Court of Appeal for Saskatchewan

Docket: CACV4403

Citation: *RIP Beverages Co. Ltd. v Dave Dunn Enterprises Ltd.*, 2026 SKCA 9

Date: 2026-01-21

Between:

RIP Beverages Co. Ltd., MacDonald Jewellery Design Ltd., Ian MacDonald, Peter Klassen and Randall Wilson

Appellants
(Plaintiffs)

And

Dave Dunn Enterprises Ltd. and David Dunn, also known as Dave Dunn

Respondents
(Defendants)

Before:	Leurer C.J.S., Bardai and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Chief Justice Robert W. Leurer
In concurrence:	The Honourable Justice Naheed Bardai The Honourable Justice Keith D. Kilback
On appeal from:	QBG-RG-00574-2022, Regina (SKKB)
Appeal heard:	June 16, 2025
Counsel:	Lauren Wihak, K.C., for the Appellants Eric Marcotte for the Respondents

Leurer C.J.S.

I. INTRODUCTION

[1] The issue in this appeal is whether a Court of King's Bench judge erred in granting summary judgment dismissing a civil action because it was commenced outside of the applicable limitation period: *RIP Beverages Co. Ltd. v Dave Dunn Enterprises Ltd.* (8 July 2024), Regina QBG-RG-00574-2022 (SKKB) [*Decision*].

[2] On March 2, 2022, RIP Beverages Co. Ltd. [RIP], MacDonald Jewellery Design Ltd., Randall Wilson, Ian MacDonald and Peter Klassen [RIP Plaintiffs] commenced an action against Dave Dunn Enterprises Ltd. and David Dunn [Dunn Defendants]. I will call this the "RIP Action".

[3] In their statement of claim, the RIP Plaintiffs allege that monies they advanced for the purposes of developing three specific liquor stores were improperly used by the Dunn Defendants to develop different stores. The principal issue that the judge was called to decide was if the RIP Plaintiffs knew, or ought to have known, of the use to which their monies had been put more than two years before they issued the RIP Action. The judge found that this was the case, and therefore that the action was barred pursuant to s. 19 of *The Limitations Act*, SS 2004, c L-16.1.

[4] The RIP Plaintiffs appeal from the *Decision*. They assert that, contrary to the judge's findings, there were genuine issues regarding when they discovered their claim requiring a trial to resolve and therefore the RIP Action should not have been summarily dismissed. I have concluded that their appeal must be dismissed. In the result, the RIP Action continues to stand dismissed.

[5] In a separate action, commenced on May 17, 2022 [Dunn Action], Mr. Dunn seeks payments of monies allegedly owed to him by RIP, Mr. MacDonald, Mr. Klassen and Mr. Wilson, as well as Urban Cellars (Market Mall) Ltd. and Urban Cellars (Cumberland) Ltd. [RIP Defendants]. I will call this the "Dunn Action".

[6] In their statement of defence to the Dunn Action, the RIP Defendants pled, as a set-off, the same facts that the RIP Plaintiffs relied upon to ground the RIP Action. In the *Decision*, the judge found that "the set-off claimed in the Dunn Action is barred pursuant to s. 19 of *The Limitations Act* and cannot be maintained" (at para 142). On this basis, he also granted summary judgment in

the Dunn Action in favour of Mr. Dunn. That part of the *Decision* is the subject of a separate appeal, which is decided in reasons delivered contemporaneously with this judgment: *RIP Beverages Co. Ltd. v Dunn*, 2026 SKCA 10 [*Dunn Action Appeal Judgment*]. As explained in those reasons, I have concluded that the RIP Defendants' appeal from the grant of summary judgment in the Dunn Action must be allowed because *The Limitations Act* does not apply to the defence of equitable set-off.

[7] The overall effect of this judgment and the *Dunn Action Appeal Judgment* is that the claim by the RIP Plaintiffs for damages based on the alleged misappropriation of their monies is barred by the applicable limitation period. However, the RIP Defendants are entitled to continue to assert equitable set-off as a defence to the Dunn Action.

II. BACKGROUND

A. The basics of the dispute

[8] Mr. Dunn is a self-described entrepreneur, who focuses on opening restaurants and pubs. He is the sole director and shareholder of Dunn Enterprises Ltd. About a decade ago, as part of the privatization of the liquor store business in Saskatchewan, existing owners of off-sale liquor permits became entitled to full retail liquor store permits, and Mr. Dunn decided to open several such stores.

[9] Mr. Wilson has a significant history designing, building and operating liquor stores. Mr. Klassen and Mr. MacDonald also have experience in the liquor store business. Mr. Wilson, Mr. Klassen and Mr. MacDonald provided financing for some of the liquor stores Mr. Dunn planned to open.

[10] In 2017, Mr. Dunn and Mr. Wilson entered into what Mr. Wilson described as a "handshake agreement" relating to the development of several liquor stores in Saskatchewan under the "Urban Cellars" brand name. As summarized by the judge, Mr. Wilson's responsibilities under this arrangement were to include "identifying ideal markets, assisting in developing business plans and marketing strategies", while Mr. Dunn was to "secur[e] the leases and retail liquor licenses for

the stores, and to arrange the capital required for their set-up and development" (*Decision* at para 8).

[11] By early 2018, Mr. Dunn and Mr. Wilson had obtained leases and retail liquor licences for eight liquor stores. Each store was to have its own operating company and ownership structure. Mr. Wilson was to have an interest in each of these eight stores.

[12] Five of the eight liquor stores, known as Cumberland, Market Mall, Warman, Brighton and Whiskey Jacks, were to be in the Saskatoon area. Two of the stores, known as Quance and Golden Mile, were intended for Regina. One additional unnamed store was to be in Prince Albert, though that particular store was never opened.

[13] RIP – so named because of the first initials of the first names of Mr. Wilson (R), Mr. MacDonald (I) and Mr. Klassen (P) – was incorporated as the vehicle through which those three individuals were to invest in the Cumberland, Market Mall, and Warman liquor stores. The RIP Plaintiffs sometimes referred to these three stores as the "Enterprise Locations"; in the *Decision* the judge referred to them as the "Enterprise stores", a phrase I will adopt in this judgment except when quoting from material filed by the RIP Plaintiffs.

[14] The statement of claim commencing the RIP Action summarizes the position of the RIP Plaintiffs concerning RIP's investment, as follows:

> 10. As of May 2018, each of the three Enterprise Locations were leased to a holding corporation that was owned and/or controlled by one or both of Dunn and Dunn Enterprises (the "**Holdcos**").
>
> 11. In or about May 2018, the RIP Investors entered into an agreement with Dunn and Dunn Enterprises (collectively, the "**Dunn Defendants**") pursuant to which the RIP Investors agreed to advance funds to the Dunn Defendants for the express purpose of facilitating and funding development of the Enterprise in exchange for Dunn Defendants transferring the following percentages of the issued shares of the Holdcos to RIP, or the RIP Investors:
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> a. 45% of the Cumberland holding company;
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> b. 47.5% of Warman holding company; and
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> c. 50% of Market Mall holding company
>
> (the "**Agreement**")
>
> 12. Pursuant to the Agreement, the Dunn Defendants were also responsible for managing the development of the Enterprise, arranging the leases for the Enterprise

> Locations and securing the Retail Store Permits for the Enterprise Locations as required to operate them as retail liquor stores.
>
> 13. It was an express or implied term of the Agreement that the Dunn Defendants were only permitted to use funds received from the RIP Investors for development costs of the Enterprise Locations, and were required to account for the use of such funds in their capacity as manager of the development.

[15] The evidence of Mr. Wilson, Mr. Klassen and Mr. MacDonald aligned with these allegations. The statement of claim in the RIP Action asserts, and the evidence is, that between May of 2018 and April of 2019, the RIP Plaintiffs provided approximately $3.5 million to the Dunn Defendants.

[16] The source of the dispute between the parties became the now undeniable fact that monies advanced through or on behalf of the RIP Plaintiffs were commingled with other monies. The judge referred to this as a "cash soup" (at para 118), and a significant portion of those monies was spent in the development of liquor stores other than the Enterprise stores. The RIP Plaintiffs advance several causes of action based on the proposition that it was improper for the Dunn Defendants to have used RIP funds to develop non-Enterprise stores.

[17] For their part, the Dunn Defendants maintain that they did nothing wrong when they used monies advanced by the RIP Plaintiffs in the development of non-Enterprise stores. Mr. Dunn's evidence was that he "understood that RIP would acquire an equity stake in the Enterprise stores, but that it would also be participating in [Mr.] Wilson's equity stake in other stores, and would be funding part of [Mr.] Wilson's required contributions to those stores in order to do so" (*Decision* at para 13).

[18] There were three other liquor stores that were also developed by Mr. Dunn around this time: Golden Mile, Quance and Brighton. In the *Decision*, the judge referred to these three stores as the "Bison stores", based on the involvement of another investor group consisting of the principals of Bison Properties Limited, that he referred to as the "Bison group". The Golden Mile Store figures prominently in the *Decision*.

[19] It is now uncontroversial that the Dunn Defendants used some of the RIP funds to develop the three Bison group stores and Whiskey Jacks.

B. Milestone events bearing on the limitation of action issue

[20] The judge found that by March 25, 2019, "it was apparent that [Mr.] Klassen and [Mr.] MacDonald were getting concerned about not having a proper accounting for how their funds were being spent" (at para 17). The *Decision* contains the judge's summary of the evidence pertaining to the written communications and meetings among the parties between that date and the commencement of the RIP Action in 2022. I will examine the details of this in the context of the analysis of the issues in this appeal. However, several milestones figure prominently in the *Decision* and bear mention at this juncture.

[21] On March 25, 2019, Mr. Wilson sent an email to Mr. Dunn that was copied to Mr. Klassen. The judge reproduced parts of this email (see *Decision* at para 18). It included statements later relied upon by the Dunn Defendants to show that the RIP Plaintiffs were aware that monies they had advanced had been used in the development of the Golden Mile store.

[22] Mr. Dunn, Mr. Wilson, Mr. Klassen and Mr. MacDonald met over two days in early April of 2019. At the conclusion of that meeting, those present executed a contract on behalf of themselves, Dunn Enterprises Ltd., RIP and MacDonald Jewellery Design Ltd. [April 6th contract]. In the *Decision*, the judge reproduced parts of the April 6th contract (see *Decision* at para 19). Before the judge, the parties differed as to whether the April 6th contract simply confirmed the existing arrangement that RIP funds were to be used for the Enterprise stores (the RIP Plaintiffs' position) or if it reflected a different and more defined contract to facilitate obtaining a bank loan for the purposes of the Enterprise stores (Dunn's position). They also disagreed as to whether Mr. Dunn told the others present at that meeting that RIP funds had been used for the Golden Mile store (see *Decision* at para 21).

[23] Mr. Dunn and Mr. Klassen exchanged emails on June 9 and 12, 2019. These also mention the Golden Mile store. They then met on June 29, 2019, at which time a spreadsheet was provided to Mr. Klassen. These communications form part of the basis for the judge's conclusion that, regardless of the RIP Plaintiffs' actual knowledge, they "had sufficient information to reasonably come to the conclusion that [the Dunn Defendants] had spent RIP funds on things other than the Enterprise stores by June 29, 2019" (at para 111).

[24] On March 12, 2020, a business colleague of Mr. Dunn, Kevin Kasha, emailed a two-page spreadsheet to Mr. Klassen, Mr. Wilson and Mr. Dunn. The judge found that this spreadsheet "accounted for RIP's contributions" (at para 45). The RIP Plaintiffs' claims for damages in the RIP Action and a set-off in the Dunn Action are based on this spreadsheet. They say it shows that RIP funds totalling $1,168,604 had been spent on the following non-Enterprise stores (see para 49):

(a) $828,565 on the Golden Mile store;

(b) $48,039 on the Brighton store;

(c) $160,000 on the Quance store; and

(d) $132,000 on the Whiskey Jacks store.

[25] As the judge summarized, Mr. Klassen, Mr. Wilson and Mr. MacDonald each "averred that they did not know that RIP's funds that were intended for the Enterprise stores had been used for purposes other than the Enterprise stores, including the Golden Mile store, until receiving and reviewing the March 12, 2020 spreadsheet" (at para 47). It was a central issue before the judge whether this evidence was credible or if it was nonetheless a reasonable understanding on their part. The latter was important given the contention of the Dunn Defendants that the limitation period would begin to run against the RIP Plaintiffs if they knew or ought to have known about the misappropriation of monies well before that spreadsheet was sent.

C. Sale of interests in Cumberland and Market Mall

[26] Over the several months that followed the delivery of the March 12, 2020 spreadsheet, RIP negotiated with Mr. Dunn regarding the ownership of the Cumberland and Market Mall stores. These discussions culminated in a Share Purchase Agreement entered into as of November 13, 2020, between Mr. Dunn, Mr. Kasha, Mr. Wilson, Mr. MacDonald, Mr. Klassen, RIP, and various other corporations through which interests in the two stores were held. As summarized by the judge, the overall "effect of the agreement was to sell [Mr.] Dunn's and [Mr.] Kasha's interest in the Cumberland and Market Mall stores to RIP and its principals" (at para 51).

[27] Several other agreements were entered into contemporaneously with the Share Purchase Agreement. One was a mutual release whereby Mr. Wilson, Mr. MacDonald, Mr. Klassen, RIP and several other corporations, on the one hand, and Mr. Kasha, Mr. Dunn and a corporation, on the other hand, released the other side from certain causes of action.

[28] Another of the ancillary documents was a Deferred Payout Agreement. Again, as summarized by the judge, it "required the sum of $1,750,000 to be paid out in monthly payments, commencing six months from the closing date, based on the sales generated by the Cumberland and Market Mall stores" (at para 51). The Deferred Payout Agreement granted Mr. Dunn's investment companies access to sales records to verify what payments were due under it.

[29] Finally, Mr. Wilson, Mr. MacDonald and Mr. Klassen each provided a limited guarantee of one-third of the total amount payable by RIP under the terms of the Deferred Payout Agreement.

[30] The share sale closed in November of 2020. RIP made one payment under the Deferred Payout Agreement in 2021 but has generally refused access to information about the sales at the Cumberland and Market Mall stores.

D. The actions

[31] As mentioned, the RIP Action was commenced on March 2, 2022. The statement of claim asserts several causes of action, including conversion, breach of contract, civil fraud, breach of trust and unjust enrichment. It identifies the damages alleged to have been suffered by the RIP Plaintiffs, as well as the unjust enrichment of the Dunn Defendants, as being equivalent to the sum of RIP monies that had been used to develop liquor store locations other than the Enterprise stores.

[32] In their statement of defence, the Dunn Defendants deny any wrongdoing. They allege that Mr. Wilson represented that RIP intended to invest not only in the Enterprise stores, but also "intended to be invested in the additional Saskatchewan liquor stores by way of a purchase and participation in [Mr.] Wilson's existing interest in those stores" and that the use of RIP funds in non-Enterprise stores was done with Mr. Wilson's knowledge and approval. The statement of defence also advances the position that the sale of the Cumberland and Market Mall stores "was intended to be a settlement of all outstanding issues". Finally, and for the purposes of this judgment

most materially, the statement of defence asserts that Mr. Klassen and RIP "were fully aware of all expenditures and the approximate allocation of the RIP contributions by April 6, 2019 and in any event no later than June 29, 2019" and therefore the "entirety of the RIP claim is statute barred" by *The Limitations Act*.

[33] As has been noted, the Dunn Action was commenced on May 17, 2022. It concerns Mr. Dunn's efforts to collect monies he claims to be owed by the RIP Defendants under the November 2020 share sale agreement. In their statement of defence, the RIP Defendants pled, as a set-off, the same facts that the RIP Plaintiffs rely upon to ground the RIP Action.

E. The summary judgment applications

[34] The Dunn Defendants applied for summary judgment dismissing the RIP Action. While they did not accept that it was improper for them to have spent RIP funds on non-Enterprise stores, for the purposes of their summary judgment application only, they proceeded on the premise that the RIP Plaintiffs would succeed in their disputed allegation that the RIP funds could only be used for the Enterprise stores (see *Decision* at para 60).

[35] The Dunn Defendants asked for summary judgment on two bases. The first was that the action was statute-barred under *The Limitations Act*. In the alternative, the Dunn Defendants asserted that the RIP Plaintiffs "are estopped from pursuing their claim in light of the sale of the Cumberland and Market Mall stores which was intended as a resolution of the issues in the [RIP Plaintiffs'] claim". The judge did not deal with this alternative ground in the *Decision*. Therefore, these reasons do not address this potential defence to the RIP Action.

[36] Mr. Dunn applied for summary judgment for the amount of his claim made in the Dunn Action. His notice of application asserted that the RIP Defendants had not advanced a reasonable defence because they "claim the right to set off when no such rights exist under the [Deferred Payout Agreement] or at common law". The application also pleads that "[Mr. Dunn] is concurrently seeking dismissal of the [RIP Defendants'] claim on which they seek set off" and "[i]f that claim is dismissed, then [Mr. Dunn's] claim to set off will be eliminated regardless of whether common law set off is available to them or not".

[37] The summary judgment applications proceeded in tandem. The parties agreed that the evidence on each application could be considered for the purposes of both applications (see *Decision* at para 6).

F. Key statutory provisions

[38] Section 5 of *The Limitations Act* states that, unless otherwise provided in that Act, "no proceeding shall be commenced with respect to a claim after two years from the day on which the claim is discovered".

[39] Section 6 governs when a claim is "discovered" for the purposes of the running of a limitation period. It states as follows:

> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
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> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
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> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
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> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[40] Section 19 directs that if, after the commencement of a proceeding it is established that a limitation period applicable to the claim had expired before its commencement, "the claim is barred and the proceeding shall not be maintained".

G. The *Decision*

[41] The judge summarized the actions and the applications and the events leading to them (at paras 1-53). He next reviewed the general legal principles that govern the grant of summary judgment (at paras 54-59). Against this background, the judge turned to consider whether summary judgment should be granted in the RIP Action and the Dunn Action based on *The Limitations Act*.

[42] The judge found that the RIP monies had been spent on non-Enterprise stores well in advance of two years before the RIP action was commenced. Accordingly, he determined that "as of April 2019 the loss grounding the allegations in the RIP action had occurred" (at para 73).

[43] The judge next turned to consider when the RIP Plaintiffs could be said to have discovered their claim within the meaning of s. 6 of *The Limitations Act*. In this regard, he first concluded there was a "genuine issue requiring a trial with respect to whether the RIP Plaintiffs *knew* that they had suffered injury, loss or damage as of April 2019" (at para 76, emphasis added). Based on this, the judge determined that he could not apply the presumption created by s. 6(2) that their claim had been discovered by that date.

[44] However, the judge went on and observed that the RIP Plaintiffs' claim may nonetheless be time barred if the RIP Plaintiffs ought to have known the relevant facts that pertained to the discovery of their claim, as set out in s. 6(1) of *The Limitations Act*. He noted that the "objective standard of 'ought to have known' is assessed by ascertaining what a reasonably diligent person in the plaintiff's shoes would have known" (at para 81). He then considered the evidence and concluded that each of the elements necessary for the RIP Plaintiffs to have discovered their claim, as set out in s. 6(1), were present more than two years before March 2, 2022. For this reason, he found the continuation of the RIP Action and the assertion of the set-off claimed in the Dunn Action to be barred pursuant to s. 19 (see para 142).

[45] The judge went on to find that, if he was wrong about the running of the limitation period in relation to the claimed set-off, there was "a sufficient connection between the amounts claimed by [Mr.] Dunn and the amounts claimed as a set-off by the [RIP] Defendants, such that it would have been reasonable to permit the latter to proceed as a set-off" (at para 158).

[46] In the overall result, the judge granted summary judgement dismissing the RIP Action. He also struck the plea of set-off from the statement of defence to the Dunn Action.

III. ISSUES

[47] The RIP Plaintiffs invite this Court to address three questions. I accept that these issues provide an appropriate framework to decide their appeal, although I will address them in a different order than they are presented in its factum, and simplify them slightly, as follows:

(a) Did the judge err in law by conflating the commingling of monies with their misappropriation?

(b) Did the judge misapprehend the evidence in a material way?

(c) Did the judge provide legally sufficient reasons?

IV. ANALYSIS

A. The judge did not conflate commingling of monies with their misappropriation

1. Overview of the issue

[48] The RIP Plaintiffs argue that the judge conflated the concept of commingling with the elements of the causes of action they asserted. They say the judge failed to appreciate that several of their pleaded causes of action are not made out by the simple fact that the Dunn Defendants mixed RIP funds with monies from other sources and argue this affected his analysis as to when they should have discovered their claim.

[49] The RIP Plaintiffs assert in their factum that commingling occurs "when there is a mixing of funds that are legally required to be kept separate". This, they say, is to be distinguished from misappropriation or conversion which "is the civil equivalent of theft". In connection with the tort of conversion, they write in their factum that, in and of itself, "the act of commingling did not, and could not, lead to the [RIP Plaintiffs'] losses". They also maintain that the relevant contracts did not prohibit "commingling per se". Overall, the RIP Plaintiffs assert that "[p]rovided that the commingled funds – the 'cash soup' referred to by the Chambers judge – were eventually accounted for and available for their intended or permitted use, this would never amount to actual misappropriation in either fact or law". They also say, while they "may have had some knowledge

that their funds had been commingled with others intended to assist the [Dunn Defendants'] business ventures other than the Enterprise Stores, they had no basis for concluding that commingling amounted to the theft of part of the Contributions".

[50] The mixing of the monies contributed by the RIP Plaintiffs with monies received by the Dunn Defendants from other sources obscured the source of funds that were spent by them on the different liquor stores being developed. As well, key to assessing the elements for the discovery of the RIP Plaintiffs' claim, under s. 6(1) of *The Limitations Act*, was when they knew or ought to have known that their funds had been spent on non-Enterprise stores. For these two reasons, I agree with the RIP Plaintiffs that, if the judge conflated commingling with loss, the Court should intervene.

[51] In stating this conclusion, I put to the side a question not addressed by either party in their submissions; that being whether intangible money in an account (i.e., money in a non-cash form) can be converted. The issue arises because, in its traditional formulation, the "tort of conversion involves a wrongful interference with the *goods* of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession" (*Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 at para 31, [1996] 3 SCR 727 (SCC) [*Boma Manufacturing*], emphasis added).

[52] There is no doubt that the wrongful taking of cash, monies represented by a cheque, and other intangibles such as shares represented by a certificate, can found a claim for conversion (*Boma Manufacturing* at paras 30-31). The authors of *Fridman's The Law of Torts in Canada*, 4th ed (Carswell, 2020) at pp 156-157, write that "[w]hether intangibles that have not been given physical form — in the way that the intangible of a debt (chose in action) is given physical form in a paper cheque — is a live issue in Canada". A line of cases represented by *Reliable Mortgages Investment Corp. v Chan*, 2016 BCSC 405 at para 112, hold that "funds are chattels that can be the subject of a claim for conversion". Yet, I am unaware of this issue coming before an appellate court in this country, and the majority in *OBG Ltd. v Allen* (2007), [2008] 1 AC 1 at 42-45, 92 and 97 (UKHL), expressed the view that conversion is preserved for the wrongful taking or other interference with tangibles.

[53] As I see it, nothing in this appeal turns on whether the RIP Plaintiffs would have a cause of action in conversion, since the Dunn Defendants did not suggest that the RIP Plaintiffs would have no remedy if they succeeded in demonstrating that the use of their monies on non-Enterprise stores was an improper use of their monies. I simply wish to be clear that the question as to whether the tort of conversion is available when an intangible is misappropriated is not decided in these reasons.

[54] The RIP Plaintiffs write in their factum that the judge "frequently used the terms 'commingling' or 'spending' of funds and 'misappropriation' of funds effectively interchangeably". Thus, the issue I am considering in this section of my judgment is whether the judge erred in law by conflating the commingling of monies with a loss to the RIP Plaintiffs. The question may be put in an even more simple way: *Did the judge err because he did not understand that the RIP Plaintiffs did not suffer a loss simply because their contributions were placed into a mixed account?*

[55] As I will explain, I am satisfied that he committed no such error. A review of the *Decision* convinces me that, in determining to grant summary judgment, the judge carefully considered whether a trial was required to determine when the RIP Plaintiffs should have known that RIP funds had been *spent* on non-Enterprise stores and that he properly understood that the spending of money on non-Enterprise stores was the foundation of the RIP Plaintiffs' claim that a misappropriation had occurred.

2. The judge did not conflate commingling with misappropriation

[56] The judge organized his discussion of whether summary judgment should be granted in the RIP Action and the Dunn Action based on *The Limitations Act* into nine separate subheadings. His reasons under each demonstrates that his analysis was governed by when the RIP Plaintiffs should have known that RIP funds had been spent on non-Enterprise stores.

[57] The first subheading in the judge's analysis was "When were the RIP Plaintiffs' funds *spent*?" (emphasis added). The emphasized word in the title discloses the judge's attention on when the spending had occurred, not when commingling had taken place. The discussion that follows under this subheading is consistent with this understanding.

[58] The judge began his analysis under the first subheading by defining the issue as "whether there is sufficient evidence establishing when the RIP Plaintiffs' funds were *spent* on things other than the Enterprise stores" (at para 64, emphasis added). He explained that "[b]ecause the RIP action is based on the misappropriation of funds, it could not arise before any misappropriation took place", thus equating spending with misappropriation.

[59] In the paragraphs that follow, the judge reiterated that his concern was with when the RIP funds were spent, not commingled (see paras 65, 66, 67 and 72). The judge emphasized that Mr. Dunn's evidence was that "funds were generally spent soon after being received and commingled in Dunn Enterprises' account, because there were ongoing expenses that needed to be paid" (at para 67). The judge then focused on when the RIP Plaintiffs knew, or ought to have known, that the funds that they had contributed had been drawn upon to develop non-Enterprise stores.

[60] In the concluding paragraph of his analysis under the first subheading, the judge distinguished between the spending and comingling of monies, writing as follows:

> [73] Based on the evidence before me, it is more likely than not that the RIP funds advanced to Dunn Enterprises up to March 2019 were *entirely spent* as of April 2019. Further, I accept that up to that point in time *the funds had been commingled in Dunn Enterprises' account and were spent on things other than the Enterprise stores*. Accordingly, as of April 2019 the loss grounding the allegations in the RIP action had occurred.
>
> (Emphasis added)

[61] The issue addressed under the second subheading related to whether the presumption in s. 6(2) applied. The judge found that a trial would be required to determine whether the RIP Plaintiffs knew that they had suffered injury, loss or damage as of April of 2019 because of "Dunn's evidence that he informed [Mr.] Klassen, [Mr.] MacDonald and [Mr.] Wilson on April 6, 2019 that he had *spent* RIP's funds on the Golden Mile store" (emphasis added), but that they had denied this. This passage shows that the judge was equating the RIP Plaintiffs' claim to when the monies had been spent.

[62] The third subheading was a statement that "Actual knowledge or imputed knowledge can satisfy ss. 6(1)(a) through (d) of *The Limitations Act*". In the context of his discussion of this legal proposition, the judge's summary of the parties' positions demonstrates that his eye was fixed

squarely on the evidence relevant to when the RIP Plaintiffs should have known their monies had been spent:

> [83] Here, the RIP Plaintiffs' position is that they took reasonable steps once they were suspicious that their funds had been *converted*. They asked Dunn to account for where the RIP funds had been *spent*. They were not required to do more than this and could not have reasonably discovered their claim before Dunn provided the March 12, 2020 spreadsheet. The RIP Plaintiffs say that Dunn continually promised an accounting but deferred providing it. Dunn should not be able to benefit from his own failure to account.
>
> (Emphasis added)

[63] The fourth subheading addressed the argument by the RIP Plaintiffs that Mr. Dunn's conduct raised a triable issue regarding whether s. 17 of *The Limitations Act* applied. That provision states as follows:

> **17** The limitation periods established by this Act or any other Act or regulation are suspended during any time in which the person against whom the claim is made:
>
> (a) wilfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or
>
> (b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[64] The judge ultimately concluded that this Court's decision in *Walker v Hunter*, 2024 SKCA 34, meant that "s. 17 does not add anything to the analysis" because the "limitations issues turn on whether the RIP Plaintiffs knew or ought to have known of the matters in s. 6(1) before March 2, 2020; that is, over two years before they commenced the RIP action" (at para 88). While this statement does not specifically identify what facts the RIP Plaintiffs must know or ought to have known, in the paragraph that preceded it, the judge summarized the RIP Plaintiffs' arguments in a way that made clear that his attention was on when the RIP funds were actually spent:

> [87] The RIP Plaintiffs' argument with respect to s. 17 is that, in spite of their request for a detailed accounting with supporting documents pursuant to the April 6th contract, Dunn repeatedly failed to provide same and wilfully concealed that their funds had been *spent* on things other than the Enterprise stores until he provided them with the March 12, 2020 spreadsheet. Because of his wilful concealment, they did not know and could not have known, through the exercise of reasonable diligence, that: (1) their funds had been *spent* on things other than the Enterprise stores; (2) that this was caused by Dunn and Dunn Enterprises; and (3) that a proceeding would be an appropriate means to remedy the loss. As such, the two-year limitation period could not start running until March 12, 2020.
>
> (Emphasis added)

[65] The fifth subheading was “What the documentary evidence establishes”. In this context, the judge made 16 findings of fact based on the documentary evidence. The RIP Plaintiffs place emphasis on several of these that relate to the uncertainties they faced in accounting for the monies in the Dunn Defendants’ hands. For example, one of the judge’s findings was that “as of June 20, 2019, the RIP Plaintiffs were aware that litigation was an option to resolve [Mr.] Dunn’s failure to account for the expenditure of RIP’s funds” (at para 98). They say this finding reflects confusion by the judge. I cannot accept this. The judge’s conclusion that, as early as June 20, 2019, the RIP Plaintiffs were aware that litigation was an option to resolve the Dunn Defendants’ failure to account is in no way inconsistent with his more fundamental conclusion that the elements necessary for them to have discovered their claim were present more than two years before the RIP Action was commenced.

[66] Moreover, the finding in paragraph 98 is but one of many made in the context of the discussion under this subheading, and the *Decision* as a whole. The question that the judge was addressing was whether “what [Mr.] Dunn was conveying in writing was more than sufficient to alert the RIP Plaintiffs that their funds had been *spent* on things other than the Enterprise stores” (at para 89, emphasis added). Thus, I read nothing in the analysis under the fifth subheading that suggests the judge had any view other than that the outcome of the inquiries demanded by s. 6(1) would turn on when the RIP Plaintiffs knew, or ought to have known, the RIP funds had been spent by the Dunn Defendants on non-Enterprise stores, and not simply commingled.

[67] The same can be said about the judge’s analysis under the remaining subheadings in this part of the judgment, all of which relate to the specific inquiries under s. 6(1).

[68] The sixth subheading was “Is there a genuine issue requiring a trial with respect to s. 6(1)(a)?” That section requires that for a claim to be discovered the plaintiff must know, or in the circumstances ought to have known, that “the injury, loss or damage has occurred”. In connection with this, the judge found the question to be “when the RIP Plaintiffs either knew, or ought to have known, that some of the RIP funds had been *spent on things other than the Enterprise stores*” (at para 110, emphasis added). After a review of the evidence, he found that he was “satisfied that as of June 29, 2019, the RIP Plaintiffs had sufficient information available to them such that they knew, or ought to have known, that their funds had been *spent on things other than*

the Enterprise stores, particularly the Golden Mile store" (at para 122, emphasis added). He ended his analysis under this subheading by making the alternative finding that if he was "mistaken in concluding that the RIP Plaintiffs knew or ought to have known that RIP funds had been spent on things other than the Enterprise stores as of June 29, 2019 … they ought to have reasonably come to this conclusion well in advance of March 2, 2020" (at para 128).

[69] Under the seventh subheading, the judge discussed whether there was a genuine issue requiring a trial with respect to s. 6(1)(b) or s. 6(1)(c). Section 6(1)(b) demands that to be discovered, a plaintiff must have actual or constructive knowledge that "the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim". The requirement under s. 6(1)(c) is that the plaintiff have actual or constructive knowledge that "the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made". The judge considered these two elements together, finding that Mr. Klassen's "July 7, 2019 email makes it clear that the RIP Plaintiffs were aware of whose conduct would have resulted in the *expenditure* of RIP funds on expenses other than those for the Enterprise stores" (at para 133, emphasis added).

[70] The judge's discussion under the eighth subheading addressed whether there was an issue requiring a trial regarding s. 6(1)(d). It demands that, for a claim to be discovered, the plaintiff must know, or in the circumstances ought to have known, that "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it". In connection with this, the judge found that "the RIP Plaintiffs knew, or ought to have known, that it was legally appropriate to commence an action in relation to the alleged *misappropriated* funds over two years before they commenced the RIP action" (at para 141, emphasis added).

[71] The ninth, and last, subheading was titled simply "Conclusion with respect to limitations". Under it, the judge stated as follows:

> [142] The RIP action was commenced over two years after the RIP Plaintiffs' claim was discovered or discoverable. Accordingly, pursuant to s. 19 of *The Limitations Act*, the RIP action is barred and cannot be maintained. Similarly, the set-off claimed in the Dunn action is barred pursuant to s. 19 of *The Limitations Act* and cannot be maintained.

[72] There is nothing in this paragraph – or for that matter anything else in the *Decision* – that can fairly be read to suggest that the judge conflated the misappropriation of the RIP funds with their commingling.

[73] Overall, I am satisfied that the judge's finding that the RIP Action was commenced outside of the applicable limitation period was because, on or before March 2, 2020, the RIP Plaintiffs knew or ought to have known that the Dunn Defendants had spent RIP funds on the development of non-Enterprise stores – not simply that RIP funds had been commingled with other monies.

3. The judge did not err by failing to examine revocability of the expenditures

[74] In their factum, the RIP Plaintiffs argue that the act of commingling alone could not lead to their losses and that "the simple act of 'spending' the Contributions on ventures other than the Enterprise Stores" would not cause them harm, "provided that this spending never amounted to an *irrevocable* misappropriation of those funds" (emphasis added). Elsewhere in their factum, the RIP Plaintiffs suggest that the evidence failed to show that they knew or ought to have known that their monies "had been *converted*, as opposed to simply temporarily spent or commingled" (emphasis in original). They also write that prior to receiving the accounting in March of 2020, they were not aware, and could not have independently discovered, "[w]hether the Contributions were *irrevocably* contributed to locations that RIP Beverages did not have an interest in, or were merely temporarily borrowed by the [Dunn Defendants] to off-set other expenses" (emphasis in original).

[75] The RIP Plaintiffs did not advance this argument in their oral submissions. There is good reason for this; it has no merit.

[76] The ability of the Dunn Defendants to repay the money, or the RIP Plaintiffs to trace their monies into another fund or asset may affect the quantum of damages that they could ultimately recover. However, I see no principled basis to conclude that this in any way affects the accrual of the cause of actions asserted by the RIP Plaintiffs based on the misappropriation of their monies.

[77] The RIP Plaintiffs offer no authority for the proposition that the running of the limitation period in this case might be deferred because of the possibility that the monies used to develop

non-Enterprise stores had only been "temporarily spent", or that they had been "temporarily borrowed" or that the Dunn Defendants did not commit an actionable wrong because in some way they might be able to retrieve the money that was spent on the non-Enterprise stores. The wrongful use of monies is actionable and whether the wrongdoer "can in their turn get it back from those persons who received it is another matter; but their own liability to restore it is now clearly settled" (*Angus v R. Angus Alberta Limited*, 1988 ABCA 54 at para 54, quoting *Re Sharpe*, [1892] 1 Ch 154 (CA) at 165).

[78] There may have been a basis for this argument if the RIP Plaintiffs had contended that the legal arrangement with the Dunn Defendants was such that it was *proper* for the Dunn Defendants to temporarily divert RIP funds for use to develop non-Enterprise stores, so long as its repayment was promised. However, the premise of their action, and all of their evidence, is opposed to this proposition.

4. Conclusion on the issue of the alleged conflation

[79] The judge did not equate the commingling of funds with their misappropriation when he analyzed the elements necessary to determine when the RIP Plaintiffs discovered their claim, within the meaning of s. 6(1) of *The Limitations Act*. He also did not err in any of the other related ways alleged by the RIP Plaintiffs.

B. The judge did not misapprehend the evidence in a material way

1. Overview of the issue

[80] The RIP Plaintiffs argue that the judge "fundamentally misapprehended key evidence as to what was occurring between the parties between June, 2019 and March, 2020". The second date is important, because the RIP Plaintiffs maintain that it was *after* they had received Mr. Dunn's March 12, 2020 spreadsheet that they became aware that RIP funds had been spent on non-Enterprise stores and only after this date was it reasonable for them to have had this knowledge.

[81] As I have noted, in this case, the judge found that *"as of June 29, 2019*, the RIP Plaintiffs had sufficient information available to them such that they either knew, or ought to have known, that their funds had been spent on things other than the Enterprise stores, particularly the Golden Mile store" (at para 122, emphasis added, see also para 111). He also made the alternative finding

that if he was "mistaken in concluding that the RIP Plaintiffs knew or ought to have known that RIP funds had been spent on things other than the Enterprise stores as of June 29, 2019 … they ought to have reasonably come to this conclusion well in advance of March 2, 2020" (at para 128).

[82] The RIP Plaintiffs' submission that the judge misapprehended the evidence is an attack against these findings. In my consideration of their arguments, I will first address the standard of review that this Court must apply in these circumstances. I will then consider separately the question of whether either of these findings is the product of a reversible error. As a bottom line, I see no basis for this Court to find that the judge misapprehended the evidence.

2. Standard of review

[83] The RIP Plaintiffs invite this Court to characterize the judge's alleged misapprehension of evidence as an error of law, writing in their factum that the "misapprehension of, or failure to consider or give appropriate weight to, relevant evidence or relevant factors can give rise to an error of law". As authority, they refer to *Kot v Kot*, 2021 SKCA 4 at para 20 [*Kot*]. *Kot* was an appeal from a decision to dismiss an application to revoke the grant of probate of a will. In that context, after reviewing many cases, Barrington-Foote J.A. said as follows:

> [20] In summary, these cases confirm that appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[84] I agree with the Dunn Defendants that this passage does not describe the standard of review applicable in this case. It certainly does not assist the RIP Plaintiffs in elevating the error alleged to one of law.

[85] As noted in paragraph 20 of *Kot*, an allegation of misapprehending or failing to consider material evidence is a component of whether a judge has made a palpable and overriding error in their assessment of the facts. In the context of a discretionary decision, it is the failure to identify or correctly apply legal criteria that amounts to an error of law. In this case, the RIP Plaintiffs do not identify any error by the judge in regard to the legal criteria that he identified or applied to assess the applications for summary judgment.

[86] More to the point, however, *Kot* does not describe the standard that is applicable to the appellate review of a summary judgment. Absent an error of law, a determination of whether there exists a genuine issue requiring a trial is a question of mixed fact and law. This means that, where there is no extricable legal error, this Court can only intervene if the judge has committed a palpable and overriding error (*Deren v SaskPower*, 2017 SKCA 104 at para 41; *Hryniak v Mauldin*, 2014 SCC 7 at para 81, citing *Housen v Nikolaisen*, 2002 SCC 33 at para 36; and *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39 at para 32 [*Venture Construction*]). Whether a limitation period has expired before the issuance of a statement of claim is also a question of mixed fact and law (*Venture Construction* at para 33).

[87] All of this means that, absent legal error, this Court can only intervene in the judge's determinations that as of June 29, 2019, the RIP Plaintiffs knew or should have known that their funds had been spent on non-Enterprise stores, and if he was mistaken about this, they ought to have reasonably come to this conclusion in advance of March 2, 2020, if those findings were the product of palpable and overriding error. The misapprehension of evidence can give rise to such an error. However, to be palpable, it must be obvious. To be overriding, it must go to the very core of the issue or finding.

3. No error in relation to what the RIP Plaintiffs should have known as of June 29, 2019

[88] The judge introduced his discussion on the issue of when the RIP Plaintiffs knew, or ought to have known, that some of the RIP funds had been spent on things other than the Enterprise stores by stating his conclusion that he had sufficient evidence to answer the question. He rested his finding that the RIP Plaintiffs had sufficient information to conclude that Mr. Dunn and Dunn Enterprises had spent RIP funds on things other than Enterprise stores by June 29, 2019, on the communications from Mr. Dunn beginning on June 6, 2019.

[89] As described by the judge, in an email of that date to Mr. Klassen, Mr. Wilson and Mr. Kasha, Mr. Dunn identified "the (past) cash transactions for which he claims the RIP Plaintiffs (including [Mr.] Klassen and [Mr.] MacDonald) are responsible". As the judge also noted, the transactions for which the RIP Plaintiffs were responsible "include transactions for non-Enterprise stores" (at para 69). The judge had reproduced large parts of this email early in the *Decision* (see

para 23). He subsequently extracted the following portions of the email that led him to make these conclusions (at para 69):

> Peter
>
> …
>
> I am proceeding under the pretense that you purchased various interests in addition to participating in Wilsons existing share in Cumberland, Warman and Market Mall, as well as participating in Wilsons 25% Brighton and Golden Mile. …
>
> … Right now I have included the following projects in calculating cash transactions: Cumberland, Warman, Market Mall Golden Mile, Brighton. There are other projects that Randy is in that you are not that also required cash which Randy will be required to fund on his own.
>
> (Affidavit of David Dunn, sworn October 18, 2023, Exhibit D, RIP action)

[90] Later in the judgment, the judge explained why these parts of the June 6, 2019 email should be understood to have communicated that the Dunn Defendants had spent RIP funds on non-Enterprise stores:

> [115] I consider the RIP Plaintiffs to have been clearly put on notice that Dunn was allocating expenditure of RIP funds to cash transactions that had occurred for stores other than the Enterprise stores, including the Golden Mile store, on June 6, 2019. Dunn said as much in his email on that date. Klassen was asked how he interpreted the email, and particularly whether it indicated that Dunn had invested RIP's funds in the Golden Mile store. His response, after arguing about the proper meaning of the word "pretence", was: "I don't know. All I know is that I have an agreement signed by Mr. Dunn saying exactly what it said, and if he's trying to maneuver something else, that's up to him." Respectfully, to the extent this is an answer, it is effectively "I wasn't concerned because we had the April 6th contract to fall back on."

[91] On June 9, 2019, Mr. Dunn and Mr. Klassen exchanged emails about an in-person meeting. The subject of the meeting was "funding". The judge reproduced the following part of that email exchange written by Mr. Dunn (at para 25):

> We need money for inventory at Golden Mile etc. Everything else is secondary. All my trades have bent over backwards for me and need cash but they are not what is going to cost us our permit. The SLGA is our problem. There are no options available. We need to open. It happens or it doesn't. If RIP can't help I need to know.
>
> The answer in my mind was always the financing package with a TD for Cumberland. If the TD were to provide the funds for our inventory at Cumberland in advance of paperwork (costs we financed 100% with cash) the funds could be advanced to Golden Mile. I believe that Ian agreed to this concept as indirectly it was yours and his money.
>
> **I brought forward the Golden Mile problem to Randy's attention weeks ago impressing upon him that we needed to get Golden mile open. At that time I had funds for our share and Bison had theirs and we only needed yours. Unfortunately yours was not available at the time, thus the present situation.** Now my fund portion has been chewed up by the delays as I used my funds for rent and payables. In fairness Peter you

> have been dealing with a constant moving target which has been very frustrating for RIP. I understand that and appreciate your resolve. We have clearly been unable to strike while the iron was hot becsuse [*sic*] of the resulting uncertainty. As a result we have backed ourselves into a cornor [*sic*]. We need to open Golden Mile by June 27 or lose the permit.
>
> (Emphasis added by the judge)
>
> (Affidavit of Peter Klassen sworn January 24, 2024, Exhibit K, RIP action)

[92] The judge also saw, in an email Mr. Klassen sent to Mr. Dunn on June 12, 2019, evidence that Mr. Klassen was aware that RIP funds had likely been spent on non-Enterprise stores. One part of a larger extract from Mr. Klassen's June 12, 2019 email that the judge reproduced (see *Decision* at para 26) stated as follows:

> Dave further in response to your email of the 9th wherein you request funds for the inventory at Golden Mile. **I understand your concerns regarding Golden Mile but as you are aware there are equally immediate pressing concerns relating to the three stores we have a direct common interest in (Cumberland, Warman, and Market Mall), being those three stores referred to in the April 6th agreement** - one of the issues being to achieve disbursement of the bank loan for the 8th and Cumberland Store.
>
> **Dave our position is simply this we have provided 3.5 million dollars to the enterprise, which by my calculations is sufficient to fund all expenditures made to date for Cumberland, Warman and Market Mall.** To date you have provided no detailing of expenditures made or paid or any accounting of revenues received and expenditures incurred at the Cumberland store. In short we are totally in the dark except as in so far as we availed ourselves of other resources – Yet you say contractors are hounding you for unpaid bills. **One conclusion I can draw from the facts as I have them, is that either you have contributed nothing financially to the development of the three locations or if you have you have used a considerable portion of the funds advanced by us for purposes not related to the three locations. This conclusion is a cause for concern.**
>
> **Dave we have reached a point which simply stated, is that without full disclosure and agreement by you to the points outlined below we are not prepared to advance any further funds and we will pursue such options as are available to us. The result will be that everyone will be a loser; it is simply a matter of who will be the bigger loser.** On the other hand if you are prepared to cooperate as requested below, the original intent of all of the parties can be achieved. The choice is yours. Dave it is just not fair on the one hand to demand more money far in excess of what was first contemplated and on the other not tell where the money has gone nor keep us up to date about what is happening.
>
> (Emphasis added by the judge)

[93] The judge further explained why he took the June 12, 2019 email from Mr. Klassen to speak to Mr. Klassen's personal awareness that it was likely that RIP funds had been spent on non-Enterprise stores:

> [116] Klassen's email to Dunn, on June 12, 2019, evinces that he was attuned to the likelihood of Dunn having spent RIP funds on non-Enterprise stores. He had concluded that Dunn had either contributed **nothing** to the Enterprise stores or, alternatively, spent a **considerable portion** of RIP's funds for purposes not related to them. He also indicated

> that without a full accounting of the source and application of RIP's funds that RIP would "pursue such options as are available to us". By June 20, 2019, one of the options was highlighted by Klassen – commencing litigation.
>
> (Emphasis added by the judge)

[94] The RIP Plaintiffs invite this Court to conclude that the judge misapprehended the business context of the June 12, 2019 email, which was sent at a time that Mr. Klassen was attempting to obtain a bank loan in relation to the financing of the Enterprise stores, and for that purpose a proper accounting of expenses was required, and contemporaneously, Mr. Dunn was attempting to convince the RIP Plaintiffs to invest in additional liquor stores. However, I read nothing in the *Decision* suggesting that the judge ignored this overall context. If he erred, it is not palpable that he did so.

[95] The RIP Plaintiffs also submit that the conclusions the judge drew from the June 12th email are unsupported by its text. They raise two issues on this score.

[96] First, they assert that it was an overstatement for the judge to say that Mr. Klassen had reached any conclusion about the expenditure of RIP funds on non-Enterprise stores, since he identified two possibilities. However, it was Mr. Klassen who indicated that there was "one conclusion" he could draw. That one conclusion involved two alternatives, one of which was that a "considerable portion" of RIP funds had been spent on non-Enterprise stores. The judge did not misrepresent the content of the June 12th email.

[97] Second, the RIP Plaintiffs argue that the judge misunderstood the reference to the possibility that they may "pursue such options as are available", which they say "had nothing to do with the issue over the Contributions" and "ignores the broader context in which this e-mail was sent". However, I do not read the email as evincing a misapprehension by the judge at all, if what the judge said about the June 12, 2019 email, and another sent on June 20, 2019, are placed side by side with the pertinent parts of those emails:

Decision	**Emails**
[116] … [Mr. Klassen] also indicated that without a full accounting of the source and application of RIP's funds RIP would "pursue such options as are available to us." By June 20, 2019, one of the options was highlighted by Klassen – commencing litigation.	June 12 email: "Dave we have reached a point which simply stated, is that without full disclosure and agreement by you to the points outlined below we are not prepared to advance any further funds and we will pursue such options as are available to us…"

	June 20 email: "… agreement is in the majority of occasions is a better method of resolving differences is in [*sic*] a better and less expensive way or [*sic*] resolving those differences than expensive and time consuming legal proceedings …"

[98] The judge did not mention that Mr. Klassen had asked for both "disclosure and agreement" on several points as necessary to avoid litigation. However, this is a conjunctive demand. It is not a palpably wrong reading of the text of what Mr. Klassen wrote to understand that he threatened litigation if disclosure was not provided.

[99] I also read nothing in the *Decision* that convinces me that the judge did not understand the context in which the two emails were sent. To the contrary, earlier in the judgment the judge recognized this background when he correctly stated that Mr. Klassen had sent the June 20, 2019 email "asking to discuss the common concerns of the Bison group and RIP" (at para 30). The judge then reproduced the relevant parts of the June 20th email, emphasizing the words that he later drew on in paragraph 116, only part of which I have reproduced above.

[100] On June 29, 2019, Mr. Klassen met with Mr. Dunn and Mr. Kasha. At that meeting, Mr. Klassen was provided with a spreadsheet entitled "Reconcile Peter's cash prior to any bank financing". The judge summarized the contents of the spreadsheet as follows:

> [33] … Below this title, it stated "Includes existing set up, outstanding and estimated cost for turn key opening". The spreadsheet included a column for "Cash Paid Out to date" for the Enterprise stores as well as for the Brighton, Golden Mile and Regent Park stores. It also included a column for "Klassen Cash required", which was a percentage of the cash paid out to date based on an equity stake in each of the six stores. For example, for the Cumberland store, "Cash Paid Out to date" was listed as $3,408,200. "Klassen Cash required", based on a 45% equity stake for RIP, was listed as $1,533 ,690.
>
> [34] For the Golden Mile store, "Klassen Cash required" was listed as $809,023 of the $3,236,090 in "Cash Paid Out to date". This was based on a 25% equity stake, being Wilson's stake in that store, and Dunn's understanding that RIP was financing Wilson's stake. According to Dunn, the Golden Mile store opened on June 29, 2019, which would indicate that the "turn key opening" costs had essentially been incurred when he reviewed the spreadsheet with Klassen.
>
> [35] Notably, under the column total of "Klassen Cash required" for the six stores (the Enterprise stores plus the Brighton, Golden Mile and Regent Park stores), an entry indicated that based on the cash required, there had been an overpayment of "Klassen Cash" in the amount of $71,124.

[101] In his affidavit, Mr. Klassen described this meeting as well as the conclusions he drew based on what he was told by Mr. Dunn and what he read in the spreadsheet. As part of this, he stated that he "determined that RIP had contributed about $800,000 more than our requisite capital contributions to the Enterprise Locations and that $525,000 of that sum was entirely unaccounted for". He also revealed that he "suspected that Mr. Dunn may have misappropriated some portion of the Contributions intended for the Enterprise Locations and used them for Golden Mile", but that the RIP Plaintiffs "did not have any actual evidence proving that this occurred, establishing the amounts that he misappropriated or disclosing the recipient of those potentially misappropriated funds".

[102] The judge summarized Mr. Klassen's evidence about this meeting, as follows:

> [36] According to Klassen, as of June 2019, based on Dunn's ongoing failure to provide an adequate accounting of RIP's contributions toward the Enterprise stores, and his suggestion that unaccounted for funds be allocated to an equity investment in the Golden Mile store, he suspected that Dunn may have misappropriated some portion of RIP's contributions toward the Enterprise stores and used them for the Golden Mile store. However, "we did not have any actual evidence proving that this occurred, establishing the amounts that [Dunn] misappropriated, or disclosing the recipient of those potentially misappropriated funds": Affidavit of Peter Klassen sworn January 24, 2024, para. 28, RIP action.

[103] The RIP Plaintiffs maintain that it was because of the spreadsheet delivered on March 12, 2020, that they gained actual knowledge that the Dunn Defendants had spent RIP funds on non-Enterprise stores. This is the backdrop for the conclusions that the judge reached based on communication that had occurred up to June 29, 2019:

> [117] By June 29, 2019, the RIP Plaintiffs, through Klassen, had some evidence that Dunn had committed alleged misappropriations within the scope of what is alleged in the RIP action.
>
> [118] The June 29, 2019 spreadsheet, for all intents and purposes, was a similar form of accounting to the March 12, 2020 spreadsheet. It was dividing up the commingled "cash soup" for the purposes of allocating funds based on equity stakes. With respect to the Golden Mile store, in particular, the store was open as of June 29, 2019. The turn-key opening costs had been incurred. Klassen knew this because he and MacDonald had advanced $200,000 for inventory for the Golden Mile store, and had remote access monitoring of its operating account. Dunn had advised Klassen in his June 6, 2019 email that he intended to account for RIP's funds via incurred cash transactions for the Golden Mile store. The June 29, 2019 spreadsheet did exactly that. Further, after allocating RIP funds to all six stores, the spreadsheet concluded with the allocation having established an "overpayment" by RIP. An overpayment cannot occur if the funds have not been spent.
>
> [119] While Klassen, MacDonald and Wilson have sworn that they had "no actual evidence" proving that Dunn had spent RIP's funds on the Golden Mile store, this is not

> correct. At a minimum, they had Dunn's June 6, 2019 email, and the June 29, 2019 spreadsheet. At law, these would constitute admissions. Further, the RIP Plaintiffs obtained nothing more probative with respect to the Golden Mile store in the March 12, 2020 spreadsheet than was contained in the June 6, 2019 email and June 29, 2019 spreadsheet.

[104] All of this was the foundation for the judge's conclusion that, even if the RIP Plaintiffs did not have actual knowledge, they should have known of the matters constituting discovery of their claim by June 29, 2019. The judge wrote this:

> [122] I am satisfied that as of June 29, 2019, the RIP Plaintiffs had sufficient information available to them such that they either knew, or ought to have known, that their funds had been spent on things other than the Enterprise stores, particularly the Golden Mile store. The information available to them gave rise to a permissible fact inference and a plausible inference of liability; something beyond mere suspicion or speculation: *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at paras 45-46, [2021] 2 SCR 704. See also *Nexus Holdings Inc. v City of Saskatoon*, 2023 SKCA 126:
>
> > [6] As the Chambers judge understood, the principles of discoverability do not require a plaintiff to appreciate or have an awareness of all the facts that are necessary to *prove* a claim. It is sufficient that a plaintiff has enough actual or constructive knowledge of the material facts to draw a "plausible inference of liability" on the part of a defendant *(Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at paras 42-46, 461 DLR (4th) 613 [*Grant Thornton*]*).*
>
> (Emphasis in original)

[105] Later, the judge referred to *Jardine v Saskatoon Police Service*, 2017 SKQB 217 [*Jardine*], to support his conclusion that the evidence before him established that the RIP Plaintiffs ought to have known that by June 29, 2019, their funds had been spent on non-Enterprise stores (see para 124).

[106] The RIP Plaintiffs do not specifically allege that the judge committed legal error in his analysis. However, in their factum, they offer criticism of the judge's reliance on *Jardine*. They say that the judge erred in doing so, because *Jardine* "dealt with the question of whether the plaintiff had sufficient knowledge that the defendant had caused its loss" whereas the "question in this case is when the [RIP Plaintiffs] learned that they had suffered a loss at all".

[107] The RIP Plaintiffs' complaint over the judge's use of *Jardine* is misplaced. He referred to it for two propositions. The first was that the "RIP Plaintiffs did not require perfect knowledge to be aware that RIP's commingled funds had been spent on things other than the Enterprise stores". The second was that "they did not need to know that their claim was likely to succeed in order to have discovered it" (at para 124). Both these points are well-supported by the extract from *Jardine*

that the judge reproduced in his reasons and the case law it cites. More importantly, the principles that the judge drew from *Jardine* are consistent with the direction given in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 [*Grant Thornton*], and *Nexus Holdings Inc. v Saskatoon (City)*, 2023 SKCA 126, to which he also referred.

[108] In *Grant Thornton*, Moldaver J. wrote that "a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise" (at para 44). *Grant Thornton* further holds that for a court to find that a claim is discoverable, what is required is that the plaintiff is "able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known". The question is "whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable" (at para 45). Thus, while "it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists", and the standard is not to be applied in this way, "requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability" (at para 46).

[109] The RIP Plaintiffs assert that the judge's reasons reflect a failure to appreciate "crucial differences" between the June 29, 2019 spreadsheet and the March 12, 2020 spreadsheet. In substance, they say that the June 29, 2019 spreadsheet was intended to communicate general information necessary for the RIP Plaintiffs to become investors in other stores. However, the judge did not say that the June 29, 2019 spreadsheet and the March 12, 2020 spreadsheet were produced for identical reasons or contained identical information. Indeed, he specifically reviewed the differences between the two documents (see para 105).

[110] More importantly, the judge did not base his finding that by June 29, 2019, the RIP Plaintiffs should have known their funds had been spent on non-Enterprise stores on the similarities between the two documents. Instead, he drew that conclusion from the fact that the spreadsheet of that date "concluded with the allocation having established an 'overpayment' by RIP" and that an "overpayment cannot occur if the funds have not been spent" (at para 119).

[111] The judge stated his finding that the RIP Plaintiffs *should have* known their monies had been spent on non-Enterprise stores before expressing his conclusion as to the credibility of the

RIP Plaintiffs' contention that there had not been an express disclosure of the fact of the use of RIP funds to develop non-Enterprise stores. However, the judge went on and explained why he could not accept that evidence:

> [123] Further, I do not accept that Dunn was not forthcoming with respect to his having used RIP funds with respect to the Golden Mile store. In addition to his June 6, 2019 email, in his June 9, 2019 email he plainly stated to Klassen (emphasis added): "I brought forward the Golden Mile problem to Randy's attention weeks ago impressing upon him that we needed to get Golden mile open[;] At that time I had funds for our share and Bison had theirs and **we only needed yours**": Affidavit of Peter Klassen sworn January 24, 2024, Exhibit K, RIP action. Further still, the June 29, 2019 spreadsheet showed that RIP funds had been applied to the incurred turn-key opening costs for the Golden Mile store. This was not being hidden by Dunn.
>
> (Emphasis added by the judge)

[112] It was open to the judge to interpret the emphasized words as confirming Mr. Dunn's evidence that the fact of the expenditure of RIP funds on non-Enterprise stores *had* been made known to the RIP Plaintiffs. In *Grant Thornton,* Moldaver J. wrote that "[i]n assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used" (at para 44). In this case the judge had both direct and circumstantial evidence as to what had been disclosed by Mr. Dunn to Mr. Klassen. The judge's acceptance that it "was not being hidden by [Mr.] Dunn" that RIP funds were used to develop non-Enterprise stores justifies the judge's conclusion that the RIP Plaintiffs had discovered their claim based on their actual knowledge and not merely constructive knowledge.

[113] The judge specifically considered, but rejected, the RIP Plaintiffs' argument that events after June 29, 2019, should lead him to the conclusion that they could not reasonably have known that there had been more than a commingling of funds:

> [126] I have considered the RIP Plaintiffs' argument that the fact that they continued to ask for an accounting from July onward evinces that they did not know and could not have reasonably known that RIP funds had been spent on things other than the Enterprise stores. In my view, the fact that they continued to ask for an accounting does not lead to this conclusion. Klassen was seeking financial records from Dunn with respect to the Enterprise stores for the TD loan, regardless of whether the RIP Plaintiffs knew or ought to have known that RIP funds had been spent on the Golden Mile store, or other stores.
>
> [127] I have also considered Klassen's evidence that if he knew that RIP funds had been spent on the Golden Mile store on June 29, 2019, he would have demanded an immediate repayment. I do not accept that this would have been the case. The evidence does not disclose this occurring after Klassen received the March 12, 2020 spreadsheet, which the RIP Plaintiffs say allowed them to discover their claim. Klassen's evidence is that the

> parties negotiated the share purchase agreement for months afterward, leaving the issue of RIP's contributions to the Golden Mile store to be dealt with another day.

[114] In short, absent legal error in the judge's analysis, this Court can disturb his finding that the RIP Plaintiffs ought to have known that by June 29, 2019, their funds had been spent on non-Enterprise stores only if it is the product of an obvious error that goes to the root of that finding. I see no such error. In overall summary, I see no basis to intervene in the judge's finding that by June 29, 2019, the RIP Plaintiffs had sufficient information to reasonably conclude that Mr. Dunn and Dunn Enterprises had spent RIP funds on things other than Enterprise stores.

4. No need to examine further the judge's alternative finding

[115] The judge's unimpeachable finding that, by June 29, 2019, the RIP Plaintiffs had sufficient information to reasonably conclude that Mr. Dunn and Dunn Enterprises had spent RIP funds on things other than Enterprise stores renders it unnecessary to assess if anything that took place after that date ought to have made it more obvious to a reasonable person that this had occurred.

5. No error regarding s. 6(1)(d)

[116] The RIP Plaintiffs argue that one of the judge's misapprehensions of evidence related specifically to s. 6(1)(d) of *The Limitations Act*. As noted, that provision requires that, for a claim to be discovered, a person must know or ought to have known that "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it".

[117] The judge found that the RIP Plaintiffs should have known that a legal action was appropriate more than two years before they issued their statement of claim. The RIP Plaintiffs argue that this finding was a product of the judge's mischaracterization of discussions between the parties as "settlement discussions". An understanding of their criticism, and why I reject it, requires a more careful consideration of the judge's reasons.

[118] Before the judge, the RIP Plaintiffs maintained that it was not appropriate for them to commence the RIP Action prior to receiving the March 12, 2020 spreadsheet. In their view, it was sufficient to request that Mr. Dunn account for where the RIP funds had been spent, pursuant to the April 6th contract. Their position, as summarized by the judge, was that the parties "were still determining whether they could carry on a viable business relationship together, at least for a certain amount of time", although their evidence was that "by December 11, 2019, they knew they

could not continue with Dunn" (*Decision* at para 136). They also said that "there was a chance that [Mr.] Dunn would either repay their funds or increase their equity in the Enterprise stores as a means of making things right" (at para 137).

[119] After summarizing the RIP Plaintiffs' arguments on this point, the judge reviewed the evidence they relied upon to support the possibility that the Dunn Defendants would make them whole by increasing their stake in the Enterprise stores (see para 137). He also reproduced a part of a written brief filed by the RIP Plaintiffs which included an argument that Mr. Klassen "must have interpreted" statements made by Mr. Dunn "as an undertaking to convert the over contribution into shares of the operating companies for the Enterprise Locations" (at para 138).

[120] The judge did not find this to be a persuasive reason for the RIP Plaintiffs to have postponed bringing an action. He observed that "even if counsel's submissions regarding what [Mr.] Klassen must have understood is correct (in the absence of any evidence from [Mr.] Klassen to this effect), a party's statement that they will 'make it right' is generally insufficient to provide compelling and appropriate reasons for a plaintiff to hold off bringing an action". He added that "[f]or settlement discussions to justify postponing discoverability pursuant to s. 6(1)(d), they must have a realistic possibility of a successful resolution and an ascertainable end point" (at para 139).

[121] The judge supported these statements by reproducing and highlighting a long passage from *Venture Construction*, which also referred to many other cases. He then concluded his analysis as follows:

> [140] Here, the RIP Plaintiffs have not pointed to any type of settlement discussions with a realistic possibility of a successful resolution and an ascertainable end point that would justify postponing the commencement of the RIP action. Their position, simply stated, is that they did not have sufficient information to know that they had suffered a loss of the type claimed in the RIP action until they received the March 12, 2020 spreadsheet. See para. 171 of the RIP Plaintiffs' brief: "In sum, the respondents submit that the evidence does not support a finding that the respondents became aware of the fact that the applicants misappropriated the Converted Funds prior to March 12, 2020."
>
> [141] In my view, the RIP Plaintiffs knew, or ought to have known, that it was legally appropriate to commence an action in relation to the allegedly misappropriated funds over two years before they commenced the RIP action; that is, before March 2, 2020. Indeed, they had alluded to pursuing litigation with respect to allegedly misappropriated funds as of June 20, 2019. Their decision to hold off, in spite of increasing evidence after June 20, 2019 that RIP funds had been spent on the Golden Mile store (and elsewhere), did not toll the limitation period pursuant to s. 6(l)(d).

[122] Section 6(1)(d) of *The Limitations Act* has no common law counterpart (see G. Mew, D. Rolph & D. Zacks, *The Law of Limitations*, 4th ed (LexisNexis, 2023) at pp 125-126 [Mew]). At least one of the purposes for the added statutory requirement that a plaintiff can be found to have discovered a claim only if a legal proceeding would be appropriate "was to enable courts to function more efficiently by deterring needless litigation" (*407 ETR Concession Company Limited v Day*, 2016 ONCA 709 at para 48 [*407 ETR Concession*]).

[123] Under s. 6(1)(d), for a claim to be discovered, a proceeding must only be a *legally* appropriate remedy. *Markel Insurance Company of Canada v ING Insurance Company of Canada*, 2012 ONCA 218, explains why this is the case:

> [34] This brings me to the question of when it would be "appropriate" to bring a proceeding within the meaning of s. 5(1)(a)(iv) of the *Limitations Act*. Here as well, I fully accept that parties should be discouraged from rushing to litigation or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1)(a)(iv) states that a claim is "discovered" only when "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it", the word "appropriate" must mean *legally appropriate*. To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.
>
> (Emphasis in original)

[124] I have already explained why the judge's conclusion that by June 29, 2019, the RIP Plaintiffs should have been aware that their money had been spent on non-Enterprise stores must stand. Thus, the sole remaining issue to be resolved is whether the judge erred when he found that they knew or ought to have known that it was legally appropriate to commence an action based on this fact.

[125] The RIP Plaintiffs submit that the judge's conclusions are not supported by the evidence of what occurred between the parties in 2019 and into 2020. They say that the parties were "specifically discussing a resolution to broader and outstanding business issues, including but not limited to Mr. Dunn's failure to properly account" as he was required to do and as was needed to secure bank financing at the time and that it was in this context that Mr. Dunn ultimately produced the March 12, 2020 spreadsheet. For these reasons, they invite this Court to interfere with the judge's conclusion that they should have known that a legal action was appropriate by June 29, 2019.

[126] The RIP Plaintiffs' arguments fail to come to grips with the fact, as the judge observed, that there is no evidence that the RIP Plaintiffs deferred bringing their action because of the negotiations between the parties. Apart from the submission in their counsel's brief about what Mr. Klassen "must have" thought, their evidence and overall position was that they only became aware of the fact of the misappropriation of monies when they received the March 12, 2020 spreadsheet.

[127] In any event, nothing in the *Decision* reflects a misunderstanding by the judge of the discussions that occurred between the parties in 2019 and into 2020. Elsewhere in the *Decision* he accurately summarized many facets of them. Contrary to the RIP Plaintiffs' submissions, the judge did not characterize the discussions between the parties as "settlement discussions". Rather, after finding that by June 29, 2019, the RIP Plaintiffs should have been aware that their money had been spent on non-Enterprise stores, which was the basis for their claim, the judge considered if there was a reason to suspend the running of the limitation period. His conclusion was that a vague promise to remedy the situation was not sufficient to do so. It was in this context that the judge reproduced a lengthy quote from *Venture Construction* that described when the existence of an alternative dispute resolution process might justify the delay in the running of a limitation period.

[128] In *407 ETR Concession*, Laskin J.A. stated that case law on this subject "is of limited assistance because each case will turn on its own facts" (at para 34). In the same vein, other decisions have emphasized that there are many factual issues that will influence whether it is legally appropriate to bring an action, notwithstanding that the other elements of discoverability are present (*Presidential MSH Corp. v Marr, Foster & Co. LLP*, 2017 ONCA 325 at para 18). Thus, there is "no limit to the circumstances that can delay when a proceeding becomes appropriate" (Mew at p 127).

[129] Here, other than offering the unsound criticism that the judge misunderstood or mischaracterized the evidence, the RIP Plaintiffs offer no justification for why this Court should interfere with the judge's conclusion on the s. 6(1)(d) inquiry. The judge referred to the correct legal test (whether the RIP Plaintiffs knew or ought to have known that it was *legally appropriate* to commence an action more than two years before they did so). He justified his conclusion for why a legal proceeding was appropriate considering the increasing evidence that RIP funds had

been spent on non-Enterprise stores. For all these reasons, I see no basis to interfere with his finding on this mixed question.

6. Conclusion on the misapprehension issue

[130] I see no basis for this Court to find that the judge misapprehended the evidence.

C. The judge's reasons are adequate

[131] The RIP Plaintiffs argue in their factum that the *Decision* is legally deficient. The legal foundation for this proposition is the obligation that rests on a trial judge to give reasons that are sufficient to permit meaningful appellate review (*R v Sheppard*, 2002 SCC 26 at para 21).

[132] The RIP Plaintiffs assert that the judge erred by failing to independently assess the discoverability of their claim for breach of contract. In their factum, they observe that the judge "gave no reasons for why all of the [RIP Plaintiffs'] claims could be subsumed into an analysis focused solely on when the funds were *spent*, including the claims rooted in breach of contract and good faith performance of contract, which focused on the delays in the [Dunn Defendants'] performance of the obligation to account under the Contract" (emphasis in original).

[133] I see no merit to this argument for two reasons. First, the RIP Plaintiffs do not specify what facts pertain to the claim for breach of contract that are not engaged in the judge's overall analysis of when they knew, or should have known, that the Dunn Defendants had spent RIP funds on non-Enterprise stores. Second, and related to this, apart from the monies that they say were inappropriately spent on non-Enterprise stores, the RIP Plaintiffs claim only unspecified general damages associated with the alleged breach of contract. Combining these two points together, I see no facts pleaded or alleged in evidence that would ground an actionable breach of contract that is not subsumed in the judge's analysis as to when the RIP Plaintiffs should have discovered that their funds had been spent on non-Enterprise stores.

[134] Trial judges give reasons to (a) justify and explain the result, (b) tell the losing party why they lost, (c) provide for informed consideration of the grounds of appeal, and (d) satisfy the public that justice has been done (see *Sheppard* at para 24, *R v Walker*, 2008 SCC 34 at para 19). *Sheppard* and *Walker* were criminal cases. However, the same general principles apply to the examination

of reasons in a civil case (*F.H. v McDougall*, 2008 SCC 53 at paras 98-100, and *Aecon Mining Construction Services v K+S Potash Canada GP*, 2024 SKCA 48 at para 36).

[135] In this case, the judge's reasons were sufficiently detailed to allow for appellate review. More specifically, the judge explained the legal and factual basis for why he found that the RIP Plaintiffs had discovered their claim prior to March 1, 2020, and therefore was time barred. His reasons were sufficiently detailed to allow this Court to fulfill its appellate function.

V. CONCLUSION

[136] The judge did not err in his conclusion that the RIP Action was commenced over two years after the RIP Plaintiffs' claim was discovered within the meaning of s. 6(1) of *The Limitations Act* and therefore is barred and cannot be maintained pursuant to s. 19 that Act. For this reason, the RIP Plaintiffs' appeal must be dismissed.

[137] In the ordinary course, the Dunn Defendants would be entitled to the costs of this appeal. However, those costs are offset by the costs awarded in favour of the RIP Plaintiffs in their appeal from the *Decision* so far as it related to the Dunn Action. For this reason, I would order no costs in this appeal.

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Bardai J.A."

Bardai J.A.

I concur. "Kilback J.A."

Kilback J.A.