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Indexed as:

**Chester Industrial Tool Supply Ltd. v. Cantec Wire and Cable Ltd.**

Between

Chester Industrial Tool Supply Ltd. carrying on business as  
Gescan Electrical Distributors, Plaintiff, and  
Cantec Wire and Cable Ltd., Harold D. Saunders, the Trustee of  
the Estate of Cantec Wire and Cable Ltd., a Bankrupt, Blaire  
Robert Smith, Kenneth Robert Brown, Michael Venditti, John  
Benjamin Venditti, Victor James Elderton, Elvic and Associates,  
Normax Transport Inc., Norman Robert Smith, Chambers Electrical  
Corp., Ronald H. Chambers, Texcan Cables Limited, and Dynamic  
Industrial Equipment Ltd., Defendants

Vancouver Registry No.: C854119

[1989] B.C.J. No. 1081

**British Columbia Supreme Court  
Vancouver, British Columbia  
Cohen J.**

Heard: March 6, 7, 8, 9, 10 and 13, & April 21, 1989

Judgment: June 2, 1989

Counsel for the Plaintiff: F.G. Potts.

Counsel for the Defendants, Chambers Electrical Corp. and Ronald H. Chambers: W.J. Rodgers.

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**COHEN J. :—**

I. Background

The plaintiff, Gescan Electrical Distributors ("Gescan"), a division of the plaintiff Chester Industrial Tool Supply Ltd., is a wholesaler of electrical products. Chester has offices and warehouse facilities located in the City of Vancouver and at other locations throughout the Province of British Columbia. Gescan is a major supplier to electrical contractors of wire, cable and electrical equipment.

The defendant, Ronald H. Chambers, is the owner of the defendant, Chambers Electrical Corp., an electrical contracting company. The defendant, Blaire Robert Smith, is a former employee of Gescan. Smith, hired as a salesman by Gescan in June 1983, was fired by Gescan in February 1985 after confessing to engaging in a scheme to misappropriate goods from Gescan's warehouse and sell them through his own proprietorship, Elvic and Associates ("Elvic"), to third parties, including Chambers.

The defendant, John Benjamin Venditti, was a principal of the defendant, Cantec Wire and Cable Ltd. ("Cantec"), a supplier of speciality wire and cable. Venditti and Cantec have gone through bankruptcies. A substantial number of Smith's fraudulent transactions were made between Elvic and Cantec.

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Chambers met Smith when Smith was employed as a salesman at Cantec prior to his being employed with Gescan. Chambers knew Venditti not only from the fact that Chambers did business with Cantec but Chambers was related to Venditti through Chambers' wife who is Venditti's niece. At all material times, Venditti and Chambers knew that Smith was employed by Gescan as a salesman.

## II. The Scheme

In late 1983, Smith and his brother-in-law Victor Elderton, formed a proprietorship called Elvic and Associates. Elvic, a defendant in these proceedings, engaged in a few legitimate transactions buying and selling surplus electrical products, and then, unknown to Elderton, Smith used Elvic as a vehicle to perpetrate his fraudulent scheme on Gescan.

Smith's scheme involved him preparing false warehouse requisition documents for goods in Gescan's inventory and then intercepting Gescan's internal records and either destroying or hiding them so Gescan would have no knowledge of the goods having left its inventory.

Prior to creating the false warehouse documents, Smith had sold Gescan's goods to third parties through Elvic, telling purchasers from Elvic that the goods were surplus electrical products obtained from Elvic's own sources.

There are four transactions at issue in this action by Gescan against Chambers. In the period May to October 1984 Chambers received goods belonging to Gescan but paid Elvic for three of the shipments and Cantec for the fourth shipment. Gescan has not been paid for the goods received by Chambers and brings this action against Chambers in conversion to recover damages.

## III. The Evidence

### (i) Robert McKamey

Gescan's representative, Robert McKamey, has been employed by Gescan for the past 18 years. He testified about Gescan's inventory, sales and billing procedures. In January 1985 Gescan did a physical count of its inventory and discovered an apparent shortage of some of its goods. McKamey investigated the shortage and queried Smith about certain transactions. Smith denied being involved in the transactions.

Several days later, Smith confessed to McKamey that he had removed goods from Gescan's warehouse, had arranged for shipment to third parties and had diverted payment rightfully owed to Gescan to himself. Following this confession, there was a thorough investigation by Gescan and the police into Smith's conduct. Smith was charged with and pleaded guilty to seven counts of fraudulent conduct.

Following his confession to McKamey, Smith produced some of the false documents he had used as part of his scheme. From these and other documents, McKamey, with the help of the police, was able to piece together details of the sale and delivery of goods removed from Gescan's warehouse by Smith. Two of the shipments involved goods moving from Gescan's warehouse into the possession of Chambers at a location in Vancouver known as the Pennyfarthing Project. A third transaction involved Smith purchasing cable from a Gescan supplier called Pirelli Cables and then arranging to have the goods invoiced to Gescan and delivered by Pirelli directly to the Pennyfarthing Project site. The fourth transaction involved a sale of Gescan's wire by Smith to Cantec. In turn Cantec sold this same wire to Chambers.

McKamey said that Gescan was unaware that the goods involved in the first two transactions were removed from its warehouse. While Gescan paid Pirelli for the cable purchased by Smith and shipped to Chambers, Gescan was unaware of the sale made by Smith and the arrangements by him to ship the cable directly from Pirelli to the Pennyfarthing Project site. With respect to the fourth transaction, Gescan did not normally deal with Cantec in the kind of wire involved in this transaction. The wire sold was called NMD wire, normal household wire not usually

stocked by Cantec, a supplier of speciality wire and cable.

McKamey said that Gescan has not been paid for any of the goods sold by Smith in the four transactions.

The first shipment of Gescan goods involving Chambers was made around May 18, 1984. This shipment involved 200 boxes of wire. Gescan had no documentation with respect to this transaction. The second shipment of Gescan's goods to Chambers around June 4, 1984 involved 14 bundles, 9 reels and 2 skids of wire, cable and pipe. The only documentation Gescan had for this transaction was a bill of lading prepared by one of its shippers. This document was located by McKamey after Smith's confession.

The third Chambers transaction was the one involving the shipment of cable by Pirelli to Chambers at the Pennyfarthing Project site on June 14, 1984. Gescan paid the invoice from Pirelli relating to this transaction. The invoice from Pirelli to Gescan showed an address on Pennyfarthing Drive but did not identify Chambers or Chambers Electrical Corp. as the recipient of the goods. In the fall of 1984 Gescan's invoice clerk queried Smith about this transaction. Smith denied any knowledge of it. McKamey explained that Pirelli is a major supplier of cable to Gescan and it is not uncommon for Gescan to have to reconcile Pirelli invoices where Gescan's customer has not been identified on the Pirelli invoice. This process takes some time because of the large volume of transactions between Gescan and Pirelli. McKamey uncovered the document trail for this transaction after Smith's confession.

The last transaction involving Chambers took place on October 25, 1984 and involved a substantial amount of housewire bought by Chambers from Cantec who had purchased the wire from Smith. The only document Gescan had in its records relating to this transaction was a false warehouse requisition document provided to McKamey by Smith after Smith confessed.

McKamey said that in 1984 Gescan did not have any reason to suspect Smith of wrongdoing. The Gescan internal inventory, sales and billing system had been in place for all of the years that McKamey worked there. According to McKamey, the Gescan system was an established one for the shipment of goods from its warehouse. Up until the Smith scheme, the system had worked well. McKamey explained that Smith was able to divert Gescan's goods from its warehouse without Gescan's knowledge by falsifying Gescan documents and then intercepting the documents and hiding or destroying them.

(ii) Blaire Smith

Smith testified that in late 1983 he and his brother-in-law, Victor Elderton, set up Elvic and Associates as a sole proprietorship. Elvic engaged in a few legitimate transactions to buy and sell surplus electrical products. By early 1984, Elderton was no longer involved and thereafter all of Elvic's transactions were carried out by Smith using the Elvic name.

Prior to his employment with Gescan in 1983, Smith worked for two years as a wire salesman with Cantec. Smith said that in 1984, while employed with Gescan, he was involved in fraudulent transactions to obtain goods from Gescan's warehouse for sale to third parties through Elvic. He told third parties that he could get surplus wire and cable through Elvic when in fact what he was doing was taking Gescan's new goods and selling them for his own profit.

Elvic never actually had possession of any of the goods sold to Chambers. Smith always completed the transaction between Elvic and the third party before he prepared false documents for the transaction, because he did not have a place to store the goods being sold. Upon delivery of the Gescan goods, the purchaser would pay Elvic. Smith would then transfer the sale proceeds from Elvic to his personal account.

Smith's scheme was to intercept the documents in Gescan's warehouse so Gescan would have no record of the goods removed. A substantial number of fraudulent sales were made between Elvic and Cantec.

Smith met Chambers when he was still employed with Cantec. In the spring of 1984, Smith had a conversation with Chambers. He told Chambers he had access to surplus electrical materials and Chambers told him what he needed. There were several telephone conversations between Smith and Chambers during which they discussed prices and delivery of the so-called surplus electrical products. At the time of these conversations, Smith did not have possession of the goods but intended to remove them from Gescan's warehouse once a sale to Chambers was concluded. He fully intended to intercept the paperwork to preclude Gescan's knowledge of the transactions with Chambers.

Smith carried out his modus operandi in the transactions with Chambers. For the May 18, 1984 delivery he put together false warehouse documents to generate assembly and delivery of the goods in Gescan's warehouse. On a Friday afternoon in May 1984 he arranged for a friend to arrive at Gescan's warehouse with a 3/4 ton truck to pick up 200 boxes of wire. He made certain that there were no copies of the internal documents and that no microfilm copy was made of the documents, which was the usual practice at Gescan.

Apart from his previous employment with Cantec, Smith and Venditti were friends and business associates. Smith explained that for some reason the 200 boxes of wire were delivered to Venditti's father's residence, where Venditti lived. Smith did not know how the goods moved from Venditti's father's residence to Chambers. Chambers Electrical Corp. issued a cheque to Elvic in the amount of \$9,143.23 for this delivery. The cheque, dated May 18, 1984 was picked up by Smith from Chambers' office. Smith said that he personally ended up with the proceeds from this sale. He never paid Gescan for the 200 boxes of wire and confirmed that he was not authorized to make this sale.

With respect to the June 4, 1984 transaction between Smith and Chambers, Smith again prepared false warehouse documents to generate delivery of the wire and pipe. He then destroyed the internal warehouse documents so Gescan would have no record of the goods being removed from its warehouse. In this transaction, the false documents showed the goods destined for Lornex Mining Corporation. When the delivery truck arrived at the Gescan warehouse to pick up the goods, Smith obtained a bill of lading from the truck-driver and filled it out himself, showing Cantec as the shipper and Chambers Electrical Corp. as the recipient of the goods, giving the Pennyfarthing Project site as its address. In fact, unknown to Smith, a Gescan shipper had already prepared a bill of lading for these goods. Apparently the false document prepared by Smith described the transaction as a customer pick-up and Smith explained that Gescan shippers would not normally fill out a bill of lading for a customer pick-up. The Gescan bill of lading, mistakenly completed by one of its shippers, was apparently not noticed by Gescan at the time of this transaction.

Smith said he showed Cantec on the bill of lading as being the shipper because he knew that by doing so, the trucking company's delivery bill would be sent to Cantec and not Gescan. He said he had no idea why he chose Cantec. In any event, Smith confirmed that he had no authority to remove these goods and did not pay Gescan for the goods removed. Elvic received a cheque dated June 5, 1984 from Chambers Electrical Corp. in the amount of \$11,000. Smith picked up this cheque from Chambers' office and eventually transferred the monies into his own account.

Smith explained how the goods moved from Pirelli to the Pennyfarthing Project site on June 14, 1984. Smith said that he could not locate the goods in the Gescan warehouse so he ordered the goods from Pirelli, instructing Pirelli to ship the goods directly to Chambers' Pennyfarthing Project site. He carried out this transaction by selecting from Gescan's internal records a purchase order number previously used in an earlier transaction between Gescan and Pirelli. Smith left the impression that because of the large volume of transactions between Pirelli and Gescan, he was not worried about using this procedure to arrange for shipment of the goods directly to Chambers. Apart from Pirelli's invoice to Gescan, Smith said there were no Gescan documents recording this transaction. Smith was asked about this transaction in the fall of 1984 by a Gescan employee. Smith lied to the employee saying he had no knowledge of this transaction.

Smith admitted that Gescan did not authorize him to make the purchase from Pirelli and Gescan was never paid for these goods. Smith picked up a cheque payable to Elvic dated September 4, 1984 from Chambers Electrical Corp. in the amount of \$2,000. He could not recall why there was a delay between June 14, 1984, the date of shipment, and September 4, 1984, the date of payment.

Finally, there was the transaction involving the sale of NMD wire between Smith, Cantec and Chambers. Again, Smith generated false documents to remove the goods from the Gescan warehouse and deliver them to Cantec. Smith received a Cantec cheque payable to Elvic dated October 24, 1984 in the amount of \$9,360 as payment for the goods involved in this transaction. Smith never paid Gescan for these goods. According to Smith, Cantec did not ordinarily keep this quantity of NMD wire in its inventory.

Smith said that Venditti was not involved in any of his discussions or negotiations with Chambers. He denied telling Chambers that Venditti received a commission on sales to Chambers. Smith said Chambers knew about Elvic prior to the first delivery of goods in May 1984 but he could not recall what exactly he told Chambers about Elvic. His explanation for the fact that Chambers Electrical Corp. cheques were made payable to Elvic was that he requested this be done and Chambers operated on a blind trust that the transactions were legitimate.

Smith said he kept his involvement with Elvic secret from Gescan until he was found out. In cross-examination, he testified that some of the goods sold to Chambers were returned to him. He had the returned goods sent to Cantec to protect himself. He thought that if the goods were returned to Gescan it would set off bells.

(iii) John Venditti

Venditti identified the Cantec documents relating to the fourth transaction. He said Cantec paid Elvic for the goods. From the documents it was reasonable to conclude that the NMD wire purchased from Smith in this transaction were the same goods that Cantec in turn sold to Chambers. He said that Cantec never paid Gescan for the goods because it had already paid Elvic.

Venditti said that in 1984 he knew Smith was selling goods to Chambers. Venditti agreed that Smith was in a conflict of interest by selling goods on the side while he was still employed by Gescan.

In cross-examination, Venditti said that at the outset of his dealings with Elvic he did not know Elvic and Smith were related but that after three or four transactions, Smith told him that there was no surplus dealer supplying Elvic, that Smith was getting the goods from Gescan, selling them and making a profit on the price he paid to Gescan. Venditti also said that at some point in time, he and Chambers discussed the relationship between Smith and Elvic.

Venditti recalled the event when the 200 boxes of wire were delivered to his father's residence. The goods were delivered on a Saturday. Venditti understood that the goods had been sold to Chambers by Smith. According to him the goods remained at his father's residence for 5 to 10 days. Venditti said that to this day he does not know where the goods went after leaving his father's residence.

(iv) Ronald Chambers

Chambers Electrical Corp. was incorporated by Ronald Chambers in 1976. Chambers Electrical Corp. does residential, commercial and industrial wiring jobs. In 1984, Chambers was the only person in the Chambers Electrical Corp.'s office. At the time, Chambers had 20 employees working on projects in several different locations, including the Pennyfarthing Project in Vancouver.

Chambers' wife is Venditti's niece and Chambers first met Venditti shortly after he and his wife met. Prior to 1984, Chambers had bought wire and cable from Venditti's company, Cantec. Chambers met Smith while Smith was still an employee of Cantec. Chambers knew that Smith left Cantec to go to Gescan as a salesman.

Chambers Electrical Corp. had business dealings with Gescan in 1983 and 1984. At the material times, Chambers' contact person at Gescan was someone other than Smith. Towards the end of 1983, Chambers bid on the Pennyfarthing Project. He obtained the contract for phases two and three of this large construction project.

According to Chambers' evidence, in early 1984, Venditti told Chambers that Smith had a company called Elvic that dealt in surplus electrical goods and asked him if he would be interested in buying such goods from Smith. Chambers told Venditti he was. Following this conversation Chambers heard from Smith. Smith confirmed to him that he was selling surplus electrical goods. Chambers told Smith what he required. Smith said he would get back to Chambers with prices and the quantities available. Chambers is certain that at this time he discussed Elvic with Smith.

Chambers prepared a Chambers Electrical Corp. purchase order dated May 11, 1984 relating to the goods that he expected to receive from Smith. Apparently this purchase order was prepared following several conversations between Smith and Chambers about the goods listed on the order. According to Chambers, after satisfying himself about the prices quoted by Smith, they agreed on price and quantity and Chambers understood that he would receive the goods in one delivery at the end of May 1984. During one of their conversations, Chambers was given to understand that the goods were surplus from the Revelstoke Dam Project site.

To Chambers' surprise, some of the goods arrived early on May 18, 1984. Between May 11, 1984, when Chambers prepared the purchase order, and May 18, 1984, Smith had called him to say that some of the wire had come in early and asked Chambers if he would take it. Chambers answered yes and asked Smith to send the goods directly to the Pennyfarthing Project site. Smith raised a query about delivery of the goods after regular working hours and Chambers told Smith that the project site was only open during the day. This conversation did not arouse any suspicion in Chambers.

The next news to Chambers about this delivery was when Venditti contacted him and said that the goods were at Venditti's father's residence. Venditti explained to Chambers that as Smith was working at Gescan during the day he could not arrange to obtain the goods from where they were being stored during regular hours. Chambers offered to send his truck to the storage yard but apparently Smith rejected this offer. Chambers assumed Smith wanted to keep his source of the goods secret.

Chambers sent his company truck to Venditti's father's residence and went along himself to count and inspect the boxes of wire. The boxes were loaded onto the truck and taken to the Pennyfarthing Project site. Chambers then made out a Chambers Electrical Corp. cheque payable to Elvic for this shipment.

Following the May 18, 1984 shipment, Chambers asked Smith when the balance of the goods would be coming and Smith told him that they would be shipped at a later date. On June 4, 1984 Chambers heard from one of his employees on the Pennyfarthing Project site that some goods had arrived on the site. Chambers had not received any prior warning of this shipment. Chambers told his employee to unload the goods and find the packing slip. Of the goods delivered, the wire was moved inside one of the buildings on the project site, the pipes were piled along with others already piled on the site and the reels of cable were left sitting outside on the site. Chambers visited the site a day or two later to inspect the goods. However, before his inspection, he issued to Smith a Chambers Electrical Corp. cheque dated June 5, 1984 payable to Elvic in the amount of \$11,000. At the time of this delivery Chambers could not be certain of the quantity of goods delivered or the exact amount owing. The \$11,000 was an amount agreed upon with the balance to be settled later. Following this delivery, there was a discussion between them about some of the goods Chambers wanted to return. Smith asked him to hold on to the unwanted goods until he had another purchaser or place to send them. Chambers said that he asked Smith for packing slips and invoices which, to this point in time, had not been received for any of the shipments. Smith said he would send them along.

Between June 4 and June 14, 1984, Chambers asked Smith for the balance of the wire ordered. On June 14, 1984 Chambers received a call from one of his men on the Pennyfarthing Project site regarding some wire that had been

delivered to the site. This was the Pirelli wire. It turned out that it was the same kind of wire Chambers had already told Smith he did not want and wished to return. He spoke to Smith about this. Smith requested the balance of monies owing but Chambers resisted, saying he wanted documentation to establish the quantities of goods that had been delivered so far. Eventually, on Smith's instructions, the unwanted wire was shipped by Chambers to Cantec.

As far as Chambers was concerned, following the June 14, 1984 shipment, his dealings with Smith were at an end. On September 4, 1984 a cheque in the amount of \$2,000 was issued by Chambers Electrical Corp. and was made payable to Elvic. After June 14, 1984 Chambers estimated that he still owed Smith \$3,000 and decided that he would hold back \$1,000 until he received documents from Smith evidencing the transactions. He said that between the June 14, 1984 shipment and September 4, 1984 he did not discuss buying any more goods from Smith. Chambers feels he still owes Smith the \$1,000. Smith has not tried to collect.

While packing and delivery slips for the shipment of the Pirelli wire on June 14, 1984 existed in Chambers' site file, he could not say for certain if his site file ever contained a copy of the June 4, 1984 delivery slip in evidence showing Cantec as the shipper of the goods delivered on that date. He agreed however that delivery slips would normally be retained by his on-site employee when the goods were received. In any event, Chambers did not see documents relating to any of the transactions until after the Smith scheme was uncovered.

As to the transaction with Cantec in October 1984, Chambers explained that Venditti called him and asked if he would like a good price on NMD wire. Chambers phoned around to his competitors and learned that they would be interested in purchasing some of this wire. He bought it from Cantec and resold it to his competitors at a profit.

In cross-examination, Chambers explained that normally delivery and packing slips arrive with the goods. Despite his repeated requests, at no time did Chambers receive shipping documents or invoices from Smith.

Chambers said he did not know what involvement Venditti had with Smith although he suspected that Venditti was receiving a commission from the transactions between himself and Smith. He said that although the transactions were made with Smith, he often discussed the transactions with Venditti. He also used Venditti to send messages to Smith. In fact, he gave the \$2,000 cheque dated September 4, 1984 to Venditti to give to Smith.

Throughout 1984, Chambers knew that Smith was an employee of Gescan and that he operated Elvic on the side. He thought that if Gescan found out about this, Smith might get fired. He conceded that he thought Smith had a conflict of interest. He also conceded that the pick-up of the goods from Venditti's father's residence was the only time in 1984 that he picked up this quantity of goods from a private residence.

Chambers does not dispute that the goods he purchased from Smith and Cantec were the rightful property of Gescan. He confirmed that he never paid Gescan for these goods and that in June of 1984, he knew Pirelli was a wholesaler of cable and wire and not involved in the sale of surplus electrical products. He conceded that had he seen the June 4, 1984 delivery slip showing Cantec as the shipper of the goods or the Pirelli packing slip, these documents would have stood out as they were names that he would not have expected to see on any documents relating to shipments from Smith.

Chambers confirmed that he knew Gescan did not deal in surplus electrical products, knew that Gescan dealt in the very same kind of goods that he was buying from Smith, knew that Smith was in a conflict of interest which could get him fired, and knew that Smith wanted to hide the source of the goods. Further, despite the fact that Chambers withheld payment and told Smith to produce documentary proof before he would pay the balance owing, Smith never did produce the documents or try to collect.

Chambers conceded that normally surplus goods are weathered, damaged, or of uneven lengths. This is why he wanted to inspect the goods before payment. However, in this case, all of the goods received from Smith were brand new. According to Chambers, this fact did not arouse his suspicions.

Even though Chambers was dealing with Smith, he said it did not concern him that the unwanted goods were returned to Cantec. He agreed that the June 4, 1984 delivery slip and the Pirelli packing slip would have put him on notice had he seen them at the time. He said that he stopped dealing with Smith after the June 14, 1984 delivery because he was concerned about the way Smith was conducting business.

#### IV. Decision

By agreement between counsel, there is no dispute that the goods purchased by Chambers were rightfully the property of Gescan. As well, there is no dispute that all the goods purchased by Chambers from Smith or Venditti were used up at the Pennyfarthing Project site or were resold by Chambers.

Chambers argues that he is not liable for damages in conversion and relies primarily upon the defences of estoppel by negligence and s.58 of the Sale of Goods Act, R.S.B.C. 1979, c.370.

##### (i) The Sale of Goods Act Defence (s.58)

Section 58 provides:

58 (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent is, subject to this Act, as valid as if he were expressly authorized by the owner of the goods to make the same, if the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

For the s.58 defence to succeed there are five preconditions:

- (a) The sale must be from a mercantile agent;
- (b) The mercantile agent must have been in possession of the goods at the time of the sale;
- (c) The possession of the mercantile agent must be by consent of the owner;
- (d) The sale must have been made in the ordinary course of business; and
- (e) The purchaser must have acted in good faith.

If any of the above preconditions are not met, then the s.58 defence is not available to Chambers.

It is conceded that Chambers purchased the goods from Smith, that in two cases the goods purchased came from the warehouse of Gescan, in the third case, directly from Pirelli, and that the goods in the fourth transaction were purchased by Chambers from Cantec, Cantec having purchased the goods from Smith.

Generally, where goods are taken by theft, the true owner is entitled to a return of the goods (*Brandon v. Leckie* [1972] 6 W.W.R. 113 (Alta. S.C.)). However, where someone gets possession of the goods with consent of the owner, even if the consent is fraudulently obtained, the owner cannot get the goods back (*Newtons of Wembley Ltd. v. Williams* [1965] 1 Q.B. 560). However, much turns on the nature of the fraud and here, Gescan argues that the nature of the fraud that Smith committed is such that Chambers must be liable in damages for the conversion of the goods sold to him by Smith. This is so primarily because Smith was not in possession of the goods when the sale to Chambers was concluded and moreover, Gescan never gave its consent as owner to the transfer of possession from itself to Chambers or Cantec. In effect, its goods were taken by theft.

The plaintiff's submissions regarding conversion apply to the four transactions. The only real issue of whether



there was in fact a conversion is with respect to the goods that were returned by Chambers to Cantec. The plaintiff says that on the facts before me those goods were converted as well. I agree. In the leading case of *Hollins v. Fowler*, (1875) 44 L.J.Q.B. 169 (H.L.), the headnote states:

Any person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion, unless the possession was obtained by him as finder or as bailee, or by purchaser in market overt or from an agent, so as to be protected by the Factors Act.

(emphasis added)

The two essential elements of conversion are possession and transfer of property of the chattels of another. There is no dispute about whether Chambers was in possession of the goods he eventually returned. Also in returning the goods to Cantec, there can be no dispute that there was a subsequent disposition of the goods in a manner inconsistent with the owner's rights. Therefore, even with respect to those particular goods, Chambers is guilty of a conversion notwithstanding that his involvement might be said to have been innocent.

In my opinion, the s. 58 defence is not available to Chambers. In reaching my opinion I have relied heavily on the decision of His Honour Judge Boyle in *Gescan Electrical Distributors v. Texcan Cables Limited*, (October 14, 1988), Vancouver 5936/ C854119 (B.C.S.C.). That case involved the sale of the same type of goods, the same rogue and the same fraudulent scheme as was involved in the case at bar. In consideration of the appropriate principles regarding the application of s. 58, the Texcan case is practically on all fours with this case.

The Texcan case was a Rule 18A application brought by Gescan. The goods involved were reels of cable. In that case, Smith asked Venditti to find a buyer for the goods. The buyer was Texcan. Smith then prepared fraudulent documentation and delivered the goods from Gescan's warehouse to Cantec. The cable had been sold by Venditti to Texcan before it came into Venditti's possession. After leaving Gescan's warehouse Smith destroyed Gescan's documents with the result that Gescan was unaware of the transaction. Texcan paid Venditti for the goods and Venditti paid Smith.

As in the case at bar, the main defence in the Texcan case hinged on s. 58 of the Sale of Goods Act. Judge Boyle had to consider whether Venditti could pass title in the cable to Texcan. In arriving at his decision he first found that Venditti was not in possession at the material time as required by s. 58. The cable was in Gescan's possession when Venditti "sold" it to Texcan. Judge Boyle said that "sale" under the Act includes a bargain and sale, which was completed while the cable still was in Gescan's stock.

Second, Judge Boyle held that even if Venditti had been in possession of the cable, he could not be said to be in possession with Gescan's consent. There was no willing transfer by Gescan to Smith because Gescan did not know the cable was gone. Judge Boyle went on to deal with the effect of a person getting possession of goods by fraud. At pp. 5 to 6 of the decision Judge Boyle said:

The Code does not bind the common law nor the Sale of Goods Act but it provides a description of what happened here. Smith stole the wire by fraudulent means. I take as confirmation of that conclusion *Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd.* (1979), 1 D.L.R. (3d) 1 (S.C.C.) at 15 and 16: "... simply a other instance of a fraudulent agent's inability to give a good title to goods stolen from his principle", Laskin, C.J.C., dissenting on quantum only. The Canlab case cites with approval *Farquharson Brothers & Co. v. King & Co.* [1902] A.C. 325 at 329: "Assuming always the element of fraud ... what element is there wanting to make that stealing?"

Section 29 of the Code provides:

29(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods stolen reverts in the person who was the owner of the goods, or his personal dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in the goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

Subsection 2 does not save the Defendant because this fraud does amount to theft. Goods may be obtained by fraud which does not amount to theft. That is how s. 29(2) is distinguished here.

The cable cannot be returned. The Defendant has sold it. The Defendant is liable for its conversion, *Mackenzie and Mackenzie v. Blindman Valley Cooperative Association Limited* [1947] 2 W.W.R. 443 even though the Defendant stands in good faith down the line from the theft.

In this transaction Venditti was Smith's agent. "Broker" might be more descriptive. Smith had no right to or in the cable and so had none to transfer to Venditti. None accrued to Venditti by virtue of his mercantile agency.

Judge Boyle found Texcan liable for conversion. He concluded that Venditti was Smith's agent and that Smith had no right to or in the goods and so had none to transfer to Venditti.

While I am not satisfied that Smith can be said to be a mercantile agent, for the purpose of what follows I shall make the assumption, as did Judge Boyle, that he was. In the case at bar the evidence is uncontradicted that as to the goods involved in the first three deliveries, Smith had concluded his deal with Chambers prior to removing the goods from Gescan's warehouse or ordering the goods from Pirelli. Smith's transaction with Chambers was complete when the goods sold were still in Gescan's or Pirelli's warehouses.

Smith's scheme precludes a finding that Smith ever had the goods with Gescan's consent. It was only after Gescan's annual physical inventory was taken in early 1985 that Gescan became aware that the goods sold to Chambers were gone. Smith was therefore not in possession of the Gescan goods at the time of the sale to Chambers. Even if it could be said that he was, there was certainly no consent to Smith's possession by Gescan because Gescan did not know the goods were removed from its warehouse or ordered by Smith from Pirelli at the time Smith arranged for the sale and delivery of the goods to Chambers.

The facts of this case support a conclusion consistent with the finding in the Texcan case, that is, what Smith did was "to convert the cable fraudulently and without colour of right to his own use, that use being sale to the defendant" (p. 5, supra). Accordingly, the s. 58 defence cannot assist Chambers. Smith's fraudulent scheme amounted to theft of a nature that brought it outside the scope and application of s. 58 of the Sale of Goods Act.

As to the unwanted goods returned by Chambers to Cantec, I am satisfied those goods were converted as well for the reasons set out at page 22.

With respect to the fourth transaction, relying on the Texcan case, Smith had no right to or in the goods and so had none to transfer to Venditti. Therefore, Venditti could not pass title to Chambers.

#### (ii) Estoppel by Negligence

This defence must also fail. The cause of the conversion was Smith's fraudulent taking of Gescan's property. The cause of Gescan's loss had nothing to do with Gescan's conduct.

On first impression, one might conclude that Gescan was negligent in that Smith, a junior employee, after only a few months of employment, was able to plan and perpetrate his fraud. However, a closer look at the evidence from McKamey makes it clear that Gescan's loss was not the result of any act, omission or negligence on Gescan's part.

The fact is that Gescan was not negligent. As in the case of *Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd.* (1979), 1 D.L.R. (3d) 1 (S.C.C.), at p. 6, it cannot be said that Gescan "should have known of or discovered the fraud of Cook [Smith] within a reasonable time after it was put into effect".

The Canlab case involved the conversion of goods by an employee of the plaintiff company. The plaintiff's employee ordered platinum from the defendant on behalf of the plaintiff and then fraudulently resold it to the defendant as scrap in the name of a fictitious customer. The plaintiff brought an action in conversion against the defendant. The defendant argued that the plaintiff was estopped from denying the defendant's title because it had been negligent in permitting the employee's scheme to go undetected. At trial, it was held by O'Driscoll J. that Canlab's control system was adequate and that there had been no negligence in its operation. This finding was concurred in by all members of the Ontario Court of Appeal and was not interfered with at the Supreme Court of Canada which allowed the appeal in part, but for reasons having to do with the issues of agency and ostensible authority.

Gescan's procedures for documenting its transactions had been in place for more than 18 years and until Smith's scheme, had operated effectively and adequately. There is no evidence before me that the accounting or inventory systems at Gescan were not proper, sufficient or in accord with generally accepted industry standards.

Gescan is a multi-million dollar wholesale distributor of electrical products. In such a large operation, a daily physical count of inventory would be impractical. Gescan does an annual physical inventory audit. It was the 1985 audit which turned up the discrepancies caused by Smith's scheme. However, notwithstanding the frequency or sophistication of audit procedures, any inventory system will fail to react quickly when an employee, as in the case at bar, is prepared to lie, falsify, hide or destroy records.

Even if it could be said that Gescan's internal accounting or inventory procedures were deficient or that its supervision of Smith was lax, Chambers could still not succeed in his defence of estoppel. The law is settled. There must be a duty owed by Gescan to Chambers in order to make a finding of negligence (*Mercantile Bank of India Ltd. v. Central Bank of India Ltd.* [1938] 1 All E.R. 52 (P.C.)). In this case Chambers did not deal with Smith when Chambers made legitimate purchases of Gescan's goods. Chambers dealt with a different salesman. At no time was Gescan aware of Smith's dealings with Chambers nor did Gescan authorize Smith's possession of the goods for the purpose of sale of the goods to Chambers or Venditti. At no time did Smith purport to be acting as Gescan's agent but rather, he made it perfectly clear in his dealings with Chambers that he was acting on behalf of Elvic.

Further, there was no duty owed by Gescan to Chambers to maintain its accounting or inventory systems in a manner other than it did. The only possible suggestion of negligent behaviour by Gescan lies in the fact that for a short time, Smith's fraudulent scheme went undetected. This alone is not enough. Smith's success in defrauding Gescan was due only to the fact that he "went around, over and under the normal and adequate business controls which had been established by the plaintiff company" (*Canadian Laboratory Supplies Ltd. v. Englehard Industries of Canada Ltd.*, (1975), 68 D.L.R. (3d) 65 (Ont. H.C.) at p. 75), and not because of any failing on the part of Gescan.

## V. Conclusion

In the result, I am satisfied that Gescan is entitled to judgment. There remain several matters to be dealt with in connection with the extent of the judgment.

(i) On the eve of trial Gescan entered into a settlement with Smith settling Gescan's interlocutory judgment against Smith. The evidence is that the terms of the settlement with Smith did not prejudice Gescan's claim against

Chambers. No payments have been received by Gescan from Smith under the terms of the settlement.

In my opinion, the existence of the interlocutory judgment and settlement is of no bearing on Chambers' liability to Gescan and cannot be raised as a defence to Gescan's claim against Chambers. As held by Lawrence J. in *Ellis v. John Stenning and Son* [1982] 2 Ch. D. 81 at p. 87:

... the owner of the property is not, in the absence of special circumstances, divested of his title thereto unless and until the judgment is fully satisfied.

That case involved a plaintiff instituting a separate action in conversion against the defendants after having been successful in obtaining judgment for the same conversion against a different party. The pre-existing judgment in relation to the same act of conversion was not held to bar the plaintiff's right to obtain a second judgment, because the first judgment never had been, nor was it ever likely to be "fully satisfied".

Chambers' counsel submitted, without calling evidence, that somehow Chambers is entitled to a credit for any payments received by Gescan under the terms of its settlement with Smith. The onus is on Chambers to establish double recovery by Gescan. There is no evidence before me of double recovery resulting from Gescan pursuing its claim against Chambers. In my view, on the facts, this defence is not available to Chambers.

(ii) Gescan seeks a judgment against Chambers Electrical Corp., and Ronald H. Chambers. Gescan's counsel argued, on the authorities, that because throughout his evidence Chambers referred to his business dealings with Smith and Venditti in the first person and did not distinguish himself from his company, this somehow rendered him personally liable. He said that the onus was on Chambers to establish that the transactions were carried out by him as an agent for his company and he has failed to do so. In my opinion, notwithstanding the authorities cited, the evidence in the case at bar does not support a judgment against Chambers in his personal capacity. Chambers clearly conducted his business dealings through his company. Chambers' company was a legitimate well established vehicle and not a sham. In his dealings with Smith, Chambers used a company purchase order and paid for the goods with company cheques. I am satisfied that at all material times in this case it was clearly understood by all parties that Chambers was purchasing the goods in his corporate capacity and not personally.

(iii) Gescan charges that Chambers was wilfully blind in his dealings with Smith. I agree. While Chambers initially may have been lulled into dealing with Smith as a matter of trust arising out of Chambers' relationship to Venditti and the fact that Venditti and Smith were friends, there is no doubt that during the course of his dealings with Smith, Chambers knew or ought to have known that Smith was a rogue. I base this finding on the following facts:

- (a) Chambers knew Smith was employed as a salesman at Gescan and that by selling goods on the side he was in a conflict position which if discovered by Gescan, would result in his termination.
- (b) Chambers never received an explanation directly from Smith for sending the first shipment to Venditti's father's house. Chambers received an explanation from Venditti that because Smith was working during regular hours at Gescan, he had to arrange for delivery of the goods during off hours. The fact is that goods which were supposed to be delivered at the end of May showed up, in part, unannounced, in the middle of May at an unexpected location. I do not consider that Chambers made a proper inquiry of Smith regarding these circumstances or that he received a plausible explanation for the circumstances and timing of the delivery.
- (c) No documents were ever produced by Smith to Chambers to confirm the quantity of goods shipped. After the second delivery there was a dispute between them surrounding the quantity of goods delivered. Chambers estimated what he owed Smith and held back funds

demanding documentation before final payment. Notwithstanding Chambers' position, Smith never supplied shipping documents to reconcile the issue of the quantity of goods delivered. He simply walked away from the balance owing to him.

- (d) The reason for Chambers' interest in dealing with Smith in the first place was the opportunity to purchase surplus goods at a substantial discount over new goods. Chambers knew from past experience that in purchasing surplus goods they often arrive weathered and damaged. This is why he negotiated a position whereby he could inspect the goods before paying Smith. Yet when all of the goods delivered by Smith were brand new, Chambers raised no inquiry about this fact.
- (e) Documents existed in Chambers' on-site file from the time of the delivery of the goods which would have made Smith's explanation to Chambers about the source of the goods suspect. For example, the delivery slip accompanying the June 4, 1984 shipment showed Cantec as the shipper. Chambers conceded that this document should have been received by his on-site employee and kept on file. Further, Chambers' site file contained a delivery slip and packing slip showing Pirelli as shipper. Chambers knew that Pirelli did not sell surplus goods and in any event, he was not expecting goods from this source.

Chambers said he did not review the documents existing in his site file until after he was approached by the police investigating Smith's scheme. Chambers, and his counsel, conceded that a review of the site file documents by Chambers at the time of the delivery of the goods would have alerted Chambers to Smith's fraud. Chambers, or his site employees, either noticed the documents at the time of delivery and ignored the obvious discrepancies on them, or Chambers failed to review his own records when he disputed quantities with Smith. In either case, he is guilty of turning a blind eye to information within his possession that would have alerted him to Smith's fraud.

Gescan argued that Chambers' wilful blindness rendered Chambers personally liable. I cannot agree. Absent a finding that Chambers expressly directed the doing of a wrongful act (a finding I am unable to make on the facts of this case), Chambers is personally insulated by the corporate veil of Chambers Electrical Corp.

The cases referred to by Gescan are ones where a corporate personality is used blatantly as a cloak for fraud or improper conduct. In *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465, it was held at p. 476:

If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences...

(emphasis added)

In *The King v. Grubb* [1915] 2 K.B. 683, personal liability is acknowledged in circumstances where someone acting on behalf of a company "acts with an intent to defraud" (headnote). In the case of *Scott v. Riehl* (1959), 15 D.L.R. (2d) 67 which is cited in *Wawanesa Mutual Insurance Co. v. Chalmers and Co.* (1969), 7 D.L.R. (3d) 283 (Sask. Q.B.) at p. 287, it was held that the defendant, as director and agent of the contractor, was personally liable to the beneficiaries because he "knowingly created and operated the illegal system and thereby was implicated".

While corporate members are not absolutely insulated from liability by the corporate veil, the cases do not seem to go so far as to say that they can be held personally liable where they are wilfully blind to suspicious circumstances. In my view, in order to hold an individual member of a corporation personally liable, it is necessary

that there be an express intention by the member to defraud. It is because of the absence of such an intention by Chambers in the case at bar that Gescan's argument on this point must fail.

## VI. Quantum of Damages

The prima facie measure of damages for conversion of goods is their value at the time and place of loss (Tom Hopkins International v. Wall & Redekop (1985), 64 B.C.L.R. 245 (B.C.C.A.) at p. 251). The rationale for this principle is explained by Lord Wrenbury in "Volturno" [1921] 2 A.C. 544 (H.L.), at p. 563:

If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150 l. Adjudge that the plaintiff recover from the defendant 150 l. It would be nihil ad rem to say that in July similar cows would have cost in the market 300 l. The defendant is not bound to supply the plaintiff with cows.... The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

(emphasis added)

On the basis of this rationale, it is reasonable to fix the value of the goods converted at the date at which the conversion was discovered, since this is the earliest time at which the plaintiff could "go into the market" to replace the goods of which he was tortiously deprived. This is in accordance with the principle set out in Spence J.'s dissenting judgment (concurring with by Hall J., and the majority on the issue of damages) in R. v. Arnold [1971] S.C.R. 209 at p. 232, where he held:

I have come to the conclusion that the respondent's damages should be calculated with reference to the price of the shares when he was notified of the conversion. There is no doubt that he could have purchased other shares in their place and have claimed from the appellant the cost of such replacement purchase.

(emphasis added)

In my opinion the damages Gescan is entitled to is the quoted price for the goods sold in the first three transactions plus the cost of the NMD wire marked up by 29%. For the goods involved in the first three transactions Gescan's quoted price was \$41,084.95. As to the NMD wire Gescan would have sold it for \$10,424.79. These amounts total \$51,509.74. To this must be added sales tax of \$3,605.68 and a reel charge of \$113.00. There is no evidence that the value of the goods converted rose between the time of conversion and the date Gescan first became aware of it. In the result, I fix Gescan's damages at \$55,228.42.

In setting Gescan's damages on the basis of quoted price, I am mindful of the judgment in Smith v. Baechler (1889), 18 O.R. 293 (Q.B.), which was cited by Gescan to support its argument that due to Chambers' wilful blindness, damages should be fixed at the value of the converted goods plus the profit made by Chambers in disposing of them. Gescan argues that Chambers should not benefit from his dealing in Gescan's converted goods. While I accept the general principle put forward in the Smith v. Baechler case, supra, I am of the view that the Smith case can be distinguished from the one at bar. The Smith case involved the unlawful conversion of timber which was tortiously cut and hauled from the plaintiff's land. It was the tortious act itself which added value to the goods in question. In my opinion, it would be improper indeed to allow a wilfully blind defendant to benefit from the value added to converted goods by the conversion itself. In the case at bar, while it is true that Chambers was wilfully blind in his dealings with Smith, it cannot be said that his profits were in any direct way linked to the

tortious act of conversion of which he was wilfully blind. Given that Gescan could have immediately after learning of the conversion, replaced the goods and realized a profit on their disposition in much the same way as Chambers, it would be unreasonable to compensate Gescan at this time for a risk it chose not to take. In the Smith case, the cut and hauled timber could not have been replaced in its original state by Smith, after learning of the conversion. The best that could have been done to restore Smith to his original position was to return the cut timber to him. The situation was analogous in *Gallagher v. Ketchum & Co.* (1912) 2 D.L.R. 871 (Ont. D.C.).

As between a plaintiff and a wilfully blind defendant, it stands to reason that the defendant should not benefit from any increase in value to the goods brought about by the tortious act. However, the situation is different where the increase in value is brought about as a result of the defendant having accepted to take a risk which the plaintiff himself could have, but did not accept.

Interest on the damages awarded will be calculated from the date at which damages for conversion were claimed (i.e. the date at which the statement of claim first was issued). This accords with the principle enunciated by Spence J. in *R. v. Arnold*, supra at p. 232.

In view of my findings, Gescan shall have its costs of this action against Chambers Electrical Corp.

COHEN J.