CITATION: Zentner v. GFA World, 2022 ONSC 1683
COURT FILE NO.: CV-20-00643091-00CL
DATE: 20220317

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GFA WORLD

BETWEEN: GREGORY ZENTNER Moving Party and Responding Party by Cross-Motion	*Garth Myers*, *Paul D. Guy*, *John A. McKiggan Q.C.* and *Brian Hebert* for Gregory Zentner
– and – GFA WORLD, PAT EMERICK, GOSPEL FOR ASIA, INC., K.P. YOHANNAN, DANIEL PUNNOSE, and DAVID CARROLL Responding Parties and Moving Parties by Cross-Motion	*Jeffrey S. Leon*, *Ilan Ishai*, *Ranjan Agarwal*, and *Rabita Sharfuddin* for GFA World and Pat Emerick *Rahool P. Agarwal*, *Cole Pizzo* and *Crystal Li* for Gospel for Asia, Inc., Kadappiliaril Punnose Yohannan, Daniel Punnose and David Carroll *Mario Forte* for PricewaterhouseCoopers Inc., in its capacity as the Monitor for GFA World **HEARD:** June 21 and 22, 2021

CAVANAGH J.

REASONS FOR JUDGMENT

Introduction

[1] Two motions were brought and heard together.

[2] Greg Zentner ("Zentner"), the proposed representative plaintiff in a class action (the "Zentner Claim") brought against GFA World ("GFA Canada") (the debtor in the within *CCAA* proceedings) and other defendants, moves for an order appointing Zentner as the representative of the class defined in the Zentner Claim (the "Class") and authorizing Zentner to instruct counsel on behalf of the Class. He seeks a declaration that the requirements for certification under Nova Scotia's *Class Proceedings Act, 2007* are satisfied.

[3] The defendants in the proposed class action have brought a summary judgment motion for an order dismissing the Zentner Claim on limitation grounds.

[4] Zentner's motion is brought under Rule 10.01 of the *Rules of Civil Procedure* and s. 11 of the *Companies' Creditors Arrangements Act*, R.S.C., 1985, c. C-36 (*CCAA*).

[5] GFA Canada is one of several related defendants named in the Zentner Claim. Also named are GFA Canada's affiliate, Gospel for Asia, Inc. ("GFA USA") and four individuals who are directors and officers of GFA USA and GFA Canada. All of the US-based defendants have attorned to this Court's jurisdiction for the adjudication of the Zentner Claim.

[6] The core allegation in the Zentner Claim is that the defendants defrauded thousands of individuals and churches from across Canada who collectively donated millions of dollars to GFA Canada by diverting those funds to improper purposes.

[7] The Zentner Claim was commenced in February 2020, four months before GFA Canada filed for *CCAA* protection. The Zentner Claim was started in Nova Scotia under that province's *Class Proceedings Act, 2007* (the "Nova Scotia *CPA*"). While the Zentner Claim will be adjudicated by this Court as part of the within *CCAA* proceedings, the substantive law of Nova Scotia applies, including the Nova Scotia *CPA* and its requirements for certification.

[8] Pat Emerick is a director and the current President of GFA Canada. GFA Canada and Mr. Emerick are represented by the same counsel. When I refer to submissions by GFA Canada, I include Mr. Emerick.

[9] The defendants GFA USA, Kadappiliaril Punnose Yohannan, Daniel Punnose and David Carroll are separately represented. These defendants support the submissions of GFA Canada.

[10] Zentner seeks, as part of the representation order, an order declaring that the criteria for certification under the Nova Scotia *CPA* are satisfied, including an order approving the proposed common issues.

[11] On October 28, 2020, a Litigation and Mediation Process Order was made by Hainey J. that provides that the Zentner Claim shall be heard and determined by this Court within the *CCAA* proceedings.

[12] For the following reasons, (a) Zentner's motion is dismissed, and (b) GFA Canada's motion for summary judgment is dismissed.

Factual Background

[13] GFA Canada is a registered Canadian charity that has operated since 1984. GFA Canada is headquartered in Stony Creek, Ontario. Pat Emerick is a director and the current President of GFA Canada.

[14] GFA Canada is affiliated with GFA USA, a nonprofit corporation and non-denominational mission organization incorporated under Texas law. Dr. K.P. Yohannan and Gisela Punnose founded GFA USA in 1979. Several "Gospel for Asia" organizations have since been established around the world. Dr. Yohannan is also the former president and current president *emeritus* of GFA Canada.

[15] GFA USA is a non-profit, Texas-based Christian mission organization. GFA USA was founded in 1979 by Dr. Yohannan and his wife, Gisela Punnose. Dr. Yohannan is the President of GFA USA and serves as Chairman of its Board of Directors. Daniel Punnose is a Director and Vice-President of GFA USA and Dr. Yohannan's son. David Carroll is a Chartered Public Accountant and the former Chief Operating Officer of GFA USA.

[16] GFA Canada's purpose is to raise funds in Canada to support humanitarian projects and share the Christian gospel in South Asia. GFA Canada often refers to South Asia as the "Mission field" or the "field".

[17] GFA Canada solicits donations from individuals and churches in Canada. GFA Canada does not provide services in the field. It works with its partners in the field where donated funds are to be used to execute GFA Canada's charitable objects.

[18] GFA Canada's and GFA USA's primary field partner is Believers Eastern Church ("BEC"). BEC is based in India. It operates several charitable trusts there. GFA Canada raises donations domestically and gifts these donations to BEC, or trusts operated by BEC. In turn, BEC and the trusts use GFA Canada's donations to provide charitable services in the field. BEC and the trusts also solicit donations locally.

[19] In the Zentner Claim, Zentner asserts that GFA Canada made two promises to donors in its fundraising efforts: (1) the ability of donors to direct the specific charitable purpose that their donation would be used to support (a promise Zentner describes as the "Donor Designation Promise"); and (2) the promise that 100% of all donations designated by donors for a purpose in the mission field or the field would actually be spent in the field (a promise that Zentner describes as the "100% Guarantee").

[20] Zentner and his wife are residents of Nova Scotia, and they were regular donors to GFA Canada for many years.

[21] The Zentner claim is brought against GFA Canada, Pat Emerick, GFA USA, Dr. Yohannan, Daniel Punnose; and David Carroll.

[22] The Zentner Claim seeks $100 million in damages for fraud, breach of fiduciary duty, negligent misrepresentation, and conspiracy; $50 million in punitive damages; and the return of

$20 million in donations made to GFA Canada that is alleged to have been used by GFA USA towards construction of a 350-acre corporate headquarters and personal residence in Texas.

[23] A claim was made in the United States against GFA USA on behalf of American donors. The case in the United States was brought against many of the same defendants named in the Zentner Claim, including the four individuals, although GFA Canada was not a defendant. The claim on behalf of American donors in the United States was certified as a class action. The class action was settled. There was no admission of liability under the settlement.

[24] Zentner, in his Reply factum, appends as Schedule "C" proposed amendments to the statement of claim. For the purposes of these motions, I treat Zentner's pleading as including the requested amendments.

Analysis

[25] The first question on this motion is whether a declaratory order should be made that the Zentner Claim satisfies the requirements for certification set out in the Nova Scotia *CPA*.

[26] Section 7(1) of the Nova Scotia *CPA* states that the court shall certify a class proceeding if the following conditions are met:

> a. the pleadings disclose or the notice of application discloses a cause of action;
>
> b. there is an identifiable class of two or more persons that would be represented by a representative party;
>
> c. the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> d. a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> e. there is a representative party who
>
> i. would fairly and adequately represent the interests of the class,
>
> ii. has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> iii. does not have, with respect to the common issues, and interest that is in conflict with the interests of other class members.

[27] The requirements for certification that are in issue on this motion are the first, third, and fourth requirements.

[28] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at paras. 99-100, the Supreme Court of Canada confirmed that the test for certification is concerned with the form of

the action. The plaintiff must show "some basis in fact" for each of the certification requirements (except the cause of action requirement, for which the "plain and obvious" test applies).

Has Zentner shown that the pleadings disclose a cause of action?

[29] In *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, the Nova Scotia Court of Appeal held, at para. 18, that the Nova Scotia *CPA* is procedural, not substantive, and that pleadings survive judicial review unless it is "plain and obvious" the cause of action will fail. The question is assuming the pleaded facts to be true, do they disclose a cause of action? This is a question of law.

[30] The cause of action criterion requires that the pleadings disclose a legally viable cause of action. No evidence is admissible in connection with this inquiry. The material facts pleaded are accepted as true unless they are "patently ridiculous" or "incapable of proof". The pleadings must be read generously to allow for any inadequacies arising from drafting frailties and lack of access to documents or discovery. Bare allegations and conclusory legal statements based on assumption or speculation are not material facts. They are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determined whether a legally viable claim has been pleaded: *Whitehouse v. BDO Canada LLP*, 2020 ONSC 144, at paras. 91-92. Matters of law not fully settled in the jurisprudence must be permitted to proceed: *Robinson v. Rochester et al*., 2010 ONSC 463, at para. 12.

[31] Zentner brings the Nova Scotia action as a class proceeding on his own behalf and on behalf of a proposed class of "all persons in Canada who made donations to GFA Canada using donation codes 1000 to 4900 from January 1, 2006 to date that were not specifically directed for use of the "Home Team" or "Home Office".

[32] Zentner submits that his claim adequately pleads causes of action for fraud, breach of fiduciary duty, negligent misrepresentation, unjust enrichment, and conspiracy:

a. With respect to the claim in fraud, Zentner alleges that the defendants induced Class members to donate money by making false representations that such monies were needed urgently, that donations would be used for the individuals, items, and programs designated by the Class member making a donation, and that 100% of all donations made by Class members would be used in the Field and for the individuals, items, or programs designated and not for administrative or other purposes. Zentner alleges that the defendants knew that the representations were false or were reckless as to the truth of the representations. He pleads that Class members acted on the false representations and donated money to GFA Canada, and, as a result, Class members suffered injury, loss, and damages. Zentner proposes to plead additional particulars of the fraud claim through his requested amendments.

b. With respect to the claim for breach of fiduciary duty, Zentner pleads that the defendants owed a fiduciary duty to the Class members to use donations for the purposes intended by the Class members and breached their fiduciary duty by

failing to use the donations in the field and for the purposes and in the manner intended by the Class members.

c. With respect to the claim for negligent misrepresentation, Zentner pleads that: (i) there was a duty of care between Class members and the defendants; (ii) the representations that the donations would be used "100% in the field" and for specific purposes as designated were untrue; (iii) the defendants acted negligently in making the representation; (iv) the Class reasonably relied on these misrepresentations; and (v) the Class suffered damages.

d. With respect to the claim in unjust enrichment, Zentner pleads that: (i) the defendants were enriched by the donations made by the Class; (ii) there was a corresponding deprivation; and (iii) there was no juristic reason for the enrichment.

e. With respect to the claim in conspiracy, Zentner pleads that the defendants engaged in a conspiracy to cause harm to the Class. He alleges that the defendants agreed to act unlawfully, that the predominant purpose was to cause injury to the Class, and that the Class was injured. Zentner proposes to plead additional particulars of his claim in conspiracy through his requested amendments.

[33] The claims made by Zentner relate to donations to GFA Canada. Although the Class as defined is limited to donors to GFA Canada, Zentner pleads that the corporate defendants are part of a "syndicate", and the defendants are often grouped together in respect of the allegations pleaded in the statement of claim. Zentner proposes to amend his claim to plead that "Emerick and GFA Canada ceded all control to GFA USA under the Texas joint venture agreement and/or its Indian agents" and that "GFA USA prepared GFA Canada's donation solicitation material". Zentner submits that the liability of GFA USA is rooted in the allegation that GFA USA was a participant in a fraudulent scheme to misappropriate Canadian donor funds for the benefit of the defendants.

[34] The claims against GFA USA do not plead facts that, assuming they are true, would justify ignoring the separate personhood of GFA USA by piercing the corporate veil.

[35] In *First Gulf Bank v. Collavino Incorporated*, 2013 ONSC 4630, the court addressed a theory of liability advanced in that case based on a common business enterprise, at paras. 113:

> However, to pierce the corporate veil it is not sufficient that companies act in concert in a common business enterprise were that one entity controls the operations and structure of the group of companies. Moreover, little value is added to the argument by merely demonstrating that members in the group of companies have similar names, have changed their names, share and inter-mingle assets, have a common logo, trade off the same reputation, have the same business address, or use company names interchangeably. More is needed. There must be a corporate entity set up as a sham to facilitate wrongdoing and to shield the corporate shareholders from liability for existing indebtedness.

[36] Zentner has not pleaded facts that give rise to a cause of action against GFA USA based on common enterprise liability.

[37] Zentner has also made claims against the individual defendants Dr. Yohannan, Mr. Punnose and Mr. Carroll. Zentner proposes to amend the statement of claim to allege that these persons falsely represented to Class members that (a) their donations would be used for specific, designated purposes; and (b) their donations were urgently needed in the field. Zentner proposes to plead that the individual defendants failed to disclose information to Class members and intended to conceal this information from Class members. I address these claims as part of my analysis of the claims pleaded against GFA Canada and Father Emerick.

[38] Zentner submits that the statement of claim discloses recognized causes of action and, therefore, the first requirement for certification is met.

[39] Zentner submits that courts have repeatedly held that class actions against charities alleging fraud and misstatement should be certified. In support of this submission, Zentner cites *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, leave to appeal dismissed, 2012 ONSC 6101, and *Robinson v. Rochester Financial Limited et al.*, 2010 ONSC 463, leave to appeal dismissed, 2010 ONSC 1899.

[40] In *Cannon*, the plaintiff made a $2,500 charitable donation and, in return, received a $10,000 charitable tax credit. His tax returns were reassessed by Canada Revenue Agency (CRA), and he had to repay his deductions, with interest. The plaintiff brought a motion to certify an action as a class proceeding and sought to represent a class of Canadian taxpayers who contributed to the gift program. The plaintiff asserted multiple causes of action against various defendants, including the charitable foundation that received donations and its directors. Strathy J. (as he then was) certified the plaintiff's negligence claims against various defendants, including the charitable foundation, on the basis that they failed to ensure that CRA would recognize its charitable donation receipts as valid. Strathy J. addressed the claim pleaded in fraud that the gift program was an elaborate fraud, planned and created by certain of the defendants for the purpose of profiting at the expense of class members. Strathy J. held that there are sufficient pleadings of fraud and fraudulent misrepresentation against certain of the defendants to disclose a cause of action. This cause of action was not pleaded against the charitable foundation or its directors (see paras. 139 and 163).

[41] In *Cannon*, there was no claim against the charitable foundation for the return of donated money or against directors of the foundation for having misappropriated charitable donations. The claim was based on the failure of the charitable scheme because CRA did not accept the charitable tax credit. CRA took the position that the donors did not have donative intent.

[42] In *Robinson*, the plaintiffs sought to certify a class action on behalf of taxpayers who contributed to a gift program. They sued the promoters and a law firm as a result of CRA's disallowance of their tax deductions. The motion judge certified causes of action in negligence and breach of contract against the promoters, and against the law firm in negligence. Like in *Cannon*, there was no claim against the recipient of the gifts for return of donated funds, or against directors of the recipient for misappropriation of donated funds.

[43] *Cannon* and *Robinson* are distinguishable on their facts, and do not stand as authority to support the causes of action pleaded by Zentner.

[44] GFA Canada submits that the Zentner Claim fails to disclose a cause of action as a matter of law because all of the causes of action pleaded are based on a fundamental misconception of a right to recovery of an unencumbered gift and that the Zentner Claim lacks the necessary material facts to support the causes of action asserted.

[45] GFA Canada submits that the essence of Zentner's claim for relief (regardless of the particular cause of action) is that GFA Canada should be ordered to refund him donations made in prior years. GFA Canada submits that Zentner cannot show that he suffered "damages" as a result of the defendants' conduct because even if there were some basis in fact for his claim that the donated funds were used for a different charitable purpose than the one designated, or even if there is some basis in fact for the allegation that donated funds were misappropriated because they were not used for any legitimate charitable purpose, the losses allegedly suffered by Zentner and other proposed class members are not actionable as civil causes of action absent a trust, which Zentner has not pleaded.

[46] GFA Canada submits that the donated funds belonged to GFA Canada after being donated and that the donors did not attach any express trust conditions to the donation or expect GFA Canada to return their donations if not used towards their preferred charitable object. GFA Canada submits that, as a result, no matter what purpose the donated funds were put towards after they became GFA Canada's property, the donors suffered no actionable harm or injury.

[47] GFA Canada submits that even accepting the pleaded facts as true, Zentner and other class members cannot have suffered a loss if they gifted funds with no expectation of receiving the funds back or anything else in return for their donations. GFA submits that there is no private cause of action by a donor to be reimbursed his or her donation if donated funds are dishonestly misused. The remedy is to have the regulator of the charity or other enforcement body compel the charity to direct donated funds to their proper charitable object.

[48] In response, Zentner submits that there is no fraud exception for charities, and that a donor to a charity whose donated funds were dishonestly misappropriated from the charity and not used for the charitable objects of the charity is not precluded from commencing an action to recover the misappropriated donated funds. Zentner submits that in the absence of an authority holding that a donor to a charity is precluded as a matter of law from suing for reimbursement of donations where they were misappropriated from the charity, the claims as pleaded disclose recognized causes of action.

[49] For each of the pleaded causes of action, the law requires a compensable loss as an essential element. See *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC, at para. 8 (civil fraud); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, at para. 39 (equitable fraud); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at para. 34 (negligent misrepresentation); *Stirrett v. Cheema*, 2020 ONCA 288, at para. 65 (breach of fiduciary duty); *Canada Cement Lafarge v. British Columbia Lightweight Aggregate*, [1983] 1 S.C.R. 452, at paras. 31-34 (civil conspiracy); and *Kerr v. Baranow*, 2011 SCC 10, at para. 41. (unjust enrichment).

[50] In support of its submissions, GFA Canada relies on *McNamee v. McNamee* (2011), 106 O.R. (3d) 401 (C.A.). In *McNamee*, the Court of Appeal set out the elements of a gift, at paras. 23-24:

> Although the term "gift" is not defined in the *Family Law Act*, a gift, generally speaking, is a voluntary transfer of property to another without consideration: [citations omitted]. A transfer of property by contractual agreement involves a mutual exchange of obligations ("consideration"), but a transfer by way of gift involves a gratuitous, unilateral transaction: Mary Jane Mossman and William Flanagan, *Property Law: Cases and Commentary, 2nd ed.* (Toronto: Emond Montgomery Publications, 2004), at p. 439. As McLachlin J. observed in *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] S. C. J. No. 36, at p. 991-92 S.C.R., "[t]he central element of a gift [is the] intentional giving to another without expectation of remuneration".
>
> The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee and (3) a sufficient act of delivery or transfer of the property to complete the transaction: [citations omitted].

[51] The principal authority upon which the defendants rely in support of their submission that on the facts pleaded, the money donated by Zentner was, upon receipt, beneficially owned by GFA Canada, is *Christian Brothers of Ireland in Canada (Re)*, 2000 CanLII 5712 (Ont. C.A.)

[52] In *Christian Brothers*, many tort claims (founded on allegations of abuse) were made against a charity which sought a winding up of their affairs in Canada with a view to making their assets available to compensate victims of abuse. In the court of first instance, the motion judge confirmed that the law in Canada is that a charity is not immune from liability for the negligent acts of those who administer the charity, and he went on to consider whether any of the assets of the charity enjoyed immunity from exigibility depending on how the asset was held by the charity. The motion judge held that where assets are held in a special purpose trust, where the three certainties of a trust are present, for a claim to qualify for payment out of the trust funds, the claim must relate to a wrong done by the trustee in the course of carrying out the charitable purposes.

[53] The Court of Appeal identified an issue on appeal as whether there is in law a special purpose charitable trust which has the effect of protecting the assets within that trust from all tort claimants except those whose claims arose in relation to the purposes of that trust. The Court of Appeal concluded that the motion judge erred, and once he determined that there is no doctrine of charitable immunity in Canada, the assets of the charity, be they beneficially owned or be they trust funds, are available to respond to the charity's tort liabilities. See *Christian Brothers*, at paras. 18-28.

[54] In *Christian Brothers*, the Court of Appeal, at paras. 24-25, addressed the status of funds donated to a charitable corporation but earmarked or designated not for the general purposes of the

charitable corporation but for a specific purpose. The Court of Appeal addressed the distinction made by the motion judge between gifts given in what is sometimes referred to as a precatory trust and those given as a specific charitable purpose trust. The Court of Appeal explained, at para. 24, that "a precatory trust is not a true trust but an expression of the desire of the donor to have the funds used for a specific purpose without the creation of a true trust for the purpose". The Court of Appeal held that this desire is not binding on the corporation and such funds are beneficially owned by the corporation and not shielded from execution. The Court of Appeal held that this is to be distinguished from the case where the three certainties of a trust are present: certainty of intention, certainty of subject matter, and certainty of objects (in this case charitable purposes), so that a charitable purpose trust is created.

[55] The Court of Appeal in *Christian Brothers*, at para. 69, accepted that charitable corporations receive and hold their assets beneficially as all corporations do, however, they are obliged to use those assets only to further the charitable purposes of the corporation. The Court of Appeal held that a person who gives a gift to a corporation does not do so in trust for the objects of that corporation, even where the donor gave the gift with certain objects in mind. The Court of Appeal confirmed, at para. 70, that because of the "trust-like obligations of the charitable corporation" a court maintains its "supervisory scheme-making power" to continue to ensure that gifts made with charitable intent will not fail even if the object of the gift is unclear or uncertain or the gift is directed to a charitable corporation which is misnamed or no longer exists. This power is referred to as the cy-pres doctrine. The Court of Appeal, at para. 72, approved the statement of Buckley J. in *Re Vernon's Will Trusts,* [1971] 3 All E.R. 1061 (in the context of a testamentary gift), at p. 1064, that such a gift to a corporate body "takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee …".

[56] In Zentner's statement of claim, he pleads that after learning of GFA's guarantee that 100% of the donations would be used in the field and that donations would be used as directed, he made donations, relying upon the defendants' representations that the donated funds would be used by the defendants to fund specific individuals or projects in India as identified and directed by him, specifically in his case, donations for Native Missionaries. Zentner pleads that each donation he made was made on the understanding, based on representations made by the defendants, that 100% of the donations would be used in the field and applied as directed. He pleads that had he known that the funds would be misdirected, he would not have donated to GFA Canada.

[57] Based on the facts as pleaded, the donations by Zentner to GFA Canada satisfy the three essential elements of legally valid gifts set out in *McNamee*.

[58] Zentner submits that it is not necessary for him to plead the existence of a trust in order to plead a cause of action that gives him a remedy. Zentner submits that if a trust is necessary, there are several of them. Zentner refers to the factum of GFA USA in which BEC is described as GFA Canada's primary field partner which operates as a charitable trust and also operates other Indian charitable trusts, including GFA India, through which it fulfilled the donor designations.

[59] I accept that it is not necessary for Zentner to plead the legal conclusion that a trust was created. Zentner must, however, plead facts that, assuming they are true, plausibly support the conclusion that he has a legal right to recover money he donated to GFA Canada through any one

or more of the stated causes of action in his pleading. In order to do so, he must plead facts that plausibly support the legal conclusion that he suffered a compensable loss because of the way GFA Canada used, misused, or misappropriated, the donated money.

[60] Although the statement of claim does not plead the existence of trusts operated by BEC, even if such facts were pleaded, this would not address the legal issue raised by GFA Canada because there would still be no facts pleaded to plausibly support the creation of a trust between Zentner as settlor and GFA Canada as trustee. The fact that BEC may hold money that it received from GFA Canada in trust would not affect the legal conclusions that follow from the facts pleaded in respect of money donated by Zentner to GFA Canada.

[61] The facts pleaded support the expression of a desire by Zentner to have funds donated used for a specific purpose. The facts pleaded do not support the conclusion that the three certainties are satisfied such that the money donated by Zentner was not beneficially owned by GFA Canada, rather, a charitable purpose trust was created upon receipt of the donation by GFA Canada whereby funds donated by Zentner to GFA Canada were held by GFA Canada in trust. On the facts pleaded, the donations by Zentner to GFA Canada were unencumbered gifts to GFA Canada that, upon receipt, became property beneficially owned by GFA Canada.

[62] Zentner points to *Whitehouse v. BDO Canada LLP* as an example of a case where the court properly held that a pleading in a class action failed to disclose a reasonable cause of action. In *Whitehouse*, the plaintiffs were investors in mutual funds of a mutual fund management company. They lost their life savings. The plaintiffs alleged that the management of the management company misappropriated assets that were to be invested. They alleged that the auditors of the management company failed to conduct proper audits and, had they done so, the frauds would have been discovered. The plaintiffs sued the auditors for common law negligence. The motion judge held, at para. 113, that there is no duty of care owed to investors arising from a statutory audit based on the clear authority of decisions in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 and *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, leave to appeal refused [2018] S.C.C.A. No. 488.

[63] Zentner draws a contrast between the decision in *Whitehouse* and his claim. He submits that the decision of the Court of Appeal in *Christian Brothers*, unlike the decisions upon which the motion judge relied in *Whitehouse*, is not clearly on point and does not clearly establish that his claim is legally untenable. Zentner submits that the jurisprudence with respect to whether, absent a trust, funds donated to a charitable corporation as a gift are beneficially owned by the corporation and are not recoverable by the donor is not settled and, as such, his claim must be allowed to proceed.

[64] As an example of unsettled jurisprudence, Zentner relies on *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684. In *Victoria Order of Nurses*, the Court addressed a claim by one of the applicants that it was beneficially entitled to all assets held by the respondent foundation, a fundraising foundation for the applicants. The applicants in *Victoria Order of Nurses* were not donors to the foundation. They were a national charity and one of the national charity's regional organizations. The respondent foundation conducted fundraising activities and raised money for programs and services delivered by the applicants. When the

application was heard, an order had been made that enjoined the foundation from dispersing money it had raised while it was a specific fundraiser for the applicants to any other entity.

[65] The applicant made a number of arguments to support its claim, described at para. 69 of the decision. The application judge, at para. 86, concluded that the *Charities Accounting Act* deems property received by a charity to be trust property and "the *CAA* deems a charity to be a trustee and its directors to be fiduciaries for the implementation of a charity's objects and the management and disbursement of donations both in accordance with the directions of donors as well as the representations made by the charity to the public about how donations are sought and how they are used". The application judge exercised the Court's broad inherent jurisdiction in charitable matters to order the transfer of the foundation's assets to the applicant in trust to be used in accordance with the foundation's original objects. Zentner submits, on the authority of *Victoria Order of Nurses*, that it is not plain and obvious that the fiduciary duty claim will fail.

[66] *Victoria Order of Nurses* is not authority for the proposition that money or other property donated to a charity is, as a matter of law, property held by the charity in trust and recoverable by donors. The application judge, at para. 72, cited the *Christian Brothers* decision, and the decision in *Rowland v. Vancouver College Ltd.*, [2000] 8 W.W.R. 85 (B.C.S.C.), affirmed 205 D.L.R. (4th) 193 (B.C.C.A.) that followed it, as affirming "the principle that a charitable corporation holds its corporate assets beneficially to be used only and strictly in accordance with its charitable objects". The decision in *Victoria Order of Nurses* is an example of Court's exercise of powers, confirmed in *Christian Brothers*, to continue to ensure that gifts made with charitable intent will not fail if the gift is directed to a charitable corporation which no longer exists. This decision is not authority for the proposition that a donor who makes an unencumbered gift to a charity has a legal right to recover the amount gifted where the charity misuses or misappropriates the amounts gifted.

[67] In his oral reply submissions, counsel for Zentner drew a distinction between a "property-based claim" and a "tort claim", and he submitted that where a charity has misappropriated donors' money, the donors may not have a proprietary claim for the return of donated money, but they would still have a legal right to sue for misappropriation of donated funds in tort. Counsel submits that there is no immunity conferred on charities from tort claims.

[68] In support of this submission, counsel relies on a case cited by GFA Canada, *Bacic v. Millennium Educational & Research Charitable Foundation*, 2014 ONSC 5875. In *Bacic*, an estate brought a motion appealing the disallowance of its claim against a bankrupt estate. The estate argued that gifts by the deceased to a charity failed and must be returned to his estate in priority to claims of creditors and other claimants. The motion judge, at para. 30, held that "[s]ubject to conditions, a gift, once complete, cannot be undone". Counsel for Zentner accepts this judicial finding as correct. Counsel refers to para. 93 of *Bacic* where the motion judge held that a charity is not immune from liability to those who suffered at its hand, and that assets of the charity are available to respond to those liabilities. The motion judge noted that the applicants "have numerous potential claims against the charity which include misappropriation and conversion of their money". The estate had asserted that the deceased, as donor, intended to create a trust. The motion judge held that there was no evidence of an intention to create a trust, and the estate has no equal right to share in the consolidated remaining assets in the charity. The motion by the estate was dismissed. The motion judge did not conclude that a donor of money to a charitable corporation

had a legal right to recover gifted money, even if misappropriated. The motion judge's statement that "a gift, once complete, cannot be undone" suggests a contrary conclusion.

[69] I do not accept that the distinction raised by counsel for Zentner in his oral reply submissions is meaningful. For all of the causes of action that Zentner pleads, he must have a compensable loss. This requirement exists whether the action is framed as a proprietary claim for breach of trust (which is not made here) or a claim in tort.

[70] The law is settled that unless the three certainties necessary for the creation of a trust are satisfied, money received from donors by a charitable corporation is beneficially owned by the corporation. On the facts pleaded by Zentner, the money he donated to GFA Canada was gifted, without conditions, and without the creation of a trust. Upon receipt of the donations, GFA Canada became the beneficial owner of the monies donated. As the donor of an unencumbered gift, Zentner cannot have suffered a compensable loss on the facts pleaded, regardless of how the donated funds were used, or whether they were misused or misappropriated. To the extent that donated funds were misused or misappropriated, the remedies are through regulatory or enforcement measures, such as those provided for by the *Charities Accounting Act* or, possibly, through criminal proceedings.

[71] It is plain and obvious that even if proposed amendments were to be granted Zentner, the statement of claim does not plead facts that, assuming they are true, plausibly support the legal conclusion that he suffered a compensable loss. Absent a claim for a compensable loss, Zentner's statement of claim does not disclose a cause of action against the defendants.

Do the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members?

[72] Although I have held that the first requirement for certification is not satisfied, I go on to address the other requirements that are at issue on this motion.

[73] Zentner proposes the following common issues:

a. Civil Fraud:

    i. Did the Defendants, or any of them, deprive class members of their property by dishonest means?

b. Negligent Misstatement:

    i. Did the Defendants owe a duty of care to the Class?

    ii. If so, did the Defendants breach that duty of care by making untrue, inaccurate, or misleading representations to the Class?

    iii. If so, did the Defendants acted negligently in making these representations?

    iv. If so, was reliance on these representations reasonable?

v. If so, what damages, if any, are payable by the Defendants, or any of them, to the class?

c. Breach of Fiduciary Duty:

i. Did the Defendants of a fiduciary duty to the Class?

ii. If so, did the Defendants breached their fiduciary duty?

iii. If so, what damages, if any, are payable by the Defendants, or any of them, to the Class?

d. Unjust Enrichment:

i. Were the Defendants, or any of them, unjustly enriched?

ii. If so, have Class members suffered a corresponding deprivation?

iii. If so, was there a juristic reason for the enrichment?

iv. If not, what damages, if any, are payable by the Defendants, or any of them, to the Class?

e. Conspiracy

i. Did the Defendants, or any of them, conspire to harm the Class?

ii. If so, did the Defendants, or any of them, act in furtherance of that conspiracy?

iii. If so, was the predominant purpose of the conspiracy to harm the Class?

iv. Alternatively, did the conspiracy involve unlawful acts?

v. Did the Defendants, or any of them, know that the conspiracy would likely cause injury to the Class?

vi. Did the Class suffer any economic loss on account of the conspiracy?

vii. If so, what damages, if any, are payable by the Defendants, or any of them, to the Class?

f. Equitable Fraud:

i. Was there a fiduciary or special relationship between the Defendants, or any of them, and the Class Members?

ii. If so, was the Defendants' conduct, having regard to the special relationship between the parties, unconscionable?

iii. If so, what damages, if any, are payable by the Defendants, or any of them, to the Class?

g. Punitive Damages

i. Are the Defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

[74] Zentner relies on all of these proposed common issues, although he submits that two questions arise that are common to the common issues proposed: First, what happened to the donated money, or was there a fraud? Second, if there was a fraud, what did the defendants know?

[75] In *Wright Medical Technology Canada v. Taylor*, 2015 NSCA 68, the Nova Scotia Court of Appeal confirmed that the "some basis in fact" standard must be met for each requirement for certification other than that the pleading discloses a cause of action. This standard does not require that the court resolve conflicting facts and evidence at the certification stage and is not an exercise that involves an assessment of the merits of the claim. The Court held, citing the decision of Rothstein J. in *Pro-Sys*, that there must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merit stage.

[76] In *Kuiper v. Cook (Canada) Inc*., 2020 ONSC 128, the Divisional Court described the two-step test for commonality. The moving party must show (1) that the proposed common issue actually exists, and (2) that the proposed common issue can be answered in common across the entire class. The Divisional Court referred to the motion judge's statement that the "some basis in fact" standard requires the plaintiff to adduce some evidence demonstrating that there is a "colourable claim", or a rational connection between the class members as defined and the proposed common issues. The Divisional Court quoted from the decision of the motion judge who reaffirmed the importance of certification as a meaningful screening device and held that the standard for assessing evidence at certification does not involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny. The Divisional Court held, at para. 27, that "[w]hile the standard is low, it is not subterranean".

[77] Zentner submits that there will be two central questions raised at the common issues trial: first, whether GFA Canada violated the Donor Designation Promise and the 100% Guarantee and, instead, misdirected Canadian donations for the benefit of the defendants; and second, what were the various defendants' knowledge of the true state of affairs and their participation in the alleged fraud? Zentner submits that these core issues, which focus on the defendants' conduct and knowledge, are common to the Class, and that their resolution will significantly advance the adjudication of the Zentner Claim.

[78] In his Reply factum, Zentner made it clear that although the Donor Designated promise plays a central role in GFA Canada's fundraising efforts and is a key part of the factual matrix of the case, the central issue upon which the defendants' liability is rooted is "their intentional misappropriation of donor funds in a manner that had no connection to <u>any</u> purported charitable purpose".

[79] Zentner submits that there is a significant and credible evidentiary basis for his claims.

[80] Zentner cites the evidence upon which he relies in Schedule "E" to his factum (a 19-page schedule with 50 paragraphs). The evidence citations are organized under the following headings:

a. GFA Canada takes no steps to confirm donations are used as designated.

    i. Mr. Emerick confirmed on cross-examination that GFA Canada does not receive reports or confirmations that Canadian donations are used on specific donations or preferences.

b. GFA Canada admitted that its auditors were provided with backdated Indian audits.

    i. Zentner relies on evidence from Andy Harington, GFA Canada's forensic accounting expert, that he relied on GFA Canada's annual audited financial statements for the 5-year period from 2010 to 2014. The audit letters themselves were dated May 31, 2019, many years after the underlying events. Mr. Harington testified that he had not noticed this and that it raised a red flag, but it did not change his conclusions.

c. GFA India withheld a second set of financial letters from Indian auditors from its own forensic accounting expert report different revenues and expenditures.

    i. On cross-examination, Mr. Harington was shown another audit letter for 2013 prepared by a different accounting firm. The revenue reported differed from the revenue reported in the audit letters upon which he relied, and the discrepancy was approximately $3.5 million. Mr. Harington could not explain the conflicting information and agreed that if he had seen the document, he would have looked to understand what the difference was.

d. GFA Canada does not comply with Canadian charity law.

    i. Zentner cites certain regulatory requirements of the Canada Revenue Agency. He states that because GFA Canada does not receive reporting from its Indian agents on the use of funds as designated, it fails to comply with its CRA obligations.

    ii. Zentner relies on a letter from CRA to Mr. Emerick dated March 19, 2019. The letter states that it resulted from the audit of GFA World [GFA Canada] related to its operations for the period January 1, 2014 to December 31, 2015. The letter describes the areas of noncompliance identified by the CRA during the course of the audit and states "[w]hile the CRA does not consider these problems are serious enough to affect the Organization's registered status at this time, the Organization must nonetheless take appropriate action to remedy these concerns, which may be subject to future review". The areas identified in the letter relate to "Maintenance of Books and Records" and "Errors/Omissions on the Information Return".

e. Dr. Yohannan dismisses Canadian directors who asked for financial statements.

    i. Zentner cites evidence that Dr. Yohannan dismissed two GFA Canada directors immediately after they asked to review financial statements and other financial reports.

f. None of the $76.7 million collected from donors in the year 2017 2013 was sent to India during that time.

    i. Zentner cites evidence that GFA Canada's Indian agent, Believers Eastern Church, set up two bank accounts in Canada. He states that the evidence shows that from 2007 to 2013, $76 million was collected from Canadian donors to be used "in the field", but none of that money was actually sent to India during that time.

g. Discrepancies in GFA Canada's alleged transfers to India.

    i. Zentner states that the evidence shows that there are significant discrepancies between (1) the amounts reported by GFA Canada to CRA as having been sent by GFA Canada's to India; and (2) the amount GFA India and Believers Eastern Church reported to Indian authorities as having been received.

h. Massive amounts of interest earned by Indian entities.

    i. Zentner cites evidence that four GFA related Indian entities that received funds from foreign contributions reported massive amounts in interest between 2007 and 2014. He states that this shows that Canadian donations were not spent in the field, let alone spent as designated.

i. Chartered Professional Accountants of Ontario (CPAO) regulator found extensive auditing irregularities in Canada.

    i. Zentner cites a report from the CPAO disciplinary committee on GFA Canada's auditor in relation to audit work done for GFA Canada in which the committee expressed concern that there was no attempt to ensure that funds were being spent as directed by the donors.

j. Concerns raised by the Evangelical Counsel for Financial Accountability.

    i. Zentner states that the Evangelical Counsel for Financial Accountability is an evangelical organization formed to ensure that Christian organizations that are raising money from donors meet certain basic ethical standards. He states that GFA USA was one of the founding members. Zentner relies on evidence that in 2015, the ECFA sanctioned GFA USA after an audit determined that it was not meeting ECFA's financial and ethical standards.

k. GFA USA admits in US litigation that Canadian donations used to build compound.

i. Zentner relies on evidence in the class action in the U.S.A. that GFA USA received $20 million for the construction of the Texas Compound from Believer's Church in India and that this money (from donors) came from GFA Canada's Indian bank account. He cites evidence from Mr. Emerick that GFA Canada's field partner in Asia had the resources to cover spending in accordance with Canadian designations, and that GFA Canada received reports of that being accomplished. Zentner disputes this evidence.

l. GFA's corpus fund holds millions of dollars in India.

i. Zentner cites evidence that in India, GFA reported a "Corpus Fund" and that GFA Canada never solicited money from Canadian donors for corpus purposes.

m. Phantom offices in Canada.

i. Zentner cites evidence that GFA Canada registered five corporations under the *Canada Not-for-profit Corporations Act* showing addresses in Hamilton, yet, at these premises, there is no evidence of any offices for these corporations.

n. Indian government revokes GFA charitable status, raids of GFA's Indian operations.

i. Zentner asserts that in 2017, the Indian government revoked the charitable registration of Believers Church, yet GFA Canada continues to report that Believers Church is its agent in India for distributing money donated in Canada.

ii. Zentner relies on a press release issued on November 6, 2020 by the Indian Ministry of finance titled "Income tax Department conducts searched in Kerala" that refers to search and seizure operations said to have been carried out as "as credible information was received that the group received donations from foreign countries ostensibly for helping the poor and destitute and for evangelical purposes, but was actually siphoning out of such tax-exempted funds in cash to engage in unaccounted cash transactions for personal and other illegal expenses in real estate transactions".

[81] Zentner relies on extracts from transcripts of evidence given in the U.S. litigation in which the judge expressed frustration with GFA's actions to produce documents.

[82] Zentner also relies on a transcript of proceedings in the U.S. litigation which references an internal email from Mr. Carroll who was the CFO for GFA USA to Dr. Yohannan that was produced in the U.S. litigation that was read, in part, into the record. The transcript references a statement from Mr. Carroll from the email that published reports show that "we have either sent money to the field raised for National ministries and Bridge of Hope to fund the hospital and corpus fund, or our FC filings are wrong. Either way, this is a huge problem". The transcript references concerns about the "FC-6 reports" that Mr. Carroll cannot explain. The transcript

records a statement read from this email expressing Mr. Carroll's concern that "India feels that we raised money and sent it to them and they can legally use it any way they deem fit. I hope that I am wrong, but I am doubtful". The transcript records that Mr. Carroll wrote in the email that "I also don't think that it is an intentional wrong, but if I am correct, it is a huge wrong".

[83] Zentner submits that this evidence more than satisfies the low threshold of showing some basis in fact for the existence of common issues. Zentner submits, citing *Carom v. Bre-X Minerals Ltd.*, 2000 CanLII 16886 (Ont. C.A.), at para. 51, that the issues focus on the conduct and knowledge of the defendants and, therefore, the action should be certified, even where the issue of reliance may be individual.

[84] GFA Canada submits that (a) there is no evidence to show some basis in fact that the putative class suffered a compensable loss; (b) there is no admissible evidence sufficient to show that there is some basis in fact for the allegations of fraud, a common misrepresentation, or that the defendants misdirected donations for their personal benefit; and (c) even if there is some basis in fact for the allegations of fraud and misappropriation of funds, those claims require a representation relied on by members of the putative claim to their detriment. GFA Canada submits that the issues of reliance require an individual analysis and cannot be decided in common.

[85] I have held that the facts pleaded in the statement of claim do not disclose a cause of action because, accepting as true the facts pleaded, Zentner did not suffer a compensable loss. No evidence is admissible in respect of this criterion for certification. In respect of whether the claims of class members raise a common issue, evidence is admissible and Zentner is required to show, based on admissible evidence, that there is some basis in fact that one or more common issues exist and can be answered across the entire class. Zentner has not provided evidence that adds to the facts pleaded in relation to whether he suffered a compensable loss. Zentner has not shown that there is some basis in fact that he or other Class members suffered a compensable loss.

[86] With respect to the allegations of fraudulent misappropriation of donors' money, GFA Canada submits that Zentner has failed to adduce admissible evidence that shows that there is some basis in fact to support the existence of the common issues that Zentner has proposed. GFA Canada submits that the evidence tendered by Zentner is speculative and conclusory and does not satisfy the low threshold that applies. GFA Canada tendered evidence from Andrew Harington, a certified public accountant, certified financial analyst, and certified business valuator, in his expert report dated September 14, 2020 and it submits that the analysis of whether Zentner has satisfied his evidentiary onus should be undertaken having regard to Mr. Harington's evidence.

[87] Mr. Harington was asked to provide his opinions on the allegations (a) that GFA Canada is not using the donations for charitable purposes or are not sending the donations to the "Field" (defined as South Asia) as indicated in GFA Canada's promotional material; (b) that GFA Canada did not send CA $93,497,321 to the Field as GFA Canada reported to CRA between 2007 and 2014 as being spent outside of Canada based on the fact that during the same period the Indian entities that GFA Canada claim so given the funds to reported to Indian authorities as having received no funds from Canada; and (c) that GFA Canada did not disclose that Canadian donations in the amount of US $20 million were not delivered to the Field but were instead sent to Gospel for Asia Inc. to help build the headquarters for Gospel U.S.

[88] Mr. Harington expressed the following opinions, for the period January 1, 2007 to December 31, 2018:

a. The donations GFA Canada received for which the donor expressed a preference that the funds be used in the Field are in fact being fully used in the Field.

b. The amounts disclosed by GFA Canada to CRA is being spent outside of Canada reconcile to the amounts reported to Indian authorities as having been received from Canada, once two items are accounted for: (i) C$20,550,000 for which the charitable activities in India requested by Canadian donors was funded by cash already in India, and which BEC elected to hold such funds outside of India and subsequently transfer the money to GFA USA in 2013; and (ii) C$22,500,000 that was transferred to India via Hong Kong in 2016 and which, therefore, the Indian filings indicate such funds as having been received from Hong Kong.

c. The transfer of $20,550,000 to B.E.C. to GFA U.S. in August 2013 was made using B.E.C.'s own cash which it had built up in its RBC bank account in Canada since May 2011, during which time B.E.C. had used cash that already existed in its bank account in India to fund the charitable activities in India requested by Canadian donors.

[89] Mr. Harington's evidence shows that while money may have been held in a GFA India bank account in Canada for years, an equivalent amount of funds was used to satisfy Canadian donor preferences in India.

[90] With respect to the evidence cited by Zentner as supporting the allegation that GFA Canada's auditors were provided with "backdated audits", GFA Canada points to Mr. Harington's evidence on cross-examination in which he noted that the May 31, 2019 date is on correspondence from "auditors to auditors", and not on the financial statements themselves, and he agreed that, with this knowledge, he would change his statement that the audited statements were provided "contemporaneously", but that this knowledge does not affect the "actual numbers". Mr. Harington confirmed that his financial analysis is not affected.

[91] It was put to Mr. Harington on cross-examination that the dates on the cover letters "raises the possibility that these were prepared after the fact to correspond with the numbers, the receipts from Canada" and he responded that he has "absolutely no reason to believe that an external auditor would be preparing something to make something match something else" and that the statement put to him was not reasonable. He added that he has no reason to think that an external auditor is going to "fudge the numbers" and that this is not a reasonable statement.

[92] Zentner has not shown some basis in fact that the audited financial statements were backdated or fraudulently prepared by auditors after the fact to correspond with the receipts from Canada. His allegations to this effect are just that.

[93] Zentner relies on evidence that there appears to be a discrepancy of approximately $3.5 million in the revenue reported in an audit letter from the Indian auditor for 2013 based on a comparison with another audit letter for the same year from another auditor. Mr. Harington, when shown the conflicting information, testified if he had been shown the conflict, he would have

looked to understand what the difference was. This kind of evidence does not amount to some evidence in fact that GFA Canada misappropriated donated funds or failed to use them as directed. It shows an unexplained discrepancy in financial reporting which, without more, is not evidence supporting an inference of improper financial dealings.

[94] Zentner submits that Mr. Harington's report should not be taken as conclusive because he relied on auditors' reports but did not review the source documents upon which the auditors relied. I am not making findings of fact on this motion with respect to the matters addressed in Mr. Harington's report. Mr. Harington's evidence must be considered as part of the full evidentiary record as part of my assessment of whether Zentner has shown some basis in fact for the common issues he has proposed. Zentner's evidence does not include any independent expert analysis of how money donated to GFA Canada was used.

[95] The CRA audit letter upon which Zentner relies is not a factual basis to support his allegations. After completion of a two-year audit, the CRA did not sanction GFA Canada or make any findings about its financial management practices. The CRA audit letter describes two areas of non-compliance with CRA requirements, one of which was that GFA Canada maintains source documents relating to its activities outside Canada, in India, and the other was that the Information Return for the fiscal period ending December 31, 2015 was not completed accurately because the box for directors who are at arm's length and non-arm's length was not marked. These are minor issues, and do not constitute evidence showing a basis in fact to conclude that donor money was misappropriated.

[96] The press release issued by the Ministry of Finance of the Indian government and appended as an exhibit to Mr. Morrison's affidavit refers to search and seizure operations having been conducted "in the case of a well-known self-styled evangelist of Thiruvalla in Kerala and his group of various trusts". The press release states that credible information was received that "the group has received donations from foreign countries ostensibly for helping the poor and destitute and for evangelical purposes". Other statements are made with respect to the operations of the group, but the press release does not disclose the source of the information. The press release does not name GFA Canada or any of the defendants. This press release is not admissible evidence showing some basis in fact for Zentner's allegation that GFA Canada fraudulently misappropriated donor's money.

[97] The CPAO report appended to Mr. Morrison's affidavit with respect to GFA Canada's auditors includes a general expression of concern that there was no attempt to ensure that funds were being spent as directed by the donors. This report is not admissible evidence that establishes some basis in fact for the Zentner's allegations or the existence of the proposed common issues.

[98] With respect to the allegation that $20 million of donated funds were misappropriated from GFA Canada and used to build a compound in Texas, Mr. Harington explained that "while this money was sent, the activities for which funds raised in Canada had already been undertaken in India using funds already residing in India as evidenced by the ongoing and periodic representations from the B.E.C. auditors". This explanation is supported by the affidavit of Mr. Punnose who explains the circumstances of the gift made by field partners to GFA USA for the Campus. He explains that this was a gift made without the involvement of GFA USA or GFA Canada. The rationale for the gift is explained in Mr. Punnose's affidavit who appends as an exhibit

Minutes from the Board of trustees of GFA India and Believers Church India that explains the rationale for the gift. The Minutes explain that the $20 million USD contribution was sent from the GFA India account in Canada to avoid exchange rate related payments and fees. In the face of this evidence, the assertion that $20 million was misappropriated from donations made to GFA Canada is only an unsupported allegation and is not evidence showing some basis in fact for Zentner's allegation.

[99] Zentner refers to a report from the Evangelical Counsel for Financial Accountability with respect to GFA USA. There is no evidence that GFA Canada is a member of this organization and any statements made about GFA USA in a different context is not evidence showing some basis in fact for the allegations against GFA Canada.

[100] In addition to the report from Mr. Harington, GFA Canada filed evidence from Pat Emerick, a director, and the President of GFA Canada. He provided evidence that donors can request that GFA Canada allocate their donation to a specific GFA program, the only assurance GFA Canada ever provided was that donations designated for a charitable initiative in the field would be sent to the field. He points to GFA Canada's tax receipts issued during the proposed class period that state that GFA Canada may re-allocate donations in the field to other charitable initiatives. Father Emerick's evidence is that some of GFA Canada's promotional materials and its website between 1996 and 2016 contained statements that 100% of all donations requested for use in the field would be used for humanitarian and missionary projects in the field. GFA Canada relies on Mr. Harington's report as evidence that all funds GFA Canada raised for use in the field were ultimately used in the field.

[101] With respect to the transcript from the U.S. litigation in which an email from Mr. Carroll was read into the record, the affidavit of Rev. Morrison appending the transcript is not evidence of the truth of the contents of the email. The email itself is not in evidence. The email was not put to any of the defendants on cross-examination. Neither Mr. Carroll nor Dr. Yohannan was examined as a witness to be questioned about this email. Counsel for GFA USA asked on the record that the entire email be read into the record, but this was not done. The parts of the email do not express any concern that donor funds were personally used or misappropriated. In this context, I do not accept the transcript references in another proceeding to parts of an email as admissible evidence of the truth of selected statements read from the email. The parts of the email read into the record in the U.S. proceeding do not, without more, provide some basis in fact for Zentner's assertions that donor money was dishonestly misused or misappropriated.

[102] In his affidavit in support of Zentner's motion, Reverend Bruce Morrison states that he has spent hundreds of hours investigating and researching "what happened to Canadian donors money". He states that proof of how the money was spent in India was an issue in the U.S. class action and proof was not provided. He states that the lack of proof and documentation in Canada as to how money was spent in India was addressed in the CPAO disciplinary decision and in the CRA audit, to which he referred in his affidavit. Rev. Morrison states that he has not found any evidence that Canadian donors' money was spent in India or elsewhere as donors designated.

[103] The "some evidence in fact" threshold does not require that Zentner prove his claim. A certification hearing is not a hearing on the merits. Credibility issues are not to be resolved at a

certification hearing. However, to satisfy this low threshold, Zentner must tender admissible evidence beyond speculation, conjecture, and allegations of wrongdoing.

[104] Although Zentner asserts that there is a "significant and credible basis" for his allegations, the admissible evidence upon which he relies does not show some basis in fact to support his assertion that the defendants intentionally misappropriated donor funds in a manner that had no connection to any purported charitable purpose. I regard the evidence as supporting Zentner's suspicion, based on evidence that is speculative, that GFA Canada misappropriated donors' money. But suspicion, based on speculation, is not enough. The approach that Zentner has taken on this motion, as shown by Rev. Morrison's affidavit, is to make serious allegations of fraud and then assert that the evidence tendered by the defendants is not sufficient to prove that donors' money was spent in India as they designated, and discovery is needed to uncover the evidence of fraud. This approach reverses the onus. The onus is on Zentner to adduce admissible evidence showing some basis in fact that donated funds were misappropriated. He has not done so. The only expert who has undertaken an analysis of how donor funds were used is Mr. Harington, and his opinion is that GFA Canada used donor funds in the field as directed, an opinion that is not challenged by other expert evidence.

[105] With respect to allegations of personal enrichment by the individual defendants, Zentner does not provide evidence that any of the individual defendants were personally enriched. On Mr. Zentner's cross-examination, he was asked to agree that there is no evidence that the individual defendants have diverted funds to themselves, and his counsel responded that Zentner was "not seeking to certify that the Defendants used the money themselves". Zentner has not provided evidence that shows some basis in fact for the proposed common issues as they relate to the individual defendants.

[106] GFA Canada submits, in any event, that the proposed common issues are not appropriate for certification because the causes of action pleaded all require proof of reliance by Zentner and other class members on representations by the defendants and proof of causation, and that proof of reliance and causation can only be done on an individual basis, with the result that a common issues trial will break down into individual proceedings. GFA Canada submits that there is no issue that is common to all class members that will advance the litigation in any meaningful way.

[107] In support of this submission, GFA Canada relies on the decision of Strathy J. (as he then was) in *Singer v. Schering Plough Canada Inc*., 2010 ONSC 42, at paras. 70-71. In his decision, Strathy J. rejected the plaintiff's submission that the court could determine at a common issues trial whether the defendants' marketing message was false and misleading to a reasonable person, holding that such a conclusion would be meaningless unless the court were to conclude that there was reliance on the misleading statement and damages were incurred as a result, something that could only be done on an individual basis. Strathy J. accepted, at para. 164, that claims based on misrepresentation are capable of giving rise to common issues that are capable of certification, citing a number of cases, and he held that these cases "typically involved very specific, clearly defined and limited representations made in circumstances in which reliance could reasonably be inferred".

[108] In *McKenna v. Gammon Gold Inc.*, Strathy J. (as he then was) held, at paras 136-137, that "[i]ssues of reliance have usually been considered to be individual issues that are not capable of

being resolved on a common basis. Strathy J. noted that "[e]xceptions may be made where there is a single representation made to all members of the class or there are a limited number of representations that have a common import".

[109] Donors learned about GFA Canada in many different ways, as explained by Father Emerick in his affidavit. These included (i) Church presentations at which GFA Canada staff and volunteers attended and spoke at churches throughout Canada in different formats, without having been given specific speaking notes or directions on what or how to communicate, (ii) mailings of brochures and letters to people on its mailing list, some of which asked for donations for specific purposes and others were more general, (iii) the GFA Canada website related to donors which changed over the years, and (iv) word of mouth, through discussions with family and friends. GFA Canada tendered affidavits from several donors who learned of GFA Canada in different ways and who state that they did not rely on the 100% language to make their donations.

[110] GFA Canada filed evidence from an expert witness, Dr. Russell James, a professor in the Department of personal Financial Planning at Texas Tech University. Dr. James' research focuses on charitable giving and charitable decision making. His evidence, based on empirically demonstrated academic research, is that the motivations of donors to make charitable gifts are, in general, highly diverse, individually variable, and are often disconnected from and not impacted by narrow financial processes or even the economic impact on beneficiaries.

[111] In *Bruno Appliance*, the Supreme Court of Canada, at para. 21, summarized the four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsity of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[112] In *Lee v. Transamerica Life Canada*, 2017 BCSC 843, the plaintiffs sought certification of a class action on behalf of a class of investors who invested in universal life insurance policies that were marketed by the insurer's agent under a contract. One of the defendants had marketed a distorted version of the policies for the purpose of generating commissions for himself. The plaintiffs pleaded a claim based in fraud, rather than based on fraudulent misrepresentation. The plaintiffs failed to plead reliance on fraudulent misrepresentation as a cause of their losses. The Court, at para. 63, held that a cause of action has not been properly pleaded and the pleadings fail to disclose a cause of action. The Court, at para. 64, held that the in the decision of the Supreme Court of Canada in *Bruno Appliance*, the Court had definitively specified the necessary components of the tort of civil fraud and overruled cases which have held that civil fraud can simply comprise the deprivation of property by dishonest means.

[113] In *Cannon*, Strathy J. addressed the defendants' argument that the misrepresentation claims will require individual analysis of each class member's knowledge, experience, sophistication, and risk tolerance and a determination of whether each class member was induced to act as a result of the misrepresentations. He considered the decision of McPherson J.A. in *Bre-X* who accepted that it was appropriate to certify common issues dealing with both fraudulent and negligent misrepresentation. Strathy J. considered that there are parallels between *Bre-X* and the case before him, in that it is arguable that there was a single misrepresentation such that if the donation program was a fraud, the court could find that every representation, no matter how it was made or who

made it, was tainted by fraud. The question would then be what did each defendant know and what did each defendant do in relation to the fraud? Strathy J. held that these issues can be addressed without reference to the behaviour of individual class members. See *Cannon*, at paras. 313-324.

[114] The decision in *Cannon* was made before the decision in *Bruno Appliance* and, to the extent that Strathy J. suggests that at para. 187 that a pleading of a cause of action in fraud may not require a component of false representation, this question has been clarified in *Bruno Appliance* which held that a false representation is an element of this tort.

[115] Zentner's claim in civil fraud is based on representations made to him and to other Class members. The two questions identified by Zentner that are common to the common issues he has proposed are: First, what happened to the donated money, or was there a fraud? Second, if there was a fraud, what did the defendants know? These questions omit the questions that must be determined on this claim for civil fraud, that is, what was said to each donor, and by whom, and whether the representations that were made to each donor were false. These questions lead to highly individualized lines of inquiry, just as the questions did in *Lee*. The individual issues of reliance and causation cannot be inferred based on the evidentiary record, given the evidence of the many different ways that donors were informed of the opportunity to donate, and the different motivations of donors to donate. In my view, a common issues trial would be unworkable because it would break down into a myriad of individual investigations with respect to the issues of reliance and causation.

[116] I conclude that Zentner has failed to show some basis in fact for his allegation that the defendants intentionally misappropriated donor funds in a manner that had no connection to any purported charitable purpose. Zentner has failed to satisfy the requirement for certification that the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members.

Is a class proceeding the preferable procedure for the resolution of the common issues?

[117] The fourth criterion for certification is that a class proceeding be the preferable procedure for the resolution of the common issues.

[118] I have held that Zentner has failed to satisfy the "cause of action" requirement and the 'common issues" requirement. I go on to determine whether, if I had held otherwise, Zentner has satisfied the "preferable procedure" requirement for certification.

[119] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims. Whether a class proceeding is the preferable procedure is judged by reference to the purposes class proceedings, access to justice, behaviour modification, and judicial economy, by taking into account the importance of the common issues to the claims as a whole, including the individual issues. See *Whitehouse*, at paras. 138-140; *Cannon*, at paras. 380-382.

[120] Zentner submits that having regard to these principles, a class proceeding is the preferable way to resolve the common issues he proposes.

[121] GFA Canada submits that a class action would not be the preferable procedure. GFA Canada submits that an investigation into his proposed common issues is something that, if warranted, should be done by the Public Guardian and Trustee under the *Charities Accounting Act* or the C.R.A., as part of their regulatory functions. GFA Canada submits that there is another alternative procedure to address the proposed class members' claims that is preferable to a class action: a judicially supervised claims process through the *CCAA* proceeding.

[122] Under s. 6(1) of the *Charities Accounting Act*, any person may complain as to the manner in which a person organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which such funds have been dealt with or disposed of. This section gives the court discretion to issue an order directing the Public Guardian and Trustee to make such investigations as the PGT considers proper in the circumstances. Section 12 of the Act provides that it does not apply to affect or in any way interfere with any right or remedy that any person may have under any other Act or in equity or at common law or otherwise. If Zentner had a civil claim in tort to recover donated money that was misappropriated, the Act would not affect his claim.

[123] Zentner submits that from the perspective of the objective of promoting access to justice, a class proceeding is preferable to a claims process in the *CCAA* proceeding. A class member would not be required to opt in if the action proceeds as a class action. On the other hand, a *CCAA* claims proceeding would require each claimant to, in effect, opt-in to the claims process. The amounts of individual claims are low, and it would not be economically feasible for individual class members to pursue their claims on an individual basis. Zentner also submits that the objective of judicial economy also supports a class action as opposed to individual claims made through a *CCAA* claims process.

[124] If I had decided that Zentner's claims disclose a cause of action and that his claims raise one or more common issues, I would accept that a class action would be the preferable procedure for resolution of the common issues on a class-wide basis. This procedure would promote the objectives of access to justice and judicial economy in ways that would be preferable to an individualized claims process in the *CCAA* proceeding.

GFA Canada's summary judgment motion

[125] GFA Canada moves for summary judgment dismissing Zentner's action on the basis that his claim is statute barred. The parties agree that this motion should be heard by this court and at the same time as the motion for a declaration that the requirements for certification under the Nova Scotia CPA have been satisfied, even though a statement of defence has not been filed.

[126] Although I have held that Zentner's claim as pleaded does not disclose a cause of action, I address GFA Canada's summary judgment motion.

[127] GFA Canada submits that Zentner and Wall discovered, or could reasonably have discovered, all material facts underlying the allegations in the statement of claim by or before February 24, 2018. They rely on the following facts:

a. Mr. Morrison shared his allegations against GFA Canada with his congregation, including Zentner, in 2015;

b. Mr. Morrison's allegations were communicated to hundreds of churches across Canada and published on the internet in 2015;

c. Zentner and Mr. Walton each received charitable tax receipts from GFA Canada in 2007, which stated that GFA Canada could use designated gifts "were needed most";

d. Zentner received similar receipts until he stopped donating in 2015;

e. Mr. Wall received similar receipts until 2016, then he received receipts directing him to the Gift Acceptance Policy.

[128] The Nova Scotia *Limitations of Actions Act* provides:

> 8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) Two years from the day on which the claim is discovered; and
>
> (b) Fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
> (c) that the act or omission was that of the defendant; and
> (d) that the injury, loss or damage is sufficiently serious to warranty proceeding.

[129] In response to GFA Canada's submissions, Zentner makes four submissions:

a. Zentner relies on evidence that Zentner did not become aware of the material facts giving rise to his claim until 2019. Zentner proposes Brian Wall as an alternate representative plaintiff who did not become aware of the material facts giving rise to his claim until 2019 and he continued to donate until 2020.

b. Zentner submits that the doctrine of fraudulent concealment applies in these circumstances.

c. Zentner submits that this motion is for partial summary judgment and, as such, should not be permitted to proceed.

d. Zentner submits that donors, including Brian Wall continued to donate and, with respect to Mr. Wall, he continued to donate until 2020.

[130] Mr. Zentner was cross-examined about when he first became aware of his claim. He agreed that he was aware of concerns raised by Rev. Morrison relating to GFA Canada when he stopped donating in 2015, but Rev. Morrison did not discuss his concerns with GFA Canada and financial practice. Zentner testified that he knew that Rev. Morrison had concerns related to various things such as governance. His understanding was that Rev. Morrison's concerns were that GFA Canada was not acting in a Christian-like manner as a board. He know that Rev. Morrison had trouble with the leadership of GFA Canada. He agreed that the alleged misconduct that Rev. Morrison had identified was enough for Zentner to be concerned such that he stopped making any further donations to GFA Canada.

[131] Rev. Morrison was also cross-examined on May 5, 2021. He testified that over the years, he discussed with Zentner his concerns about GFA Canada and GRA US in terms that he had concerns, but they never really discussed the details of the concerns. He suggested that the church stop supporting GFA in 2015 until he had done some research and figured out whether the organization was credible or not. He had misgivings at the time but did not go into details of what they were at that time. He testified that in the last year or so, he shared with Zentner a document he had prepared, and this was the only time he gave details of his concerns.

[132] Zentner submits that a reasonable person in his position would not have known of his claim before he learned the material facts in 2019. He submits that it would not have been reasonable for a person in his circumstances to have undertaken the research done by Rev. Morrison, who had very different expertise and was in different circumstances.

[133] The claims against the defendants required special expertise to understand the financial matters upon which the claims are founded. In *Van Allen v. Vos*, 2014 ONCA 552, there was a partnership dispute involving allocation of annual profits and the accounting upon the partnership's termination. The Court of Appeal held that the plaintiff did not know and could not reasonably have known of the misallocation of profits (because an associate's expense was being treated as a shared expense) earlier than he did and that to preclude the respondent from recovery because of his failure to review underlying financial information would hold him to an unreasonably high standard.

[134] Zentner's evidence is that he did not know the details of Rev. Morrison's concerns about GFA until 2019. GFA Canada has not shown that there is no genuine issue requiring a trial in relation to whether Zentner knew, or should reasonably have known, the facts to support his claims more than two years before he commenced the action.

[135] Given this conclusion, it is not necessary for me to address Zentner's other submissions.

Disposition

[136] For these reasons:

a. Zentner's motion is dismissed.

b. GFA Canada's summary judgment motion is dismissed.

[137] If the parties are unable to resolve costs, written submissions may be made in accordance with a timetable to be agreed upon by counsel and provided to me for approval.

Cavanagh J.

Released: March 17, 2022

CITATION: Zentner v. GFA World, 2022 ONSC 1683
COURT FILE NO.: CV-20-00643091-00CL
DATE: 20020317

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GREGORY ZENTNER

Moving Party and Responding Party by Cross-Motion

- and -

GFA WORLD, PAT EMERICK, GOSPEL FOR ASIA, INC., K.P. YOHANNAN, DANIEL PUNNOSE, and DAVID CARROLL

Responding Parties and Moving Parties by Cross-Motion

REASONS FOR JUDGMENT

Cavanagh J.

Released: March 17, 2022