Grand Financial Management Inc. v. Solemio Transportation Inc., [2016] O.J. No. 1089

Ontario Judgments

Ontario Court of Appeal

A. Hoy A.C.J.O., R.A. Blair and C.W. Hourigan JJ.A.

Heard: November 20, 2015.

Judgment: March 2, 2016.

Docket: C58867

[2016] O.J. No. 1089 | 2016 ONCA 175 | 263 A.C.W.S. (3d) 374 | 395 D.L.R. (4th) 529 | 2016 CarswellOnt 2899 | 5 P.P.S.A.C. (4th) 88 | 346 O.A.C. 173

Between Grand Financial Management Inc., Plaintiff (Respondent/Appellant by Cross-Appeal), and Solemio Transportation Inc., Sami Ullah and Arnold Bros. Transport Inc., Defendants (Appellants/Respondents by Cross-Appeal)

(109 paras.)

Case Summary

Contracts — Proceedings in contract — Practice and procedure — Pleadings — Appeal by defendant Solemio Transportation from trial judgment in action for breach of factoring agreement allowed in part — Respondent provided factoring services to appellant and Wild Lions — Arnold Transport had subcontracted some of its work to Solemio which Solmio assigned to Wild Lionsa — Solemio and Wild Lions assigned receivables to respondent — Trial judge found Solemio Agreement had been terminated — Trial judge erred in awarding respondent $200,000 based on admission by Solemio that it owed this amount to respondent under Wild Lions Agreement — That agreement was not pleaded by respondent.

Damages — For torts — Interference with contractual relations — Appeal by Solemio Transport from trial judgment awarding it $175,000 damages at large for Interference with economic relations dismissed — Damages at large were a matter of impression and were not something that could be precisely measured — It could not be said that the trial judge erred in principle in doing so — He properly took into account all of the relevant factors in arriving at his conclusion.

Tort law — Interference with economic relations — Interference with business relationship — Cross-appeal by respondent from trial judgment finding it liable to Solemio for interference with economic relations dismissed — Respondent provided factoring services to Solemio and Wild Lions — Both had assigned receivables for work from Arnold to respondent --- Solemio claimed its agreement with respondent was terminated and Arnold ceased paying respondent — Respondent threatened Arnold which ceased its relationship with Solemio — Trial judge's findings of elements of tort were supported by the evidence.

Appeal by the defendant Solemio Transportation and cross-appeal by the plaintiff from trial judgment in an action for breach of a factoring agreement. The respondent provided factoring services to the appellant and Wild Lions. The Solemio Agreement was guaranteed by Solemio's principal, Ullah. Arnold Transport had subcontracted some of its freight delivery obligations to Solemio, thus creating accounts receivable in favour of Solemio for those services. Those accounts receivable were assigned to the respondent. Solemio subcontracted the Arnold work to Wild Lions, thus creating accounts receivable owing by Solemio to Wild Lions which were also assigned

to the respondent. Ullah claimed that the Solemio Agreement was terminated through a mutual understanding shortly after it had been entered into. Arnold therefore stopped making payments to the respondent. At the same time, pursuant to the Wild Lions Agreement, the respondent continued to pay Wild Lions immediately on the Wild Lions invoices for the same deliveries of goods. Solemio did not pay those invoices on the same timely basis. To enforce payment, the respondent threatened Arnold, which immediately ceased doing business with the appellant. The respondent also seized 35,000 from Solemio's bank account. In the present action, the respondent sued Solemio, Ullah and Arnold for defaults under the Solemio Agreement. Solemio and Ullah counterclaimed for damages for intentional interference with economic relations. Although the trial judge found that the Solemio Agreement had been terminated shortly following its execution and awarded no damages for its breach, he granted judgment against Solemio for $200,000 based on an alleged admission by Ullah that Solemio was liable to the respondent for that amount under the Wild Lions Agreement. He awarded Solemio damages at large of $175,000 on the counterclaim. He declined to award punitive damages against the respondent.

HELD: Appeal allowed in part.

Cross-appeal dismissed. The trial judge erred by awarding the respondent $200,000 based on Ullah's admission that this amount was owing to it under the Wild Lions Agreement, even though that Agreement had not been pleaded as the basis for recovery by the respondent. The respondent framed its case solely on the basis that Solemio was in breach of its obligations under the Solemio Agreement. While the Wild Lions invoices were an integral component of the ultimate flow of funds in the factual and commercial context, the case was not pleaded on the basis that Solemio had defaulted in its obligations relating to the Wild Lions Agreement. It was also not clear that Ullah necessarily admitted Solemio was obligated to pay that amount under the Wild Lions Agreement, either at the time of the dispute or at the time of trial. If this claim was first asserted at trial, it would also be statute barred. The trial judge did not err in finding the respondent liable for intentional interference with economic relations. The trial judge's finding that the respondent's actions were directly intended both to harm Solemio in its business interests and to enrich itself was amply supported by the record. The trial judge's findings of unlawful acts and economic loss were also well-founded. There was no basis for interfering with the damages awarded to Solemio. Damages at large were a matter of impression and were not something that could be precisely measured. It could not be said that the trial judge erred in principle in doing so. He properly took into account all of the relevant factors in arriving at his conclusion. His application of the law on punitive damages to the circumstances of this case was a matter of fact and mixed fact and law, and was therefore entitled to deference. He did not err in not awarding Solemio punitive damages.

Statutes, Regulations and Rules Cited

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B.,

Personal Property Securities Act, R.S.O. 1990, c. P.10,

Appeal From:

On appeal from the judgment of Justice Michael K. McKelvey of the Superior Court of Justice, dated December 31, 2013, with reasons reported at *2013 ONSC 3257*, *2 P.P.S.A.C. (4th) 94*, and from the costs order dated May 1, 2014.

Counsel

Tim Gleason and Matthew Tubie, for the appellants/respondents by cross-appeal.

Terry Corsianos and George Corsianos, for the respondent/appellant by cross-appeal.

The judgment of the Court was delivered by

R.A. BLAIR J.A.

Overview

1 In a factoring agreement, a party assigns its accounts receivable to a financing party, the factor, in return for immediate payment of the accounts at a discount. The factor collects from the third party responsible for payment and assumes the risk of delay and potential loss associated with that exercise; hence, the discount.

2 Grand Financial Management Inc. provides factoring services -- amongst other financial services -- to companies in the transportation industry. This appeal arises in the context of two such agreements that are legally distinct, but that were to operate in an overlapping factual and commercial context. The first was between Grand Financial and Solemio Transportation Inc. ("the Solemio Agreement"). The second was between Grand Financial and Wild Lions Inc. ("the Wild Lions Agreement"). The Solemio Agreement was guaranteed by Solemio's principal, Sami Ullah.

The Overlapping Factual and Commercial Nature of the Two Agreements

3 Arnold Bros. Transport Ltd., a large trucking operation, was the source of the commercial link between the two factoring agreements. It subcontracted some of its freight delivery obligations to Solemio, thus creating accounts receivable in favour of Solemio for those services ("the Solemio Receivables"). Those accounts receivable were, for a short period of time, assigned to Grand Financial pursuant to the Solemio Agreement. In turn, however, Solemio subcontracted the Arnold Bros. work to Wild Lions, thus creating accounts receivable owing by Solemio to Wild Lions ("the Wild Lions Receivables"). Those accounts receivable were also assigned to Grand Financial, but from Wild Lions and pursuant to the Wild Lions Agreement.

4 In the factual and commercial context, therefore, there was a connection between the two factoring triangles: Grand Financial was at the top of each and the payments for the services provided in each related to the same truckload deliveries of goods. Conceptually, both Solemio and Wild Lions were to be paid immediately for the discounted amounts of their respective accounts receivable and, at the end of the day, Arnold Bros. was to pay Grand Financial for what it owed Solemio and Solemio was to pay Grand Financial for what it owed Wild Lions.

5 In reality, the arrangement did not work out so simply, however. Mr. Ullah claimed that the Solemio Agreement was terminated through a mutual understanding shortly after it had been entered into. He resumed Solemio's "quick pay" arrangement with Arnold Bros., whereby Arnold Bros. paid Solemio promptly and received a 2.5 per cent discount. Arnold Bros. therefore stopped making payments to Grand Financial. At the same time, pursuant to the Wild Lions Agreement, Grand Financial continued to pay Wild Lions immediately on the Wild Lions invoices, which were, as previously noted, for the same deliveries of goods. While it looked to Solemio for payment of those invoices, Solemio did not make them on the same timely basis because, pursuant to its payment terms with Wild Lions, it took the position that it had 45-90 days for payment. Grand Financial thus found itself out of pocket, in its eyes.

6 This lawsuit resulted. Grand Financial sued Solemio, Mr. Ullah and Arnold Bros. for defaults under the Solemio

Agreement. But it did not sue Solemio or anyone for default under the Wild Lions Agreement, and it did not plead any such default. The action was discontinued against Arnold Bros. prior to trial, but Solemio and Mr. Ullah defended and counterclaimed for damages for the tort of intentional interference with economic relations.

7 Although the trial judge found that the Solemio Agreement had been terminated approximately two weeks following its execution, and so awarded no damages for its breach, he nonetheless granted judgment against Solemio, but not Mr. Ullah, in the amount of $200,000. This amount was arrived at by relying on what the trial judge took to be an admission by Mr. Ullah that Solemio was liable to Grand Financial for about that amount under the Wild Lions Agreement. At the same time, he awarded Solemio, but not Mr. Ullah, damages "at large" in the amount of $175,000 on the counterclaim. He declined to award punitive damages against Grand Financial. He also declined to award costs because, in his view, success was divided.

8 Both parties appeal from these respective results, and Solemio and Mr. Ullah appeal against the trial judge's decision not to award any costs.

The Transportation Chain and Payment Arrangements

9 Because the factual and commercial context referred to above is relevant to the narrative underlying Grand Financial's claim against Solemio and Mr. Ullah, I propose to review it in more detail here.

10 The pattern of operations as between the trucking companies was that Arnold Bros. would subcontract some of its delivery obligations to Solemio, which would, in turn, further subcontract some of that work to Wild Lions. Wild Lions would then invoice Solemio for its services on 45- to 90-day payment terms; Solemio would apply a mark-up and invoice Arnold Bros. for the work done. Arnold Bros. paid Solemio on the basis of the "quick pay" system described above, which was the arrangement in place between Solemio and Arnold Bros. prior to the execution of the Solemio Agreement on July 10, 2007.

11 That Agreement came about after Wild Lions introduced the principal of Grand Financial, Michael Rakhnayev, to Mr. Ullah and Mr. Rakhnayev pursued Solemio as a potential Grand Financial client. Mr. Ullah testified that he explained to Mr. Rakhnayev that he had a "quick pay" arrangement with Arnold Bros., but he ultimately accepted Mr. Rakhnayev's suggestion that Solemio try Grand Financial's services, with the proviso that if Mr. Ullah was not satisfied, he could go back to his old system of dealing directly with Arnold. Bros. On that representation, he said, Solemio entered into the Solemio Agreement and he gave his personal guarantee.

12 Under the Agreement, Solemio could offer to assign accounts receivable to Grand Financial and Grand Financial, if it accepted the account, would pay 90 per cent of it to Solemio and take an assignment of the receivable. On July 10, 2007, Grand Financial sent a direction to Arnold Bros., signed by Mr. Ullah, directing that, "[e]ffective immediately, all the accounts payable to Solemio Transportation Inc. shall be paid directly to Grand Financial Management Inc."

13 In addition to Mr. Ullah's guarantee of its obligations under the Solemio Agreement, Solemio granted to Grand Financial a security interest in the undertakings of its business, which was registered pursuant to the *Personal Property Securities Act*, R.S.O. 1990, c. P.10 ("the PPSA Security").

14 Meanwhile, pursuant to the Wild Lions Agreement, in effect from at least January 2007, Grand Financial took assignments of the Wild Lions Receivables. Solemio was accordingly obliged to pay those Receivables directly to Grand Financial, but, in Solemio's view, on 45- to 90-day payment terms, and not necessarily before it received payment from Arnold Bros. under the "quick pay" arrangement.

The Subsequent Events

15 For a brief period after the signing of the Solemio Agreement, Solemio sent its invoices to Grand Financial for processing, but by September 2007, Mr. Ullah had reverted to his original practice of dealing directly with Arnold

Bros. for payment of the Solemio Receivables on a "quick pay" basis. The parties' evidence as to the circumstances leading up to this change, and what followed it, diverge.

16 Mr. Rakhnayev and Mr. Ullah agree that they had a telephone discussion, but they disagree as to what was said.

17 According to Mr. Rakhnayev, Mr. Ullah wanted to change the structure for the making of payments under the two Agreements. He proposed that Grand Financial would pay Wild Lions directly, but that Solemio would not be required to pay Grand Financial for the Wild Lions Receivables; instead, Grand Financial would recoup those amounts out of the payments it received from Arnold Bros. for the Solemio Receivables. Mr. Rakhnayev denied there was any discussion about terminating the Solemio Agreement.

18 Mr. Ullah had a different version. He said that he soon realized that Solemio was losing money on the Solemio Agreement and that it was better off dealing directly with Arnold Bros. and taking only a 2.5 per cent discount on the Solemio Receivables under the "quick pay" system. He therefore decided that he would take Mr. Rakhnayev up on his representation that if he was not satisfied, he could go back to his old system. He said that Mr. Rakhnayev agreed during their telephone conversation to terminate the Solemio Agreement, and accompanying assignment of the Solemio Receivables.

19 Mr. Ullah's testimony that the Agreement had been orally terminated was corroborated by the evidence of Helmiene Dueck, who was the logistics manager for Arnold Bros. and an independent witness, and who confirmed that she had engaged in a three-way call with Mr. Rakhnayev and Mr. Ullah, in which Mr. Rakhnayev agreed that Arnold Bros. could go back to paying Solemio directly and that payment would not be required to be made by Arnold Bros. to Grand Financial thereafter.

20 Based on this corroboration and other factors supported by the record, the trial judge accepted Mr. Ullah's testimony over that of Mr. Rakhnayev and found that the Solemio Agreement had been terminated several weeks after it had been signed and that Solemio was free thereafter to bill and receive payment from Arnold Bros. directly for any invoices beyond the date of the telephone conversations. This finding was amply supported by the evidence, and there is no basis for interfering with it.

21 As indicated, Arnold Bros. paid Grand Financial for the Solemio Receivables up to the date of the foregoing conversations. Ms. Dueck confirmed that in a second three-way conversation shortly after the first one, Mr. Rakhnayev and Mr. Ullah agreed that Arnold Bros. would pay for those Receivables and that it did so. When Mr. Rakhnayev realized sometime in December 2007, however, that Grand Financial was paying Wild Lions directly for the Wild Lions Receivables, but was not receiving payments from Arnold Bros., and few or problematic payments from Solemio, the dispute came to a head.

22 Mr. Rakhnayev reacted strongly, if not angrily. Even though the Solemio Agreement had been terminated, he caused Grand Financial to act on its PPSA Security and to seize the sum of $35,000 from Solemio's account at RBC. He also threatened to put Solemio out of business. And he contacted Arnold Bros. and stated that someone was going to pay the money he was owed -- he "didn't care who" -- and that he would "go after" the customers of Arnold Bros. In response, Arnold Bros. stopped doing business with Solemio because it did not want to put its customers in jeopardy. It even interrupted deliveries that were in process at the time, directing that Solemio's trucks were to be stopped where they were located and arranging to pick up the loads and complete delivery. It is this conduct that forms the basis for Solemio's counterclaim for intentional interference with economic relations.

23 During his cross-examination at trial, Mr. Ullah acknowledged that "there was an outstanding balance [of] around $200,000" in favour of Grand Financial pursuant to the assignment of the Wild Lions Receivables under the Wild Lions Agreement. He did not acknowledge, however, that Solemio was in default in making those payments at the time of the dispute. In fact, Mr. Ullah maintained at all times that Solemio had been paying Grand Financial in compliance with the delayed payment terms of the Wild Lions invoices. It was on the basis of this "admission" that the trial judged awarded judgment in favour of Grand Financial.

Issues

24 For the purposes of the appeal and cross-appeal, the issues to be addressed are whether the trial judge erred by:

(a) awarding Grand Financial the amount of $200,000 based on Mr. Ullah's admission that about that amount was owing to it under the Wild Lions Agreement, even though that Agreement had not been pleaded as the basis for recovery by Grand Financial;

(b) finding Grand Financial liable for the tort of intentional interference with economic relations;

(c) awarding damages "at large" in the amount of $175,000;

(d) refusing to award Solemio punitive damages on the counterclaim; and

(e) failing to award costs in favour of Solemio.

The $200,000 Award

25 As noted above, the award of $200,000 to Grand Financial was derived from what the trial judge characterized as Mr. Ullah's admission during testimony that "there was an outstanding balance [of] around $200,000" owing by Solemio to Grand Financial with respect to payment of the Wild Lions Receivables that were factored to Grand Financial.

26 Solemio argues on appeal, however, that Grand Financial's claim as asserted in the action was based solely on the Solemio Agreement, and that Grand Financial did not plead or claim recovery under the Wild Lions Agreement. The trial judge therefore erred in awarding such recovery.

27 In support of this proposition, Solemio relies on the decisions of this Court in: *460635 Ontario Ltd. v. 1002953 Ontario Inc.* (1999), 127 O.A.C. 48, at para. 9; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 60-62; and *Bulut v. Carter*, 2014 ONCA 424, 322 O.A.C. 58, at para. 12. Those authorities stand generally for the tenet that lawsuits are to be decided within the boundaries of the pleadings; a finding of liability and damages against a defendant on a basis that was not pleaded must be set aside for fairness reasons because it deprives the defendant of the opportunity to address the issue in evidence and argument at trial. Grand Financial, on the other hand, relies on the principle that pleadings are to be given "a generous and liberal interpretation" in this context: *Link v. Venture Steel Inc.*, 2010 ONCA 144, [2010] O.J. No. 779, at para. 36.

28 I accept Solemio's submission on this ground of appeal.

29 In my view, Grand Financial framed its case solely on the basis that Solemio was in breach of its obligations under the Solemio Agreement, arguing the following: Arnold Bros. had failed to pay Grand Financial for the Solemio Receivables as required and therefore Solemio was in default under that Agreement; Grand Financial was accordingly entitled to act on the PPSA Security and to recover the amounts not paid by Arnold Bros.; and Mr. Ullah was personally liable on his guarantee.

30 The claim asserted by Grand Financial in its Statement of Claim was for breach of "the Factoring Agreement". No other breach was pleaded. "The Factoring Agreement" is defined as the "exclusive full and factoring agreement [entered into by Solemio] with the plaintiff [on July 10, 2007] to obtain financing by selling and assigning to the plaintiff acceptable accounts receivable". There is no mention of Wild Lions or of the Wild Lions Agreement anywhere in either Grand Financial's Statement of Claim or its Reply.

31 Equally problematic is the fact that Solemio signalled the difficulty that has arisen in its Statement of Defence. In paras. 19-21, it directly pleaded -- correctly, as it turns out -- that the amount claimed by Grand Financial as damages for breach of the Solemio Agreement was based not on invoices submitted by Solemio to Arnold Bros.

and assigned to Grand Financial, but on invoices issued by Wild Lions and purchased from it by Grand Financial under the Wild Lions Agreement. In its Reply and Defence to Counterclaim, Grand Financial did not even respond to this allegation, nor did it at any time seek an amendment to claim recovery for amounts that Solemio may be required to remit to it as a result of the Wild Lions Agreement.

32 In argument, Grand Financial submitted that its reference in para. 4 of its Reply and Defence to Counterclaim to "any other indebtedness due to the plaintiff by Solemio" was sufficient to put in play Grand Financial's right to recover for amounts that may be owing under the Wild Lions Agreement. I do not accept this submission.

33 The para. 4 allegation is in response to the allegation in para. 10 of the Statement of Defence and Counterclaim that Solemio and Mr. Ullah had approached Grand Financial and informed it that it wished to terminate the Solemio Agreement. In that context, Grand Financial pleaded that even if the Agreement had been terminated, Solemio remained liable for full and prompt payment of accounts purchased by Grand Financial, as well as for any other indebtedness due to the plaintiff by Solemio -- a clear reference to the wording of s. 12.2 of the Solemio Agreement. Given the context, this could only mean that Grand Financial was arguing for Solemio's continued liability under the terms of the Solemio Agreement. The trial judge properly interpreted s. 12.2 in that fashion. I do not think -- particularly in view of the precise wording in the Statement of Claim, and the absence of a direct response by Grand Financial in its Reply to Solemio's specific pleading flagging the issue -- that the reference to "any other indebtedness due to the plaintiff by Solemio" in para. 4 could fairly be taken as signalling a claim by Grand Financial for recovery under a different and legally separate agreement, the Wild Lions Agreement.

34 This is so, in my view, even giving the pleadings the kind of "generous and liberal interpretation" referred to by this Court in *Link v. Venture Steel Inc.* In that case, O'Connor A.C.J.O., also made it clear, at para. 35, that:

> It is well accepted that the parties to an action are entitled to have a resolution of their differences based on the pleadings. The trial judge cannot make a finding of liability and award damages against a defendant on a basis not pleaded in the statement of claim because it deprives the defendant of the opportunity to address that issue.

35 Grand Financial's case at trial was also put to the trial judge as a claim for damages for breach of the Solemio Agreement. In his opening statement, trial counsel told the trial judge:

> This case Your honour involves a factoring agreement that was entered into between the plaintiff, Grand Financial Management Inc. and the defendants, Solemio Transportation Inc. The personal defendant, Mr. Ullah, also signed a personal guarantee where he guaranteed the obligations of the defendant Solemio.
>
> ...
>
> You'll hear evidence that Solemio received payment from the defendant Arnold Brothers, but it did not remit the payment to Grand Financial, so it's holding the money. Whatever they did with the money, we don't know. [Emphasis added.]

36 Counsel continued by advising the trial judge that Solemio had counterclaimed, that it was raising the defence of *non est factum* and the "excuse that the factoring agreement was terminated", and that Grand Financial's response to the latter was "that the factoring agreement need[ed] to be terminated in writing" (emphasis added). He then concluded with the following:

> So Your Honour, the plaintiff is claiming $219,500 against both defendants, Solemio under the factoring agreement and against Mr. Ullah under the personal guarantee and I'll leave the rest in chief. [Emphasis added.]

37 Nothing in the way the case was framed at trial raises even the suggestion that Grand Financial was asserting a claim for the recovery of damages for breach of the Wild Lions Agreement.

38 I accept that the factual interrelation between the Solemio Agreement and the Wild Lions Agreement, and between the commercial activities of the parties, was in play before and at the trial. The substance of Grand Financial's complaint was that the Solemio Receivables and the Wild Lions Receivables arose out of the transportation of the same truckloads of goods and that it had factoring agreements with respect to both sets of receivables, but that -- after Solemio and Arnold Bros. reinstated their quick pay arrangement -- Grand Financial was left to pay Wild Lions for its receivables, while receiving nothing further from Arnold Bros., and no or unreliable payments from Solemio, to offset the payments for the Wild Lions Receivables. Mr. Ullah's response to Grand Financial's complaint was that his business model involved terminating the Solemio Agreement (as it had been agreed he was entitled to do) and thereafter collecting immediate payment directly from Arnold Bros. on the quick pay system, while also not paying the Wild Lions Receivables until up to 90 days after receipt of the invoices, which was a better financial alternative from Solemio's perspective.

39 But I do not accept Grand Financial's argument that the issue of whether it could collect on the Wild Lions invoices "was clearly 'joined in battle'."

40 While the trial judge described one of the "large number of issues to be addressed" as "[t]he right of Grand Financial to judgment against Solemio for the Wild Lions' invoices", from my review of the pleadings, the opening statements, and the record, I do not think this is an accurate description.

41 The issue at trial was whether Grand Financial was entitled to judgment against Solemio for breach of the Solemio Agreement. To the extent there was confusion between the two factoring agreements, it was because the invoices listed in the Statement of Claim as the basis for Grand Financial's claim, and placed in evidence, were all Wild Lions' invoices to Solemio. Grand Financial had paid Wild Lions under the Wild Lions Agreement and, on the theory that the Solemio Agreement remained in effect, would have been reimbursed for those amounts through the payments it expected Arnold Bros. to pay to it under the Solemio Agreement. This was because of the flow-through nature of the invoicing for the delivery services provided -- Wild Lions to Solemio, Solemio to Arnold Bros., and Arnold Bros. to Grand Financial, which had already paid the Wild Lions invoices at the outset of the flow.

42 As explained above, however, while the Wild Lions invoices were an integral component of the ultimate flow of funds in the factual and commercial context, the case was not pleaded or put against Solemio at trial, on the basis that it had defaulted in its obligations relating to the Wild Lions Agreement. The case was put against Solemio on the basis that it had breached the Solemio Agreement, which Grand Financial claimed had not been terminated.

43 The trial judge resolved this dispute in favour of Solemio, concluding that the Solemio Agreement had been terminated as Mr. Ullah testified, and finding, at para. 44, "that Solemio did not have any further obligations to Grand Financial under its factoring agreement". That should have been the end of the matter.

44 As noted above, Grand Financial did not seek leave to amend its pleadings to claim recovery under the Wild Lions Agreement prior to trial, at trial, or on appeal.

45 I make two further observations before leaving the issue of the $200,000 judgment. First, it is not clear to me, from a review of the record, that Mr. Ullah necessarily admitted Solemio was obligated to pay around that amount to Grand Financial under the Wild Lions Agreement, either at the time of the dispute or at the time of trial. Secondly, on the assumption that the claim was first asserted at trial, it would be statute barred.

46 On the first point, I think it is clear that Mr. Ullah did not admit the monies were due and owing at the time of the dispute and Mr. Rakhnayev's reaction. His "admission" came during an exchange in cross-examination which appears to have been directed at establishing that Mr. Rahkhnayev was not acting "unlawfully" for purposes of the intentional interference with economic relations claim. It was not made in the context of determining what amounts were due and owing to Grand Financial for purposes of recovery under the Wild Lions Agreement. Had Solemio been receiving funds directly from Arnold Bros. improperly, and not paying Grand Financial on the Wild Lions invoices in a timely fashion, at least some of Grand Financial's conduct during the period of the dispute -- the RBC

seizure, for example -- might not have been "unlawful", thereby taking some of the sting out of Solemio's case on the counterclaim.

47 In that context, Mr. Ullah acknowledged that "there was an outstanding balance [for] about $200,000" in favour of Grand Financial, but steadfastly maintained that Solemio was not obligated to pay the Wild Lions receivables at that time, or at the same time as it received payment from Arnold Bros. Mr. Ullah's acknowledgement that there was about $200,000 outstanding needs to be read in that context.

48 In this respect, the exchange with counsel began with this suggestion:

> Your beef is that my client took -- took unlawful action, make my guy look like the bad guy and here, here you're holding onto $200,000 of my guys money.

49 To which Mr. Ullah replied he did not know it was "[his] guys money" because "basically [the Wild Lions receivables weren't] due yet ... [because Solemio] had 45 to 90 days to pay," and he "was paying [Grand Financial] regularly as per ... the [invoices]". This is not an admission that Solemio was legally obliged to pay $200,000 under the Wild Lions Agreement at the time.

50 It may be, as Grand Financial contends, that Solemio's counsel conceded during argument at trial that about $200,000 was owing, but we do not have a copy of the argument transcript and we do not know the context of that concession or the purpose for which it was made.

51 Addressing the amounts outstanding on the Wild Lions invoices, and whether they were due and owing at the relevant time, as part of a claim by Grand Financial for recovery under the Wild Lions Agreement is not the same setting as addressing those issues in the context of the tort claim. What other evidence may have been led, and what other arguments made based on that evidence, had the claim for recovery been the issue, may have been quite different. Equally compellingly, what defences, if any, may have been open to Solemio are unknown.

52 Significantly, the trial judge himself observed, at para. 45: "The evidence led by Grand Financial with respect to the amount owed on the Wild Lions' invoices [was] unsatisfactory."

53 All of these considerations reinforce the risks of straying into areas that are not covered by the pleadings, because the parties do not address the issues directly and formulate their approaches to the evidence and argument accordingly. As this Court stated in *Rodaro*, at para. 62:

> In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how [the trial judge's] lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. [Emphasis added.]

54 Finally, if Grand Financial's claim under the Wild Lions Agreement is treated as having been made for the first time at trial (as it must be, given my determination above), there is a further impediment to recovery: the two-year limitation period provided for under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sch. B.

55 Solemio raised the limitation defence on appeal, arguing that it could not have done so earlier because the issue of Grand Financial's right to recover under the Wild Lions Agreement was not pleaded at trial. Grand Financial disputes this and says that Solemio ought to have argued the defence at trial, that no evidence was led at trial on the limitations issue, and that Solemio ought not to be permitted to argue a new issue for the first time on appeal.

56 In this respect, Grand Financial relies on the following comments of this Court in *Ontario Energy Savings L.P. v.*

767269 Ontario Ltd., 2008 ONCA 350, at para. 3:

> In *Ross v. Ross* (1999), 181 N.S.R. (2d) 22, the Nova Scotia Court of Appeal set out the test concerning receiving arguments for the first time on appeal. The court said that such an argument, "should only be entertained if the court of appeal is persuaded that all of the facts necessary to address the point are before the court as fully as if the issue had been raised at trial". The rationale for the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised.

57 I shall return to this notion when dealing with Grand Financial's contention that it is entitled to set-off its claim on the Wild Lions Agreement against the damages at large awarded in favour of Solemio -- an argument also raised for the first time on appeal. I am satisfied, however, that Solemio ought not to be precluded from raising the defence, in this context, for the first time on appeal.

58 Having regard to my determination that the issue of Grand Financial's right to recover under the Wild Lions invoices pursuant to the Wild Lions Agreement was not one that was properly before the trial judge, and therefore not one on which he could grant judgment, it is technically unnecessary to deal with the limitation defence raised by Solemio on appeal. Nonetheless, had the trial judge considered the claim under the Wild Lions Agreement to have arisen during the course of the trial, it would have been an error for him to have granted judgment, since the claim would have been statute barred on any interpretation of the record. The evidence was that by the end of January 2008, the monies were due and owing. Everyone was aware of that. By the time of trial, the two-year limitation period for initiating a claim had long expired.

59 In the end, then, while it may have been tempting to give effect to what was possibly a partial admission by Solemio through Mr. Ullah regarding a $200,000 outstanding balance, in my view, the trial judge was not entitled on these pleadings and this record to grant judgment in favour of Grand Financial for breach of the Wild Lions Agreement -- a claim that was neither pleaded nor asserted at trial and which -- if treated as having arisen at trial -- would be statute barred in any event.

60 For all of the foregoing reasons, I would give effect to this ground of appeal and set aside of the award of $200,000 against Solemio.

Intentional Interference with Economic Relations

61 Grand Financial argues on the cross-appeal that the trial judge erred in law in holding that it was liable for the tort of intentional interference with economic relations (or, as it is sometimes called, the tort of causing loss by unlawful means). In my view, however, Solemio has succeeded in establishing the necessary elements of that tort on the evidence.

62 The trial judge properly identified the three essential elements of the tort as traditionally understood: first, the defendant must have intended to injure the plaintiff's economic interests; secondly, the interference must have been by illegal or unlawful means; and thirdly, the plaintiff must have suffered economic harm or loss as a result: see *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, and cases cited therein, leave to appeal refused, [2010] S.C.C.A. No. 403.

Intentional Injury

63 The trial judge found that the actions of Grand Financial were directly intended both to harm Solemio in its business interests and to enrich itself. This finding is amply supported by the record. Mr. Rakhnayev threatened Mr. Ullah that he would take steps to shut him down if he did not make certain payments and give Grand Financial business from other clients. He told Arnold Bros. in an angry message that someone was going to pay the money owed to Grand Financial, and he "didn't care who" -- supporting the trial judge's finding that Mr. Rakhnayev would take any steps within his power, whether lawful or unlawful, to get the money he thought he was owed. Mr.

Rakhnayev also threatened to pursue Arnold Bros.' customers, causing Arnold Bros. to sever its business relationship with Solemio. Finally, the trial judge found, at para. 52, that Mr. Rakhnayev was "well aware of and intended the natural consequences which he knew would flow from his deliberate actions in executing on security pursuant to an agreement which he knew was terminated."

Unlawful Means

64 Grand Financial's main argument on the cross-appeal is that the trial judge erred in his application of the "unlawful means" criterion for the establishment of the tort. It points out that the trial judge did not have the benefit of the recent decision of the Supreme Court of Canada in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, *2014 SCC 12*, *[2014] 1 S.C.R. 177* -- which was still under reserve at the time of trial -- and suggests that the analysis of the tort in that case leads to the conclusion that the trial judge erred in holding Grand Financial liable.

65 I disagree. That *A.I. Enterprises* did not change the essential elements of the tort is apparent from the following succinct description of its parameters by Cromwell J. at para. 23:

> The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party). [Emphasis added.]

66 The primary issue resolved by *A.I. Enterprises*, had to do with "the scope of liability for [the] tort and, in particular, what the unlawfulness requirement means": at para. 4. Although there has been no dispute that the unlawful conduct forming the basis for the tort must be intentional and must cause the plaintiff injury, there has been considerable debate in Canadian and international jurisprudence about the scope of the type of conduct that will constitute "unlawful means". Should the courts take a broad approach or a narrow approach to this question? I need not review that jurisprudence here. After doing so at length, the Supreme Court of Canada settled firmly on the narrow approach in *A.I. Enterprises*.

67 Writing for the Court, Cromwell J. made it clear, at para. 5, that "the tort should be kept within narrow bounds" and, at para. 35, that it should be viewed "as one of narrow scope." In particular, he confirmed, at para. 5, that for conduct to constitute "unlawful means" in this context, it must be conduct that "would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it." In this respect, *A.I. Enterprises* is consistent with this Court's analysis in *Alleslev-Krofchak* and *Correia v. Canac Kitchens* *(2008), 91 O.R. (3d) 353*.

68 Grand Financial underscores the now-confirmed "narrow approach" to the interpretation of conduct that constitutes "unlawful means" and submits that the trial judge erred in finding that criterion had been met in this case. In this respect, it focusses on the trial judge's finding that Grand Financial's actions in purporting to exercise on its PPSA Security when it knew that the Solemio Agreement had been terminated constituted the use of unlawful means. Grand Financial provided both RBC and Arnold Bros. with copies of the security documentation and claimed entitlement to the funds in Solemio's RBC account and to any funds owing by Arnold Bros. to Solemio. RBC turned over $35,000. (Grand Financial ultimately backed off from this demand from Arnold Bros. and permitted it to pay the sum of $25,000 that Arnold Bros. owed to Solemio.)

69 Grand Financial argues that the exercise of its PPSA Security would not have been actionable by either RBC or Arnold Bros. in these circumstances and, accordingly, that the unlawful means element of the tort has not been made out. In particular, it submits that the Bank acted voluntarily on the request and that RBC therefore could not claim there was any unlawful act giving rise to a civil cause of action against Grand Financial; instead, the acts were only unlawful against Solemio, which would have a direct cause of action against Grand Financial.

70 There are at least two difficulties with this submission, in my view.

71 First, it is questionable whether it can be said that RBC acted "voluntarily" in responding to the request when it was faced with what appeared, on its face, to be a valid security instrument being enforced by the creditor. In any event, it is not accurate to say that RBC or Arnold Bros. could have had no claim against Grand Financial in the circumstances, or at least no claim if they had suffered loss because of the conduct. Solemio contends that there are a number of claims that could have been asserted, including the torts of deceit, fraudulent misrepresentation, negligent misrepresentation, intimidation, and conversion.

72 It is not necessary to test all of these assertions because I am satisfied that -- assuming it had suffered a loss from Grand Financial's wrongful conduct in claiming to recover on what Grand Financial knew to be an ineffective security instrument -- RBC would have been able to advance a claim for, at the very least, negligent misrepresentation. Grand Financial represented to it that the security was enforceable, intending it to act upon the representation. It was reasonably foreseeable that the bank would do so and such reliance would, in the circumstances, have been reasonable. The representation was untrue and misleading, and Grand Financial was negligent in making it. And, if RBC had suffered loss as a result, the reliance would have been detrimental to it: see *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at p. 110; and *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24.

73 Secondly, the trial judge did not rely solely on the purported execution on the PPSA security to hold that the "unlawful means" element had been established on the evidence. He relied as well on Mr. Rakhnayev's unlawful threat to pursue Arnold Bros. for the money he felt Grand Financial was owed and to go after Arnold Bros.' customers -- a threat that led directly to the abrupt termination by Arnold Bros. of its business relationship with Solemio, stranding a number of Solemio's trucks in various places in the process. Had Arnold Bros. suffered a loss as a result of terminating that relationship, the loss would have been actionable by it, perhaps based on the misrepresentation grounds outlined above, but otherwise based on the tort of intimidation. The elements of the latter tort are (i) a threat, (ii) intent to injure, (iii) some act taken or forgone as a result of the threat, and (iv) resulting damages: see *The Score Television Network Ltd. v. Winner International Inc.*, 2007 ONCA 424, [2007] O.J. No. 2246, at para. 1, and cases cited therein. There is evidence on the record going to all of these elements.

74 It is true that the trial judge viewed the wrongful acts in question through the lens of determining whether they were not actionable by Solemio, the injured party in the unlawful interference scenario. That was because the law in Ontario at the time was that to constitute unlawful means, the wrongful conduct could not be actionable by the plaintiff: see *Alleslev-Krofchak*, at para. 60; and *Correia*, at para. 100. On this point, *A.I. Enterprises* changed the law, holding, at paras. 77-82, that liability for the unlawful means tort is not limited to situations in which the defendant's conduct is not otherwise actionable by the plaintiff. I do not think this change matters for the purposes of this case, however.

Economic Loss

75 The trial judge correctly found that Solemio had satisfied the third element of the tort of intentional interference with economic relations. The sum of $35,000 was improperly taken from its RBC bank account. Its significant business relationship with Arnold Bros. was destroyed.

Conclusion

76 For these reasons, the trial judge did not err in holding that Solemio had satisfied its onus of establishing the elements necessary for a finding that Grand Financial was liable for the tort of intentional interference with economic relations.

Damages at Large

77 The trial judge concluded on the evidence that even though Solemio had "failed to prove the quantum of its pecuniary losses there [did] appear to be a reasonable basis to make an award of general damages for intentional interference with economic relations": at para. 84. He rested this decision on three footings: first, that the actions of Grand Financial had resulted in significant, but not readily assessable, liquidity problems for Solemio; second, that those actions had contributed to a loss of reputation for Solemio; and third, that they constituted a serious abuse of the legal process, a reference to the unlawful resort to the PPSA Security.

78 Solemio submits on the appeal that the trial judge's award of $175,000 for damages at large is insufficient and was apparently based on his misconception that Solemio had "significant liquidity problems unrelated to the actions of Grand Financial" when there was no such evidence to support that conclusion: at para. 81. Grand Financial argues on the cross-appeal that the trial judge erred in granting damages at large at all, or in any amount more than the $35,000 seized from the RBC account.

79 Although Solemio argues that its damages exceeded $175,000 -- and seeks the amount of $250,000 in its factum -- it points to no evidence, or to any error on the part of the trial judge, that would justify interfering with his finding that Solemio had failed to prove pecuniary losses that could be quantified.

80 At trial, Solemio summarized its claim as follows:

DATE	DESCRIPTION	AMOUNT
January to June 2008	Loss due to all 3 trucks and trailers being reacquired by the lessor	$135,000.00
January to June 2008	Office telephone and utilities losses for 6 months	$77,121.00
January to June 2008	Plaintiff's loss in business income	$537,879.00
	TOTAL	$750,000

81 The trial judge's findings that these claims were not supported by any reliable documentary, accounting, or expert evidence were well-founded on the record, and there is no basis for interfering with them. Indeed, Solemio does not seriously press its argument with respect to the damages award on the appeal. It is left with the assertion that the award of general damages at large was simply insufficient and should be increased to the $250,000 number, which it appears to have picked out of the air.

82 Damages at large may be awarded in cases of intentional torts, and to corporations in such circumstances where there has been injury to the corporation's reputation and associated economic loss: see *Uni-Jet Industrial Pipe Ltd. v. Canada (A.G.)* (2001), 198 D.L.R. (4th) 577 (Man. C.A.), at paras. 66-72; *Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499, 266 O.A.C. 17, at para. 37; *PSC Industrial Canada Inc. v. Ontario (Ministry of the Environment)* (2005), 48 B.L.R. (3d) 58 (Ont. S.C.), at paras. 60-62, rev'd in part on other grounds (2005), 258 D.L.R. (4th) 320 (Ont. C.A.); and *Alleslev-Krofchak v. Valcom Ltd.*, 2009 CanLII 30446 (ON SC), at para. 361, aff'd 2010 ONCA 557, 322 D.L.R. (4th) 193.

83 Unlike pecuniary damages, such damages are not capable of being precisely measured and are more a matter of impression: *Uni-Jet*, at para. 72; and *Foschia*, at para. 37. As Kroft J.A. explained in *Uni-Jet*, at para. 72:

> [D]amages at large are a matter of impression; they must include the consideration of a host of circumstances involving both the particular plaintiff and the particular defendant, and they are likely to be unique in each case.

84 In *Howard v. Madill*, 2010 BCSC 525, at para. 89, Bruce J. summarized the principles relating to the assessment of damages at large, as canvassed in *Uni-Jet*:

> An accurate summary of the law with respect to the assessment of damages at large, and the circumstances in which such an award may be made, is contained in *Uni-Jet* at paras. 66 to 73. I summarize these principles as follows:
>
> 1. Damages other than for pecuniary loss are "damages at large" and generally include compensation for loss of reputation, injured feelings, bad or good conduct by either party, or punishment.
> 2. Damages at large are compensatory for loss that can be foreseen but cannot be readily quantified.
> 3. Damages at large are a matter of discretion for the trial judge and are more a "matter of impression and not addition."
> 4. Where damages at large are imposed for intentional torts, the assessment of damages provides an opportunity to condemn flagrant abuses of the legal process.

85 I too would adopt this summary.

86 Damages at large for intentional torts include damages for loss of reputation, but are not limited to that type of loss. As the authorities above demonstrate, they include as well damages reflecting the court's condemnation of flagrant abuses of the legal process. Generally speaking, they are compensatory for loss that can be foreseen, but not readily quantified. The trial judge applied these factors.

87 As a result of Grand Financial's unlawful conduct, Solemio lost its major client; Arnold Bros., representing 60 per cent of its business, abruptly ended its dealings with Solemio. Solemio's trucks were literally stopped in their tracks and their loads transferred to other trucks. Solemio lost the business of other customers as well. In addition, its bank account was emptied and frozen, thus creating obvious liquidity problems, including the inability to make payments for trucks, utilities, insurance, salaries, and other bills. These events amply supported the trial judge's findings that Grand Financial's conduct contributed to Solemio's liquidity problems, as well as its loss of reputation, and engaged the court's concern for abuse of the legal process.

88 What of the amount of the damages at large award, then?

89 It is not readily apparent how the trial judge arrived at the amount of $175,000, although at one point Mr. Ullah testified that he had received about $200,000 from Arnold Bros. minus an amount of $25,000 that he "left there", perhaps referring to the same sum of money that Grand Financial later allowed Arnold Bros. to pay to Solemio. As noted above, however, damages at large are "a matter of impression" and are not something that can be precisely measured. It is difficult for an appellate court to say that the assessment is plainly erroneous in such circumstances: see Stephen M. Waddams, *The Law of Damages*, loose-leaf (2015-Rel. 24), 2nd ed. (Toronto: Canada Law Book, 2015), at para. 13.470. While I may not have arrived at the amount of $175,000, I cannot say that the trial judge erred in principle in doing so. He properly took into account all of the relevant factors in arriving at his conclusion.

90 Before leaving this issue, I need to address, briefly, Grand Financial's wrongful seizure of the $35,000 from Solemio's RBC account. I am satisfied on the record that Solemio did not claim the seized amount as a separate head of damages.[1] That said, the trial judge's award of damages at large appears to encompass some recognition of the improper seizure, and Grand Financial itself appears to have accepted the $35,000 as a component of that award, since its argument on appeal was that the damages at large award ought to be set aside or, at least, reduced to that amount. As well, one of the three foundations upon which the trial judge based his award of

damages at large was that Grand Financial's actions had constituted a serious abuse of the legal process, a reference to the unlawful resort to the PPSA Security. I conclude, on these bases, that the award of damages at large was intended to incorporate the factors that would give rise to the recovery of the $35,000 amount, and I see no error in that approach.

91 On that basis, I would not interfere with the trial judge's award of damages at large.

Equitable Set-Off

92 On the cross-appeal, Grand Financial advances, for the first time, an equitable set-off argument. It submits that it is entitled to set-off against the $175,000 damages at large awarded to Solemio on its counterclaim any amounts owing to it under the Wild Lions Agreement. And, because set-off is a defence and not a claim in itself, Grand Financial contends that, as a defendant to a counterclaim, it was able to raise the defence, and was entitled to do so despite any limitation defence available to Solemio in respect of amounts owing under the Wild Lions Agreement.

93 In support of the latter submission, Grand Financial relies on the decision of *Canada Trustco Mortgage Co. v. Pierce,* (2005), 254 D.L.R. (4th) 79, 197 O.A.C. 369 (C.A.), at para. 43, in which this Court adopted the following statement of Lord Denning in *Henriksens Rederi AIS v. PHZ Rolimpex*, [1973] 3 All E.R. 589 (C.A.), at p. 593:

> In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a *defence* and one which is in the nature of *cross-claim*. When a defendant is sued, he can raise any matter which is properly in the nature of a *defence*, without fear of being met by a period of limitation.

94 I agree that a limitation period does not operate to preclude a defence of equitable set-off. However, it is too late, in my view, for Grand Financial to raise this argument for the first time on appeal. Recall that Grand Financial itself argues that Solemio is foreclosed from raising the limitation period defence for the same reason, taking the position that it was incumbent upon Solemio to raise the limitation issue through evidence and argument at trial, and having failed to do so, Solemio, "as a matter of law forfeited [its] right to do so now for the first time on appeal": see *Ontario Energy Saving LP*, at para. 3. Although I would not give effect to that argument with respect to Solemio's limitation period defence, as explained above, that rationale does apply to preclude Grand Financial's attempt to rely on equitable set-off at this stage of the proceedings, in my opinion.

95 Unlike Solemio with respect to the Wild Lions Agreement claim, Grand Financial knew from the outset that it was facing a Solemio counterclaim. It could have raised equitable set-off in that context, but did not do so. Equitable set-off was not pleaded, was not the subject of any evidentiary foundation (or counter-foundation), and was not argued. In short, it was not an issue to which either the parties or the trial judge turned their minds.

96 Grand Financial submits that, even in the absence of a plea of set-off and any joinder of issue on that point, the evidentiary foundation still exists for this Court to determine that equitable set-off applies. I disagree. There may be *some* evidentiary basis upon which to propose, or to oppose, the argument, but we do not know what other evidence may have been led, or arguments made, had it been known that the issue was in play.

97 Equitable set-off is a defence that is particularly rooted in the circumstances of the individual case. It requires, amongst other things, that the set-off claim go directly to impeach the plaintiff's demands, the "plaintiff" in this case being Solemio and the "claim" being an award of damages to compensate it for harm suffered as a result of an intentional wrongdoing -- the tort of interference with economic relations. To put it another way, the defence requires that the set-off claim be so closely connected to the plaintiff's demands that it would be "manifestly unjust" to allow the plaintiff (Solemio) to enforce payment without taking into account the set-off claim: see *Holt v. Telford*, [1987] 2 S.C.R. 193, at p. 212; *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716, 340 O.A.C. 359, at paras. 55-59; *Ang v. Premium Staffing Ltd.*, 2015 ONCA 821.

98 In addition, the application of equitable set-off is subject to the equitable doctrine of "clean hands". The courts will not allow a party to set-off "where there [is] an equity to prevent [the party from] doing so; that is to say, where the rights, although legally mutual, [are] not equitably mutual": *In re Whitehouse & Co.* (1878), 9 Ch. D. 595, at p. 597; see also *Stewart v. Bardsley*, *2014 NSCA 106*, at paras. 54-61; *Saskatchewan Wheat Pool v. Feduk*, *2003 SKCA 46*, at para. 63; and Kelly R. Palmer, *The Law of Set-Off in Canada* (Aurora, Ontario: Canada Law Book Inc., 1993), at p. 66. Here, Grand Financial seeks to set off against its contractual claim under the Wild Lions Agreement Solemio's judgment for damages caused by Grand Financial's own intentional wrongdoing, albeit a wrongdoing that may have some connection with, or arise from, the issues regarding the Wild Lions Agreement. Whether equitable set-off would be available as a defence in such circumstances is something that would require *viva voce* evidence and credibility findings made during an assessment focused on that particular issue.

99 All of these considerations underscore the need for a trial record focused on the set-off issue to enable effective appellate review. It does not exist in this case.

100 For these reasons I would not permit Grand Financial to raise the issue on appeal. Given that determination, it is not necessary to resolve the question of whether the defence can be made out on the merits in this case.

Punitive Damages

101 Even though he found that Solemio had made out the tort of intentional interference with economic relations, the trial judge declined to grant Solemio's request for punitive damages in the amount of $250,000. I see no error in this determination.

102 The trial judge properly summarized the law relating to punitive damages at para. 88 of his reasons:

> Punitive damages are only awarded in extraordinary situations. In general, punitive damages are considered in situations where the defendant's misconduct is so malicious, oppressive, and high-handed that it would offend the court's sense of decency. Punitive damages do not bear any relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate a party, but rather to punish someone. It is the means by which a court expresses its outrage at what it considers egregious conduct of a party. As noted by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, *[2002] 1 S.C.R. 595*, punitive damages are very much the exception rather than the rule. [Citations omitted.]

103 His application of the law on punitive damages to the circumstances of this case was a matter of fact and mixed fact and law, and is therefore entitled to deference.

104 The trial judge concluded on the evidence that, even though Grand Financial had acted in an unlawful manner, its conduct did not rise to a level warranting an award of punitive damages. In doing so, he took into account, at para. 89, the fact "that Solemio [had run] up a very substantial debt in connection with the Wild Lions' invoices", while at the same time it was receiving prompt payment from Arnold Bros. for the Solemio counterpart of those invoices. He noted in addition that one component of the award of damages at large was a reflection of the court's disapproval of Grand Financial's abuse of the legal process. The punitive damages concept of expressing society's disapproval of the defendant's behaviour had accordingly already been taken into account.

105 He was entitled to make this call on the evidence, in my view.

The Costs Award

106 My conclusion earlier in these reasons that Grand Financial was not entitled to recover on the basis of the Wild Lions invoices pursuant to the Wild Lions Agreement has overtaken Solemio's attack on the costs award below. I need not deal with that aspect of the appeal.

Disposition

107 For all of the foregoing reasons, I would allow the appeal and set aside the judgment for $200,000 granted against Solemio. I would dismiss the cross-appeal.

108 I observe here that, although Mr. Ullah is an appellant and a respondent on the cross-appeal, no submissions were made with respect to the trial judge's dismissal of the claims made by and against him personally. Nothing in this decision is intended to affect the judgment below on those issues.

109 Solemio has been substantially successful and is entitled to its costs here and below. It was successful on a motion before a panel of this Court on November 18, 2014, at which time the costs of the motion were fixed in favour of Solemio in the cause in the amount of $6,000. I would fix the costs of the appeal in total, including the foregoing amount, in favour of Solemio in the amount of $27,000, inclusive of disbursements and HST. I would remit the costs of trial to the trial judge for determination, if the parties are unable to agree.

R.A. BLAIR J.A.
A. HOY A.C.J.O.:— I agree.
C.W. HOURIGAN J.A.:— I agree.

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1 Solemio acknowledges in its factum that it did not sue to recover the $35,000, and its damage summary, outlined above, does not include a claim to recover that amount.

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