the evidence of Sivaneswaran and Garland (read in from his discovery) that at all material times RPS knew that all monies received by it on the Plaintiff's behalf and deposited to the Account were trust funds belonging to the Plaintiff.

[45] As a result, it is my view that RPS knew by transferring monies from the Account from time to time for its own use or benefit, it was in breach of trust. Notwithstanding that RPS took the monies with the intention of returning them and did so during 2003, its actions throughout constituted a clear breach of trust.

[46] Accordingly, RPS is liable to the Plaintiff for breach of contract, conversion and breach of trust in the amount of $370,381.47.

Garland and RBC

[47] Neither Garland nor RBC had any direct dealings with the Plaintiff. Garland's dealings with the Plaintiff were at all material times in his capacity as president of RPS. Further, the Plaintiff had no contractual relationship with RBC nor did it ever have any dealings with RBC until Mr. Pais sent his letter of June 3, 2005 on its behalf.

[48] In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1977] 3 S.C.R. 805 (S.C.C.), the Supreme Court set out the three ways a stranger to a trust can be held liable as a constructive trustee for breach of trust. La Forest J. on behalf of the majority, stated at para. 19:

> **19.** There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust. First, a stranger to the trust can be liable as a trustee *de son tort*. Secondly, a stranger to the trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees ("knowing assistance"). Thirdly, liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property ("knowing receipt".....).

[49] In order for a third party to be liable for breach of trust as a trustee de son tort the third party must take on the roll of trustee and commit a breach of trust while acting in such roll: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at para. 32.

[50] Liability of a third party based on "knowing assistance" arises where the third party participated in the breach of trust. In order to succeed, the Plaintiff must prove that the trustee's breach of trust was fraudulent and dishonest and that the third party knowingly participated in the breach of trust: *Gold v. Rosenberg*, [1977] 3 S.C.R. 767 (S.C.C.) at para. 32. The knowledge

requirement for "knowing assistance" is actual knowledge, recklessness or wilful blindness: *Air Canada*, supra, at para. 38. Constructive knowledge is not sufficient to establish liability on the basis of knowing assistance. In that regard, Iacobucci J. stated in *Air Canada* at para 40:

> **40.** The reason for excluding constructive knowledge (that is, knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry) was discussed in *In re Montagu's Settlement Trusts*, *supra*, at pp. 271-73, 275-85. Megarry V.-C. held, at p. 285, that constructive notice was insufficient to bind the stranger's conscience so as to give rise to personal liability. While cases involving recklessness or wilful blindness indicate a "want of probity which justifies imposing a constructive trust", Megarry V.-C., at p. 285, held that the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience. See also, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 331 (Q.B.), at pp. 341-49, 351-57, rev'd in part, [1992] 4 All E.R. 409 (C.A.), at pp. 416-18, rev'd in part on other grounds, [1992] 4 All E.R. 512 (H.L.).

[51] The third basis for liability of a third party for breach of trust is "knowing receipt". Knowing receipt arises in circumstances where the third party has received trust monies for his or her personal benefit. In *Gold v. Rosenberg,* supra, at para. 41, Iacobucci J. stated:

> **41.** The essence of a knowing receipt claim is that, by receiving the trust property, the defendant has been enriched. Because the property was subject to a trust in favour of the plaintiff, the defendant's enrichment was at the plaintiff's expense. The claim, accordingly, falls within the law of restitution. As Denning J. said in Nelson v. Larholt, [1948] 1 K.B. 339, at p. 343:
>
> > The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution....
>
> Similarly, in Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 3 W.L.R. 64 (P.C.), at p. 70, Lord Nicholls of Birkenhead stated, "Recipient liability is restitution-based". I note that La Forest J. reached a similar conclusion in Citadel, where he described liability in knowing receipt as "receipt-based" liability (at para. 46). Therein lies a fundamental difference between the categories of knowing assistance and knowing receipt. Participation in a fraud underlies liability in cases of knowing assistance; unjust enrichment is

> the essence of a claim in knowing receipt. In Agip (Africa) Ltd., Millett J. distinguished between the two heads of liability (at pp. 292-93):
>
> > Tracing claims and cases of "knowing receipt" are both concerned with rights of priority in relation to property taken by a legal owner for his own benefit; cases of "knowing assistance" are concerned with the furtherance of fraud.

[52] Actual knowledge of the breach of trust by the third party is not required to found liability based upon knowing receipt. Rather constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry) is sufficient: *Citadel General*, supra, at para 48; *Gold v. Rosenberg*, supra, at para. 42 – 53.

2. Garland

[53] As noted, at all material times, Garland was the directing mind of RPS. He was an officer and director from RPS' inception to July 2004. Although he ceased to be an officer or director at that time as a result of the transaction with Matus, he still retained signing authority and control of the day to day operations of RPS. When the sale to Schraibman and Matus fell through in November 2004, and they withdrew from RPS, Garland continued to run the company.

[54] At all material times, Garland knew that moneys received on behalf of Plaintiff and the other condominium customers of RPS were trust funds under the *Condominium Act, 1998* and that the Account RPS opened at the RBC to transact the Plaintiff's business was a trust account.

[55] In his discovery, portions of which were read in by the Plaintiff at trial, Garland admitted that he was aware that there was trust money that had been taken out of trust accounts

in 2003 without authorization for use in RPS' business. He further admitted that he became aware from a discussion he had in February 2004 with Sivaneswaran that trust moneys were specifically being taken from the Account without authorization for use in RPS' business or to repay other clients from whom money had been taken. Not only did Garland take no steps to stop such a practice, it was Sivaneswaran's evidence that he directed it.

[56] The monies received by RPS on behalf of the Plaintiff which were deposited to the Account were at all material times administered in the name of RPS. Garland did not personally administer the monies on behalf of the Plaintiff. Accordingly, Garland cannot be found liable for breach of trust as a trustee de son tort.

[57] Further, the evidence, in my view, does not establish that Garland ever received any of the Plaintiff's monies in his personal capacity. Although Sivaneswaran testified that the monies taken from the Account were used in part to pay the salaries of Garland, his wife and two children as well as personal expenses, in the absence of specific evidence establishing the monies were received by Garland personally, I am not prepared to accept that evidence. While Garland knew about the transfers and permitted them to occur, it was Sivaneswaran, in my view, who effected all of the transfers from the various accounts, including the Account. In the aftermath of what has happened, it is clear that they each blame the other for what has happened.

[58] Accordingly, in order for Garland to be liable to the Plaintiff for breach of trust, the evidence must establish that Garland knowingly participated in the breach. As noted, the Plaintiff must prove that RPS' breach of trust was fraudulent and dishonest and that Garland had actual knowledge of the trust and the breach or was wilfully blind or reckless in respect of it.

[59] Was RPS' breach of trust fraudulent and dishonest? In *Air Canada*, supra, at para.59, Iacobucci J. adopted the following description of fraud and dishonesty in connection with a trustee's breach of trust: "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take."

[60] RPS knew that the monies in the Account were trust monies. By transferring monies from the Account to itself or other clients to cover shortfalls in its business, RPS took a risk to the prejudice of the Plaintiff. Further, given the terms of the Management Agreement, as amended by the November 28, 2002 banking resolution, RPS knew that it had no right to take such risk. Accordingly, I have no hesitation in concluding that RPS' breach of trust in this case was fraudulent and dishonest.

[61] Further, because Garland knew the monies in the Account were trust monies belonging to the Plaintiff and authorized and directed them to be used by RPS to cover shortfalls in other areas of its business in direct contravention of RPS' agreement with the Plaintiff, I find that Garland not only had actual knowledge of RPS' breach of trust but he also enabled the breach of trust to occur.

[62] Accordingly, based on knowing assistance, Garland is personally liable to the Plaintiff as a constructive trustee for breach of trust in the amount of $370,381.47.

3. RBC

[63] The Plaintiff submits that RBC is liable to it for breach of trust as a constructive trustee. Although it has not pleaded such a claim, RBC raises no issue in that regard. The Plaintiff also submits that RBC is liable on the basis of the tort of conversion.

a) Constructive Trustee

[64] There is no evidence that RBC ever assumed the office or functions of trustee in respect of the monies in the Account or administered the monies in the Account on behalf of the Plaintiff. At all times RBC acted as a banker and administered RPS' bank accounts including the Account on behalf of RPS. Accordingly, RBC cannot be liable to the Plaintiff as a trustee de son trot.

[65] Nor in my view can RBC be held liable to the Plaintiff as a constructive trustee based on knowing receipt. As noted, the relationship between RBC and RPS was one of administering RPS' bank accounts, including the Account. There was never any lending or overdraft facility between RPS and RBC. Over the two and a half year period that the Account was operated by RPS, RBC never received or applied any monies from the Account for its own use or benefit.

[66] Receipt or application of trust funds by RBC for its own use or benefit is essential to liability for knowing receipt. In *Citadel General,* supra, at para. 25, LaForest J. stated:

> **25** Liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit; see Agip (Africa) Ltd. v. Jackson, [1990] 1 Ch. 265, aff'd [1992] 4 All E.R. 451 (C.A.); Halsbury's Laws of England, supra, at paras. 595-96; Pettit, supra, at p. 168. As Iacobucci J. wrote in Air Canada v. M & L Travel Ltd., supra, at pp. 810-11, the "knowing receipt" category of liability "requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees". In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:
>
> > The essential characteristic of a recipient . . . is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, if the collecting bank uses the money to reduce or discharge

> the customer's overdraft. In doing so it receives the money for its own benefit. . . . [Footnotes omitted.]
>
> P. J. Millett, "Tracing the Proceeds of Fraud" (1991), 107 L.Q.R. 71, at pp. 82-83.

[67] The third and final way in which RBC can be liable to the Plaintiff for breach of trust is based on "knowing assistance". As already noted, in order for RBC to be liable for breach of trust based on knowing assistance, the Plaintiff must prove that RPS' breach of trust was fraudulent and dishonest, that RBC had actual knowledge of the trust and the breach (or was wilfully blind or reckless to it) and that it participated in it.

[68] As previously discussed, it is my view that RPS' breach of trust in this case was fraudulent and dishonest.

[69] Apart from deemed knowledge of the trust pursuant to s. 115(1) of the *Condominium Act, 1998*, supra, RBC concedes that it had actual knowledge that the Account was a trust account.

[70] It is clear from the evidence that RBC did not have any indication, let alone actual knowledge, of RPS' breach of trust until June, 2005. Ms. Wendy Sprung, the relationship account manager for RPS at RBC, testified that the first time RBC became aware of any issues in respect of the operation of RPS's account relating to the Plaintiff was in June 2005 when RBC was contacted by Mr. Pais on behalf of the Plaintiff.

[71] RPS' bank accounts were operated by RPS and were not monitored by the Bank. The monthly account statements were compiled at the Bank's data centre and sent directly to RPS without Ms. Sprung ever seeing them. In accordance with the provisions of the Financial

Services Agreement between the Bank and RPS, RBC relied on RPS to advise it if there were any mistakes or irregularities in the operation of the Account based on the account statements. At no time prior to June, 2005, did RBC receive any indication that there was any issue or irregularity in respect of the operation of the Account.

[72] The Plaintiff submits that when RBC received the signature cards for the Account that indicated that RPS only had authority to sign cheques up to $100 they should have made reasonable inquiries of RPS and/or the Plaintiff to determine whether RPS had unlimited authority to access the Account through internet banking. By failing to make any such inquiries, RBC must be found to have constructive knowledge of RPS' subsequent breaches of trust. In support of its position, the Plaintiff relies on *A&A Jewellers Ltd. v. Royal Bank of Canada* (2001), 53 O.R. (3d) 97 (C.A.).

[73] *A&A Jewellers* is a knowing receipt case. In that case, RBC had a lending relationship with the trustee companies who committed the breach of trust. Pursuant to that relationship, RBC utilized trust monies from the accounts to repay loans. In this case, as noted, there was no lending relationship between RPS and RBC and RBC never received any trust funds from the Account for its own use or benefit.

[74] Accordingly, whether the signature card and the RPS banking resolution that RBC received at the time that RPS opened the Account were sufficient to give rise to a duty on RBC to inquire whether there were any restrictions on RPS' internet banking need not be determined. Such an inquiry is only relevant to the issue of constructive knowledge which is not sufficient to establish liability for knowing assistance.

[75] The Plaintiff further submits that by throwing the signature cards in a file and not looking at them, RBC was wilfully blind to RPS' breach of trust. It is not accurate to say that RBC simply threw the signature cards in a drawer and never looked at them. Ms. Sprung's evidence is that they were utilized by RBC when someone sought to negotiate a cheque drawn on the Account at a branch of RBC. They were not, however, utilized in respect of internet banking.

[76] Liability for knowing assistance is based on the third party or stranger to the trust participating in the fraudulent and dishonest breach of trust. As stated by Iacobucci J. in *Gold v. Rosenberg*, supra, at para 33, participation implies actual knowledge of the fraud being perpetrated. To the extent, therefore, that wilful blindness can also found liability, it must equate, in my view, to actual knowledge. Negligence or carelessness will not suffice: *Air Canada*, supra at para. 40.

[77] In criminal law, knowledge can be imputed to an accused by wilful blindness. It follows, in my view, because wilful blindness can substitute for actual knowledge in determining liability for knowing assistance, the definition of wilful blindness in the criminal context is applicable. In that regard, the Supreme Court of Canada recently considered the meanings of wilful blindness in *R. v. Briscoe*, [2010] 1 S.C.R. 411. In *Briscoe*, the Court considered whether the doctrine of wilful blindness is applicable in determining the requisite knowledge for murder, either as a principal or as an aider or abettor. Charron J., writing for the Court, stated at paras. 20 to 24:

> **20** In essence, Mr. Briscoe argues that wilful blindness is but a heightened form of recklessness which is inconsistent with the very high *mens rea* standard for murder under s. 229(*a*) of the *Criminal Code*. He argues further that allowing fault for murder, as either a principal or party, to be established by wilful blindness could run afoul of the principle that

"subjective foresight of death" is the minimum standard of fault for murder under s. 7 of the *Canadian Charter of Rights and Freedoms*: *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645. The Court of Appeal rejected these arguments and, in my view, rightly so. As I will explain, wilful blindness, correctly delineated, is distinct from recklessness and involves no departure from the subjective inquiry into the accused's state of mind which must be undertaken to establish an aider or abettor's knowledge.

21 Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"

22 Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in *Sansregret* (at p. 584):

> ... while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry. [Emphasis added.]

23 It is important to keep the concepts of recklessness and wilful blindness separate. Glanville Williams explains the key restriction on the doctrine:

> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in [page425] effect a finding that the defendant intended to cheat the

> administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge. [Emphasis added.]
>
> (*Criminal Law: The General Part* (2nd ed. 1961), at p. 159 (cited in *Sansregret*, at p. 586).)
>
> **24** Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (*Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

[78] The act of not looking at the signature cards does not, by itself, come close in my view to establishing wilful blindness on the part of RBC such that it can be said that RBC had actual knowledge of RPS' breach of trust. To paraphrase the above quote from Glanville Williams in *Briscoe*, supra, in order to find that RBC was wilfully blind to RPS' breach of trust, the evidence would have to establish that RBC suspected that RPS was using the Account in breach of trust; that given the way the Account had been set up and was being used, such a breach was probable; and RBC refrained from obtaining confirmation of its suspicion in order to be able to deny knowledge.

[79] As noted, prior to June 3, 2005, when RBC received Mr. Pais' letter, there is no evidence it had any knowledge of facts that would cause it to suspect that RPS's operation of the Account was in breach of trust.

[80] RBC knew that RPS' business was administering property on behalf of clients, some of whom were condominiums. There is no evidence that prior to the Account being opened in

November 2002, RBC had any information of any concerns or impropriety in the way RPS conducted its business or operated its bank accounts for itself or its clients. RPS had opened current accounts both for its own business and for its clients' business in its name at RPC. Some of those account involved trust funds. There was therefore nothing unusual in the manner in which RPS opened the Account from RBC's perspective or that, even though it was for the Plaintiff's business, it was in RPS' name and had access to internet banking.

[81] Further, there is no evidence that at any time during the operation of the Account, RBC had notice of any issues or concerns in respect of its operation or the operation of any other RPS' bank account that may have given rise to a suspicion by RBC of breach of trust by RPS.

[82] There is no evidence that any of the cheques written on the Account were not signed in accordance with the signing authority provided to RBC. While there were clearly internet transfers from time to time, no signatures were required to carry them out. From RBC's viewpoint, the transfers could have been carried out by the Plaintiff or by RPS with authority. In the absence of a duty to inquire, RBC has no obligation to monitor the Account: *Bank Act*, S.C. 1991, c. 46, s. 437(3) and (4); *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363 (C.A.).

[83] Accordingly, on the evidence, I am unable to find that RBC was wilfully blind or "deliberately ignorant" to RPS' breach of trust.

[84] Similarly, there no evidence that establishes RBC was reckless to the extent that it would amount to actual knowledge of RPS' breach of trust.

[85] In the absence therefore of actual knowledge, wilful blindness or recklessness, RBC cannot be held liable to the Plaintiff for breach of trust on the basis on knowing assistance.

b) Conversion

[86] Nor, in my view, can the Plaintiff's claim against RBC for conversion succeed. In *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312 (S.C.C.), Major J., on behalf of the Court, noted at para. 10 that a lending institution's liability in conversion is predicated upon a finding both that payment upon a cheque was made to someone other than the rightful holder and that such payment was not authorized by the rightful holder. Neither circumstance exists in this case.

[87] Accordingly, for the above reasons, it is my view that the Plaintiff's action against RBC fails and must be dismissed.

[88] Notwithstanding I have dismissed the Plaintiff's claim against RBC, in my view the Plaintiff's damages are the amount of its loss, which, as earlier noted, is $370,381.47.

Conclusion

[89] For the reasons given, judgment shall issue for the Plaintiff in the amount of $370,381.47 against RPS for breach of contract, conversion and breach of trust and against Garland for a similar amount for breach of trust.

[90] The Plaintiff is entitled to pre-judgment interest from RPS and Garland on $370,381.47 from November 30, 2004 to the date hereof at the rate provided by the *Courts of Justice Act*.

[91] The Plaintiff's action against RBC is dismissed in its entirety. As a result, RBC's cross-claim against Sivaneswaran and its third party action against the Plaintiff's officers and directors during the material time are also dismissed.

[92] In the event that the parties are unable to agree on costs within 30 days from the date of this judgment, the Plaintiff and RBC shall file a brief written submission of no more than two pages, including a costs outline for the action, within five days following the failure to agree or 30 days, whichever comes first. All of the parties, including Garland, shall have a further seven days to provide reply submissions of no more than two pages, excluding a costs outline, if required.

L. A. Pattillo J.

Released: January 19, 2011

CITATION: Y.R.C.C. No. 890 v. RPS Resource Property Ltd., 2011 ONSC 732
DATE: 20110119
DOCKET: 05-CV-295767PD2

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

YORK REGION CONDOMINIUM CORPORATION NO. NO. 890

Plaintiff

- and –

RPS RESOURCE PROPERTY SERVICES LTD., WILLIAM GARLAND, KANDIAH SIVANESWARAN, BRETT MATUS, ERIC SCHRAIBMAN, RICHARD TAYLOR, JAMES WILSON, W.H. BOSLEY & CO. LTD. AND ROYAL BANK OF CANADA

Defendants

REASONS FOR JUDGMENT

PATTILLO J.

Released: January 19, 2011