

October 16, 2023

Think Twice Before Proceeding By Way of Application When Dealing With Allegations of Fraud

by [Corey Groper](#)

In *Sase Aggregate Ltd. v. Langdon*, the Court of Appeal for Ontario dismissed a plaintiff's attempt to recoup fraudulently obtained funds from the fraudster's wife, who was a stranger to the fraud. In doing so, the Court provided guidance on the high standard required to properly trace misappropriated funds, even in the most clear-cut cases of fraud. It also provided useful commentary on how proceeding by way of application may hinder the effective adjudication of civil fraud claims.

Background

Sase Aggregate Ltd. ("Sase") owns and operates a gravel pit in Uxbridge, Ontario. In 2021, it discovered that its pit manager, Jamie Showers ("Showers"), had defrauded it of more than \$2.1 million¹ by issuing false invoices to two of its customers and then depositing the funds into bank accounts that he alone controlled.²

Sase brought an application seeking to recover the stolen funds. The application was commenced against Showers' wife, Michelle Langdon ("Langdon"). Sase claimed that the stolen funds were used by Langdon to purchase and renovate a property in Uxbridge (the "Property"). It sought a constructive trust over the net proceeds from the sale of the Property, alleging that Langdon:

1. knowingly received funds belonging to it to purchase and improve the Property;
2. knowingly assisted her husband in perpetrating the fraud by allowing cheques payable to it to be deposited into accounts under her control; and

¹ *Sase Aggregate Ltd. v. Langdon*, 2023 ONCA 554 (CanLII), [para. 1](#).

² [Para. 9](#).

3. was unjustly enriched by Showers' fraud.³

Langdon denied having any knowledge of Showers' fraud. She claimed that all the payments she made for the purchase and renovation of the Property came from legitimate sources (except for one payment in the amount of \$177,632.38, which, in the course of reviewing banking records, she discovered had been made by her husband with the stolen money).⁴

The Application Judge's Decision

The application judge concluded that Langdon had no actual or constructive knowledge of the fraud. She rejected Sase's claim of knowing assistance, finding that "there was no evidence to show that [Langdon] knew anything about [Showers'] alleged improper actions"⁵. She also concluded that the elements of knowing receipt had not been met, as there was no evidence that "the allegedly stolen funds were received or applied by [Langdon] for her own use and benefit (other than the \$177,632.38)".⁶ With respect to Sase's claim for unjust enrichment, the application judge concluded that there was "no evidence that [Langdon] received any of the allegedly stolen funds (except for the \$177,632.38). Thus, unjust enrichment was limited to that amount".⁷

Sase Failed to Follow the Funds

Central to the application judge's analysis was the finding that Sase had not provided a proper tracing analysis to support its claim.

Although the evidence produced by Sase followed the misappropriated funds from Showers' corporate bank accounts into an account held jointly by Showers and Langdon (the "Joint Account"), its tracing analysis stopped there. Crucially, there was no evidence to show that the stolen funds were used to fund any of the payments for the Property.

According to the application judge, "a tracing analysis must follow the funds through as many steps or transfers as necessary to arrive at the conclusion that they are the same funds and were used in the way that the plaintiff claims." Sase failed to accomplish this, as it neglected to follow the stolen funds from

³ [Paras. 2 & 15.](#)

⁴ [Para. 3.](#)

⁵ [Para. 34.](#)

⁶ [Para. 35.](#)

⁷ [Para. 36.](#)

the Joint Account “directly into the drafts and cheques that were used to pay for the purchase and improvement of the [Property].”⁸

The Court of Appeal’s Decision

Sase appealed the application judge’s findings, raising several grounds of appeal.

First, Sase argued that a constructive trust ought to have been imposed because the case involved “a wrongful act like fraud”. In other words, not requiring Langdon to return the stolen funds would, according to Sase, “offend the principles of good conscience”.⁹

In dismissing this first ground of appeal, the Court of Appeal noted that although there was “no question that a fraud occurred”, Sase “chose not to bring legal action against the fraudster” but, instead, sued Langdon, who, based on the evidentiary record, was a complete “stranger to the fraud”.¹⁰

Sase also contended that the application judge erred in finding that it had not properly traced the misappropriated funds in and out of the Joint Accounts. According to Sase, “where fraudulently obtained proceeds are deposited into a bank account and then mixed with the perpetrator’s funds, liability in tracing is strict and there is no need to show that they are the same funds”.¹¹ The Court of Appeal rejected this contention, noting that “while [Sase] could have tried to trace its funds into the joint accounts and then out again, its tracing stopped at the accounts”.¹²

In concluding that “Sase’s tracing was incomplete”, the Court of Appeal noted that while Sase provided “a chart setting out the cheques and drafts used to pay for the purchase and renovation of the [Property]”, it “did not trace its own funds into those payments”. Sase’s “tracing only showed its money being deposited into Showers’s accounts and then, in some cases, transferred into the Joint Account.”¹³ The Court of Appeal contrasted this with Langdon’s explanation of the source of funds used for the purchase and renovation of the Property, which included “detailed evidence, showing the original source of

⁸ [Para. 37.](#)

⁹ [Para. 44.](#)

¹⁰ [Para. 45.](#)

¹¹ [Para. 55.](#)

¹² [Para. 58.](#)

¹³ [Para. 59.](#)

payments she had arranged and step-by-step how the transfer of funds occurred”.¹⁴

Finally, Sase submitted that the application judge committed a palpable and overriding error in finding that Langdon did not benefit from the fraud perpetrated by her husband. According to Sase, when one compares Langdon’s net value before the fraud with what she had amassed at the end of the fraud, the benefit to her became “obvious and significant”.¹⁵

The Court of Appeal noted that although it was “no doubt” concerning to Sase that “Langdon’s financial circumstances seem to have greatly improved after the fraud commenced”, she provided evidence that there were legitimate sources of money available to her and that she used those other sources to acquire and renovate the Property.

Importantly, according to the Court of Appeal, the question before the application judge was not whether Langdon had benefited in some way from the fraud but whether the record established that the stolen funds were used to buy and renovate the Property. As a result of the “gaps in the evidence”, it remained an open question where the stolen funds went.¹⁶

Application Process Ill-Suited to Issues Before the Court

In dismissing the appeal on behalf of a unanimous court, Justice van Rensburg noted that the application procedure was “ill-suited to the determination of the issues between the parties because there were disputed facts and questions of credibility”. It also resulted in a documentary record which provided an “incomplete and thus unsatisfactory account of what happened to the fraudulently obtained funds”, making it “impossible to know whether they might indirectly have made their way into the improvements of the [Property]”.¹⁷

In the end, although there was “no question that Sase was defrauded by [Showers]” and that “the movement of money [had] a number of indicators consistent with money laundering”, there was no basis to disturb the application judge’s findings because of:

1. the specific remedies sought by Sase (a constructive trust over the Property);

¹⁴ [Para. 61.](#)

¹⁵ [Para. 65.](#)

¹⁶ [Para. 68.](#)

¹⁷ [Para. 6.](#)

2. the application process that Sase chose to initiate and pursue; and
3. Sase's willingness to proceed without oral evidence and on a written record that was not fully developed.¹⁸

Key Takeaways

- Even in the clearest cases of fraud, plaintiffs will be held to a higher and more robust standard when seeking to recoup misappropriated funds from a third party.
- Clear and cogent evidence is required to properly trace misappropriated funds, especially when that tracing makes its way into third parties' assets and accounts. Circumstantial evidence is not enough.
- A proper tracing analysis will allow the court to determine where the fraudulently obtained funds went. Merely showing that the funds were stolen, without showing where they ended up, will not suffice.
- The application process will rarely be suited to the adjudication of civil fraud claims. Whenever there are disputed facts and questions of credibility in issue, plaintiffs should think twice before proceeding by way of application.
- Trying to take advantage of a less expensive and more expeditious process can be held against plaintiffs who are unable to adduce the evidence needed to successfully support their claims.

¹⁸ [Para. 6.](#)