IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dediu v. Martin Estate,*
2023 BCSC 852

Date: 20230519
Docket: S180378
Registry: Victoria

Between:

Michael Dediu

Plaintiff

And:

Sandra Ann Martin as Executor and Trustee of the Estate of Douglas Warren Martin also known as Douglas W. Martin, Douglas Martin and Doug Martin

Defendant

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	M.R. Mark G. Coles, Articled Student
Counsel for the Defendant:	J.K. Ough B. Kitzke
Place and Dates of Trial:	Victoria, B.C. April 24–28, 2023
Place and Date of Judgment:	Victoria, B.C. May 19, 2023

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Introduction

[1] The plaintiff claims that certain trading accounts in the name of the deceased, Douglas Martin ("Douglas"), were held in trust for the plaintiff and seeks a declaration to that effect. He also seeks damages against the defendant for breach of trust, including the loss of appreciation of the value of the trust assets after they were sold by the defendant without his consent.

[2] The defendant maintains that no trust ever existed in fact or in law.

Evidence Led By The Plaintiff

[3] The plaintiff was born in Romania. As a child, he immigrated to the United States with his parents. He later attended the University of California at Berkley and obtained a Mathematics Degree in 1987. At all material times, he resided in San Francisco. For the last several years, he had resided in Moldova.

[4] After obtaining his degree, the plaintiff became employed by an entity called "American Transit Supply", which sourced various parts and equipment for the United States Army ("US Army").

[5] Douglas lived in Hawaii and had a relationship with the US Army through his sole proprietorship named "The Exchange Supply Co." ("Exchange Supply"). Exchange Supply was one of American Transit Supply's customers. It was through this connection that Douglas and the plaintiff became acquainted.

[6] In the early 1990s, the plaintiff left American Transit Supply and established his own sole proprietorship, which he named "Fleet Direct". He and Douglas began doing business together through their respective proprietorships. Douglas provided business opportunities for the supply of materials to the US Army (through a prime contractor) and the plaintiff sourced those materials from manufacturers.

[7] The plaintiff testified that, over the years that followed, his relationship with Douglas grew from that of a business association to one of mentorship, friendship, and trust.

[8] The plaintiff testified that in 2003, Douglas—who was then in his mid-sixties and living on Salt Spring Island, BC—approached him about the possibility of the plaintiff purchasing Exchange Supply from him. The plaintiff agreed and they executed an agreement dated September 3, 2003 ("Purchase Agreement"), the relevant terms of which provided:

a) that the plaintiff would purchase Exchange Supply for the sum of US$120,000, payable in monthly installments of US$2,000 each commencing October 1, 2003 to and including September 1, 2008;

b) as security for the payment of the purchase price, the plaintiff would deposit US$25,000 worth of marketable securities into to a trading account to be opened in Douglas' name (the "Scottrade Account");

c) Douglas would retain ownership of the name Exchange Supply but the plaintiff would be entitled to conduct business under that name;

d) Douglas would continue to work as "Sales Manager" for Exchange Supply on a full-time basis until August 31, 2004 and then on a part-time basis until August 31, 2005; and

e) Douglas would not receive remuneration for his services other than reimbursement for his out-of-pocket expenses.

[9] The plaintiff testified that a Scottrade Account was opened in Douglas' name and the plaintiff transferred US$25,000 in marketable securities into it. Thereafter, the plaintiff conducted all of the trades in the Scottrade Account, using on-line access that Douglas had provided to him. The plaintiff testified that Douglas played no part in the investment decisions related to the Scottrade Account.

[10] The plaintiff paid all of the monthly installments and out-of-pocket expenses payable under the Purchase Agreement. In addition, the plaintiff paid Douglas a gratuitous "bonus" based on the performance of Exchange Supply. The bonuses were approximately US$800 per month.

[11] Prior to the Purchase Agreement being executed, Douglas used an account at a bank located in Point Roberts, Washington State, for Exchange Supply's business transactions ("Sterling Account"). The plaintiff testified that, after the Purchase Agreement and with Douglas' authorization, the Sterling Account

remained in Douglas' name and the plaintiff (as Exchange Supply) continued to use it for Exchange Supply's business transactions. The plaintiff testified that, in order to facilitate the ongoing use of the Sterling Account, Douglas authorized the plaintiff to "replicate" his signature on cheques drawn on the Sterling Account. He testified that this arrangement was implemented as a matter of convenience and was thought to be more secure than would have been the case had Douglas issued "blank cheques". On cross-examination, the plaintiff acknowledged that his replication of Douglas' signature on the cheques was "not even close" to Douglas' actual signature.

[12] Monies continued to be sent by the United States government (or its prime contractor) to the Sterling Account in payment for Exchange Supply's services. The plaintiff transferred monies from the Sterling Account to Fleet Direct's bank account to cover it's associated expenses.

[13] Douglas continued to use the Sterling Account to receive his United States Social Security payments and for personal expenses owed in the United States for car insurance, income taxes, etc. The plaintiff testified that he sent Douglas cheques in the amounts of the Social Security payments drawn on the Sterling Account, although he also acknowledged that Douglas occasionally wrote cheques on the Sterling Account payable to himself for the Social Security payments.

[14] In 2009, Douglas designated the plaintiff as the beneficiary of the Scottrade Account.

[15] In addition to the Sterling Account, Exchange Supply also used a mail box with an address in Point Roberts, Washington State, operated by a private mail box ("PMB") service. That service forwarded the mail that was received at the PMB to Exchange Supply. The plaintiff continued to use the PMB after the Purchase Agreement.

[16] The plaintiff testified that, after the final installment payment under the Purchase Agreement had been made, he continued to pay Douglas his ongoing out-

of-pocket expenses associated with Exchange Supply together with a stipend of $1,000 per month in recognition of Douglas' continued assistance and management of the Scottrade Account and the Sterling Account. The plaintiff testified that Douglas was grateful for this stipend.

[17] By October 2009, Exchange Supply's business had grown significantly. The plaintiff testified that, given the hazardous nature of the work associated with the materials being supplied to the US Army, he wanted to protect his assets from potential vulnerability. He testified that he approached Douglas and asked him to open accounts in Canada in Douglas' name. Douglas agreed to do so. At the plaintiff's behest, Douglas opened two accounts at Credential Direct, an online brokerage service affiliated with Island Savings Credit Union. The accounts were a US dollar account ("Credential US$ Account") and a Canadian dollar account ("Credential C$ Account") (collectively, the "Credential Accounts").

[18] The "New Accounts Application Form" that was completed by Douglas in respect of the Credential Accounts indicated that no other person would have trading authorization or have a financial interest in the accounts. Douglas sent the form to the plaintiff. Douglas also forwarded to the plaintiff the emails he received from Credential Direct that confirmed each of the online trading accounts had been activated together with the password that Credential Direct provided for each account. The plaintiff testified that he changed those passwords to his own and did not share them with Douglas. He testified that, thereafter, Douglas did not have online access to the Credential Accounts.

[19] The plaintiff testified that, for each of the months of August, September, October, and November 2009, he added US$2,000 to the payments he made to Douglas for his out-of-pocket expenses and stipend. He testified that, as he and Douglas had agreed, this additional US$8,000 was transferred by Douglas into the Credential US$ Account.

[20] The Credential C$ Account was never used.

[21] The plaintiff purchased shares in AT&T with the money in the Credential US$ Account.

[22] In July 2010, the plaintiff transferred US$170,000 from the Sterling Account to the Scottrade Account. He testified that he did so for further "asset protection", with Douglas' knowledge and concurrence. The plaintiff used the money to purchase shares in Apple Inc.

[23] Douglas purchased a home in Mexico where he spent the winter months.

[24] In September 2010, the plaintiff transferred an additional US$150,000 to Douglas. He testified that the monies were to be deposited in the Credential US$ Account, again as part of his plan to shield his assets from potential liability. The monies were deposited into Douglas' Island Savings Credit Union account ("Island Savings Account") on September 28, 2010.

[25] Because Douglas was in Mexico, the monies were not transferred to the Credential US$ Account at that time.

[26] On January 3, 2010, Douglas sent an email to the plaintiff stating, part:

> Hi Mike:
>
> […]
>
> I'm not sure where we are with the credential account you are with. Only one piece of mail has arrived and remains not opened. Let be [*sic*] know if I should do anything. I believe you have 8,000 dollars I'm holding for you. I can receive e-mails much easier than I can send them.

[27] On January 31, 2011, Douglas transferred $151,000 from his Island Savings Account to the Credential US$ Account. The plaintiff testified that this deposit was comprised of the $150,000 that he had transferred to Douglas in September 2010 together with an additional $1,000 that Douglas told the plaintiff was to compensate the plaintiff for the delay in making the deposit.

[28] On February 1, 2011, the plaintiff purchased additional shares in Apple Inc. using funds in the Credential US$ Account.

[29] The monthly account statements for the Credential Accounts were sent by Credential Direct to Douglas who regularly forwarded them to the plaintiff.

[30] The plaintiff testified that, in early 2011, Douglas advised him that he had been diagnosed with Parkinson's Disease and a form of dementia. The plaintiff testified that he decided it would be wise to memorialize his arrangement with Douglas. On April 6, 2011, the plaintiff faxed a document to Douglas that he prepared without legal advice or guidance. The document stated (in full):

> To whom it may concern:
>
> The following establishes a historical and ongoing agreement between Douglas W. Martin and Michael O Dediu. Both parties ask that their respective heirs honor this agreement and return any funds upon the dissolution of this agreement.
>
> 1) The following account is being used by Michael Dediu for business purposes, to make deposits and withdrawals:
>
> Sterling Savings Bank account xxxx507 (Business Premium Checking)
>
> 2) The following mailbox belonging to Doug Martin is also being used a [sic] business location. This business is currently managed by Michael.
>
> EXCHANGE SUPPLY
>
> 1574 Gulf Road
>
> Suite PMB 1207
>
> POINT ROBERTS, WA 98281
>
> 3) The following accounts contain funds (cash and stock) that belong to Michael Dediu, in their entirety. The funds were entrusted to Doug Martin for safekeeping, but will be returned to Michael upon request.
>
> Scottrade account xxxx179
>
> Credential Direct accounts xxxxA-s (Canadian funds), xxxxB-3 (US Funds)
>
> 4) Doug Martin is being financially compensated, on a monthly basis, for the maintenance and safekeeping of these accounts and for the business location and its representation.

("the Acknowledgement").

[31] The Acknowledgement was signed by Douglas and returned to the plaintiff via facsimile on April 7, 2011.

[32] On cross-examination, the plaintiff explained that the phrase "[…] upon the dissolution of this agreement" in the Acknowledgment was intended by him to convey the understanding that the funds would be returned to him upon the dissolution of their business dealings or a party's death. He also testified that, at the time of the Acknowledgement, he was not aware of any tax implications that might result from it.

[33] The plaintiff testified that Douglas told him he had given his power of attorney to each of his sister, Susan Romano, and his daughter, the defendant, Sandra Martin ("Sandra"), and that he had provided a copy of the signed Acknowledgement to each of Ms. Romano and his lawyer, Mr. Brent Kitzke.

[34] Sandra gave evidence on examination for discovery that she and Ms. Romano used their joint powers of attorney to fund Douglas' care givers and the medical equipment he required in order for him to continue to live in his Salt Spring Island home.

[35] The plaintiff testified that no further investments were made into the Credential Accounts after the Acknowledgement was signed.

[36] In late 2012, the plaintiff closed the businesses he had been conducting under the names Exchange Supply and Fleet Direct. He did so because the US Army bases were no longer in need of the materials and equipment he had been supplying to them. He did not utilize the Sterling Account thereafter.

[37] The plaintiff testified that, in 2013, he sent Douglas US$900 to cover "maintenance" costs associated with the Sterling Account and the Credential Accounts. He testified that the amount was determined through consultation with Douglas. He testified that he offered to send a similar amount to Douglas in 2014 but Douglas insisted that there was no need for him to do so.

[38] Douglas executed his last will and testament on October 5, 2015.

[39] The plaintiff testified that, during a telephone call he had with Douglas on October 19, 2015, Douglas advised him that his health care was becoming a financial drain on him and that he needed money for health care expenses. He testified that his relationship with Douglas was such that he did not want Douglas to feel that he had no financial support. He testified that Apple Inc. had begun paying dividends on its shares in 2012 and that he offered to share with Douglas the dividends that had accumulated in the Credential US$ Account ("Dividend Payments") by giving Douglas 30% of them. He testified that Douglas was thankful for this gesture.

[40] On October 20, 2015 (the following day), the plaintiff received a telephone call from Ms. Romano, who advised him that Douglas was very unwell and became extremely anxious whenever financial matters were discussed with him. She asked the plaintiff not to communicate with him in the future. He testified that they discussed the Acknowledgement. He understood that Ms. Romano had a copy of the Acknowledgement because she seemed to be reading from it during the phone call. He testified he advised Ms. Romano that he was no longer using the Sterling Account and that it could continue to be used by Douglas for his personal U.S. transactions. He also testified he advised Ms. Romano that he would be providing the Dividend Payments to Douglas.

[41] After the phone call, the plaintiff sent a lengthy email to Ms. Romano dated October 20, 2015 memorializing their conversation that day. The email, *inter alia*, detailed the history and relationship between the plaintiff and Douglas, the trust arrangements the plaintiff claimed were in place between them regarding the Sterling Accounts and the Credential Accounts, as well as the Dividend Payments arrangement. He also wrote, in part:

> […]
>
> To clarify, I established stock-brokerage accounts into which I entrusted Doug with my funds, which were used to buy stock (mostly Apple):
>
> Scottrade account: xxxx179 (copy of recent statement attached).
>
> Credential accounts: xxxxA-2 and xxxxB-3
>
> […]

> With regard to the stock-brokerage accounts, the main reason I used him as a trust was to limit my financial exposure as [*sic*] sole proprietor. In case I was sued I have unlimited personal liability. Holding the investments in his name would shield those investments.
>
> […[
>
> With regards to the Credential account, this is a Canadian account, which does affect his Canadian income. I am not listed as a beneficiary because I have not gotten around to establishing it, being very busy the past few years. Also, I lost online access because I believe Credential changed its ownership, and web interface. I do receive occasional emails saying an account is incurring charges and it is at $0. I believe this is the Canadian funds account. Also, I believe these monthly charges are being billed because paper statements are being mailed. If they were to end, ie. Online, electronic statements only, the monthly fee would be waived. This is also something I wanted to ask Doug to do, but perhaps you can now help with this. I also wanted to ask Doug to help me reestablish online access, but perhaps you can help me instead. There is also the possibility of closing this account, transferring the stock (without selling it), or leaving it as is, but listing me as a beneficiary. I leave this up to you (and Doug), to analyze what is best.
>
> […]
>
> Per my agreement with Doug, I am to reimburse him for any taxes he paid plus compensation for safekeeping of these accounts. I believe 30% of the dividends paid is fair: 15% for taxes he already paid (even if did not pay any), and an additional 15% for compensation = 30%
>
> My plan was to have Doug withdraw this $50,000 in cash dividends and divide it amongst ourselves 30/70: $15,000 for him and $35,000 for me.
>
> In our more recent conversations (past year), Doug has expressed an anxiety about running out of money to pay for his health care. I assured him that I would help him however possible including using the funds entrusted to him. I am doing this out of appreciation for our 25+ year working relationship and for our past business partnership….
>
> […]

[42] On November 16, 2015, Ms. Romano sent an email to the plaintiff requesting that he not contact Douglas about anything, “regardless of your good intentions”. The plaintiff testified that he was very upset by this request. Ms. Romano also advised the plaintiff that she and Sandra were “waiting for Credential to give us the go ahead on the power of attorney”.

[43] Sandra gave evidence during her examination for discovery that Douglas did not want to talk about the Credential Accounts and told her not to worry about them.

[44] After several requests to Ms. Romano that he be given online access to the Credential Accounts, the plaintiff received an email from her on February 10, 2016, advising that the "Credential power of attorney is in place". Sandra gave evidence on her examination for discovery that she made no enquiries regarding the source of the monies that were deposited into the Credential Accounts. Defendant's counsel advised that his offices' efforts to obtain the records were unsuccessful because they did not go back to 2011.

[45] In an email dated February 17, 2016, the plaintiff responded to several questions that had been asked of him by Sandra. He again explained that his reason for making the arrangement with Douglas regarding the Credential Accounts was "to shield some of my assets from liability" and that "Doug assured me on several occasions that all his family was aware of these investments, that he distributed [the Acknowledgement] to all relevant parties".

[46] On October 25, 2016, the plaintiff sent a cheque to Douglas in the amount of US$4,000 as payment for the ongoing expenses and maintenance fees associated with the Scottrade Account and the Credential Accounts. The cheque was returned to the plaintiff, uncashed.

[47] On February 16, 2017, unbeknownst to the plaintiff, US$28,000 was withdrawn from the Credential US$ Account. The plaintiff testified that he did not become aware of this withdrawal until after this action had been commenced, but assumed it was for Douglas' ongoing account maintenance and health expenses. By his calculation, it equated to 39% of the dividends that had accumulated in the Scottrade Account and the Credential US$ Account.

[48] Douglas died on May 19, 2017 at the age of 78.

[49] On cross-examination, the plaintiff testified that, during the course of their business relationship, he and Douglas spoke frequently but only spoke approximately once per year after Exchange Supply's business was closed in late

2012. He acknowledged that he only ever met Douglas in person six to eight times over the course of their relationship.

[50] On July 5, 2017, the holdings in the Scottrade Account, valued at US$718,964, were transferred to the plaintiff. The plaintiff testified that the entirety of the increase in value of the Scottrade Account since 2003 was the result of additional deposits and timely trades he made in the account. He testified that Douglas played no hand in the increase.

[51] On September 6, 2017, the plaintiff sent an email to Ms. Romano and Sandra attaching the Acknowledgement in which he wrote, in part:

> […]
>
> As you close Doug's estate I bring to your attention the attached written agreement between me and Doug, dated 4-6-2011 about the Credential accounts xxxxA-2 and xxxxB-3.
>
> > "The following accounts contain (cash and stock) that belong to Michael Dediu, in their entirety. The funds were entrusted to Doug Martin for safekeeping, but will be returned to Michael upon request."
> >
> > "Both parties ask that their respective heirs honor this agreement and return any funds upon dissolution of this agreement."
>
> Doug assured me that he gave Susan Romano a copy of this, and Susan confirmed with me by phone Doug's repeated confirmation as well.
>
> This account was meant as a safety net for Doug, should he run out of money in his old age, if he needed it. He did not need it, but knowing it was there provided him with psychological support. This was my understanding with him over his last few years, and the reason why the funds were not returned before his death.
>
> […]
>
> Please return these funds to me at your earliest convenience.
>
> My Scottrade account is xxxx862 (for stocks and cash)
>
> Bank of [*sic*] America account xxxx885 (for cash only)
>
> Thank you,
>
> Michael Dediu

[52] This action was commenced by the plaintiff on January 19, 2018.

[53] By letter dated June 4, 2018, defendant's counsel wrote to plaintiff's counsel, stating, *inter alia*:

> […]
>
> […] I suggest that the Credential accounts be collapsed, so that the Estate can pay the taxes, as it is our belief that the Canada Revenue Agency is going to require the Estate to pay those taxes, as Mr. Martin had always paid the taxes on the monies earned on that account. Of course, the balance of those funds would continue to be held until it can be determined if, in fact, your client was the beneficial owner of the account.

[54] By letter dated July 17, 2018, defendant's counsel again wrote to plaintiff's counsel stating:

> Further to my letter of June 4, 2018 […] please advise if your client is agreeable to the Credential accounts being collapsed.
>
> I look forward to your instructions in this regard.

[55] By letter dated July 31, 2018, plaintiff's counsel advised defendant's counsel as follows:

> We write further to our telephone messages and to confirm that our client does not consent to the collapse of the Credential accounts as those are held for our client, in trust. This will avoid any issues with respect to taxation pending the determination of ownership.

[56] By letter dated August 1, 2018, defendant's counsel responded, writing:

> Thank you for your letter of July 31, 2018. I am advised by the Estate accountant that the taxes on the Credential account were already paid by the Estate on the 2017 return, as there was a deemed disposition upon Mr. Martin's death. The amount paid was $94,996.67. Please advise if you client will consent, upon proof of the amount of the taxes, to the collapse of enough of the Credential account to reimburse the Estate for the taxes paid on the Credential account […]

[57] On May 3, 2019, the defendant's counsel wrote to the plaintiff's counsel stating, in part:

> […]
>
> Your client has never provided a valid reason not to close the Credential account and he has never responded to my request to reimburse the Estate for the taxes already incurred by the Estate on the account. Please be advised that unless your client makes an application to Court, I will be closing the Credential account and placing those funds in trust and reimbursing the Estate for the taxes incurred.

[58] Plaintiff's counsel's office's response was an email dated May 28, 2019, requesting defendant's counsel's available dates for a trial.

[59] By letter dated June 13, 2019, defendant's counsel wrote to plaintiff's counsel as follows:

> I have in hand an email from your office inquiring about trial dates. I am reluctant to take any steps to secure a trial date when you have not provided a response to my letter of May 3, 2019. Clearly, these tax issues have to be dealt with as soon as possible. Again, please provide me with the following information regarding the Scottrade account.
>
> 1. Original cost base;
> 2. The date of death value; and
> 3. The current value.

The plaintiff testified that he did not have access to the Scottrade information that was requested.

[60] On September 22, 2019, the defendant caused the shares held in the Credential US$ Account to be sold and the account closed, without any further notice to the plaintiff. The funds were transferred to the Royal Bank of Canada and invested in a Guaranteed Investment Certificate ("GIC"). The GIC is presently valued at approximately $841,000.

[61] The value of the Apple Inc. and AT&T shares that were held in the Credential US$ Account increased significantly after they were sold by the defendant. The plaintiff testified that his investment strategy was to continue to hold those shares.

[62] I found the plaintiff to have been an honest and genuine witness who testified in a credible and forthright manner. His credibility was enhanced during his cross-examination by the consistency of his evidence and the alignment of his evidence with the financial records that were available to him and the other documents that were put to him. I accept his evidence in its entirety.

Expert Report of TCS Forensics Ltd.

[63] A forensic expert report dated April 4, 2022 prepared by Julia Noga and Shelly-Ann Parkinson of TCS Forensics Ltd. ("TCS") was tendered in evidence by the plaintiff without objection by the defendant. The authors examined the metadata embedded in the plaintiff's computer and opined that there was nothing in it to suggest that the content of its files or metadata related to the sending and receiving of the Authorization had been altered or tampered with. TCS opined that the following accurately reflected the timeline of events:

April 6, 2011	7:44 PM PST	Acknowledgement was faxed from plaintiff's computer to Douglas' fax machine
April 7, 2011	8:04 PM PST	Acknowledgement was received by plaintiff's computer from Douglas' fax machine
April 8, 2011	8:19 AM PST	Acknowledgement was uploaded from plaintiff's computer and saved using the .MAX file format

Expert Reports of Paula Frederick

[64] Ms. Frederick is an expert in business valuation and quantification of loss. She prepared a "Damages Report" dated July 15, 2022 in which she calculated, based upon her uncontroverted qualifications and experience, what the after-tax value of the Credential US$ Account would have been had the Apple Inc. and AT&T shares that were held in it not been sold on September 22, 2019 (using the highest trading price of those shares since September 6, 2017 when the plaintiff requested return of the property in the Credential Accounts). Ms. Frederick also prepared an Addendum to her July 15, 2022 report, dated April 12, 2023, which updated her calculations to April 11, 2023 (the "Credential Valuation"). Both reports were tendered in evidence by the plaintiff without objection by the defendant.

[65] In her July 15, 2022 report, Ms. Frederick opined:

> **5.6 Gross Up for U.S. Income Taxes Payable on Damages**
>
> Should Mr. Dediu be awarded damages, he will be required to pay income taxes on the damages received. As we have already deducted the capital

> gains tax that Mr. Dediu would have incurred on the assumed sale of the shares in calculating Mr. Dediu's net after-tax proceeds, it was necessary to gross-up our estimate of the after-tax proceeds for the taxes he will have to pay on an award of damages. This is so that after he pays the taxes on the award, he will have the same after-tax proceeds he would have had had the Trust Agreement been honoured and he sold the shares as at [April 11, 2023].
>
> We understand that damages awarded to Mr. Dediu will likely be taxed as regular income as opposed to capital gains. As the U.S. tax rates for regular income are higher than the tax rates for capital gains, it was necessary to use the U.S. tax rates that apply to regular income in calculating the gross-up amount. In calculating the gross-up amount we utilized the federal tax rates and tax brackets for U.S. citizens. As Mr. Dediu was not resident in the United States and was living abroad subsequent to January 1, 2019, we have not considered any state income taxes. This resulted in an assumed 35.4% effective tax rate being payable by Mr. Dediu on the award estimated herein.

[66] In Ms. Frederick's opinion, the Credential Valuation was as follows:

	Amount (US$)
Total Cash and Share Value (Pre-Tax) of Credential US$ Account as at April 11, 2023 assuming no liquidation and highest share prices	$2,277,634
Less: Net Taxes Payable on Dividends	($5,690)
Less: Capital Gains Taxes Payable on Assumed Disposition of Shares	($416,430)
Net After-Tax Proceeds on Assumed Sale of Shares Plus Cash Value	$1,855,514
Gross-Up for U.S. Income Taxes Payable on Damages	$1,032,718
Total in US$	$2,288,232
Total in C$	**C$3,894,203**

[67] In Ms. Frederick's opinion, the plaintiff would have to receive a damages award of US$2,888,232, on which he will be required to pay U.S. income taxes of US$1,032,718, in order for him to receive net after-tax damages of US$1,855,514.

Evidence Led By The Defendant

[68] No expert evidence was tendered by the defendant.

Fulvio Fonda

[69] Mr. Fonda is a realtor who resides in Hawaii. Mr. Fonda testified that he met Douglas in approximately 1989 when he, Mr. Fonda, acted as a realtor in respect of the purchase by Douglas and Sandy of a house there. He testified that Douglas and Sandy began living together in 1991 and were married approximately six years ago.

[70] Mr. Fonda described Douglas at the time he met him as “real sharp” but testified that, by 2010, Douglas was having difficulty with writing and reading and was “starting to lose it”.

[71] He testified that Douglas’ former common law spouse and one of their daughters from that relationship, Julie, were “always trying to get money” from Douglas, which was upsetting to him.

[72] Mr. Fonda testified that in 2014 or 2015, while he was visiting Douglas at his home on Salt Spring Island, he found a stack of credit cards. He testified that he asked Douglas why he had so many of them and Douglas responded that he did not owe the plaintiff anything and, in fact, the plaintiff owed Douglas money.

[73] He further testified that, in 2014 or 2015, Douglas passed a driver’s licence road test in Hawaii and obtained his Hawaiian driver’s licence.

[74] On cross-examination, Mr. Fonda conceded that he had no idea about where the money for the Credential Accounts had come from or what money Douglas had been referring to in their conversations regarding monies owed to him (Douglas) by the plaintiff.

[75] Mr. Fonda’s testimony was replete with hearsay, speculation, and assumptions. To the extent that is was based on personal knowledge, it was vague, uncertain, and abounding in generality. Much of it made little sense.

[76] I find Mr. Fonda’s testimony to have been a rehearsed attempt to provide support for the defendant’s case without the benefit of personal knowledge or any

other admissible evidentiary foundation. To the extent any of it may have been marginally relevant, it was unreliable. I decline to give it any weight.

Sandra Martin

[77] Sandra is one of Douglas' children.

[78] Sandra testified that she was born in Hawaii and that she continues to reside there. She lived with Douglas until she was five years old, when her parents divorced and Douglas moved to Canada. She testified that she did not have much of a relationship with him until she was approximately 18 years old, when Douglas remarried and returned to live in Hawaii before moving back to Canada.

[79] She testified that Douglas had relationships with several women over the years, including an approximate 18-year common law relationship with a Judy Sproule and an approximate one-year marriage to an Elizabeth Hewson that ended in 2012.

[80] She described Douglas as having been a "pretty sharp businessman" and a "knowledgeable investor". She testified that she knew that Douglas was in business with the plaintiff but she did not discuss with him either those business dealings or his investments. She testified that the first time she met the plaintiff was a few days after Douglas had died.

[81] She testified that Douglas purchased a home in Mexico in 2009 or 2010 and spent the winter months there.

[82] Sandra testified that, in approximately February 2012, Douglas was diagnosed with a form of dementia and later with Parkinson's Disease, but continued to live independently in his home on Salt Spring Island and to manage his own affairs. This continued until approximately 2014 when he tripped and fell in the middle of the night and broke his neck while he was visiting Sandy at her home in Hawaii. Sandra testified that, after that incident, Douglas required 24-hour care and he granted her and Ms. Romano a joint power of attorney over his affairs.

[83] Sandra testified that she exercised her power of attorney to manage Douglas' full-time caregivers. Ms. Romano was charged with dealing with Douglas' other financial matters. She testified on cross-examination that she and Ms. Romano only communicated with each other "once in a while".

[84] Sandra testified that, after Douglas became ill, arrangements were made for him to have full-time caregivers living with him. One of the caregivers, Ute Flaig, reported to Sandra that several of Douglas' family members, including Ms. Sproule and Janet Martin, his daughter from another relationship, were repeatedly contacting Douglas, wanting him to give them money and that he became very upset each time it occurred. The caregiver also reported that Douglas became upset when the plaintiff contacted him. It was for those reasons that she asked the plaintiff not to communicate with Douglas.

[85] Sandra testified that, after receipt of emails from the plaintiff regarding the Credential Accounts, she asked Douglas about them but he told her to "leave it alone", "don't worry about it", that he did not want to discuss the Credential Accounts and that the subject was a "taboo". She testified that, after receiving the plaintiff's emails in 2016, she explained to Douglas that she needed to know about the Credential Accounts and that he told her the money in the Credential Accounts was "laundered", that it was not the plaintiff's money, and that the plaintiff in fact owed him money. She agreed on cross-examination that she did not ask Douglas what money was owed to him by the plaintiff. She stated that "it felt like something was wrong".

[86] Sandra testified that the first time she read the Acknowledgement was when she received the plaintiff's email dated September 6, 2017 and that she was "shocked" when she read it.

[87] On cross-examination, Sandra agreed she had no knowledge of the arrangement between the plaintiff and Douglas regarding the use of the Sterling Account. She also testified that she did not know what to believe when Douglas commented that the Credential Accounts were "laundered money" but agreed that

she did not believe her father would have been involved in anything unlawful and that she did nothing to follow up on his comment. She had no explanation for why Douglas would have sent the plaintiff copies of the statements for the Credential Accounts.

[88] Sandra acknowledged on cross-examination that, had she or Ms. Romano contacted Credential Direct in late 2015 or early 2016 when the plaintiff first advised of his beneficial interest in the Credential Accounts, it is likely that the banking records would have been available. She confirmed that by the time they attempted to obtain the records in 2019, they were no longer available due to the bank's "seven-year" document retention rule.

[89] Sandra also acknowledged that her investigation into the source of the funds in the Credential Accounts did not uncover any information that refuted or contradicted what the plaintiff had told them about his interest in the accounts.

[90] Sandra also acknowledged on cross-examination that the sum of US$28,000 was withdrawn from the Credential US$ Account on February 16, 2017 by Ms. Romano. She believes the money was used for Douglas' caregiving costs.

[91] Finally, Sandra acknowledged that the shares held in the Credential US$ Account were sold at her instruction on September 22, 2019. She testified that, because stocks go up and go down, it "seemed prudent to protect the money". She also acknowledged that the shares were sold without the plaintiff's consent.

[92] Sandra was an excellent witness who gave her evidence in an honest, forthright, and credible manner, objectively and without embellishment. I accept her evidence in its entirety.

Ute Flaig

[93] Ms. Flaig was Douglas' healthcare support worker from 2014 to his death in 2017. She provided that care five days a week, 24 hours a day. While doing so,

she stayed in Douglas' house. On weekends, another care worker assumed the task while Ms. Flaig stayed in a loft apartment located in another building close by.

[94] Ms. Flaig described Douglas' temperament as "easy-going". She did not discuss his business or financial affairs with him. She did not open Douglas' mail or ever discuss the plaintiff with him.

[95] She testified that, at times when he was speaking to people on the telephone, he would get very upset, begin yelling words to the effect that he did not want to talk to the person and for them to leave him alone.

[96] Ms. Flaig was a credible witness who gave her evidence in a dispassionate and credible manner. I accept her evidence.

Analysis

[97] At the outset of the trial, counsel for the defendant conceded that there is no issue in this case regarding Douglas' cognitive ability or capacity to enter into the trust in question. Rather, the issue to be decided is whether a trust existed in fact and in law.

[98] The availability of banking and other financial records regarding the money transfers and other transactions in issue in this proceeding would have been of assistance in the determination of whether the alleged trust existed. However, I accept the evidence of both the plaintiff and Sandra that the passage of time after the events in question was such that those records were not longer available.

Did Douglas hold the Credential Accounts as a Bare Trustee for the Plaintiff?

[99] A trust arises where one party (the trustee) holds the title to property for the benefit of another (the beneficiary). An express trust is a trust that has been intentionally created by the settlor.

[100] A bare trustee simply holds legal title to an asset, with all the risks and rewards remaining with the beneficial owner: *Scoretz v. Kensam Enterprises Inc.,*

2017 BCSC 1356 at para. 41 [*Scoretz BCSC*], rev'd on other grounds 2018 BCCA 66 [*Scoretz BCCA*]. A bare trustee owes a fiduciary duty to the trust's beneficiary: *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 at paras. 243–246. The bare trustee is obligated to deliver the trust property to the beneficiary upon demand and to take whatever steps are required to do so: *Scoretz BCCA* at para. 23. This obligation was summarized in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 2.VIII:

> The usually accepted meaning of the term "bare", "naked" or "simple" trust is a trust where the trustee or trustees hold property without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand. It is true, of course, that so long as a trustee holds property on trust he or she has the duty to account for the property, keeping it secure and unharmed. The trustee cannot divest him- or herself of this duty, and, if that is the trustee's sole duty, he or she must transfer that property to the beneficiary on demand.

[101] For a bare trust to be valid, the law requires that it comply with three certainties at the time of settlement:

a) certainty of intention,

b) certainty of objects, and

c) certainty of subject matter.

See: *Forsyth (Re)*, 2010 BCSC 1720 at para. 6; *Sanchez v. Canada (National Revenue)*, 2022 BCSC 1963 at paras. 11–13.

[102] The three certainties are explained in *Waters' Law of Trusts in Canada* at 5.I:

> This means that the alleged settlor, whether giving the property on the terms of a trust or transferring property on trust in exchange for consideration, must employ language which clearly shows his or her intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he or she is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitely ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

[103] If the first requirement is not met, i.e., the transfer of property was not intended to have been subject to a trust obligation, the transferee takes the property beneficially. If the first requirement is met but the intended trust fails due to uncertainty of subject matter or objects, then the property is held on a resulting trust in favour of the settlor: *Lewis v. Alliance of Canadian Cinema Television and Radio Artists*, 1996 CanLII 661 at para. 21, 18 B.C.L.R. (3d) 382 (C.A.).

Certainty of Intention

[104] Counsel for the defendant submitted that the Court should find there was no intention on the part of Douglas to create a trust regarding the Credential Accounts because Douglas' signature on the Acknowledgement was not witnessed, there is no evidence he received legal advice in respect of it, and because the evidence is that Douglas was a prudent businessman who had taken those steps in 2003 at the time he entered into the Purchase Agreement. She also submitted that the indication on the Credential New Accounts Application Form that no other person would have trading authorization or have a financial or beneficial interest demonstrates a lack of certainty of Douglas' intention to create a trust. I reject each of these submissions.

[105] The settlor's intention may be express or implied. A settlor may create a trust without the word "trust" being used and without fully understanding the concept of trusteeship. Intention is a matter of substance, not form: *Virk v. Singh*, 2022 BCCA 153 at para. 47.

[106] Other than Sandra's evidence that when Douglas was suffering from dementia and Parkinson's Disease, he said to her that the money in the Credential Accounts was "laundered" and did not belong to the plaintiff, Douglas' communications with the plaintiff and actions related to the Credential Accounts are consistent only with an intention to create a trust and an understanding that it was in place. The suggestion that the money in the Credential Accounts was "laundered" was not put to the plaintiff during his cross-examination and is not supported by any

reliable evidence. Moreover, Sandra testified that she did not believe her father would have involved himself in such nefarious conduct.

[107] Although not pleaded, counsel for the defendant asserted during the course of the trial that the plaintiff could not prove on the balance of probabilities that the Acknowledgement had been signed by Douglas. In my view, the plaintiff's evidence as a whole, which I accept, is that the trust agreement was entered into with Douglas and was subsequently memorialized in the Acknowledgement by him. The TCS's expert evidence, which was not challenged by the defendant, demonstrates that the Acknowledgement was sent and received as the plaintiff said it was, and that it was never altered or tampered with. The defendant did not tender any evidence to suggest that the signature on the Acknowledgement was not that of Douglas. The TCS expert evidence is a complete answer to the defendant's unpled assertion.

[108] On the basis of the evidence tendered by the plaintiff, all of which I accept, I find that the plaintiff intended, and Douglas agreed, that the Credential Accounts would be opened in Douglas' name, that the plaintiff's money would be deposited into them, and that the Credential Accounts would be held in trust by Douglas for the plaintiff. I find that, in furtherance and confirmation of the trust agreement, Douglas forwarded to the plaintiff a copy of the New Accounts Application Form he completed for the Credential Accounts. He also forwarded to the plaintiff the emails he received from Credential Direct confirming that the Credential Accounts had been opened and provided the plaintiff with the online trading passwords that had been assigned to them. Those passwords were then changed by the plaintiff, after which the plaintiff had exclusive online access to the accounts and to do with them as he chose. There is no evidence that Douglas was the source of any of the money that was deposited or the transactions that occurred in the Credential Accounts.

[109] I find that in April 2011, the plaintiff decided to ensure that the trust arrangement between him and Douglas was memorialized in writing because of Douglas' advancing age and declining health. Douglas signed the Acknowledgement at the plaintiff's request and returned the signed document to

him. The defendant did not provide any evidence that the Acknowledgement was not authentic or did not accurately set out the trust agreement between the plaintiff and Douglas.

[110] It is noteworthy that the defendant never appeared to question the plaintiff having been designated as the beneficiary of the Scottrade Account, the value of which at all material times was significantly higher than the value of the Credential US$ Account. If Ms. Romano or Sandra, as Douglas' powers of attorney, doubted the legitimacy of that arrangement, which was also detailed in the Acknowledgement, Douglas could have easily revoked the beneficiary designation for the Scottrade Account when he executed his will on October 5, 2015. Douglas did not betray his trust position when he could have.

Certainty of Subject Matter

[111] Certainty of subject matter requires that the property subject to the trust be clearly identifiable, and that the share to which each beneficiary is entitled be clearly defined. The subject matter must be either clearly ascertained or ascertainable at the time the trust was created. Certainty refers to conceptual certainty and not whether it is difficult to ascertain the subject matter: *Sanchez* at paras. 14, 40.

[112] Counsel for the defendant submitted that there was no certainty of subject matter because words and terms used in the Acknowledgement were "ambiguous", in particular:

a) the phrase "the following accounts contain funds (cash and stock)" does not identify what cash and what stocks were in the account;

b) the phrase "belong to Michael Dediu, in their entirety" does not identify what cash/stocks belong to the plaintiff;

c) there is no way to discern the ownership of any future gains in the accounts;

d) there is no methodology for determining financial compensation to be paid to Douglas.

[113] I reject each of these submissions as fallacious. The subject matter of the trust was the Scottrade Account and the Credential Accounts. Each was clearly specified in the Acknowledgement, by name and account number. There was certainty of subject matter.

Certainty of Objects

[114] There was no uncertainty as to who the beneficiary of the trust was. The Acknowledgement clearly specified that the beneficiary was the plaintiff.

[115] There was certainty of objects.

[116] I find that Douglas, and after his death, the defendant, held the Credential Accounts in trust for the plaintiff.

Did the Defendant Breach the Trust?

[117] The plaintiff's evidence that Douglas advised him he had provided a copy of the Acknowledgement to Ms. Romano and to his lawyer, and that Ms. Romano seemed to be reading from the Acknowledgement during his telephone conversation with him on October 20, 2015, was uncontroverted. Ms. Romano was listed as a witness on the defendant's trial brief but was not called.

[118] Regardless, the plaintiff made Ms. Romano aware of his claimed beneficial interest in the Credential Accounts on October 20, 2015. He similarly made Sandra aware of his claims no later than February 2016. The defendant, through Sandra, was fully aware of the Acknowledgement no later than September 6, 2017 when the plaintiff attached it to his email of that date and clearly and unequivocally requested that the defendant transfer the cash and stock in the Credential Accounts to his Scottrade account. The defendant took no steps to do so. Rather, despite the plaintiff's request, despite this action having been commenced on January 19, 2018, and despite being advised by plaintiff's counsel on July 31, 2018 that the plaintiff did not consent to the Credential Accounts being collapsed, on September 22, 2019, the defendant caused the Credential Accounts to be collapsed without the plaintiff's knowledge. The defendant said that it did so to "preserve the asset".

[119] It is perhaps understandable that the existence of the Acknowledgement would have come as a surprise to Ms. Romano and Sandra when they became aware of it. But as Douglas' powers of attorney and, later, executors of his estate, they were duty bound to make reasonable efforts to investigate the validity of the plaintiff's claims before taking it upon themselves to liquidate the Credential Accounts, particularly given the fact that litigation had been commenced. They could easily have brought an application under s. 86 of the *Trustee Act,* R.S.B.C. 1996, c. 464, seeking directions from the court. They failed to take any of those steps and, instead, treated the Credential Accounts as their own. When asked by the Court why no such steps were taken, defendant's counsel responded: "it was not incumbent on the executor to do so" and that "it was up to the plaintiff to prove his case".

[120] I disagree. In the circumstances, it was up to the defendant to do so.

[121] I find that, by no later than September 30, 2017, the defendant breached the trust that had been memorialized by the Acknowledgment.

What Remedies are Available to the Plaintiff for Breach of Trust?

Declaration

[122] The plaintiff is entitled to a declaration that he is the beneficial owner of the GIC.

Damages

[123] I recently had occasion to consider the obligation of a defaulting trustee in *Zhang v. Zhang*, 2022 BCSC 2156 at paras. 319–324:

> [319] The obligation of a defaulting trustee was summarized by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 360–361, 1984 CanLII 25:
>
> > The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of *Re Dawson; Union Fidelity Trustee Co. v.*

Perpetual Trustee Co. (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:

> The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.
>
> […]
>
> *Caffrey v. Darby* (1801) *6* Ves. Jun. 488; 31 E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.
>
> […]
>
> The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.
>
> […]
>
> The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract. It is on this fundamental ground that I regard the principles in *Tomkinson's* case *[Tomkinson v. First Pennsylvania Banking and Trust* Co. [1961] A.C. 1007] as distinguishable. Moreover the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the

> obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before. [Wilson J.'s emphasis.]
>
> The reasoning which the House of Lords adopted in *Tomkinson's* case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach.
>
> This statement of the law has been cited with approval in *Underhill's Law of Trusts and Trustees* (13th ed. 1979), at pp. 702-03, and was also recently adopted by Brightman L.J. in *Bartlett v. Barclays Bank Trust Co. (No. 2),* [1980] 2 All E.R. 92 (Ch.), at p. 93: see also Waters, *Law of Trusts in Canada* (1974), at pp. 843-45.

[320] While the presumptive date for the assessment of damages for breach of contract is the date of the breach, there is an exception where as here, the contract is in relation to shares whose value is volatile and subject to sudden fluctuations of unpredictable amplitude: *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 S.C.R. 633 at 664–665, 1978 CanLII 16 [*Asamera*].

[321] In *McNeil v. Fultz*, [1906] 38 S.C.R. 198 at 205, 1906 CanLII 41, the Supreme Court of Canada held that damages for breach of trust such circumstances should be calculated at the best price the shares had during the period in which they were withheld:

> […] the defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent*, he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable […]

[322] This principle was also affirmed in *Guerin* at 528:

> Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee […], so also it should be presumed that the band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determining damages for breach of trust are to be contrasted with the

> principles applicable to determining damages for breach of contract. In contract it would have been necessary for the band to prove that it would have developed the land; in equity a presumption is made to that effect […]
>
> [323] This logic is explained in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 1368 [*Waters'*]:
>
> > […] Why should the plaintiff have the benefit of the highest price during the relevant time where the claim is for breach of trust? The logic seems to be that the contract rules presumptively identify a particular moment as the moment of breach, and the plaintiff is speculating on his or her own account if he or she does not replace the property, at the market price, when the defendant fails to deliver. The trust, however, is a relationship that involves holding property over time. The breaching trustee has created an evidentiary difficulty as to what benefit the beneficiary would have acquired; and, because the difficulty was created by the trustee's own wrongful act, it is resolved against him or her.
>
> [324] This principle has been applied by this Court in circumstances similar to those in these actions: *Cash v. Georgia Pacific Securities Corp.*, 1990 CanLII 1052, 1990 CarswellBC 1821 (S.C.).

[124] My decision in *Zhang* is presently under appeal. Nevertheless, the foregoing passage from the judgment sets out the state of the law regarding damages for breach of trust, as I understand it.

[125] Ms. Frederick's Credential Valuation is based on the highest value the Credential Accounts would have achieved had the AT&T and Apple Inc. shares never been sold after the breach of trust occurred. It is uncontroverted. However, the valuation assumes that the entire amount will be awarded to the plaintiff as damages. There are two flaws in her calculation.

[126] First, no deduction was made for the value of the GIC (currently C$842,812.46).

[127] Second, and related to the first, the gross-up in recognition of U.S. income taxes payable on a damages award assumed that the GIC will be part of the damages award. The GIC is merely the subject of the court's declaration that the plaintiff is the beneficial owner of it. It will not be taxed in the United States as an

award of damages and should not have been included in the calculation of "Gross-Up for U.S. Income Taxes Payable on Damages" as though it would be taxed.

[128] I have concluded that an assessment of the plaintiff's damages can be made by deducting the value of the GIC (converted to US$ using the exchange rate used in the Credential Valuation: 1.3483) from Ms. Frederick's calculation of "Net After-tax Proceeds on an Assumed Sale of Shares Plus Cash Value) and applying the 35.4% effective U.S. tax rate to that total. The Credential Valuation, thus revised, becomes:

	Amount (US$)
Total Cash and Share Value (Pre-Tax) of Credential US$ Account as at April 11, 2023 assuming no liquidation and highest share prices	$2,277,634
Less: Net Taxes Payable on Dividends	($5,690)
Less: Capital Gains Taxes Payable on Assumed Disposition of Shares	($416,430)
Net After-Tax Proceeds on Assumed Sale of Shares Plus Cash Value	$1,855,514
Deduct GIC (C$842,812.46/1.3843)	($625,093)
Net Damages Award	$1,230,421
Total Grossed-Up for US Income Taxes Payable on Damages (X - 0.354X = $1,230,421)	$1,904,676
Total in C$ ((conversion rate @ 1 US$/1.3483 C$)	**C$2,568,075**

Accordingly, the plaintiff is entitled to an award of damages against the defendant in the amount of C$2,568,075.

[129] The defendant neither pleaded nor made any submissions regarding whether the plaintiff failed to take reasonable steps to mitigate his loss.

Conclusion

[130] There will be a declaration that the plaintiff is the beneficial owner of the GIC.

[131] There will be an order that the plaintiff is entitled to an award of damages against the defendant in the amount of C$2,568,075.

Costs

[132] Subject to any submissions the parties wish to make on costs, the plaintiff is entitled to his costs of this action, at Scale B.

"G.C. Weatherill J."