Court of Queen's Bench of Alberta

Citation: R v Breitkreutz, 2022 ABQB 449

Date: 20220629
Docket: 180594889Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Arnold Breitkreutz

Accused

Reasons for Judgment
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Over a period of more than thirty years, investors gave their money to Arnold Breitkreutz and his company, Base Finance Ltd, on the promise of a safe investment and attractive returns. The investors were led to believe that Mr. Breitkreutz was loaning their money to his mortgage brokerage clients and, in turn, securing the loans with first mortgages on Alberta real estate. At the outset some investor money was secured by first mortgages on Alberta real estate but, unbeknownst to investors, Mr. Breitkreutz also loaned their money to an oil and gas promoter and took security in oil and gas leases and equipment. By May 1, 2014, Mr. Breitkreutz and Base Finance had almost no mortgages on real estate in Alberta. Investor money, to the extent

that it had not already been dissipated, was invested with Saddle Lake Energy LLC ("Saddle Lake") in a risky oil play in Texas and secured against oil and gas leases and equipment in Texas.

[2] By the time that Base Finance was advancing money to Saddle Lake or its principal, Brian Fox, significant investor funds had already been lost on a series of bad oil and gas investments involving Mr. Fox. Whether loaning money to Saddle Lake for its Texas oil play was a cynical ploy to allow Mr. Breitkreutz to claim that investor monies were secured by something like a mortgage or whether it was a "Hail Mary" play to try and recoup lost funds is not clear on the evidence before the Court. Regardless, Mr. Breitkreutz and Base Finance had to tread water while waiting for their Texas payday; they paid interest and principal owed to investors out of new investment funds that were flowing into Base Finance.

[3] The Crown contends that this treading water – paying old investors with the money from new investors – is a hallmark of a Ponzi scheme, a classic type of fraud. Labels like "Ponzi scheme" can sometimes be useful as a shorthand for characterizing a complex type of criminal activity. Other times, such labels can be a distraction. A business or series of transactions need not fit within the definition of a Ponzi scheme to be fraud. The question for the Court, in the present case, is whether Mr. Breitkreutz defrauded investors in Base Finance during the period covered by the indictment, nothing more.

[4] Mr. Breitkreutz is charged with two offences: (1) fraud over $5,000 pursuant to *Criminal Code* s 380(1)(a); and (2) theft over $5,000 pursuant to *Criminal Code* s 334. As these reasons explain, I conclude that investors were induced to give money to Base Finance by Mr. Breitkreutz's deceit and/or falsehoods. The business of Base Finance and the nature of investment opportunities during the period May 1, 2014 to September 30, 2015 was fundamentally different than that represented to investors. Mr. Breitkreutz's deception and untruths resulted in the loss of tens of millions of dollars. For the reasons to follow, Mr. Breitkreutz is guilty of fraud over $5,000 pursuant to *Criminal Code* s 380(1)(a) and the charge of theft over $5,000 is stayed.

The Relevant Time Period

[5] The charges against Mr. Breitkreutz relate only to the period May 1, 2014 to September 30, 2015 (the "Relevant Period"). The narrow temporal scope of the charges and the limited number of witnesses and documents presented to the Court during trial means that these reasons do not, indeed they cannot, tell the whole story of the failure of Base Finance and of Mr. Breitkreutz's fraud.

[6] Base Finance was established in the mid-1980s. Many of the investors who testified at trial began investing with Base Finance in the 1990s or early 2000s. While evidence concerning Mr. Breitkreutz's business activities and interactions with investors from before May 1, 2014 is necessary to contextualize what occurred during the Relevant Period, the focus of these reasons is the events of the Relevant Period.

[7] The only financial evidence before the Court, much of it from Base Finance's Royal Bank of Canada ("RBC") bank account, relates to the Relevant Period. While total investor losses in Base Finance are said to be more than $100 million, this estimate cannot be verified because the estimate includes losses on investments made before May 1, 2014. Investor losses from investing activity in the Relevant Period are less than $100 million, but still substantial.

The Law

i. General Principles

[8] Mr. Breitkreutz comes before this Court with a presumption of innocence, meaning that the Crown must prove the offences of fraud and theft beyond a reasonable doubt. That presumption of innocence stays with him throughout the trial and is displaced only if the Crown, on the evidence I accept, has proven Mr. Breitkreutz's guilt beyond a reasonable doubt. Mr. Breitkreutz does not have to prove his innocence. He does not have to prove anything.

[9] Proof beyond a reasonable doubt is a very high standard and derives from the presumption of innocence: ***R v Morrison***, 2019 SCC 15 at para 56. A reasonable doubt is a doubt based upon reason and common sense, logically flowing from the evidence or absence of evidence. Neither the presence nor absence of doubt is based upon sympathy or prejudice: ***R v Layton***, 2009 SCC 36 at para 57.

[10] For the Crown to meet its burden, it does not have to prove the elements of the offence to an absolute certainty. A reasonable doubt is not an imaginary or frivolous doubt: ***R v Villaroman***, 2016 SCC 33 at para 28. However, the Crown must prove more than the accused is probably guilty. Proof beyond a reasonable doubt lies much closer to absolute certainty than to a balance of probabilities: ***R v Starr***, 2000 SCC 40 at para 242.

[11] The standard of proof beyond a reasonable doubt applies to each of the essential elements of the offences charged (***R v Morrison***, 2019 SCC 15 at para 51) and to the evidence as a whole (***R v Ryon***, 2019 ABCA 36 at para 46 quoting ***R v Carrière*** (2001), 2001 CanLII 8609 (ON CA), 151 OAC 115 (Ont CA) at para 48. See also, ***R v Dinardo***, 2008 SCC 24 at para 23), but not to individual pieces of evidence (***R v JMH***, 2011 SCC 45 at para 31).

[12] Mr. Breitkreutz testified at trial. This means that the Court must consider the instruction provided by the Supreme Court in ***R v W(D)***, [1991] 1 SCR 742, and recently restated by Justice Martin in ***R v Ryon***, 2019 ABCA 36. If I believe Mr. Breitkreutz's exculpatory evidence – or any exculpatory evidence – I must acquit. Even if I do not believe his evidence, I must still consider whether it leaves me with a reasonable doubt. If Mr. Breitkreutz's evidence does not leave me with a reasonable doubt, I do not use that as any evidence of guilt or to infer that the Crown's version of the case must be true. Rather, I can only convict where the evidence that I do accept proves each element of the offence beyond a reasonable doubt.

[13] I remain mindful that this instruction is applicable to all exculpatory evidence whether presented by the Crown or through the Defence and that even if I reject the exculpatory evidence tendered, the Crown's case must establish proof of guilt on the governing standard: ***Ryon*** paras 48-51.

ii. Legal Elements of Fraud

[14] The main question for the Court is whether Mr. Breitkreutz defrauded investors during the Relevant Period. The charge of theft is redundant because the assertion is that Mr. Breitkreutz stole from investors by means of fraud. That is, through fraudulent means, Mr. Breitkreutz converted to his use investor funds more than $5,000 with the intent to deprive the

investors of such funds. Accordingly, the analysis in these reasons focusses on fraud. Fraud is defined in s 380(1)(a) of the *Criminal Code* as follows:

> 380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars [...]

[15] Generally, fraud has been described as "...dishonest conduct that results in at least a risk of deprivation to the victim": ***R v Riesberry***, 2015 SCC 65 at para 17.

[16] The elements of fraud were set out by the Supreme Court of Canada in two cases: ***R v Théroux***, [1993] 2 SCR 5 and ***R v Zlatic***, [1993] 2 SCR 29. Fraud, like most crimes, is comprised of a physical element – the *actus reus* – and a mental element – the *mens rea*. As noted above, the Crown has the burden of establishing both the *actus reus* and *mens rea* beyond a reasonable doubt.

[17] Justice McLachlin, as she then was, explained in ***Zlatic*** at 43 (see also, ***Théroux***, at 20) that "the *actus reus* of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss of the placing of the victim's pecuniary interests at risk.

[18] More recently and succinctly, our Court of Appeal stated that the *actus reus* of fraud "consists of two elements, dishonesty and deprivation": ***R v Iver***, 2020 ABCA 439 (leave to appeal refused 2021 CarswellAlta 1106) at para 24.

[19] The question for the first element of the *actus reus* is whether, viewed objectively, the accused has lied, committed a deceitful act or engaged in some other fraudulent means. McLachlin J further explained in ***Théroux***, at 16 that the first element of the *actus reus* may also be satisfied if the accused has committed "what a reasonable person would consider to be a dishonest act."

[20] The second element of the *actus reus*, deprivation, is established where it is proven that there has been an economic loss or where economic interests are imperilled: ***Théroux***, at 16; ***R v Iyer***, *2020 ABCA 439*, para 46.

[21] McLachlin J stated in ***Théroux***, at 20 that "the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[22] She further explained that "[w]here the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur." In ***Iver***, Wakeling JA (concurring in the result) similarly recognized that the accused need not intend the deprivation – he must be aware of the risk and reckless as to whether it occurs: para 75.

[23] McLachlin J concluded in ***Théroux***, at 16 saying that fraud is "an offence of general scope capable of encompassing a wide range of dishonest commercial dealings."

[24] What actually constitutes a falsehood or deceit for the purposes of the act of fraud is judged on the objective facts: ***R v Neilson***, 2020 ABQB 433 at para 27 referencing ***Théroux***. I begin then with a review of the facts established on the evidence before me.

Analysis

i. Preliminary Note

[25] There is significant common ground between the Crown and Defence on the evidence. The Crown's evidence showed and Mr. Breitkreutz admitted that during the Relevant Period:

(a) Base Finance earned next to no interest income;

(b) Base Finance had little or nothing in terms of mortgage security on real estate in Alberta;

(c) Base Finance paid investors with money raised from other investors; and

(d) Investors lost large amounts of money as a result of the demise of Base Finance.

[26] There is significant disagreement between the Crown and Defence on other evidence, including, among other things, what was represented to investors by or on behalf of Mr. Breitkreutz, the nature and sufficiency of the security held by Base Finance, whether it was permissible for Base Finance to use investor money to pay interest and capital to other investors, and whether Mr. Breitkreutz subjectively understood that he put investors at risk of deprivation.

[27] The following discussion provides some background and discusses some of the common ground between the Crown and Defence, but focusses mostly on the disputed points of evidence.

ii. The Business of Base Finance Ltd.

[28] The origins of Base Finance are not clear. Few of the investor witnesses were involved with Base Finance in its early years and those that were did not offer detailed accounts of Base Finance's business during that time. What evidence there is on the Base Finance business from the mid-1980s through the 1990s comes primarily from Mr. Breitkreutz.

[29] Mr. Breitkreutz testified that after spending the early part of his career in banking, he struck out on his own as a mortgage broker. He started a company called Base Mortgage & Investment Ltd. ("Base Mortgage") through which he worked as a licenced mortgage broker. Mr. Breitkreutz was only ever licenced to broker mortgages in Alberta.

[30] Later, in 1984, he established Base Finance as an investing company. Base Finance would invest in private mortgages, often syndicated to investors, and in oil and gas ventures associated with Mr. Fox.

[31] Mr. Breitkreutz had a significant network of contacts from his time in banking and through his activities as a mortgage broker. These contacts became the customers – the borrowers and investors – of Base Finance. From there, Base Finance grew by word of mouth and through the promotional activities of Mr. Breitkreutz and Mr. Hogaboam, who was paid finders fees for referrals.

[32] Mr., Breitkreutz explained that when borrowers approached Base Mortgage, sometimes they would be suitable for bank financing and other times they would have to seek alternative lending sources. Mr. Breitkreutz would direct some of the borrowers unsuited to bank financing to Base Finance. He explained that Base Finance would make loans for a range of purposes and take many different kinds of security. As will be explained, this is at odds with the evidence of investors who were mostly under the impression that Base Finance only syndicated first mortgages on residential and commercial real estate. I am satisfied that, for a significant part of its existence, Base Finance had some legitimate mortgage lending activities. One investor witness, Leslie Lis, offered two examples of lending by Base Finance with which he was personally involved in the 1990s. One loan was to a shopping centre owner who needed bridge financing where a mortgage was taken by Base Finance against the shopping centre. The other was a loan to the proprietor of a Lethbridge restaurant where a mortgage was taken by Base Finance against the proprietor's home. As mentioned in the introduction, Base Finance, much to the surprise of most investors when it was revealed after the collapse of Base Finance, also appears to have had a practice of lending to Mr. Fox and businesses associated with Mr. Fox to support investments in oil and gas properties in the US.

iii. Has the Act of Fraud Been Established?

[33] The key factual contest in this case is about what was said to investors by Mr. Breitkreutz. Ten investor witnesses testified. They come from a range of backgrounds; there were engineers, a bookkeeper, an accountant, a lawyer, business owners, and real estate professionals. The evidence of the investor witnesses, which I accept, shows that Mr. Breitkreutz misrepresented the business of Base Finance and the nature of specific investments. The investor witnesses all gave evidence of having received representations about investing with Base Finance from Mr. Breitkreutz or from Mr. Hogaboam who they understood to be acting on behalf of Mr. Breitkreutz. As will be explained, the essence of the representations was that Base Finance was a safe investment secured against Alberta real estate with guaranteed returns. Mr. Breitkreutz denies making any misrepresentations and the Defence contends that the evidence of the investor witnesses is not credible. The following discussion reviews the evidence and gives my reasons for preferring the evidence of the investor witnesses over the evidence of Mr. Breitkreutz.

a. Credibility of the Investor Witnesses

[34] The Defence submits that the evidence of the investor witnesses, specifically their recollections of alleged representations inducing investment with Base Finance cannot be trusted. According to the Defence, the investor witnesses absorbed media coverage of the demise of Base Finance, some investor witnesses read reports issued by the receiver of Base Finance, and many of the Crown witnesses were acquainted with one another and may have or did speak with each other about the subject matter of this case. The Defence also submits that many of the investor witnesses received emails from Bill Janman updating investors on various legal developments and legal efforts to recover lost monies.

[35] Bill Janman was the leader of what has been described as the *ad hoc* committee of investors, and the Defence asserts that he affected the evidence given by the investor witnesses. Mr. Janman worked with several other investors to explore legal options for the recovery of their lost investments. Mr. Janman sent out emails to a large group of investors to keep them apprised of developments in the receivership, the ASC proceedings, and the criminal investigation. Mr. Janman assisted both the receiver and RCMP by providing the contact information of many of the investors with whom he was communicating.

[36] The Defence also points to communication between investors and Mr. Hogaboam, and specifically to an email dated November 4, 2015 from Mr. Hogaboam to a particular group of investors, most of whom had been introduced to Base Finance through Mr., Hogaboam. Mr. Hogaboam wrote that:

> [w]e now have concrete evidence that Arnold lied to all of us in our dealings with him. We were told that we were investing in first mortgages on Calgary residences when in fact, for many years apparently, the money was being diverted to Texas oil properties. I have spoken to a number of investors on [the receiver's] Schedule A of their email. The 'story' from Arnold was exactly the same for everyone.

[37] After Base Finance failed, Mr. Hogaboam, as its commissioned sales agent, had an interest in focussing attention on Mr. Breitkreutz and away from himself. I have no doubt that Mr. Hogaboam repeated and expanded upon the views expressed in his email in his communications with other investors on the phone or in person.

[38] The Defence contends that the public and private discussion of the circumstances surrounding the failure of Base Finance has resulted in the stories told by the investor witnesses coalescing into a false narrative. The Defence asserts that the narrative is false because the investor witnesses attribute representations to Mr. Breitkreutz that were either never made by him or were made by others without his knowledge or permission. In sum, the Defence submits that the talk about the demise of Base Finance, both public and private, had the effect of witnesses aligning their stories consciously or unconsciously.

[39] Communication as between witnesses can have the effect of aligning testimony. In ***R v B(C)*** (2003), 171 CCC (3d) 159 (ONCA) the Court acknowledged, at para 40 that such alignment "...can arise both from a deliberate agreement to concoct evidence as well as from communication among witnesses that can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events."

[40] Further, exposure to the media and the publicity surrounding a case may – even subconsciously – taint the evidence of witnesses providing similar evidence: see for example, ***R v Dorsey***, 2012 ONCA 185.

[41] While there was clearly communication as between certain witnesses and the failure of Base Finance attracted some media attention, I do not accept that alignment or collaboration – subconsciously or otherwise – took place in this instance. That is, I find that the investor witnesses' evidence with respect to their investments in Base Finance or their dealings with Mr. Breitkreutz was not compromised in any way. I accept their evidence as to who told them what about the investments they were making.

[42] I am led to this conclusion for several reasons. The Defence raised the prospect that media coverage, the ASC hearing, and the receivership proceedings and receiver's reports, affected the testimony of the investor witnesses. However, the Defence did so without identifying any statements from those sources that are alleged to have affected the evidence of the investor witnesses. Specifically, not a single item of media coverage was put to any of the investor witnesses nor was a receiver's report put to any of the investor witnesses. The spectre of public sources of information about Base Finance's failure and the proceedings related to that failure affecting the evidence of the investor witnesses is not supported by the evidence.

[43] In turning to the communication as between the investors, I accept Mr. Janman's denial of interfering with any witnesses. There is no evidence that Mr. Janman coached or cajoled any witnesses to alter their evidence in any way. Nor can the Defence point to any communication from Mr. Janman to investors that directly or indirectly indicates what evidence they should give in this or any other legal proceeding relating to Base Finance. I conclude that Mr. Janman did nothing to compromise the evidence of any other witness in this proceeding.

[44] The investors did nothing wrong in communicating with one another. They had all lost money and communication amongst investors is not only understandable, but from their perspective it was necessary to come to terms with what had happened to them and to take positive steps to recover their losses using whatever legal processes they could. Mr. Janman, as the hub of investor communications, provided a valuable service to investors.

[45] I turn next to Mr. Hogaboam's communications, and whether these may have compromised the other investor witnesses' testimony and credibility. In finding that Mr. Hogaboam's communications did not affect the other investor witnesses' testimony, I first note that four of the investor witnesses – Judy Olson, Philip Bazant, Ryan Bazant, and Larry Revitt – had no connection or communications with Mr. Hogaboam. Each of these witnesses related similar stories despite never speaking with Mr. Hogaboam.

[46] Judy Olson said that Mr. Breitkreutz told her that Base Finance loaned money to people who could not borrow from other institutions and took back mortgages on their homes. She further explained that Mr. Breitkreutz told her that Base Finance only loaned to 70% to 80% of appraised value of the underlying property. Ms. Olson rejected the suggestion that her memory was refreshed or reconstructed and said that she has a specific memory of her meeting with Mr. Breitkreutz even if she does not remember exactly when it was. I accept her evidence in this regard and her evidence as to what Mr. Breitkreutz told her about investing with Base Finance.

[47] Philip Bazant testified that Mr. Breitkreutz told him that he was a mortgage broker arranging "co-op" mortgages. Philip Bazant further relayed that Mr. Breitkreutz said that he worked with clients who could not get regular mortgages, dealt with "only residential mortgages," and that he would never loan more than 65% of a property's value. Philip Bazant testified that Mr. Breitkreutz told him that "we haven't had to foreclose on one mortgage yet." Mr. Breitkreutz even told him the location of a potential upcoming mortgage opportunity on a home in Conrich, Alberta so that Philip Bazant could drive by the home. Philip Bazant's evidence was clear that statements by Mr. Breitkreutz led him to believe that Base Finance was a safe investment. I accept the evidence of Philip Bazant.

[48] Ryan Bazant, Philip's son, testified about a meeting that he had with Mr. Breitkreutz in 2014. Ryan Bazant explained that, at that meeting, Mr. Breitkreutz described his process using an example. Mr. Breitkreutz said that if a business owner wanted to buy some equipment, he

would loan money for that purpose and take a mortgage on the business owner's personal residence. He further explained to Ryan Bazant that he would never loan more than 65% to 75% of the appraised value of the property. Ryan Bazant further testified that Mr. Breitkreutz told him that the mortgaged properties were all residences in Calgary neighbourhoods that he knew well. I conclude that Ryan Bazant's account of his meeting with Mr. Breitkreutz is accurate and that Mr. Breitkreutz made the representations that Ryan Bazant said he made.

[49] Larry Revitt told a similar story to Ryan Bazant about his initial meeting with Mr. Breitkreutz at his office in 2014. According to Mr. Revitt, Mr. Breitkreutz told him that he was in the business of making first mortgages to people in Alberta, mainly in the Calgary area. He said that he would only loan to 70% of the appraised value of the property. I accept Mr. Revitt's evidence concerning the representations made by Mr. Breitkreutz to him in their first meeting.

[50] The testimony of the investor witnesses with no connection to Mr. Hogaboam rings true. There are similarities, but also differences and that leads me to conclude that there was no effort to co-ordinate their testimony.

[51] The evidence of three witnesses that Mr. Hogaboam had communicated with, Susanne Young, Leslie Lis, and Thomas Wiseman, reinforces my conclusion that whatever Mr. Hogaboam may have said to investors concerning what he knew after the Base Finance accounts were frozen, did not affect the evidence of the investor witnesses in this proceeding. The evidence of these three witnesses is discussed later in these reasons, in relation to specific misrepresentations made by Mr. Breitkreutz. It suffices at this point to say that their evidence contradicts Mr. Breitkreutz's position that he never made any misrepresentations and that the only misrepresentations were made by Mr. Hogaboam.

[52] The commonalities that run through the evidence of the investor witnesses, whether they had a connection with Mr. Hogaboam or not, are not indicative of witness collaboration. Indeed, the idiosyncratic descriptions and small differences in the evidence given by each investor witness supports my conclusion that these are genuine memories and not reconstructed versions of events based on anything Mr. Hogaboam or anyone else said.

[53] The investor witnesses were credible and presented their evidence in a straightforward manner. They were unshaken in cross-examination and were not confronted with any material contradictions or inconsistencies. I do not accept that the evidence of the investor witnesses was compromised in any way by public or private communications about Base Finance from September 2015 to the time of this trial. To the contrary, I find them to have been honest, truthful witnesses, and I accept their evidence as to what they were told Mr. Breitkreutz and Mr. Hogaboam.

b. Irrevocable Assignment of Mortgage Interest

[54] Base Finance issued a document called "Irrevocable Assignment of Mortgage Interest" (IAMI) to every investor for every investment. Replacement IAMIs were issued when investment terms ended and investors rolled-over their investments with Base Finance.

[55] Each IAMI contains representations about the nature of the investment. The premise of each IAMI is that Base Finance is assigning mortgage interest that it receives from borrowers. Paragraph 2 says "[i]t is further agreed that Base shall direct from the borrowers ... to the lender, interest payments...." This is a representation that Base Finance loans money to borrowers and then directs interest paid by the borrowers to the lender (*ie*. investor). This is important because it

is a representation that for interest payments the flow of funds is from borrowers to lender (*ie.* investor) via Base Finance rather than payment out of Base Finance funds raised from other investors.

[56] I have no difficulty finding that the IAMIs were direct representations, known and approved of by Mr. Breitkreutz, as to the nature of the investments being made in Base Finance.

c. Misrepresentations Made by Mr. Breitkreutz

[57] As relayed above, each of the investor witnesses unconnected to Mr. Hogaboam gave evidence of being told by Mr. Breitkreutz that their investments were secured by mortgages on Alberta real estate. They were also told that Base Finance only advanced loans up to a conservative percentage of the appraised value of the property against which the loans were secured. Again, in some instances, vague details of the specific property against which the investment was to be secured were provided.

[58] I accept the investor witnesses' evidence and prefer it to that of Mr. Breitkreutz where it conflicts. I find as a fact that he specifically represented to the investor witnesses that Base Finance dealt primarily in syndicated mortgages secured by Alberta real estate and that investments with Base Finance were safe because loans were only made to a conservative percentage of the appraised value of the secured property.

[59] Mr. Breitkreutz denied that he ever made any representations to investors other than the rate, term, and amount of an investment opportunity. I do not believe Mr. Breitkreutz's evidence because it is contrary to the evidence of the investor witnesses and, as will be shown in the following paragraphs, the investor witnesses' evidence is corroborated by a recording of a conversation with Mr. Breitkreutz. Further, Mr. Breitkreutz himself gave evidence that one investment that he was trying to secure shortly before the demise of Base Finance was to be secured by a mortgage on a residential property in the Calgary neighbourhood of Windsor Park. Mr. Breitkreutz's evidence does not leave me with a reasonable doubt.

[60] The extent to which Mr. Breitkreutz misrepresented the business of Base Finance and specific investment opportunities is also demonstrated through the evidence of those investors who were in communication with Mr. Hogaboam. Despite their connection to Mr. Hogaboam, the testimony of Ms. Young, Mr. Lis, and Mr. Wiseman leaves no doubt that Mr. Breitkreutz misrepresented the business of Base Finance and specific investment opportunities to investors.

[61] Ms. Young recorded a telephone conversation between herself, her husband Robert Young, and Mr. Breitkreutz. The call took place because the Youngs were trying to get Mr. Breitkreutz to return some of their capital in August 2015 not long before the bank accounts of Base Finance were frozen. Mr. Breitkreutz was trying to persuade them to leave their capital in Base Finance for a short period. The key part of the conversation is as follows:

> R. Young: Okay is your security still five hundred thousand on as a first mortgage on his personal residence at, valued at two million?
>
> Breitkreutz: Oh yeah, ah-huh. But nothing was changed in that regard. I've been carrying the mortgage on this fellow and I've had a mortgage on his property for the last ah fifteen, twenty years and you know he uses us like a line of credit.

[62] Mr. Breitkreutz subsequently asserted that he did not know what Mr. Young was talking about. He stated that his response was not an agreement to the representation that, unbeknownst to Mr. Breitkreutz, Mr. Young must have received from Mr. Hogaboam. He explained that he wanted to reassure the Youngs rather than get into a debate about whether Mr. Hogaboam had lied to them. He further explained that the borrower that he was referring to was actually Mr. Fox whose home Base Finance owned. I do not believe Mr. Breitkreutz. Mr. Young asked a clear question and was met with obfuscation and dissembling by Mr. Breitkreutz in an effort to convince the Youngs to leave their money in Base Finance.

[63] Mr. Lis was introduced to Base Finance by Mr. Hogaboam in the late 1980s. Mr. Lis was a real estate professional and, as noted earlier, was involved with loans that Base Finance made in the 1990s and which were secured by Alberta real estate. Mr. Lis dealt with both Mr. Hogaboam and Mr. Breitkreutz with respect to his investments in Base Finance and reported meeting with Mr. Breitkreutz many times including at the annual Base Finance client barbeque, Christmas parties, and at golf. After Mr. Hogaboam moved to Vancouver Island, Mr. Lis dealt more with Mr. Breitkreutz.

[64] Mr. Lis explained that prior to investing with Base Finance he talked to Mr. Breitkreutz about the structure of Base Finance's deals. From these discussions he understood that Base Finance would lend to a borrower at a higher rate such as 14% and then pay investors 10% or 12% and that Base Finance would also take a fee. Mr. Breitkreutz further told him that it was Base Finance's practice to maintain a loan to value ratio of approximately 60% to 70%. Beyond this, he said that Mr. Breitkreutz was very secretive. On cross-examination, Mr. Lis conceded that after he had been dealing with Mr. Breitkreutz for many years, the discussion about specific investment opportunities would only be about rate, term, and amount.

[65] Mr. Lis explained that he invested $100,000 with Base Finance in December 2014 for a term of 3 months. When the repayment was due in early 2015, Mr. Breitkreutz said to Mr. Lis that "the borrower couldn't close" and that he would need more time. Mr. Breitkreutz persuaded Mr. Lis to leave his money with Base Finance in exchange for a bonus payment and a higher rate of interest. The clear implication from Mr. Breitkreutz's statement to Mr. Lis was that his money was earmarked for a specific borrower and that this specific borrower had a problem that prevented him paying out Mr. Lis' investment. Based on his dealings with Mr. Lis in the real estate world and his discussions with him about the Base Finance business, Mr. Breitkreutz must have known that his story about a borrower who couldn't close could only be understood by Mr. Lis as being about a borrower who owned real estate in Alberta over which Base Finance had a mortgage.

[66] Mr. Lis' evidence is coherent and his concession on cross-examination concerning the evolving nature of his conversations about investments with Mr. Breitkreutz reinforces my conclusion that Mr. Lis' evidence is true and accurate.

[67] During the final weeks before the Base Finance bank accounts were frozen by the ASC, Mr. Hogaboam raised a $500,000 investment from Thomas Wiseman or one of his companies. Mr. Wiseman was told by Mr. Hogaboam in an email that "[f]urther to our telephone discussion Saturday, Arnold's main appraiser is out of town until Monday so that appraisal update will be in his hands a week this Tuesday. The property is in Windsor Park as is Base's office, so he's very familiar with values there and thinks that the update will be close to the $750,000." During his re-examination, Mr. Breitkreutz confirmed that Mr. Wiseman's investment in September 2015

was to be directed toward and secured by a mortgage on "a house in Windsor Park." Mr. Breitkreutz's moment of candour on re-examination shows that he was communicating details about specific investments to Mr. Hogaboam for the purpose of communication to potential investors. And it shows that Mr. Breitkreutz's insistence that he only ever represented the rate, term, and amount of investment opportunities is untrue.

[68] The investor witnesses believed that their investment in Base Finance was secured by first mortgages on real estate. Some investor witnesses reported being told that Base Finance had never had to foreclose on a borrower. Others were told that all the borrowers were long-time clients of Base Finance. Many of the investor witnesses reported being told that their money was being loaned to a specific borrower and was being secured by a mortgage against real estate, typically a single-family home, in a specific quadrant or neighbourhood in Calgary or a nearby municipality. Despite Mr. Breitkreutz's denials, I accept the evidence of the many investor witnesses who reported being told details about specific investment opportunities.

[69] I pause to observe that one must not miss the forest for the trees. Every one of the investor witnesses wanted a safe, secured, local, mortgage-backed investment. None of them wanted to invest in speculative Texas oil plays, or thought this is what they were doing. It therefore makes sense that Mr. Breitkreutz was telling the investors these things, contrary to his denials. Getting people to put more money into Base Finance depended on them believing it was a safe, secured, local, mortgage-backed investment. Their evidence about Mr. Breitkreutz's representations makes sense, whereas his version does not.

[70] In addition to overt misrepresentations, Mr. Breitkreutz also deceived investors by omission. He testified that he had an arrangement with Mr. Fox or Saddle Lake to get what he described as a "residual" on the Texas oil properties after Base Finance investors were paid back. Mr. Breitkreutz did not explain whether the "residual" was some sort of royalty on production, an ownership interest in Saddle Lake, or something else. This prospect of a personal gain was not disclosed to investors in Base Finance. Of course, for Mr. Breitkreutz to have disclosed that he had a personal financial incentive to loan their money to Saddle Lake for its Texas oil play, he would have had to disclose to investors in Base Finance that their money was being invested with Saddle Lake in a Texas oil play. The fact that Mr. Breitkreutz had a collateral motive for advancing money to Mr. Fox and Saddle Lake is an important fact that investors would have wanted to have known.

[71] In ***R v Lauer***, 2011 PECA 5 at para 80, the PEI Court of Appeal reviewed what actions constitute deceit, falsehood, and "other fraudulent means." In listing acts of fraud by way of "deceit", the Court stated that inducing a person to believe a thing is true when it is false, and the representor knows it is false, is deceit and that deceit may be practiced by way of oral or written representation and may be in relation to a fact or an intention.

[72] "Falsehood" means something which is untrue, contrary to fact, or a misrepresentation of the facts: ***Lauer*** at para 81. What constitutes "other fraudulent means" is a question of fact to be established an objective standard. It includes the non-disclosure of material facts as well as unauthorized use of funds: ***Lauer*** at paras 82-83, ***Iyer*** at paras 26-28. Reliance upon this third category usually occurs when the first two cannot be established: ***Zlatic*** at para 44. In this case, I find that all three forms of the prohibited act have been established on the evidence.

[73] Telling investors that their funds were going to be used in relation to residential or commercial mortgage lending in Alberta when that was not the case, or was only partially or

minimally true, constitutes a misrepresentation of the facts and is a falsehood and an act of deceit. I further conclude that the failure to disclose information concerning Mr. Fox or Saddle Lake and the "residual" interest in the Texas oil play that he had arranged for himself to investors was dishonest and constitutes "other fraudulent means" pursuant to *Criminal Code* s 380(1)(a).

[74] Investors relied on Mr. Breitkreutz's misrepresentations in making their investment decisions. Investors were comforted that their investments were safe because Base Finance advanced loans using a conservative loan-to-value ratio and had security that could easily be enforced in event of a default by the borrower. Mr. Breitkreutz omitted to provide important information to investors that may have caused them to avoid investing with Base Finance; specifically, that he was loaning money for a Texas oil play and that he had a separate financial interest in the Texas oil play. Investors, such as the Youngs and Mr. Lis as set out earlier, relied on Mr. Breitkreutz's misrepresentations in making decisions to leave funds with Base Finance at crucial times. Mr. Breitkreutz's misrepresentations and material omissions affected investor decision-making and, in that sense, caused investor losses.

[75] The Crown has therefore established the first element of the *actus reus* of fraud – namely the commission of the prohibited act – beyond a reasonable doubt.

d. Related Deprivation

[76] The second element of the *actus reus* of fraud – deprivation caused by the prohibited act, has also been established. Put simply, the investors' money is gone. The investor witnesses testified to the amounts they lost through Base Finance due to their reliance upon the fraudulent representations and actions of Mr. Breitkruetz. Each of the investor witnesses who testified lost more than $100,000 on investments made during the Relevant Period and, in some cases, lost much more.

[77] This loss, or deprivation, was also professionally quantified. Specifically, the Court heard evidence from Meena Bhatti who, at the time of preparing her report was, a Senior Forensic Accountant with the Forensic Accounting and Management Group of Public Services and Procurement Canada. She is now employed by the RCMP in a similar role.

[78] Ms. Bhatti has extensive qualifications in the area of forensic accounting and has taken numerous courses on fraud investigation and money laundering investigation. After a brief *voir dire*, I concluded that she was qualified to provide the Court with her expert opinion and that her expert opinion would be of assistance to the Court. I find that Ms. Bhatti was a cautious, reliable, and professional witness. I accept her evidence entirely as it relates to the financial affairs of Base Finance during the Relevant Period.

[79] Schedule 6.0 to Ms. Bhatti's expert report, which is 95 pages long, details all the payments by investors to Base Finance and disbursements by Base Finance to investors during the Relevant Period. Ms. Bhatti's analysis shows that many investors lost money during the Relevant Period. These losses were significant with investors losing hundreds of thousands or even millions of dollars. Other investors were lucky and realized gains by withdrawing principal and receiving interest payments rather than investing during the Relevant Period.

[80] Quite apart from Ms. Bhatti's analysis, the investor witnesses also demonstrated their losses during the period May 1, 2014 to September 30, 2015. Each investor witness adduced cheques or bank drafts made out to Base Finance, deposit slips, and IAMIs to show their

investments. Losses for each of the investor witnesses during the period exceeded $100,000 and, in some cases, significantly exceeded that amount.

[81] Many of the investor witnesses also spoke of greater losses. Indeed, Mr. Breitkreutz himself said investor losses from the collapse of Base Finance were in the range of $100 million. These losses were not calculated by Ms. Bhatti because they related, in part, to investments made prior to the Relevant Period.

[82] I have no difficulty concluding that the Crown has established a corresponding deprivation, in this instance loss of funds, occurred as a result of the prohibited act.

[83] Having found all elements of the act of fraud established, I move now to whether the Crown has established the *mens rea* of this offence.

iv. Has the Mental Element of Fraud Been Established?

a. Subjective Knowledge of the Prohibited Act

[84] The first part of the *mens rea* of fraud is whether the accused had subjective knowledge of the prohibited act. In other words, did Mr. Breitkreutz know that he was deceiving investors with lies or other falsehoods and know that others were doing so on his behalf? Based on the analysis in the preceding sections of these reasons, the answer is obvious. Of course, he knew that he was lying to investors.

[85] When Mr. Breitkreutz was telling investors that Base Finance loaned money that was secured by mortgages on conservatively valued Alberta real estate, he knew that this was untrue because, with one exception, Base Finance had no mortgage security on property in Alberta. He knew that some investor money was being loaned to Mr. Fox and Saddle Lake and that most investor money was being used to make interest and capital payments to other investors. He never told investors that their money would be used for these purposes. As I have already found, these critical omissions were falsehoods as was his non-disclosure of his so-called “residual” from Base Finance’s Saddle Lake investment.

[86] Even if Mr. Breitkreutz was unaware of every single representation made to investors on his behalf by Mr. Hogaboam and the word of mouth amongst investors, which I do not accept, there are unequivocal misrepresentations in each IAMI. Specifically, each IAMI provides that the interest payments are made to Base Finance by a borrower and then directed to the investor. That is not what was actually going on as the so-called interest payments were made out of money invested by other investors. Mr. Breitkreutz acknowledges that he was familiar with the IAMIs as he must because they were the only written acknowledgement of investments given to investors and were essential to Base Finance’s record keeping.

[87] The content of the IAMIs alone is enough to find that Mr. Breitkreutz knew he was lying to investors about the nature of their investment. I make precisely that finding

[88] Mr. Hogaboam testified that all the descriptions of investment opportunities that he passed on to investors were given to him during telephone calls with Mr. Breitkreutz. I accept his evidence. Even allowing that Mr. Hogaboam may have improvised and embellished from time-to-time, the descriptions of the Base Finance business and the details of specific investment opportunities that he told investors were similar to those given by Mr. Breitkreutz to other investors. This is not a coincidence. My conclusion in this regard is reinforced by Mr. Breitkreutz’s evidence concerning Mr. Wiseman’s investment set out earlier in these reasons at

para 66. I am satisfied beyond a reasonable doubt that Mr. Breitkreutz misrepresented the nature of the Base Finance business and specific investment opportunities to investors, both directly in his own words to investors and indirectly through Mr. Hogaboam.

[89] Defence counsel submits that if Mr. Breitkreutz misrepresented the nature of the Base Finance business or specific investment opportunities, he did so unintentionally. That is, Mr. Breitkreutz's misrepresentations are said to be careless or negligent, not fraudulent. I reject this submission. Mr. Breitkreutz's representations were not one offs or slips; they were part of a longstanding effort to construct the image of Base Finance as a safe place where investors could obtain attractive returns. All the representations were predicated on the idea that Mr. Breitkreutz, using his connections and experience as a mortgage broker, would loan money against Alberta real estate. The evidence proves beyond a reasonable doubt that Mr. Breitkreutz knew he was deceiving investors and he intended his misrepresentations or falsehoods to induce investors to give money to Base Finance and, in some cases, intended to induce investors to leave their money in Base Finance.

b. Mr. Breitkreutz's Subjective Knowledge of Risk of Deprivation

[90] To determine whether Mr. Breitkreutz subjectively knew that he was putting investors at risk of deprivation requires an assessment of Base Finance's use of investor funds and its assets during the Relevant Period to determine objectively whether investors were put at risk of deprivation. The Court must then consider whether Mr. Breitkreutz subjectively understood that his actions put investors at a risk of deprivation.

Uses of Investor Funds and Investments in the Relevant Period

[91] The bank accounts and other records of Base Finance for the Relevant Period were reviewed by Ms. Bhatti in late 2016 and early 2017. Ms. Bhatti's analysis revealed that Base Finance raised $27 million from 107 investors during the Relevant Period. During the same time frame, Base Finance disbursed $26.3 million to 297 investors. That left little money to be invested in mortgages during the Relevant Period. Ms. Bhatti explained that after reviewing the Base Finance bank accounts and other records for the Relevant Period, she "was unable to identify any transactions where Base Finance has invested in mortgages for the benefit of Investors." Ms. Bhatti concluded that "[i]nvestors were being paid back with their own money or the money of other Investors, not from any actual profit-generating activity."

[92] On cross-examination, Ms. Bhatti conceded that she was unaware that Base Finance owned a property near Strathmore and that she was unaware of Base Finance's security in Texas oil properties. Ms. Bhatti agreed that if these properties were legitimate business activities, she would amend her conclusion that Base Finance had no legitimate business activities. However, with the exception of a small amount of money advanced to Saddle Lake, her conclusion that no investor money was invested in mortgages during the Relevant Period stands.

[93] Ms. Bhatti was also challenged on cross-examination concerning her conclusion that investors were being paid back with their own money. Counsel for Mr. Breitkreutz submitted that there was nothing wrong with investors being paid back their principal with the money of investors who were taking their place in the investment. He contended that this is the way that syndicated lending works; when one lender wants out, another can take its place. Defence counsel also suggested to Ms. Bhatti that there was nothing wrong with the payment of interest with investor money. He contended that, in financial terms, what was happening was that when

the borrower failed to pay interest, that interest was "capitalized" (*ie* the balance owing on the loan increased).

[94] Whether it was fraudulent for Base Finance to pay principal and interest with the money of other investors is a question for the Court, not Ms. Bhatti. Ms. Bhatti maintained her factual conclusion that earlier investors were paid out with the money of later investors. Mr. Breitkreutz knew how investors were being paid during the Relevant Period and knew that this is not what investors were told. That is, despite informing investors that Base Finance would direct to them interest payments by borrowers, he knew that Base Finance was not receiving interest payments and instead was paying investors with their own money.

Base Finance's Assets in the Relevant Period

[95] A key aspect of the Defence position is that Base Finance had security in real property as represented to investors. Defence counsel submits that Base Finance had security in the form of ownership of an acreage near Strathmore, a Deed of Trust in respect of oil properties in Texas, and a mortgage on a property on Macleod Trail.

(1) The Strathmore Acreage

[96] Mr. Breitkreutz testified that starting in the late 1980s, Base Finance would from time-to-time loan money to Mr. Fox or companies associated with Mr. Fox for the purposes of developing oil and gas properties.

[97] Base Finance took a mortgage on Mr. Fox's residence, an acreage near Strathmore, Alberta, in connection with a loan to Mr. Fox or a company associated with Mr. Fox in 1989. A further mortgage was taken on the property in 1990 by a numbered company also owned by Mr. Breitkreutz.

[98] The Laurentian Bank foreclosed on the Strathmore acreage in 1991. The numbered company owned by Mr. Breitkreutz subsequently acquired the Strathmore acreage from Laurentian Bank. Ownership in the Strathmore acreage was transferred to Base Finance in 2013.

[99] The Land Titles Certificate for the Strathmore acreage states a value of $950,000 as of 2013. Mr. Breitkreutz claims that the value is between $1 million and $1.5 million. During the Relevant Period, Terrigno Investments Inc. held a mortgage on the Strathmore acreage in the amount of $650,000. Based on the different value estimates, the net equity held by Base Finance in the Strathmore acreage during the Relevant Period was between $300,000 and $850,000. Given that Base Finance was the property owner, Mr. Breitkreutz knew of the limited security this equity provided as against what was being represented to investors.

(2) Saddle Lake

[100] Mr. Breitkreutz testified that Base Finance loaned money to a series of companies associated with Mr. Fox, including Saddle Lake. Evidence of Base Finance's investments in oil and gas companies associated with Mr. Fox was given by both Mr. Breitkreutz and Mr. Fox. The evidence is incomplete and contradictory. What is clear is that Mr. Fox was associated with a string of unsuccessful oil and gas companies. Though the amounts cannot be determined with any precision based on the lack of evidence before the Court, it appears that Base Finance lost investor money, and likely significant amounts of investor money, by investing in companies associated with Mr. Fox prior to the Relevant Period.

[101] According to Mr. Breitkreutz, the cumulative debts of Mr. Fox's companies to Base Finance, which may also be understood as Base Finance investor losses, were assumed by Saddle Lake, which was Mr. Fox's most recent venture. Mr. Breitkreutz testified that he believed that the debts assumed by Saddle Lake were in the range of $100 million which is also the amount he believed that Base Finance owed to investors.

[102] Mr. Fox testified that Base Finance never advanced significant money to Saddle Lake and that he did not recall Base Finance ever advancing any significant sums to other companies that he was associated with. Mr. Fox conceded that small amounts of money were advanced by Base Finance to him personally and to companies that he was associated with. Mr. Fox's evidence cannot be trusted. He did not remember or refused to acknowledge documents that he had obviously signed. He was forgetful, obtuse, and dishonest. I prefer the evidence of Mr. Breitkreutz that significant amounts of money were advanced by Base Finance to Mr. Fox and companies associated with Mr. Fox, though there is no documentary or other corroborating evidence to substantiate Mr. Breitkreutz's claim that the total advanced was in the range of $100 million.

[103] Mr. Breitkreutz testified that he believed that the oil and gas properties owned by Saddle Lake were worth more than $100 million USD. This stated belief is belied by Mr. Breitkreutz's evidence that, to his knowledge, Mr. Fox purchased all the oil and gas properties for Saddle Lake out of receivership for "pennies on the dollar" after the wells on the properties had ceased producing for the receiver.

[104] Base Finance's interest in the Saddle Lake properties was secured by a Deed of Trust dated October 3, 2014. Defence counsel submits that the Deed of Trust is the equivalent of or better security than a mortgage in Alberta. No expert evidence on Texas law was called on behalf of Mr. Breitkreutz to support this claim.

[105] The Deed of Trust states that Base Finance has a USD $30 million security interest in the real property described in an exhibit to the Deed of Trust and other property of Saddle Lake on those lands. According to Mr. Breitkreutz, the figure of USD $30 million stated in the Deed of Trust did not limit Base Finance's security interest. Instead, he testified that he believed that Base Finance had an enforceable security interest limited only by the value of the property and the quantum of the money owed. According to his testimony, Mr. Breitkreutz believed the Deed of Trust to be security worth USD $100 million or more. This interpretation of the Deed of Trust is inconsistent with the plain and ordinary meaning of its words.

[106] Mr. Fox rejected Mr. Breitkreutz's interpretation of the Deed of Trust. According to Mr. Fox, the Deed of Trust provided for security equivalent to the amount loaned up to a maximum of USD $30 million. Although I have found Mr. Fox to lack credibility, his reading of the Deed of Trust is commercially reasonable.

[107] The Deed of Trust was executed on October 3, 2014 which falls within the Relevant Period. There are no banking documents or other financial records before the Court that show that Base Finance ever advanced USD $30 million to Saddle Lake or Mr. Fox during the Relevant Period and, indeed, Ms. Bhatti's evidence is that only small sums were advanced to Saddle Lake during the Relevant Period. Mr. Breitkreutz also conceded on cross-examination that very little money was advanced to Saddle Lake during the Relevant Period.

[108] Mr. Breitkreutz asserted that he had an appraisal of the Saddle Lake properties that indicated a value of more than USD $100 million. He did not provide the appraisal to the Court.

[109] Mr. Breitkreutz complained at various points that he did not have access to his documents because they were in the possession of the receiver of Base Finance. The evidence shows that the receiver allowed Mr. Breitkreutz to inspect the documents in its possession and obtain copies of specific documents if he paid a fee for photocopying. Indeed, counsel for Mr. Breitkreutz used documents that he said came from the receiver of Base Finance in his re-examination of Mr. Fox. And yet, Mr. Breitkreutz did not provide the appraisal to the Court.

[110] I conclude that the Saddle Lake properties had negligible value, and that Mr. Breitkreutz knew they had negligible value, for three reasons. First, Mr. Breitkreutz failed to provide the appraisal of the Saddle Lake properties that he claims exists to the Court despite having access to Base Finance records. Second, it is implausible that properties worth USD $100 million could be obtained for next to nothing from a receiver who must be presumed to be acting rationally to maximize returns for creditors. Third, Mr. Breitkreutz complained that the receiver of Base Finance did not realize value for investors from the Saddle Lake properties. A receiver is obliged to take reasonable steps to recover assets for creditors: The Honourable Justice Lloyd W Houlden, Justice Geoffrey B Morawetz & Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2016, release 10), at 7-288.5. The most obvious explanation why the receiver of Base Finance did not realize value is that the Saddle Lake properties were worthless or required a significant injection of capital before they would be worth anything.

[111] I have no difficulty finding beyond a reasonable doubt that Mr. Breitkreutz knew he was gambling with his investors' money in ways, and with risks, they did not understand and had not agreed to. Taking that different and self-evidently more substantial risk is in-and-of-itself a knowing, dishonest deprivation that satisfies the elements of fraud.

(3) Jaroc Holdings Mortgage

[112] Ms. Bhatti's analysis of Base Finance's bank account with RBC flagged what she considered to be an unusual investor transaction. On April 8, 2015, $5,561,666 was paid by Jaroc Holdings Ltd. to Base Finance and the next day $5,561,674 was paid by Base Finance to Easy Loan Corporation. Both Jaroc and Easy Loan are associated with the Terrigno family. The discrepancy in the amount paid to Base Finance by Jaroc and recorded by RBC as paid by Base Finance to Easy Loan was said to be the cost of issuing a bank draft to Easy Loan.

[113] Mr. Breitkreutz explained that the transaction was not an investment by Jaroc. Instead, it related to the payout of a mortgage that Base Finance held on a property located on Macleod Trail in Calgary and owned by Jaroc. He said that Easy Loan, for reasons that are unclear, wanted to loan money to Jaroc, a related company, through Base Finance. Easy Loan advanced the funds to Base Finance and, in turn, Base Finance transferred the funds to Jaroc and took a mortgage.

[114] The mortgage that Base Finance held in the Macleod Trail property owned by Jaroc was not more security for investors. Mr. Breitkreutz explained that the mortgage in the Macleod Trail property was security only for Easy Loan's investment. Mr. Breitkreutz's evidence on this

point is consistent with the fact that all the money that was paid by Jaroc to Base Finance was paid out the following day to Easy Loan.

[115] The transaction involving Base Finance, Jaroc, and Easy Loan is peculiar. The Land Titles Certificate and the Mortgage Agreement indicate that the mortgage was in the amount of $2.5 million. No explanation was offered for the transfer of a further $3 million by Jaroc via Base Finance to Easy Loan. The full nature and purpose of the transaction is not clear.

[116] Regardless of the peculiarity of the Jaroc/Easy Loan transaction, the inescapable conclusion is that the Jaroc mortgage was not an asset securing the investment of any investor in Base Finance other than Easy Loan. This was known by Mr. Breitkreutz, as he stated as much in his evidence.

Mr. Breitkreutz Knew that He Put Investors at Risk of Deprivation

[117] During the Relevant Period, Base Finance had somewhere between $300,000 and $850,000 equity in the Strathmore Acreage and a security interest in Texas oil and gas properties of negligible value. For the reasons discussed above, I find that Mr. Breitkreutz knew of at least these approximate values. Mr. Breitkreutz estimated that Base Finance owed investors about $100 million. As a result, he was subjectively aware that he was involved in a deceit, falsehood, or some other fraudulent means when he represented to investors that their investments were secured, when they were effectively unsecured. As such, I find that he was subjectively aware that he was engaged in actions that were deceitful or dishonest; namely, he was aware that he was accepting funds from investors obtained by making certain misrepresentations and that he knew these funds were being used for purposes other than those stated. He also knowingly made false representations in persuading investors not to withdraw their funds.

[118] The remaining question is whether Mr. Breitkreutz knew that his lies could harm, or deprive, the investors. As explained by our Count of Appeal in ***Iyer***, at para 46 (quoting ***R v Olan et al***, 1978 CanLII 9 (SCC) at 1182): "[t]he element of deprivation is satisfied on proof of detriment, prejudice, or risk to the economic interests of the victim... ."

[119] The accused need not intend or foresee the deprivation, he need only be aware of the risk: ***Théroux*** at 18, ***Iyer***, at para 75. Nor does the fact that an accused believed nothing was wrong with his actions shield him from criminal liability: ***Iyer*** at para 75, ***Macleod*** at para 76. Rather, what is required is proof of a sufficient causal connection between the fraudulent conduct and the risk of deprivation to the victim(s): ***Riesberry***, at para 22. I have little difficulty concluding the Crown has proven such a connection in this instance beyond a reasonable doubt.

[120] The Defence submits that Mr. Breitkreutz lacked the mental state necessary for fraud because he honestly believed that investor money was secured by the equivalent of a first mortgage on Texas oil properties, that this was consistent with his representations, and that he believed that investor money was not at risk.

[121] Did Mr. Breitkreutz believe that securing investor money against Texas oil properties owned by Saddle Lake and under the direction of Mr. Fox did not pose a risk of deprivation to investors? Mr. Breitkreutz's own evidence is that he had placed $100 million of investor money with Mr. Fox in previous oil and gas plays. Because these investments had not paid out, Mr. Breitkreutz's evidence is that Saddle Lake assumed the debts of Mr. Fox's companies in the amount of $100 million. No rational person who had lost money time and again investing with

Mr. Fox in oil and gas plays could reasonably believe that securing investor money against oil and gas assets owned by Saddle Lake was safe and posed little risk of deprivation to investors.

[122] New investor money raised by Mr. Breitkreutz during the Relevant Period went mainly to the payment of interest or return of capital for other investors, not to Mr. Fox or Saddle Lake. Mr. Breitkreutz knew that investor money raised during the Relevant Period was at risk because of this practice and because the Texas oil play may not pay out in time or at all. Mr. Breitkreutz's understanding of this risk is reflected in the fact that when investors like the Youngs and Mr. Lis tried to take their capital out of Base Finance in the months before its collapse, he offered bonus payments and increased interest rates to induce them to leave their money in Base Finance. Despite his protests to the contrary, Mr. Breitkreutz's behaviour shows that during the Relevant Period he understood that Base Finance's business was teetering on a precipice and that there was a serious risk that investors would be deprived of their investments.

[123] The Crown has thus established the second element of *mens rea* beyond a reasonable doubt.

Theft Charge Stayed

[124] The charges fraud and theft in the present case arise out of the same events. Fraud is the more serious of the offences. Where an accused is charged with two or more offences arising out of the same transaction and the elements of the offences are substantially the same, the accused should only be convicted of the most serious of the offences ***R v Kienapple***, 1974 CanLII 14 (SCC), [1975] 1 SCR 729. Accordingly, the charge of theft is stayed.

Conclusion – Mr. Breitkreutz Defrauded Investors

[125] Mr. Breitkreutz defrauded investors in Base Finance by lying to them about the true nature of the Base Finance business and specific investment opportunities. These were not inadvertent representations; they were intended to induce investors to give money to Base Finance or to prevent or delay withdrawal of money from Base Finance. Mr. Breitkreutz knew that his misrepresentations put investors at risk of losing money. Mr. Breitkreutz's deceit, falsehoods, or other fraudulent means caused investors who advanced money to Base Finance in the Relevant Period to lose millions of dollars. He is guilty of fraud.

Heard on the 6, 7, 8, 9, 10, 13, 14, 15, 16 and 17th days of June, 2022.
Dated at the City of Calgary, Alberta this 29th day of June, 2022.

Colin C.J. Feasby
J.C.Q.B.A.

Appearances:

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for the Crown

Cale W. Ellis-Toddington
for the Accused