See para. 74

Case Name:

Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.

Between
Commercial Union Life Assurance Company of Canada, plaintiff (respondent/appellant by cross-appeal), and John Ingle Insurance Group Inc., JIIG Holdings Inc., Ingle Insurance Brokers Inc., HSP Direct Health Insurance Brokers Inc., M.H.I. Brokers Ltd., Insurance Claims Management Systems Inc., John Dwight Ingle, Steven Michael Overgaard, and ICMS Canada Inc., defendants (appellants/respondents by cross-appeal)

[2002] O.J. No. 3200

61 O.R. (3d) 296

217 D.L.R. (4th) 178

162 O.A.C. 203

50 C.C.L.I. (3d) 6

117 A.C.W.S. (3d) 519

Docket No. C35761

Ontario Court of Appeal
Toronto, Ontario

Weiler, Abella and Goudge JJ.A.

Heard: May 6 and 7, 2002.
Judgment: August 22, 2002.

(81 paras.)

On appeal from the five orders of Justice David G. Stinson contained in his reasons for judgment dated September 20, 2000, reported at [2000] O.J. No. 3289 (S.C.J.) (Quicklaw), 22 C.C.L.I. (3d) 221, and his supplementary reasons dated January 9, 2001, reported at [2001] O.J. No. 65 (S.C.J.) (Quicklaw), 26 C.C.L.I. (3d) 305.

Counsel:

Sandra Antoniani, R. Nairn Waterman and Clive Elkin, for the plaintiff (respondent/appellant by cross-appeal).
Alan J. Lenczner, Q.C., for the defendant (appellants/respondents by cross-appeal) JIIG Holdings Inc., Steven Michael Overgaard and ICMS Canada Inc.

The judgment of the Court was delivered by

1 **WEILER J.A.**:-- The only appellant on whose behalf submissions were made is Steven M. Overgaard ("Overgaard"). As against all other appellants, therefore, the appeal is dismissed. The issue on this appeal is whether the trial judge erred in holding that Overgaard, as the directing mind of the appellant JIIG Holdings Inc. ("JIIG"), is liable for "knowing assistance of breach of a trust".

2 For a director of a company to be held personally liable as a "stranger" under the "knowing assistance" head of liability, three elements are required: there must be an express trust, a sufficiently grave breach of that trust and knowledge by the stranger that the trust has been breached. The trust may be created by statute or by contract. If the trust is imposed by statute, the director will be deemed to know that a trust existed. If the trust was created by contract, then whether the director knew of the trust will depend on his or her familiarity or involvement with the contract. In addition to actual knowledge of a breach of trust, recklessness or wilful blindness will also suffice: Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787 at 811. Constructive knowledge will not suffice: Air Canada, supra, at 812; and Citadel General Assurance Co. v. Lloyds Bank of Canada, [1997] 3 S.C.R. 805 at 820.

3 With respect to the second element - breach of trust - it is the corporate trustee's actions that must be examined. The director's conduct is scrutinized only in relation to the third element - knowledge of the breach and of the trust's existence: Air Canada, supra, at p. 811-12, 825-26. One line of cases requires participation by the stranger in the fraudulent and dishonest design of the trustee to breach the trust: Air Canada, supra, at 812. Under this line of cases, a director would have to participate in a corporate trustee's fraudulent and dishonest design before the director could be held liable for knowing assistance. See, e.g., MacDonald v. Hauer (1976), 72 D.L.R. (3d) 110 (Sask. C.A.). A second line of authority holds that a director who is the controlling or directing mind of a corporate trustee can be liable for an innocent or negligent breach of trust by the

corporation if the director knowingly assisted in the breach of trust. Pursuant to these authorities, proof of fraud and dishonesty is not required. See, e.g., Trilec Installations Ltd. v. Bastion Construction Ltd. (1982), 135 D.L.R. (3d) 766 (B.C.C.A.).

4 In Air Canada, supra, at 826, Iacobucci J. characterized the nature of the breach of trust required to impose liability on a stranger for knowing assistance. He held: "[T]he taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability" and is consistent with both lines of authority. Such a standard, he held, accords with the "basic rationale" for the imposition of personal liability, "namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability." He also commented that the third element - knowledge by the director of the corporation's breach of trust - will generally not be a difficult hurdle to overcome in the case of a closely-held corporation. The director, if active, will usually have knowledge of all of the actions of a closely-held corporate trustee. See Air Canada, supra, at 827. The receipt of a personal benefit by a director is a factor that, when considered with other evidence, may permit an inference of knowledge of a wrongful risk: Air Canada, supra, at 812 and 827-28.

FACTS

Ingle and MHI's Relationship with Commercial Union

5 For many years, beginning in 1946, the Ingle family carried on business as insurance agents and brokers under the name M.H.I. Brokers Ltd. ("MHI"), specializing in travel health insurance. The Ingle group of companies, including MHI, designed insurance policies for travelers, created and maintained a network of insurance brokers and agents, managed claims processing and sold these products directly to consumers. It established a significant "book of business" that was, at the relevant times, underwritten by Commercial Union ("CU"), under the terms of a 1989 Agreement.

6 Initially, the relationship was profitable for both parties. The Agreement provided a methodology for sharing the underwriting profits established by the Agreement. Thus, 70 percent of the Retrospective Earned Surplus ("RES") for a contract year was to be paid out to MHI, with the balance retained by CU. RES is a formula for determining the sharing of underwriting profit on claims experience; it is a backward-looking snapshot of one year of the business, using opening and closing reserves for future claims, with the balance of the net earned premium contributing to the surplus or deficit for that year. To calculate RES for a given year, the actual claims experience is compared to what was the expected claims experience. The reserves are set based on experience and actuarial know-how. The parties agreed to arrive at a claims cost for a contract year by adding total claims paid, plus a reserve for claims reported but not paid, and claims incurred but not reported. Subtracted from that total is the amount of the prior year's reserve, if any. Working from the claims cost and specific ratios, a figure for RES would be determined and shared between CU and MHI. If a deficit was not eliminated in the subsequent year, it was to be carried forward and would reduce further earned surpluses until it was eliminated.

Losses: Steven Overgaard and JIIG

7 The relationship between the parties faltered after the death of the companies' founder, John Ingle Sr., in 1992. At that time, changes to reimbursement rates under provincial health plans for out-of-province medical treatment and the sinking value of the Canadian dollar relative to the U.S. dollar made the travel health insurance business precarious. These factors resulted in a $1.18 million underwriting deficit in calendar 1992, followed by a deficit of more than $7 million in 1993.

8 As part of the effort to turn the situation around, the Ingle group incorporated Florida-based Insurance Claims Management System Inc. and a Canadian subsidiary, ICMS Canada Inc. ("ICMS") for the purpose of reducing claims costs in the United States by managing the care of insureds. Among other things, ICMS was responsible for arranging transportation to Canada for persons receiving treatment in Florida so that those persons could be treated under their respective (lower cost) provincial health plans.

9 In addition, in the summer of 1993, the Ingle family members who were then running the business recruited Overgaard, a family friend and corporate fixer (but who had no experience in the insurance business), initially as a lender and ultimately as a manager of the business, and agreed to make him a one-third owner of the enterprise. A new corporation called John Ingle Insurance Group Inc. (now known as JIIG Holdings Inc.) ("JIIG") was incorporated in July 1993. Overgaard was one of the directors and also chairman and chief executive officer. Overgaard acquired majority voting and operational control of JIIG and the Ingle book of business by early 1994, through his holding company, Whitemount Holdings Inc., taking over the business formerly operated by MHI.

10 JIIG itself was not a licensed insurance agent or broker. However, a subsidiary corporation created in 1993, Ingle Insurance Brokers Inc. ("IIBI") (now known as HSP Direct Health Insurance Brokers Inc.), was a licensed entity. In effect, all of the Ingle companies (JIIG, IIBI, ICMS) were operated as a unified whole, under Overgaard's control.

JIGG and CU Negotiate New Arrangements

11 Between 1994 and 1997, JIIG and CU negotiated a number of revisions to their relationship. In light of the underwriting losses suffered by CU in 1992 and 1993, it was agreed that CU should retain the entire 1994 underwriting profit. A Memorandum of Understanding ("MOU"), signed in April 1995, addressed the issue of RES sharing. It provided that JIIG would receive 33.3 percent of any RES surplus in 1995, and that between 1996 and 1999, 50 percent of any surplus would be retained by CU, with 25 percent to JIIG and 25 percent to ICMS. For the year 2000 and beyond, it would be split one-third to each of the parties.

12 Another MOU, effective January 1996, contained a method of sharing surplus RES that was the same as in the April 1995 document. In response to Overgaard's concerns that the RES method

of reporting financial performance did not permit sufficiently rapid distribution of underwriting profits, it also provided for the development of a "best estimate" (or Accumulated Surplus Available for Distribution) report in parallel to the RES reports for the monitoring of financial performance. Such a formula was more directly related to actual claims results and a claim-by-claim analysis that could permit a more rapid distribution of underwriting profits.

13 From JIIG's perspective, many outstanding issues between the parties needed to be resolved. These included Overgaard's desire for the implementation of ASAD profit calculation, and three monetary/accounting issues arising from JIIG's post-1993 involvement in the business - known as the "three skunks" (none of which are significant for the purposes of these appeals). Discussions between Overgaard and Frank Crowley, the president of CU, resulted in a handwritten agreement in January 1997. It provided, inter alia, that 1) a new operating agreement was to be finalized and put into place by January 1997, incorporating an underwriting profit sharing formula based on the ASAD method; 2) CU would make a payment of $800,000 to JIIG to settle the "three skunks"; and 3) CU would make a payment to JIIG in regard to surplus RES. CU in fact made these payments to JIIG. However, the parties never reached agreement on a new operating agreement based on ASAD. In the final analysis, the payments that CU made to JIIG in respect of the 1996 profit share totaled slightly less than 50 percent of the annual profit, despite the fact that MOU in place at the time called for a 50-50 division.

Overgaard Changes the Marketing Structure

14 At the time JIIG took over control of the operation, it became the party responsible for printing brochures, overseeing the distribution network, collecting premium revenues, remitting net premium payments to CU, overseeing and adjusting claims and making recommendations regarding claims payments to CU and collecting "recoveries" from primary insurers. Overgaard immediately made changes with respect to the marketing and distribution functions. MHI had formerly acted as both a direct seller (through advertising, sales offices, airport kiosks, etc.) and as a distributor (through other insurance agents, brokers and travel agents).

15 In 1994, Overgaard decided to close the direct selling operations because such efforts were in competition with the sales activities of the other agents and brokers, i.e., they created a built-in disincentive to increase sales through the distribution network. He acquired separate retail-like space for the licensed broker, IIBI, expanded the broker/agent distribution network and negotiated new agency agreements by which these parties were required to hold any premiums they collected from consumers in trust for JIIG. Alternatively, consumers could pay the premium directly to JIIG, either by a cheque payable to "John Ingle Insurance" to be forwarded by the agent to JIIG or by pre-authorized direct payments. Promotional brochures also were changed to include the mention of JIIG, ICMS and IIBI, and sometimes MHI and MHI's French name. Some of the new brochures merely described the relevant Ingle policies and invited the consumer to inquire of his or her own broker/agent in order to obtain coverage. Other brochures included contact information, such toll-free telephone numbers or mailing addresses, through which consumers could obtain coverage

directly.

16 Under Overgaard's control, JIIG also created a website that provided promotional information, similar to the brochures, as well as an area that was accessible only to existing policyholders, to facilitate renewal or extension of existing coverage. The website invited consumers to purchase Ingle products by telephone, fax, Internet or in person by visiting the Ingle office on University Avenue in Toronto. JIIG arranged its affairs such that any "walk-in" sales at that office would be arranged through a representative of IIBI, rather than direct sales through JIIG or a related company.

Unresolved Business and the Withholding of Premiums From CU

17 The failure to reach agreement on implementation of ASAD frustrated Overgaard. He believed that JIIG was owed additional money from CU, on three basis. First, JIIG calculated it would receive a greater amount of profit if the ASAD formula was in place; second, it calculated that CU was charging more for premium taxes and industry fees than it had actually spent in the period 1994-96; and third, JIIG made specific claims in respect of certain products and policies. In particular, it wanted premium income from an Ingle insurance plan (known as FLACC) included in the profit calculation; and it wanted to be compensated for an amount charged to the profit pool arising from the $99,000 claim of one of CU's former employees who suffered a heart attack while he was in Florida (Dawson). These amounts totaled more than $1.4 million.

18 In August 1997, JIIG sent CU an invoice for this amount, and threatened to withhold $500,000 in premium remittance. Under the 1989 Agreement, such remittances were due on the 45th day following the end of the month in which they were collected, net of commissions and agreed-upon deductions such as ICMS fees. Following a series of meetings, JIIG remitted the entire premium amount (12 days late), in exchange for a cheque for $500,000 on account, pending resolution of the issues between the parties. On September 16, 1997, CU paid a further $200,000 to JIIG for "surplus sharing on account."

19 However, in October 1997, Overgaard withheld $150,000 from premium remittances to CU, as an "on-account payment" for JIIG's claims with respect to the taxes and fees, and the Dawson invoices. JIIG subsequently withheld a further $387,605.17 in premiums from November 1997 to February 1998 in respect of the outstanding invoices. At that time, CU gave six-months' written notice of termination of the relationship, in accordance with the 1989 Agreement. Following its receipt of that notice, JIIG withheld virtually all of the CU premiums, totaling $2,620,338.39. For its part, CU considered the withholding of premium remittances by JIIG to be unauthorized, a fundamental breach of the parties' longstanding arrangements and a breach of JIIG's obligations under the Registered Insurance Brokers Act, R.S.O. 1990 c. R.19. CU gave written notice of its position, through its solicitors, on December 23, 1997. On February 5, 1998, CU's solicitors served a notice referring the disputed issues, including the withheld premiums, to arbitration. On the same day, JIIG sent to CU additional invoices, claiming $413,341.50 in profit sharing funds, calculated

on the ASAD basis.

The End of the Relationship and Litigation

20 In December 1997, JIIG arranged to purchase a separate insurance company to underwrite the Ingle book of insurance, which was renamed Ingle Life and Health Assurance Company. In mid-March of 1998, JIIG ceased using CU as an underwriter.

21 An attempt by CU to resolve the parties' disputes by arbitration was unsuccessful. CU commenced a proceeding by way of notice of application in June 1998. Beaulieu J. heard the application in October 1998, concluded the parties' dispute would have to go to trial and ordered that the proceeding be converted to an action.

22 In its statement of claim, CU sought a declaration that the defendants were holding the premiums and the recoveries in trust for CU and an order requiring the defendants to account for and pay to CU the net premiums and recoveries. CU also sought damages for breach of contract, breach of trust and conversion, as well as punitive damages. CU asserted that the parties' relationship was at all times governed by the 1989 Agreement, as amended by the MOUs, that the 1997 payments to JIIG were payments on account of future surplus sharing, and that JIIG's withholding of premiums was a breach of trust in which Overgaard and John Ingle (Jr.) personally participated.

23 In their statement of defence and counterclaim, the defendants other than MHI contended that the 1989 Agreement had no application the parties' relationship after 1993 and that all parties understood that MHI was no longer part of the business. With the involvement of JIIG, they asserted, there was an entirely new arrangement for sharing the profits on the sale of travel health insurance policies, which changed from time to time for the period 1994-97. Under the "new arrangement", they said CU had not paid to JIIG all of its share of the profits due and further fees were due to ICMS for the period ending August 31, 1998. While the defendants admitted that JIIG has set-off amounts owing to it and ICMS against payments to which CU would otherwise be entitled, they denied that the funds are the subject of any trust. Finally, they argued that CU owed substantially more to JIIG/ICMS than the amount of payments against which JIIG had exercised the right of setoff and claimed the balance due to them.

ISSUES AND ANALYSIS

24 I turn now to the issues in this case:

1. Was JIIG an express trustee for CU with respect to the premiums it collected a) pursuant to a statutory trust; or b) at common law because the requirements for a trust were met?
2. If JIIG was a trustee, it is not disputed that it breached its duty as trustee. The issue is, however, whether Overgaard, as the directing mind of JIIG,

took a "knowingly wrongful risk" resulting in prejudice to CU sufficient to ground personal liability; and

3. The JIIG counterclaim concerning surplus sharing.

1. Was JIIG an express trustee for CU?

25 The trial judge found that JIIG held premiums it collected in trust for CU. He did so on two basis: 1) pursuant to an express trust at common law; and 2) on the basis that a statutory trust was created by s. 402(1) of the Insurance Act, R.S.O. 1990, c. I.8, deeming the insurance premiums to be held in trust. The appellant submits that the trial judge erred on both basis. For the reasons that follow, I would reject the appellant's submissions.

26 I shall first deal with whether there was a statutory trust.

Section 402(1) of The Insurance Act

27 For ease of reference, s. 402(1) is produced below:

Section 402(1) provides:

> 402(1) An agent or broker who acts in negotiating, or renewing or continuing a contract of insurance, other than life insurance, with a licensed insurer and who receives any money or substitute for money as a premium for such a contract from the insured, shall be deemed to hold such premium in trust for the insurer, and if, if the agent or broker fails to pay the premium over to the insurer within 15 days after written demand made by the agent or broker therefor, less the commission of the agent or broker and any deductions to which by the written consent of the company, the agent or broker is entitled, such failure is proof, in the absence of evidence to the contrary, that the agent or broker has used or applied the premium for purpose other than paying over to the insurer.

Statutory Trust

28 In support of its submission that the premiums collected by JIIG were not held in trust for CU, the appellant advances three arguments.

(i) Section 402 deems premiums to be trust funds in the hands of licensed agents only, not unlicensed agents;

(ii) JIIG was not performing functions that brought it within the definition of agent in the Insurance Act; and

(iii) CU is estopped from taking the position that JIIG is an agent under the Act.

(i) Section 402 deems premiums to be trust funds in the hands of licensed agents only, not unlicensed agents

29 The appellant submits that the Insurance Act applies only to those agents who have been granted licenses.

30 In support of its submission that the trial judge erred in concluding that s. 402 applies to unlicensed as well as licensed agents, the appellant relies on the decision of Sharpe J. in Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank, [1998] O.J. No. 1273 (Gen. Div.) (Quicklaw).

31 In that case, Guardall Administrative Services, a "third party administrator", contracted with a number of insurance companies, including Transamerica, to secure distributors for a form of credit insurance and authorized Guardall to nominate agents, since Guardall was not a licensed agent. Among other things, Guardall received premiums from insureds and was required by a term of its contract to submit these to the insurance company. The agreement did not provide that the premiums were to be held in trust. Although Guardall appointed Paul Michael Lane Insurance as its licensed agent, it was difficult to determine what Lane did. Guardall and not Lane carried out the day-to-day duties involved in the promotion, sale and administration of Transamerica policies without Lane's assistance. Guardall set up a banking arrangement in which it deposited unsegregated premiums funds into an account that could be used for any purpose. Guardall defaulted in making substantial payments to the plaintiff insurers on account of insurance premiums and became insolvent. Transamerica claimed against the bank, inter alia, on the basis that the premium funds were impressed with an express, limited or constructive trust in Transamerica's favour and that the bank was liable for breach of trust. Sharpe J. held that there was no evidence of any intention between the parties that the funds were to be held as trust funds. Sharpe J. also considered whether Guardall was subject to a statutory trust pursuant to s. 402(1) and held, in the circumstances, that, as an unlicensed agent, it was not.

32 On appeal, (1999), 44 O.R. (3d) 97 (C.A.), Osborne J.A. held at 113 that the insurers provided some admissible evidence that, consistent with industry practice, the premiums represented trust funds and ordered the trial of an issue as to whether there was an intention that the premiums be held as trust funds. Osborne J.A. also commented on the issue of whether Guardall was a deemed to hold the premiums in trust pursuant to s. 402. He stated at p. 116:

> The motions judge ... concluded that the agent' referred to in s. 402(1) had to be licensed, notwithstanding the fact that the word licensed does not appear in s. 402(1) to qualify agent'. He also found that the insurance contracts in issue came within the Insurance Act definition of life insurance and, therefore, s. 402 did not apply.

33 Whether s. 402(1) applied to create a statutory trust with respect to unlicensed agents was a question of law that could be determined on summary application if it was the only issue for trial.

However, because there was a genuine issue for trial as to whether an express trust had been created, the existence of a statutory trust was not the only issue for trial and, accordingly, Osborne J.A. held that summary judgment should not be granted on the statutory trust issue.

34 Sharpe J. considered s. 402(1) in light of ss. 393(23) and 401 of the Act. Section 393(23) provides that:

> 393(23) Every person who assumes to act as an agent without the licence required by this Section, although the person's licence as such is suspended, is guilty of an offence.

Section 401 provides that:

> 401. A person who, not deemed to be licensed as an agent or adjuster, represents or holds himself, herself or itself out to the public as being such an agent or insurance adjuster, or as being engaged in the insurance business by means of advertisements, cards, circulars, letterheads, signs or other methods, or, deemed to be licensed as such agent or adjuster, advertises as what aforesaid or carries on such business in any other name in that state of the licence is guilty of an offence.

Finally, s. 403(1) provides as follows:

> 403(1). No insurer, and no officer, employee or agent thereof, and no broker, shall directly or indirectly pay or allow, or agree to pay or allow, compensation or anything of value to any person for placing or negotiating insurance on lives, property or interests in Ontario, or negotiating the continuance or renewal thereof, or attempting so to do, who, at the date thereof, is not an agent or broker and whoever contravenes this subsection is guilty of an offence. S.O. 1994, c. 11, s. 342, in force February 1, 1995 (O. Gaz. 1995 p. 157).

35 In commenting on the interplay of these sections, Sharpe J., wrote at para. 41:

> Assuming that GAS played the role of "agent or broker ... negotiating" insurance within the meaning of section 402(1), I fail to see how the plaintiffs can claim the benefit of the protection of the trust fund provisions of that section. *Although Section 402(1) does not explicitly require that the agent be a licensed agent, the very activity relied on to bring GAS within the scope of Section 402(1) is by virtue of Sections 393(23) and 401 of the same statute illegal unless conducted by a licensed agent. In my view, the Insurance Act must be read as a coherent and consistent whole*. Having chosen to satisfy the regulatory requirements of the Act by naming Lane as their agent, it is not open to the plaintiffs now to shift their ground and rely on protective provisions of the same Act relating to agents with respect to the activities of an entity they knew could

not legally act as their agent for the purposes of the Act. [Emphasis added.]

36 It is apparent that, in making the above comments, Sharpe J. was primarily concerned with whether an insurance company should be estopped from asserting that an entity it has treated as an agent is not an agent. This case is not as straightforward as the situation facing Sharpe J. in Transamerica, supra. CU does not seek to deny the existence of an agency relationship. Crowley, the representative of CU, testified that, in effect, he continued to deal with the Ingle organization on the basis that he was satisfied that it would continue to comply with all relevant licensing requirements. MHI maintained its licence and IIBI later obtained one. While CU's direct dealings during 1994-98 were all with JIIG, it was on the understanding that the insurance business was being conducted in accordance with the licensing requirements of the Act. Contrary to the appellant's submission, this is not a case like Transamerica.

37 JIIG's status as an unlicensed agent/administrator would not exclude it from the section that imposes the statutory trust, the trial judge held. He observed that the word "agent" in the Insurance Act does not seem to be used in an entirely consistent manner. In some sections, such as s. 403, the word "agent" must be read as referring to a licensed agent in order for the section to make sense. That section prohibits the payment of compensation to anyone who negotiates insurance who is not an agent or broker. He held that that section can only refer to a licensed agent or broker. But the specific functions outlined in the definition section make it clear that characterization as an agent is function-based as opposed to licence-based. The Act has one reference to "licensed agent" in s. 400(5), which prohibits amalgamation by non-residents. By this reference, he held, it is clear the Legislature did not intend all references to "agent" to be read as "licensed agent."

38 To accept JIIG's approach, he concluded, would mean that if an agent's licence is suspended or lapses, any premiums subsequently received by that party would cease to be held in trust for the benefit of the insurer. That would be an undesirable result. Also, under that analysis, an unlicensed agent would actually be in a better position than a licensed one. He or she could commingle premium funds or use them for his or her own purposes, while a licensed agent would be in breach of trust for those same actions. The insurer would be unable to trace misappropriated funds based on the statutory trust that would be imposed upon a licensed agent. While the Insurance Act as a whole envisions a regime that is dominated by licensed agents, the trial judge concluded that it would be illogical if the application of s. 402 depended on the "agent's" status as licensed or not. Its purpose, he said, is to protect the insurer's money. Thus, he held that s. 402 imposes a statutory trust in this case.

39 Stinson J. also concluded that CU should not be precluded from relying on s. 402 because it paid compensation to JIIG, apparently in violation of s. 403.

40 Even assuming that CU breached s. 403, he held, it would not negate the existence of the statutory trust under s. 402(1). It would make no sense to conclude that the effect of a violation of s. 403 is to dissolve the trust or put the trust funds out of the beneficiary's reach. CU would therefore

not be precluded from relying on the statutory trust.

41 I agree with these comments of Stinson J. The legislative intent of the trust provisions in the Insurance Act is to protect the public. Agents and brokers are required, primarily because they handle premiums, to hold them as trust funds. Premiums are for the ultimate benefit of the policyholders. Section 394 aims to prevent parties from contracting out of the statutory deeming provision. In essence, the licensing regime was designed to prevent exactly what happened here - the failure of the premiums to flow from the insured policyholders to the insurer who is at risk. To interpret this section as referring only to licensed agents would be to unduly restrict the ambit of a section that is remedial and is meant to protect the public.

42 I therefore conclude that, as used in s. 402, "agent" encompasses both licensed and unlicensed agents.

(ii) JIIG was not performing functions that brought it within the definition of agent in the Insurance Act

43 The relevant portion of the definition of agent in s. 1 the Insurance Act is as follows:

> "agent" means a person who, for compensation, commission or any other thing of value,
>
> (a) solicits insurance on behalf of an insurer who has appointed the person to act as the agent of such insurer or on behalf of the Facility Association under the Compulsory Automobile Insurance Act, or
> (b) solicits insurance on behalf of an insurer or transmits, for a person other than himself, herself or itself, an application for, or a policy of insurance to or from such insurer, or offers or assumes to act in the negotiation of such insurance or in negotiating its continuance or renewal with such insurer,
>
> and who is not a member of the Registered Insurance Brokers of Ontario nor a person acting under the authority of subsection 393(16), (17) or (18);

44 The trial judge held that the interpretation of "agent" in s. 402 of the Insurance Act required a functional definition that depended on an analysis of the functions that JIIG performed. The questions were whether JIIG could be found to have "solicited" insurance, "transmitted" policies or "negotiated" insurance. The definition of agency in the Act, he said, is limited and "pinpoints the requisite functions" and is reflective of an "intention to circumscribe the category."

45 JIIG, he held, did not "solicit insurance" by distributing brochures to licensed brokers and

agents, travel agencies and other businesses. Rather, JIIG established an elaborate system in an effort to comply with the Act and to ensure that any sale of insurance "somehow involved a licensed person." For example, if a customer called JIIG directly, one of JIIG's own licensed agents, such as MHI (later IIBI) was arranged to be the licensed agent at least nominally involved in the sale. Solicitation of insurance only began or occurred when the potential customer received the brochure from the licensed agent or broker. However, it established a website that created "direct contact" between an agent and potential customers (the general public) to buy Ingle products by phone, fax, Internet or in person at JIIG's University Avenue offices. JIIG effectively removed the system of interposing a licensed agent between itself and the customer in the solicitation process. By doing so, JIIG "crossed the line" into soliciting insurance.

46 The trial judge noted that the definition of "agent" also includes someone who "transmits, to or from an insurer, an application for insurance or a policy of insurance, for a person other than himself, herself or itself." He found that JIIG did not act as a unique type of conduit in contrast to other agents. While it did not issue the policies itself, clearly CU conveyed to JIIG the approved content of those policies at some point. CU originally decided what risks it was willing to underwrite and whom it would insure. JIIG had pre-authorization to issue certain policies but some kind of transmittal had to underlie that authorization. Indeed, JIIG still transmitted the policy for CU and then forwarded the premiums to CU, which had the right to request the application from JIIG at any time, although there was no evidence that it ever made such a request.

47 Moreover, he held, the policy of s. 402(1) is to protect insurers and to guarantee that the premium moneys for the policies they underwrite make their way back to them, thus protecting the financial integrity of the industry. Thus, there is no policy-based reason why the insurer should be denied the protection of s. 402(1) simply because a third party administrator has pre-authorization to process customers' applications and to issue the insurers' policies. While the parties' arrangement was intricate, JIIG's activities fell within the definition of "transmittal."

48 The trial judge next discussed the issue as to whether JIIG "negotiated" insurance. JIIG's counsel proposed a definition grounded in ideas of "bargaining" and relied on the inflexible nature of the CU policies and the fact that JIIG's customer service representatives were not allowed to interpret or vary the policy terms in the brochures when taking calls to submit that no bargaining or negotiation took place. The trial judge held that such an interpretation is too narrow. He held that the proposed definition would have the effect of excluding a majority of agents from the deemed statutory trust. Agents who simply sign people up for policies would not fall within the definition of "agent." That would be both illogical and undesirable. While negotiation clearly involves communication for purposes such as to arrive at the settlement of a matter, it need not involve bargaining or, necessarily, the exchange of proposals and counter-proposals.

49 The trial judge held that "Negotiation" in the s. 1 definition should be interpreted as meaning "arrangement through communication" or "agreement through discussion". It need not contain an element of bargaining and its applicability should not in any way depend on the degree of flexibility

in the policy. JIIG personnel processed insurance applications by telephone as well as those submitted by mail, fax and the Internet. Thus, JIIG acted in the negotiation of insurance and it fell within the statutory definition.

50 Before us, the appellant has attempted to reargue the trial judge's finding of fact that JIIG solicited insurance directly through its website. The appellant submits that the trial judge's finding ignores the fact that IIBI, a registered broker, was permanently identified as such on the website. In relation to this argument, Stinson J. held at para. 257 of his reasons:

> The website was published by JIIG itself, and not IIBI. Although IIBI was mentioned, there was nothing on the website that suggested that it belonged to IIBI, or that IIBI was actually marketing the policies that were promoted therein. I therefore reject that argument that IIBI, as opposed to JIIG, was soliciting through the website.

Stinson J.'s conclusion did not ignore the appellant's argument respecting IIBI.

51 The appellant also submits that the trial judge's finding ignored the fact that "any policy sold was sold by a licensed broker or agent". The trial judge found that "the website invited the general public to visit JIIG's office directly and did not specifically mention a licensed agent (albeit the invitation was to visit our office at 438 University Avenue, Toronto - main floor')." This was where IIBI was located. The trial judge's reasons further discuss the appellant's submission at paras. 259-260 of his reasons:

> It was established on the evidence that JIIG used licensed intermediaries to get its brochures into the hands of potential customers. Indeed, JIIG relied on the existence of these intermediaries to avoid characterization as one who solicits. With the website there was not such intermediary. A person seeking travel insurance could "go online" and search for information about travel insurance, and end up on JIIG's website. Compared to the brochure scenario, this is analogous to the traveler who walks into the licensed agency seeking travel insurance. The difference is that at this point in the brochure scenario, the licensed agent or broker intervened to provide JIIG's marketing tool to the customer. Online, the customer simply arrived at JIIG's website.
>
> In my view, it is not merely the fact of a website that amounts to solicitation. Rather, it is the different distribution structure that applies to the online material. Using JIIG's own definition of solicitation, the website amounted to direct contact between JIIG and potential customers who were seeking travel insurance.

52 Soliciting insurance is not the same thing as selling insurance. A person who solicits seeks to incite or influence someone to do something, in this case, to buy insurance. The trial judge

considered the appellant's submission and held that the manner in which the website was structured resulted in direct contact between JIIG and potential customers and, further, that potential customers were not directed to a licensed agent to purchase insurance. Having regard to the deference due to a trial judge's finding, there is no basis to interfere with it. This comment applies equally to the trial judge's finding that JIIG's mode of handling applications and policies brought it within the definition of persons who "transmit, for a person other than itself, application for or policies of insurance to or from an insurer." I also agree with the trial judge that the word "negotiate" means to agree through communication or discussion. An element of bargaining or exchange need not be present. The appellant states at para. 92 of its factum:

> The most frequently cited definition of negotiation in the Canadian cases derives from the Oxford English Dictionary, which defines negotiate as "to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise." Westward Farms v. Cadieux (1982), 138 D.L.R. (3d) 137 (Man. C.A.); International Corona Resources Limited v. Lac Minerals (1986), 53 O.R. (2d) 737 (H.C.J.).

53 Accepting this definition, it is not necessary to import an element of exchange or bargaining into the definition.

54 The trial judge did not err in concluding that JIIG fulfilled the functions of an agent.

(iii) CU is estopped from taking the position that JIIG is an agent under the Act

55 This was the issue in Transamerica, supra. Here, the trial judge found that CU dealt with JIIG believing that JIIG was acting lawfully through licensed entities. There was no representation or corresponding reliance that would give rise to an estoppel against CU.

56 I shall now turn to the issue of whether JIIG was subject to an express trust at common law.

Express Trust

57 The trial judge found that all three certainties required to create a trust - certainty of intention, of object or beneficiary, and of subject matter - were present in this case.

58 The appellant submits that the trial judge erred in finding certainty of intention to create an express trust. JIIG says that the 1989 Agreement did not specifically require that the premium funds collected by MHI be held in trust and none of the later MOU specifically dealt with the remittance of premiums. During a 1996 audit, CU's internal audit staff identified the absence of an express trust provision in the agreements between JIIG and CU as an issue. In a 1997 memorandum to Crowley concerning the internal audit, Wilfred Steven Prince of CU noted the auditor's letter gave no reasons this was a concern after nine years of doing business. JIIG specifically rejected a proposed clause in

the new draft which would have required it to hold those premiums in trust and in subsequent drafts, CU removed that provision. In essence, JIIG's submission is that the parties' conduct alone does not give rise to the necessary intention to create a trust. The relationship, it asserts, was ever-changing and complex but never evidenced such a mutual intention. It was instead a debtor-creditor relationship.

59 The trial judge found as a matter of law that certainty of intention can be inferred from the parties' conduct and by reference to industry practice. He stated that the Court of Appeal, in Transamerica, supra, noted that, while evidence of an agency relationship between the parties does not establish a trust relationship, it does provide some evidentiary support for it. JIIG clearly acted as an agent for CU (quite apart from the statutory definition). JIIG had authority to act on CU's behalf, to advance CU's interests and to bind CU to insurance contracts. JIIG was required to collect premiums, see to customer adjustments, deduct its fees and remit the premiums to CU. Throughout the relationship, premiums collected by the Ingle companies (whether MHI or JIIG) were remitted to CU on the 45th day following the end of the month in which they were collected. JIIG followed this practice until it delayed remittance in August 1997 and then withheld premiums in October 1997.

60 Industry practice, the trial judge held, is not determinative of intention but it is significant that this type of arrangement is typically characterized as a trust relationship in the industry. In this regard, he accepted the evidence of Lawrie Savage, a former Ontario superintendent of insurance. In this case, JIIG followed a typical remittance procedure when it assumed MHI's functions. When MHI collected the premiums they were trust funds; JIIG gave no notice to CU that it considered the funds to be otherwise characterized.

61 While the scope of JIIG's responsibilities and the profit sharing arrangement might have been atypical, the trial judge concluded that these aspects of the relationship do not change the nature of the fundamental obligation to remit premiums less only front-end commissions and authorized fees. He noted the absence of a document that confirms the existence of a trust but that there was likewise no evidence that JIIG had any special authority or interest in the funds that would take away the inference that JIIG was a trustee. While Overgaard removed trust terminology from an early draft of the proposed 1997 operating agreement, that agreement was never finalized and there was no binding agreement from which a newly agreed intention might be ascertained. The absence of a written confirmation of a trust arrangement in the signed documents was not, in these circumstances, conclusive.

62 On all the evidence, the trial judge concluded that JIIG and CU intended to be in a trust relationship and were in such a relationship. Therefore, certainty of intention was present and the other two certainties were easily met. The net premium funds were held to be trust funds.

63 In ascertaining the intention of the parties, Stinson J. was entitled to take into account the evidence of industry practice that premiums are trust funds, the agency relationship, and the conduct

of the parties.

64 The appellant further submits that the trial judge misapprehended the law in that he found that there was an express or constructive trust. As indicated at the outset of these reasons, a constructive trust is not sufficient for knowing assistance. At para. 363 of his reasons, the trial judge stated: "In my opinion, in keeping CU's premium remittances, JIIG took a risk to the prejudice of CU's rights, which JIIG knew or should have known it had no right to take". While not as felicitous a phrase as the trial judge might have used, the use of the phrase "should have known" is not indicative of a constructive trust being found by the trial judge. Read in context, the phrase is a rejection of JIIG's explanation.

65 The trial judge did not misapprehend the evidence or the law. I would dismiss the appellant's submission that he erred in finding that the parties intended the premiums to be held in trust for CU.

Conclusion on the appellant's first argument

66 I would dismiss the appellant's first argument. The trial judge correctly held that premiums collected by JIIG were to be held in trust for CU both as a result of a statutory trust and on the basis of an express trust.

2. Is Overgaard personally liable for permitting JIIG to take a knowingly wrongful risk" resulting in prejudice to CU?

67 Stinson J. held that Overgaard, as JIIG's directing mind, was personally liable for his knowing assistance in a fraudulent scheme to hold the premium funds for ransom. He reached this conclusion on the basis that JIIG took a "knowingly wrongful risk" in withholding the premium remittances, to the prejudice of CU's rights. With respect to whether Overgaard should be held personally liable for knowingly assisting JIIG's breach of trust, the trial judge found that the conduct fell within the ambit of the decision in Air Canada, supra, for grounding personal liability.

68 The appellant submits Stinson J. erred in three fundamental respects in finding Overgaard personally liable. First, the appellant submits that JIIG's breach of trust was not fraudulent and dishonest because JIIG's was very open about its intention to withhold premiums and because it thought the relationship was one of debtor and creditor and had a colour of right to the money. Second, the appellant submits that Overgaard did not have the requisite knowledge of the trust or its breach so as to make himself liable as a stranger. Third, the appellant submits that Overgaard was only one of many executives involved in the decision to withhold premiums. He did not exercise any degree of control necessary to make him personally liable for the corporation's acts.

69 With respect to the appellant's first submission, although one line of authority holds that the director's conduct, as well as that of the corporation must have an element of moral turpitude, that is not the test for personal liability that was adopted in Air Canada. The test, articulated at 826, is whether the trustee took "a knowingly wrongful risk resulting in prejudice to the beneficiary". The

trial judge concluded that, in withholding the premiums, JIIG committed a willful, intentional and deliberate act. The trial judge rejected the appellant's submission that it had "a colour of right" to the money "in light of the clear assertions by CU that these were trust funds, the history of regular remittances and the very apparent disagreement whether any sums were due by CU to JIIG." In these circumstances, JIIG was not entitled to retain almost all of the premiums that it received from sales of CU policies in 1998. Consequently, as the trial judge found, in retaining the premiums, JIIG's actions constituted a fraudulent, or dishonest, breach of trust.

70 The appellant's second and third submissions concerning Overgaard's knowledge of JIIG's actions and control over the company are also untenable in light of the trial judge's findings which are amply supported by the evidence. The trial judge found that, from the fall of 1993 onward, Overgaard's involvement with the Ingle business was conditional upon his having majority control, voting control and operational control. He achieved all three and was JIIG's majority shareholder, chairman and CEO. It was Overgaard who informed CU in a memorandum in August 1997 that JIIG was "proceeding on the basis of a $500,000 on-account payment to be made either by payment from CU or deduction from our August 15, 1997 remittance", thus formally threatening to withhold premiums. The trial judge's finding that it was Overgaard who made the decision to withhold premiums is supported by the evidence of Robert Duncan of JIIG, which he accepted. The trial judge rejected the evidence that the decision to withhold the 1997 and 1998 premiums was a decision by JIIG's executive team based, in part, on the fact Overgaard had veto power over whether to make the payments. In addition, Overgaard benefited significantly from the withholdings, in that such funds were used to enable JIIG to continue in operation and to transform its business into that of a freestanding insurance company of which Overgaard is the majority shareholder. Accordingly, I would reject the appellant's second and third submissions.

71 In this case, because of its history of involvement with the Ingle companies and CU, JIIG had actual knowledge that the premium moneys were held in trust for CU and were not for the general use of Ingle or JIIG. Trust accounts were used to hold the premium funds until 1997. In addition, Crowley, on behalf of CU, informed JIIG that CU would regard any withholding of premiums as a breach of trust. By no longer turning over the premium money, JIIG took a risk to the prejudice of the rights of CU, which risk was known to be one that there was no right to take. The appellant's argument takes too narrow a view of the nature of Overgaard's action. In order to be fixed with liability, it was not necessary for Overgaard to falsely portray JIIG's position to CU in some regard. Imposing that requirement would, contrary to the jurisprudence in Air Canada, supra, effectively preclude liability on the basis of recklessness. The breach of trust by JIIG was dishonest and fraudulent from an equitable standpoint.

72 Beyond merely having knowledge of it, it is clear that Overgaard, as the directing mind of JIIG, participated or assisted in the breach of trust. Overgaard knew that the premiums were to be used to support the actual and potential claims on policies sold to clients. He dealt with the funds in question. In particular, he stopped remitting the premiums and then set up a competing business, transferred the funds and used them to fund the start-up costs of his competing business. The breach

of trust was directly caused by the conduct of Overgaard. In so doing, he was acting solely in his own interest. In these circumstances, he is personally liable for the breach of trust. With respect to the knowledge requirement, he was in fact an active trustee. He knew that the trust funds were being deposited into his own company. He had subjective knowledge. He knowingly and directly participated in the breach of trust and is personally liable to CU for that breach of trust. As in Air Canada, supra, it is therefore unnecessary to determine whether Overgaard had a dishonest state of mind when he engaged in this conduct, as above.

73 The appellant relies on the decision in Twinsectra Ltd. v. Yardley, [2002] H.L.J. No. 12 (Quicklaw), in support of his position that, in addition to fraud or dishonesty on the part of the trustee, there must be fraud or dishonesty by the "stranger" to the trust before personal liability will be found. In Twinsectra, a solicitor, Sims, received money from a lender, Twinsectra, on condition that the money was to be used for the acquisition of certain property. In breach of his undertaking to the lender, Sims paid the money over to another solicitor, Leach, who in turn paid it out to his client, Yardley. Yardley did not use the money only to buy property and did not repay the loan. Twinsectra sued. The basis of the claim was that the payment by Sims to Leach was a breach of trust and that Leach was liable for dishonestly assisting in that breach of trust. The trial judge found that Leach was misguided but not dishonest. The Court of Appeal reversed this finding. By a three-to-two decision, the House of Lords restored the trial judge's decision. The law lords held that Leach was required to be conscious that he was transgressing ordinary standards of honest behaviour for him to be liable for knowingly assisting in a breach of trust. In this case, however, the trial judge found that there was a dishonest breach of trust by a closely-held company, JIIG, and that, on the evidence, Overgaard was the directing mind behind the breach of trust. The trial judge also rejected Overgaard's rationalizations and explanations for his conduct. Twinsectra does not assist the appellant. The trial judge did not err in concluding that the test in Air Canada, supra, was met.

74 In addition, inasmuch as I have found that a statutory trust exists, JIIG is deemed to have knowledge that the premiums are held in trust for the insurer because it is deemed to have knowledge of the law. The statute requires is that premiums be paid over and failure to pay the premium is proof, in the absence of evidence to the contrary, that JIIG used the premium for other purposes. The trial judge found that JIIG used the premium for other purposes thereby breaching the statutory trust imposed on it. In Air Canada, supra, the statement is made that the knowledge requirement on the part of the director is generally not a difficult hurdle to overcome in cases involving closely-held corporations. That is the situation here. Moreover, earlier in the decision, Iacobucci J. discusses the line of cases requiring a "fraudulent and dishonest design". One of these cases is the decision in Wawanesa Mutual Insurance Co. v. J.A. (Fred) Chalmers & Co. Ltd. et al. (1969), 7 D.L.R. (3d) 283 (Sask. Q.B.), which he summarizes at 817-18 as follows:

> In Wawanesa Mutual Insurance Co., supra, the defendant corporation Chalmers was the agent of the plaintiff insurance company, Wawanesa. The defendant Mislowski was the sole shareholder, president, general manager, and the only

> active director of Chalmers. There was no written agency agreement between Chalmers and Wawanesa, but a provision in The Saskatchewan Insurance Act, R.S.S. 1960, c. 77, provided that an agent who received monies as premiums for a contract of insurance was "deemed to hold the premium in trust for the insurer" and liable to pay out to the insurer such monies less commission within 15 days after demand. The insurance company sued both the corporation and Mislowski for unpaid insurance premiums collected by the corporation, which had been deposited into the corporation's general account from which office expenses and salaries had been paid. Mislowski also had a construction business with a separate general account, but he constantly transferred funds between the insurance and construction accounts. The trial judge held the corporation liable for breach of trust, and then proceeded to discuss the liability of Mislowski at p. 287:
>
> > The conversion of the trust funds to other purposes was a wrongful and illegal act or series of acts. There can be no doubt that the breach was inspired and directed by Mislowski who made all the corporate decisions. See Underhill's Law Relating to Trusts & Trustees, 11th ed., p. 558:
> >
> > > ... the liability for breach of trust is not confined to express trustees, but extends to all who are actually privy to the breach.
>
> The trial judge therefore concluded that Mislowski was also liable for Wawanesa's loss.

75 In my opinion, this case is indistinguishable from the decision in Wawanesa. As in Wawanesa, the breach of trust was inspired and directed by Overgaard.

3. The JIIG Counterclaim

76 The appellant's submissions respecting the counterclaim concern the surplus sharing arrangement and are inextricably bound up with its submissions on the appeal. The trial judge carefully considered all of the evidence in arriving at his decision on profit sharing. There is no reason to disturb his findings and conclusions.

Punitive Damages and Solicitor-and-Client Costs

77 Although issues respecting punitive damages and solicitor-and-client costs are raised in the appellant's factum, the appellant made no oral submissions respecting these issues. I see no reason to disturb the trial judge's conclusions on these issues.

78 Accordingly, for the reasons above, I would dismiss the appellant's appeal.

THE CROSS-APPEAL

79 The cross-appeal brought by CU pursuant to s. 133(b) of the Courts of Justice Act, involves the issue of the availability of a Sanderson costs order (or alternatively a Bullock order). CU obtained judgment for breach of trust and other relief against several members of the Ingle group of companies as well as against Steven Overgaard. The trial judge, however, dismissed CU's claim against MHI Brokers Ltd. with costs and declined to make a Sanderson or Bullock award requiring some or all of the unsuccessful defendants to pay CU's costs respecting MHI Brokers Ltd. The trial judge found that, in light of the knowledge that CU had beforehand, it was not reasonable for CU to sue MHI. In these circumstances, he was not prepared to order the unsuccessful defendants to pay the costs awarded to MHI against CU. It was within the trial judge's discretion to make the order that he did.

80 Accordingly, I would not grant leave to appeal the order as to costs.

COSTS

81 In order to comply with the rule that now requires this court to fix costs, the respondent is requested to file a bill of costs with the court in the appropriate form. The appellant may make submissions in writing thereon within 10 days after filing and the respondent may reply within 10 days thereafter.

WEILER J.A.
ABELLA J.A. -- I agree.
GOUDGE J.A. -- I agree.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Monday, June 13, 2016 12:18:22