SUPREME COURT OF CANADA

CITATION: Scott *v.* Golden Oaks Enterprises Inc., 2024 SCC 32

APPEAL HEARD: December 5, 2023
JUDGMENT RENDERED: October 11, 2024
DOCKET: 40399

BETWEEN:

Lorne Scott, Janet Arsenault, Jeremy Mitchell, Josée Bouchard, Le Thu Nguyen, Mark McKenna, Judy McKenna, Susan McKillip, 1531425 Ontario Inc., Joe Messa and Ernest Toste
Appellants

and

Doyle Salewski Inc., in its capacity as Trustee in Bankruptcy of Golden Oaks Enterprises Inc., and Joseph Gilles Jean Claude Lacasse
Respondents

- and -

Attorney General of Ontario and Insolvency Institute of Canada
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 132) Jamal J. (Wagner C.J. and Karakatsanis, Rowe, Martin and O'Bonsawin JJ. concurring)

CONCURRING REASONS: (paras. 133 to 189)	Côté J.

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Josée Bouchard, Le Thu Nguyen, Mark McKenna,
Judy McKenna, Susan McKillip, 1531425 Ontario Inc.,
Joe Messa and Ernest Toste *Appellants*

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2024 SCC 32

File No.: 40399.

2023: December 5; 2024: October 11.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency — Unjust enrichment — Limitation of actions — Corporate attribution doctrine — One-person corporations — Equitable set-off — Illegal contracts — Preferences — Ponzi scheme operated by company with sole officer, shareholder and directing mind collapsing — Trustee in bankruptcy commencing actions to recover amounts paid by company to investors in interest under loans and in commissions under referral agreements — Trustee's actions commenced more than two years after company paid interest and commissions — Whether trustee's actions statute-barred — Whether knowledge of sole officer, shareholder, and directing mind of company should be attributed to company — Whether investors can rely on principle of equitable set-off to set off interest payments they owe against loan principal owed to them — Whether referral agreements are illegal contracts at common law — Whether interest and commissions paid by company to real estate agent were unlawful preferences — Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, ss. 4, 5, 12 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 95(1)(b), 97(3).

L was the sole shareholder, officer, and directing mind of a company. The company appeared to be successful; but, in reality, it was a textbook Ponzi scheme. L was a fraudster, who lured investors to lend money to the company for unreasonably high rates of return on promissory notes, and then paid existing investors by recruiting new investors, rather than by generating revenue from a legitimate business. The Ponzi scheme collapsed in July 2013. The company and L went into receivership and made assignments in bankruptcy, and a trustee in bankruptcy of their estates was appointed.

In 2015, the trustee launched actions against the company's lenders, including 17 actions to recover illegal interest and commissions paid to investors by the company before its bankruptcy. In those actions, the trustee advanced statutory claims under the *Bankruptcy and Insolvency Act* ("*BIA*") as well as unjust enrichment claims, arguing that there was no juristic reason for the interest payments made to the investors by the company because the interest rates were illegal, and the investors were enriched at the company's expense. The trustee also asserted that the commissions paid to the investors for referring new investors to the company were unlawful and thus the referral agreements could not supply a juristic reason for the commissions.

The investors raised four main defences to the actions. First, they argued that the actions were statute-barred under ss. 4 and 12(1) of Ontario's *Limitations Act, 2002*, which imposes a two-year limitation period beginning when the bankrupt knew or ought to have known of its claims. They asserted that because L knew of the impugned payments when they were made between June 6, 2011 and April 3, 2013, L's knowledge should be attributed to the company under the common law doctrine of corporate attribution. Second, the investors asserted that they were not unjustly enriched. Third, they invoked s. 97(3) of the *BIA* to set off amounts they owed the estate against the principal of the loans owed to them. Fourth, they argued that their referral agreements with the company were lawful and thus provided a juristic reason for them to keep the commissions that they had received.

The trial judge found the company was a Ponzi scheme and attributed L's knowledge to the company, but she concluded that the trustee's actions were not statute-barred because legal proceedings were not "appropriate", under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, before the trustee had been appointed, investigated the causes of the bankruptcy, and discovered the Ponzi scheme. She ordered the investors to return the illegal interest payments they had received, and refused to allow them to set off under s. 97(3) of the *BIA* the interest amounts they owed the estate against the principal they were owed. She rejected the trustee's unjust enrichment claims for repayment of the referral commissions. Lastly, the trial judge granted the trustee's claim that the interest and commissions paid by the company to a real estate agent, S, were unlawful preferences under s. 95(1)(b) of the *BIA* because S was not acting at arm's length from the company.

The Court of Appeal dismissed the investors' appeal. It agreed with the decision of the trial judge to reject the limitations defence but held that the trial judge should have exercised her discretion not to attribute L's knowledge to the company on public policy grounds. In its view, the actions were not statute-barred because the company lacked the knowledge to initiate the actions before it entered into bankruptcy. It also agreed with the conclusion of the trial judge to reject the set-off defence and with her ruling on the unlawful preference claims against S. The Court of Appeal allowed the trustee's cross-appeal on the issue of whether the referral agreements constituted a juristic reason to deny the unjust enrichment claims for the commission payments, holding that they did not.

Held: The appeal should be dismissed.

Per Wagner C.J., Karakatsanis, Rowe, Martin, **Jamal** and O'Bonsawin JJ.: The trustee's actions are not statute-barred by the *Limitations Act, 2002*. The principles of the corporate attribution doctrine, summarized in *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, apply to one-person corporations. The Court of Appeal appropriately exercised its discretion to refuse to attribute L's knowledge to the company because this would not have promoted the purposes of the laws under which attribution was sought.

Under the discoverability rule, a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. Discoverability is a common law principle that is now codified by statute in Ontario under the *Limitations Act, 2002*. Section 5(1) sets out when a claim is discovered on the basis of actual or constructive knowledge. Section 12 sets out rules for when persons shall be deemed to have had the knowledge referred to in s. 5(1)(a). Section 12(1) addresses claims brought by a successor in right, title, or interest to the person with a claim, and stipulates when the successor is to be imputed with the knowledge of a predecessor. Section 12(2) addresses claims brought by a principal, and stipulates when the principal is to be imputed with the knowledge of an agent.

In the instant case, although the trustee's actions were launched more than two years after the illegal interest and commissions were paid, the actions would not

be statute-barred if the commencement of the limitation period were deferred by the rule of discoverability. The company's knowledge must be imputed to the trustee under s. 12(1) of the *Limitations Act, 2002*, because the trustee is the successor in interest to the company. However, L's knowledge cannot be attributed to the company under s. 12(2) of the *Limitations Act, 2002*. Section 12(2) only applies to "a proceeding commenced by a principal". Assuming, without deciding, that the company acted as principal and L as its agent, and that L acted within the scope of the authority granted to him, the underlying proceedings were not commenced by the company, the supposed principal, but by the trustee, who was not a principal of L. Furthermore, there were insufficient findings at trial as to whether L was an agent of the company and whether he was acting within the scope of his authority, hampering the Court's ability to apply common law agency principles for the first time. As a result, if L's knowledge is to be attributed to the company, it must be under the doctrine of corporate attribution.

As noted in *Aquino*, the doctrine of corporate attribution provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation. It must be applied purposively, contextually, and pragmatically to give effect to the policy of the law under which attribution is sought. These principles provide sufficient flexibility to address most if not all situations of corporate attribution, including for one-person corporations. There is no principled basis to apply different guiding principles for corporate attribution to one-person corporations. Moreover, accepting the argument that the knowledge of a sole directing mind must always be attributed to the corporation

would effectively disregard the bedrock principle of corporate separateness. Even one-person corporations have an existence that is separate from that of their sole owner and directing mind.

As stated in *Aquino*, courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought. Attributing L's knowledge to the company would undermine the purpose of the discoverability rules of the *Limitations Act, 2002* by making the trustee's claims statute-barred before the trustee was even able to assert them, creating an injustice. Attributing L's knowledge to the company would also undermine the purposes of the *BIA*, and would allow the investors to retain the proceeds of their wrongful conduct and thereby reduce the value of the debtor's assets available for distribution to other creditors. This would not be in the public interest.

With respect to the other issues, the investors cannot rely on the principles of equitable set-off under s. 97(3) of the *BIA* to set off the interest payments they owe the estate against the loan principal owed to them. The investors did not come to court with clean hands because their wrongful conduct was at the heart of their claim for set-off, thus disentitling them from the benefit of the defence of equitable set-off. Nor is there any basis to impugn the Court of Appeal's conclusion that the referral agreements were illegal contracts at common law. The investors' lack of subjective knowledge of illegality does not defeat the trustee's illegality argument, because the question of

whether a contract was entered into at least in part with the purpose of committing an illegal act is examined from the objective standpoint of a reasonable person. The investors all knew, or should have known, that they were entering into illegal agreements. Lastly, the lower courts did not err in finding that S was not dealing at arm's length from the company for the purposes of s. 95(1)(b) of the *BIA*.

Per **Côté** J.: There is agreement with the majority that the trustee's claims in unjust enrichment against the investors are not time-barred by the two-year limitation period set out in s. 4 of the *Limitations Act, 2002*; however, there is disagreement as to how this conclusion is reached. There is no need to resort to the corporate attribution doctrine, since codified rules of attribution exist in s. 12 of the *Limitations Act, 2002* and provide a complete answer. Rather, during the time that the company was solely controlled by L, claims against the investors were not discoverable because legal proceedings by the company were not an appropriate means to seek to remedy that injury, loss or damage for the purposes of s. 5(1)(a)(iv) of the *Limitations Act, 2002*.

As stated by the majority, the trial judge correctly held that the trustee asserted the claims in unjust enrichment as a successor in interest to the bankrupt company. Whether the trustee's claims in unjust enrichment are time-barred then hinges on when the claims were discovered by the company. To answer this question, it is not necessary to resort to the common law by way of the corporate attribution doctrine. That doctrine is reserved for exceptional cases. This is not such an exceptional case, as the question of discoverability can be answered using the codified rules of

attribution, which include the general principles of agency. As a codified means of attribution exists, this precludes the application of the corporate attribution doctrine on the basis of the principle that the common law should not displace the will of the legislature expressed in a statute. Specifically, the legislature has codified the deeming rules of agency in s. 12 of the *Limitations Act, 2002*. Indeed, s. 12(2) provides that the principal "shall be deemed to have knowledge" of the matters referred to in s. 5(1)(a) where the agent was duty-bound to communicate knowledge of those matters to the principal. Under the law of agency, L's knowledge was that of the company throughout the Ponzi scheme. By finding L to be the corporation's sole directing mind, the trial judge effectively found him to be an agent. This finding of fact by the trial judge is owed deference. The company therefore had knowledge more than two years before the actions were commenced of the payments to the investors that gave rise to the claims in unjust enrichment.

However, even though the company had the legal capacity to sue the investors, the claims in unjust enrichment were not "appropriate" and therefore not discoverable until the trustee was authorized by the court to bring them. The fact that the company, through L, knew of the injury, loss or damage and knew that it was caused by or contributed to by the investors is not enough to establish that the claims were discovered for the purposes of the *Limitations Act, 2002*. Section 5(1)(a)(iv) establishes that the company must also have known that, "having regard to the nature of the injury, loss or damage, a proceeding would have been an appropriate means to seek to remedy it". Whether legal proceedings are "appropriate" is a fact-specific inquiry. The trial

judge was correct to hold that although the company may have known, through L, about its dealings with the investors, it did not and could not have known that it would be legally appropriate for it to sue them to recover its losses so long as it was directed by L. When the company became insolvent, L ceased to have unfettered control over it, and the possibility that the company could make claims in unjust enrichment actualized. The trustee was appointed receiver on July 9, 2013. Therefore, the claims in unjust enrichment brought by the trustee between June 23 and July 9, 2015, were all brought within the limitation period. As for the actions commenced between July 10 and July 23, 2015, they are not time-barred since it was not appropriate for the trustee to bring the actions until June 16, 2015, when the court supervising the insolvency process issued an interim order permitting the trustee to serve the statements of claim on the investors and to issue the actions.

There is agreement with the majority and the courts below that the investors are not entitled to set off the interest payments they were ordered to repay to the bankrupt estate of the company against the outstanding principal of their loans pursuant to s. 97(3) of the *BIA*. However, the trial judge erred in considering the effect of preferring one creditor over the general body of creditors as part of her set-off analysis. Parliament has indicated that set-off in insolvency must be considered in the same manner and to the same extent as it would outside of the insolvency context. In this way, Parliament has given its blessing for the reordering of a claimant's priority in bankruptcy by virtue of the operation of the law of set-off. Finally, there is agreement with the majority that the referral agreements between some of the investors and the

company were illegal contracts at common law; and that S was not dealing at arm's length with the company under s. 95(1)(b) of the *BIA*.

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Moloney, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Lister v. Hooson*, [1908] 1 K.B. 174; *Holt v. Telford*, [1987] 2 S.C.R. 193; *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14; *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, 395 D.L.R. (4th) 529; *Stewart v. Bardsley*, 2014 NSCA 106, 353 N.S.R. (2d) 284; *Re Jason Construction Ltd.* (1972), 29 D.L.R. (3d) 623; *DeJesus v. Sharif*, 2010 BCCA 121, 284 B.C.A.C. 244; *Strellson AG v. Strellmax Ltd.*, 2018 ONSC 1808, 62 C.B.R. (6th) 328; *Canada Trustco Mortgage Co. v. Sugarman* (1999), 179 D.L.R. (4th) 548; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Holman v. Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120; *Hall v. Hebert*, [1993] 2 S.C.R. 159; *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2020 BCCA 130, 35 B.C.L.R. (6th) 326; *Zimmermann v. Letkeman*, [1978] 1 S.C.R. 1097; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th) 169; *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 86 Alta. L.R. (5th) 203;

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APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J. and Roberts and Sossin JJ.A.), 2022 ONCA 509, 162 O.R. (3d) 295, 1 C.B.R. (7th) 53, [2022] O.J. No. 2999 (Lexis), 2022 CarswellOnt 9234 (WL), affirming in part a decision of Gomery J., 2019 ONSC 5108, 76 C.B.R. (6th) 3, [2019] O.J. No. 4446 (Lexis), 2019 CarswellOnt 14145 (WL). Appeal dismissed.

Charles R. Daoust, for the appellants.

Harvey G. Chaiton, *Doug Bourassa* and *Laura Culleton*, for the respondents.

Dona Salmon and *Jennifer Boyczuk*, for the intervener the Attorney General of Ontario.

Natasha MacParland, *Chanakya A. Sethi*, *Rui Gao* and *J. Henry Machum*, for the intervener the Insolvency Institute of Canada.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Jamal and O'Bonsawin JJ. was delivered by

JAMAL J. —

I. Introduction

[1] The main question raised by this appeal is how the common law doctrine of corporate attribution should be applied to a "one-person" corporation controlled by its sole officer, shareholder, and directing mind. This question arises in the context of determining whether actions commenced by a trustee in bankruptcy to recover funds that a corporation paid out under a Ponzi scheme are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[2] Golden Oaks Enterprises Inc. was ostensibly a legitimate rent-to-own residential property business operated by its sole officer, shareholder, and directing mind, Joseph Gilles Jean Claude Lacasse. In reality, Golden Oaks was a classic Ponzi scheme: the company continuously needed new loans to repay existing loans. It paid short-term investors interest at criminal interest rates to raise funds to pay its existing investors. Some investors also helped perpetuate the Ponzi scheme by entering into referral agreements with Golden Oaks to refer new investors to the company in exchange for commissions based on a percentage of the amounts invested. When the Ponzi scheme eventually collapsed, Golden Oaks and the respondent, Mr. Lacasse, went into receivership and made assignments in bankruptcy.

[3] The respondent trustee in bankruptcy, Doyle Salewski Inc., launched several actions to recover amounts that Golden Oaks had paid the appellant investors in interest under the loans and in commissions under the referral agreements. The trustee's actions were based mainly on unjust enrichment. The appellants were all victims of the Ponzi scheme who lost their invested principal when Golden Oaks went bankrupt but managed to recoup some of their early investments through interest and commission payments before its bankruptcy.

[4] The appellants asserted that the trustee's actions were statute-barred by the *Limitations Act, 2002* because they were commenced more than two years after Golden Oaks had paid the interest and commissions. The appellants argued that Mr. Lacasse knew about these payments before the limitation period expired, and they asserted that

Mr. Lacasse's knowledge should be attributed to Golden Oaks under the common law doctrine of corporate attribution developed by this Court in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, and *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, [2019] 2 S.C.R. 530.

[5] The trial judge attributed Mr. Lacasse's knowledge to Golden Oaks, but she concluded that the trustee's actions were not statute-barred because legal proceedings were not "appropriate" under s. 5(1)(a)(iv) of the *Limitations Act, 2002* before the trustee had been appointed, had investigated the causes of the bankruptcy, and had discovered the Ponzi scheme.

[6] The Court of Appeal for Ontario agreed that the limitations defence failed, but held that the trial judge should have exercised her discretion not to attribute Mr. Lacasse's knowledge to Golden Oaks on public policy grounds in accordance with this Court's decision in *Livent*.

[7] The appellants' main submissions before this Court rely on the *Limitations Act, 2002* and the corporate attribution doctrine. The appellants note that the Court's decision in *Livent* left open whether the judicial discretion not to attribute the knowledge of a directing mind to a corporation applies in the case of a one-person corporation. They assert that the knowledge of a directing mind must *always* be attributed to a one-person corporation because the two are essentially one and the same. The result, the appellants submit, is that Mr. Lacasse's knowledge of the interest and

commission payments should be imputed to Golden Oaks, and then attributed to the trustee, with the consequence that the trustee's actions are statute-barred because they were not commenced within two years after the payments were made.

[8] This appeal also raises questions as to whether: (i) the appellants can rely on the principles of equitable set-off under s. 97(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), to set off the interest payments they owe the estate against the loan principal owed to them; (ii) the referral agreements are illegal contracts at common law; and (iii) one appellant, Lorne Scott, was dealing at arm's length from Golden Oaks under s. 95(1)(b) of the *BIA*.

[9] I would dismiss the appeal. As this Court noted in *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, at para. 1, the corporate attribution doctrine "provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation". The attribution doctrine must be applied purposively, contextually, and pragmatically to give effect to the policy of the law under which attribution is sought (paras. 56, 64, and 82). In my view, the same principles apply to one-person corporations. These principles provide sufficient flexibility to address most if not all situations of corporate attribution, including for one-person corporations. Moreover, accepting the appellants' argument that the knowledge of a sole directing mind must always be attributed to the corporation would effectively disregard the bedrock principle of corporate separateness.

[10] In this case, the Court of Appeal properly exercised its discretion to decline to attribute Mr. Lacasse's knowledge to Golden Oaks because attribution of that knowledge would undermine the purposes of the limitations and bankruptcy provisions at issue. Attribution would create an injustice by precluding the trustee's claims to recover the unlawful payments before the trustee was even able to assert them. It would also allow the appellants to retain the proceeds of their wrongful conduct of entering into illegal agreements and reduce the value of the debtor's assets available to the other creditors in bankruptcy. I would also dismiss the remaining grounds of appeal.

II. <u>Background</u>

A. *The Golden Oaks Ponzi Scheme*

[11] Golden Oaks was founded by Mr. Lacasse and operated in Ottawa between 2009 and 2013. Mr. Lacasse was the company's sole shareholder, officer, and directing mind. He publicly advertised Golden Oaks as an altruistic rent-to-own business that gave people who did not qualify for a mortgage a path to home ownership. Tenants would make a down payment and pay a slightly inflated rent for a property, which they would then acquire an option to purchase after three to five years.

[12] Mr. Lacasse also promoted Golden Oaks to prospective investors as a way to make a quick profit by lending the company money to fund its operations in exchange for high-interest promissory notes. Investors in Golden Oaks were short-term lenders to the company. Some investors also had referral agreements with Golden Oaks

under which they recruited new investors in exchange for commissions of 8 percent of the amount invested.

[13] To outside observers, Golden Oaks appeared to be successful. The reality was completely different. Golden Oaks was a textbook Ponzi scheme. A fraudster, Mr. Lacasse, lured investors to lend money to the company for unreasonably high rates of return on promissory notes, and then paid existing investors by recruiting new investors, rather than by generating revenue from a legitimate business.

[14] Between 2009 and 2013, Golden Oaks issued 504 promissory notes to 153 investors. Rates of interest on the promissory notes were initially between 12 and 40 percent per year for loans at one- or two-year terms. Later, rates increased to over 60 percent per year — the threshold for the criminal rate of interest under s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. On one occasion, Golden Oaks even offered interest at a rate approaching 67,000 percent per year. By 2012, most promissory notes involved loans at criminal interest rates. Overall, nearly two-thirds of all the promissory notes issued by Golden Oaks were at criminal interest rates. During the life of the Ponzi scheme, Mr. Lacasse personally pocketed about $1.3 million in profits.

[15] The Ponzi scheme collapsed in July 2013. Soon afterwards, Golden Oaks and Mr. Lacasse went into receivership and made assignments in bankruptcy, and Doyle Salewski Inc. was appointed trustee in bankruptcy of their estates.

B. *Legal Actions Commenced by the Trustee*

[16] In 2015, the trustee launched over 80 legal actions against Golden Oaks' lenders, including 17 actions to recover illegal interest and commissions paid by Golden Oaks before its bankruptcy.

[17] The trustee's 17 actions to recover the interest and commissions were consolidated and heard together in one trial. The trustee made two broad categories of claims. First, the trustee advanced statutory claims to recover alleged preferential payments and transfers under the *BIA*. It argued that because Golden Oaks was a Ponzi scheme, it was insolvent by definition and never had enough money to pay its legitimate creditors. The interest and commissions paid by Golden Oaks were therefore preferential payments that deprived legitimate creditors of their share of the company's remaining equity.

[18] Second, the trustee advanced unjust enrichment claims. It argued that there was no juristic reason for the interest payments made by Golden Oaks because the interest rates that it offered were illegal, and that the defendants — including all the appellants before this Court — were enriched at Golden Oaks' expense. The trustee also asserted that the commissions paid for referring new investors to Golden Oaks were unlawful and contrary to the *Securities Act*, R.S.O. 1990, c. S.5, and thus the referral agreements could not supply a juristic reason for the commissions.

[19] The appellants raised four main defences.

[20] First, the appellants argued that the trustee's actions were statute-barred under ss. 4 and 12(1) of the *Limitations Act, 2002*, which impose a two-year limitation period beginning when the bankrupt, Golden Oaks, knew or ought to have known of its claims. The appellants asserted that because Mr. Lacasse knew of the impugned payments when they were made between June 6, 2011, and April 3, 2013, Golden Oaks also knew or ought to have known of the payments at that time. This was over two years before the trustee sued in its capacity as successor of Golden Oaks beginning in June 2015.

[21] Second, the appellants asserted that even if the trustee's actions were not statute-barred, the appellants were not unjustly enriched. They invoked the doctrine of "notional severance", which allows a court to partially enforce an otherwise illegal agreement by reading down a contractual provision to make the rest of the agreement legal and enforceable, rather than declaring the entire agreement to be void *ab initio*. The appellants argued that the court should reduce the criminal rate of interest to the maximum legal rate of interest and order the appellants to return only the interest above that rate, but not the principal or the lawful interest.

[22] Third, the appellants invoked s. 97(3) of the *BIA* to set off amounts they owed the estate against the principal of the loans owed to them. The appellants claimed a complete set-off because the loan principal exceeded what they owed.

[23] Fourth, those appellants who had referral agreements with Golden Oaks argued that their agreements were lawful and not contrary to the *Securities Act* and hence provided a juristic reason for them to keep the commissions they had received.

III. Judicial History

A. *Ontario Superior Court of Justice, 2019 ONSC 5108, 76 C.B.R. (6th) 3 (Gomery J. (as she then was))*

[24] The trial judge readily found that Golden Oaks was a Ponzi scheme. This had two implications. First, Golden Oaks never had enough money to pay its legitimate creditors and was insolvent by definition. Second, as of mid-2011, Golden Oaks' operations were fraudulent.

(1) The Limitations Defence and the Corporate Attribution Doctrine

[25] The trial judge rejected the appellants' argument that the trustee's unjust enrichment claims were statute-barred.

[26] The trial judge noted that, under s. 5(2) of the *Limitations Act, 2002*, Golden Oaks was presumed to have known about the matters giving rise to its claims when it made the payments unless the contrary was proved. She also accepted that because the trustee advanced the unjust enrichment claims as the successor in interest to Golden Oaks under s. 71 of the *BIA*, it was deemed, by operation of s. 12(1) of the *Limitations Act, 2002*, to have known of Golden Oaks' claims when the company

discovered or reasonably could have discovered them. She found that the question of whether Golden Oaks knew or reasonably could have known about the payments had to be resolved by considering whether Mr. Lacasse's knowledge of the payments should be attributed to Golden Oaks under the corporate attribution doctrine.

[27] The trial judge held that Mr. Lacasse's knowledge should be attributed to Golden Oaks. She relied on *Canadian Dredge* for the proposition that the acts of the directing mind of a corporation are attributed to the corporation unless those acts were totally in fraud of the corporation or were not by design or result partly for its benefit. She found that neither exception applied. The trustee had not shown that Mr. Lacasse had acted totally in fraud of the corporation or solely for his own benefit. Of the $16.4 million raised from investors, Mr. Lacasse pocketed only $1.3 million. Another $7.7 million was used to pay other investors, while the rest was used partly for the benefit of the company, including to pay for operating expenses, the purchase, renovation, and repair of properties, advertising, and other administrative expenses. The trial judge therefore imputed Mr. Lacasse's knowledge of the payments to Golden Oaks.

[28] Despite finding that Golden Oaks discovered its claims as early as 2011 when the payments were first made, the trial judge concluded that a legal proceeding was not "appropriate" under s. 5(1)(a)(iv) of the *Limitations Act, 2002* before Golden Oaks went into receivership on July 9, 2013. Until then, Golden Oaks was controlled solely by Mr. Lacasse, who would not have launched proceedings on the company's behalf because this would have exposed the Ponzi scheme. The delay in the running of

the limitation period thus arose from Mr. Lacasse's unfettered control of the company, which only ended when the company entered into receivership.

(2) Legal and Equitable Set-Off

[29] The trial judge applied the doctrine of notional severance to the trustee's unjust enrichment claims to recover the illegal interest payments. She ordered the appellants to return all the illegal interest payments they had received, but not the principal amounts they had invested in Golden Oaks. At the same time, the trial judge refused to allow the appellants to invoke s. 97(3) of the *BIA* to set off the interest amounts they owed the estate against the principal they were owed.

[30] The trial judge ruled that the appellants did not meet the criteria for legal set-off because the appellants' debts only became liquidated after the trustee's legal actions. The ruling on legal set-off was not appealed further.

[31] The trial judge also ruled that the appellants could not rely on equitable set-off. She referred to her earlier findings that the appellants did not conduct themselves with Golden Oaks in a manner consistent with above-board commercial dealings and that they knew or ought to have known that they had entered into illegal agreements. She also noted that because the effect of granting a set-off in bankruptcy is "to prefer one creditor over the general body of creditors", the permissible set-off under s. 97(3) of the *BIA* must be "confined within narrow limits" (para. 550, citing *King Insurance*

Finance (Wines) Inc. v. 1557359 Ontario Inc., 2012 ONSC 4263, 99 C.B.R. (5th) 227, at para. 21).

[32] As a result, the trial judge ruled that the estate could recover the interest received by the appellants and distribute the proceeds *pro rata* to the unsecured creditors.

(3) Commissions Under the Referral Agreements

[33] The trial judge rejected the trustee's claims in unjust enrichment for repayment of the referral commissions received by some of the appellants. She did not accept that the referral agreements involved the unlicensed sale of securities contrary to the *Securities Act*, and concluded that the agreements provided a juristic reason for the commission payments that defeated the trustee's claims.

(4) Unlawful Preference Claims Against Mr. Scott

[34] Lastly, the trial judge granted the trustee's claim that the interest and commissions paid by Golden Oaks to the appellant Mr. Scott were unlawful preferences under s. 95(1)(b) of the *BIA*. Mr. Scott is a real estate agent who became involved in Golden Oaks' operations in 2011. The trial judge found that Mr. Scott was not acting at arm's length from Golden Oaks at the time he received the interest and commission payments. Although Mr. Scott was never employed by Golden Oaks, he regularly represented that he acted on the company's behalf and continued to solicit investments

even after he became aware of the Ponzi scheme. The trial judge ordered Mr. Scott to pay the estate $72,575 of the interest and commissions that he had received.

B. *Court of Appeal for Ontario, 2022 ONCA 509, 162 O.R. (3d) 295 (Sossin J.A., Strathy C.J. and Roberts J.A. concurring)*

[35] The Court of Appeal dismissed the appeal. The court agreed with the conclusion of the trial judge to reject the limitations and set-off defences and with her ruling on the unlawful preference claims against Mr. Scott. The trustee also cross-appealed on several issues. The only issue from the cross-appeal that is relevant to this appeal is whether the referral agreements constituted a juristic reason to deny the trustee's claims in unjust enrichment for the commission payments. The court held that they did not and allowed the trustee's cross-appeal on this issue.

(1) The Limitations Defence and the Corporate Attribution Doctrine

[36] The Court of Appeal agreed with the trial judge that the trustee's actions were not statute-barred under the *Limitations Act, 2002*, but reached this conclusion for different reasons.

[37] The Court of Appeal ruled that the trial judge should not have attributed Mr. Lacasse's knowledge to Golden Oaks under the corporate attribution doctrine. The *Livent* decision recognized a court's discretion to refrain from applying corporate attribution when doing so would be in the public interest, but left open whether the

same principles apply to one-person corporations. The Court of Appeal saw no basis not to apply the *Livent* framework to a one-person corporation such as Golden Oaks. As a result, the trial judge should have considered whether to exercise her discretion not to attribute Mr. Lacasse's knowledge of the payments to Golden Oaks. In the Court of Appeal's view, attribution in this case would undermine the policy of insolvency law of ensuring equitable distribution of the assets among creditors. It would also compromise the social policy of promoting corporate responsibility to prevent fraud and regulatory non-compliance.

[38] Because the Court of Appeal declined to attribute Mr. Lacasse's knowledge to Golden Oaks, the court held that Golden Oaks lacked the knowledge to initiate the actions before it entered into bankruptcy, and hence the actions were not statute-barred. The court held that it was unnecessary to consider whether, by operation of s. 12 of the *Limitations Act, 2002*, Golden Oaks and the trustee were deemed to have had knowledge of the payments, or whether, under s. 5(1)(a)(iv), the trustee's claims were not "appropriate" before the trustee's appointment.

(2) Equitable Set-Off

[39] The Court of Appeal concluded that the trial judge did not err in applying the test for equitable set-off under s. 97(3) of the *BIA*. There was no basis to interfere with the trial judge's conclusion that the appellants lacked the "clean hands" required to seek an equitable remedy. The trial judge had found the appellants had not engaged

in above-board dealings and they knew or ought to have known that they were entering into illegal agreements.

(3) The Unlawful Preference Claims Against Mr. Scott

[40] The Court of Appeal dismissed Mr. Scott's appeal from the trial judge's finding that he was not acting at arm's length from Golden Oaks when he received the commission and interest payments, and hence these payments were unlawful preferences under s. 95(1)(b) of the *BIA*.

(4) The Trustee's Cross-Appeal on the Referral Agreements

[41] The Court of Appeal allowed the trustee's cross-appeal in part. The court held that the referral agreements were unlawful at common law and could not provide a juristic reason for the recipients' enrichment. It ordered Mr. Scott and several of the other appellants to pay the estate the commissions that they had received.

IV. Issues

[42] This appeal raises four issues:

(a) Did the Court of Appeal err in concluding that the trustee's actions are not statute-barred by the *Limitations Act, 2002*?

(b) Did the Court of Appeal err in concluding that the appellants are not entitled to rely on equitable set-off under s. 97(3) of the *BIA*?

(c) Did the Court of Appeal err in concluding that the referral agreements were illegal contracts at common law?

(d) Did the Court of Appeal err in affirming the trial judge's conclusion that Mr. Scott and Golden Oaks were not dealing at arm's length for the purpose of s. 95(1)(b) of the *BIA*?

V. Analysis

A. *Are the Trustee's Actions Statute-Barred by the Limitations Act, 2002?*

[43] The first and main issue on this appeal is whether the trustee's unjust enrichment claims against the appellants are statute-barred by the two-year limitation period under s. 4 of the *Limitations Act, 2002*.

[44] Although the trustee's actions were launched more than two years after the illegal interest and commissions were paid to the appellants, the actions would not be statute-barred if the commencement of the limitation period were deferred by the rule of discoverability. Under the discoverability rule, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable

diligence” (*Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] 2 S.C.R. 704, at para. 29, citing *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224, and *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2). Discoverability is a common law principle that is now codified by statute in Ontario. The relevant discoverability rules for this appeal are contained in ss. 5 and 12 of the *Limitations Act, 2002*.

[45] The appellants argue that the Court of Appeal erred in concluding that the trustee’s actions are not statute-barred. They advance three arguments.

[46] First, the appellants submit that s. 12 of the *Limitations Act, 2002* deemed the trustee to have had knowledge of the illegal interest and commission payments before the limitation period expired. They argue that, by operation of s. 12, Mr. Lacasse’s knowledge of the payments must be imputed to Golden Oaks and to the trustee as Golden Oaks’ successor.

[47] Second, in the alternative, the appellants seek to attribute Mr. Lacasse’s knowledge to Golden Oaks under the corporate attribution doctrine. Again, therefore, Golden Oaks would be deemed to have known about the payments before the limitation period expired.

[48] Third, the appellants claim that the trial judge erred by concluding that it would not have been “appropriate” within the meaning of s. 5(1)(a)(iv) of the *Limitations Act, 2002* for Golden Oaks to have sued the appellants before the trustee’s

appointment. Thus, once again, the actions were not commenced before the limitation period expired.

[49] As I will explain, I do not accept the first and second arguments, and it is unnecessary to address the third.

(1) Section 12 of the *Limitations Act, 2002* Does Not Resolve Whether the Trustee's Actions Are Statute-Barred

[50] Sections 5(1)(a), 5(2), and 12 of the *Limitations Act, 2002* are the relevant discoverability rules in this appeal.

[51] Section 5(1) sets out when a claim is discovered on the basis of actual or constructive knowledge. It provides that a claim is not discoverable until the person with the claim knew or ought to have known that: (i) an injury, loss, or damage had occurred; (ii) the injury, loss, or damage was caused by a particular act or omission; (iii) the act or omission was that of the person against whom the claim is made; and (iv) a proceeding would be an appropriate means to seek to remedy the injury, loss, or damage. Section 5(2) states that a person with a claim is presumed to know of the matters referred to in s. 5(1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. Sections 5(1) and 5(2) provide:

> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[52] Section 12 sets out rules for when persons shall be deemed to have had the knowledge referred to in s. 5(1)(a). Section 12(1) addresses claims brought by a successor in right, title, or interest to the person with a claim. It stipulates when the successor is to be imputed with the knowledge of a predecessor. Section 12(2) addresses claims brought by a principal. It stipulates when the principal is to be imputed with the knowledge of an agent. Section 12 provides:

12 (1) For the purpose of clause 5(1)(a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the person shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:

1. The day the predecessor first knew or ought to have known of those matters.

2. The day the person claiming first knew or ought to have known of them.

> (2) For the purpose of clause 5(1)(a), in the case of a proceeding commenced by a principal, if the agent had a duty to communicate knowledge of the matters referred to in that clause to the principal, the principal shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:
>
> 1. The day the agent first knew or ought to have known of those matters.
>
> 2. The day the principal first knew or ought to have known of them.
>
> (3) The day on which a predecessor or agent first ought to have known of the matters referred to in clause 5(1)(a) is the day on which a reasonable person in the predecessor's or agent's circumstances and with the predecessor's or agent's abilities first ought to have known of them.

[53] The appellants argue that the trustee's actions are statute-barred by the combined effect of ss. 12(1) and 12(2) of the *Limitations Act, 2002*, making it unnecessary to consider the corporate attribution doctrine at common law. The appellants base this argument on two propositions. First, the appellants say that Mr. Lacasse's knowledge must be imputed to Golden Oaks under s. 12(2) before the expiry of the limitation period, because Mr. Lacasse knew of the impugned payments and was Golden Oaks' sole officer, director, and agent and acted within the scope of his authority when directing that the payments be made. Second, the appellants say that Golden Oaks' knowledge must be imputed to the trustee under s. 12(1), because the trustee is the successor in interest to Golden Oaks. As a result, the appellants claim that the trustee's actions were statute-barred.

[54] I agree with the second proposition — that Golden Oaks' knowledge must be imputed to the trustee — but not with the first — that Mr. Lacasse's knowledge must be imputed to Golden Oaks.

[55] I pause to note that the Court of Appeal concluded that it was unnecessary to decide whether the trustee was the successor of Golden Oaks under s. 12(1) (para. 60). In my view, this point must be addressed because the appellants argue that s. 12 is a sufficient basis to defeat the trustee's actions without resorting to the corporate attribution doctrine.

[56] Golden Oaks' knowledge should be imputed to the trustee because the trustee is the successor in interest to Golden Oaks. Section 12(1) applies to "a proceeding commenced by a person claiming through a predecessor". The trustee began the proceedings against the appellants as successor to, and claiming through its predecessor, Golden Oaks. As this Court has noted, when a trustee takes control of a bankrupt's property under s. 71 of the *BIA*, "the trustee is the bankrupt's successor" (*Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, at para. 36).

[57] However, even though Golden Oaks' knowledge must be imputed to the trustee, I conclude that Mr. Lacasse's knowledge cannot be attributed to Golden Oaks under s. 12(2) of the *Limitations Act, 2002*. Section 12(2) only applies to "a proceeding commenced by a principal". Assuming, without deciding, that Golden Oaks acted as principal and Mr. Lacasse as its agent, and that Mr. Lacasse acted within the scope of the authority granted to him by Golden Oaks (both of which points the trustee disputes),

the underlying proceedings were not commenced by Golden Oaks, the supposed principal, but by the trustee, who was not a principal of Mr. Lacasse. Therefore, s. 12 of the *Limitations Act, 2002* alone does not resolve whether the trustee's actions are statute-barred.

[58] The question therefore remains: When might Golden Oaks be said to have acquired the knowledge of the matters referred to in s. 5(1)(a) of the *Limitations Act, 2002*?

[59] The appellants assert before this Court that Mr. Lacasse's knowledge can be imputed to Golden Oaks under the common law principles of agency. By contrast, both the trial judge and Court of Appeal addressed the question of attribution by examining the common law doctrine of corporate attribution. As the trustee correctly notes, however, "[t]he [t]rial [j]udge did not determine whether [Mr.] Lacasse was an agent of Golden Oaks, and if so, whether he was acting within the scope of that authority" (R.F., at para. 46, fn. 27). The trustee further submits that, in any event, the knowledge of an agent should not be attributed to a principal when the agent is acting in fraud of the principal or beyond the scope of the agent's authority.

[60] In my view, as the trustee correctly argues, there were insufficient findings at trial as to whether Mr. Lacasse was an agent of Golden Oaks and whether he was acting within the scope of his authority. This hampers this Court's ability to apply common law agency principles for the first time in this appeal. Although the trial judge concluded that Mr. Lacasse was the directing mind of Golden Oaks, this is a different

question from whether Mr. Lacasse was an agent of Golden Oaks at the relevant times. I would therefore decline to address the appellants' agency argument.

[61] As a result, if Mr. Lacasse's knowledge is to be attributed to Golden Oaks, it must be under the doctrine of corporate attribution, to which I now turn.

(2) The Court of Appeal Did Not Err by Exercising Discretion Not to Attribute Mr. Lacasse's Knowledge to Golden Oaks Under the Corporate Attribution Doctrine

(a) *Guiding Principles of Corporate Attribution*

[62] As I noted in *Aquino*, "[t]he common law doctrine of corporate attribution provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation" (para. 1). In *Aquino*, I reviewed this Court's corporate attribution decisions in *Canadian Dredge*, *Livent*, and *DeJong* and persuasive authority from the United Kingdom, and summarized the guiding principles for the common law corporate attribution doctrine under Canadian law as follows:

> (a) As a general rule, a person's fraudulent acts may be attributed to a corporation if two conditions are met: (1) the wrongdoer was the directing mind of the corporation at the relevant times; and (2) the wrongful actions of the directing mind were performed within the sector of corporate responsibility assigned to them (*Canadian Dredge*, at pp. 681-82; *Livent*, at para. 100).
>
> (b) Attribution will generally be inappropriate when: (1) the directing mind acted totally in fraud of the corporation (the fraud

exception); or (2) the directing mind's actions were not by design or result partly for the benefit of the corporation (the no benefit exception) (*Canadian Dredge*, at pp. 712-13; *Livent*, at para. 100).

(c) In addition to the fraud and no benefit exceptions, courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought (*Livent*, at para. 104; *DeJong*, at para. 2).

(d) In all cases, courts must apply the common law corporate attribution doctrine purposively, contextually, and pragmatically. The corporate attribution doctrine is not a "standalone principle" (*Livent*, at para. 97); there is no one-size-fits-all approach. The court must always determine whether the actions, knowledge, state of mind, or intent of a person should be treated as those of the corporation for the purpose of the law under which attribution is sought (*Livent*, at paras. 102-3). This may require the court to tailor the general rule of attribution or its exceptions to the particular legal context. Attribution may be appropriate for one purpose in one context but may be inappropriate for another purpose in another context. [para. 82]

[63] In *Livent*, this Court had decided to "leave for another day" whether the same approach to corporate attribution should be taken in the context of a one-person corporation when the directing mind is the sole director and shareholder (para. 104). That question arises in this case, because Mr. Lacasse was the sole directing mind, shareholder, and director of Golden Oaks.

(b) *The Same Principles Apply to One-Person Corporations*

[64] The appellants argue that this Court should adopt a different approach to corporate attribution for one-person corporations. They say that the corporate attribution doctrine is "superfluous" in such cases because "the corporation and sole

directing mind are *de facto* alter egos of one another" and are "indistinguishable" (A.F., at paras. 67, 70-71 and 76, citing *Stone & Rolls Ltd. v. Moore Stephens*, [2009] UKHL 39, [2009] 1 A.C. 1391). In a one-person corporation, the appellants claim, "the sole director and shareholder cannot be committing a fraud on the corporation" (A.F., at paras. 67 and 72, citing *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, [2002] 4 S.C.R. 312). For the same reason, the appellants assert that the judicial discretion not to attribute the knowledge of a directing mind to a corporation should never apply in the case of a one-person corporation.

[65] I do not accept these submissions. There is no principled basis to apply different guiding principles for corporate attribution to one-person corporations. As this Court explained in *Aquino*, the principles of corporate attribution must always be applied purposively, contextually, and pragmatically, having regard to the purpose of the law under which attribution is sought (paras. 56, 64 and 82). Those principles provide sufficient flexibility to deal with most if not all situations of corporate attribution, including for one-person corporations. Moreover, accepting the appellants' argument that the knowledge of a sole directing mind must automatically be attributed to the corporation would effectively disregard the bedrock principle of corporate separateness. Even one-person corporations have an existence that is separate from that of their sole owner and directing mind.

[66] Nor am I persuaded that the authorities cited by the appellants warrant a different approach for one-person corporations. The appellants cite this Court's

decision in *373409 Alberta Ltd.* as holding that a directing mind cannot commit a fraud against a one-person corporation. The appellants misinterpret that decision, which dealt with corporate authority, not corporate attribution. The sole shareholder and directing mind of two corporations (companies A and B) had altered a cheque payable to company A by adding company B as a payee and depositing the cheque in company B's account. The bank accepted the cheque for deposit in company B's account and the funds were later withdrawn. A receiver and manager of company A brought a claim in conversion against the bank for accepting the cheque for deposit. This Court held that the bank was not liable in conversion because the directing mind had corporate authority to deposit the cheque made payable to company A into company B's account. Applying *Canadian Dredge*, the Court concluded that the action of the directing mind was not in fraud of company A, since the directing mind had full authorization as sole shareholder and director of company A to act as he did (paras. 22-23). This decision does not stand for the proposition that a sole directing mind can never commit a fraud against a one-person corporation.

[67] The appellants also cite the House of Lords' decision in *Stone & Rolls* as suggesting that a one-person corporation must always be imputed with the knowledge of its directing mind. The appellants' view finds some support in the speech of Lord Walker in *Stone & Rolls*, who concluded that "one or more individuals who for fraudulent purposes run a one-man company . . . cannot obtain an advantage by claiming that the company is not a fraudster, but a secondary victim" (para. 174). The Supreme Court of the United Kingdom would later note that *Stone & Rolls* was

interpreted by some as establishing "a rule of law that the dishonesty of the controlling mind in a 'one-man company' could be attributed to the company . . . whatever the context and purpose of the attribution in question" (*Singularis Holdings Ltd. v. Daiwa Capital Markets Ltd.*, [2019] UKSC 50, [2020] A.C. 1189, at para. 33).

[68] However, the Supreme Court of the United Kingdom has now repudiated this view and has embraced a purposive, contextual, and pragmatic approach to corporate attribution akin to the Canadian approach.

[69] In *Bilta (UK) Ltd. v. Nazir*, [2015] UKSC 23, [2016] A.C. 1, Lord Neuberger wrote that, subject to certain caveats, *Stone & Rolls* should be "put on one side in a pile and marked 'not to be looked at again'" (para. 30, citing *In re King*, [1963] Ch. 459, at p. 483, per Lord Denning M.R. (in another context)). Lords Toulson and Hodge similarly questioned the precedent set by *Stone & Rolls*, observing that the case had "no majority ratio decidendi" (para. 154).

[70] A few years later, the Supreme Court of the United Kingdom revisited this issue in *Singularis* and unequivocally rejected the view that one-person corporations should be subject to an automatic rule of attribution. Speaking for the court, Lady Hale noted that *Stone & Rolls* had "prompted much debate and criticism" (para. 30). She held that "there is no principle of law" that the fraudulent conduct or knowledge of a director of a one-person corporation should always be attributed to the corporation (para. 34). Instead, she ruled, "the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in

consideration of the context and the purpose for which the attribution is relevant" (para. 34, citing the trial judge in the case, [2017] EWHC 257 (Ch), [2017] 2 All E.R. (Comm.) 445, at para. 182). She emphasized that even one-person corporations "have their own legal existence and personality separate from that of any of the individuals who own or run them" and that "a sole shareholder can steal from his own company" (para. 37). Lady Hale concluded that because the context and purpose of relevant law under which attribution is sought is now the guiding principle in questions of corporate attribution, "*Stone & Rolls* can finally be laid to rest" (para. 34; see also J. C. Fisher, "The 'one man company' after *Patel v Mirza*: attribution and illegality in *Singularis Holdings v Daiwa Capital Markets*" (2020), 71 *N.I.L.Q.* 387).

[71] I agree that there is no rule that the knowledge or state of mind of the directing mind of a one-person corporation must invariably be imputed to the corporation. Context and purpose always serve as the primary considerations. The guiding principles for corporate attribution outlined in *Aquino* apply to all corporations, including one-person corporations.

(c) *Application to This Case*

[72] In my view, the Court of Appeal properly declined to attribute Mr. Lacasse's knowledge of the illegal interest and commission payments to Golden Oaks. Under the discoverability rules in s. 5(1) of the *Limitations Act, 2002*, the limitation period did not commence until the trustee acquired knowledge of Golden Oaks' claims, which at the earliest was only when the trustee was appointed. The trustee's actions to

recover payments from the appellants were thus started before the limitation period expired.

[73] At the outset, I acknowledge that under the common law doctrine of corporate attribution, Mr. Lacasse's knowledge may *prima facie* be attributed to Golden Oaks because Mr. Lacasse was the directing mind of Golden Oaks and his wrongful actions were performed in the sector of corporate responsibility assigned to him. I also acknowledge, as the trial judge found, that Mr. Lacasse did not act solely to defraud the company for his own benefit, because some of the money raised from investors as part of the Ponzi scheme benefitted Golden Oaks and was used to pay for its operating expenses, the repair of properties, advertising, and other administrative expenses.

[74] Even so, I agree with the Court of Appeal that the trial judge erred "by failing to consider the discretion not to apply the corporate attribution doctrine on public interest grounds" (para. 56). It was therefore appropriate for the Court of Appeal to consider how the discretion should have been exercised.

[75] As this Court noted in *Aquino*, "courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought" (para. 82(c); see also *Livent*, at para. 104; *DeJong*, at para. 2). Here, the appellants seek to attribute Mr. Lacasse's knowledge to Golden Oaks to trigger the discoverability rule under the *Limitations Act,*

2002 so as to bar the trustee's claims under the *BIA*. There are two relevant laws engaged, and it is necessary to consider whether attribution would promote the purpose of each.

[76] The purpose of the *Limitations Act, 2002*, like other modern limitations statutes, is to balance the interests of plaintiffs and defendants by promoting the established certainty, evidentiary, and diligence rationales underlying limitation periods (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 57; *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 64-67). The certainty rationale seeks "to promote accuracy and certainty in the adjudication of claims"; the evidentiary rationale seeks "to provide fairness to persons who might be required to defend against claims based on stale evidence"; and the diligence rationale seeks "to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion" (*Green*, at para. 57, citing P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123).

[77] More specifically, the purpose of discoverability rules, such as s. 5(1)(a) of the *Limitations Act, 2002*, is "to avoid the injustice of precluding an action before the person is able to raise it" (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 36, per Major J.; see also *Grant Thornton LLP*, at para. 29).

[78] In this case, attributing Mr. Lacasse's knowledge to Golden Oaks would undermine the purpose of the discoverability rules of the *Limitations Act, 2002*. It would preclude Golden Oaks' claims, even though, realistically, the company was not

able to advance them before the trustee was appointed and the limitation period had expired. Mr. Lacasse had no interest in suing the appellants on behalf of Golden Oaks while he was solely in charge of the corporation. This would have exposed the Ponzi scheme he had orchestrated and from which he was profiting. As a practical matter, a lawsuit could only have been brought by the trustee, which was only after the trustee was appointed. As a result, attributing Mr. Lacasse's knowledge to Golden Oaks would create an injustice by making the trustee's claims statute-barred before the trustee was even able to assert them.

[79] The main purposes of the *BIA* are the equitable distribution of the bankrupt's assets among its creditors and the bankrupt's financial rehabilitation (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 32; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7; *Poonian v. British Columbia (Securities Commission)*, 2024 SCC 28, at para. 1; *Aquino*, at para. 36). Other objectives of the *BIA* include preserving and maximizing the value of a debtor's assets and protecting the public interest (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 40; *Aquino*, at para. 36).

[80] In this case, attributing Mr. Lacasse's knowledge to Golden Oaks would undermine the purposes of the *BIA*. Attribution would allow the appellants to retain the proceeds of their wrongful conduct and reduce the value of the debtor's assets available

for distribution to other creditors. As the Court of Appeal noted, attribution would "lead to the perverse outcome of saving the appellants from the consequences of their collection of usurious interest, as well as depriving the trustee of a civil remedy that would inure solely for the collective benefit of legitimate creditors" (para. 57). This would not be in the public interest.

[81] As a result, the Court of Appeal appropriately exercised its discretion to refuse to attribute Mr. Lacasse's knowledge to Golden Oaks because this would not have promoted the purposes of the laws under which attribution was sought.

(3) It Is Not Necessary to Address Section 5(1)(a)(iv) of the *Limitations Act, 2002*

[82] In view of this conclusion, it is unnecessary to address the trial judge's conclusion that the trustee's actions were not statute-barred on the basis that the actions were not "appropriate" within the meaning of s. 5(1)(a)(iv) of the *Limitations Act, 2002*.

(4) Conclusion

[83] The trustee's actions are not statute-barred by the *Limitations Act, 2002*.

B. *Are the Appellants Entitled to Claim Equitable Set-Off Under Section 97(3) of the BIA?*

[84] The appellants advance two arguments supporting their position that they should have been allowed to set off the interest payments they were ordered to pay the estate against the outstanding principal of their loans to Golden Oaks. First, the appellants say that there were no equitable grounds to deny them a set-off defence because they, too, were victims of the Ponzi scheme. Second, the appellants claim that the courts below erred in applying the principles of equitable set-off under s. 97(3) of the *BIA* by considering, as part of the equities, whether allowing a set-off would give them a priority over other creditors. They argue that this Court has accepted that the effect of s. 97(3) is that "the party claiming set-off has Parliament's blessing for the 'reordering' of his priority in bankruptcy by virtue of the operation of the law of set-off" (A.F., at para. 101 (emphasis deleted), citing *Husky Oil*, at para. 60, per Gonthier J.).

[85] As I will explain, I do not accept the appellants' first submission, making it unnecessary to address the second.

(1) General Principles of Set-Off in Bankruptcy

[86] The law of set-off in the common law provinces or compensation under Quebec civil law allows "parties with reciprocal claims to 'net out' amounts owed to each other" (J. D. Honsberger and V. W. DaRe, *Honsberger's Bankruptcy in Canada* (5th ed. 2017), at p. 332; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, at para. 34).

[87] Section 97(3) of the *BIA* governs claims of set-off or compensation in bankruptcy:

> **(3)** The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

[88] Section 97(3) of the *BIA* incorporates the relevant provincial law of set-off or, in Quebec, the law of compensation, into proceedings the trustee institutes, "in the same manner and to the same extent" as that law would ordinarily apply in non-bankruptcy proceedings between the bankrupt and the creditor, subject to statutory exceptions relating to fraud and fraudulent preferences (see K. R. Palmer, *The Law of Set-Off in Canada* (1993), at pp. 176-77 and 192-93; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), at p. 5-1,086; Honsberger and DaRe, at pp. 332-33, 449 and 452-53; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at pp. 43-45; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 99-102). None of the statutory exceptions is at issue here.

[89] Allowing set-off in bankruptcy avoids the injustice of "making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate" (*Lister v. Hooson*, [1908] 1

K.B. 174 (C.A.), at p. 178, per Fletcher Moulton L.J., cited in *Husky Oil*, at para. 56; see also Palmer, at pp. 205-6; Honsberger and DaRe, at pp. 450-51).

[90] Under legal set-off, which generally arises by statute, both obligations must be liquidated debts and there must be mutuality, meaning that the debts must be between the same parties and in the same capacity (*Holt v. Telford*, [1987] 2 S.C.R. 193, at p. 204; Palmer, at pp. 4-5 and 21; J. A. M. Judge and M. E. Grottenthaler, "Legal and Equitable Set-Offs" (1991), 70 *Can. Bar Rev.* 91, at pp. 94-97; Honsberger and DaRe, at pp. 332 and 451-52; Wood, at pp. 100-101).

[91] Equitable set-off is available on a broader basis than legal set-off. Equitable set-off applies to both liquidated and unliquidated claims and regardless of whether there is mutuality (*Holt*, at p. 212; Palmer, at p. 5; Judge and Grottenthaler, at p. 99; Honsberger and DaRe, at p. 332; Wood, at pp. 101-2). In considering whether to grant equitable set-off, courts "look at the connection between debts that are sought to be set off against each other. If the connection between the debts is such that it would be unfair or inequitable to stand without set-off, then the courts will permit it" (Honsberger and DaRe, at p. 332 (footnote omitted); see also McElcheran, at p. 44; Judge and Grottenthaler, at pp. 113-14; Palmer, at p. 5; Wood, at pp. 101-2). "Equitable set-off is available if the transactions or dealings are so inseparably connected that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim" (Wood, at p. 102).

[92] The leading case on equitable set-off in Canada is this Court's decision in *Holt*, in which Wilson J. affirmed the following summary of the principles governing equitable set-off:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands . . . .
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed . . . .
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim . . . .
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract . . . .
>
> 5. Unliquidated claims are on the same footing as liquidated claims . . . . [Citations omitted.]
>
> (*Holt*, at p. 212, citing *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] 6 W.W.R. 14 (B.C.C.A.), at p. 22, per Macfarlane J.A.)

[93] Canadian courts have recognized a judicial discretion to disallow a defence of equitable set-off when the party invoking the defence does not have "clean hands" or is tainted by some other form of inequity (Palmer, at pp. 66-67; see also *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, 395 D.L.R. (4th) 529, at para. 98; *Stewart v. Bardsley*, 2014 NSCA 106, 353 N.S.R. (2d) 284, at paras. 58-59 and 61). This is because "Courts of Equity do not permit parties to gain advantages that accrue to them solely through their own default" (Palmer, at p. 67, citing *Re Jason Construction Ltd.* (1972), 29 D.L.R. (3d) 623 (Alta. S.C. (App. Div.)), at p. 628, per Johnson J.A.). To seek equity's assistance, "[t]he plaintiff must not only

be prepared now to do what is right and fair, but he must also show that his past record in the transaction is clean; for 'he who has committed inequity . . . shall not have Equity'" (Palmer, at p. 66, citing *Snell's Principles of Equity* (28th ed. 1982), by P. V. Baker and P. St. J. Langan, at pp. 32-33). It is also settled that the iniquitous conduct must have an "immediate and necessary relation" to the particular transaction at issue, such that it would be "unjust" to grant relief in light of the conduct; the claimant's general depravity, for instance, is irrelevant (*Snell's Equity* (34th ed. 2020), by J. McGhee and S. Elliott, at p. 96; I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014), at p. 254; see also *Stewart*, at paras. 62 and 65; *DeJesus v. Sharif*, 2010 BCCA 121, 284 B.C.A.C. 244, at paras. 85-86).

[94] Courts have refused to allow equitable set-off in a wide range of circumstances. Examples include when the claimant abused a position of trust within a corporation or was otherwise guilty of corporate misfeasance; wrongfully retained funds or failed to disburse them in contravention of an agreement; or waived payment of their claim (see Palmer, at pp. 67-71). The circumstances in which courts will deny equitable set-off are not "closed or well defined, as undoubtedly the capacity for defendants to act inequitably will continue to grow over time" (p. 67).

(2) The Trial Judge Did Not Err in Denying Equitable Set-Off

[95] The trial judge was correct to deny the appellants' claim for equitable set-off on the basis that they did not come to court with clean hands.

[96] Although the trial judge accepted that the appellants were not aware they were involved with a fraudulent Ponzi scheme, she nevertheless concluded that they "all knew, or should have known, that they were entering into illegal agreements" (para. 484). She found that the "evidence of the parties' interactions shows that they did not conduct themselves in a manner consistent with above-board commercial dealings", such as by failing to undertake basic due diligence and ignoring several red flags in entering into the investment contracts with Golden Oaks (para. 509; see also para. 494). She also found the appellants were unjustly enriched by the payment of the illegal interest on the promissory notes (para. 514).

[97] In essence, the appellants did not come to court with clean hands because their wrongful conduct was at the heart of their claim for set-off, thus disentitling them from the benefit of the defence of equitable set-off (see *Strellson AG v. Strellmax Ltd.*, 2018 ONSC 1808, 62 C.B.R. (6th) 328, at para. 43). This is a sufficient basis to dismiss this ground of appeal.

[98] In view of this conclusion, it is not necessary to address the appellants' second argument, that courts should apply the principles of equitable set-off under s. 97(3) of the *BIA* without considering whether a set-off would give the claimant a priority over other creditors.

[99] I nevertheless acknowledge that some cases appear to suggest that a court may consider, as part of the equities, the effect of allowing an equitable set-off on other creditors (see *King Insurance*, at para. 21; *Canada Trustco Mortgage Co. v. Sugarman*

(1999), 179 D.L.R. (4th) 548 (Ont. C.A.), at para. 24). Both the appellants and the intervener the Insolvency Institute of Canada argue that these cases conflict with s. 97(3) of the *BIA* and this Court's decision in *Husky Oil*. Since I have concluded that this important question of law does not affect the outcome in this appeal, I would leave it for consideration on another day (see *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 6).

(3) Conclusion

[100] The appellants were not entitled to claim equitable set-off.

C. *Were the Referral Agreements Illegal Contracts at Common Law?*

[101] The appellants Mr. Scott, Judy McKenna, Mark McKenna, Susan McKillip, and 1531425 Ontario Inc. contend that the Court of Appeal erred in concluding that their referral agreements with Golden Oaks were illegal contracts at common law. They argue that the trustee did not plead or argue common law illegality at trial and hence this issue was not properly before the Court of Appeal. They also say that the Court of Appeal erred in how it applied the illegality doctrine. They claim that they did not know that the referral agreements were illegal contracts and that they were less blameworthy than Golden Oaks. They therefore say that they should have been allowed to retain the commissions under their referral agreements.

[102] I do not accept these submissions. Based on my review of the record, the trustee pleaded and argued at first instance that the referral agreements were illegal contracts at common law. Although the trial judge erred by failing to address common law illegality, the Court of Appeal considered and correctly dismissed this argument.

(1) The Trustee Pleaded and Argued Common Law Illegality at Trial

[103] I see no merit in the appellants' argument that the trustee did not plead or argue at trial that the referral agreements were illegal contracts at common law.

[104] The trustee pleaded and argued that the referral agreements were illegal contracts contrary to the *Securities Act*, and the trial judge rejected this argument. This conclusion was not appealed to the Court of Appeal and is not before this Court.

[105] The trustee also pleaded and argued that the referral agreements were illegal contracts at common law. Each of the trustee's statements of claim pleaded that the commissions received under the referral agreements were "unlawful and contrary to the *Ontario Securities Act*" (see A.R., vol. II, at p. 9; A.R., vol. III, at pp. 54, 109 and 218 (emphasis added)). At trial, the trustee continued to rely on common law illegality, arguing that the referral agreements were "all illegal contracts with a criminal purpose that [were] all void ab initio" (Road Map of Issues and Law of Doyle Salewski Inc., at paras. 43-44, reproduced in appellants' book of authorities, at p. 25 (emphasis added)).

[106] The trial judge herself noted that the trustee argued both common law and statutory illegality. The trustee's first argument was that the referral agreements were "contracts with a criminal purpose; that is, the operation of a fraudulent Ponzi scheme" (para. 535); its second argument was that the appellants were engaged in the unlicensed sale of promissory notes, which met the definition of a "security" and was therefore contrary to the *Securities Act*. The trial judge rejected the second argument, but did not address the first (see C.A. decision, at para. 83). As the Court of Appeal noted, this was an error of law. Common law illegality was also fully argued before the Court of Appeal.

(2) <u>The Court of Appeal Correctly Held That the Referral Agreements Were Illegal Contracts at Common Law</u>

[107] Nor do I see any basis to impugn the Court of Appeal's conclusion that the referral agreements were illegal contracts at common law.

(a) *General Principles of Contractual Illegality*

[108] A contract may be unenforceable because of illegality if it is contrary to statute (statutory illegality) or void at common law on grounds of public policy (common law illegality) (S. M. Waddams, *The Law of Contracts* (8th ed. 2022), at p. 393; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 361; J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 500-502 and 544-46; A. Swan,

J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 1079 and 1112; G. R. Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020), at pp. 171-72).

[109] The doctrine of illegality is sometimes expressed in the Latin maxim *ex turpi causa non oritur actio*, which means that "from an immoral consideration an action does not arise" (*Black's Law Dictionary* (11th ed. 2019), at p. 732; A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at pp. 173-74; *Holman v. Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120, at p. 1121; *Hall v. Hebert*, [1993] 2 S.C.R. 159, at p. 175 ("a plaintiff will not be allowed to profit from his or her wrongdoing")). This doctrine seeks to maintain the "integrity of the legal system" by ensuring that illegal conduct is treated consistently across the justice system, so that courts do not "punish conduct with the one hand while rewarding it with the other" (*Hall*, at p. 176, per McLachlin J., as she then was).

[110] A contract may be found illegal in one of two ways. First, a contract may be illegal *per se* if the "performance of the contract violates a statutory or common law prohibition" (*Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2020 BCCA 130, 35 B.C.L.R. (6th) 326, at para. 47; see also *Zimmermann v. Letkeman*, [1978] 1 S.C.R. 1097, at p. 1101, citing *Alexander v. Rayson*, [1936] 1 K.B. 169 (C.A.), at p. 182). For example, a contract may be illegal *per se* if it contains an agreement to do an act or for a consideration that is illegal, immoral, or contrary to public policy (*Zimmermann*, at p. 1101).

[111] Second, even if a contract is not illegal *per se*, it may still be unenforceable if it "was entered into, at least in part, with the object of committing an illegal act. Enforcement of such a contract may be so tainted with illegality that a court is entitled to refuse to enforce it" (*Youyi Group*, at para. 48; see also *Zimmermann*, at p. 1101). Whether a contract was entered into with the object of committing an illegal act is a question of contractual interpretation that is evaluated objectively from the perspective of a reasonable person (Hall, at pp. 57-63; P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at pp. 112-17).

(b) *Application to This Case*

[112] The appellants assert that the Court of Appeal applied the doctrine of common law illegality incorrectly. They claim they did not know that the illegal purpose of the referral agreements was to perpetuate a Ponzi scheme when they entered into these agreements and hence the agreements provided a "juristic reason" for the commissions they received from Golden Oaks. This juristic reason, they say, defeats the trustee's unjust enrichment claims.

[113] I disagree. Even assuming, without deciding, that the referral agreements were not illegal *per se*, the Court of Appeal concluded that the referral agreements were tainted with illegality (para. 83). This conclusion is entirely consistent with the trial judge's finding that the appellants were not aware they were involved in a fraudulent Ponzi scheme (para. 494). The appellants' lack of *subjective* knowledge of illegality does not defeat the trustee's illegality argument, because the question of whether a

contract was entered into at least in part with the purpose of committing an illegal act is examined from the *objective* standpoint of a reasonable person.

[114] In this case, each appellant that earned referral commissions *also* lent money to Golden Oaks under one or more promissory notes and received illegal interest as part of the Ponzi scheme (S.C.J. decision, at para. 95). The trial judge found as fact that the appellants, as lenders to Golden Oaks, "all knew, or should have known, that they were entering into illegal agreements" (para. 484). Although this finding relates specifically to the payment of illegal interest, it also bears on the appellants' referral agreements, under which they agreed to recruit new investors to lend money to Golden Oaks at a criminal rate of interest in order to perpetuate the Ponzi scheme. The purpose of the referral agreements was, at least in part, to induce others to enter into the illegal loan agreements, a purpose that is contrary to public policy at common law (see McCamus, at p. 503; Waddams, at p. 396; Swan, Adamski and Na, at pp. 1083-84; Fridman, at p. 364). In such a case, a court is entitled to refuse to enforce the contracts. I therefore agree with the Court of Appeal that the referral agreements were illegal contracts at common law and hence could not provide a juristic reason to justify the commission payments.

[115] The appellants also argue that the Court of Appeal did not consider whether the appellants could assert that they were not *in pari delicto* to defeat the trustee's unjust enrichment claim. The appellants submit that they were less blameworthy than Golden

Oaks and should not have to pay the estate of Golden Oaks what they received under the referral agreements. I would not give effect to this submission.

[116] As part of the illegality doctrine, the Latin maxim *in pari delicto, potior est conditio defendentis* ("in a case of equal fault, the position of the defending party is the better one") addresses the allocation of fault between parties and provides that, in a case of equal fault, the defendant's position is stronger (Mayrand, at pp. 240-41; *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347, at pp. 410-11; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 475-77; Waddams, at pp. 408-11; Fridman, at p. 414; McCamus, at pp. 546-56; Swan, Adamski and Na, at pp. 1102-3; L. Caylor and M. S. Kenney, "*In Pari Delicto* and *Ex Turpi Causa*: The Defence of Illegality — Approaches Taken in England and Wales, Canada and the US" (2017), 18 *B.L.I.* 259, at p. 260).

[117] The law also recognizes that a plaintiff may recover, notwithstanding illegality, if the plaintiff is less blameworthy than the defendant (or not *in pari delicto*) (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2nd ed. 2022), at p. 1152). The purpose of this rule is to avoid the injustice of allowing a defendant to be unjustly enriched by their wrongful conduct when they are more blameworthy than the plaintiff (pp. 1150 and 2257; McCamus, at pp. 546-47 and 552-54; Waddams, at p. 408).

[118] Assuming, without deciding, that the appellants *as defendants* can argue that they were not *in pari delicto* with Golden Oaks in order to *enforce* their illegal

referral agreements and *retain* the commissions they received, rather than simply to seek *restitution* of payments made under their illegal agreements, this rule does not assist the appellants. It cannot be said that the appellants were less blameworthy than Golden Oaks, unless Golden Oaks is first attributed with Mr. Lacasse's knowledge under the corporate attribution doctrine.

[119] I would decline to attribute Mr. Lacasse's knowledge to Golden Oaks in the circumstances. As already noted, I accept that Mr. Lacasse was the directing mind of Golden Oaks and that neither the fraud nor the no benefit exception to corporate attribution applies. Even so, courts have discretion to decline to attribute the knowledge of the directing mind to a corporation when attribution would not promote the public interest, in the sense that it would not promote the purpose of the law under which attribution is sought. In this case, attributing Mr. Lacasse's knowledge to Golden Oaks would not promote the purpose of either the *BIA* or the rule that a party who is less at fault should be entitled to recover under an illegal contract. Attribution would reduce the value of the estate available for distribution to creditors, thereby undermining the purpose of the *BIA*. Attribution would also allow the appellants to be unjustly enriched by retaining the proceeds of their wrongful conduct, thereby undermining the purpose of the illegality doctrine.

[120] The consequence of declining to attribute Mr. Lacasse's knowledge to Golden Oaks is that the appellants cannot be said to be less blameworthy than Golden

Oaks so as to allow them to retain the commissions they received under their illegal referral agreements.

(3) <u>Conclusion</u>

[121] I see no error in the Court of Appeal's conclusions regarding the doctrine of common law illegality.

D. *Were Mr. Scott and Golden Oaks Not Dealing at Arm's Length for the Purpose of Section 95(1)(b) of the BIA?*

[122] Finally, the appellant Mr. Scott argues that the trial judge erred in concluding that he and Golden Oaks were not dealing at arm's length when Golden Oaks paid him commissions under their referral agreement and interest on his loans in the year before Golden Oaks' bankruptcy. If these payments were not at arm's length, they would constitute unlawful preferences and would be void as against the trustee and recoverable under s. 95(1)(b) of the *BIA*.

[123] Mr. Scott claims that the trial judge and Court of Appeal erred in law by focussing on his relationship with Golden Oaks "writ large", as its real estate agent, rather than focussing on the specific transactions at issue (A.F., at para. 122). He says that the trial judge's own factual findings show that he and Golden Oaks "were in an adversarial relationship and acting in their own interests with respect to the impugned transactions" (para. 122).

[124] I would reject this argument. I first set out the approach to non-arm's length dealing under s. 95(1)(b) of the *BIA*, and then address why the trial judge made no reviewable error.

(1) General Principles of Non-Arm's Length Dealing Under Section 95(1)(b) of the *BIA*

[125] Preferences occur when a debtor with insufficient assets to satisfy all its creditors pays one creditor preferentially over other creditors. Such payments are unfair because they undermine the scheme of distribution that would otherwise prevail in bankruptcy (Wood, at pp. 205-6; Honsberger and DaRe, at p. 375). Section 95(1)(b) of the *BIA* provides that transactions that have the effect of giving one creditor a preference over other creditors are void as against the trustee when they involve a non-arm's length creditor within a specified period of time surrounding the bankruptcy. Section 95(1)(b) provides:

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> . . .
>
> **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(See also Wood, at p. 215; Honsberger and DaRe, at p. 387.)

[126] The *BIA* does not define an arm's length transaction. It does, however, stipulate that "[i]t is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length" (s. 4(4)). A finding of non-arm's length dealing attracts a high level of appellate deference and is reviewable only for palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36).

[127] Courts generally examine the following criteria in determining whether unrelated persons are dealing at arm's length: (i) whether there was a common mind that directed the bargaining for both parties to a transaction; (ii) whether the parties to a transaction were acting in concert without separate interests; and (iii) whether there was *de facto* control (*Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 43 and 62; *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th) 169, at para. 68, citing *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 86 Alta. L.R. (5th) 203, at para. 29; Wood, at pp. 204-5).

(2) The Trial Judge Did Not Err in Finding Non-Arm's Length Dealing

[128] The trial judge correctly addressed the question of non-arm's length dealing under s. 95(1)(b) of the *BIA*. I agree with the Court of Appeal that although the trial judge was required to focus on the transactions at issue between Golden Oaks and Mr. Scott, it was appropriate for her to consider these transactions in the overall context of the parties' relationship, including the Ponzi scheme that these transactions facilitated and Mr. Scott's role in that scheme. In *McLarty*, this Court rejected a

“restrictive approach” under which a trial judge could examine only an impugned transaction, but not the parties’ relationship at any other time or the facts relating to any other transaction (para. 65). Likewise, here, the trial judge was entitled to consider the totality of the evidence in determining whether parties were dealing at arm’s length (see *National Telecommunications Inc., Re*, 2017 ONSC 1475, 45 C.B.R. (6th) 181, at para. 48; *National Telecommunications v. Stalt*, 2018 ONSC 1101, 59 C.B.R. (6th) 263, at para. 41).

[129] I also see no palpable and overriding error in the trial judge’s findings that Mr. Scott and Golden Oaks were not dealing at arm’s length and were acting in concert under Mr. Lacasse’s direction to perpetuate the Ponzi scheme. The trial judge found that Mr. Scott participated in Golden Oaks’ operations in 2012 and regularly represented the company or acted on its behalf. She also found that Mr. Scott knew that he was helping to prop up a Ponzi scheme. She quoted text messages from Mr. Scott to another real estate agent in which he described Golden Oaks as a “pyramid”, “Ponzie [*sic*] like”, and “a house of cards” (para. 319). Mr. Scott understood, to quote his own words, that if “[o]ne day investors stop, the whole house of cards would collapse” (para. 319 (emphasis deleted)).

[130] The trial judge’s factual and credibility findings were extensive. She rejected most of Mr. Scott’s evidence, noting that he “was not in any way a credible witness”, and concluding that “[h]is account of his involvement with Lacasse and Golden Oaks in his affidavits was manifestly untrue” (para. 276). She found that he

"lied to the court" (para. 276), and highlighted "gross inconsistencies" between his evidence and other evidence that she found credible (para. 291). As a result, the trial judge said she gave "no weight to any of Scott's testimony", unless it was corroborated by other evidence that she did accept (para. 291). I see no basis for this Court to intervene with any of these findings.

(3) Conclusion

[131] The trial judge had ample basis in the record to find as fact that Mr. Scott and Golden Oaks were not acting at arm's length in the impugned transactions.

VI. Disposition

[132] I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. —

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I. Introduction

[133] I agree that the claims in unjust enrichment brought by the respondent trustee in bankruptcy, Doyle Salewski Inc., against the appellant investors are not time-barred by the two-year limitation period set out in s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. However, I reach this conclusion for different reasons than my colleague.

[134] With respect, the main question raised by this appeal is not "how the common law doctrine of corporate attribution should be applied to a 'one-person' corporation" (majority reasons, at para. 1). Rather, the relevant question is the following: Are the trustee's claims in unjust enrichment against the appellants time-barred? As I will explain, there is no need to resort to the corporate attribution doctrine to answer this question — be it in connection with a one-person corporation or a different type of corporation. This is especially so given that, as the appellants contend and as my colleague states, "the same principles apply to one-person

corporations" as to other types of corporations (see majority reasons, at paras. 9, 65 and 71; A.F., at para. 1).

[135] Furthermore, I agree with my colleague and the courts below that the appellants are not entitled to set off the interest payments they were ordered to repay to the bankruptcy estate of Golden Oaks Enterprises Inc. ("Golden Oaks") against the outstanding principal of their loans to Golden Oaks pursuant to s. 97(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). However, in my view, and with respect, the trial judge erred in considering the effect of preferring one creditor over the general body of creditors as part of her set-off analysis.

[136] Indeed, through s. 97(3), Parliament has indicated that set-off in insolvency must be considered "in the same manner and to the same extent" as it would outside of the insolvency context. In this way, Parliament has given its "blessing for the 'reordering' of [a claimant's] priority in bankruptcy by virtue of the operation of the law of set-off" (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 60).

[137] Finally, my colleague addresses two other issues in his reasons: first, whether the referral agreements between some of the appellants and Golden Oaks were illegal contracts at common law; and second, whether the appellant Mr. Scott was dealing at arm's length with Golden Oaks under s. 95(1)(b) of the *BIA*. I am in agreement with his disposition of those two issues.

II. Analysis

[138] The trustee brought numerous actions in which it asserted claims in unjust enrichment and sought repayment of usurious interest payments and commission payments that Golden Oaks made to the investor appellants. The trustee suggested that there was no juristic reason for the payments that flowed to the appellants, as they were based on illegal contracts. In the trustee's view, those payments "were made to the deprivation of the company and the enrichment of the [appellants]" (2019 ONSC 5108, 76 C.B.R. (6th) 3 ("S.C.J. reasons"), at para. 391). The trustee maintained that Golden Oaks could not have sued the appellants for unjust enrichment given that Joseph Gilles Jean Claude Lacasse controlled Golden Oaks and was using it for a Ponzi scheme. On the other hand, the appellants argued that the claims could have been commenced at any time before the receivership and bankruptcy. They suggested that the trustee's rights were no greater or lesser than the rights of the bankrupt corporation. In the appellants' opinion, resorting to the corporate attribution doctrine would be superfluous (A.F., at para. 71). As for the respondent trustee, it "contends that the doctrine does not apply" in this context (S.C.J. reasons, at para. 408).

[139] The trustee's claims in unjust enrichment were subject to a two-year limitation period pursuant to s. 4 of the *Limitations Act, 2002*. According to the Act, that limitation period began when the bankrupt first knew or ought to have known of its claims (see s. 12). The appellants argued that the limitation period had expired and that the claims were therefore barred as they were brought more than two years after

the payment of illegal interest and commissions. The question of whether the trustee's claims are time-barred is now before our Court.

[140] Whether the trustee's claims in unjust enrichment are time-barred hinges on when the claims were discovered. Section 5(1) of the *Limitations Act, 2002* sets out the principles of discoverability and indicates that a claim is discovered once certain criteria are met:

> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[141] Once again, the trustee brought the claims in unjust enrichment against the appellants. The question at issue is therefore as follows: When did the trustee, as the person with the claims, first know of the facts giving rise to them?

A. *In What Capacity Did the Trustee Bring the Claims in Unjust Enrichment?*

[142] I am of the opinion that, as my colleague states at para. 56 of his reasons, the trial judge correctly held that the trustee asserted the claims in unjust enrichment as a successor in interest to Golden Oaks (S.C.J. reasons, at para. 396). The *BIA* establishes that the trustee is the successor in interest to Golden Oaks, the bankrupt. On bankruptcy, a bankrupt ceases to have any capacity to dispose of or deal with its property, which immediately passes to and vests in the trustee (*BIA*, s. 71). The bankrupt's property includes any cause of action the bankrupt may have (*BIA*, s. 2). As stated in s. 30(1)(d) of the *BIA*, the trustee may, with the permission of inspectors, "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt". When this occurs, the trustee has no greater or lesser rights than the bankrupt corporation. Rather, "[t]he trustee simply steps into the shoes" of the bankrupt corporation, accepting it "warts and all" (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 50).

[143] Section 12(1) of the *Limitations Act, 2002* establishes that when a successor in interest commences a proceeding, the successor shall be deemed to have the predecessor's knowledge:

> **12** (1) For the purpose of clause 5(1)(a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the person shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:
>
> 1. The day the predecessor first knew or ought to have known of those matters.

2. The day the person claiming first knew or ought to have known of them.

[144] Therefore, pursuant to s. 12(1), as the successor in interest bringing these claims, the trustee is deemed to have Golden Oaks' knowledge. The question then becomes: When did Golden Oaks discover the claims in unjust enrichment? To answer this question, my colleague asserts that we must apply the common law doctrine of corporate attribution. With respect, I disagree for the reasons explained below. Furthermore, I am of the view that unlike the companion case, *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, the present appeal does not require us to resort to the common law by way of the corporate attribution doctrine given that codified rules of attribution exist and are sufficient to dispose of this appeal. The distinction between the two cases can be found in the different types of recourse sought. In *Aquino*, the trustee brought its claims under s. 96 of the *BIA* in its representative capacity. The circumstances in the instant appeal are such that the trustee is acting as a successor in interest; it has stepped into the shoes of Golden Oaks.

B. *The Common Law Doctrine of Corporate Attribution Is Reserved for Exceptional Cases*

[145] Having found that the trustee is deemed to have Golden Oaks' knowledge, I must now turn to the question of when Golden Oaks came to discover this knowledge. My colleague contends the answer to this question lies in the common law doctrine of corporate attribution. Respectfully, I do not agree, because that doctrine, as I will

explain, is reserved for exceptional cases. In my view, this is not such an exceptional case, as the question of discoverability can be answered using the codified rules of attribution, which include the general principles of agency.

[146] A corporation is an abstraction and, as such, has no will or mind of its own; "[i]t is incapable itself of doing any physical act or being in any state of mind" (*Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.), at p. 198). Therefore, it is "a necessary part of corporate personality that there should be rules by which acts are attributed to the company" (*Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 A.C. 500 (P.C.), at p. 506). These rules "tell one what acts . . . count as acts of the company" (*ibid.*). As a result, "[a]ny statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary [or] general) as they apply to that company" (*ibid.*).

[147] A corporation's primary rules of attribution are generally found in its corporate constitution. Directors, and sometimes shareholders, normally derive their authority to act from procedures established by statute or by the company's constitutional documents (P. Watts and F. M. B. Reynolds, *Bowstead and Reynolds on Agency* (23rd ed. 2024), at pp. 26-27). For example, the articles of association may specify that a majority vote of shareholders shall be a decision of the company (*Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11, 128 O.R. (3d) 225 ("*Livent CA*"), at para. 83, citing *Meridian*, at p. 506, rev'd in part on other grounds 2017 SCC 63, [2017] 2 S.C.R. 855 ("*Livent SCC*")). However, "[t]here are also primary rules of

attribution found in business law and general rules of attribution — such as agency law" (*Livent CA*, at para. 83; see also G. H. L. Fridman, *Canadian Agency Law* (3rd ed. 2017), at §11.1).

[148] The practical realities of operating a business preclude a corporation from having all of its decisions confirmed by a resolution of the board of directors or a unanimous decision of the shareholders. As a result, a corporation appoints agents, whose acts count as acts of the company:

> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.
>
> (*Meridian*, at p. 506)

[149] The primary rules of attribution are complemented by general rules grounded in business law, as explained by Lord Hoffman in *Meridian*: "The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer" (p. 507 (emphasis added)).

[150] Peter Watts and F. M. B. Reynolds echo a sentiment similar to that of Lord Hoffman, indicating that resort to the corporate attribution doctrine is reserved for unusual cases:

> In construing statutes, contracts, or other documents intended to have legal effect, it will frequently be necessary to consider how the text applies to the owners of businesses who rely on agents to run the business, as all companies must. Usually, there will be little difficulty in assuming that the drafter intended the acts, omissions, and states of mind of appropriate agents to be attributed to the owner. [Emphasis added; p. 28.]

[151] Even though "[t]he question of whether knowledge possessed by a corporate officer should be attributed back to his or her corporation is complex, [i]f the officer in question is the effective directing mind of the corporation, then any knowledge acquired by the officer will normally be so attributed back" (K. P. McGuinness and M. Coombs, *Canadian Business Corporations Law* (4th ed. 2023), at ¶9-74, fn. 147, citing *El Ajou v. Dollar Land Holdings plc*, [1994] 1 B.C.L.C. 464 (C.A.)).

[152] In my view, the facts of the present case do not fall into the class of "exceptional cases" referred to in *Meridian*. Rather, in this case, the rules of attribution — and specifically the codified principles of agency — provide an adequate answer, and the corporate attribution doctrine therefore need not be applied (see *Meridian*, at p. 507).

[153] I would also note that to employ the corporate attribution doctrine is to actively attribute the intent or knowledge of a corporation's directing mind to the corporation (see *Livent SCC*). As my colleague states, the doctrine provides the rules that govern when actions, knowledge, state of mind or intent *may be attributed* to the corporation (majority reasons, at para. 62). While courts have discretion to refrain from applying the doctrine, the application of the doctrine, by definition, involves *attributing* or imputing something to the corporation when there is no other means to reach that result. That is not the situation here, as a codified means of attribution exists and therefore precludes the application of the doctrine on the basis of the principle that the common law should not displace the will of a legislature expressed in a statute.

[154] With respect, it is not necessary to apply the corporate attribution doctrine because the codified rules at issue in the present appeal provide a complete answer and take precedence over the common law doctrine. The common law doctrine should be invoked only where the codified rules are inapplicable.

C. *Mr. Lacasse Was Golden Oaks' Agent Through the General Principles of Agency*

(1) Agency Law and Corporations

[155] The notion that corporations "primarily operate through the concept of agency dates back at least as far as *Yarborough v Governor and Company of The Bank of England* (1812) 16 East 6 at 7" (Watts and Reynolds, at p. 26, fn. 171; see also McGuinness and Coombs, at ¶9-80). The principles of agency apply equally to

corporations (as mere legal abstractions) and to natural persons: ". . . the physical acts and state of mind of the agent are in law ascribed to the principal" in the same way (*Tesco Supermarkets*, at p. 199, cited in Watts and Reynolds, at p. 25).

[156] It is true that "the rules by which the acts and states of mind of agents are attributed to their principals must remain sensitive to the legal question that is engaged by the facts" (Watts and Reynolds, at pp. 25-26). At common law, an agent's knowledge will not always be imputed to the principal; whether or not a company is fixed with the knowledge acquired by an agent will depend on the circumstances (*R. v. Rozeik*, [1996] 1 B.C.L.C. 380 (C.A.), at p. 385; see also Watts and Reynolds, at p. 588).

[157] The relevant considerations in determining whether an agent's knowledge is to be imputed to the principal include "(1) the position of the agent in relation to the principal and whether the agent had a wide or narrow sphere of operations, and (2) the position of the agent in relation to the relevant transaction and whether he represented the principal in respect of that transaction" (McGuinness and Coombs, at ¶9-74, fn. 147, citing *Regina Fur Co. v. Bossom*, [1957] 2 Lloyd's Rep. 466 (Q.B.D.), at p. 484).

[158] It is therefore necessary to "establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated

as the company itself" (*R. v. Andrews-Weatherfoil Ltd.*, [1972] 1 W.L.R. 118 (C.A.), at p. 124).

[159] An agent "who acts for the company within the scope of his employment will usually bind the company since he *is* the company for the purpose of the transaction in question" (*Rozeik*, at p. 385 (emphasis in original)). However, different considerations apply where an agent obtains information privately or is guilty of a wrong against the company (McGuinness and Coombs, at ¶9-74, fn. 147). A flexible approach must be adopted in imputing an agent's knowledge to a principal, since in circumstances "where an agent has acted in breach of duty to the principal, the law needs to preclude the agent and parties associated with him from asserting that they cannot be sued by the principal because the principal must be deemed to know what the miscreant agent knew" (Watts and Reynolds, at p. 590).

[160] In *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, [2002] 4 S.C.R. 312, our Court considered whether 373409 Alberta Ltd. had authorized the Bank of Montreal to deposit the proceeds of a cheque into a particular account. As noted by Blair J.A. in *Livent CA*, that case "depended on the 'primary rules' of attribution in corporate law, where the actions of the sole shareholder and director are attributed to the corporation" (para. 110). Our Court held that because Douglas Lakusta, the sole owner of 373409, had instructed the Bank to deposit the proceeds into the account as it did, 373409 had authorized the act. Writing for the Court, Major J. reasoned as follows:

> There can be no doubt that Lakusta's act of directing the Bank to deposit the proceeds of the cheque into Legacy's account can be attributed to and considered authorized by 373409. See *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), per Viscount Haldane L.C., at p. 713:
>
>> . . . a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself. . . .
>
> Here, Lakusta was the sole shareholder, director, and officer of 373409. He was the only person capable of acting as the corporation's directing mind, and he formed the entire "ego" and "personality" of the corporation. In his capacity as sole shareholder and director of the corporation, he had the full capacity to delegate authority to the corporation's agents. He was the sole officer of the corporation, and its only agent. Consequently, any act which he undertook as 373409's agent must be deemed authorized by the corporation. The only conclusion available on the evidence was that Lakusta, *qua* shareholder and director, authorized Lakusta, *qua* officer, to deposit 373409's funds into Legacy's account. [paras. 19-20]

[161] Resort to the corporate attribution doctrine was not necessary in *373409 Alberta Ltd.* The case cited in relation to that doctrine "was only used to explain why the wrongfulness of Lakusta's actions with respect to the creditors did not prevent his actions from being attributed to the corporation for the purpose of determining whether the bank was authorized to deal with the cheque" (*Livent CA*, at para. 110, citing *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662). The actions in question were instead attributed to the corporation on principles of agency (para. 111).

[162] The principles outlined above make it clear that corporations must act through agents. The assessment of whether knowledge possessed by an agent should be attributed to the corporate principal is context-specific. However, when the agent in question is the effective directing mind of the corporation, the knowledge acquired by the agent will normally be attributed back to the principal (McGuinness and Coombs, at ¶9-74, fn. 147). With this in mind, I will now consider whether Mr. Lacasse was acting as Golden Oaks' agent and, if so, whether his knowledge ought to be attributed to Golden Oaks through the principles of agency.

(2) <u>Mr. Lacasse Was Golden Oaks' Agent</u>

[163] Mr. Lacasse founded and operated Golden Oaks (S.C.J. reasons, at para. 2). The trial judge concluded that Mr. Lacasse was "the only officer of Golden Oaks and the only person with complete insight into its operations and finances" (para. 78; see also para. 55). Golden Oaks was "under Lacasse's direction" and was "controlled solely by Lacasse" (paras. 363 and 421). At trial, "[t]here [was] no evidence that anyone had the means to challenge [Mr. Lacasse's] control of [Golden Oaks]" (para. 421).

[164] There can be no doubt that Mr. Lacasse's knowledge of the impugned promissory notes and commission payments "can be attributed to and considered authorized by" Golden Oaks (see *373409 Alberta Ltd.*, at para. 19; see also McGuinness and Coombs, at ¶9-74, fn. 147). I arrive at this conclusion based on the trial judge's findings and the principle that if the agent in question is effectively the

directing mind of the corporation, then any knowledge acquired by the agent in that capacity will be imputed to the principal.

[165] Pursuant to the principles of agency, Mr. Lacasse's knowledge of the Ponzi scheme, including of the impugned promissory notes and commission payments, is attributable to Golden Oaks. As in other cases where "any knowledge acquired by the officer will normally be . . . attributed back [to the corporate principal]", attributing the knowledge of Mr. Lacasse, as agent, back to Golden Oaks is consistent with a typical application of the principles of agency (McGuinness and Coombs, at ¶9-74, fn. 147, citing *El Ajou*).

[166] The trustee asserts that the common law principles of agency include an exception for situations where an agent is guilty of fraud or misfeasance vis-à-vis the corporation (R.F., at para. 34, citing Fridman, at §10.6). Even accepting that, the exception does not apply here for two reasons.

[167] First, while the trial judge found that "[t]hrough Golden Oaks, Lacasse operated a Ponzi scheme [that] was built on fraudulent misrepresentations about how money lent to Golden Oaks would be used" (para. 474), this finding does not mean that Mr. Lacasse, as agent, committed fraud against the principal, Golden Oaks. This is because, in operating this scheme, Mr. Lacasse did not act in breach of his duties to Golden Oaks. Rather, Golden Oaks and Mr. Lacasse were one and the same. Mr. Lacasse was the sole officer and director of Golden Oaks. He was the effective directing mind of the corporation. Throughout the Ponzi scheme, he was acting within

the scope of the authority granted to him by Golden Oaks. In other words, Mr. Lacasse represented Golden Oaks and did not act privately or of his own accord. As held by the trial judge, both Mr. Lacasse and Golden Oaks benefitted from his actions (at para. 412), thereby negating any fraud exception to the common law principles of agency. Second, this exception would not apply because reliance on the common law principles of agency is not required in order to decide this matter, as the legislature has codified the deeming rules of agency in s. 12 of the *Limitations Act, 2002*.

[168] Similarly, with respect for my colleague's contrary assertion, it is neither appropriate nor necessary to resort to the corporate attribution doctrine to determine whether Mr. Lacasse's knowledge ought to be imputed to Golden Oaks. In my view, s. 12 of the *Limitations Act, 2002* provides a complete answer (see A.F., at para. 21). Indeed, s. 12(2) provides that the principal "shall be deemed to have knowledge" of the matters referred to in s. 5(1)(a) where the agent was duty-bound to communicate knowledge of those matters to the principal. Under the law of agency, Mr. Lacasse's knowledge was that of Golden Oaks throughout the Ponzi scheme. Golden Oaks therefore had knowledge more than two years before the actions were commenced of the payments to the appellants that gave rise to the claims in unjust enrichment.

[169] My colleague asserts that there were "insufficient findings at trial as to whether Mr. Lacasse was an agent of Golden Oaks" (majority reasons, at para. 60). Respectfully, this fails to account for the trial judge's factual finding that Mr. Lacasse's knowledge ought to be imputed to Golden Oaks on the basis that he founded and

operated Golden Oaks, he was its only officer, he was the only person with complete insight into its operations and finances, he was exercising direction and sole control over the corporation, and his control was beyond challenge by anyone (paras. 2, 55, 78, 363, 413 and 421-22). In effect, the trial judge found him to be the sole directing mind of Golden Oaks. In my view, while an agent may not always be the sole directing mind of a corporation, that is the case here. By finding Mr. Lacasse to be the corporation's sole directing mind, the trial judge effectively found him to be an agent. This finding of fact by the trial judge is owed deference. I agree with the appellants that refusing to acknowledge that Golden Oaks had knowledge of the claims in unjust enrichment, through Mr. Lacasse, "creates a fiction atop a fiction, where the corporation is divorced from its alter ego for the purposes of extending the limitations period" (A.F., at para. 77).

[170] However, this does not mark the end of the analysis on discoverability, because of the existence of s. 5(1)(a)(iv) of the *Limitations Act, 2002*. Even though Golden Oaks had the legal capacity to sue the appellants, it would not have been legally appropriate for Golden Oaks to commence proceedings. As a result, the trial judge was correct to conclude, on the basis of s. 5(1)(a)(iv) of the *Limitations Act, 2002*, that the claims were not discovered. I elaborate on this point in the section that follows.

D. *The Claims in Unjust Enrichment Were Not "Appropriate" and Therefore Not Discoverable Until the Trustee Was Authorized by the Court to Bring Them*

[171] The fact that Golden Oaks, through Mr. Lacasse, knew of the injury, loss or damage and knew that it was caused by or contributed to by the appellants is not enough to establish that the claims were discovered for the purposes of the *Limitations Act, 2002*. Section 5(1)(a)(iv) of the *Limitations Act, 2002* establishes that Golden Oaks must also have known that, "having regard to the nature of the injury, loss or damage, a proceeding would [have been] an appropriate means to seek to remedy it".

[172] Whether legal proceedings are "appropriate" is a fact-specific inquiry, such that case law applying s. 5(1)(a)(iv) is "of limited assistance" (*407 ETR Concession Co. Ltd. v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762, at para. 34; see also *Beniuk v. Leamington (Municipality)*, 2020 ONCA 238, 150 O.R. (3d) 129, at para. 60; *Nelson v. Lavoie*, 2019 ONCA 431, 47 C.C.P.B. (2nd) 1, at para. 25).

[173] Despite the "limited assistance" it provided, the trial judge referred to *Ridel v. Goldberg*, 2019 ONCA 636, 147 O.R. (3d) 23, when determining whether legal proceedings were appropriate prior to Golden Oaks' bankruptcy. In *Ridel*, shareholders of a company sued the company's director. According to the shareholders, their claim was not discoverable until the corporation was bankrupt because it would not have been appropriate for them to bring proceedings in the company's name while it was controlled by the director (para. 59). Justice van Rensburg held that it was unnecessary to consider this argument because, prior to the bankruptcy, the director did not have complete control of the company. Indeed, "the shareholders could have assumed control of [the company's] board of directors and caused [the company] to make a

claim against [the director], or they could have commenced a derivative action on [the company's] behalf" (para. 69).

[174] The critical difference between *Ridel* and the instant case is that Golden Oaks was solely controlled by Mr. Lacasse. There was no one apart from Mr. Lacasse who could have pursued the claims in unjust enrichment in Golden Oaks' name. As found by the trial judge, "[t]here is no evidence that anyone had the means to challenge [Mr. Lacasse's] control of the company" (para. 421). However, "Lacasse had no motivation to begin lawsuits on the company's behalf. On the contrary, bringing the actions would end the arrangement from which he was profiting personally and would expose the fraudulent Ponzi scheme that he had orchestrated" (*ibid.*).

[175] In my opinion, the trial judge was correct to hold that "[a]lthough Golden Oaks may have known, through Lacasse, about its dealings with the [appellants], it did not and could not have known that it would be legally appropriate for it to sue them to recover its losses so long as it was directed by Lacasse" (para. 424). When Golden Oaks became insolvent, Mr. Lacasse ceased to have unfettered control over it, and the possibility that the company could make claims in unjust enrichment actualized.

[176] As the trial judge clarified, this is not to say that receivership and bankruptcy automatically reset the limitations clock. The claims in unjust enrichment were inappropriate because Mr. Lacasse had complete control over Golden Oaks. That control could have been severed by another event: "Had Lacasse sold the company

prior to the receivership, or appointed other directors, the claims in unjust enrichment might also have become discoverable at that point" (para. 426).

[177] The trustee brought the claims in unjust enrichment giving rise to this appeal between June 23 and July 23, 2015. Doyle Salewski Inc. was appointed as receiver on July 9, 2013 (then appointed as trustee on July 26, 2013). Therefore, the claims in unjust enrichment brought between June 23 and July 9, 2015, were all brought within the limitations period.

[178] The actions that were commenced between July 10 and July 23, 2015, are time-barred unless there is a reason why it was not appropriate for the trustee to bring them as soon as the receivership order was issued. Like the trial judge, I conclude that it was not appropriate for the trustee to bring the actions until June 16, 2015, when the Ontario Superior Court issued an interim order permitting the trustee to serve the statements of claim on the appellants and to issue the actions. The insolvency process in this case was court-supervised. In such a context, it is "inappropriate for a trustee to begin legal proceedings without the authorization of the court" (S.C.J. reasons, at para. 435).

[179] Although the investments and interest payments in the Ponzi scheme were made outside of the two-year limitation period, the trustee's claims were only discoverable once the trustee was appointed and had legal authority to bring the actions. I therefore conclude that the claims in unjust enrichment are not time-barred.

E. *Section 97(3) of the BIA Expressly Permits the Reordering of Creditors*

[180] I agree with my colleague and the courts below that the appellants are not entitled to set off the interest payments they owe to Golden Oaks' estate against the principal amounts of the loans that Golden Oaks still owes them. However, on this point, I believe some clarification is in order.

[181] The trial judge provided two reasons for refusing the appellants' claim for equitable set-off. First, the appellants did not come to court with clean hands. Second, "because the effect of set-off is to prefer one creditor over the general body of creditors (inasmuch as the effect is to give the setting-off creditor a full recovery of the amount set-off), the permissible set-off [under s. 97(3)] is confined within narrow limits" (para. 550 (text in brackets in original), citing *King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc.*, 2012 ONSC 4263, 99 C.B.R. (5th) 227, at para. 21). The Court of Appeal appears to have endorsed the trial judge's statement in this respect (paras. 68-69).

[182] The appellants and the intervener the Insolvency Institute of Canada submit that the trial judge's second reason runs afoul of both s. 97(3) of the *BIA* and our Court's decision in *Husky Oil*. They assert that a court cannot disallow an otherwise valid claim for set-off because of the effect that the set-off may have on other creditors and the priority of the creditors' claims. I agree.

[183] Section 97(3) of the *BIA* is clear: "The law of set-off or compensation applies . . . in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences." As the Insolvency Institute of Canada correctly notes in its factum, "[a] faithful application of section 97(3) will no doubt place one creditor further ahead of others 'by enabling the . . . creditor to use his indebtedness to the bankrupt as a form of security.' But that result provides no license for judicial disregard of Parliament's unambiguous policy choice" (para. 6, citing *Husky Oil*, at para. 57, citing *Stein v. Blake*, [1995] 2 All E.R. 961 (H.L.), at p. 964).

[184] Our Court came to the same conclusion in *Husky Oil*. After reviewing academic commentary on permitting set-off in bankruptcy, our Court stated the following:

> While this academic debate is undoubtedly interesting, the fact remains that our Parliament has recognized in s. 97(3) of the *Bankruptcy Act* that the "law of set-off applies to all claims made against the estate of the bankrupt". As a result, in the bankruptcy context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Consequently, in this limited sense the party claiming set-off has Parliament's blessing for the "reordering" of his priority in bankruptcy by virtue of the operation of the law of set-off. [para. 60]

[185] Nothing in s. 97(3) of the *BIA* points to a residual judicial discretion to deny an otherwise valid claim for set-off on the basis of "the effect" of the set-off on other

creditors. Indeed, it is reasonable to suggest that courts should not take into account the impact of a set-off on other creditors, as they "are not without legislative direction" in this area (see I.F., Insolvency Institute of Canada, at para. 13). In fact, set-off helps prevent or mitigate another type of unfairness: ". . . making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate" (*Husky Oil*, at para. 56, citing *Lister v. Hooson*, [1908] 1 K.B. 174 (C.A.), at p. 178; see also I.F., Insolvency Institute of Canada, at paras. 11-13). Consequently, I would reiterate what our Court stated in *Husky Oil* and clarify that as long as a party's claim for set-off is otherwise valid, that party "has Parliament's blessing for the 'reordering' of his priority in bankruptcy by virtue of the operation of the law of set-off" (*Husky Oil*, at para. 60).

III. Conclusion

[186] While I agree with my colleague that the claims in unjust enrichment are not time-barred, resort to the corporate attribution doctrine is unnecessary in this case. As I have noted in these reasons, s. 12 of the *Limitations Act, 2002* provides a complete answer.

[187] Rather, during the time that Golden Oaks was solely controlled by Mr. Lacasse, claims against the individuals to whom Mr. Lacasse had Golden Oaks pay usurious interest and commission amounts were not discoverable because legal proceedings by Golden Oakes were not "an appropriate means to seek to remedy" that injury, loss or damage for the purposes of s. 5(1)(a)(iv) of the *Limitations Act, 2002*.

The claims were not discovered until the Ontario Superior Court authorized the trustee to begin the legal proceedings. The claims were therefore brought within the two-year limitation period.

[188] Finally, to the extent that their reasons can be taken to suggest that a court can disallow an otherwise valid claim for set-off under s. 97(3) of the *BIA* on account of "the effect" that the set-off may have on other creditors, the courts below were incorrect.

[189] For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

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