EXHIBIT "16"

**To the Receiver's Seventh Report to Court
Dated January 14, 2019**

In the Court of Appeal of Alberta

Citation: Easy Loan Corporation v Wiseman, 2017 ABCA 58

Date: 20170213
Docket: 1601-0044-AC
Registry: Calgary

2017 ABCA 58 (CanLII)

Between:

Easy Loan Corporation

Appellant
(Plaintiff/ Respondent)

\- and -

Mike Terrigno

Not a Party to the Appeal
(Plaintiff)

\- and -

Thomas Wiseman, Sandra Unger, Ken Unger, Larry Revitt, Shirley Revitt, Raymond Sampert, Margaret Sampert, Aggregate Recycling Ltd., John Davies, Fred Dowe, Carol Dowe, Resch Construction Ltd.

Respondents
(Applicants)

\- and -

Base Mortgage & Investments Ltd., Base Finance Ltd., Arnold Breitkreutz, Susan Breitkreutz, Susan Way and GP Energy Inc.

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice J.D. Bruce McDonald

2017 ABCA 58 (CanLII)

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 8th day of February, 2016
Filed the 12th day of October, 2016
(2016 ABQB 77, Docket: 1501 11817)

Memorandum of Judgment

The Court:

2017 ABCA 58 (CanLII)

[1] Base Mortgage & Investments Ltd., Base Finance Ltd., (collectively Base Finance) Arnold Breitkreutz, Susan Breitkreutz, Susan Way and GP Energy Ltd. are alleged to have operated a Ponzi scheme. Following an investigation by the Alberta Securities Commission, a bank account was frozen and a receiver appointed over the assets of Base Finance Ltd. The appellant and the respondents to this appeal were investors in the scheme. A chambers judge directed that the funds in the bank account be distributed according to a specific tracing scheme: *Easy Loan Corporation v Base Mortgage & Investments Ltd*, 2016 ABQB 77, 613 AR 384, (Order). The appellant appeals, contending that a different method of distribution ought to have been imposed.

[2] We dismiss the appeal.

I. Background

[3] The sole director and shareholder of Base Mortgage & Investments Ltd. and Base Finance Ltd is Arnold Breitkreutz. Base Mortgage & Investments Ltd. was incorporated in 1978 to carry on business as a mortgage broker. Base Finance Ltd. was incorporated in 1984 to carry on business as an investment company into which investor funds were deposited and distributed. Base Finance obtained money from investors, which it pooled. The investors were told that the monies would be loaned to borrowers who would provide Base Finance with mortgages on land in Alberta. The investors were to be the beneficial holders of the mortgages held in Base Finance's name. In most cases Base Finance would provide the investors with a document titled, "Irrevocable Assignment of Mortgage Interest". It named the investor, showed the amount that the investor provided to Base Finance, and itemized the terms of the mortgage into which the borrower was entering. It also indicated that the funds were pooled. The Irrevocable Assignment of Mortgage did not identify the mortgagor or the lands upon which the mortgage was placed.

[4] On September 24, 2015, after receiving a telephone call from the Royal Bank raising a concern about an account held by Base Finance, the Alberta Securities Commission commenced an investigation into an alleged $83.5M Ponzi scheme. Ponzi schemes were described in *R v Mazzucco*, 2012 ONCJ 333 at para 9, 101 WCB (2d) 651 as follows (with emphasis added):

> The hallmark of such a fraudulent scheme (named after the infamous speculator Charles Ponzi) is that investments claimed by the fraudster to have been made on behalf of investors are not in fact made. Instead... investors are given forged documents as evidence of non-existent security. The monies supposedly invested are not invested at all, but instead, in the typical Ponzi scheme, the swindled monies are siphoned off by the fraudster(s) for their purposes. <u>Such schemes are kept afloat by making interest payments and returning principle upon request so that there is the appearance of legitimacy. Early investors are paid off with funds fraudulently raised from later investors.</u>

[5] In addition to the investigation by the Securities Commission, there are other proceedings underway. On application by the appellant, Easy Loan Corporation, the court appointed a receiver (BDO Canada Ltd) over Base Finance's assets. The receiver reports that there were no underlying Alberta mortgages. The bulk of investor funds (over $80M) were invested in a U.S. company, Powder River Petroleum International Inc. which had filed for bankruptcy protection under Chapter 7 (Liquidation) of the United States Bankruptcy Code, 11 USC. In an effort to recover the loss, Arnold Breitkreutz continued to solicit investments from the Base Finance investor group in order to maintain the interest payments and principal redemption requirements of the investor group.

2017 ABCA 58 (CanLII)

[6] One of the assets of Base Finance is an account at the Royal Bank. The account was opened on May 16, 2014 after the Bank of Montreal advised that it would not continue to accept funds into two accounts held by Base Finance. The account at the Royal Bank was frozen on September 25, 2015 with about $1.085M on deposit ("Frozen Funds"). When the receiver applied for the Frozen Funds to fund the receivership, some investors objected. Only as regards the Frozen Funds, the court directed that those investors claiming an entitlement should apply to the court to determine whether they were entitled to funds in the Frozen Account.

[7] The investors, Easy Loan and the respondents (about 20 of the approximately 240 Base Finance investors) argued that Base Mortgage held their invested "funds in trust for them": Reasons at para 1. The receiver opposed the applications and wanted those funds to cover the cost of the receivership: para 2. Before the chambers judge, the receiver took the position that a constructive trust was not appropriate because it would have the effect of elevating the position of some investors over others, and over other (non-investor) creditors. In its first report the receiver wrote that following the receiver's investigation into Base Finance, "at some point in the future, a claims process to determine the priorities of each creditor will be established ... and funds will be systematically distributed".

[8] The receivership is still in progress. The appellant applied to have the receiver's third report dated May 9, 2016 admitted as new evidence on appeal. The respondents did not object and we have admitted and reviewed the new evidence.

II. Chambers Decision

[9] The chambers judge impressed the Frozen Funds with a constructive trust. He cited *Soulos v Korkontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214 and held that the applicants met the *Soulos* conditions: para 51. As some of the chambers judge's findings of fact are relevant to the issue of tracing, we reproduce them here (with emphasis added):

> (a) They provided their investments to Base Finance based on representations that Base Finance made through Mr. Breitkreutz, that their investments would be used to fund mortgages and that their investments would be protected through security in the form of first mortgages on the properties that their investments were funding.

Base Finance was not only under a legal obligation, but it was under an equitable obligation, to use (and secure) those funds in that manner. This meets condition 1 of the *Soulos* test.

(b) The Applicants provided their investments to Base Finance on the understanding that Base Finance was the conduit through which the investments would flow through to the mortgagors. ... This Court finds that Base Finance held itself out as the investors' agent in using their invested funds for loans that were to be secured by a mortgage for their benefit. In this way, Base was representing them in such a way as to be able to affect their legal position in respect of the various mortgagors. This meets condition 2 of the *Soulos* test.

(c) Base Finance did not obtain any mortgages using the investors' money. **The investors' monies as they relate to the September RBC Statement, can be easily and clearly traced to the Bank Account.** Base Finance's banking records of the Bank Account, including the cancelled cheques, point to the individual investment amounts, and the timing of the deposits. As well, the parties and Ms. Pickering have produced the cancelled cheques for those deposits that show the date of the deposit into the Bank Account. Accordingly, this Court finds that the Applicants have a legitimate reason for seeking a proprietary remedy. The Receiver does not challenge this. This meets condition 3 of the *Soulos* test. (emphasis added)

(d) The Receiver argues that the imposition of a constructive trust, as it relates to the September 2015 advances that the Applicants made would be unjust inasmuch as this elevates their claims over those of previous investors. This is a timing issue, which this Court will discuss later in these reasons. If this Court were to accede to the Receiver's argument, the funds in the Bank Account could be used by the Receiver for purposes other than the payment to the investors. This would be unjust. This Court finds that there are no factors that would render the imposition of a constructive trust of the Applicants' investments unjust, as the whereabouts of those investments are contained in the Bank Account, and their respective deposits can be readily identified. This meets condition 4 of the *Soulos* test.

[10] Next, the chambers judge determined the method to distribute the Frozen Funds. He considered three possible tracing schemes. He quickly rejected the first (the rule in *Clayton's Case*) and no complaint arises in that regard.

[11] Easy Loan and the receiver contended the Frozen Funds should benefit all those wronged by the unlawful scheme in proportion to their investment with set-off for amounts already recouped, whereas the respondents said method three (see below) should apply.

[12] The chambers judge explained the second two methods at para 55:

2017 ABCA 58 (CanLII)

2017 ABCA 58 (CanLII)

(2) *Pro rata* or *pro rata ex post facto* sharing based on the original contribution that the various claimants made, regardless of the time they made their contributions. If there is a shortfall, between the amount the claimant's claim and the amount remaining in the account, the claimants share proportionately, based on the amount of their original contribution;

(3) *Pro rata* sharing based on tracing or the lowest intermediate balance rule ("LIBR") which says that a claimant cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment but before the next claimant makes its investment.

[13] The chambers judge held that the third method was the "general rule", if workable. He held that "calculating entitlement to the Bank Account might be considered by some to be inconvenient and moderately complex. It is not, however, impossible to do the calculations. Inconvenience should not stand in the way of fairness": para 71. The chambers judge concluded set-off was not appropriate.

[14] One of the respondent's lawyers calculated each claimant's entitlement. The entitlements ranged from $480,832.89 (paid to the investor who deposited $500,000, the final deposit in September the day before the account was frozen) to $46.20 paid to an investor who made his deposit of $100,000 three months earlier, in June. As is apparent, the distribution method chosen does not reflect a simple proportional approach: the late September investor recovered significantly more (proportionately) than the June investor. Because all of Easy Loan's investments were made prior to June, 2015, it received $309.95 of the $5.7 million it had invested.

[15] The Order also includes a distribution to Base Finance because it contributed to the Frozen Funds. Those funds were paid into court pending further direction.

[16] The calculations were incorporated into the Order, which also included the following: "The Application by the Receiver for an Order directing that the [Frozen Funds] be vested in the Receiver is hereby denied:" para 2. We draw attention to this paragraph because it puts to rest the receiver's contention that its application had yet to be heard.

III. Grounds of Appeal and Standard of Review

[17] It is important to emphasize that there is no appeal of the chambers judge's imposition of the constructive trust. No notice of appeal was filed by the receiver and counsel for the receiver confirmed at the hearing of the appeal that there was no appeal of that finding.

[18] The benefit of the proprietary remedy of a constructive trust is best illustrated by its impact on the assets available for distribution in the bankruptcy context. Although this is a receivership, similar considerations may apply. Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 states: "The property of a bankrupt divisible among his creditors shall not comprise

property held by the bankrupt in trust for any other person". And, when property subject to a constructive trust is removed from the estate of the bankrupt, it is "effectively trumping the priority scheme under the bankruptcy legislation": *306440 Ontario Ltd. v 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548 at para 24.

2017 ABCA 58 (CanLII)

[19] Accordingly, and despite the fact that the receivership was at an early stage when the Order was made, the Frozen Funds are now outside the receivership.

[20] The sole ground of appeal is in relation to the methodology used to trace the Frozen Funds. The appellant submits the chambers judge erred in law by holding that a *pro rata* sharing on the basis of tracing to the lowest intermediate balance in the account is the 'general rule' unless it is practically impossible, and that the chambers judge failed to consider the intention of the beneficiaries to hold commingled funds as co-owners in the mortgage investment.

[21] A careful reading of *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*, 2013 ONCA 26 leads to the conclusion that determining the proper tracing method is a question of law and therefore the correctness standard of review applies (paras 7-9), whereas the palpable and overriding error standard applies to calculations, which are questions of fact: paras 10-11.

IV. Analysis

Preliminary Matters

[22] To minimize confusion, these reasons use the term "mixed fund" to mean an account that contains both trust funds (i.e., funds impressed with an express or a constructive trust) and non-trust funds: see generally, *Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd.*, 2009 ABCA 99 at paras 11, 13 and 15, 454 AR 162. Non trust funds include the wrongdoing fiduciary's own funds and those of other non-beneficiaries, for example, creditors. Commingled means the assets subject to the trust are indistinguishable.

Tracing Rules

[23] On the findings of the chambers judge, Base Mortgage was under an equitable obligation in relation to the activities that gave rise to the Frozen Funds, and the Frozen Funds resulted from its breach of those equitable obligations. Equitable tracing principles govern the distribution of the Frozen Funds.

Mixed Fund

[24] The Order reflects a distribution to Base Mortgage associated with its contribution to the Frozen Funds: paras 8-9. Ordinarily this would engage different tracing principles (including the

rule from *Re Hallett's Estate* (1879), 13 Ch D 696 (see *Brookfield* at para 13) because other considerations apply to so-called "mixed" funds.

2017 ABCA 58 (CanLII)

[25] *Brookfield* states at para 15 (citations omitted, square brackets in original):

> A trustee mixes his own money with trust money; he withdraws money from the mixed fund, dissipates some of it and then deposits more money into the mixed fund. Subsequent deposits of the fiduciary into the mixed fund are not presumed to be impressed with the trusts in favour of the beneficiary. ... Consequently if the trustee is insolvent, that part of the mixed fund, equal to the amount paid in, will normally pass to the trustee's general creditors. The beneficiary will be entitled to additions to the mixed fund only if he can prove that thereby the trustee intended to make restitution to the trust. It follows that the trust is entitled only to the lowest intermediate balance of the mixed fund. So, if the fund is wholly dissipated before any additions are made to it, the interest of the trust in the mixed fund is extinguished. Professor Scott has justified this result on the ground that "the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; but there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant. ...

[26] The chambers judge made no mention of the fact that the fund was "mixed", and he did not apply the applicable tracing rules that originated with *Re Hallet's Estate.*

[27] Notwithstanding that and paragraphs 8 and 9 of the Order, no appeal is taken on that issue. When counsel was questioned at the hearing, we were advised that all the Frozen Funds were from investors for whose benefit the constructive trust was declared, not from others (including creditors). We therefore proceed as though no non-trust assets were mixed with those of the beneficiaries of the constructive trust.

Tracing Rules and Principles

[28] Three methods are available to trace commingled trust assets on deposit in a bank account. They are: (i) the rule in *Clayton's Case*; (ii) the lowest intermediate balance rule, also referred to as "*pro rata* on the basis of tracing", the "North American method", "rolling charge method" or "LIBR" ("LIBR"); and (iii) the *pro rata* approach, also referred to as the "basic *pro rata* approach", "*pro rata ex post facto*" or "*pari passu ex post facto*" ("Proportionate Distribution").

[29] The following general equitable principles apply.

[30] First, "modern [tracing] rules ... have been ... altered, improved, and refined from time to time": *Re Hallett's Estate* at 710 *per* Jessel MR. And, "equity's ... flexible remedies such as constructive trusts, ..., tracing ... must continue to be moulded to meet the requirements of fairness and justice in specific situations": *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534, 85 DLR (4th) 129 at 538. The significance of this principle will be apparent shortly, in the context of the applicability of the rule in *Clayton's Case*.

[31] Second, the overarching goal of equity is "to serve the ends of fairness and justice": *Canson* at 586 *per* LaForest J. When tracing into a commingled bank account that contains only trust funds, fairness of distribution is paramount. Balanced against fairness is a more pragmatic consideration: practicality and workability. "A rule that is in accord with abstract justice but which, for one or more reasons, is not capable of practical application, may not, when larger considerations of judicial administration are taken into account, be a suitable rule to adopt": *Ontario (Securities Commission) v Greymac Credit Corp* (1986), 55 OR (2d) 673, 17 OAC 88 at para 48, affirmed [1988] 2 SCR 172.

2017 ABCA 58 (CanLII)

The Rule in *Clayton's Case*

[32] The Rule in *Clayton's* Case, also known as the "first in, first out" rule deems that funds deposited first into a commingled account are also the first funds withdrawn. The rule has been called "unfair, arbitrary, and based on a fiction": *Boughner* at para 81; see also *Greymac*.

[33] In Alberta, *Re Elliott (Legal Profession Act)*, 2002 ABQB 1122, 333 AR 39 rejected the rule in *Clayton's Case*. Case law from this court states that the rule in *Clayton's Case* is the "general" rule: *Sawchuk v Bourne*, 2005 ABCA 382, 144 ACWS (3d) 12; *Kretschmer v Terrigno*, 2012 ABCA 345, 539 AR 212 at para 93 *per* Slatter JA in dissent but not on that point.

[34] However, given the equitable tracing principles set out above and the parties' agreement that the rule in *Clayton's Case* did not apply in the present circumstances, we proceed on the basis that the rule in *Clayton's Case* has no application here. This leaves two other distribution methods.

Proportionate Distribution

[35] Proportionate Distribution divides the final balance in the commingled account in proportion to each claimant's original contribution to the fund. In other words, contributors share the shortfall in the account. An open question is whether set-off should apply against an investor's contribution as a result of funds the investor received from a return on capital, dividends, bonuses, etc. Given our conclusion that this is not the tracing method to use in these circumstances, there is no need to address set-off.

[36] Intermediate balances (see below) are not taken into account. See generally, Christian Chamorro-Courtland, "Demystifying the Lowest Intermediate Balance Rule: The Legal Principles

Governing the Distribution of Funds to Beneficiaries of a Commingled Trust Account for Which a Shortfall Exists", 30 BFLR 39 (Nov 2014) at 42.

2017 ABCA 58 (CanLII)

LIBR

[37] LIBR considers each beneficiary's contribution to the commingled account and the lowest balance in the account after each beneficiary's contribution. Simply put each beneficiary loses the ability to trace (and therefore claim) its contribution once the funds in the account drop below the amount of the beneficiary's contribution (deposit).

[38] A simple example: if X deposits $100 to a commingled account and the balance in the account later drops to $5, the most X can claim is $5, the lowest balance in the account; the ability to trace to anything more than $5 is lost because anything more comes from a funding source other than X. "Intermediate" refers to the period between X's contribution and when X makes the claim against the account. Once the lowest intermediate balance is determined for each beneficiary, each beneficiary is entitled to claim only the lowest balance's proportional share of the final balance of the account.

[39] *Law Society of Upper Canada v Toronto-Dominion Bank* (1998), 42 OR (3d) 257, 116 OAC 24 ("*LSUC*") at para 14 explains:

> a claimant to a mixed fund cannot assert a proprietary interest in that fund in excess of the smallest balance in the fund during the interval between the original contribution and the time when a claim with respect to that contribution is being made against the fund.

[40] It is self-evident that calculating the lowest balance in the account for each beneficiary's contribution is not workable or practical if the commingled account has many contributors, supporting records are unavailable or incomplete or the timeframe in question is lengthy. These problems do not arise in this case.

[41] Indeed, the proof is in the pudding. Counsel for one of the respondents calculated the lowest intermediate balance for each beneficiary and the proportion that each balance comprised of the Frozen Funds, all to the satisfaction of the chambers judge who personally signed the Order. No respondent disputes the amount.

Tracing Cases

[42] The leading tracing cases involving shortfalls in a commingled account are from Ontario. The first in time is *Greymac*, followed by *LSUC*, *Re Graphicshoppe* and finally, *Boughner*. The Supreme Court approved *Greymac*. In *Greymac* all the funds were trust funds although there were at least two trusts. In *LSUC* the fund was mixed and included the lawyer's clients' funds (trust funds) and a creditor's funds (Toronto Dominion Bank). In *Graphicshoppe* the account included

what were once trust funds (pension plan contributions) but their trust fund characterization was lost when the account to which they were paid became overdrawn, and therefore the trust funds could no longer be traced.

2017 ABCA 58 (CanLII)

[43] Only *Boughner* involved a Ponzi scheme and an account that was not mixed, i.e., 100% trust funds.

[44] The court in each case rejected the rule in *Clayton's Case* so the central issue became whether Proportionate Division or LIBR should be used to distribute the funds.

[45] Much has been written (in support and otherwise, academically and by judges in subsequent cases) about all these cases but for present purposes it is only necessary to discuss their legal propositions. By way of preview, the guiding principle is that courts should "apply the method which is the more just, convenient and equitable in the circumstances": *LSUC*. And, there appears to be little doubt that LIBR (even if not applied) is the fairest rule but also the most difficult to apply in practice because of the detailed calculations it requires.

Greymac

[46] In reasons later adopted by the Supreme Court, Morden J.A. held that LIBR was the "general" rule: para 45. He accepted that it might be unworkable in some situations because of the complexities associated with calculating the lowest balance applicable to each contributor: paras 45-48. Morden JA also acknowledged another exception: if the claimants expressly or by implication intended to distribute on some other basis, including Proportionate Distribution: paras 48-50.

[47] This Court recognized *Greymac* as authority for a general rule of LIBR. *Brookfield* at para 13 held that the "claim of the beneficiaries is *prima facie* limited to the lowest intermediate balance in the account".

LSUC

[48] The court should "seek to apply the method which is the more just, convenient and equitable in the circumstances": para 31. The *LSUC* court agreed that LIBR was "manifestly fairer" but also recognized the complexity of calculating it: para 32.

[49] The court held that LIBR was too complex and impractical to adopt as a general rule "for dealing with cases such as this" (over 100 claimants and multiple withdrawals and contributions). Instead, the basic *pro rata* approach (i.e., Proportionate Distribution) was preferable because of its relative simplicity.

[50] The court also held that it "is always open to a trust contributor to gain protection from having to share a shortfall with others by insisting upon the funds being placed in a separate trust

account": para 27. In short, there was agreement with *Greymac* that beneficiaries could contract out of the general rule or other tracing rules.

[51] *Re Elliott* followed *LSUC* and ordered a Proportionate Distribution of funds from a lawyer's trust account which had a shortfall: para 47.

2017 ABCA 58 (CanLII)

Re Graphicshoppe

[52] Unlike *Greymac* and *LSUC*, the impugned account included deposits other than those made by innocent beneficiaries. And, after the beneficiaries made their final contributions, the lowest balance of the account was (at one point) negative. This meant the beneficiaries lost their ability to trace their funds: para 120. "While this may seem harsh, it must be remembered that in the commercial context and particularly in the realm of bankruptcy, innocent beneficiaries may well be competing with innocent unsecured creditors for the same dollars. This raises policy considerations which the courts in *Greymac* and *LSUC* did not have to face": para 130.

[53] Moldaver J.A. (for the majority) also distinguished *LSUC* and *Greymac* on other grounds: para 124. He noted that "in the present case" it was still necessary to determine "if any or all of the funds in the bankrupt's bank account at the date of bankruptcy were trust funds". And, at para 126:

> At this preliminary stage, we are not concerned about calculating the amount each beneficiary may claim from the trust funds, if it turns out that some such funds do in fact exist. Instead, we are simply trying to determine what, if any, of the money in the Graphicshoppe's bank account at the date of bankruptcy was trust money and therefore did not belong to it.

[54] Here the chambers judge did impose a constructive trust over the Frozen Funds despite the fact that the receivership was still (as in *Graphicshoppe*) at a preliminary stage.

Boughner

[55] *Boughner* involved a Ponzi scheme; the question at trial was which distribution method (Proportionate Distribution or LIBR) should be used. A sub-issue was whether the case law dictated a "general" rule. The Court held that LIBR was the general rule, and *LSUC* could be explained by the complexity of the LIBR calculations in that case: paras 7-9.

[56] Neither the trial decision nor the Court of Appeal make reference to whether set-off is appropriate for interest and return of capital.

Conclusion on Tracing Rules

[57] LIBR is the general rule for allocating funds among innocent beneficiaries when there is a shortfall in a trust account or in an account that has been impressed with a constructive trust by

operation of law. There are two exceptions: LIBR is unworkable or the beneficiaries expressly or impliedly intended another method of distribution.

2017 ABCA 58 (CanLII)

[58] As already concluded, the "unworkable" exception does not apply because the Order demonstrates that LIBR is, in fact, workable. That leaves discussion of the investors' intentions.

Intention of the Parties

[59] Was there evidence of any intention by the beneficiaries about how the funds were to be distributed in the event of a shortfall? *Greymac* states at para 53: "Another exception, an obvious and necessary one ... would be the case where the court finds that the claimants have, either expressly or by implication, agreed among themselves to a distribution based otherwise than on a *pro rata* division following equitable tracing of contributions.". Blair J. also noted that it "is always open to a trust contributor to gain protection from having to share a shortfall with others by insisting upon the funds being placed in a separate trust account.": *LSUC* at para 27 . Finally, in *Demystifying the Lowest Intermediate Balance Rule*, *supra*, Chamorro-Courtland wrote at 66-67 (emphasis in original):

> In summary, consideration must first be given to the express or implied contractual *intention* of the beneficiaries in the case of a shortfall in a commingled trust fund; the beneficiaries may opt for any distribution method that satisfies their business needs.
>
> If the contract is silent as to the method of distribution, the presumed intention, as the general rule, should be that the beneficiaries intended to segregate their funds and use LIBR. This is the presumption even in cases where the parties have opted to commingle their funds in an omnibus account, as it is possible to legally segregate the funds...

[60] In summary, nothing in the evidence suggests that the investors intended there be any particular distribution method, therefore absent anything more, LIBR applies.

Funds Commingled

[61] It appears from the investors' affidavits that they knew their investments would be pooled or commingled. For example, one affiant deposed he "understood ... [that] Base would obtain investments from individuals like myself that <u>would be pooled</u> by Base, and then loaned by Base to borrowers who would provide Base with mortgages on real estate": Wiseman Affidavit (with emphasis). Another stated: "My wife and I understood that Base Mortgage was merely acting as an intermediary in the proposed transaction, in order to pass the <u>accumulated pool of mortgage funds</u> through to the mortgager": Revitt Affidavit (with emphasis).

[62] However, the parties' contract also specified that:

> 2. ... Should the lender request any portion or the entire amount of the investment back prior to the due date without proper written notice, the assigned bonus, if any, and/or the interest shall not be due or payable... by the borrowers and the assignment may be renewed at the borrower's option.

2017 ABCA 58 (CanLII)

[63] In other words, the contract appears to contemplate something less than full pooling or commingling because the investor beneficiaries are entitled to request a return of their capital at a time of their choosing or, in any event, at the maturity date of their investment. This suggests an element of segregation.

[64] The only document from which the court might discover the intention of the investors is the Irrevocable Assignment of Mortgage Interest. It is a contract between Base Mortgage and the investor, defined as "lender". There is also reference to an undefined and unnamed "borrower" who is obviously not a party to the contract. Also undefined and unnamed are the "demised premises" referred to in clause 3. Of interest are clauses 3 and 4 (with emphasis):

> 3. It is further agreed that the lender shall indemnify and save harmless Base from any and all claims and demands against Base with respect to the assigned portion of the mortgage. The lender agrees that its sole remedies with respect to default by the borrowers shall be against the demised premises and the borrowers.
>
> 4. It is understood that Base and the lender are not partners or joint venturers ... and nothing contained herein shall be construed so as to make them partners or joint venturers or impose any liability as such on either of them.

[65] Nothing can be gleaned from this document about the investors' intentions as to which distribution method to use.

[66] In summary, there is nothing to suggest that the investors considered the question of how a shortfall in the commingled funds would be distributed among the investors, and therefore the general rule, LIBR, is not displaced.

V. Conclusion

[67] The chambers justice applied LIBR. The cases say this is the fairest rule absent two exceptions (unworkability or the contrary intention of the beneficiaries) which we have concluded do not apply.

[68] We leave the question of whether set-off should apply in the context of a Ponzi scheme for another time. The issue in this appeal is narrow given the imposition of the constructive trust which, as noted, is not appealed. However, had all the assets of Base Mortgage formed part of the traceable pool of assets, set-off may have been an appropriate consideration.

[69] The appeal is dismissed.

Appeal heard on December 6, 2016

Memorandum filed at Calgary, Alberta
this 13th day of February, 2017

2017 ABCA 58 (CanLII)

As authorized to sign for: Berger J.A.

Rowbotham J.A.

McDonald J.A.

2017 ABCA 58 (CanLII)

Appearances:

C.M.A. Souster and P. Higgerty, Q.C.
for the Appellant

R.N. Billington, Q.C.
for the Respondent BDO Canada LTD

P. Mahoney
for the Respondent Larry Revitt and others

D. Hutchison and M. Kheong
for the Respondent Thomas Wiseman and others

September 17, 2018

Dear Sir/ Madam:

RE: Base Finance Ponzi scheme - Statement of Claim (Tracing and Recovery of Funds) Court File Number 1701-12991

Please accept this letter for service upon you of the enclosed Statement of Claim and the Order for Extension of Time for Service. Our office acts for the Plaintiff in the enclosed action.

Service of the enclosed Statement of Claim is made to preserve our client's claim under the limitation rules and as such, our client does not require you to file a Statement of Defence at this time. No action will be taken against you without further written notice to you, provided that you contact our office, in writing, to confirm that you received service of the enclosed Claim and further provide us with your email or other contact information (so that we may provide you with future written notices regarding this law suit).

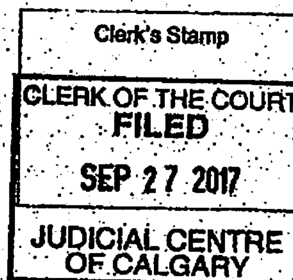
We look forward to hearing from you.

Sincerely,

Christopher M. A. Souster

CMAS/ja
Enclosure (2)

RIVERSIDE LAW OFFICE
4108 Montgomery View N.W., Calgary, Alberta T3B 0L9
T. 403 685 4224 F. 403 685 4225 Email: info@riversidelawoffice.ca

COURT FILE NUMBER	1701-12991	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
PLAINTIFF	Barile Investments Inc.	
DEFENDANTS	Don Harbison, Leslie Harbison, James Macleod, Barry Brown, Diane Brown, Windigo West Holdings Ltd. Clem Kuelker, Theresa Kuelker, Helen Bridges, Claire Tocher, Jorge Grinman, Susana Grinman, Don McMullen Equipment Ltd., Don Mcmullen, Elizabeth Mcmullen, Robert K. Mast Professional Corporation, Robert Mast, Alta Streamwatch Conservation Association, Thomas Wiseman and Sean Wiseman, Allan Forrest Sales (1976) Ltd., Allan Forrest Sales (1991) Ltd., John Forrest	
DOCUMENT	**STATEMENT OF CLAIM**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	RIVERSIDE LAW OFFICE c/o Christopher M.A. Souster 4108 Montgomery View N.W. Calgary, AB T3B 0L9 Phone: (403) 685-4224 Fax: (403) 685-4225 E-mail: cmas@riversidelawoffice.ca	

NOTICE TO DEFENDANTS(S)

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. The Plaintiff is a corporation that is duly registered pursuant to the laws of Alberta that operates in Calgary, Alberta.
2. The individual Defendants reside in or around Calgary, Alberta. The corporate Defendants are duly registered pursuant to the laws of Alberta and conduct business in Calgary, Alberta.
3. The Defendants, Don Harbison and Leslie Harbison reside in Creston, British Columbia.
4. The Defendants received $150,000 from Base Finance Ltd. ("Base Finance") withdrawn from the Base Finance RBC Account #02649, 100-405-0 ("RBC Account") as follows:

Figure: 1

Sep-14 Barlie Invest. $150,000 DEPOSIT ANALYSIS

	Cheque No.		Barlie Inv. Depoist	Withdrawal	Act. Balance
					$ 1,399,082.99
Sep 10/14			$ 150,000.00		$ 1,549,082.99
Sep 11/14	Barlie's Investment deposit		$ 146,000.00	$ 4,000.00	$ 1,545,082.99
Sep 11/14	342 Don McMullen Equipment Ltd.		$ 141,000.00	$ 5,000.00	$ 1,540,082.99
Sep 11/14	381 Windigo Holdings Ltd		$ 131,000.00	$ 10,000.00	$ 1,530,082.99
Sep 11/14	396 Allan Forrest Sales Ltd		$ 121,000.00	$ 10,000.00	$ 1,520,082.99
Sep 11/14	399 Susan Way		$ 108,500.00	$ 12,500.00	$ 1,507,582.99
Sep 11/14	382 Alta Streamwatch Conservation Association		$ 106,000.00	$ 2,500.00	$ 1,505,082.99
Sep 12/14	365 Helen Bridges		$ 103,500.00	$ 2,500.00	$ 1,502,582.99
Sep 12/14	390 Clair Techer		$ 99,750.00	$ 3,750.00	$ 1,498,832.99
Sep 12/14	348 Robert E. West Professional Corp.		$ 94,750.00	$ 5,000.00	$ 1,493,832.99
Sep 12/14	369 Barry & Diane Brown		$ 84,750.00	$ 10,000.00	$ 1,483,832.99
Sep 12/14	351 James MacLeod		$ 74,750.00	$ 10,000.00	$ 1,473,832.99
Sep 12/14	352 Clem & Theresa Kuelker		$ 56,750.00	$ 18,000.00	$ 1,455,832.99
Sep 12/14	400 Don & Leslie Harbison		$ -	$ 200,000.00	$ 1,255,832.99
Sep 12/14	401 Jorge & Susanna Grinman	Note	$		

Note
As $56,700 is remaining of Barlie Inv. Depoist on Sept 12, 2014, that portion is traced to Jorge & Susanna Grinman withdrawal of $200,000.
i.e. Jorge & Susanna Grinman are required to return $56,700 of the $200,000 that it accepted from Base Finance Ltd.

5. On or about September 11, 2014, the Plaintiff invested $150,000 with Base Finance. The investments monies were deposited into the RBC Account. The RBC Account started with a nil ($0) balance in May 2014.

6. At all times, the Plaintiff understood that Base Finance operated a mortgage business whereby it lent money to entities secured by a 1st mortgage on residential property located in and around Calgary, Alberta.

7. By order of Justice Yamauchi K.D on October 15, 2015, Base Finance was placed under receivership. BDO Canada Limited was appointed by the Court as the receiver (the "Receiver").

8. In a decision dated February 8, 2016, Mr. Justice Yamauchi K.D (the "Decision") found that Base Finance was fraudulent. The Receiver has determined that Base Finance was operating as a Ponzi scheme.

9. At no time did the Plaintiff know that the funds it advanced were used in a Ponzi scheme. The Plaintiff would not have invested with Base Finance had it known that Base Finance was perpetrating a fraud.

10. The Decision made the following findings:

    a. The RBC Account is imposed with a trust for the benefit of all investors of Base Finance.

    b. The money of the investors of Base Finance could be traced into the RBC Account.

    c. The tracing and distribution of the RBC Account shall be conducted by the Lowest intermediate Balance Rule ("LIBR")

11. The Decision was appealed to the Alberta Court of Appeal and was upheld.

12. The Plaintiff claims an interest in those monies, or the value of which, received by the Defendants by virtue of a constructive trust, equitable proprietary right or otherwise. As a result, the Plaintiff claims that the Defendants have been unjustly enriched to its detriment and there is no juristic reason for the unjust enrichment.

13. Alternatively, the Plaintiff claims that the transaction resulting from dispersing the Plaintiff's monies to the Defendants is void pursuant to the Fraudulent Preferences Act, RSA 2000, c F-24, the Fraudulent Conveyances Statute, 13 Eliz. 1, Chapter 5 (U.K.), (the "Statute of Elizabeth"), the Bankruptcy and Insolvency Act, RSC 1985, c B-3 and/or the Judicature Act, RSA 2000, c J-2.

14. Don Mcmullen, Elizabeth Mcmullen, Thomas Wiseman, Sean Wiseman, Robert Mast, and John Forrest, are the controlling minds of the Defendant corporations. The Plaintiff claims that these individuals received the benefit and use of funds that rightfully belong to the Plaintiff from the corporation in which they are a shareholder and the controlling mind. As such, the Plaintiff seeks judgment against them.

15. The Plaintiff claims the full amount to be returned as set out in Figure 1 or as may otherwise be determined by this Honorable Court.

Real and Substantial Connection to Calgary Alberta

16. Base Finance operated from Calgary, Alberta since about 1985. The RBC Account is situated in Calgary, Alberta and the funds which are sought for recovery were dispersed from Calgary, Alberta. The Plaintiff is resident in Calgary, Alberta and the witnesses to this matter are situated in Calgary, Alberta. This claim relates to a contract or alleged contract made, performed or breached in Calgary, Alberta. Lastly, this action relates to a breach of an equitable duty in Calgary, Alberta.

17. The Plaintiff proposes that the trial of this action take place at the Court House in the City of Calgary in the Province of Alberta and it shall not exceed 25 days.

Remedy sought:

18. An accounting and tracing of the said monies received by the Defendants.

19. A declaration that the said money, or value of which, received by the Defendants, or to whom the valued is traced, from the RBC Account is the rightful property of the Plaintiff, held in trust for and on behalf of the Plaintiff and vesting order to those money, or properties into which the money, or value thereof, may be traced.

20. An order directing the Defendants to pay to the Plaintiff the amounts identified in the Plaintiff's tracing analysis, or such tracing analysis prescribed by this Honorable Court, failing which the Plaintiff shall be entitled to judgment against those Defendants for the amount unpaid.

21. Costs.

22. Interest pursuant to the Judgment Interest Act, R.S.A. 2000, c. J-1 as amended.

23. Such further and other relief as this Honourable Court may see fit to grant.

NOTICE TO THE DEFENDANTS(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

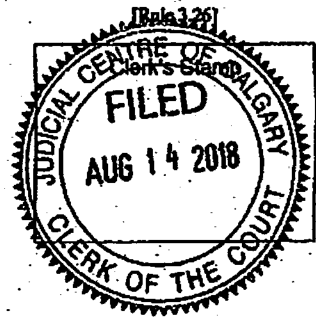
1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.



COURT FILE NUMBER	1701-12991
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	BARILE INVESTMENTS INC.
DEFENDANTS	Don Harbison, Leslie Harbison, James Macleod, Barry Brown, Diane Brown, Windigo West Holdings Ltd. Clem Kuelker, Theresa Kuelker, Helen Bridges, Claire Tocher, Jorge Grinman, Susana Grinman, Don McMullen Equipment Ltd., Don Mcmullen, Elizabeth Mcmullen, Robert K. Mast Professional Corporation, Robert Mast, Alta Streamwatch Conservation Association, Thomas Wiseman and Sean Wiseman, Allan Forrest Sales (1976) Ltd., Allan Forrest Sales (1991) Ltd., John Forrest
DOCUMENT	**ORDER FOR EXTENSION OF TIME FOR SERVICE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	RIVERSIDE LAW OFFICE Attention: Christopher M.A. Souster 4108 Montgomery View NW Calgary Alberta T3B 0L9 Tel: 403 685 4224 Fax 403 685 4225 File 3279

I hereby certify this to be a true copy of the original Order
Dated this 14 day of Aug 2018
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: AUGUST 14, 2018
NAME OF MASTER WHO MADE THIS ORDER: J. FARRINGTON
LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATION of the Plaintiff, ex parte; **AND UPON HAVING READ** the Affidavit of Pasquale Barile, sworn July 17, 2018; **AND UPON HAVING HEARD** from counsel for the Plaintiff;

IT IS HEREBY ORDERED THAT:

1. The time for service of the Statement of Claim or Amended Statement of Claim upon the Defendants, is hereby extended to ~~December~~ 14, 2018 of November;

2. There shall be no costs of this Application to any party hereto.

M.C.C.Q.B.A.