Citation: Winnipeg (City) v Sheegl et al, 2023 MBCA 63
Date: 20230707
Docket: AI22-30-09780

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

THE CITY OF WINNIPEG	
(Plaintiff) Respondent	
- and -	
FSS FINANCIAL SUPPORT SERVICES INC., PHIL SHEEGL, 2686814 MANITOBA LTD.	***R. L. Tapper, K.C.*** *for the Appellants*
(Defendants) Appellants	
- and -	***M. G. Finlayson*** *and* ***G. C. Lisi*** *for the Respondent*
CASPIAN PROJECTS INC., CASPIAN CONSTRUCTION INC., ARMIK BABAKHANIANS, SHAUN ANDRE BABAKHANIANS, JENIK BABAKHANIANS, TRIPLE D CONSULTING SERVICES INC., PAMELA ANDERSON, 4816774 MANITOBA LTD. operating as MOUNTAIN CONSTRUCTION, PETER GIANNUZZI, DUNMORE CORPORATION, OSSAMA ABOUZEID, ADJELEIAN ALLEN RUBELI LIMITED (also known as A.A.R.), PETER CHANG, GRC ARCHITECTS INC., PATRICK DUBUC, 8165521 CANADA LTD. operating as PHGD CONSULTING, 2316287 ONTARIO LTD. operating as PJC CONSULTING, JAGS DEVELOPMENT LTD., BROOKE HOLDINGS LTD.,	*Appeal heard:* ***January 3, 2023***
	Judgment delivered: ***July 7, 2023***

LOGISTIC HOLDINGS INC., JAW ENTERPRISES INC., ABC LTD., DEF LTD., GHI LTD., JKL LTD., JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, and JOHN DOE VIII	)
(Defendants)	)

On appeal from *Winnipeg (City) v Caspian Projects Inc et al*, 2022 MBQB 53; and 2022 MBQB 81

MAINELLA JA

Introduction

[1] The Latin expression quid pro quo means something for something. The litigation giving rise to this civil bribery appeal focused on whether an exchange was legitimate or corrupt. While the poverty of ethics on display here piques curiosity, a breach of ethics does not necessarily mean a breach of the law has occurred. Bribery is a special form of fraud that does not require a false representation, reliance or dishonesty. The heart of bribery is a secret payment that, as here, gives rise to a realistic prospect of a conflict of interest.

[2] Between 2009 and 2016, the plaintiff (the City) purchased the old Canada Post mail processing building in downtown Winnipeg and then commissioned and funded a multi-million-dollar redevelopment project for the new headquarters of the Winnipeg Police Service (the project).

[3] The project became a scandal. It was significantly delayed, there were millions of dollars in cost overruns, there were and still are concerns as to the quality of the construction and, in a sad irony, an undertaking to build the municipal police headquarters itself became the subject of a lengthy criminal corruption investigation by the RCMP known as Project Dalton.

[4] One sordid revelation of Project Dalton is that, in 2011 and 2012, the defendant, Phil Sheegl, the then chief administrative officer (the CAO) of the City, secretly received two payments—$200,000 (in Canadian funds) and $127,200 (in US funds)—from the defendant, Armik Babakhanians. At the time, Armik and his companies, the defendants Caspian Projects Inc. and Caspian Construction Inc. (collectively, Caspian), were providing construction management services on the project pursuant to contracts that Sheegl had used his influence to award to Caspian.

[5] By 2013, Sheegl's tenure at City Hall was over. He resigned amid controversy and was paid a severance payment by the City.

[6] In 2017, the payments from Armik to Sheegl became public as part of the media coverage of Project Dalton. While it normally falls to the criminal courts to hear and determine serious allegations of malfeasance, no criminal charges were laid as a result of Project Dalton. That there were no criminal charges is of no moment to decide this civil appeal.

[7] In 2020, the City commenced an action alleging a multi-dimensional fraud scheme relating to the project. As part of its action, the City claimed that the two payments from Armik to Sheegl amounted to the tort of bribery and that Sheegl also breached his fiduciary duty to the City by the receipt of the money and in numerous other ways.

[8] Sheegl and two other defendants, FSS Financial Support Services Inc. (FSS) and 2686814 Manitoba Ltd., two Manitoba corporations he controlled (collectively, the Sheegl defendants), successfully moved for severance of the City's claim against them from the other defendants (see 2020 MBQB 129).

[9] In respect of the City's claim, the motion judge heard cross-motions for summary judgment filed by the City and the Sheegl defendants pursuant to r 20 of the MB, *Court of King's Bench Rules*, MR 553/88 (the *KB Rules*). He had before him an extensive documentary record consisting primarily of evidence gathered from Caspian during Project Dalton that the City obtained after a successful motion for non-party production (see 2020 MBQB 120, aff'd 2021 MBCA 33), together with several affidavits from Michael Jack, the deputy CAO of the City, and Sheegl on which they were cross-examined.

[10] Given the nature of the factual and legal issues and the positions of the parties, the motion judge was satisfied that this was an appropriate case where summary judgment would be, in the language of *Hryniak v Mauldin*, 2014 SCC 7, "a fair process that [resulted] in a just adjudication of disputes" (at para 28). As he put it, "this [was] indeed a case that [could] and should [have been] brought to a fair and equitable conclusion prior to a trial" (at para 192[1]; see also para 6).

[11] At the summary judgment hearing, the Sheegl defendants did not dispute receipt of the two payments from Armik. Rather, their position was that the exchange was what the motion judge called a "handshake deal" (at para 24). Sheegl claimed that the payments were not a corrupt bribe, as the City alleged, but were in relation to a bona fide real estate transaction in the town of Buckeye, Arizona referred to as the Tartesso Land Development (Tartesso) involving the two men and their mutual friend, the mayor of Winnipeg from 2004 to 2014, Sam Katz.

[12] The motion judge granted the City's motion for summary judgment and dismissed the cross-motion of the Sheegl defendants. He rejected

[1] All references to the motion judge's reasons pertain to 2022 MBQB 53 unless specifically stated otherwise.

Sheegl's explanation of the handshake deal, calling it "incredible" (at para 220) and "fictional" (at para 233) given the record before him and, in particular, the complete absence of documentation that would normally be generated by such a real estate investment. In any event, he said the debate about the true character of the transaction and whether it was corruption was entirely academic because, even if Sheegl's explanation had been true, it would not have provided "any relief in law" as far as the tort of bribery was concerned (at para 220). He stated that, "once the elements to the tort of bribery [were] established, the motives behind that payment [were] irrelevant" (at para 233).

[13] In terms of the claim of breach of fiduciary duty, the motion judge catalogued 14 different instances during the tendering process for contracts for the project from 2010 to 2012 where he found that Sheegl failed to give loyal, honest and disinterested advice to the City (see paras 169, 246, 249). In each of these serious derelictions of duty, Sheegl misused his influence to favour Armik, Caspian or another defendant connected to Caspian.

[14] The motion judge said that the civil bribe was itself yet another breach of fiduciary duty by Sheegl and, regardless of what the true motives behind the two payments were, what was not disputed was that Sheegl never disclosed receipt of the payments to the City as he was required to do as a fiduciary. The motion judge said it would be a "preposterous message" if "high-ranking public officials [could] do business in secret with persons [who, at the same time, were] seeking contracts from the very public bodies for whom [the] public officials [worked]. Neither the law nor common sense [supported] or [justified] such a dubious conclusion or message" (at para 264).

[15] The motion judge ordered that the Sheegl defendants pay the City damages consisting of: (i) the amount of the bribe money, plus interest;

(ii) the amount of the severance payment paid on the termination of Sheegl's employment, plus interest; and (iii) punitive damages of $100,000. He ordered further that the Sheegl defendants pay the City costs for the lawsuit on a lawyer and client basis.

[16] The Sheegl defendants raise three grounds of appeal. First, they submit that this was not an appropriate case for summary judgment. They argue that a trial was necessary to properly decide the true nature of the money paid to Sheegl. This would include calling investigators from Project Dalton to testify as to their findings. The Sheegl defendants also submit that, by finding that a bribe was paid to Sheegl, the remaining civil case of the other defendants, such as Armik, is unfairly prejudiced. Second, they say that the motion judge erred by relying on hearsay evidence contained in Jack's affidavits to make his finding regarding bribery. Third, they challenge the order of punitive damages and lawyer and client costs.

[17] For the following reasons, I would dismiss the appeal.

Background

Preliminary Comments

[18] At the hearing of the appeal, counsel for the Sheegl defendants fairly conceded that, in the event that this is an appropriate case for summary judgment, there is no reversible error relating to hearsay evidence and the bribery allegation is removed from the facts of this case, Sheegl likely would still be liable for breach of fiduciary duty.

[19] This concession by counsel is entirely appropriate; the evidence of Sheegl's dereliction of duty is nothing short of staggering. The City was entitled to expect honest and disinterested advice from Sheegl during the

tendering of contracts on the project. That did not occur. The 14 different derelictions of duty by Sheegl from 2010 to 2012 chronicled in the detailed reasons of the motion judge, which he summarized at paragraphs 169, 246 and 249, together with the undisclosed receipt of payments of $200,000 and $127,200 USD from Armik in 2011 and 2012 (regardless of the parties' motives), can only be described as disgraceful, unethical behaviour by a public servant.

[20] Counsel for the Sheegl defendants, to his credit, did not waste the Court's time on the lost cause of Sheegl's ethics. There can be no reasonable debate that Sheegl failed to provide the City with the required loyal and disinterested advice in several ways during the tendering of contracts on the project, separate and apart from the bribery allegation.

[21] Counsel for the Sheegl defendants conceded further that, if the motion judge's finding of bribery cannot be disturbed, there is no basis to interfere with the award of punitive damages or the order as to costs. On the question of punitive damages, it is accepted that a proven allegation of bribery is an extreme case representing a marked departure from ordinary standards of decent behaviour. Unsurprisingly, it was common ground between the parties that a senior public servant receiving a substantial bribe was conduct "deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature" (*Vorvis v Insurance Corporation of British Columbia*, [1989] 1 SCR 1085 at 1107-8).

[22] In terms of the costs ordered by the motion judge, it is noteworthy that, when Sheegl was sued by the City, he refused to disclose all the relevant emails he possessed relating to the lawsuit as the law required him to do. He said that, while he had possession of numerous emails, he could not "provide them because [he was] not a computer geek and [he couldn't] do the research"

(at para 55). It is no surprise to me that such reprehensible conduct by Sheegl during the course of this litigation was part of the motion judge's justification for ordering costs on a lawyer and client basis in favour of the City (see *Judges of the Provincial Court (Man) v Manitoba et al*, 2013 MBCA 74 at paras 173-79 (*Provincial Court Judges*)).

[23] The motion judge delivered extensive reasons. Accordingly, it is unnecessary for me to repeat the relevant facts save in brief. Given that the dispute over whether Sheegl was paid a "bribe" when he was the CAO of the City was the main controversy of this litigation, before turning to the relevant facts, it is necessary to first say a little about the law of bribery generally.

The Law of Bribery

[24] The law sees bribery as a "corrosive practice" (*Wood v Commercial First Business Ltd & Ors*, [2021] EWCA Civ 471 (BAILII) at para 42). The giving and receiving of bribes is injurious to the proper operation of the free market and the good governance of public institutions. It is, as Templeman LJ explained in *Attorney-General for Hong Kong v Reid* (1993), [1994] 1 AC 324 (PC (Eng)), an "evil practice which threatens the foundations of any civilised society" (at p 330).

[25] The criminal law and the civil law take different approaches to regulate bribery. The former is primarily a product of statute and the latter of the common law.

[26] Separate and apart from general crimes, such as conspiracy, fraud, theft, possession of property obtained by crime and money laundering, the *Criminal Code* (the *Code*) creates several offences to address different forms of domestic bribery and corruption (see sections 119-125, 426). Of particular

relevance here is the scenario where a municipal official receives money in exchange for greater cooperation in favour of the payer. Such conduct may give rise to criminal charges under section 122 (breach of trust by public officer) and/or section 123 (municipal corruption) of the *Code*. As Richards JA (as he then was) explained in *Strudwick v Lee*, 2007 SKCA 11, section 123, "in plainest terms, prohibits the payment of bribes to municipal officials" (at para 16).

[27] In the civil law, bribery lies at the crossroads between common law and equitable rules as remedies for bribery can arise in both realms (see *Wood* at para 94). An allegation of bribery, as is the case here, will also often give rise to multiple, overlapping and sometimes esoteric causes of action in contract, tort and equity (see Paul M Perell, "Remedies for the Victims of a Bribe" (1999) 22:2 Adv Q 198; and Peter T Burns & Joost Blom, *Economic Torts in Canada*, 2nd ed (LexisNexis, 2016) at ch 10).

[28] Much will depend on how the action is framed, the particular facts of the bribery allegation and whether there is some legal advantage to the plaintiff proceeding with one cause of action over another (for example, a different limitation period or the defendant's degree of participation in the plaintiff's loss). In most cases, the various causes of action are simply alternative routes to relief that will matter little in practical effect. As Professor Grower has noted, the recent approach of the English Court of Appeal is moving the law towards an "amalgam of common law (as opposed to equitable) rules covering [civil] bribery" (Julius AW Grower, "The Tort of Bribery Bares Its Teeth" (2022) 138 Law Q Rev 15 at 15-16).

[29] Historically, in tort law, bribery has been seen as a special form of fraud based on the fact that the bribe was secret from the plaintiff (typically the principal of the agent who received the bribe directly or indirectly). The

cause of action does not require a false representation, any reliance or a finding of dishonesty (see *Petrotrade v Smith*, [2000] 1 Lloyd's Rep 486 at 490 (QB (Eng))).

[30] An action for the tort of bribery and resulting remedies (such as account of profits, compensation for loss and rescission (if possible)) is available whether the defendant is the payer or payee of the bribe (see *Frigidaire Corp v Steedman*, [1931] 3 DLR 370 at 373 (Ont SC (AD)); and *Wood* at paras 83, 94-96. The law does not distinguish between bribery schemes of inducement where the payer is seeking favour, or those of graft, where the payee is demanding a bribe. A plaintiff has a separate and distinct cause of action against both the payer and the payee of the bribe, not one cause of action against both or either of them (see *Salford (Mayor of) v Lever* (1890), [1891] 1 QB 168 (CA (Eng))).

[31] As the motion judge noted in his reasons, Canadian courts have followed the path set in England as to the parameters of the tort of bribery at common law (see *Ruiter Engineering & Construction Ltd v 430216 Ontario Ltd* (1989), 57 DLR (4th) 140 (Ont CA); *Procon Mining & Tunnelling Ltd v McNeil*, 2010 BCSC 487; *Enbridge Gas Distribution Inc v Marinaccio*, 2012 ONCA 650; and Perell). This approach is premised on a "strict" response of the law to civil bribery and "broad" scope of possible remedies (Perell at p 201). I see no reason to deviate from this course (and agree with the sentiment), nor did counsel argue there was any good reason for the English authority to not be followed in Manitoba.

[32] As this case involves only the question of the motion judge's determination as to liability, nothing need be said about the scope of possible remedies for civil bribery.

[33] A working definition of a "bribe" was provided by Leggatt J (as he then was) in *Anangel v IHI* (1989), [1990] 1 Lloyd's Rep 167 (QB (Eng)), where he stated a bribe is a "commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal" (at p 171). The meaning of a bribe "extends well beyond its popular connotation of a corrupt payment, to include any payment or gift made as an inducement to an 'agent' and not disclosed to the 'principal'" (*Wood* at para 43).

[34] The elements of a successful claim for the tort of bribery are three-fold and were explained by Slade J in *Industries and General Mortgage Co, Ltd v Lewis*, [1949] 2 All ER 573 (KBD (Eng)), as being (at p 575):

> . . . (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. . . .

[35] As Richards LJ explained in *Wood*, "The vice involved in the payment of a bribe, for the purpose of civil remedies, is that it may induce the payee to depart, consciously or otherwise, from the duty he owes to another person" (at para 44). As noted in *Otkritie International Investment Management Ltd & Ors v Urumov & Ors*, [2014] EWHC 191 (BAILII), "The principal is entitled to be confident that the agent will act wholly in the principal's interests" (at para 67; see also *Hitchcock v Sykes* (1914), 49 SCR 403 at 422, Brodeur J; and *Barry v Stoney Point Canning Co* (1917), 55 SCR 51 at 73-77, Anglin J).

[36] The test for whether the payment, other benefit or promise amounts to a bribe depends on whether it creates the realistic prospect of a conflict of

interest between the agent and their principal (see *Fiona Trust & Holding Corporation Ors v Privalov Ors*, [2010] EWHC 3199 (BAILII) at para 73; *Otkritie International* at para 67; and *Eze v Conway & Anor*, [2019] EWCA Civ 88 (BAILII) at para 35).

[37] For reasons of public policy, there are two "special rules" that apply to the tort of bribery as to what does not need to be proven: "First, the court does not inquire into the payer's motives in making the payment or allow evidence to be given as to motive. Second, the court will presume in favour of the principal and against the payer and the agent that the agent was influenced by the payment, and this presumption is irrebuttable" (*Wood* at para 43). It is therefore not a requirement of the tort of bribery that either the payer or the payee acted with a corrupt motive or otherwise acted in bad faith. This is irrebuttably presumed if the tort is made out (*ibid*; see also *Fiona Trust* at para 72; *Enbridge* at para 34; and *Eze* at para 35).

[38] Interestingly, even in the criminal law, bribery is not restricted to cases where an offender's mindset is "corruption in [its] crassest [form]" (*R v Greenwood; R v Tsinonis* (1991), 67 CCC (3d) 435 at 448 (Ont CA)); rather, the prohibitions in the *Code* criminalize not just quid pro quo arrangements, but also "more subtle forms of potential corruption" (*Greenwood* at p 450; see also *R v Cogger*, [1997] 2 SCR 845 at paras 13-24).

[39] Finally, the point was made in *Wood* that the tort of bribery is not reserved for situations, such as the facts of this case, where a fiduciary relationship exists between the payee and the plaintiff. All that must be shown is that the payee is under a "duty to provide information, advice or recommendation on an impartial or disinterested basis"; if that is established, "the payment of bribes or secret commissions exposes the payer and the payee

to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required" (at para 48; see also paras 92-102).

The Relevant Facts

Sheegl's Relationship with the City

[40] As the CAO, Sheegl was a statutory officer of the City under *The City of Winnipeg Charter*, SM 2002, c 39. He held that position, effective May 25, 2011, until he resigned on October 17, 2013. He had previously worked for the City as the deputy CAO from November 1, 2008 to May 2011, and as the director of planning, property and development from April 28, 2008 until November 2008. He was a key figure acting on behalf of the City in the project since its inception.

[41] As the head of the City's civil service, the CAO reports directly to the elected councillors on City Council. The office of the CAO plays an important executive role in the City's administration. As Jack explained in one of his affidavits, "[i]n practical terms, the CAO has exclusive authority and/or delegated authority to make decisions, act and implement decisions required for the proper administration of the City."

[42] Sheegl was in a fiduciary relationship with the City and was required to comply with the City of Winnipeg Employee Code of Conduct (the Code of Conduct). In his employment contracts with the City, Sheegl acknowledged and accepted his obligations under the Code of Conduct. Pursuant to these legal duties, it was expected that Sheegl be loyal, honest and disinterested in his decision-making in relation to the City's affairs.

[43] The Code of Conduct required Sheegl to act in the "public interest" at all times such that his conduct in official affairs be "above reproach". He

was to avoid personal interest conflicts, or their appearance, with the interests of the City in dealings with persons doing or seeking to do business with it. Sheegl was obligated to report any conflict of interest, or potential conflict, and the circumstances (with ongoing updates), in writing in the form as set out by the Code of Conduct. When he was CAO, written disclosure of actual or potential conflicts and their circumstances (with ongoing updates) was to be made to the clerk of the Executive Policy Committee of City Council.

[44] Under the Code of Conduct, Sheegl was prohibited from accepting "any gift, favour, commission, reward, advantage or benefit of any kind from any person who [was] directly or indirectly involved in any business relationship whatsoever with the City" subject to specific exceptions that are not relevant.

[45] The Code of Conduct also prevented Sheegl from granting "any special consideration, treatment or advantage to any person in [his] dealings with the City."

[46] Finally, because of the Code of Conduct, Sheegl could not represent the City in dealings with any person in which he had a "direct or indirect pecuniary interest".

Sheegl's Personal Relationships

[47] Sheegl, Katz and Armik were longstanding personal friends prior to Sheegl joining the City in 2008.

[48] Since 2005, Sheegl, Katz and a consortium of other Winnipeg residents had a joint venture investment in Tartesso (the Winnipeg consortium). The Winnipeg consortium paid $376,600 USD (or about $47,000 USD per acre) for a one-third interest in Tartesso. Sheegl's Arizona

corporation, Winnix Properties Corporation (Winnix), was the trustee for the Winnipeg consortium who each separately held varying percentages of the one-third interest.

[49] Two of the members of the Winnipeg consortium were the brothers Richard and Daniel Akman through corporations each controlled separately. R. Akman is the directing mind of Akman Construction Ltd. (Akman), a Manitoba corporation involved in construction management. Until September 1, 2011, D. Akman was an officer and director of Akman.

The Tendering Process

[50] There were three phases to the contracting process on the Project.

[51] Phase 1 covered construction management services for design and development of the Project. On February 10, 2011, the City awarded the phase 1 contract to a joint venture bid of Caspian and Akman.

[52] The motion judge identified seven different breaches of fiduciary duty by Sheegl between December 15, 2010 and February 8, 2011 (see paras 169, 246(a)-(f), 249) that included disclosing confidential information and manipulating the tendering process to favour the Caspian/Akman bid. As well, Sheegl failed to disclose to the City his financial relationship with R. and D. Akman in Tartesso.

[53] Phases 2 (construction services) and 3 (post-construction services) of the project were subject to the guaranteed maximum price contract (the GMP contract). Pursuant to the terms of the phase 1 contract, the City had the option to enter into the GMP contract, without tendering, with Caspian/Akman and Caspian after Akman departed the joint venture.

[54] The details and value of the GMP contract were the subject of extensive discussion between various defendants to the City's action.

[55] On February 17, 2011, Armik sent an email to himself that the City called an "aide mémoire," confirming the nature of the agreement he and Sheegl had reached as to the GMP contract (the 2+2 email).

[56] In the 2+2 email, Armik noted that "Phil said he will get approval for 126m". He went on to state: "However I think he wanted 2+2 for sam and phil but the rest for us . . .. This will remain confidential for ever." (All references to quotes taken from Armik's emails are reproduced exactly as written.)

[57] In the summary judgment process, Sheegl was cross-examined on the 2+2 email. He said he did not recall telling Armik that he would get approval for $126 million for the project. However, he was able to explain the meaning of the notation—"However I think he wanted 2+2 for sam and phil but the rest for us . . .. This will remain confidential for ever"—in part.

[58] Sheegl testified that the notation was a reference to hockey tickets for the Winnipeg Jets. He said he and Katz each had four season tickets to the Winnipeg Jets games and both agreed to give up two of their seats to Armik but, in the end, a different arrangement was arrived at for the hockey tickets.

[59] When asked, Sheegl had no explanation as to why an arrangement on sharing hockey tickets would need to be kept confidential "for ever."

[60] The motion judge focused on an important timing deficiency in Sheegl's explanation for the 2+2 email. On February 17, 2011, the Winnipeg Jets did not exist (except in the distant memory of fans of professional ice hockey). The purchase of the Atlanta Thrashers hockey team by TrueNorth

Sports + Entertainment (later rebranded the Winnipeg Jets) was not announced until May 31, 2011.

[61] The motion judge also referenced other emails seized from Caspian confirming that, on May 31, 2011, Sheegl and Armik did discuss season tickets to the Winnipeg Jets games but made no mention of their arrangement for season tickets for a hockey team that did not exist.

[62] The motion judge did not believe Sheegl's innocent explanation for the 2+2 email. He accepted the City's submission that the email was an act or declaration made in furtherance of a conspiracy.

[63] The motion judge found that, after the awarding of the phase 1 contract, Sheegl breached his fiduciary duty in at least six ways by taking action to assist Caspian by eliminating or marginalizing unfriendly parties and promoting friendly ones (see para 246(h)-(m)). Sheegl's unethical behaviour included classic abuses of executive authority, such as marginalizing civil servants doing their jobs (Abdul Aziz), attempting to eliminate independent bodies providing oversight (AECOM) and bringing in a new "team" which included an "inside man" (Ossama Abouzeid) (at para 135). Even Akman did not survive despite the financial relationship between R. Akman, D. Akman and Sheegl in Tartesso. Sheegl used his influence at the request of Armik to remove Akman from the project in 2011 before the GMP contract was awarded and signed.

[64] On July 20, 2011, City Council resolved to increase the budget for the project from $127.167 million to $155 million and that the then CAO, Sheegl, be delegated authority to award contracts on the project.

The $200,000 Payment

[65] Sheegl admits receipt of $200,000 from Armik by way of a cheque dated July 22, 2011. He concedes that at no time did he disclose receipt of this money to the City.

[66] The $200,000 flowed from Caspian to a company controlled by Armik, the defendant 4816774 Manitoba Ltd., operating as Mountain Construction, and then to FSS. Sheegl deposited the money into FSS's Winnipeg bank account on July 25, 2011.

[67] The memorandum on the cheque to FSS read as follows: "RE Consultant Services".

[68] Sheegl dispersed the $200,000 in two ways: half of the money he used for various personal matters and the other half of the $200,000 was paid by Sheegl to Katz on July 30, 2011.

[69] On the notation section of the $100,000 cheque to Katz, Sheegl wrote: "RE LOAN". According to the banking records of FSS, Katz cashed this cheque on August 2, 2011. At the hearing of the appeal, the Court was told that there is no evidence as to the nature of this "loan" between Sheegl and Katz and there are no documents in the litigation to support its existence other than the cheque. Katz provided no evidence on the summary judgment motion, a matter I will return to momentarily.

The Signing of the GMP Contract

[70] Sheegl used his delegated authority to award the GMP contract to Caspian without public tendering. The motion judge concluded that, given all

of the evidence, this was part of Sheegl breaching his fiduciary duty to the City (see para 246(g)).

[71] A letter of intent between the City and Caspian was agreed upon on August 8, 2011 with the GMP contract being executed by those parties on November 17, 2011. Sheegl signed the GMP contract on behalf of the City; Armik signed on behalf of Caspian. The GMP contract price was not to exceed $137.1 million. Caspian's fees under the GMP contract were $1.371 million.

The $127,200 USD Payment

[72] Sheegl admits receipt of $127,200 USD from Armik by way of a wire transfer. He concedes that at no time did he disclose receipt of this money to the City.

[73] The defendant, Logistic Holdings Inc. (Logistic), is a Manitoba corporation controlled by Armik. On August 15, 2012, Logistic issued a cheque for $127,200 (in Canadian funds) to Armik. Armik deposited this money into a personal bank account in Winnipeg on August 16, 2012 and then wired $127,200 USD to the US bank account of a Nevada corporation, Samuel Michaels Properties (SMP), a company controlled by Katz.

[74] On August 28, 2012, SMP transferred half of the money, $63,600 USD, to Sheegl's Arizona corporation, Winnix.

Termination of Sheegl as the CAO

[75] By the spring of 2013, the project was over budget with costs ballooning to $168 million (the final cost to complete the project exceeded $200 million). For issues not related to this case, the Executive Policy

Committee of City Council lost confidence in Sheegl and called for his termination. Sheegl hired legal counsel and threatened to sue the City. A settlement was reached on October 16, 2013, whereby Sheegl resigned as CAO and signed a release giving up any claims he may have had against the City in relation to his employment in exchange for a severance payment of $250,000. The City reached this agreement with Sheegl unaware of the payments he had received from Armik relating to the project or any of the breaches of Sheegl's fiduciary duties to the City.

The Handshake Deal

[76] In early 2017, what the RCMP had learned during the course of Project Dalton became public. The CBC reported on Sheegl's receipt of the money from Armik in 2011 and 2012.

[77] On January 26, 2017, Sheegl's lawyer gave an interview with the CBC. In it, he provided Sheegl's explanation for receipt of the two payments from Armik saying that, while "the optics [were] terrible", it was not bribery but was an Arizona land deal. On that date, the CBC was given the only document underlying Sheegl's assertion that there was a handshake deal, a two-page handwritten document entitled "Trust Agreement".

[78] The trust agreement was dated May 1, 2012 but was signed by Sheegl only with the space for the signature of Armik being unsigned.

[79] Pursuant to the stated terms of the trust agreement, for the sum of $327,000, Winnix, as the trustee for the Winnipeg consortium in Tartesso, sold 25% of its interest in Tartesso to Armik.

[80] Two weeks after the January 26, 2017 disclosure of the handshake deal, Sheegl's lawyer provided the CBC with a copy of the trust agreement then signed by Armik.

[81] According to the terms of the purported transaction, Armik acquired a 1/24th interest in Tartesso or about 4.2%, effectively paying $327,000 per acre, almost seven times more than what Sheegl, Katz and the other members of the Winnipeg consortium had paid for the same land in 2005.

[82] During the summary judgment process, Sheegl's evidence was that he, Katz and Armik made the handshake deal in June or July of 2011 but no effort was made to memorialize the arrangement until 2012. He confirmed that no lawyers were involved in the transaction and Armik did not seek an appraiser as to the value of the 1/24th interest he was purchasing in Tartesso. He simply accepted the value that Sheegl and Katz ascribed to the interest sold. Sheegl said the other investors he was acting for as trustee were not told about the sale, nor was their consent sought or the proceeds paid by Armik shared with them.

[83] Despite the complexity of the Tartesso transaction and the trust and income tax implications of such a transaction, there was little in the way of evidence to support the handshake deal except for the two-page handwritten trust agreement and Sheegl's evidence.

[84] The motion judge said to accept Sheegl's explanation "[required] a suspension of reasonable belief not to mention an acceptance of a line of reasoning that only the most naïve could endorse or accept." In coming to that the conclusion, he said there were "details" of the handshake deal that "[gave] rise to serious questions" (at para 222) such as:

i) This was essentially an undocumented and complex transaction that would have generated numerous supporting documents at the time of the transaction even if the main agreement was truly a handshake, yet none were produced on the motion or found by the RCMP during Project Dalton.

ii) The transaction made no commercial sense. There was a sharp decline in real estate prices in Arizona in 2007-2008 and, despite this, the purchase price agreed to in 2011 was many times larger than what was paid in 2005.

iii) The sale was done without the involvement of the other members of the Winnipeg consortium despite Sheegl's responsibilities as a trustee. They did not know about the transaction, did not consent to it and did not receive a share of the proceeds of the purported sale despite it being a joint investment and a large profit being generated.

iv) Sheegl never disclosed to the City his intention to enter into an investment relationship with Armik in Arizona when he interviewed for the CAO position in 2011 despite Armik being financially involved in the project through Caspian.

v) The trust agreement, other "impugned payments" (at para 227), and oddly worded emails between Sheegl and Armik many years after the fact, in light of "all of the other incredible and incongruous details surrounding this transaction" (at para 225), support the inference that

Sheegl manufactured an "incredible and fanciful explanation" (at para 228).

The Relevance of Former Mayor Katz

[85] Before turning to a discussion of the grounds of appeal, something must be said about what is a proverbial elephant in the courtroom—the significance to this appeal of the conduct of Katz, the former mayor.

[86] It is important to highlight that Katz is not a defendant in the City's action. Also, none of the defendants have brought Katz into the litigation formally as a third party. This means that, currently, nobody in this civil litigation has made a formal legal accusation against Katz of wrongful conduct and, accordingly, he is entitled in law to be presumed to have done nothing wrong regardless of what occurred during his tenure as mayor.

[87] In terms of the judgment appealed from, in the summary judgment cross-motions, no one adduced evidence from Katz as to his knowledge about the nature of the two payments made by Armik to Sheegl that the motion judge determined were bribes despite the fact that Katz is, without any question, a material witness as, in both instances, he received precisely half of the money. While it may clear the air for Katz to formally tell under oath what he knows about the two payments, he is under no legal obligation to do so unless he becomes a witness. Moreover, this litigation is not a chance for Katz to speak formally on his own motion. He has no legal status. Each of the parties made the tactical choice to not adduce evidence from Katz either voluntarily or by compulsion. It would be speculative and entirely inappropriate for this Court to question the decisions of counsel. This case is also not a public inquiry into the project; this is an appeal on the record that was before the motion judge.

[88] Finally, the City asked the motion judge to draw an adverse inference against the Sheegl defendants for failing to produce evidence from Katz who would have been able to confirm or deny Sheegl's narrative. The motion judge declined to rule on the City's request as he thought it was unnecessary to do so (see paras 193-204). Neither side took issue with this aspect of his decision and there is no basis to intervene.

Discussion

Standard of Review

[89] Given that a decision on a motion for summary judgment under r 20 of the *KB Rules* involves the exercise of judicial discretion, the standard of review on an appeal is deferential. An appellate court should not interfere with the decision absent demonstration of a material misdirection as to the law or the facts or unless the decision is so clearly wrong that it resulted in an injustice (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at paras 36-37; and *Bibeau et al v Chartier et al*, 2022 MBCA 2 at para 50).

Appropriateness of the Case for Summary Judgment Determination

[90] Rule 20.03(1) of the *KB Rules* provides as follows:

> **Granting summary judgment**
> **20.03(1)** The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[91] The determination of whether there is a genuine issue requiring a trial for the purposes of r 20.03(1) is a question of mixed fact and law

reviewable only for palpable and overriding error (see *Hryniak* at para 81; and *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at para 31).

[92] At the outset, I would say I have difficulty with the logic of the asymmetrical position of the Sheegl defendants that this was an appropriate case for summary judgment if they were successful on their motion, but it was not an appropriate case if they were not and the City was on its cross-motion. The evidence and issues on the cross-motions were the same.

[93] The position of the Sheegl defendants strikes me as an attempt to retreat from a formal admission as to an issue before the motion judge (that this was an appropriate case for a summary judgment determination) which the law does not permit save only in unusual situations (see *Rosenberg et al v Securtek Monitoring Solutions Inc*, 2021 MBCA 100 at paras 55-57).

[94] In any event, there is no merit to that ground of appeal. Given the concession by counsel for the Sheegl defendants as to the claim for breach of fiduciary duty if there was no genuine issue requiring a trial on the allegation of bribery, I will limit my commentary to the question of whether the motion judge made a reversible error when he found that there was no genuine issue requiring a trial as to bribery.

[95] The Sheegl defendants' reliance on the view expressed in *Berscheid v Federated Co-operatives et al*, 2018 MBCA 27—that factually complex cases are "not generally well-suited" (at para 34) for summary judgment determinations—is misplaced. This is not a complicated case either legally or factually; a fiduciary failed to disclose to his employer money received by him from a person seeking contracts from the employer. That is a bribe for the purposes of tort law. Unlike the situation in *Berscheid v Government of Manitoba*, 2022 MBCA 12, the undisputed evidence allowed the motion judge

to decide the questions of liability before him in light of the governing legal standard without a trial (see para 73).

[96] In accordance with the test for summary judgment discussed in *Dakota Ojibway Child and Family Services* (see paras 108-11), I see no reason why the motion judge could not have decided that there was sufficient evidence to establish the essential factual record which would allow him to make a fair and just determination of the issues without a trial. Given the law of bribery and the uncontested facts, it can be said that not only is there no basis to say the motion judge made a reversible error in the exercise of his discretion, on these facts, he could have come to only one conclusion: that the Sheegl defendants had no defence to the City's claim of bribery.

[97] Neither a fairness concern nor the merits of the case required a trial in respect of the City's claim of bribery. In particular, I agree with the conclusion of the motion judge that the effort the Sheegl defendants expended in their unsuccessful attempt to establish the genuineness of the handshake deal was legally irrelevant (see para 233).

[98] As occurred here, it is not uncommon in bribery cases for a debate to arise as to whether a transaction said to be a "bribe" was legitimate or a sham. A "sham transaction" is the deceitful act of creating the appearance of legal rights and obligations to third parties or the courts that, in reality, do not exist. The classic definition of a sham transaction that has been applied in Canada comes from the comments of Diplock LJ in *Snook v London & West Riding Investments, Ltd*, [1967] 1 All ER 518 (CA (Eng)), where he stated (at p 528):

> . . .
> . . . [A] "sham" . . . means acts done or documents executed by the parties to the "sham" which are intended by them to give to

> third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. . . . [F]or acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. . . .

(See also *Stubart Investments Ltd v The Queen*, [1984] 1 SCR 536 at 572-73; and *SA v AA*, 2017 ONCA 243 at paras 36-37.)

[99] As the motion judge explained, r 20.03(2) of the *KB Rules* provided him with the necessary powers to make "findings of fact on the evidence presented" (at para 191). If it was necessary to review the motion judge's negative credibility finding against Sheegl, I would have no difficulty concluding that his finding can reasonably be supported by the record and, therefore, cannot be disturbed by this Court (see *Albo v The Winnipeg Free Press et al*, 2020 MBCA 50 at para 57). With that qualification stated, at the end of the day, whether the purported Tartesso transaction was genuine, as Sheegl claimed because of the handshake deal in 2011, or the transaction was a "concocted story" (at para 281) made up in 2017 as part of a cover-up, as the motion judge found, is immaterial in law. In either factual scenario, the Sheegl defendants are liable for civil bribery. There is no genuine issue requiring a trial.

[100] All of the material facts necessary to establish the three requirements of the tort of bribery, as set out in *Lewis*, were not disputed on the record before the motion judge:

(i) Payment to the Agent of the Person With Whom They Are Dealing:

- There is no dispute that Sheegl was an agent of the City—he had some role in the decision-making on the project and, as a fiduciary, had duties of loyalty and trust to the City.

- There is no dispute that Armik and Caspian were dealing with Sheegl's principal, the City, on the project.

- There is no dispute that Armik made a payment to Sheegl directly (in the case of the first payment) or indirectly (in the case of the second payment via Katz).

(ii) Payer's Knowledge:

- There is no dispute that Armik had knowledge of the payment to Sheegl as he made both of them.

- There is no dispute that Armik had knowledge that Sheegl was the agent of the principal (the City) with whom he was dealing on the project; the rich email evidence between the two men in Jack's affidavits makes that abundantly clear.

(iii) Payment Not Disclosed to the Principal:

- There is no dispute that Sheegl failed to make full disclosure to his principal (the City) of receipt of the payments. It is noteworthy that the Code of Conduct created a procedure that obligated Sheegl to follow to make such disclosures which he completely ignored.

[101] It is undeniable that the payments received by Sheegl created a realistic prospect of a conflict of interest between him and the City regardless of whether the money was a payoff for favours rendered as "consultant services" or was a substantial profit on the sale of part of Winnix's interest in Tartesso. In either scenario, Sheegl's receipt of the payments put him in the position where his duties to the City and his interests might conflict. As previously explained, the law does not inquire into motives in bribery cases. Corruption and fraud are assumed by the law against the payee and payer if the preconditions of the tort of bribery are met. Maintaining trust in markets and/or government justifies such an exacting standard.

[102] A trial would serve no purpose in this case. The motion judge was correct that, given the law of civil bribery, the explanation given by Sheegl provided him and the other Sheegl defendants with no legal defence to the City's claim even if it had been true.

[103] The situation here is far removed from the scenario where there is a genuine issue that a payee received no benefit from a payment such that it is not appropriate for the case to be decided on a summary judgment basis (see *BFS Group Ltd (t/a Bidvest Logistics) & Ors v Foley & Ors*, [2017] EWHC 2799 (BAILII) at paras 93-95). By his own admission, due to the payments from Armik, Sheegl received an almost 700% return on the investment in Tartesso in less than seven years despite the Arizona real estate market crashing in 2007-2008. Also pertinent to the large capital gain he enjoyed as per his narrative is, despite being a trustee, he didn't tell all of the beneficiaries in the Winnipeg consortium of the transaction or that he split the large profits realized with only one of them—Katz.

[104] The Sheegl defendants say they should have been able to adduce evidence from the RCMP investigators in Project Dalton. This is not a

persuasive submission. The Sheegl defendants' motion for non-party discovery of the RCMP investigators in Project Dalton was denied and the appeal period expired before either of the summary judgment motions were filed (see 2021 MBQB 63). The time to bring that issue to this Court was before the Sheegl defendants' summary judgment motion was perfected, not after the motion had been lost. That is contrary to the obligation to put one's best case forward on a motion for summary judgment.

[105] More importantly, I fail to see any relevance in the evidence of the RCMP investigators to the appropriateness of this case for summary judgment. The submission is based on a misunderstanding of the elements of the tort of bribery as set out in *Lewis*. The fact that Sheegl received an obvious benefit from a party doing business with the City and Sheegl kept that benefit secret, by his own admission, made this an appropriate case for summary judgment.

[106] The other concern raised by the Sheegl defendants is the somewhat altruistic submission that the motion judge's decision creates unfair prejudice to other defendants, such as Armik. This is a new argument raised for the first time on appeal and, accordingly, it should only be permitted in exceptional circumstances (see *R v EGM*, 2004 MBCA 43). I see none here. That said, I would make three comments.

[107] First, it should be highlighted that it was the Sheegl defendants, by requesting severance, who did not want their case heard at the same time as the other defendants. It makes little sense now that they have a concern about how their case impacts others.

[108] Second, none of the other defendants or their privies are parties to this appeal and, accordingly, nothing decided in this appeal conclusively

determines their rights and obligations in relation to the City's action. The other defendants will have their day in court in due course to answer the claims of the City based on the applicable law and the evidence presented. As was explained in *Lever,* a claim of bribery gives rise to separate and distinct causes of action against the payer and the payee of the bribe, not one cause of action against both or either of them.

[109] Third, once again, the law of civil bribery does not concern itself with motives. I fail to see any prejudice to other defendants, such as Armik, given his motivations are irrelevant in law. On this point, Perell J noted in *Yang v Co-operators General Insurance Company*, 2021 ONSC 1540: "The secret payment is a bribe even if the person making the payment did not intend a bribe and believed or expected that the recipient would properly disclose the payment; the person making the payment must accept the risk that the recipient will not disclose the payment" (at para 97).

Hearsay Evidence Determinations

[110] Rules 4.07(2) and 39.01(4) of the *KB Rules* are relevant to affidavit evidence on a motion for summary judgment and read as follows:

> **Contents**
> **4.07(2)** An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.
>
> **Contents — motions**
> **39.01(4)** An affidavit for use on a motion, including a motion for summary judgment, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[111] In *Dakota Ojibway Child and Family Services*, this Court explained that, consistent with the "culture shift" (at para 147) signalled in *Hryniak* away from traditional trial procedures in an appropriate case and the wording of the relevant rules of court on a summary judgment motion, there can be some relaxation of the rules of evidence as to the contents of an affidavit provided that the judge is satisfied that a fair and just determination of the issues can otherwise be made.

[112] The approach signalled in *Dakota Ojibway Child and Family Services* does not mean that exclusionary rules, such as the rule against hearsay, have been abolished or should be ignored on a motion for summary judgment. Far from it. Rather, the judge should exercise their gatekeeper role, mindful that they enjoy some leeway as to the use of hearsay evidence in an affidavit filed on a motion for summary judgment (for example, where the underlying source of the information is reliable and would be admissible at a trial (see *Saito v Lester Estate*, 2021 ABCA 179 at paras 11-12)).

[113] In this case, the motion judge decided to apply the strictures of the rule against hearsay to the record before him in a manner similar to a trial. That was entirely within his discretion. The objection before him from the Sheegl defendants was that much of what was contained in the Jack affidavits relied on by the City was inadmissible hearsay. In particular, objection was taken to the email communications contained in Jack's affidavits which were seized by the RCMP from the office of Caspian during Project Dalton.

[114] The hearsay determinations of the motion judge, "if informed by the correct principles of law and reasonably supported by the evidence, are entitled to deference on appeal" (*R v Hall*, 2018 MBCA 122 at para 40).

[115] The motion judge's admissibility analysis was appropriately nuanced. He first considered whether different pieces of evidence in the Jack affidavits were being tendered for hearsay purposes, to prove the truth of their contents or because the evidence was relevant for some other reason (see *R v Khelawon*, 2006 SCC 57 at paras 56-57). If evidence was being tendered for a hearsay purpose, he went on to consider whether the evidence fell within a traditional exception to the hearsay rule and/or the principled approach (see *Fawley et al v Moslenko*, 2017 MBCA 47 at paras 94-120).

[116] One of the difficulties for the Sheegl defendants is that much of the email evidence contained in the Jack affidavits consisted of communications where Sheegl was a party to the electronic conversation. Leaving aside the rather baroque academic debate as to whether such evidence is admissible as non-hearsay or as an exception to the hearsay rule, the bottom line is such email communications where Sheegl was a party to the conversation were properly admissible on the motions for summary judgment (see *R v SGT*, 2010 SCC 20 at para 20; and *R v Schneider*, 2022 SCC 34 at paras 52-55).

[117] The motion judge also, in meticulous detail, went through the various pieces of evidence in the Jack affidavits that did not involve communications involving Sheegl (for example, internal email communications by the defendants at Caspian or the 2+2 email). He considered this evidence in light of traditional exceptions to the hearsay rule, such as the documents in possession exception and the co-conspirators exception, and concluded each of the pieces of evidence satisfied one of the traditional exceptions to the hearsay rule. He also decided that all of the email communications in the Jack affidavits would be admissible under the principled approach to the hearsay rule (see paras 78-88).

[118] The Sheegl defendants failed to pinpoint a particular admissibility error the motion judge made in their submissions on appeal. I am not persuaded he erred. Moreover, the great bulk of the Jack affidavits was not contentious given the requirements of the tort of bribery and the fact Sheegl admitted on cross-examination to the requisite elements of the tort as set out in *Lewis*. In my view, the concerns raised in this Court about the motion judge's hearsay determinations are really much to do about nothing.

[119] In summary, I am not persuaded that the motion judge committed any error, let alone a reversible one, in addressing the hearsay objections of the Sheegl defendants.

Conclusion—Summary Judgment

[120] I have not been persuaded that the motion judge erred by granting summary judgment in favour of the City, nor is the decision so clearly wrong as to amount to an injustice.

Punitive Damages and Costs

[121] In light of my decision on the first two grounds of appeal and the concessions made at the hearing of the appeal, there is no basis to interfere with the motion judge's award of punitive damages or his order as to costs in favour of the City on a lawyer and client basis.

[122] I do, however, feel it incumbent to comment on the quantum of punitive damages ordered by the motion judge. As Kroft JA noted in *Uni-Jet Industrial Pipe Ltd v Canada (Attorney General)*, 2001 MBCA 40 (at para 85):

> . . . [U]nlike general and aggravated damages, punitive damages are not compensatory. They are meant to punish a defendant and

> to express society's outrage at his egregious conduct. They are like a civil fine that is meant to act as a deterrent not only to the wrongdoer but to others who might be inclined to act in a similar manner.

Such damages should be awarded "only rarely and with restraint" (*Keeton v The Bank of Nova Scotia*, 2009 ONCA 662 at para 102).

[123] The rationality test applies to both the award of punitive damages, as well as the question of quantum (see *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 101). The quantum of punitive damages must be proportional to the blameworthiness of the defendant's conduct (*ibid* at paras 112-13).

[124] Despite the thoroughness of the motion judge's reasons generally, how he arrived at the figure of $100,000 in punitive damages as being "reasonable in the circumstances" (at para 282) is not readily apparent given that he appropriately found that Sheegl's outrageous conduct included not only taking over $300,000 in bribes as a fiduciary, but also repeatedly attempting "to cover up his wrongdoing" (at para 281).

[125] As was explained in *Keeton*, "In addressing a claim for punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law" (at para 102). The analysis is highly contextual. As made clear in *Whiten*, the analysis is more nuanced than applying some form of formula based on a ratio of punitive damages to compensatory damages (see para 127).

[126] There are examples of punitive damages awards in cases involving employee fraud of varying degrees of seriousness: see *International Commercial Bank of Cathay (Canada) v Chen*, 2003 BCSC 1616 ($100,000); *Jefflin Investments Ltd v Charendoff*, 2009 CarswellOnt 7790 (Sup Ct J)

($75,000); *Procon Mining & Tunnelling Ltd v McNeil*, 2010 BCSC 487 ($20,000); *Elekta Ltd v Rodkin*, 2012 ONSC 2062 ($200,000); and *M-I Drilling Fluids Canada, Inc v Cottle*, 2018 ABQB 143 ($12,000).

[127] In *ICBC v Dragon Driving School*, 2007 BCSC 389, an award of $50,000 in punitive damages was ordered for a low-level but lucrative bribery scheme in relation to the fraudulent obtaining of drivers' licences. Similar to here, the participants viewed the "enterprise as just a normal business" which the Court viewed as "indicative of a seriously perverted value system" (at para 20). Of course, Sheegl was not a vulnerable front-line civil servant such as was the case in *Dragon Driving School*. He was the head of a municipal civil service and one of the key decision-makers of a construction project involving hundreds of million dollars of public funds.

[128] The bribery scheme here impacts not just one or even many victims, but public confidence in municipal government generally. Deterring and denouncing public corruption is a matter not just for the criminal courts because, as is the case here, sometimes criminal law solutions are unworkable or unsuccessful. Bribery prosecutions are complicated and rare; however, that does not mean the law is powerless to address the "evil" of bribery.

[129] It should not be forgotten that Sheegl was the most senior civil servant in the administration of the City heading up a construction project with the objective of providing the infrastructure for public safety. His behaviour set the example for others as he was supposed to be the leader and role model of the civil service, directing one of the largest expenditures of tax dollars in a generation.

[130] Like in the case of *Dragon Driving School*, there was here, as I said earlier, a poverty of ethics by all involved. One illustration of this is an email

sent on December 15, 2010 by Armik to his son, determined by the motion judge to be admissible as being in furtherance of a conspiracy, where he explained: "Integrity well when we deal with politicians that tends to be compromised to a certain extent (at para 96(b)).

[131] In my view, satisfying the needs of denunciation and deterrence in the award for punitive damages was significant in this case to send the correct message to other ethically bankrupt officials or business people and the public generally that the civil law will administer punishment fairly and firmly when necessary.

[132] With respect to the views of the motion judge, the conduct of Sheegl was so serious and so reprehensible that the bounds of rationality could have justified a much higher award of punitive damages than $100,000 to satisfy the need for retribution, deterrence and denunciation in light of the total award and the conduct in issue. I say that because the integrity of public finances must be protected by the courts from large-scale bribery and the systemic ignorance of fiduciary duties, particularly those involving the most senior public officials.

[133] Accordingly, the quantum of the motion judge's award of punitive damages should be understood in the future to be a precedent within the bounds of rationality; it is not an award that gives rise to any concern of disproportionality, nor can it be said to be an award that tests the limits of the bounds of rationality given all of the relevant circumstances.

Costs of the Appeal

[134] An appellate court has complete discretion to "mould its order [as to costs] so as to do justice" (*McIlhargey v Queen*, 1911 CarswellOnt 175 at

para 7 (SC (H Ct J))). This wide discretion is confirmed in r 47(1) of the MB, *Court of Appeal Rules*, MR 555/88R, which states:

> **Costs**
> **47(1)** The court shall have discretion to award costs in any proceeding before it.

[135] Moulding a just order as to costs of an appeal requires the appellate court to consider several factors together, including the result of the appeal, the nature and merits of the appeal, the positions advanced by the parties and the scale of costs granted in the Court below (see Mark M Orkin & Robert G Schipper, *Orkin On the Law of Costs*, 2nd ed (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2023, release 3), ch 8 at section 8:10, online: WL Can (date accessed 6 July 2023)).

[136] Solicitor/client costs are not generally available simply because of the lack of merit of an appeal. Such an exceptional costs order is reserved for cases where there is some basis to say that a party's conduct has been reprehensible, scandalous or outrageous (see *CIBC v Ahmed*, 2021 MBCA 25 at paras 15-18).

[137] The City has asked for costs on a lawyer and client basis on the appeal. I am persuaded that this is an exceptional case where it is in the interests of justice to make such an order as to costs in this Court.

[138] The City has been entirely successful in resisting the appeal. Moreover, the appeal by the Sheegl defendants raises no point of substance and has little merit. However, the key fact, in combination with the result and the lack of merit to the appeal, that makes this case exceptional for costs purposes is the scale of costs granted in the Court below due to Sheegl's attempt to cover up his illegal conduct during the litigation and his total

disregard of his obligations during the discovery process and the implications of that conduct to the proportionality of this litigation.

[139] It is not lost on me that, according to the record before the motion judge, during his employment, Sheegl used his City email account on some communications but then used his private email account with Winnix when he wanted to discuss confidential matters with Armik and others, thereby shielding those emails from the potential watchful eye of his employer. When sued by the City, his response—I can't produce what I possess—obstructed the discovery of the truth, making it necessary for the City to obtain the emails by the extraordinary remedy of non-party production from the RCMP. Conjuring up a sham transaction in Arizona to explain away the payments received from Armik did not impress the motion judge and rightly so. Cover-ups by public officials and being dishonest about one's disclosure obligations in a civil suit will not be tolerated, particularly in relation to evidence which is central to the case.

[140] The motion judge decided, and I agree, that the "unique circumstances" allowed for an order of costs on a lawyer and client basis and an award of punitive damages to "co-exist" (at para 287) without "double compensation" (*Provincial Court Judges* at para 176). In my view, there is a principled and independent justification for compensatory damages, punitive damages, and lawyer and client costs (in this Court and the Court below). In the circumstances—particularly given that Sheegl was in a fiduciary relationship with the City—it is appropriate to adopt the logic of Sexton JA in *Bank of Nova Scotia v Fraser*, 2001 FCA 267 (at para 11):

> . . . Where a litigant's conduct has warranted solicitor-client costs at trial and the litigant appeals that very order, it only seems appropriate that, that litigant bear the full costs of losing that appeal upon failure. Otherwise, the object of saving a litigant from

> "being put to the expense of defending" a case would be frustrated by the other party's continuous appeals.

(See also *221 Corp v C & N Enterprises Co*, 1999 CarswellMan 548 at para 13 (CA).)

Disposition

[141] In the result, I would dismiss the appeal with costs on a lawyer and client basis in favour of the City.

_______________ JA

I agree: _______________ JA

I agree: _______________ JA