

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Martin v. ALPC Housing Solutions Inc.*, 2020 NSCA 35

**Date:** 20200402

**Docket:** CA 487274

**Registry:** Halifax

**Between:**

Kris Martin and Jacques Martin

Appellants

v.

ALPC Housing Solutions Inc., a body corporate

Respondent

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**Judge:** The Honourable Justice Linda Lee Oland

**Appeal Heard:** January 16, 2020, in Halifax, Nova Scotia

**Subject:** Trusts—Trust Property—Fiduciary Duty—Corporate Opportunity

**Summary:** Byrony House retained ALPC to manage a home lottery. For the grand prize, Byrony House purchased a property owned by Jacques Martin, the husband of Kris Martin, one of ALPC’s directors. Ms. Martin had publicly stated she may be interested in buying it back if the lottery winners should want to sell it. After the draw, Mr. Martin purchased it from the winners for much less than what he had sold it for to Bryony House. The trial judge found that Ms. Martin and her husband had breached their fiduciary duties to the ALPC.

**Issues:**

1. Did the trial judge err in finding the property to be subject to a trust?
2. Did he err in finding Jacques Martin to have fiduciary obligations to ALPC?
3. Did he err in finding the repurchase of the property to be a “corporate opportunity” and subsequently a breach of a

fiduciary duty?

4. Did he err in the calculation of damages awarded to ALPC?

**Result:**

Appeal allowed, with costs. The judge erred in finding that Mr. Martin had received property held in trust for ALPC. Since it was never held in trust, Mr. Martin had no fiduciary obligation to ALPC.

The purchase of the property from the lottery winners was not a corporate opportunity that belonged to ALPC. The company did not meet the requirement that it was actively pursuing a maturing business opportunity. It had never expressed an interest in buying the property from the winners, had no funds, and was not in the real estate business. The judge erred by failing to take all relevant factors into account.

It was not necessary to address the judge's calculation of damages awarded to ALPC.

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| <p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 13 pages.</i></p> |
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Respondent

**Judges:** Farrar, Oland and Bryson JJ.A.

**Appeal Heard:** January 16, 2020, in Halifax, Nova Scotia

**Held:** Appeal allowed with costs, per reasons for judgment of Oland J.A.; Farrar and Bryson JJ.A. concurring

**Counsel:** James D. MacNeil and Allison Godwin, for the appellants  
J. Walter Thompson QC, for the respondent

## **Reasons for judgment:**

[1] A transition house that needed to raise funds held a home lottery. The company it retained to manage the lottery brought a claim related to that endeavour against one of that company's own directors. In a decision dated March 15, 2017 (2017 NSSC 49) (the "Fiduciary Decision"), Justice C. Richard Coughlan found that the director and her husband had breached their fiduciary duties to the company. In another, issued March 14, 2019 (2019 NSSC 42) (the "Accounting Decision"), he determined the amount the two had to pay the company.

[2] This is an appeal from his Order issued May 10, 2019. For the reasons that follow, I would allow the appeal.

## **Background**

[3] Kris Martin and Jacques Martin, a married couple, are in the business of building and selling homes. In 2010, the Martins built a house for themselves on a lot that Mr. Martin had purchased and which was in his name. It is at 205 Willowhill Ridge in Waverley, Nova Scotia (the "Property").

[4] Kris Martin and Maria Sancho became friends in 2012. The following year, they entered into a partnership called ALPC Housing Solutions to create affordable housing. The partnership purchased land in Eastern Passage, Nova Scotia, to be developed for that purpose. The development, the "Cleopatra Project," did not proceed to completion.

[5] Halifax Transition House Association, a registered non-profit organization, operates Bryony House in Halifax. Bryony House provides shelter for women and children seeking refuge from abusive relationships. Ms. Sancho learned that it wanted to raise funds to expand its facility. In August 2013, she and Ms. Martin had several meetings with Laurie Ehler, the Executive Director of Bryony House. Ms. Sancho and Ms. Martin suggested a lottery, and Ms. Martin offered the Property as the main prize.

[6] Ms. Sancho and Ms. Martin incorporated ALCP Housing Solutions Inc. ("ALPC") in September 2013. Ms. Sancho was president, and Ms. Martin the secretary treasurer. Each was a director and a shareholder. Ms. Martin continued as a director of ALPC until her resignation in January 2015.

[7] The Board of Directors of Bryony House approved the idea of a lottery. ALPC and Bryony House signed a letter of intent dated November 30, 2013, which captured their intention to enter into a formal contract for ALPC “to manage the Marketing Strategy Design, Management and Financing of the Dare to Dream Lottery (“the Project”).” That document provided that ALPC would finance all applicable costs associated with the Project, and Bryony House would pay APLC a management fee of 15% of the lottery collections every month starting January 30, 2014 and ending on October 30, 2014 or upon completion of the ticket sales, whichever came first. It also stipulated that by December 2, 2013, Bryony House would enter into a purchase and sale agreement with Jacques Martin to purchase the Property.

[8] Bryony House obtained two or three independent appraisals of the Property and negotiated what it considered to be a fair price with Maria Santos. It had legal representation when, in November 2013, it entered into an agreement of purchase and sale with Jacques Martin. The purchase price for the Property was \$1,075,000.

[9] The permit for the lottery was in the name of the Halifax Transition House Association. The Martins and their three children moved from the Property to a house in Eastern Passage and paid the rent themselves.

[10] Ticket sales started in January 2014. The lottery draw was scheduled for September 30, 2014, but sales were slower than hoped. Bryony House requested, and the lottery commission granted, an extension of the draw date. The original agreement of purchase and sale expired. Bryony House and Mr. Martin entered into another in November 2014. The purchase price remained \$1,075,000.

[11] In his Fiduciary Decision, the judge described the costs associated with getting the lottery underway and some of the amounts paid by Ms. Martin and her husband personally:

[12] Initially, Ms. Martin provided the funds for lottery expenses. ...

[13] During the course of the lottery Ms. Martin provided funds which were used to purchase furniture to furnish the house at a cost of \$75,237.85 and to pay Ms. Sancho's home rent, car rental and cell phone. Ms. Martin and her husband also paid the cost of maintaining the home during the lottery, including utilities, insurance and mortgage.

Ms. Martin also paid some \$4,000 to have the house painted; close to \$20,000 to have the basement finished; over \$20,000 for a video of the Property; and for

television and radio commercials. She arranged for loans totaling \$110,000 from an uncle and a friend to help with the lottery expenses.

[12] In February 2014, after Ms. Martin told Ms. Ehler that she had drained all her resources and asked for \$25,000, Bryony House provided that amount. A dispute arose in the course of the lottery and Bryony House did not pay ALPC the monthly management fees set out in their letter of intent.

[13] Ms. Martin was at the Property daily to show it and sell lottery tickets. She cleaned, vacuumed and dusted. Ms. Ehler was there every weekend, helping with ticket sales. Ms. Martin did expos, parades, home shows, everything she could to sell tickets. Mr. Martin took care of all the property maintenance, including mowing the lawn and snow removal, without payment.

[14] Kris Martin was open about her interest in possibly purchasing the Property from the winners of the lottery. She told people who toured the house and said they would probably sell it, that she “might want to buy it back if the price is right.” Ms. Martin also made the same statement when she went “on the news” to publicize the lottery. The Property was her “dream home” and, while she was just as content building a house on a lot up the street that her husband had already purchased, if someone did not want it she “wouldn’t mind buying it back.”

[15] Ms. Santos had heard Ms. Martin telling potential ticket buyers that if they won and wanted to sell the Property, she may be interested in buying it. Ms. Ehler testified she was aware that Ms. Martin was offering to repurchase the Property. It was public knowledge that Ms. Martin loved the house and would not hesitate to buy it back.

[16] There was no evidence that ALPC ever expressed an interest in purchasing the Property from the lottery winners.

[17] In his Fiduciary Decision, the judge described what happened when the draw for the Property took place and afterwards:

[16] The lottery draw took place November 14, 2014. Ms. Martin called the winner on a speaker phone. The young woman was excited. Subsequently, Ms. Martin met the winners, Jonathan Robert Gould and Erin Trevors, a young couple who came to the house with Mr. Gould's stepmother and Ms. Trevor's [sic] sister. Another day the winners visited with Mr. Gould's father and others. The father asked Ms. Martin if she was interested in repurchasing the house. The father said they would discuss selling the house to the Martins. Originally, the winners offered to sell the house to Mr. and Ms. Martin for \$800,000. Ms. Martin, rejected

the offer and they agreed on a price of \$601,000. Later after further discussions, Ms. Martin offered to pay \$621,500 for the house which was accepted. Ms. Martin contacted her lawyer on November 17, 2014 and on November 21, 2014, Jonathan Robert Gould and Erin Trevors conveyed the property to Jacques Martin.

[18] The judge found that Kris Martin, a director of ALPC, had breached her obligation as a fiduciary not to allow a conflict of her duty as a director with her own interests, and was liable to ALPC under the corporate opportunity doctrine. He determined that Jacques Martin was personally liable for his involvement in his wife's breach of her fiduciary duty.

[19] The judge ordered the Martins to pay ALPC the difference between the amount the Property was sold for the lottery and the amount paid to repurchase it, less appropriate amounts paid by Mr. or Ms. Martin towards debts of ALPC, expenses properly incurred in connection with the lottery or Maria Sancho. The parties were unable to agree on the amount, if any, to be paid. In his Accounting Decision, the judge ordered the Martins to pay ALPC \$416,523.24, being \$324,127.39 plus costs of \$50,664.37 and interest of \$41,731.48.

### **The Issues**

[20] The Martins raise the following issues on appeal:

- (a) Did the trial judge err in finding the Property to be subject to a trust?
- (b) Did he err in finding Jacques Martin to have fiduciary obligations to ALPC?
- (c) Did he err in finding the repurchase of the Property to be a "corporate opportunity" and subsequently a breach of a fiduciary duty?
- (d) Did he err in the calculation of damages awarded to ALPC?

### **Trust Property and Fiduciary Obligations**

[21] I will deal with the first two issues together; namely, whether the Property was subject to a trust and whether Jacques Martin had fiduciary obligations to ALPC. These issues raise questions of mixed fact and law, which attract the standard of review of palpable and overriding error, unless there is an extricable error of law. See *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8–9.

[22] In his Fiduciary Decision, the judge determined that Mr. Martin had received property subject to a trust, failed to make inquiries when he had knowledge of facts which would put a reasonable person on inquiry, and so was personally liable for involvement in Kris Martin's breach of her fiduciary duty as a director of ALPC. He wrote:

[37] Is Jacques Martin liable to ALPC Housing Solutions Inc.? The real property in question was conveyed to Mr. Martin by deed dated November 21, 2014 from Jonathan Robert Gould and Erin Trevors. Mr. Martin was not a director of ALPC and did not owe a fiduciary duty to ALPC. However, a stranger to a trust who receives property subject to a trust may be personally liable for involvement in a breach of trust or fiduciary obligation.

[38] The test for personal liability of a third party for knowing receipt of trust property was set out in *Citadel General Insurance Co. v. Lloyds Bank Canada* [1997] 3 S.C.R. 805 in which LaForest J. in giving the majority judgment stated at para. 49:

More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

[39] Jacques Martin is married to Kris Martin. Mr. Martin was a mechanical engineer in the military. He works for East Coast Paving a business Kris Martin testified she owns. In giving his evidence, Mr. Martin testified he had a business called East Coast Paving. Title to the property at 205 Willowhill Ridge was in his name. Mr. Martin agreed to sell the property to Bryony House for \$1,075,000.

[40] Mr. Martin planned to build a new home on another lot he owned in the area. Mr. and Ms. Martin discussed buying 205 Willowhill Ridge back from the lottery winner. Mr. Martin had the final word on the amount they would pay the winners for the property. He told Ms. Martin he would not pay more than \$620,000 which was the cost of building a home on the other lot he owned. Since their marriage Mr. and Ms. Martin built houses and then sold them and moved. I find Mr. Martin was aware of all details of the sale of 205 Willowhill Ridge to Bryony House and the purchase of the same property from the lottery winners.

[41] The real property in question 205 Willowhill Ridge, Waverley was conveyed to Mr. Martin by deed dated May 12, 2009. The property was occupied by Mr. Martin and his wife as their matrimonial home. Jacques Martin and Kris Martin entered into the agreement of Purchase and Sale to sell the property to Halifax Transition House Association for \$1,075,000.

[42] Mr. Martin sold the property to the Association for \$1,075,000 plus adjustments. Mr. Martin conveyed the property to Jonathan Robert Gould and Erin Trevors as directed by the Association. Then Mr. Gould and Ms. Trevors



conveyed 205 Willowhill Ridge to Mr. Martin by deed dated November 21, 2014, for a purchase price of \$621,500, which was substantially less than he had sold it for earlier that month.

[43] Mr. Martin knew his wife was a director of ALPC and of her involvement in the lottery. He knew he sold the Willowhill Ridge property for substantially more than he purchased it for approximately a week later. I find that Jacques Martin had knowledge of facts which would put a reasonable person on inquiry and he failed to inquire as to the possible misapplication of the trust property and is personally liable for his involvement in Kris Martin's breach of her fiduciary duty.

[Emphasis added]

[23] The judge found Jacques Martin had received trust property. According to the Martins, there is no evidence to support the judge's characterization of the Property as property that was held in trust for ALPC. I agree.

[24] A property can become trust property in certain circumstances. Waters' Law of Trusts in Canada, 4<sup>th</sup> ed. 11 – The Constructive Trust, 11.I Nature of the Trust, (Westlaw) describes an express trust and a constructive trust:

An express trust arises out of the intention of the settlor; a constructive trust comes into existence, regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he owes performance of the obligation.

and clarifies that "... there can only be two sources of trust obligations – the intention of a property owner to create a trust and the imposition by the law of a trust obligation."

[25] Here, there was no evidence that any of those who held title to the Property in the relevant period, namely Mr. Martin, Bryony House and the lottery winners, ever intended to create a trust of the Property in favour of ALPC. Consequently, an express trust was not created.

[26] The Property was in Mr. Martin's name until he conveyed it to Bryony House. ALPC had no involvement, financial or otherwise, with its original acquisition by Mr. Martin or the construction of the home on the Property, both of which were completed before ALPC was incorporated, or the maintenance of the Property afterwards. It made no contribution, and there are no other factors, which would have resulted in the Property being impressed with a trust in favour of ALPC.

[27] None of the purchase and sale transactions pertaining to the Property in connection with the lottery suggests it was ever trust property. Bryony House acquired title when it purchased it from Mr. Martin. The winners of the lottery acquired title from Bryony House. Mr. Martin, in turn, acquired title from the lottery winners. The record does not indicate how Mr. Martin could ever have been a constructive trustee for ALPC.

[28] A constructive trust may be imposed on a fiduciary who holds property acquired in breach of their duty. However, for the reasons set out in my consideration of the next issue regarding corporate opportunity, that does not arise in this case.

[29] The judge found that Mr. Martin had received property in trust for ALPC, which led to Mr. Martin having fiduciary obligations to that company. Since the Property was never held in trust, the judge erred in finding that Mr. Martin had such obligations and had breached them.

### **Was the Repurchase a Corporate Opportunity?**

[30] The main issue on this appeal is whether Ms. Martin seized a “corporate opportunity”—the purchase of the Property from the lottery winners—which belonged to ALPC, and so breached her fiduciary duty as a director of that company.

[31] The Martins argue that, since ALPC was not interested in purchasing the Property, there never was a corporate opportunity. They add that, even assuming one existed, the company could not have taken advantage of it. ALPC submits Ms. Martin pounced on an opportunity that arose when she took the lottery winners around the Property and usurped it for herself. According to the company, the Martins sold their matrimonial home to Bryony House for the lottery for \$1,075,000 and, because of Ms. Martin’s breach of her fiduciary duty to ALPC, Mr. Martin was able to buy it back for \$621,500 and reap a huge benefit. It faults Ms. Martin for not disclosing her negotiations with the lottery winners or the purchase price to ALPC. In its factum, the company says that “The transaction, to use the vernacular, ‘stinks’ and an objective observer would smell it.”

[32] I begin by determining whether there had been a corporate opportunity. In his Fiduciary Decision, the judge addressed the fiduciary duties of directors or senior officers of a company, and correctly described the corporate opportunity doctrine and the factors to be considered:

[19] A company director is in a fiduciary relationship to the company of which he or she is a director.

[20] In giving the Court's judgment in *Canadian Aero Service Limited v. O'Malley* [1973] SCJ No. 97, Laskin J., as he then was, discussed the fiduciary duties of directors or senior officers of a company stating at page 606:

Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

[21] The obligation of a fiduciary not to allow a conflict of his or her duty with his or her own interests is known as the "corporate opportunity doctrine". Determining liability under the doctrine requires a contextual analysis.

[22] In *Canadian Aero Service Limited v. O'Malley*, supra, Laskin J. set out how possible liability under the corporate opportunity doctrine should be analyzed stating at page 620:

The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[23] In addressing the proper calculation of damages, Laskin J. reiterated liability on the part of the fiduciary does not depend on proof that, but for their actions, the company would have obtained the benefit in question stating at page 621:

Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum.

[24] The Manitoba Court of Appeal addressed how the analysis should be undertaken in *Matic v. Waldner* 2016 MBCA 60 where Pfuetzner J.A., in giving the Court's judgment stated at paras. 152-153:

152. In summary, determining whether a director has breached his or her fiduciary duty under the corporate opportunity doctrine requires an extensive contextual analysis.

153. All relevant factors must be taken into account, including: the maturity of the opportunity; whether it was actively pursued by the corporation; whether the corporation was capable of taking advantage of the opportunity; whether the opportunity was in the corporation's line of business or a related business; how the opportunity arose or came to the attention of the director; whether the other directors of the corporation had knowledge of the director's pursuit of the opportunity; and whether the other directors gave their fully informed consent to the director's pursuit of the opportunity. The overall goal of the analysis is to determine whether the opportunity fairly belonged to the corporation in the circumstances.

[25] Leave to appeal to the Supreme Court of Canada was denied.

[33] The judge defined the corporate opportunity in issue as the purchase of the Property that was the grand prize of the Bryony House lottery. In ¶28 to 33 of his reasons, he dealt with the indicia of a corporate opportunity described in his ¶20, namely: (1) a maturing business opportunity; (2) an opportunity that the company was actively pursuing; and (3) an opportunity that came to the director in his capacity as a director of the company rather than as a result of the director's fresh initiative.

[34] The judge determined Ms. Martin had breached her fiduciary duty under the corporate opportunity doctrine. In my view, he made palpable and overriding errors when he did so.

[35] Quite simply, the evidence did not permit a finding that ALPC had met the requirement that it was actively pursuing the possibility of purchasing the Property from the lottery winners. The judge acknowledged this when he wrote in ¶29 of the Fiduciary Decision:

ALPC was not actively pursuing the purchase of the Willowhill Ridge property. In fact, ALPC was unaware the winners were interested in selling the property. Ms. Sancho knew Ms. Martin was telling people who purchased lottery tickets that she, Ms. Martin, was willing to repurchase the property. However, ALPC was not pursuing the possibility of purchasing the property from the winners.

[36] Nevertheless, the judge continued by considering whether ALPC had the necessary funds to purchase the Property. He stated it did not. The judge then went on and suggested ALPC might have been able to arrange financing and, as it was in the real estate business, the purchase could be a corporate opportunity for that company. He wrote:

[30] The question arises whether ALPC was capable of purchasing the property. ALPC did not have enough money to purchase the property. It had obtained funds from private investors to finance the purchase of its property for its project in Eastern Passage. Ms. Martin supplied the money used by ALPC to pay the expenses of the lottery. However, it is unknown whether ALPC could have arranged financing to allow for the purchase of the Willowhill Ridge property as it had to purchase the land in Eastern Passage. After all the property was purchased for \$621,500 far less than the purchase price paid to the Martins by Bryony House which was based on two or three appraisals. It cannot be said that ALPC did not have the capacity to take advantage of the opportunity.

[31] Even if ALPC could not have taken advantage of the opportunity that does not excuse the director. In **Felker v. Cunningham** [2000] O.J. No. 3177 Borins J.A., in giving the Court of Appeal's judgment stated at para. 14:

... Moreover, as the fiduciary duty is based on trust, loyalty and confidence, and not economic cost to the employer, fiduciary employees are not relieved of their fiduciary duties if the business opportunity sought to further their own ends is one that the employer would have been unwilling or incapable of exploiting: *Re Berkey Photo (Canada) Ltd. v. Ohlig* (1983), 43 O.R. (2d) 518 at 530-531 (H.C.J.).

[32] ALPC purchased land in Eastern Passage upon which it wished to develop affordable housing. ALPC was in the real estate business. I find the purchase of the Willowhill Ridge property for resale was within its line of business.

[33] The opportunity for Ms. Martin came to Ms. Martin and her husband as a result of Ms. Martin's role as a director of ALPC. While a director she proposed her home be the lottery's grand prize selling the home for \$1,075,000 plus

adjustments. ... Ms. Martin attended the ticket draw and went through the residence with the lottery winners as a director of ALPC. Ms. Martin contends she showed the residence as the homeowner. However, she had given up any interest in the property when she and her husband sold it for \$1,075,000 plus adjustments. Mr. and Ms. Martin were well compensated for their interest in the property. I find the business opportunity came to Ms. Martin while conducting business for ALPC.

[37] The judge's reasons themselves set out the frailties underlying his assessment of ALPC's ability to access financing to purchase the Property. He could not and did not firmly say it could have.

[38] Moreover, the evidence does not support the judge's characterization of ALPC as being "in the real estate business." Prior to the incorporation of ALPC, Ms. Martin's and Ms. Sancho's partnership, ALPC Housing Solutions, planned to develop low income housing. But the Cleopatra Project undertaken by ALPC never advanced beyond the purchase of a vacant lot, a survey and some preliminary design work. Although the judge referred to ALPC having obtained financing for that purchase, it was Ms. Martin who arranged for loans from two people she knew to herself and Ms. Santos. The lot was conveyed to those investors when ALPC could not repay those loans. There was no evidence of any other real estate project by ALPC and indeed, other than its involvement with the home lottery, any other business whatsoever. In these circumstances, ALPC could not be fairly described as being "in the real estate business."

[39] As stated in *Matic*, all relevant factors must be taken into account and the overall goal is to determine whether the opportunity fairly belonged to the company in the circumstances. The judge found that when she showed the Property to the lottery winners, Ms. Martin was conducting business for ALPC. It was undisputed that she did not disclose the proposed purchase to ALPC and did not obtain the company's consent.

[40] However, the judge had determined ALPC was not actively pursuing a maturing business opportunity, one of the criteria for a corporate opportunity. Indeed, the evidence was to the contrary. ALPC had never expressed any interest in purchasing the Property. ALPC was not in the real estate business, so that opportunity was not in its line of business. Moreover, it had no funds for such a purpose, and the judge did not find that it could likely have obtained financing. Additionally, ALPC knew of Ms. Martin's interest in purchasing the Property if the eventual lottery winners should want to sell. Ms. Martin's proclamations throughout the lottery period were clear and public.

[41] ALPC argues the fact it might not have been able to take advantage of the corporate opportunity is of no consequence. It relies on ¶14 of the Ontario Court of Appeal’s decision in *Felker*, which the judge quoted in ¶31 of the Fiduciary Decision. In *Felker*, in stating that “... fiduciary employees are not relieved of their fiduciary duties if the business opportunity sought to further their own ends is one that the employer would have been ... incapable of exploiting.” Borins J.A. cited *Re Berkey Photo (Canada) Ltd. v. Ohlig* (1983), 43 O.R. (2d) 518, a decision of the Ontario High Court of Justice. *Re Berkey Photo* had relied on *Canadian Aero* in stating:

... it is not a precondition to relief on a claim for damages for breach of a fiduciary’s duty that the corporate employer of the fiduciary would itself have obtained or maintained the business opportunity in question. ...

[42] An examination of *Canadian Aero*, the original source of this premise in *Felker*, does not support ALPC’s argument. In that case, O’Malley and Zarzycki, former directors and senior officers of Canaero, had been involved in the activities of that company in pursuing the so-called Guyana contract into 1966. That year, both resigned and formed a company that successfully submitted a proposal for that same project. The final paragraph of *Canadian Aero* reads in part:

Liability of O’Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. ...

[43] There is no wording in *Canadian Aero* that purports to hold a fiduciary liable even “if the business opportunity ... is one that the employer would have been unwilling or incapable of exploiting” as stated in *Felker*. Rather, *Canadian Aero* simply addressed the situation before it, namely, the possibility that an entity other than that controlled by its former directors could have won the Guyana contract. The Court removed any requirement that the company prove, were it not for the actions of its former directors, its proposal would have been successful and what its loss would have been. Accordingly, ALPC’s argument that its inability to seize the opportunity is of no consequence does not determine whether a corporate opportunity existed.

[44] In my view, the judge failed to take all relevant factors into account, including his own finding that ALPC was not actively pursuing the opportunity to

purchase the Property. He erred when he found there was a corporate opportunity that fairly belonged to the company, and that Ms. Martin had seized it and so breached her fiduciary duty to ALPC.

### **Calculation of Damages**

[45] It is no longer necessary for me to consider whether the judge erred in his calculation of damages to be paid by the Martins to ALPC.

### **Disposition**

[46] It is not surprising that a striking difference between the initial sale price and the price for the same property on its repurchase within a short time frame would draw suspicion. Those few facts could blind an observer from taking into account other relevant facts and context. In this case, a full appreciation of the circumstances and the law shows there has been no wrong committed against ALPC.

[47] The judge erred in finding that Mr. Martin had received property held in trust for ALPC and that Ms. Martin had breached the corporate opportunity doctrine. I would allow the appeal and award the Martins costs of \$16,000, inclusive of disbursements, on the appeal and their application for a stay of the Order below. They are also entitled to costs of \$50,000 on the application below. Since the judge's Order was stayed, I need not deal in this decision with any repayment of the monies, costs or interests in that Order.

Oland J.A.

Concurred in:

Farrar J.A.

Bryson J.A.