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FIDUCIARY DUTIES
Obligations of Loyalty and Faithfulness

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This loose-leaf service offers readers a wide-ranging, up-to-date analysis of fiduciary relationships in Canada. The publication's comprehensive coverage of fiduciary responsibility is organized into four parts: (1) Overview of Fiduciary Law; (2) Fiduciary Relationships; (3) Duties of Faithfulness; and (4) Consequences of a Breach of Faithfulness. The publication also provides readers with detailed case law analysis, valuable commentary, summaries of remedies awarded for breaches of fiduciary obligation, and other value-added reference tools. The publication includes coverage of many different types of established fiduciary relationships including directors/officers, key employees, executors and administrators, trustees, accountants, insurance advisers, lawyers, physicians, spouses, and others. The updatable loose-leaf format ensures currency.

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What's New in this Update:

New case law and commentary, including the following recent decisions:

- **Accessory Liability – Knowing Assistance –** Justice van Rensburg acknowledged that a fraud occurred. However, Justice Rensburg noted that Sase chose not to bring legal action against the fraudster but instead sued Langdon, a stranger to the fraud. Sase sought a return of its money by way of a proprietary remedy but failed to show that its money was used to buy and improve the property except for the admitted amount. While Sase submitted that it was enough to show that Sase funds went into Joint Account 82, Sase did not seek a constructive trust over the account for good reason because no money remained in the account. In the circumstances, the application judge made no error in failing to impose a constructive trust over the Property proceeds to avoid offending the principle of good conscience. Justice van Rensburg agreed that the evidence supported the conclusion that Showers' fraudulent actions were in breach of a fiduciary duty he owed to Sase. Justice van Rensburg would have no hesitation in concluding that this element of the knowing receipt and knowing assistance claims were made out on the evidence. However, the application judge's conclusion that the appellant had not tendered sufficient evidence to establish that Showers owed his employer a fiduciary duty was immaterial to the outcome of the appeal. The application judge rejected Sase's claims for knowing receipt and knowing assistance because the other elements of those claims, namely, knowledge of the duty and the breach, receipt of its proceeds and assistance in the breach had not been made out. While Sase could have tried to trace its funds into the joint accounts and then out again, its tracing stopped at the accounts, which were emptied by the time Sase obtained the Norwich order. Justice van Rensburg concluded that Sase's tracing was incomplete. By contrast, in explaining the source of funds used for the purchase and renovation of the Property, Langdon provided detailed evidence, showing the original source of payments she had arranged and step-by-step how the transfer of funds occurred. In doing so, she identified non-Sase sources, described by the application judge as payments that were funded from independent sources that she arranged, and which were not connected with the funds allegedly stolen by Showers. Justice van Rensburg saw no error in the application judge's articulation of the test for tracing funds, and in her application of the test to the evidence: *Sase Aggregate Ltd. v. Langdon*, 2023 CarswellOnt 12867, 2023 ONCA 554 (Ont. C.A.).

- **Remedies for Fiduciary Breach – Compensation for Actual Losses –** Justice Iyer explained that what Skycope lost as a result of the defendants' wrongdoing was its competitive advantage. The evidence showed that Bluvec was able to bring its product to market faster than it could have without the head start it got from using the Skycope Code. Justice Iyer noted that the "springboard doctrine" recognizes this kind of damage. Where a defendant has had a head start by misusing a plaintiff's confidential information, the court will determine the "springboard period". That period commences when the defendant started misusing the confidential information in a way that was capable of harming the plaintiff and ends when the defendant would have been able to compete with the plaintiff without that unfair advantage. The court has wide discretion to craft an appropriate remedy. Justice Iyer noted that it took Bluvec about six months to develop its product to a point that it could detect and jam four drone models, whereas it took Skycope about 17 months to decode and jam ten drone models. Justice Iyer concluded that Bluvec's misuse of the Skycope Code gave it a head start of nine months. Justice Iyer explained that the real difficulty concerned quantification. Justice Iyer agreed that there was no evidence that Skycope suffered any financial loss at all. While, it could have led evidence within its possession to quantify that loss, such as an expert opinion based on sales of its own product, it simply complained about the defendants' lack of disclosure. There was no evidence that Skycope ever sold anything. It was therefore not possible to calculate damages based on Skycope's losses. However, a disgorgement remedy might be appropriate. Such a remedy focuses on the benefits obtained by the wrongdoer rather than the damage to the plaintiff and is particularly appropriate where there has been a breach of fiduciary duty. The only evidence of the defendants' financial gain based on misuse of confidential information was Bluvec's sale to Lizheng of the direction-finding function based on the MUSIC algorithm for $800,000. Justice Iyer awarded that amount to Skycope in general damages: *Skycope Technologies Inc. v. Jia*, 2023 CarswellBC 2210, 2023 BCSC 1288 (B.C.S.C.).

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