Court File No.: CV-20-00643091-00CL

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

Applicant

REPLY FACTUM OF GREG ZENTNER

Motion for Representation Order and Ancillary Relief
(Returnable June 21-22, 2021)

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PART I - REPLY

Issue 1: Representation Order

1. None of the Defendants take issue with the need for a representation order. Such an order is necessary and should be granted.

Issue 2: Certification

2. The Defendants do not dispute that certain aspects of the five-part certification test are met:

(a) **Cause of Action:** Disputed.

(b) **Identifiable Class:** Not disputed.

(c) **Common Issues:** Not disputed in relation to the *non-reliance*-based claims.

(d) **Preferable Procedure:** Disputed.

(e) **Suitable Representative Plaintiff:** Not disputed. The Defendants do not contest that Zentner would fairly and adequately represent the interests of the class; has produced a workable litigation plan; and does not have, with respect to the common issues, an interest that conflicts with the other Class Members.

Rather, the Defendants' argument is that Zentner's claim is statue-barred on limitations grounds. This argument is logically separate from the certification test and the relevant factors to be considered under that branch of the certification analysis.

3. Zentner's reply submissions below are organized around these three contested certification requirements: cause of action; common issues; and preferable procedure.

4. The final section contains Zentner's submissions in response to GFA Canada's limitation period summary judgment motion.

A. Cause of Action

i. GFA's Misguided Focus on the Merits

5. Much of the Defendants' argument relies on the repetition of unequivocal statements about the alleged lack of evidentiary support for Zentner's claim. For example, GFA Canada invokes one of the most overused phrases in the advocacy lexicon in declaring that "the actual record reveals not a shred of evidence that any of the respondents engaged in any wrongdoing […]."[1]

6. Zentner makes three points in reply. First, a merits-based assessment is explicitly not a part of the certification test. Quoting from the Supreme Court's decision in *Hollick*, "the certification stage is decidedly *not meant to be a test of the merits of the action*."[2] Certification is about the form of the action, not the merits of the claims.[3]

7. Second, to the extent the court does consider the factual record—not as part of the certification test, but rather to inform itself of the circumstances giving rise to the claim—the record in this case does in fact contain an extensive evidentiary foundation that substantiates Zentner's allegations. That evidence is set out in Zentner's Factum at paragraph 4 and Schedule "E" and will not be repeated here. It includes, among other things, improperly backdated financial documents; two sets of books; a failure to comply with Canadian charity law; no money sent to India for seven years during the Class Period; large discrepancies between reports to CRA and Indian authorities; tens of millions of dollars of unexplained interest earned on massive deposits

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[1] GFA Canada Factum, para. 35, p. 12.
[2] *Hollick v. Toronto (City)*, 2001 SCC 68, para. 16, Plaintiff's Book of Authorities, Tab 22. [emphasis added]
[3] *Hollick v. Toronto (City)*, 2001 SCC 68, paras. 14–15, Plaintiff's Book of Authorities, Tab 22. In Nova Scotia, the merits have never been part of the certification test. See, e.g., *Wright Medical Technology Canada v. Taylor*, 2015 NSCA 68, para. 20, 38-47, leave to appeal ref'd 2016 CanLII 6845 (S.C.C.), Plaintiff's Book of Authorities, Tab 38.

in Indian accounts; and the Indian Ministry of Finance's extensive raids on GFA's Indian operations.

8. Third, while it is plainly inaccurate for GFA to assert that no evidence exists to support Zentner's allegations, GFA will also likely advance a separate argument during oral submissions, namely, that GFA's merits-based evidence should be accepted over the evidence tendered by Zentner. But again, that argument invites this Court to conduct an analysis that it is explicitly directed not to undertake. As the Supreme Court stated in *Pro-Sys*, at certification the court "*is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight*".[4] The time to weigh conflicting evidence is at trial when the court and the parties have the benefit of a full evidentiary record informed by documentary and oral discovery, neither of which occurs prior to certification.

ii. The Improper Attack Against Marc Stanley

9. The cause of action criterion requires that the pleading advance a legally viable cause of action. Like a Rule 21 motion, 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 pleading is read generously, and it will be unsatisfactory only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed."[5]

10. GFA attempts to overcome this high burden by invoking comments made by Marc Stanley, a member of Zentner's legal team, during the settlement approval hearing in the prior US litigation. GFA argues that Mr. Stanley made comments "that directly contradict the allegations made in the

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[4] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, para. 102, Plaintiff's Book of Authorities, Tab 29.
[5] *Whitehouse v BDO Canada LLP*, 2020 ONSC 144, para. 91, Plaintiff's Book of Authorities, Tab 36.

[Zentner] claim".[6] GFA USA goes so far as to say that Mr. Stanley (and possibly the entire Zentner legal team) "knows that a substantial part of the claim [Zentner] is pursuing in this Court is false."[7] This is a stunning allegation. GFA USA is defending itself in a fraud case by accusing the lawyers acting for its opponent of themselves committing a fraud upon this Court. Remarkable.

11. Aside from its utter implausibility, GFA's argument suffers from several fundamental problems.

12. First, it mischaracterizes what Mr. Stanley represented to the US court in a manner that jumps off the page upon review of the transcript. Mr. Stanley advised the US court at the settlement approval hearing that he travelled to India and he stated the following: "*It wasn't a comprehensive trip to ensure all the representations were true but we just wanted to see that there was a synod and that there was a hospital and that there were diocese and churches and the leprosy program et cetera*".[8] For example, Mr. Stanley said that he "*saw an exemplar of a Jesus Well*".[9] And he told the court that he was shown an attic full of receipts that GFA said, "would match some of the donations that were designated by class donors. *We certainly did not test that, but there certainly was a big room of notebooks and receipts*."[10] In other words, Mr. Stanley was clear in his submissions to the US court about the limited scope of his review of GFA's activities in India.

13. Second, GFA argues that Mr. Stanley acknowledged through a stipulation in the US Settlement Agreement that "all donations designated for use in the field were ultimately sent to

[6] GFA USA Factum, para. 5, p. 2.
[7] GFA USA Factum, para. 71, p. 20
[8] US Settlement Approval Hearing Transcript, p. 11, Defendants' Joint Motion Record, Vol. 7, Tab 3, p. 3583.
[9] US Settlement Approval Hearing Transcript, p. 12, Defendants' Joint Motion Record, Vol. 7, Tab 3, p. 3584.
[10] US Settlement Approval Hearing Transcript, p. 12, Defendants' Joint Motion Record, Vol. 7, Tab 3, p. 3584.

the field."[11] This disingenuous argument tries to capitalize on the peculiar way in which GFA defines sending money to "the field". According to GFA, money is sent to "the field" the moment GFA Canada transfers money from its Canadian bank account to another account at the same Canadian branch operated by GFA Canada's Indian agents. In other words, sending money to the field means nothing more than funds were moved between two bank accounts at an RBC branch in Stoney Creek. This was confirmed by the Defendant Patrick Emerick during his cross-examination.[12] Critically, and contrary to a normal understanding of the phrase, "sending money to the field" does not mean that Canadian donor funds were *actually spent on charitable purposes in India*.

14. Third, GFA's argument against Mr. Stanley is fundamentally flawed because it is premised on a distortion of Mr. Stanley's role. He is not a fact witness on this motion. He is a member of Zentner's legal team. If GFA wants to rely upon evidence from Mr. Stanley in support of its position on this motion, and in particular in circumstances where GFA is alleging that Mr. Stanley is perpetrating a fraud on this Court, basic fairness principles (e.g., the rule in *Browne v. Dunn*) require that GFA put these allegations to Mr. Stanley directly under proper examination, and afford him the opportunity to confront the allegations and explain his prior statements at the US settlement approval hearing.

15. GFA failed to do so. Instead, it chose to confront Zentner during his cross-examination with select excerpts from the US proceedings (presumably knowing that Zentner would have no

[11] US Settlement Agreement, s. 9.2.2, Exhibit 2 to the Morrison cross-examination, Plaintiff's Supplemental Motion Record, Tab 5(2), p. 1074.
[12] Transcript of the Emerick cross-examination, qq. 219, 323-333, pp. 60, 90, Plaintiff's Supplemental Motion Record, Tab 1, pp. 64, 94. Transcript of the Harington cross-examination, qq. 232-236, 250-329, pp. 55-56, 60-76, Plaintiff's Supplemental Motion Record, Tab 2, pp. 219-220, 224-240.

knowledge of what transpired in the US or why Mr. Stanley said what he said about his trip to India) and now improperly argues that "Stanley was in attendance and said nothing."[13]

iii. The Erroneous Trust Argument

16. GFA argues that Zentner has no viable cause of action because he fails to plead a trust, and that absent a trust class members could not have suffered any compensable damages because there is no right to recover an unencumbered gift. Quoting from GFA Canada's factum, "[a]s a result, no matter what charitable purpose the donated funds were put towards after they became GFA Canada's property, the donors suffered no actionable harm or injury."[14]

17. This argument incorrectly assumes that Zentner's claim is based *entirely* upon the Donor Designation Promise. In other words, that the Defendants' liability is rooted in the fact that GFA cannot show that all Canadian donor funds were actually spent in India towards the specific charitable purpose designated with each donation. GFA makes this assumption, and then argues that the claim is untenable because GFA Canada is legally permitted to use donations towards charitable purposes other than those specifically directed by donors. Hence the phrase, "*no matter what the charitable purpose the donated funds were put towards*" that GFA Canada uses in the excerpt from its Factum quoted in the preceding paragraph.

18. As explained in Zentner's initial Factum, the Donor Designated promise does play a central role in GFA's fundraising efforts and it is a key part of the factual matrix of the case. But the theory of liability underling the Zentner Claim is not based entirely upon GFA's failure to uphold the Donor Designation Promise. The Defendants' liability is rooted in something much more basic,

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[13] GFA USA Factum para. 70, pp. 19-20.
[14] GFA Canada Factum, para. 47, pp. 15-16.

namely, *their intentional misappropriation of donor funds in a manner that had no connection to any purported charitable purpose.*

iv. The Case Against the US Defendants

19. GFA USA argues that there is no cause of action against the US Defendants because: (1) the "common enterprise" theory of liability is "the only basis to maintain a reasonable cause of action against GFA USA"; and (2) Zentner has failed to satisfy the standard required to pierce the corporate veil and impose personal liability upon the individual US defendants. These criticisms can be dealt with summarily.

20. First, the case against GFA USA is not based on the common enterprise theory of liability (which says that affiliate corporate entities should be held jointly liable in circumstances where assets are held in one entity, but liabilities in another, in an intentional effort to shield the group's assets from execution). GFA USA's liability 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, such that the funds were not used for any charitable purpose in India or Southeast Asia.

21. Second, the case against the individual US Defendants is similarly based on the allegation that they each participated in the scheme to defraud Canadian donors. Liability does not depend on piercing the corporate veil. Rather, it is based on the individual Defendants' intentional conduct that falls outside the scope of their proper corporate duties. As GFA USA properly concedes in its Factum, personal liability is available and appropriate in cases of "fraud, deceit and dishonesty."[15]

[15] GFA USA Factum, para. 61, p. 21. As held by Justice Strathy in *Cannon*, "there are allegations that the [individual director defendants] were acting in their own personal capacities, with a view to their own enrichment. That is

v. The Statement of Claim Adequately Pleads Each Cause of Action

22. GFA makes various arguments that the causes of action alleged in the Zentner Claim are either insufficiently particularized (e.g., the fraud claim) or simply not available on these facts (e.g., the unjust enrichment claim). None of these arguments should be accepted.

23. **Fraud**: The Statement of Claim pleads sufficient particulars, especially given the stage of the litigation. The Defendants' argument is essentially that the fraud claim should fail for lack of evidence, but they do not dispute that the Rule 21 standard applies to the Court's assessment of the cause of action criterion, for which no evidence is admissible.[16]

24. It is no surprise that GFA makes the lack of particulars argument. This issue is raised by defendants in virtually every fraud case and it was always going to be raised where, as here, the legal sufficiency of the cause of action is automatically put into issue by virtue of the certification criterion.

25. If the court concludes that the pleading does lack particulars, then Zentner seeks leave to amend the claim to incorporate the additional material facts set out in **Schedule "C"** to this Reply Factum. Granting leave in such circumstances is appropriate.[17]

26. **Breach of fiduciary duty**: The Defendants' argument is incorrectly based on corporate law principles, as opposed to those applicable arising out of charity and trust law. As stated by Justice Beaudoin in *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness*

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sufficient to make out a cause of action in their personal capacities." *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, paras. 216-223, leave to appeal dismissed 2012 ONSC 6101, Plaintiff's Book of Authorities, Tab 10.

[16] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, 2013 SCC 57, para. 63, Plaintiff's Book of Authorities, Tab 29.

[17] See, e.g., *Normart Management Ltd. v. West Hill redevelopment Co. Ltd.*, 1998 CanLII 2447 (Ont. C.A.), pp. 15-16, Plaintiff's Book of Authorities, Tab 26.

Foundation, "[t]he [*Charities Accounting Act*] deems property received by a charity to be trust property", and "[t]he *CCA* 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 to be used."[18] It is thus not "plain and obvious" that the fiduciary duty claim against the US Defendants will fail.

27. **Unjust enrichment**: The Statement of Claim pleads that all the Defendants, including the individual Defendants, improperly enriched themselves by diverting donations for improper purposes. For example, for GFA USA, Zentner pleads that it was enriched by taking $20 million from Canadian donors designated for "the field" to instead build the US compound. By misdirecting donor funds, there was no juristic reason for the donors' transfer of property.

28. GFA USA incorrectly relies on *MVL Leasing* for the principle that there can be no claim for unjust enrichment when a defendant receives a benefit indirectly (e.g., GFA USA receiving a benefit through GFA Canada). This is a misreading of *MVL Leasing*. There, the claim for unjust enrichment in a third-party claim depended solely on the enrichment to the plaintiff in the main action, as opposed to the third-party defendant. Justice Diamond struck the claim, concluding that the alleged benefit arising from the alleged deprivation must be conferred on the defendant to the unjust enrichment claim (rather than another party, in that case, the plaintiff).[19] In contrast, here Zentner alleges that the US Defendants themselves were unjustly enriched by the misdirection of Canadian donor funds.

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[18] *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684, paras. 72, 74, 78, 86, Plaintiff's Book of Authorities, Tab 35.
[19] *MVL Leasing Limited v. CCI Group Inc.*, 2018 ONSC 1800, para. 55, Defendants' Book of Authorities, Tab 35.

29. Further, in *Cannon*, Justice Strathy (as he then was) explicitly rejected the "indirect benefit" argument that is advanced by the Defendants here. He held that "the requirement that the benefit to the defendant be "direct" is to ensure that the plaintiff does not recover twice—once from the party who received a direct benefit and again from those who received indirect, incidental or collateral benefits". Justice Strathy concluded that the benefit element of unjust enrichment can be passed through various pockets before getting to individual defendants:

> [266] This case is different. The core allegation in this case is that the defendants engaged in a course of conduct that was conspiratorial and fraudulent, that they intended to enrich themselves at the expense of the donors and that the elaborate structure of the Gift Program was contrived for that very purpose. The funds may have passed through various pockets before they got to any individual defendant, but that is all it was – a pass through. Reading the pleading generously, it cannot be said that the benefit to the defendants was an "incidental blow-by" or a "secondary collateral benefit", to use the words of Chief Justice Lamer in *Peel (Regional Municipality) v. Canada*.[20]

30. The same is true here: the funds may have passed from GFA Canada to GFA USA and then to individual Defendants, but that is all it was—a pass through, not an "indirect benefit" that invalidates the unjust enrichment claim.

B. Common Issues

31. GFA Canada and GFA USA both expend considerable effort in their written submissions dealing with issues arising out of the reliance-based nature of a misrepresentation claim. The argument starts with the proposition that "Zentner's core allegation is grounded in misrepresentation."[21] It then makes the point that reliance is a constituent element of a misrepresentation claim, and then moves to the conclusion that class certification is not appropriate because reliance necessarily raises individual, as opposed to common, issues.

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[20] *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, para. 266, leave to appeal dismissed 2012 ONSC 6101, Plaintiff's Book of Authorities, Tab 10.
[21] GFA Canada Factum, para. 56, p. 19. See also GFA USA Factum, para. 48, pp. 12-13.

32. This argument is largely a straw man. First, the primary cause of action asserted in the Zentner Claim is not based in misrepresentation, but rather fraud. The fundamental allegation is that GFA Canada raised hundreds of millions of dollars from Canadian donors for purported charitable purposes in India, but in fact diverted, in concert with the other Defendants, those funds for improper purposes unconnected to any charitable purpose in India or Southeast Asia. Hence, the first proposed common issue, under the heading "Civil Fraud" is: Did the Defendants, or any of them, deprive Class Members of their property by dishonest means?

33. Second, claims for negligent misrepresentation, especially when, as here, they are based on the same factual matrix as non-reliance-based claims, are suitable for certification. For this reason, the Defendants' reliance in *Kinross* is inapt because the Court of Appeal in that case concluded that a claim for negligent misrepresentation standing alone could not be certified, in light of the many individual reliance issues, precisely because the negligent misrepresentation case stood alone and did not have a companion statutory cause of action for secondary market misrepresentation for which reliance is not an element.

34. *Kinross* can be contrasted with *Bre-X* in which a shareholder claim for negligent misrepresentation (other than the reliance element, which was held to be an individual issue) was certified alongside claims for fraudulent misrepresentation and conspiracy. *Bre-X*, rather than *Kinross*, is therefore most similar to the facts and causes of action advanced here, and there is no reason to depart from the Court of Appeal for Ontario's conclusions and reasoning in *Bre-X* as summarized at paragraphs 56-58 and 63-66 of Zentner's initial Factum.

35. Third, the common issues trial judge will be asked to render judgment not on whether donations for "Water Buffaloes" were improperly used for "Jesus Wells", as the Defendants

contend, but rather on whether the Defendants misdirected Canadian donations for their personal benefit, and if so, the extent of the Defendants' knowledge of the true state of affairs and their participation in the fraud and conspiracy.

36. In short: Where did the money go once it was raised? To charitable purposes, as the Defendants argue? Or, in the words of the Indian Ministry of Finance, were hundreds of millions of Canadian dollars "*siphoned out* […] *to engage in unaccounted cash transactions for personal and other illegal expenses in real estate transactions*"?[22]

C. Preferable Procedure

37. GFA argues that the preferable procedure criterion is not satisfied because "there is another alternative procedure to address the proposed class members' claims that is preferable to a class action: a claims process through the CCAA proceeding."[23] This argument should be rejected for three reasons.

38. First, the prior conduct of all the Defendants should preclude any argument that a claims process involving countless individual claim hearings would be preferable to the global resolution of the Class Members' claims through the adjudication of the Zentner Claim.

39. GFA Canada originally obtained CCAA protection based on the explicit representation that it would use the CCAA proceedings to efficiently adjudicate the Zentner Claim. Shortly after it began, Zentner moved to terminate the CCAA proceedings on the basis of, among other things, the belief that GFA Canada's "objective under CCAA protection is to implement a claims process

[22] Ministry of Finance, Income Tax Department conducts searches in Kerala, November 6, 2020, Exhibit ZZ to the Morrison Affidavit, Plaintiff's Motion Record, Tab 4ZZ, p. 664, emphasis added].
[23] GFA Canada Factum, para. 68, p. 23.

to extinguish the claims of the Canadian Class Action plaintiffs".[24] In response, Emerick gave affidavit evidence that this was not GFA Canada's intention.[25]

40. GFA Canada then, along with all the other Defendants, agreed to the Litigation and Mediation Process Agreement that was explicitly designed to deal with the adjudication of the Zentner Claim within the CCAA proceedings. GFA Canada consented, along with all the other Defendants, to an expedited timetable. This Court then ordered, on the consent of parties, that documentary production be completed by the end of March 2021, and examinations for discovery be completed by the end of May 2021. The Defendants agreed to a Fall 2021 trial date.

41. All this history undercuts GFA argument that a class wide resolution of the Zentner Claim is not the preferable procedure. The adjudication of the Zentner Claim as a class action is the preferable procedure because, among other things, that is the procedure that all the Defendants have already agreed to.

42. Moreover, and perhaps most glaringly, GFA Canada has already tried and failed to have an individual claims process implemented. It served motion materials several months ago proposing the very type of claims process it now advocates. That motion never went anywhere because an individualized claims process was dismissed out of hand by Justice Hainey as antithetical to the litigation protocol already agreed to by all the Defendants.

43. Second, the Defendants' preferability argument simply defies common sense. Under the Defendants' proposal, each individual donor must come forward and file an individual claim involving allegations of fraud, breach of fiduciary duty, negligent misrepresentation, unjust

[24] Emerick Affidavit sworn September 14, 2020, para. 72, Defendants' Motion Record, Vol. 7, Tab 2, pp. 3172-3173.
[25] Emerick Affidavit sworn September 14, 2020, para. 72, Defendants' Motion Record, Vol. 7, Tab 2, pp. 3172-3173.

enrichment and conspiracy, which would then be subject to separate claims hearings to be adjudicated one by one. GFA argues, without any supportive evidence,[26] that this would be "more cost-effective, efficient and less onerous" than a class proceeding.[27] To state the position is sufficient to disprove it.

44. Third, GFA's individual claims process proposal would increase, not reduce, access to justice barriers. In *AIC Limited v. Fischer*, the Supreme Court of Canada held that the preferability criterion requires a consideration of: (1) the barriers to access to justice; (2) the potential of a class action to address those barriers; and (3) the alternatives to a class action, including how well the alternatives address the relevant barriers and how the two proceedings compare.

45. The barriers to access to justice in this case and the potential of a class proceeding to overcome those barriers are set out in Zentner's initial Factum at paragraph 61. In short, the main barrier to access to justice is an economic one. Given their modest size, individual claims, in the tens, hundreds or low thousands of dollars, do not justify the cost of being advanced in an individual claims process. In contrast, by advancing the claims on behalf of a group of individuals, a class action can provide an economically feasible vehicle to advance Class Members' claims. Likewise, only a class proceeding can achieve judicial efficiency, and only a class proceeding has the potential for behaviour modification.

Issue 3: Zentner's Response to GFA's Summary Judgment Motion / Limitation Argument

46. The summary judgment motion should be dismissed on five independent grounds.

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[26] This lack of any evidentiary support is alone fatal to the argument. See, e.g., *1176560 Ontario Limited et al. v. The Great Atlantic and Pacific Company of Canada Limited*, 2002 CanLII 6199 (Ont. S.C.J.), para. 27, aff'd [2004] O.J. No. 865 (Div. Ct.), Plaintiff's Book of Authorities, Tab 1.

[27] GFA Canada Factum, para. 6, p. 3.

i. No discovery of the claims

47. A limitation period begins running when "the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence".[28] Zentner did not, nor was he reasonably capable of, discovering his claim more than two years before the start of this action. He first learned of the Defendants' financial misconduct in 2019.[29]

48. In *Kaynes*, the Court of Appeal for Ontario recently held that a limitation period in respect of a fraud claim only begins to run after the plaintiff reasonably knows of the defendant's fraudulent intent (knowledge).[30] The fraud must be discovered—not merely suspected—to start the limitation period running.[31] This is particularly so in the context of an ongoing charity that vociferously denies the existence of any misconduct.

49. The Defendants rely on two facts that they say triggered the running of Zentner's limitation period: (1) in 2015, using his expertise with charitable accounting and bookkeeping, Bruce Morrison, Zentner's pastor, conducted a detailed review of GFA Canada, BEC and its Indian agents' charitable filings with CRA and the Indian charitable authority and then raised concerns about the use of donations; and (2) Zentner's charitable tax receipts stated that GFA Canada could use designated gifts "where needed most". Neither of these facts trigger the running of Zentner's limitation period.

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[28] *Pioneer Corp. v. Godfrey*, 2019 SCC 42, para. 31, Plaintiff's Book of Authorities, Tab 28.
[29] Transcript of the cross-examination of Gregory Zentner, qq. 94-113, pp. 28-32, Plaintiff's Supplemental Motion Record, Tab 6, pp. 1121-1125. Transcript of the cross-examination of Bruce Morrison, qq. 61-65, pp. 17-19, Plaintiff's Supplemental Motion Record, Tab 65 pp. 958-960.
[30] *Kaynes v. BP p.l.c.*, 2021 ONCA 36, para. 63, Plaintiff's Book of Authorities, Tab 23.
[31] See, e.g.: See, e.g.: Graeme Mew, Debra Rolph & Daniel Zacks, The Law of Limitations, 3rd ed. (Toronto: LexisNexis, 2016), at §3.50, quoted approvingly in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, para. 41, Plaintiff's Book of Authorities, Tab 39. *Re: Sheikh*, 2011 ONSC 939, para. 30, Plaintiff's Book of Authorities, Tab 31.

50. Morrison's investigation was based on his decades of experience working in the non-for-profit sector and his training in charitable accounting, bookkeeping and applications for charity status with the CRA.[32] He has also assisted the RCMP in several matters of charity fraud and embezzlement investigations.[33] Using his expertise, he conducted an extensive and detailed analysis comparing years of GFA Canada charitable records that he obtained from CRA with those for BEC's Indian agents obtained from the Indian charity authority. Based on his review and analysis of this documentation from India and CRA, Morrison found a mismatch in reported numbers, and wrote letters to GFA and other churches in 2015 raising this concern. Morrison did not share these concerns with his congregation or Zentner until 2019.[34]

51. The question is whether the Defendants have established that a reasonable person in Zentner's shoes—a person who lacks Morrison's particular specialized expertise—should have discovered the claim.

52. It would not be appropriate for this Court to expect that a reasonable person in Zentner's shoes, an individual residing in Woodburn, Nova Scotia who donated $360 to GFA Canada per year, to conduct this type of forensic analysis for each charity that he supports. The Defendants are unable to identify a single case where a court has imposed this type of burden on a donor to a charity (or in any analogous circumstances).

53. In cases where, as here, the subject-matter is complex, courts have repeatedly held that lay litigants are not expected to have the same knowledge and expertise of specialized experts, and

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[32] Transcript of the cross-examination of Bruce Morrison, q. 38, pp. 12-13, Plaintiff's Supplemental Motion Record, Tab 5, pp. 953-954.
[33] Transcript of the cross-examination of Bruce Morrison, q. 39, pp. 13-14, Plaintiff's Supplemental Motion Record, Tab 5, pp. 954-955.
[34] Transcript of the cross-examination of Bruce Morrison, qq. 61-62, 200-203, pp. 17-18, 63-64, Plaintiff's Supplemental Motion Record, Tab 5, pp. 958-959, 1004-1005.

that a plaintiff cannot discover a cause of action until the plaintiff has obtained expert evidence confirming the facts which give rise to the claim.[35]

54. Courts have repeatedly rejected a standard of due diligence requiring, as here, the review of complex financial documents.[36] For example, in *Van Allan v. Vos,* the appellant argued that the respondent's limitation period had expired because two years had elapsed from when the respondent should have but failed to review financial statements revealing that an expense was improperly shared among partners. In rejecting this inappropriately high level of due diligence, the Court of Appeal for Ontario held that "[t]o preclude the respondent from recovery because of his failure to review the underlying financial statements would, in the circumstances of this case, hold him to an unreasonably high standard."

55. In that case, the impugned financial statements were actually in the possession of the respondent. In contrast, here, the charitable forms and documentation relied on by Morrison could only be obtained from the Indian charitable authority and CRA. Thus, putting aside Morrison's special expertise, the due diligence expected by GFA of Zentner here is even higher than that which was rejected by the Court of Appeal in *Van Allan*.

56. Finally, as to the charitable gift receipts, these also do not reveal the Defendants' misuse of funds, nor do they reveal any evidence of the Defendants' knowledge that their conduct was fraudulent or reckless, thereby triggering the running of Mr. Zentner's limitation period.

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[35] *Burtch v. Barnes Estate*, 2005 CanLII 33583 (Ont. S.C.J.), para. 18, aff'd 2006 CanLII 12955 (Ont. C.A.), Plaintiff's Book of Authorities, Tab 7.
[36] *Van Allen v. Vos*, 2014 ONCA 552, para. 34, Plaintiff's Book of Authorities, Tab 34.

ii. Fraudulent concealment

57. This is not a motor vehicle accident or other type of personal injury claim, for example, where there was a known event and the potential claims were ascertainable from the date of the incident. As recently stated on a motion dealing with a limitation period for a conspiracy claim:

> [40] In my view, it is also important to emphasize that conspiracy is very different from other more common causes of action. A conspiracy does not take place in public. It is secret by nature. *Discovering the elements of a conspiracy is far more difficult than establishing the identity of an unidentified motorist or the possible occupier of a property for example*.[37]

58. Fraudulent concealment applies whenever "it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action".[38] Here, by repeatedly affirming to the Class that all donations were and are used as designated, the Defendants have fraudulently concealed the facts giving rise to the causes of action.[39]

iii. No partial summary judgment

59. The Court of Appeal for Ontario has confirmed that summary judgment is not appropriate when, as here, there is a risk of duplicative proceedings or inconsistent findings in the surviving

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[37] *Concord Adex Inc. v. 20/20 Management Limited*, 2017 ONSC 6748, para. 40, Plaintiff's Book of Authorities, Tab 14. [emphasis added]
[38] *Pioneer Corp. v. Godfrey*, 2019 SCC 42, para. 42, Plaintiff's Book of Authorities, Tab 28. [emphasis in the original]
[39] Morrison Affidavit, paras. 15, 96, 100, Plaintiff's Motion Record, Tab 4, pp. 51, 69, 70. Letter from Garry Cluely to GFA Canada and GFA USA Board of Directors dated December 21, 2015, Exhibit W to the Morrison Affidavit, Plaintiff's Motion Record, Tab 4W, pp. 252-255. Emails from KP Yohannan to Bruce Morrison, Exhibit LL to the Morrison Affidavit, Plaintiff's Motion Record, Tab 4LL, pp. 329-331. Affidavit of Bryan Wall sworn February 10, 2021, paras. 6, 10-11, Plaintiff's Reply Motion Record, Tab 1, pp. 9-10. Letter to Bryan Wall from Yohannan dated July 29, 2019, Exhibit B to the affidavit of Bryan Wall, Plaintiff's Reply Motion Record, Tab 1B, pp. 16-18. Transcript of the cross-examination of Bruce Morrison, qq. 136, pp. 46-47 Plaintiff's Supplemental Motion Record, Tab 5, pp. 987-988. Exhibit 1 to the cross-examination of Bruce Morrison, Plaintiff's Supplemental Motion Record, Tab 5(1), pp. 1033-1045. Transcript of the cross-examination of Bryan Wall, QQ. 68-69, pp. 20-21, Plaintiff's Supplemental Motion Record, Tab 7, pp. 1205-1206.

elements of the case.[40] Thus, when, as here, the critical evidence on whether the Defendants fraudulently concealed the claims and thereby caused the limitation period to be extended is the same evidence as that used to establish the fraud itself, a decision on one issue should not be made without the other.[41]

iv. Discoverability and fraudulent concealment are genuine issues for the common issues trial and the individual issues phase

60. In the alternative, summary judgment should not be granted because the issues of discoverability and fraudulent concealment are genuine issues for trial. A factual inquiry of all the Defendants' representations to the Class is necessary for a determination of these issues, which cannot be completed on this record.[42]

61. Moreover, in class actions, limitation periods are ordinarily dealt with at the individual phase of the litigation, following the adjudication of the common issues. This is so for two reasons. First, under the *Rules*, a defendant may only move for summary judgment after delivering a statement of defence.[43] Here, in violation of the *Rules*, the Defendants have not improperly moved for summary judgment at this time. Second, the limitation period for each Class member is idiosyncratic, requiring an individualized and contextual analysis, particularly so where donations were made at different times. These types of individual issues are appropriately addressed at the individual issues phase of the litigation following the determination of the common issues.[44]

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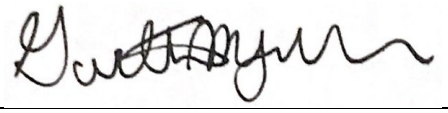
[40] *Canadian Imperial Bank of Commerce v. Deloitte Touche*, 2016 ONCA 922, para. 36-38, Plaintiff's Book of Authorities, Tab 9. *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, para. 33, Plaintiff's Book of Authorities, Tab 4.
[41] *Aircraft Finance Services Inc v Miller*, 2018 ABQB 1005, para. 71, Plaintiff's Book of Authorities, Tab 3.
[42] *Wide v TD Bank*, 2015 ONSC 6900, paras. 38-41, Plaintiff's Book of Authorities, Tab 37.
[43] Rule 20.01(3), *Rules of Civil Procedure*, Plaintiff's Factum, Schedule "B". *Beardsley v. Ontario*, 2001 CanLII 8621 (Ont. C.A.), paras. 21-22, Plaintiff's Book of Authorities, Tab 5.
[44] *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.) paras. 32, 53, 61, 81, leave to appeal ref'd [2005] 1 S.C.R. vi., Plaintiff's Book of Authorities, Tab 13.

v. Bryan Wall's limitation period could not have expired

62. Zentner has filed evidence on behalf of an alternative representative plaintiff, Bryan Wall. If Zentner's claim is dismissed on limitation grounds, Wall, who is qualified to act as the representative, has agreed to step into his shoes.[45]

63. Wall's last donation to GFA Canada was in 2020, right before he became aware of these proceedings. For the Defendants' summary judgment argument to succeed against him, Wall's limitation period would have had to have expired *before he even made his last donation*. This argument is plainly incapable of success.[46]

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Lawyers for the Plaintiff, Gregory Zentner

[45] Affidavit of Bryan Wall sworn February 10, 2021, Plaintiff's Reply Motion Record, Tab 1, p. 8.
[46] *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, para. 150, leave to appeal ref'd 2019 CanLII 37480 (S.C.C.), Plaintiff's Book of Authorities, Tab 17.

SCHEDULE "A" - LIST OF AUTHORITIES

1. *1176560 Ontario Limited et al. v. The Great Atlantic and Pacific Company of Canada Limited*, 2002 CanLII 6199 (Ont. S.C.J.)
2. *Aircraft Finance Services Inc v Miller*, 2018 ABQB 1005
3. *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450
4. *Beardsley v. Ontario*, 2001 CanLII 8621 (Ont. C.A.)
5. *Burtch v. Barnes Estate*, 2005 CanLII 33583 (Ont. S.C.J.)
6. *Canadian Imperial Bank of Commerce v. Deloitte Touche,* 2016 ONCA 922
7. *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399
8. *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.)
9. *Concord Adex Inc. v. 20/20 Management Limited*, 2017 ONSC 6748
10. *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718
11. *Hollick v. Toronto (City)*, 2001 SCC 68
12. *Kaynes v. BP p.l.c.*, 2021 ONCA 36
13. *MVL Leasing Limited v. CCI Group Inc.*, 2018 ONSC 1800
14. *Normart Management Ltd. v. West Hill redevelopment Co. Ltd.*, 1998 CanLII 2447 (Ont. C.A.)
15. *Pioneer Corp. v. Godfrey*, 2019 SCC 42
16. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57
17. *Re: Sheikh*, 2011 ONSC 939
18. *Van Allen v. Vos*, 2014 ONCA 552
19. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684
20. *Whitehouse v BDO Canada LLP*, 2020 ONSC 144
21. *Wide v TD Bank*, 2015 ONSC 6900

22. *Wright Medical Technology Canada v. Taylor*, 2015 NSCA 68

23. *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47

SCHEDULE "B" – RELEVANT STATUTES

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Defendant

20.01 (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

SCHEDULE "C" – PROPOSED AMENDMENTS TO STATEMENT OF CLAIM

PARTICULARS OF THE FRAUD AND CONSPIRACY

49. As set out below, the Defendants dishonestly deprived the Class Members of their donations. The Defendants collectively devised GFA Canada's scheme to solicit donations by designation from the Class Members and to misdirect those donations from their designated purposes to their personal and other bank accounts for improper purposes, including for for-profit enterprises and their personal benefit.

50. The GFA Canada, GFA USA, Yohannan, Punnose, Carroll and Emerick falsely represented to the Class Members that:

    (a) their donations would be used for specific, designated purposes; and

    (b) their donations were urgently needed "in the field".

51. Neither of these representations were true. The Defendants made them while knowing that they were untrue.

52. At no time did Defendants disclose to the Class Members that:

    (a) Canadian donations are considered "received on the mission field" when they are deposited in GFA Canada's Indian agent's bank account in Canada;

    (b) tens of millions of dollars collected from Canadian donors between 2007 and 2013 were not actually sent to India;

    (c) from 1993 to 2016, GFA Canada, GFA USA and GFA Germany were parties to a joint venture agreement governed by the laws of Texas which gave GFA USA de facto control over the use of Class Members donations to GFA Canada;

(d) in 2017, the Indian government revoked the charitable registration of Believers Eastern Church, GFA Canada's primary agent in India for purportedly distributing Canadian donations;

(e) GFA Canada and other GFA entities maintain a "corpus fund" in India containing tens or hundreds of millions of dollars constituting unspent Canadian donations;

(f) GFA Canada sent US$20 million of Canadian donations to GFA USA to build its headquarters and residential compound in Texas;

(g) GFA Canada's Canadian auditors were censured by the Chartered Professional Accountants of Ontario for making no attempt whatsoever to ensure that Canadian donations were spent as directed;

(h) ECFA raised numerous concerns with GFA's conduct, including:

(i) excessive cash balances held in partner accounts from donor-restricted gifts raised in response to gift solicitations that communicated urgent field needs;

(ii) long delays in sending funds to the field, despite purported urgent field needs;

(iii) concerns with the level of urgency communicated to donors contrasted with reserves held by foreign field partners and delays in sending funds to the field;

(iv) insufficient direction and control over funds granted to foreign entities;

(v) solicitation of funds for narrower purposes than were tracked as eventual expenditure of funds;

(vi) GFA USA's financial statements:

(vii) inappropriate use of US$20 million received from GFA India as gifts from Canadian donors restricted for the field to build its residential compound and headquarters in Texas;

1. falsely reported transactions with foreign partners;

2. incorrectly reported accrued field support as a liability instead of temporarily restricted net assets, contrary to Generally Accepted Accounting Principals;

(viii) GFA inappropriately and incorrectly disclaimed control over its field partners in India, despite GFA staff having significant influence on the operations and decisions of GFA field partners;

(ix) GFA sent hundreds of thousands of dollars *in cash* to India, contrary to US Department of Homeland Security disclosure obligations with no sound basis for these cash transfers;

(x) GFA USA's board of directors did not exercise adequate governance oversight, raising serious questions about GFA USA's compliance with ECFA Standards;

(xi) the Indian government through its Ministry of Finance conducted raids of GFA Canada's Indian agents properties, including Yohannan's residence in the State of Kerala.

53. The Defendants were at all material times aware of these omissions and intended to conceal them from the Class Members.

54. Emerick and GFA Canada take no, or insufficient, steps to confirm that Canadian donations are spent as designated or spent at all. Instead, Emerick and GFA Canada ceded all control to GFA USA under the Texas joint venture agreement and/or to its Indian agents. In so doing, Emerick and GFA Canada are in violation of Canadian charitable and tax law and regulation, including:

    (a) the requirements in CRA Guidance Reference Number CG-002 that:

        (i) Canadian charities to direct and control the use of its resources when carrying out activities through an intermediary; and

        (ii) Canadian charities carrying out activities through an intermediary must keep books and records in Canada;

    (b) by sending funds to GFA Canada's "Indian agents" through entities that are not registered as charities in Canada;

55. To evade Canadian and Indian tax and charity law, the Defendants:

    (a) provided backdated Indian audit letters to GFA Canada's Canadian auditors;

    (b) prepared and/or oversaw two sets of conflicting financial reports from its Indian agents in respect of funds received and expended from Canadian donors;

    (c) registered 5 companies under the *Canada Not-for-profit Act* who have no physical presence at their purported head offices;

    (d) sent Canadian donations through these 5 companies to agents in India;

(e) transferred money into Canadian bank accounts of its Indian agents knowing that it was illegal for its agents to receive foreign contributions under the ***Foreign Contributions Regulations Act*** of India in a bank account outside of India; and

(f) transferred money into Canadian bank accounts of its Indian agents knowing that its agents were not reporting the foreign contributions to authorities in India.

56. GFA USA prepared GFA Canada's donation solicitation material. GFA Canada's donation solicitation material was prepared by GFA USA acting in concert with GFA Canada, overseen by Yohannan, Punnose, Carroll and Emerick. The Defendants prepared GFA Canada's solicitation material while knowing that the representations therein were false, and the Defendants intended to deceive the Class Members by raising money on the false pretense of their charitable purposes and objects.

57. Yohannan, Punnose, and Carroll had complete direction and control over GFA Canada. Yohannan, Punnose, and Carroll directed:

(a) the manner in which GFA Canada solicited donations;

(b) who sat on GFA Canada's Board of Directors and when GFA Canada's directors were dismissed; and

(c) when and how donations were sent from GFA Canada to other GFA entities and their bank accounts, those of its purported agents, and elsewhere.

58. Emerick, Yohannan, Punnose, and Carroll also had complete direction and control over GFA Canada's purported Indian agents, including:

(a) if and how Canadian donations were spent;

(b) who were the purported figureheads of any such agents; and

(c) when and how donations were sent from GFA's purported agents to other GFA entities and bank accounts those of its purported agents, or elsewhere.

59. In 2017, the Indian government revoked the charitable registration of Believers Eastern Church, GFA India, Last Hour Ministries and Love India. Yet despite the revocation of its charitable status entitling it to receive foreign contributions in India, GFA Canada continues to report to CRA that Believers Eastern Church is its agent in India for carrying out its charitable purposes there.

60. In November 2020, Indian Revenue Authority agents raided Yohannan's residence and the Believers Eastern Church headquarters seizing millions of Rupees in cash as well as computers and records. The raids followed the Indian government's revocation of permission to Believers Eastern Church to receive foreign funds earmarked for charity. Indian authorities suspected that GFA continued to send large sums of foreign money to Believers Eastern Church.

61. In November 2020, the Indian Ministry of Finance disclosed that:

(a) it uncovered a "huge financial scam" under the Believers C Eastern hurch;

(b) GFA Canada's Indian agent Believers Eastern Church invested foreign donations in the real estate sector rather than being used for their designated purpose;

(c) GFA Canada's Indian agents were siphoning cash out of tax-exempted funds to engage in unaccounted cash transactions for personal and other illegal expenses, including real estate transactions;

(d) most of GFA Canada's purported Indian agents exist only on paper and have been found to be used only for routing the unaccounted funds and for accommodation transactions;

(e) the modus operandi of GFA and its Indian agents was to systemically inflate expenses with the help of other parties, who would return the inflated amount in cash through domestic hawala channels to the functionaries of the group;

(f) the Indian Ministry of Finance found that GFA Canada's agents:

(i) systematically inflated expenses in purchase of consumables, construction expenses, real estate development expenses, payment of salary and other expenses;

(ii) participated in a number of real estate transactions involving unaccounted cash payments; and

(iii) possessed millions of dollars in unexplained cash.

62. The misconduct identified herein was conducted by and at the direction and control of the Defendants, their employees and agents.

63. During the Class Period, the Defendants took extensive steps to hide their misconduct. For example, Yohannan, Punnose, and Carroll immediately dismissed GFA Canada directors when they sought additional financial disclosure relating to use of Canadian donor funds.

64. During the Class Period, the Defendants also invited GFA Canada donors to travel to India to view GFA Canada's purported charitable works. These trips were carefully scripted and limited in scope and were contrived to hide GFA Canada and its Indian agents' misconduct in India.

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

Court File No. CV-20-00643091-CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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(MOTION FOR REPRESENTATIVE ORDER AND ANCILLARY RELIEF)

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