COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Justice Elwood of the Supreme Court of British Columbia pronounced on the June 1, 2023

BETWEEN:

JOSEPH WAYNE PALMER SATHER

APPELLANT
(DEFENDANT)

AND:

SATHER RANCH LTD. and C. CHEVELDAVE & ASSOCIATES LTD.

RESPONDENT (PLAINTIFF) and COURT APPOINTED RECEIVER

BOOK OF AUTHORITIES

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TABLE OF AUTHORITIES

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership,*** 2009 BCCA 34

Date: 20090203
Docket: CA035780

Between:

Blue Line Hockey Acquisition Co., Inc.,
Northland Properties Corporation,
Kery Ventures Limited Partnership,
R. Thomas Gaglardi,
Ryan K. Beedie,
True North Hockey Limited Partnership and
True North Arena Limited Partnership

Appellants
(Plaintiffs)

And:

Orca Bay Hockey Limited Partnership,
Orca Bay Hockey Inc.,
Orca Bay Arena Limited Partnership,
Orca Bay Arena Corp.,
John E. McCaw, Jr.,
Sportco Investments, Inc.,
Sportco Investments II, Inc.,
Francesco Aquilini
Aquilini Investment Group, Inc.
Vancouver Hockey Limited Partnership,
Vancouver Hockey General Partner Inc.,
Vancouver Arena Limited Partnership,
Vancouver Arena General Partner Inc.,
Aquilini Investment Group Limited Partnership,
Tri Power Developments Limited Partnership,
0783612 B.C. Ltd. and
Vancouver Canucks Limited Partnership

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

I.G. Nathanson, Q.C. M.A. Clemens, Q.C. R.D. Diebolt, Q.C. S.R. Schachter, Q.C.	Counsel for the Appellants
H. Poulus, Q.C. H. Shapray, Q.C. D. Brown	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia December 9, 10, 11, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 3, 2009

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal turns on the existence — or non-existence — of a partnership among three Vancouver businessmen who worked together for some months beginning in November 2003 towards the possible purchase of a 50% interest in the Vancouver Canucks. The purchase was to be carried out not by the three men themselves, but by a "tax-effective entity" to be formed later. Negotiations with the vendors' principal, Mr. McCaw, were long and arduous. One of the three men, the defendant Mr. Aquilini, withdrew from the group in March 2004. The remaining two continued their efforts, ultimately 'expressing interest' in buying 100% of the Canucks and General Motors Place (the "Enterprise"). Six months later, at the same time as their "final" proposal was in the vendors' hands, Mr. Aquilini began discussions directly with Mr. McCaw. In very short order, Mr. Aquilini was able to reach an agreement for the purchase of a 50% interest, and an option to buy the remaining 50% of the Enterprise. His former associates, the plaintiffs Messrs. Gaglardi and Beedie, claim that in so doing, he breached a fiduciary duty owed to them as partners, either by wrongfully competing against them for the very objective of the partnership, or by appropriating a business opportunity belonging to it. Accordingly, they say Mr. Aquilini holds his interest in the Enterprise on a constructive trust for them.

[2] A decade ago, such a claim would have had little or no chance of success. Courts drew a bright line between "intended" partnerships and those that had actually commenced carrying on business. The authors of *Lindley on Partnership*

expressed this principle the same way in 1995 in their 17th edition as the authors of the 7th edition had in 1905:

> An agreement between two or more persons to carry on business at a future time cannot render them partners before they actually start to carry on that business. It is the carrying on of a business, not a mere agreement to carry it on, which is the test of partnership, hence the importance of distinguishing between actual and contemplated partnerships. As Lord Lindley put it:
>
> > "Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon."
>
> …
>
> So long as an agreement to form a partnership remains executory, no partnership will be created. Subject to the point noted in the previous paragraph, intending partners will retain that status if the chosen commencement date has not yet arrived or if some act still remains to be done before the business can be commenced. Precisely the same principle applies as between the promoters of companies, as will be seen hereafter. [At 13–14; emphasis added.]

[3] However, the plaintiffs rely on more recent case-law for the proposition that a "single venture partnership" was formed in this case to pursue the acquisition of the Enterprise by a second vehicle — likely a limited partnership — that in the end never came into existence. Counsel referred to the first partnership as the "pursuit partnership" and to the second as the "acquisition partnership". The plaintiffs say that although the three men never agreed on the "shape" of the ultimate transaction that would be acceptable to them or even on whether each of them would ultimately participate in it, there is now authority that supports the existence of a pursuit partnership in the circumstances of this case. They cite the House of Lords' decision in *Khan v. Miah* [2000] UKHL 55, [2001] All E.R. 20 and other cases

involving the establishment of new businesses by two or more persons, to show that it is not necessary for "trading" to have commenced for a partnership to come into existence or for a duty of utmost good faith to arise.

[4] The trial judge, Madam Justice Wedge, found that no partnership of any kind came into existence in this case. She found that the three men had had only an "informal agreement to work toward the formal arrangement. That agreement did not give rise to the legal relationship of partnership with its onerous duties of loyalty and good faith." Nor had the parties entered into a "joint venture" (a term she used to refer to a contractual relationship that is not a partnership). Even if a partnership or joint venture had existed, she found that Mr. Aquilini's withdrawal had ended the relationship such that he was entitled to compete against the remaining two. Nor, she found, had any "maturing business opportunity" been developed by the group by the time he departed, so as to import the application of a *CanAero*-like duty. (See *CanAero Service Ltd. v. O'Malley* [1974] S.C.R. 592, 40 D.L.R. (3d) 371.) Thus Wedge J. stated in summary at paras. 5 and 6 of her reasons:

> I have concluded that the relationship among Gaglardi, Beedie and Aquilini was not one of partnership or joint venture. The three pursued the acquisition of the Canucks without an agreement as to their respective rights and obligations during the pursuit or the terms of a deal they were ultimately prepared to accept. Each was free to leave the group and pursue the opportunity on his own account without regard to the others.
>
> Even assuming the relationship constituted a partnership or joint venture, it ended when Aquilini gave notice of his departure. Any fiduciary obligations arising from the relationship ended at the same time. [At paras. 5-6.]

She dismissed the plaintiffs' claims in their entirety.

[5] In their opening argument on appeal, the plaintiffs provided us with a list of the errors they alleged were made by the trial judge. This list was quite different from the list appearing in their factum, but counsel for the defendants did not object. The revised grounds of appeal were that the trial judge had erred as follows:

1. She misconstrued the nature of the common venture;
2. She misapprehended the evidence as to the nature of the common venture;
3. This led her to err in law in her determination of the agreement required to constitute the partnership;
4. She erred in law in determining the essential terms of the partnership contract;
5. She misconstrued the evidence and overlooked relevant evidence; and
6. She erred in law in holding that, if the parties were partners, Mr. Aquilini owed no fiduciary duty to the appellants after his departure from the partnership.

It will be evident that the first four grounds relate to the central question of the existence of a partnership among Messrs. Gaglardi, Beedie and Aquilini. Although the factors to be considered in such an enquiry are a matter of law, the question of whether a partnership exists in a given instance is generally seen as one of mixed fact and law: see *Lindley & Banks on Partnership* (18th ed., 2002) at 7–16.

[6] The plaintiffs also challenged various inferences of fact drawn by the trial judge, her analysis of the law relating to partnerships set forth at paras. 33–148 of her reasons, and her application of the legal principles to the facts she found. Indeed, as his oral argument unfolded, Mr. Nathanson on behalf of the plaintiffs left behind the six stated grounds in favour of a more specific and integrated analysis of the law relating to partnerships and fiduciary duty, and of the "pursuit partnership"

theory as a characterization of the relationship among Messrs. Gaglardi, Beedie and Aquilini. Mr. Nathanson made it clear that his clients were not advancing any argument based on breach of confidentiality of information, and that unless he could persuade the Court that a "pursuit partnership" existed, the appeal must fail. For the reasons that follow, I have concluded that the trial judge was correct in her conclusions, and that therefore the appeal must indeed fail.

FACTUAL BACKGROUND

[7] The trial of this action occupied several weeks, and the trial judge's reasons, indexed as 2008 BCSC 27 and reported at 40 B.L.R. (4th) 83, are long and detailed. They recount the circumstances of the parties' first discussions *inter se*; their negotiations with Mr. McCaw and his representative, Mr. McCammon, of Orca Bay Hockey Limited Partnership and Orca Bay Arena Limited Partnership (referred to collectively as "Orca Bay"); the facts surrounding Mr. Aquilini's departure from the group of three in March 2004; and his successful discussions with Orca Bay later that year. Because of the length and complexity of the facts, I will not attempt to recount them in these reasons but will assume the reader has read the trial judgment, and in particular the narration at paras. 149–362 thereof. I will use the same terminology used by the trial judge in her reasons.

LEGAL FRAMEWORK

[8] Wedge J. noted at the outset that although challenges to credibility had been mounted by both sides at trial, very few of her findings of fact required an

assessment of credibility. (Para. 9.) At para. 38, she began her analysis of the "legal framework" of the case by emphasizing that a partnership (defined by s. 2 of the *Partnership Act*, R.S.B.C. 1996, c. 348 as the "relation subsisting between persons carrying on business with a view of profit") results from a contract between the partners. As stated by the Supreme Court of Canada in *Porter v. Armstrong* [1926] S.C.R. 328:

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing. It is not sufficient there should be community of interest; there must be contract. [At 329.]

[9] Like any contract, Wedge J. observed, a contract of partnership requires an "offer containing all of the essential terms and an acceptance of the offer", consideration, and the "intention to create legal relations." Here she quoted from *Whistler Mountain Ski Corporation v. Projex Management Ltd*. (1994) 90 B.C.L.R. (2d) 283 (B.C.C.A.), a case that did not involve a question of partnership; and *Surerus Construction & Development Ltd. v. Rudiger* 2000 BCSC 1746, 11 B.L.R. (3d) 21 (B.C.S.C.), where the Court held that although the parties had considered themselves partners and held themselves out as such, the "essential terms of the contract" of partnership were lacking. (See also *Milroy v. Klapstein* 2003 ABQB 871, 24 Alta. L.R. (4th) 349.) Wedge J. also noted *Backman v. Canada* 2001 SCC 10, [2001] 1 S.C.R. 367, where the Court enunciated a longstanding principle:

> As adopted in *Continental Bank*, *supra*, at para. 23, and stated in *Lindley & Banks on Partnership*, *supra*, at p. 73: "in determining the existence of a partnership ... regard must be paid to the true contract

> and intention of the parties as appearing from the whole facts of the case". In other words, to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit. [At para. 25.]

[10] The trial judge briefly noted the three elements of the statutory definition of partnership and then turned to the characteristics of a joint venture, which also has contractual underpinnings: see *Canlan Investment Corp. v. Gettling* (1997) 37 B.C.L.R. (3d) 140, 95 B.C.A.C. 16, at para. 35, and *Zynik Capital Corp. v. Faris* 2007 BCSC 527, 30 B.L.R. (4th) 32. In the latter case, Tysoe J. (as he then was) held that a memorandum of understanding between two parties that described the basic terms of a "venture" pending the execution of a formal agreement, had not created a joint venture. The parties had not agreed on the price they would pay for the asset or even on the maximum price they would be willing to bid for it, and one of the parties had reserved the right to conduct 'due diligence'. In these circumstances, the Court found, no "concluded bargain" had been reached. In summary, Wedge J. observed in the case at bar that "while the constituent ingredients of a partnership differ slightly from [those] of a joint venture, both require as their foundation a binding contract among the partners or joint venturers which contains all the essential terms of the agreement between the parties." (Para. 67.)

A Partnership in This Case?

[11] The trial judge reviewed the evidence relevant to the existence of "contractual underpinnings" in this case at paras. 171–209 and 365–391 of her reasons. The

plaintiffs' position was that the three men had formed a partnership "at the latest, by November 3, 2003" or if not by then, within the "ensuing days". Prior to their first meeting on November 3, Mr. Gaglardi and Mr. Aquilini had been only slightly acquainted through business dealings between their families. Mr. Gaglardi did not know Mr. Beedie (whose name as a possible investor had been suggested to him by KPMG), and Mr. Aquilini was barely acquainted with Mr. Beedie. After a couple of preliminary contacts, the three met for dinner at a restaurant before a Canucks game and "chatted" in general terms about the terms of a possible offer and how much each might contribute in order to make a bid for a 50% interest in the Canucks. (Paras. 189–190.) At trial, Mr. Gaglardi was unable to recall any specific discussion of partnership terms, even though he was familiar with partnerships and partnership agreements. Mr. Beedie recalled that the three had agreed each would own one-third of the interest they hoped to acquire, but had not discussed other terms of partnership, either on November 3 or at any time thereafter. (Para. 194.) The trial judge wrote:

> Gaglardi testified that between November 3 and 13, 2003, he had discussions with Beedie and Aquilini about the proposal they might make to Orca Bay. It was understood that none of the three had the authority to bind the others in any transaction. <u>They agreed that all proposals would be in the form of expressions of interest. Before any proposal could form the basis of a binding agreement with Orca Bay, a consensus was required among the three of them concerning its terms</u>.
>
> There was no discussion among the three men as to the terms they were ultimately prepared to accept in order to complete the transaction. They did not discuss the upper limit of the price they were ultimately prepared to pay for the Enterprise or the maximum interest they were prepared to purchase. They deferred any decision on the actual participants in the proposed transaction. Beedie, for example, did not know whether he or his father would purchase the share on

> behalf of the Beedie family. Aquilini did not know whether he would purchase his share individually or as part of his family.
>
> It was understood that once the transaction took shape, each member of the group, in consultation with his family, was free to decide whether or not to participate. Each would seek the approval of his family as to whether to proceed with the transaction. [At paras. 196–8. emphasis added.]

Elsewhere, she stated that it was understood each was free at any time to leave the group. (Para. 384.)

[12] The three did agree to retain a solicitor, Mr. Sehmer, and it appears they at least understood that each would be responsible for one-third of his fees. However, neither Mr. Sehmer nor Mr. Gaglardi's advisor, Mr. McRae, brought up the matter of partnership or a partnership agreement among the three men during their negotiations. Wedge J. found at para. 204 that:

> There was some discussion about governance within the purchasing entity once the transaction was concluded. Beedie and Aquilini favoured the suggestion that the three interest-holders each have a one-sixth vote in the affairs of the partnership with McCaw. Gaglardi's view was that the acquiring entity should vote a 50% interest in the partnership with McCaw. In general, the discussion focussed on governance concerning the entity that would be formed to purchase the Enterprise once all of the business terms had been negotiated. There was no discussion about governance among the three members of the group while they were advancing their proposals to Orca Bay, with the exception of an agreement that Gaglardi would act as spokesperson for the group. [Emphasis added.]

[13] Beginning at para. 365, the trial judge addressed whether the evidence supported the "pursuit partnership" theory. She found that it did not. At trial, neither Mr. Gaglardi nor Mr. Beedie had described a partnership that would be distinct from

the partnership that would acquire the assets. In fact, Mr. Gaglardi's evidence was that the two partnerships were one and the same thing. (Para. 369.) When he was asked, for example, whether when he had used the word "partnership" in his testimony, he had been speaking colloquially, he answered:

> A Well, I don't know that I can agree with that because from the very beginning we discussed and agreed to use a limited partnership or a general partnership vehicle to do the deal. So, you know, from the first BLG meeting we had. So, I mean, we were, in my view, partners in a partnership. And so I don't -- I don't think I can agree with your characterization of it.
>
> Q The partnership that you have just mentioned, is that the partnership that was to be the purchaser?
>
> A Yes, it's the entity that we, you know, would form to buy an interest in the enterprise.

[14] The trial judge noted the importance of identifying the "scope" of the alleged partnership, as illustrated by *Khan v. Miah, supra*. She purported to draw a distinction between pursuing an "ownership interest" in the Enterprise and pursuing "ownership with a view to *acquiring* it". Apparently referring to the acquisition partnership, she observed at para. 372 that since the objective of the three men was to acquire an interest in the Enterprise, they required "(at a minimum) an agreement among themselves as to the nature of their relationship, the rights and obligations they shared as a result of the relationship, and the business terms with which each of them was prepared to go forward to conclude a binding transaction involving a $250 million asset." In fact, they had not agreed on the "multitude of business terms" that would need to be settled, or on the price they would ultimately be prepared to pay for the Enterprise. Nor had the identity of the partners been settled,

or even discussed – even though the objective was to form a partnership with Mr. McCaw, and he would "only enter into a partnership with individuals with whom he was convinced he could work." (Para. 387.) Finally, the trial judge wrote in a passage that is critical to her conclusions:

> The decision the three men reached in November 2003 was to defer any agreement on the essential terms of the transaction with Orca Bay to which they would be prepared to commit, as well as the terms pursuant to which they would do business together as joint owners of the Enterprise. The conduct of the parties in the meeting of November 3, 2004 -- and thereafter -- is inconsistent with an intention to enter into legal relations. Rather, it is consistent with an informal association created to explore the prospect of a partnership with McCaw that would not result in binding, reciprocal promises until the parties had identified and agreed to all of the terms of the transaction.
>
> The parties manifested by their conduct after November 3, 2003 that while they shared a common interest in the opportunity, they understood that any party could resile from the venture without consequence. It is telling that when Aquilini told Gaglardi and Beedie in March 2004 he was leaving the group, they did not suggest to Aquilini that he was not free to walk away. They did not suggest at the time that Aquilini was barred from pursuing the opportunity on his own. When Aquilini asked to rejoin the group in August 2004, Gaglardi and Beedie understood they were free to said "no", and did so.
>
> The objective of the three men was to become owners of the Canucks and partners with McCaw in the operation of the Enterprise. They intended to enter into a partnership agreement at that time which would govern the relationship among themselves and their relationship with McCaw. In the interim, theirs was simply an informal agreement to work toward the formal arrangements. That agreement did not give rise to the legal relationship of partnership with its onerous duties of loyalty and good faith. [At paras. 389–91; emphasis added.]

[15] For substantially the same reasons, she also found that no joint venture had been entered into by the three men:

> … I have concluded the evidence falls short of establishing a binding joint venture agreement. Not only was there no agreement as to the identity of the parties that would hold the interest in the Enterprise,

> should it be acquired, there was no certainty of subject matter because the scope of the acquisition had yet to be determined. The parties had yet to agree on the price they would ultimately be prepared to pay and the host of other conditions that required agreement in a complex acquisition of the kind they were contemplating.
>
> In short, the members of the group had not agreed to any of the terms necessary to bind themselves to one another in order to complete a transaction with Orca Bay.
>
> In summary, the relationship among Gaglardi, Beedie and Aquilini was not one of partnership or joint venture. None owed duties of loyalty or good faith to the others. Each was entitled to withdraw from the group at any time and pursue the opportunity for himself. [At paras. 398–400; emphasis added.]

Post-Dissolution Obligations

The latter part of the trial judge's reasons dealt in the alternative with the consequences of Mr. Aquilini's departure from the group, on the assumption that there had been a partnership or joint venture. (At trial, the plaintiffs had taken the position that the partnership continued in existence after Mr. Aquilini's departure, but in this court, both the plaintiffs and defendants were content with the finding that the partnership had indeed terminated in March 2004.)

[16] In connection with the claim based on *CanAero*, Wedge J. found that no maturing opportunity had been "developed" by the three men at the time of Mr. Aquilini's departure. Each of them had learned about the opportunity independently, before meeting the others, well in advance of their starting to work together. (Indeed, Mr. Aquilini had been interested in acquiring an interest in the Canucks for more than two years before he met with the plaintiffs in November 2003.) Orca Bay's wish to sell the Enterprise had been widely-known in the business community

and it had announced its willingness to disclose its financial information to "any credible potential purchaser." (Para. 411.) Each of the three men had signed individual non-disclosure agreements with Orca Bay before being given access to such information.

[17] By the time Mr. Aquilini left the group in early March 2004, very little progress had been made in the discussions with Orca Bay for the purchase of a 50% interest. Things did not improve after March. In July, Messrs. Gaglardi and Beedie decided to try a different tack and to explore increasing the interest they would purchase and the amount of cash they would pay on closing. At first, they discussed acquiring 75%, but later in the month, they prepared a "Term Sheet" that contemplated the purchase of 100% of the Enterprise. The opening paragraph of this document made it clear it was not a binding agreement, but was intended to set out "the principal business terms of an agreement to be negotiated and entered into upon satisfactory completion of Purchaser's due diligence and receipt of all required assurances, approvals, rulings and consents." The Purchaser was to be a limited partnership (yet to be formed) of which the general partner would be a company controlled by the Gaglardi and Beedie family companies. Many terms were left open, but by signing the Term Sheet on August 13, Orca Bay did agree to deal exclusively with the two men until "the termination by Purchaser of its efforts to purchase the Enterprise"; October 1, 2004; or the execution by all parties of the "Definitive Agreement", whichever first occurred. Mr. Gaglardi and Mr. Beedie had some preliminary discussions about "putting together the partnership" that would acquire the Enterprise. (Paras. 273–4.)

[18] In the late summer, Mr. Aquilini called Mr. Gaglardi to enquire about coming back into the transaction. He was told that Messrs. Gaglardi and Beedie were now pursuing the purchase of the entire Enterprise. Mr. Aquilini expressed an interest in acquiring a 20% share, but Mr. Gaglardi refused his overtures. (Para. 278.) Orca Bay set up a "data room", and having had a falling-out with Mr. McCrae, Mr. Gaglardi began to perform the "due diligence" himself. It took several weeks. Drafts of the Definitive Agreement raised longstanding points of contention and Orca Bay's solicitor began redrafting it extensively. The exclusivity period expired but no renewal was sought. At a meeting held on October 28 among Mr. McCammon, Mr. Gaglardi and Mr. Gaglardi's father, some personal differences between Mr. Gaglardi and Mr. McCammon surfaced and Mr. McCammon said he could not recommend Mr. Gaglardi's most recent proposal to Mr. McCaw. (Para. 304.)

[19] Meanwhile, Mr. Aquilini called Mr. McCaw to express his interest in buying a 20% interest. Mr. McCaw said he would consider this proposal, and Mr. Aquilini began to discuss possible terms with his own solicitor, Mr. Knott. Mr. McCammon provided a proposal to Messrs. Gaglardi and Beedie that was not acceptable to them, and they countered with a proposal that Mr. McCammon, at least, took as their "final offer". (Para. 324.) Following a conversation with Mr. Gaglardi on November 3, Mr. McCaw instructed Mr. McCammon to begin discussions with Mr. Aquilini about the sale of 20% of the Enterprise.

[20] Mr. McCammon met with Mr. Knott later that day. Their talks went well, but halted when Mr. Aquilini received advice that the tax benefits of the transaction

(presumably the ability to set off losses against other income for tax purposes) would be available only if there was a change of control of the Enterprise. (Para. 337.) Mr. Aquilini and his brother discussed with their family the prospect of bringing their offer up to 50% and arrived at a plan for financing that might make such a step possible. The next morning, they met again with Mr. McCammon and proposed a "new deal". Mr. McCammon responded positively. At the end of the day, the Aquilinis and Mr. McCammon signed an "Investment Agreement" with a proposed closing date of March 8, 2005.

[21] Mr. McCammon had spoken to Mr. Gaglardi on November 4 and received a fairly negative reaction to the credit terms Orca Bay had previously suggested. Mr. Gaglardi told Mr. McCammon that he would speak to his lawyers and get back to him. (Para. 339.) On November 5, after the Investment Agreement had been signed with the Aquilinis, Mr. McCaw phoned Mr. Gaglardi to reject the counter-proposal that had been made by Messrs. Gaglardi and Beedie, and to terminate negotiations with them. (Para. 345.) Mr. McCammon did not tell Mr. Gaglardi about Orca Bay's agreement with the Aquilinis, and Mr. Gaglardi suspected that Mr. McCaw was simply ending negotiations as a "bargaining ploy". The trial judge wrote:

> Gaglardi and Beedie suspected that McCaw had brought negotiations abruptly to an end as a bargaining ploy, and, for that reason, they did not tell him they were prepared to accept the October 30 proposal. Gaglardi's evidence was that they did not want to telegraph to McCaw that they would accept the proposal if it was tabled. I view that evidence with some scepticism. If they simply wanted McCaw to re-table the proposal so they could accept it, why not simply tell McCaw it was acceptable? The evidence is more consistent with the ongoing

> view of Gaglardi and Beedie, even in the face of McCaw's withdrawal from the negotiations, that the proposal was unacceptable. [At para. 355.]

[22] It was not until several days later that Mr. Gaglardi heard that Orca Bay was about to announce the sale of 50% of the Canucks. Subsequent conversations between him and Mr. Beedie on the one hand and Orca Bay on the other took place, but the die was cast. The Aquilini family closed their purchase of the 50% interest in March 2005 and exercised the option to acquire the remaining 50% of the Enterprise the following year.

[23] The trial judge rejected the plaintiffs' argument that (assuming a partnership had existed) their proposed purchase of the Enterprise had been a "maturing opportunity" at the time of Mr. Aquilini's departure in March 2004:

> The acquisition the three were pursuing at the time of Aquilini's departure was one that held no attraction to Orca Bay. As at March 2004, the chances of acquiring an interest in the Enterprise were remote. For that reason, Gaglardi and Beedie changed course and decided to advance a proposal based on a very different ownership structure than the one advanced while Aquilini was part of the group. Any maturing business opportunity did not materialize, at the earliest, until late July 2004 when Gaglardi and Beedie began negotiating for 100% of the Enterprise.
>
> In short, there was no ripening or maturing opportunity that existed at the time of Aquilini's departure. There was no "transaction begun but unfinished" at the time of the partnership's dissolution. Significantly, neither Gaglardi nor Beedie suggested otherwise at the time Aquilini announced his departure from the group. When asked whether the alleged partnership had any tangible or intangible assets, Gaglardi said he could not think of any.
>
> In conclusion, Aquilini was not bound by any fiduciary obligation to Gaglardi and Beedie when he entered into negotiations with Orca Bay in late October or early November 2004. [At paras. 423–5; emphasis added.]

[24] With respect to the claim that Mr. Aquilini breached a fiduciary duty in competing with the (assumed) partnership by acquiring the very object it had pursued, Wedge J. found that from the date of the termination, no member of the group owed fiduciary duties to the others. She stated that former partners are free to compete with one another except as constrained by s. 41 of the *Partnership Act*. (Para. 418.) Section 41(1) provides that subject to certain exceptions not relevant here:

> … after the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue despite the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions <u>begun but unfinished</u> at the time of the dissolution, <u>but not otherwise</u>. [Emphasis added.]

The trial judge did not regard the pursuit of the Enterprise as a "transaction begun but unfinished". If Mr. Aquilini had owed obligations to Messrs. Gaglardi and Beedie post-termination, she said, they had owed similar obligations to him, and if they had had ongoing rights to the opportunity in question, so had Mr. Aquilini. (Para. 419.)

[25] In the penultimate paragraph of her reasons, Wedge J. summarized her conclusions as follows:

> 1) No partnership or joint venture was formed between Gaglardi, Beedie and Aquilini in November 2003 or at any time thereafter;
> 2) Even assuming the three men entered into a relationship giving rise to fiduciary duties, the relationship ended in March 2004 as did any fiduciary obligations arising from it.
> 3) Aquilini owed no duty to Gaglardi and Beedie to refrain from competing with them for the opportunity to purchase the Enterprise, nor did he owe any duty to advise Gaglardi and Beedie of his negotiations with Orca Bay.

4) Because Aquilini owed no fiduciary duties to Gaglardi and Beedie, Orca Bay's actions did not constitute knowing assistance. Orca Bay entered into negotiations with Aquilini well after the expiry of the exclusivity period under the Term Sheet, as it was entitled to do. [At para. 454.]

ON APPEAL

[26] As noted earlier, Mr. Nathanson did not make specific reference in his oral submissions to the general grounds of appeal provided earlier. Instead, he advanced various specific and overlapping grounds, which I will try to deal with *seriatim*.

Ability to Withdraw Without Consequence

[27] The most specific error, which I take to raise a question of fact, alleged by counsel for the plaintiffs relates to the trial judge's finding at para. 384 that there was a common understanding among the three men that each was "free at any time to decide whether or not to go forward …". Mr. Nathanson submits that this is inconsistent with the finding at para. 198 that "once the transaction took shape, each member of the group, in consultation with his family, was free to decide whether or not to participate." I do not agree that the two are necessarily inconsistent, and in any event, the distinction may be more apparent than real. Certainly, as Mr. Nathanson acknowledged, it would not be possible to obtain an order of specific performance against one of the three who wished to withdraw before the "shape" of the transaction was known, so as to force him to participate in negotiations towards an objective in which he had no interest. (Nor, I suggest, would damages be at all likely.) Counsel suggested that there might nevertheless have been a contractual

obligation to remain "in the tent" until later, but could point to no evidence in this regard.

[28] The trial judge found that the most telling evidence was to the contrary — the fact that when Mr. Aquilini did withdraw from the group, neither Mr. Gaglardi not Mr. Beedie suggested to him that he was not free to walk away. (Para. 390.) When Mr. Aquilini asked to rejoin the group in August 2004, the trial judge said, the others understood they were free to say "no", and did so.

[29] In all the circumstances, I am not persuaded that she erred in finding that there was a common understanding that each member of the group was free to leave at any time.

The Plaintiffs' Evidence re Pursuit Partnership

[30] The plaintiffs also take issue with the trial judge's conclusion that their evidence was not consistent with the "pursuit partnership" theory. (See para. 13 above.) Counsel points to Mr. Gaglardi's testimony that at the time of the first meeting with Mr. Sehmer, the three businessmen had "come together to pursue … an interest in the Enterprise as equal partners" and that they intended to use "a partnership, either limited or general" to "roll the tax losses of the Enterprise … through to each of the partners." As well, counsel emphasized that Mr. Aquilini did not object to Mr. McRae's referring to the three men as "partners" at the meeting, and Mr. Gaglardi's testimony that he was not using the word "partners" at trial in a colloquial sense, given the intention to "use a limited partnership or general

partnership vehicle to do the deal." In Mr. Nathanson's submission, this and similar evidence from Mr. Beedie shows that the plaintiffs clearly differentiated between the pursuit partnership and the vehicle that would ultimately acquire the Enterprise if the negotiations were successful.

[31] It is true, in my respectful view, that the trial judge did not always distinguish clearly in her reasons between the concept of a "pursuit" partnership and that of an "acquisition" partnership. However, the evidence cited by the plaintiffs was simply not probative of a "pursuit partnership". The testimony of Mr. Gaglardi to which counsel referred, focussed consistently on the acquisition partnership and made no reference to an earlier partnership, either in name or conceptually. Mr. Beedie's testimony also contemplated that until the Enterprise was acquired, "we didn't have a business". Other facts, such as Mr. McCrae's reference to the three men as "partners" at the November meeting with Mr. Sehmer, were consistent with either theory and did not advance the plaintiffs' position materially. As many courts have noted, the word "partner" is often used to describe persons who are not partners at law: see *Ness Training Ltd. v. Triage Central Ltd.* [2002] S.L.T. 675 (O.H. Scot.) at para. 17; *Bass Clef Entertainments Ltd. v. HOB Concerts Canada Ltd*. (2007) 31 B.L.R. (4th) 255 (Ont. S.C.J.) at para. 52; *Perreault v. Churchill* [1994] Y.J. No. 121 (S.C.) at para. 19; *Interprovincial Heat Sales Ltd. v. Canada (M.N.R.)* [2002] T.C.J. No. 632 (T.C.C.) at para. 34.

[32] Ultimately, I am not persuaded the trial judge was wrong in finding that the plaintiffs' evidence did not support the existence of a pursuit partnership.

Analysis of Pursuit Partnership

[33] The plaintiffs' more general challenge to the trial judge's conclusions stems from the distinction she drew at para. 370 between pursuing an "ownership" interest in the Enterprise and pursuing "ownership with view of acquiring it." The plaintiffs say this shows that the trial judge did not accept the possibility of a "pursuit partnership" (a notion the defendants note was not even enunciated by counsel for the plaintiffs until late in the trial) or that she misunderstood the concept of a pursuit partnership as distinct from the entity that would actually acquire the "ownership interest". While some consensus on the terms of acquisition that would be acceptable to all three men might be necessary for the formation of the acquisition partnership, and certainly the identity of the actual members of that vehicle would have to be known before it could come into existence, Mr. Nathanson submits there is no reason why a pursuit partnership could not be formed at an earlier point for the purpose of pursuing and negotiating the terms of the Orca Bay purchase — an obviously uncertain and dynamic process.

[34] Not surprisingly, the plaintiffs relied strongly on *Khan v. Miah* and similar cases in which persons who have banded together to go into business have been found to be partners even though only preparatory steps for the intended business have been taken. It is important to note the facts of these cases carefully. They were generally not concerned with the intention to enter legal relations or with sufficiency of terms, but with the statutory definition of partnership, in particular the requirement that the partners 'carry on business'. In *Khan*, the two respondents and

the appellant had agreed they would be partners in a restaurant business and had agreed on their respective roles in such business. They found and leased suitable premises, borrowed money for the purchase of the freehold, opened partnership bank accounts, and entered into various commitments preparatory to the opening of the restaurant. The first target date for the opening of the restaurant came and went. Problems arose among the partners, leading to a "breakdown" in the relationship, which was found to have "determined" on January 25, 1994. On that date the restaurant was not yet open. The two respondents nevertheless carried on with their preparations and opened the restaurant on February 14, 1994, before any accounts had been settled with the appellant. He sued for a half-interest in the profits and capital of the partnership.

[35] There was no issue, then, that the three had intended to enter a partnership. They had held themselves out as partners and, in the words of the trial judge in *Khan*, had:

> … so far advanced towards the establishment of such [a] restaurant as, in my judgment, properly to be described as having entered upon the trade of running a restaurant, albeit that it was yet to open and in the event was not opened for a further two months or slightly more. [*Supra*, at 23.]

The Court of Appeal reversed the trial court on the basis that as a rule of law, parties to a joint venture do not become partners until "trading" actually commences. (See [1998] 1 W.L.R. 477.) Relying on the difference between a "contemplated" and actual partnership as described in *Lindley* (see para. 2 above), the majority of the Court identified the partnership's business as the carrying on of a restaurant. Since

the restaurant was not open for business at the time the relationship ended, the plaintiff's claim was found to be limited to damages for breach of contract.

[36] The House of Lords overruled the Court of Appeal, taking the view that the majority of the Court of Appeal had been "guilty of nominalism". In Lord Millett's analysis:

> They thought that it was necessary, not merely to identify the joint venture into which the parties had agreed to enter, but to give it a particular description, and then to decide whether the parties had commenced to carry on a business of that description. They described the business which the parties agreed to carry on together as the business of a restaurant, meaning the preparation and serving of meals to customers, and asked themselves whether the restaurant had commenced trading by the relevant date. But this was an impossibly narrow view of the enterprise on which the parties agreed to embark. They did not intend to become partners in an existing business. They did not agree merely to take over and run a restaurant. They agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment were all part of the joint venture, were undertaken with a view of ultimate profit, and formed part of the business which the parties agreed to carry on in partnership together.
>
> There is no rule of law that the parties to a joint venture do not become partners until actual trading commences. The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership. Many businesses require a great deal of expenditure to be incurred before trading commences. Films, for example, are commonly (for tax reasons) produced by limited partnerships. The making of a film is a business activity, at least if it is genuinely conducted with a view of profit. But the film rights have to be bought, the script commissioned, locations found, the director, actors and cameramen engaged, and the studio hired, long before the cameras start to roll. The work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for

> business and the first customers walk through the door. Such work is undertaken with a view of profit, and may be undertaken as well by partners as by a sole trader. [At 24; emphasis added.]

and:

> The question in the present case is not whether the parties 'had so far advanced towards the establishment of a restaurant as properly to be described as having entered upon the trade of running a restaurant,' for it does not matter how the enterprise should properly be described. The question is whether they had actually embarked upon the venture on which they had agreed. The mutual rights and obligations of the parties do not depend on whether their relationship broke up the day before or the day after they opened the restaurant, but on whether it broke up before or after they actually transacted any business of the joint venture. The question is not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. Once the judge found that the assets had been acquired, the liabilities incurred and the expenditure laid out in the course of the joint venture and with the authority of all parties, the conclusion inevitably followed. [At 25; emphasis added.]

[37] Counsel referred us to three trial decisions in this province, one affirmed by this court, in which 'ventures' have split apart or have been effectively abandoned by one or more members before the intended business could be established, but partnerships have been found to exist. Most notably, in *Davis v. Ouellette* (1981) 27 B.C.L.R. 162, two men with experience in the mining industry entered into a written agreement to carry out the mining of certain property, which provided for the sharing of net profits between them. Originally, they were interested in the tailings of a former mine, but samplings carried out by the two men proved much more promising with respect to the mine itself. The two decided to make an effort to gain control of the company that owned the mine. The trial judge, McEachern C.J.S.C., found that from that point, they were "equal partners in this venture." The defendant was able

to obtain an option to acquire a control block of the company for $500,000 and the two men set about raising funds to carry out the purchase. Differences and misunderstandings arose between them about the raising of the money, and in the words of the Court, each went his own way in attempting to put a deal together. Eventually, a shelf company controlled by the defendant acquired the control block and the plaintiff acquired a lesser number of shares. He sued for an equal share of the partnership's profits.

[38] Again, it appears there was no question as to whether a partnership had existed. The issue was whether it had terminated, and if so, when. The Chief Justice noted s. 35 of the *Partnership Act*, para. (c) of which provides that a single venture partnership is dissolved by the termination of the venture. He observed:

> One of the difficulties in these cases is to analyze what happened in a legal context when that is not likely the way the parties themselves regarded their affairs. I doubt if they addressed their minds to the subtleties of a continuing partnership particularly after they abandoned the tailing operation, although, in a general sense, they described their relationship in terms of partnership. Certainly, they did not have different kinds of partnership in mind and they did not have in mind the difference between a partnership at will and a partnership for a single adventure or undertaking.
>
> I cannot find any agreement between the parties to terminate the partnership, and no notice of termination was ever given. As this partnership was entered into for a single adventure or undertaking, it must have continued until that single adventure or undertaking was terminated: s. 35(*b*). [At 172.]

[39] Since both partners had "walked away from [the project] as a partnership undertaking", however, he ruled that the "single adventure or undertaking" had come to an end at some point. He noted that on dissolution, each partner must make a

"full and complete disclosure of all partnership affairs" and that a partner who obtains partnership assets secretly must hold what he has acquired from such assets in trust for his partner. (At 174.) At the same time, he declined to apply *CanAero,* finding that "the possible acquisition of control of the company in this case could hardly be described as a maturing business opportunity." He explained:

> … At the time the partnership came to an end these parties only had a plan, although the potential for success improved dramatically in October 1978 when Mr. Kehler became interested. The final scramble for funds just before the acquisition demonstrates the uncertainty under which the matter continued right up to the date of the final closing in July 1979. These matters are always a question of degree, and while certainty is not required, it would be unrealistic to think that the project was anything close to a sure thing, or even a likely thing, at any time before the partnership terminated.
>
> I accordingly find that the plaintiff is not entitled to 50 per cent of the defendant's share position in the company. [At 176.]

[40] A more recent decision, post-*Khan,* relied on by the plaintiffs was *Scragg v. Lotzkar* 2004 BCSC 1447, 49 B.L.R. (3d) 154, aff'd. 2005 BCCA 596, 10 B.L.R. (4th) 173. Notably, the plaintiff and defendants in that case had agreed to engage in a "venture" that would carry out a certain project in Victoria, not in a partnership but by means of a management company to be formed by one of the parties. The two defendants asked the plaintiff to become the sole director and president of the company. He accepted the offer and left his existing job in Abbotsford, where he had worked for the two defendants. Various delays were encountered and the plaintiff, who needed income, moved to Edmonton where he found a job, assuring the defendants he was "ready to go [to Victoria] at any time". Eventually, one of the defendants told him the project was "not going to happen." In fact it was completed

by the others, without his participation. He sued for his share of the management company, evidently relying on partnership law rather than contract alone.

[41] The defendants argued that although they had had a "business arrangement" with the plaintiff, it had not been a partnership, and that if it had been, the plaintiff's move to Edmonton had ended the relationship. The trial judge, Mr. Justice Bouck, found that *Khan* was analogous to the facts before him. In his analysis:

> Applying that law to the facts in this case, it seems clear that the venture the parties agreed to engage in was to acquire the BDL contract, the premises at 2111 Government Street, Victoria, and ultimately, the equal division of shares in the Management Company. They did so with a view to profit. Therefore, they were in partnership. At one time or another, Mr. Scragg assisted the partnership in getting the BDL contract and acquiring the premises. Mr. Scragg's partners failed to meet their commitment to hire him as a manager and allot him his proportion of the shares. [Para. 33; emphasis added.]

[42] On appeal, Ryan J.A. for this court upheld the judgment in favour of the plaintiff on the basis that Bouck J.'s findings were reasonably supported by the evidence. Citing *Khan*, she noted that the "ultimate test" was that formulated by Lord Millett — namely "whether the parties [had] done enough to be found to have commenced the joint enterprise in which they had agreed to engage". (Para. 30.) As well, she quoted from *Lindley & Banks*, *supra*:

> Clearly not all preparatory acts will be sufficient for this purpose; equally, a single act which involves long-term commercial consequences, *e.g.*, the acquisition of premises, may in itself be enough. [At 2–03; emphasis added.]

[43] The facts of *Red Burrito Ltd. v. Hussain* 2007 BCSC 1277, 33 B.L.R. (4th) 205, were similar to those in *Khan*, but again, with the added feature that the parties

intended to incorporate a company to carry on the intended business. They had entered into a "Letter of Understanding" to convert a grocery business into a restaurant in Vancouver which would be owned and operated by the new company, in which they would be equal shareholders. The defendant was tasked with overseeing renovations to the future premises of the restaurant and arranging for the assignment of a lease thereof to the company. Although the company was never incorporated and the lease was never assigned, the restaurant did open in June 2006. Again, however, problems arose between the parties and in August, the defendant locked out the principals of the plaintiff. The latter had invested a substantial sum of money in improvements and equipment for the business. After being locked out, it received no income or benefit from the enterprise.

[44] The trial judge, D. Smith J. (as she then was) stated that a partnership is formed "if parties to a venture go into business together with a view to sharing the venture's profits. The partnership exists even in the absence of an express agreement and even where there is an agreement but all of the terms of the agreement have not been completed", citing *inter alia, Khan*. Then, turning to the *Partnership Act*, she noted *Continental Bank Leasing Corp. v. Canada* [1998] 2 S.C.R. 298, where:

> … the court discussed the essential elements of a partnership in the context of s. 2 of Ontario's then *Partnership Act*, which employed the same language as s. 2 of the Act. At para. 22, the court listed the three ingredients as: (i) carrying on a business; (ii) in common; (iii) with a view to profit. It stated further at para. 23 that, "[t]he existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended."

> The *indicia* of a partnership were set out at para. 24. They include "the contribution of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts." [At paras. 27–8.]

[45] Applying the "common law and statutory criteria for a partnership", Smith J. concluded that one had indeed existed in *Red Burrito:*

> … The Letter of Understanding expressly referred to the joint venture as a partnership and the parties conducted themselves as one. Red Burrito and Hussain planned to carry on business together, as evidenced by the Letter of Understanding. <u>They acted on their plans by Red Burrito contributing the start-up capital to the venture and by Hussain contributing the leasehold interest. Both contributed effort, knowledge and skills. Both were involved in the management of the joint venture</u> – Red Burrito as the managing partner and Hussain as the on-site manager. <u>The restaurant was opened and the parties operated the business together from June 29, 2006</u>, until on or about August 8, 2006, when Hussain unilaterally locked out the principals of Red Burrito. During that period, the revenues from the joint venture went to pay its expenses. It was clear the parties intended to operate the business with a view to sharing in its anticipated profits. [At para. 32; emphasis added.]

(See also *Matthews v. Maurice* [1923] O.J. No. 11, 54 O.L.R. 64 (H.C.J.), where at para. 14 the Court cited an older line of cases to show that "… persons who are promoters [of a company] may at the same time become so associated by agreement that they are actually partners.")

[46] There is no doubt that *Khan* and cases following it have broadened the meaning of "carrying on business", but they do not purport to eliminate that element of the statutory definition, nor to do away with what the trial judge here referred to as the "contractual underpinnings" of a partnership — in particular the "subjective

intention to carry on business in common with a view to profit." (*Backman*, *supra*, at para. 25.) In the case at bar, no such intention was evidenced, either by written agreement or by the parties' conduct. Far from agreeing to acquire or carry on a business, the parties had only a loose understanding that as long as all three wished, they would hold exploratory talks with Orca Bay. Even that was not a binding obligation, since as the trial judge found, any of the parties could withdraw at any time from the talks without legal consequence. They were careful not to commit to anything except to the payment of their lawyer's fees in equal shares. They refrained from entering into any obligations to third parties (again other than their lawyer). They did not make any actual offer to Orca Bay, but simply advanced "expressions of interest". They did not enter a lease, establish an office, or borrow funds. There was no promise, explicit or otherwise, to become jointly liable for obligations that they might incur in connection with the acquisition. In the language of *Khan,* the parties had not "done enough to be found to have commenced the joint enterprise". Most importantly, they had not agreed to engage in, or acquire, that enterprise or any other.

[47] Consistent with the lack of any agreement of partnership, Mr. Aquilini's withdrawal was not met by any suggestion that he was bound to continue as a member. Similarly, when he enquired in August 2004 about being included again and was refused, he did not claim that the other two were under any obligation to grant his request. There was no legal consequence because the parties had not had, or evidenced, any intention to bind themselves to carry on any business

together. All three men therefore remained free to pursue their own interests and did so.

[48] In all the circumstances, it is difficult to resist the defendants' submission that the notion of a pursuit partnership was an "attempt to engineer around the uncomfortable fact the three men throughout were discussing the prospect of as-yet-unidentified parties entering into a transaction to purchase an as-yet-unidentified interest at an as-yet-unidentified price and as-yet-unidentified terms at some indeterminate date in the future." If one were to stretch *Khan* so as to infer a partnership in this case, every two or more people engaging in exploratory discussions with a third party about a transaction would be regarded as partners, with all the duties and obligations that concept entails. Such a result defies commercial sense. The reasoning of Sopinka J. for the majority in *Lac Minerals Ltd. v. International Corona Resources Ltd*. [1989] 2 S.C.R. 574, seems apposite:

> … the parties were not simply negotiating an ordinary commercial contract but were negotiating in furtherance of a common object. This factor does not particularly distinguish negotiations in furtherance of any partnership or joint venture. All such negotiations seek to achieve a common object, namely the accomplishment of the business venture for which the partnership or joint venture is sought to be formed. I do not see how this factor can elevate negotiations to something more. [At 605–6; emphasis added.]

"A View of Profit"

[49] Given the foregoing, I need not decide finally whether it could reasonably be said that the pursuit partnership (had one been intended, and had it embarked on business activity) was formed with a "view of profit". It does seem doubtful,

however, that a partnership that was never intended to acquire any assets, to receive any revenue, or to carry on any activity other than negotiating on behalf of another "tax-effective vehicle", would meet the definition in s. 2 of the *Partnership Act.* (See *Lindley & Banks, supra*, at 2-08, quoted in the dissenting judgment in *Continental Bank Leasing*, *supra*, at para. 43.) This point seems not to have been raised in *Scragg* or *Red Burrito*, *supra*.

Other Partnership Issues

[50] At some points in his argument, counsel for the plaintiffs seemed to suggest that because a "tax-effective vehicle" such as a limited partnership was to be formed at a later date to acquire the Enterprise, the relationship among Messrs. Gaglardi, Beedie and Aquilini from November 3, 2003 or thereabouts must have been a partnership. This assumption may again rest on a misreading of *Scragg* and *Red Burrito*. They turned on findings of fact that although the parties had intended ultimately to use a corporate vehicle to carry on business, their conduct evidenced an intention to carry on business in the meantime as partners, and that they had actually conducted such business, broadly defined. For reasons I have already given, I believe the trial judge was correct not to reach a similar result in this case. The other possibility, which is more probable on the evidence, was that the three 'took a flyer' at exploring, very informally, the acquisition of the Enterprise together. They delayed thinking about or forming a partnership until an acceptable deal had been negotiated and they and their respective families had decided whether or not to participate. At that point, it would make sense to incur the legal fees and to take the

time involved in the preparation of a limited partnership agreement (if that was the vehicle ultimately decided upon) and to settle the terms of "governance" of the acquiring vehicle.

[51] Mr. Nathanson also submitted that the trial judge conflated the requirement that parties to a contract, including a contract of partnership, must intend to enter a binding agreement (the requirement that there be a "concluded bargain"), with the requirement that the bargain must 'settle everything that is necessary to be settled': see *May v. Butcher* (1934) 2 K.B. 17 (H.L.) at 21, quoted by the trial judge at para. 66 of her reasons. In counsel's analysis, the trial judge failed to find the requisite subjective intention in this case because she did not find that everything necessary to be settled had been settled. If the latter conclusion was wrong, counsel suggested the former would also fall.

[52] I agree with the plaintiffs that it is not necessary, at least in a "pursuit" or "single venture" partnership, for the members to agree on the price they would ultimately be prepared to pay to acquire their objective, or on the other "multitude of business terms" that they would eventually need to settle. A partnership is consensual in that its members must intend and agree to carry on business together; but that does not mean they must anticipate and resolve all questions that may arise in future in the course of the partnership's business. Having said this, I do not read the trial judge's reasons in the way Mr. Nathanson did; and I believe the trial judge was correct in finding that both the *animus contrahendi* and sufficiency of terms were lacking in this instance. A consensus on retaining a lawyer and appointing Mr.

Gaglardi to lead the talks with Orca Bay fell far short of an agreement to carry on business together.

Fiduciary Relationship

[53] Nor did the relationship found by the trial judge resemble in any way the kind of relationship from which a fiduciary duty would normally arise outside the established categories. I have already noted that each of Messrs. Gaglardi, Beedie and Aquilini understood that none could bind or commit the others in any way. This runs counter to s. 7(1) of the *Partnership Act*, which provides that a partner is an agent of the firm and of the other partners for purposes of the partnership's business. Of course, s. 7(1) would protect any outside party dealing with a partner without knowledge of an internal prohibition, but the lack of agency is nevertheless unusual in a relationship that is said to be fiduciary. Indeed, in 1881, in *Cassels v. Stewart* (1881) 6 App. Cas. 64, Lord Blackburn said of a partner that it is "because he is an agent that the fiduciary character arises". (At 79; but cf. *Holme v. Hammond* (1872) L. Ex. 218, quoted in *Lindley & Banks, supra,* at 3–12.)

[54] More modern authorities, both academic and judicial, have emphasized other elements of fiduciary relationships. Some suggest that such a relationship arises wherever one undertakes to act in the interests of another: see in particular Austin W. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539 at 540, quoted by Leonard I. Rotman, *Fiduciary Law* (2005) at 93. In *Hospital Products Ltd. v. United States Surgical Core* [1984] 55 A.L.R. 417 (Aust. H.C.), Mason J. stated:

> … The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. [At 454.]

In a similar vein, McLachlin J. (as she then was) wrote in *Norberg v. Wynrib* [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 that:

> … Inherent in the notion of fiduciary duty … is the requirement that the fiduciary have assumed or undertaken to 'look after' the interest of the beneficiary … Generally people are deemed by the law to be motivated in their relationships by mutual self-interest. The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit. [At para. 97.]

(See also *White v. Jones* [1995] 1 All E.R. 691 (H.L.) at 713, cited by Rotman at 95; and Kevin P. McGuinness, *The Law and Practice of Canadian Business Corporations* (2002) at § 8.157.) In *Lac Minerals*, *supra*, Sopinka J. stated that "[t]he one feature … considered to be indispensable … is that of dependency or vulnerability." (At 599.) A more comprehensive analysis was of course carried out by Wilson J. in her well-known dissenting reasons in *Frame v. Smith* [1987] 2 S.C.R. 99, where she suggested as a "rough and ready guide" for the existence of a fiduciary duty the elements of (1) scope for the exercise of a discretion or power; (2) the ability to exercise such power unilaterally; and (3) a 'peculiar vulnerability', on the part of the affected person, to the exercise of the power.

[55] The concept of reasonable expectations has also been relied upon by some courts as critical to the imposition of a fiduciary duty. In *Lac Minerals*, La Forest J. stated in his minority judgment that the starting point for ascertaining the existence

of the fiduciary obligation "should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that the other would act or refrain from acting in a way contrary to the interests of that other." (At 663; my emphasis.) His Lordship advanced the same argument in his majority judgment in *Hodgkinson v. Simms* [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161:

> The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards. For instance, in *Norberg*, *supra*, the Hippocratic Oath was evidence that the sexual relationship diverged significantly from the standards reasonably expected from physicians by the community. This inference was confirmed by expert evidence to the effect that any reasonable practitioner in the defendant's position would have taken steps to help the addicted patient, in start contrast to the deplorable expectation which in fact took place … [At 412.]

[56] This is now well-tilled judicial and academic ground (see, for example, the articles cited by P. Percell, at fn. 7 of "Fiduciary Obligations or is it a Breach of Fiduciary Duty to Accept an Appointment to the Bench?" (2004) 28 The Advocates' Quarterly 471.) At the end of the day, no single litmus-test for fiduciary duty will meet all situations. One falls back on the truism that the nature of the relationship will depend on all the circumstances. As La Forest J. wrote after his lengthy review of the law of fiduciary relationships in *Hodgkinson v. Simms*:

> In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "[t]here is no substitute in this branch of the law for a

> meticulous examination of the facts"; see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831. [At 413–4.]

[57] At the core of most fiduciary relationships, however, is the idea of exercising a discretion that affects another, and the expectation that this will be done in that other's best interests. Obviously, this is the opposite of the underlying premise of commercial relationships. As Sopinka J. wrote in *Lac Minerals*, it is rarely necessary to utilize what he called the "blunt tool of equity" in the latter context. He quoted from an article by J. Kennedy entitled "Equity in a Commercial Context" in P.D. Finn, ed., *Equity and Commercial Relationships* (1987) as follows:

> It would seem that part of the reluctance to find fiduciary duty within an arms length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a beach of fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [*sic*] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party. [At 595; emphasis added.]

[58] The parties in this case were experienced businessmen who were familiar with partnerships and partnership agreements. They had legal advice at the outset of their relationship. There was no evidence that they discussed or assumed that each of them would act in the others' best interests, nor did any confer a discretion on another to act for him, thus becoming vulnerable to that other's discretion. None was empowered to bind the others in their negotiations. In short, the facts as found

by the trial judge do not establish any of the usual hallmarks either of a partnership or of a fiduciary relationship generally.

Post-Dissolution Obligations

[59] Having concluded no fiduciary relationship existed, it is unnecessary for me to consider at length the plaintiffs' arguments regarding the continuation of fiduciary obligations after Mr. Aquilini's withdrawal from the group of three in March 2004. (As mentioned above, both counsel before us took the position that if there had been a partnership, it terminated at that time. I will proceed *arguendo* on that assumption, although as evident from paras. 99–114 of the trial judge's reasons, there is some uncertainty regarding the operation of s. 35(1)(c) of the *Partnership Act*.) I do feel constrained to acknowledge some doubt on my part concerning the trial judge's conclusion that no breach of duty occurred because no "ripening or maturing opportunity" existed in March 2004 that was appropriated by Mr. Aquilini in November. First, it is not clear whether the word "maturing" used by the Court in *CanAero* was intended to restrict the scope of the corporate opportunity doctrine to opportunities that are indeed "ripe" or "a sure thing". Laskin J. (as he then was) himself stated that the standards of loyalty to which the conduct of a director must conform must be tested by many factors, including the position held by the director, "the nature of the corporate opportunity, <u>its ripeness, its specificness</u>", the director's relation to it, the amount of knowledge he or she had, the circumstances in which it was obtained, the time elapsed between the termination of his or her relationship with the corporation, and the circumstances of that termination. (At 620; my

emphasis.) As well, his Lordship said, "new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting." (At 609.)

[60] We were not referred to any Canadian authority in which the question of 'maturity' was directly addressed post-*CanAero* — although some courts have simply dropped the word "maturing" without comment. U.K. courts have traditionally taken an "absolute" view of the no-conflict rule, which does not place a great deal of emphasis on a distinction between "mature" opportunities and others. Although some English trial decisions did favour the "maturing opportunity" approach some years ago (see *Island Export Finance v. Umunna* [1986] B.C.L.C. 460 (Q. B.); *Balston Ltd. v. Headline Filters Ltd.* (No. 2) [1990] F.S.R. 385 (H.C.J., Ch.); *CMS Dolphin Ltd. v. Simonet* [2001] EWHC 415 (Ch.), the Court of Appeal's recent decision in *Bhullar v. Bhullar* [2003] EWCA Civ. 424, [2003] B.C.C. 711 reverted to the strict *Phipps v. Boardman* approach. (See [1966] 3 All E.R. 721 (H.L.); see also Michael Hadjinestoros, "Exploitation of Business Opportunities: How the U.K. Courts Ensure that Directors Remain Loyal to their Companies" [2008] I.C.C.L.R. 70 at 75). In the U.S., the corporate opportunity doctrine expanded long ago beyond the so-called "interest or expectancy" test and now incorporates a "line of business" test and a "fairness" test. (See David Clayton Carrad, "The Corporate Opportunity Doctrine in Delaware: A Guide to Corporate Planning and Anticipatory Defensive Measures", (1977) 2 Del. J. Corp. L. 1, "Corporate Opportunity", (1961) 74 Harv. L. Rev. 765, and Rotman, *supra*, at 435–6.)

[61] If and when the point is ever argued, then, a Canadian court might well take the view that the appropriation of an opportunity "belonging to" a corporation by a director or former director merits equitable intervention even where the opportunity is not a "mature" one. Certainly if one were to imagine that Messrs. Gaglardi, Beedie and Aquilini had formed a corporation of which they all became directors, that they participated in the management of its business and carried on negotiations with Orca Bay to purchase the Enterprise or an interest therein, and that Mr. Aquilini then resigned and six months later, bought the Enterprise for himself, an argument could be made that his conduct offended the corporate opportunity rule notwithstanding the proposed changes to the transaction made by Messrs, Gaglardi and Beedie after his withdrawal. In this type of situation, the rule against conflicts of interest ensures that those persons exercising control of a corporation's affairs will do so free of any taint of self-interest. As noted by Professor K. P. McGuinness, *supra*, at § 8.158:

> Although fiduciary status is exceptional in the commercial context, it is justified in the case of the relationship between the corporation and its directors and officers on the obvious basis that they do not deal with the corporation at arm's length. On the contrary, <u>they are the parties who have effective control over the corporation,</u> and because of this fact there is a particular risk to the shareholders and other persons interested in the corporation that their interests will be unfairly disregarded unless the directors and officers of the corporation are held to the highest standard of conduct that the law recognizes, namely the fiduciary standard of honesty, selflessness and loyalty. <u>The risk to which the shareholders and other interested persons are exposed arises as soon as the person achieves a position of control.</u> Prior to that time there is no exceptional risk and therefore no justification for imposing a fiduciary obligation, thus it has been held that there is no such liability in the case of a "director-elect." [Emphasis added.]

A similar argument could be made in the case of a continuing partnership, again where the alleged fiduciary was involved in policy- and decision- making on behalf of the partnership.

[62] In the circumstances of the instant case, however, the rationale for the corporate opportunity rule simply did not arise. None of the group of three was entrusted to act for the others, none was 'at the mercy of' the others and none was bound by contract, by statute, or in Equity to disregard his own interests and act in the best interests of the others. This of course brings us full circle, since these are some of the reasons why no fiduciary relationship was found in the first place.

Mr. Aqulini's Conduct

[63] Finally, I am not persuaded that Mr. Gaglardi could reasonably have been "lulled" into a position of vulnerability by Mr. Aquilini's expressed reluctance, for cash-flow reasons, to contemplate a closing in early 2004, or by his request to rejoin the other two in August of that year. On the contrary, Mr. Aquilini's request gave notice that he was still interested in the Enterprise. In the absence of a fiduciary duty, he was, as the trial judge found, just as entitled as the others to pursue that objective in his own interest. It must also be said that a false sense of security felt by Mr. Gaglardi as a result of Mr. Aqulini's request is not the kind of 'vulnerability' that would lead a court to infer the existence of a partnership from and after November 2003.

[64] In the result, I conclude that the trial judge was correct to dismiss the plaintiffs' claims. I would dismiss this appeal, with thanks to counsel for their able arguments.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Kirkpatrick"

I Agree:

"The Honourable Mr. Justice Groberman"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Consbec Inc. v. Walker,*
2014 BCSC 2070

Date: 20141104
Docket: 44716
Registry: Kamloops

Between:

Consbec Inc.

Plaintiff

And

Peter Walker, Tracy Walker, Rock Construction & Mining Inc., P&T Walker Capital Ltd., 1627436 Ontario Limited, 0794940 B.C. Ltd., and Walker Investments Ltd.

Defendants

Before: The Honourable Madam Justice Hyslop

Corrected Judgment: The front page of the judgment was corrected on November 6, 2014

Reasons for Judgment

Counsel for the Plaintiff:	N. Keith L.M. Taylor
Counsel for the Defendants:	V. Aldridge M. Preston
Place and Date of Trial:	Kamloops, B.C. April 28 - 30, May 1, 2 and 5 - 9, 2014
Place and Date of Judgment:	Kamloops, B.C. November 4, 2014

Introduction

[1] The plaintiff, Consbec Inc. ("Consbec") hired the defendant, Peter Walker ("Peter"), to head an area division of its business located in eastern Canada and later transferred him to head the Western Division. After a period of employment, Peter left Consbec and set up a business in direct competition to Consbec. Family members of Peter, who worked for Consbec, were offended with Peter's decision to resign and with events that occurred after his resignation. Consbec brings this action against Peter, his wife, Tracy Walker ("Tracy"), and their companies, in response to the alleged economic wrongs that the defendants caused Consbec.

[2] Consbec seeks heads of damages in the following amounts:

Damages for breach of fiduciary duties:	$1,820,000.00
Damages for loss on Sproule Creek Holdings Ltd. write-off:	$28,669.94
Damages for false salary paid to Tracy Walker $30,000.00 x 4 years:	$120,000.00
Wrongful resignation/no notice upon quitting:	
a) Trevor Walker ($6,510.00 + $4,625.00):	$11,135.00
b) Stuart Mitchell ($9,781.11 + $5,000.00 + $29,700) + moving expenses:	$44,481.11+ moving expenses
Punitive damages:	$250,000.00

[3] The defendants ask that Consbec's claims be dismissed. Peter in a counterclaim seeks damages for wrongful dismissal by Consbec.

[4] Consbec and Peter did not enter into a written contract of employment nor did Peter sign a non-solicitation or non-competition agreement.

[5] The following issues arise:

1. Was Peter in a fiduciary relationship with Consbec? If so, did he breach his fiduciary obligations to Consbec?

2. If Peter was not in a fiduciary relationship with Consbec, did he have contractual responsibilities to Consbec as an employee and did he breach those responsibilities to Consbec?

3. If Peter breached his responsibilities to Consbec, either as a fiduciary or an employee, what are those damages and how should those damages be calculated?

4. Was Peter obliged to give his employer, Consbec, notice terminating his employment? If insufficient notice was given, how should those damages be calculated?

5. Was Peter constructively dismissed from his employment with Consbec and, if he was, what damages ought to be awarded against Consbec?

6. Did Peter Walker and Tracy Walker engage in a fraudulent conveyance of property so as to avoid a potential judgment?

7. Costs.

Ontario Lawsuits

[6] There were two lawsuits commenced by Consbec in Ontario against Peter and some of the defendants in this lawsuit. The first lawsuit was started on November 17, 2006. It was stayed as a result of an application brought by Peter.

[7] The second Ontario lawsuit was started October 31, 2008. It was stayed as a result of an application brought by Peter. The Ontario court ordered that the issues in the Ontario actions be joined with the British Columbia action commenced by Consbec in which the sole issue was a remedy under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164.

Cast of Characters

[8] In these reasons, for the sake of clarity, I will refer to all persons who bear the surname of Walker by their first name. I intend to describe all those individuals who gave evidence, as well as others who played a role in this trial as employees of Consbec. In addition, I will describe each corporation who is either a plaintiff or defendant in this action.

Consbec

[9] Consbec is a blasting and drilling company, incorporated under the laws of Canada. Its head office is in Val Caron, located in the Sudbury area of Ontario. The head office is described as the Central Division of Consbec. Consbec has offices in the Maritimes (Eastern Division) and in British Columbia (Western Division), the latter until 2009, when that division was shut down. Consbec offers its services to the mining industry (not underground), road builders, the construction industry, including pipelines, quarrying, and anything that requires rock excavation.

Reginald Frank Walker

[10] Reginald Walker ("Rick") was born in 1948. He and his wife, Judith, are the sole shareholders of Consbec. Rick is the president and director of Consbec. Consbec has one outside director of whom information was not given at trial. Rick founded Consbec in 1980 and it started business in 1981. Rick is the father of Richard, Jeff and Trevor Walker. At the time of trial, Rick testified that his sons run the business and make all strategic decisions for Consbec and only involve him in large pipeline deals and deals in the tens or hundreds of millions of dollars.

[11] Rick often attends monthly meetings with his son, Richard, and Consbec's accountant, Brian Sawdon.

Richard Walker

[12] Richard Walker ("Richard") is the eldest son of Rick. He is the general manager and vice president of Consbec. The latter title he received two years ago

based on Richard's observations that customers preferred to deal with a vice president rather than a manager.

[13] Richard was born in 1970. From the age of 14 during summer months, Richard worked for Consbec, as did his brothers Jeff and Trevor when they were about the same age.

[14] In 1992, Richard received a degree in civil engineering. He was awarded the gold medal in his graduating class. In 1996, he received a Masters of Business Administration (MBA), receiving special recognition among ten graduates out of 225. Both degrees were from the University of Western Ontario. Between the awarding of these degrees, Richard travelled and worked for Consbec. He has held the position of general manager since 1997.

[15] Richard testified that if there was a disagreement between him and Rick, Rick would have the final say. He and Rick set management salaries.

Jeffrey Walker

[16] Jeffrey Walker ("Jeff") is the second son of Rick. He is three years younger than Richard. He did not testify at trial. At the time of trial, he was a general superintendent, supervising area superintendent, and foreman on Consbec projects.

Trevor Walker

[17] Trevor Walker ("Trevor") was born in 1977. He is the youngest of the Walker brothers. By 2010, he had received a Bachelor of Arts (BA) in Political Science with honours and an MBA that he received in 2010. Between degrees, he worked for Consbec. After completing his BA, Trevor worked for Consbec as a project manager and, in particular, on a hydroelectric project at Granite Lake in Newfoundland. At the time of trial, Trevor was the manager and president of Houston Lake Mines, a company listed with the Toronto Stock Exchange in which the family has a significant position.

Peter Walker

[18] Peter is the nephew of Rick and a cousin to Richard, Jeff and Trevor. Peter's father is James, the eldest brother of Rick. James is a surveyor.

[19] Peter was born in 1970. He grew up on a farm. Peter and his cousins lived approximately two and a half hours away by car, north of where his cousins resided as they grew up. They mainly saw each other at Christmas and rarely in the summer.

[20] Peter left school before completing grade 10. Until age 18, he worked for a landscaping company and then he had a contract providing seedlings to the government. He then worked for a paving company, eventually working his way up to the position of foreman, making him responsible for employees, excavations and trucks. He ended his employment with that company in 1994, when he started his own company – a construction layout company which involved surveying. His company contracted work with Placer Dome Inc. ("Placer Dome") that led to employment with them. When he ended his employment with Placer Dome, he was a manager of a construction site. His work with Placer Dome ended when Placer Dome was bought by another company who no longer intended on expanding in the manner in which Placer Dome had. Underground mining employment was offered to him by Placer Dome. He decided that this was not suitable for him. In July of 1997, he was offered and accepted employment with Consbec.

Tracy Walker

[21] Tracy Walker is the wife of Peter. She was called to testify by the plaintiff as an adverse witness. Tracy and Peter are married. Their relationship spans 17 years. They separated in September 2012. Tracy expects to be divorced soon. In June 2013, Tracy and their daughter left Kamloops to return to Tracy's hometown of Timmons, Ontario. Tracy is a registered nurse and, while living in British Columbia, she worked on-call in the operating room at the Royal Inland Hospital in Kamloops.

Stuart Mitchell

[22] Stuart Mitchell was born in 1967. He is married with four children. He is trained as a civil engineering technologist. He has been in Consbec's employment since April 2000. He was the manager of the Central Division, a position that he held until June 10, 2002 when he became manager for the Western Division to replace Peter. At the time of trial, Mr. Mitchell had returned to Ontario and was again the manager of the Central Division.

Brian Sawdon

[23] Brian Sawdon was born in 1956. He started employment with Consbec as its controller in 1990. He continues to work in that position and was working in that position when he testified at trial.

[24] As controller he is responsible for invoicing Consbec's customers, collecting the money, banking it, and paying Consbec's expenses and payroll. He prepares financial statements and provides monthly information to Richard relating to the cost per hour of the drills and other equipment associated with Consbec's drilling and blasting business.

Brent Ashby

[25] Brent Ashby is a chartered accountant. He is the chartered accountant for all of the defendants.

Robert Mackay

[26] Robert Mackay is a chartered accountant and business evaluator. He prepared an expert report on behalf of Consbec to assist the court in order to assess the alleged damages sought by Consbec.

P&T Walker Capital Ltd. / PA Walker Investments Ltd.

[27] On July 5, 2002, P&T Walker Capital Ltd. was incorporated in British Columbia under the name of Rock Construction & Mining Inc. ("Rock Construction"). It was the original operating company that Peter incorporated to operate its business

along with Galina Contractors Ltd. ("Galina"). Peter and Tracy owned one-half the shares of Rock Construction. The other half of the shares were owned by Galina whose principal is Ralph Allen. In August 2003, Peter purchased Galina's interest in Rock Construction resulting in Peter and Tracy being the sole owners.

[28] For purposes of tax planning, Rock changed its name to P&T Walker Capital Ltd. on December 22, 2003. Its shares were owned by Peter and Tracy. Its sole shareholder is Peter who holds some of the shares in trust for the Walker Family Trust. Its name was changed to PA Walker Investments Ltd. at or around the time of Peter and Tracy's separation (as modified following the separation, "PA Walker Investments"). It holds the equipment that is used in Peter's blasting business that is leased to Rock Construction from which it receives payments.

Rock Construction & Mining Inc.

[29] On December 19, 2003, Rock Construction was incorporated federally. It is Peter's operating company, which contracts and performs drilling and blasting. He owns all of the shares and is its sole director.

A Note on 1627436 Ontario Limited, Walker Investments Ltd., and 0794940 B.C. Ltd.

[30] 1627436 Ontario Limited was incorporated in Ontario to do business in Ontario. Its shareholder is PA Walker Investments Ltd.

[31] There was no information provided to the court regarding Walker Investments Ltd.

[32] 0794940 B.C. Ltd. is a company owned by Peter. Its activities were not described.

[33] The companies, 1627436 Ontario Limited, Walker Investments Ltd., and 0794940 B.C. Ltd., were not considered when Mr. Mackay determined the damages that Consbec is seeking in this litigation.

[34] When the court asked counsel for Consbec what role 1627436 Ontario Limited, Walker Investments Ltd. and 0794940 B.C. Ltd. had in this action, counsel stated that the two primary corporations were Rock Construction and PA Walker Investments.

[35] As to the other three, counsel for the plaintiff stated their inclusion was a precautionary approach against any improper attempt to move assets prior to or after judgment.

[36] So that there is no misunderstanding, Consbec and Peter's companies are not the only companies competing in the drilling and blasting business in British Columbia. Mr. Mitchell, after acknowledging Rock Construction was a competitor, was asked the following questions and gave the following answers:

> Q … Who else was a significant specialized drill blast contractor who was a competitor to Consbec in BC?
>
> A One right here in Kamloops is Pashco Drilling and Blasting, Pacific drilling and blasting in Vancouver, HHS Drilling and Blasting in Victoria, Western Greater Drilling and Blasting in Victoria, Rock-Tech in Nanaimo. Do you want me to keep telling you some more?
>
> Q So are those the primary competitors that come to mind?
>
> A Here in BC, yes.

[37] From time to time in these reasons PA Walker Investments, Rock Construction, 1627436 Ontario Limited, Walker Investments Ltd,, and 0794940 B.C. Ltd. are referred to together as the "Rock Companies".

Findings of Fact

Hiring of Peter

[38] Peter recognized that his position at Placer Dome would change as a result of Placer Dome being purchased by another company. In the fall of 1996, he mentioned this at a hunting camp located in Northern Ontario, owned by Rick and his father. Present at the camp were Richard, Richard's two brothers and a man whose first name was Harold. Rick mentioned to Peter that Consbec was looking to expand and that Peter should think about working for Consbec.

[39] Peter testified that many months after this conversation, he asked Richard whether the offer for employment was still open and he was hired.

[40] Richard testified that he and Peter talked several times about Peter coming to work for Consbec. Richard said that these discussions took place between late 1996 up to the time that Peter was hired in 1997. The talks revolved around what Consbec was looking for and where Peter was at that time in his career. Richard testified that Peter was "discouraged or displeased or frustrated" with his job at Placer Dome. Richard sensed that Peter was looking for a new challenge. Peter and Richard's account as to how Peter's employment occurred is not significantly different and that is not important other than I prefer and accept Richard's version as it makes the most sense.

[41] Richard's opinion of Peter was that Peter was "very aggressive", "very competent", and "a hard worker".

[42] Richard made Peter aware that it was important that Consbec grow, that it needed good people to "grow the business", and that Consbec wanted to expand to the east coast (Maritimes). Peter was hired as an area manager of the Eastern Division.

[43] Richard sought his father's opinion about hiring Peter who saw no problem with the hiring. After receiving some head office experience, in June 1998, Peter was sent to Moncton, New Brunswick as manager of the Eastern Division of Consbec.

[44] Peter remained in that position until May 1999 when Consbec decided to expand and establish the Western Division. He and Richard came out to British Columbia. Richard chose Kamloops as its head office, although Peter would have preferred Williams Lake. Prior to taking up his duties in the west, Peter was replaced in the Eastern Division with Jamie Gill, an engineer, who was familiar with the Maritimes. Peter testified that it was not a large learning curve for Mr. Gill, as he was familiar with the geography and knew a lot of the contractors. Richard testified that Peter was a good manager and that Mr. Gill learned skills from Peter.

[45] Upon leaving Moncton, Peter and his family went back to Sudbury, where Peter worked on a few projects out of Consbec's head office. In May, Peter started work in Kamloops at the Western Division.

[46] Richard, throughout his testimony, repeated that Peter, whether located at the Eastern or Western Division, was Consbec's most senior employee in each area and the eyes and ears of the company. In fact, whether in the Eastern or Western Division, Peter was the only employee of Consbec. Richard said that Peter operated each office without support staff. I find that Richard's description is an exaggeration given Richard's supervision of Peter which I will refer to later.

[47] Peter remained manager of the Western Division until June 10, 2002, when he abruptly left his employment with Consbec without giving notice to them.

[48] Peter alleges that prior to commencing his employment with Consbec, he was promised by Richard that he would eventually be appointed general manager of Consbec. At that time, Richard was 27 years old. Peter testified that Richard told him that Rick was looking to retire in the next five to seven years and that he intended on moving up to Rick's position and that "providing that I did a really good job and was a good producer, the second position would be mine". Both Richard and Rick flatly deny that such a promise was made. I accept their evidence.

[49] It was Peter who drew it to his cousin and uncle's attention that he was unhappy at Placer Dome. It was Peter who after a discussion at the hunting camp raised with Richard the opportunity of employment with Consbec. Had this promise been made, surely Peter would have been able to pinpoint the time and circumstances as to when the promise was made. Richard testified that his offer of employment to Peter was made on the telephone, after a period of discussions and after Richard discussed it with Rick. There is no evidence before me that Peter raised this promise with his cousin, Richard, or his uncle, or for that matter, anybody at Consbec during his period of employment with Consbec. Further, such a promise is unlikely to have been made prior to employment, as Peter's abilities had yet to be proven and tested.

[50] However, Richard acknowledged that he and Peter had discussions about Peter becoming general manager when and if Richard became president of Consbec. I find that these discussions took place after Peter was employed by Consbec. The specifics of those discussions were not testified to by either Peter or Richard. On June 10, 2002, Richard was not president; Rick was and still is. There has been no change in the structure of the company, Rick is still director and he and his wife are still the sole shareholders of Consbec. I find that no promise of promotion was made either before or after the employment started.

Peter's Job Responsibilities

[51] I find that Peter's job responsibilities were never reduced to writing. Those responsibilities did not change from the time he started with Consbec as manager of the Eastern Division to that of manager of the Western Division.

[52] In the words of Richard, Peter's role was to "grow the business". Upon Peter going to the Maritimes and then on to British Columbia, it was the first time that Consbec had an office in each of these areas. Peter's main focus was to solicit blasting and drilling contracts. In doing so, he was to find construction, and quarry and road projects where blasting and drilling were required. Peter had to determine what projects were proceeding and figure out the contractors who were likely to obtain the project. In the Maritimes, it was readily available on an industry website. Peter would determine which individuals or companies paid for the plans as they were potentially contractors who had bid for the work. Peter would communicate with them by asking whether they would like a quote from Consbec. In his discussions, he would find out as much as he could about the job, including information such as the kind of rock to be blasted and drilled, a description of the surrounding area where the blasting and drilling was to take place, and the schedule for the job so as to make the bid. Peter would obtain a copy of the plans or the part of the plans pertaining to the drilling and blasting from which he could determine the requirements of the job.

[53] Peter testified as to more particulars on bidding projects in British Columbia. He would obtain components relating to the drilling and blasting part or obtain a bid package from the owner of the project. He would talk to the general contractor, asking questions about the equipment they were using, as well as details about rock fragmentation (size of the rocks) and how much of the rock that they wanted moved by the hour or by the day.

[54] It was Peter's role to get customers. It was occasionally the case that he performed what could be considered a supervisory role when a project was not assigned a specific supervisor for whatever reason. Such a supervisory role would include sending reports on the project to head office. At the time of Peter's employment with Consbec, there were a number of employees that could be assigned some level of project supervision, including Peter's cousin, Jeff.

[55] Peter argues that with the arrival of Ron Thomas, a project supervisor working for Consbec in British Columbia, he was one of the two people that crews reported to and, at the time of his departure from Consbec, no one was reporting to him. I find that it was never the intention of Consbec that crews working on projects for Consbec would report directly to Peter. When it did occur, it related to times when there was insufficient business to have a supervisor. For example, the first contract that Peter had in the Eastern Division was the Grant Project on which Ron Thomas was a supervisor. On occasion, when there was not a supervisor on a project, one of the blasters or drillers would perform that role.

[56] Peter cited the example of Ron Thomas, the supervisor of the Langvista 1 project that had been bid through Timber Construction Ltd. ("Langvista 1"). Instead of reporting to Peter, Ron Thomas reported to Jeff. Peter stated that this resulted in a heated conversation with Richard. This particular incident was not put to Richard.

[57] If there were any changes to his employment, such as Ron Thomas reporting directly to Jeff rather than Peter, it was not done to demote, but rather to enhance the position for which he was hired; that is, to obtain successful bids for his employer.

[58] I find that from the beginning to the end of his employment with Consbec, Peter always reported to Richard. I find, based on the evidence, that at no time was there a plan or notice given to Peter that he would be reporting to Jeff as opposed to Richard.

[59] While working for Consbec, Peter earned, in his last full year, $73,000.00. Bonuses were discretionary in which Peter had no input or say. This included wages and salaries of all other Consbec employees. Peter drove a company truck. Peter did not have a company credit card, and any Consbec expenses were charged to Peter's personal credit card and reimbursed promptly by Consbec. All contacts and expenses for Peter's vehicle and office space in the Western Division were paid for by head office. Rick and Richard set salaries for all Consbec employees. I find that the terms of Peter's employment with Consbec did not change during his employment.

Peter's Resignation from Consbec

[60] On June 10, 2002, Peter sent Rick a letter of resignation dated with that date. The letter states:

> Dear Rick:
>
> I trust this finds you well.
>
> In assessing my future with Consbec I have determined that my continued involvement in my current capacity is not a career I will be happy with. As I continue to grow frustrated in my position, it brings stress and pressure on family relations. At this time I am going to step down immediately as a Consbec employee and search for opportunities elsewhere. This decision has not come easily, however I believe it is the only way to keep peace within the Walker family.
>
> Sincerely
>
> Peter Walker

[61] Neither Rick nor Richard anticipated that Peter would resign, nor was it hinted to them that he might take that step.

[62] Rick testified that he attempted to reach Peter by telephone. After several unsuccessful attempts, Peter days later. Rick testified that he asked Peter to go

back to the office as he was concerned about Consbec's liability as to explosives being used on the site of one of its projects. Peter refused and, when asked by Rick what led to his resignation, Peter responded with a loud tirade as to how he hated Jeff.

[63] Peter testified that he had no conversation with Rick. In addition, Rick was completely ignorant as to the distance between Kamloops and Victoria where the Langvista 1 project was, making an immediate demand for Peter's attention to a problem onsite potentially unreasonable. Peter testified that the blaster is the person responsible onsite for the explosives. Without corroborating evidence for either version, I cannot make a finding of fact either way. In any event, it is of little importance to this litigation.

[64] Peter left the Consbec office in Kamloops, did not return, and had no further contact with Consbec as an employee.

[65] As a result of Peter's resignation, Consbec sent Trevor to take short-term charge of the Kamloops office. In doing so, Trevor went to the Consbec office where he found the company truck parked and locked. In the office was office equipment belonging to Consbec, but missing was a camera, a Sharp organizer, and a blast machine. Trevor made a complaint to the RCMP resulting in Peter returning the camera and the Sharp organizer. Peter denies taking the blast machine and denies Trevor's claim that the RCMP returned the blast machine. I find that Peter did not take the blast machine.

[66] Trevor testified that there was a lack of records, such as listed projects and bids that were under way. He stated that the computer was "wiped clean" as was the Sharp organizer. He stated the following in direct examination:

> Q [W]hen you turned it on, what was on the computer? Was there any under lying software system?
>
> A Yeah, no. So the operating system was still working on the computer. It was a Windows-based computer. But, you know, the essence of this is there was no information on the computer. So at that moment zero value for me in that moment on the computer for information or data concerning our operations.

Q I just want to be very clear about what you just said there was zero data or information on the computer?

A Yeah.

Q Just so we're very clear, were there any Excel spreadsheets that had been filled out for previous bids that Peter had done?

A On the computer, no.

Q Was there any email correspondence you could find on the computer?

A No zero. There was no information. The computer was clean of any information. So that was -- that kind of made a little flag go up in my mind as something suspicious obviously when I arrive to a computer with no data on it.

Q All right. Just going back a step, did you -- prior to the assignment to go out [w]est to Kamloops, did you when you were in the field have any type of electronic data organizer or contact organizer provided by Consbec?

A Yeah, yeah. It was typical for project managers on large projects through to area managers, Richard and superintendents to have the small black organizer that flipped open.

Q Now, did that type of device, prior to getting to Kamloops, have the capability to your knowledge to be synchronized or connected to share data with laptop computers?

A Yes.

Q Then why was that the case?

A Why was it the case?

Q What was the purpose behind that kind of connectivity?

A Oh, backup.

Q Backup?

A Yeah, yeah, definitely. As everyone here knows I'm sure everyone's lost some data so you need to have backup from both the hardware device to another device on your computer.

Q So when you get to the Consbec office in Kamloops do you see this electronic contact data device in the office?

A No.

[67] Peter testified that he did not wipe the computer and the organizer clean. He stated that when he initially received the organizer, he used it for storing contacts (customers), but found it difficult to use and eventually used it only as a calculator. Peter testified that the Sharp organizer and his laptop computer did not communicate with each other.

[68] I conclude that Peter did not wipe the computer clean or the Sharp organizer clean.

[69] Mr. Mitchell testified that he came to Kamloops in either late June or early July. He testified that was the first time he went to the Consbec office in Kamloops. He testified that the filing system in the Kamloops office was not like the one they had in Ontario. He observed that Peter's filing for the first year and a half, when Peter was in Kamloops, was fairly well maintained. The last six months were not well recorded. He stated that the last six months prior to Peter's leaving lacked information. He did not find a memo or list from Peter of ongoing projects. There was no list of bids for which Peter was waiting to hear the results. There was no contact customer list in the office, nor was there a list of prospects or potential customers.

[70] I prefer Mr. Mitchell's description of the office to that of Trevor's.

[71] I conclude that, given the supervision of Peter by head office and Richard, Consbec would have known who the Western Division's customers were and the bids that were outstanding.

[72] Trevor found in the storage area of the office what appears to be a to-do list dated June 5, 2002, identified in evidence as Peter's handwriting and acknowledged by Peter as prepared by him (the "Resignation List") that included the following items: letter of resignation, and information package for Ralph.

[73] There was also a second resignation letter prepared by Peter that was retrieved at a later date from Peter's work computer. It states:

> Dear Rick,
>
> I trust this letter finds you well.
>
> In assessing my future with Consbec I have determined that the promised position of General Manager is not going to materialize. I further believe that was I given this position it would not be structured to place myself in a solid management or financial position. To that end, I will be resigning from your firm in search of new interests, effective immediately.
>
> Sincerely
>
> Peter Walker

[74] Trevor made notations on the Resignation List that he identified. I conclude from reading this list, reading the unsent resignation letter, and the evidence before me, that Peter was making plans to go into the drilling and blasting business with Ralph Allen, or perhaps on his own. The name "Ralph" on the list could have been Ralph Allen or Ralph Larsen, who was looking for commercial office space for Peter. He was preparing a truck for his use. He was to buy some insurance; its kind is unknown.

Consbec's Operations

[75] The manner in which Consbec obtains bids is firstly to be aware of the projects in which its services as blasters and drillers are required. Peter described how the projects are located. These projects are government or private projects. Blasting and drilling contractors are likely to place a bid to the owner of the project or to the general contractor who has the contract to do the project with the owner. More often than not, the lowest price takes the bid. However, other factors are also taken into consideration; that is, the bidder's ability to do the job, which includes its experience and equipment and can it do the job safely. A good example of this is the Brilliant Dam contract that Consbec bid. As part of its bid, it was required to answer a questionnaire that considered many of these factors and described as a "Level I - Prequalification". Obviously, in this particular project, those who wished to make bids had to be screened so as to determine their abilities to perform the project.

[76] Richard testified as to the importance of establishing relationships with unions and those individuals who were employed in key positions in construction companies. I accept that this is one of the many factors involved in making bids; that is, obtaining as much information about the project to make a successful bid. It is not a factor in having the bid accepted. Its importance was over-emphasized by Richard. Its importance is to the bidder so that the bidder can obtain reliable information from these relationships in order to make its bid. Peter, as I stated earlier, sought out these relationships in order to make a bid. Throughout his testimony, Richard referred to those companies to whom Consbec had made successful bids as clients, as if Consbec somehow was entitled to further drilling and blasting contracts without

having to resort to the bid process. That simply is not the nature of the business. Peter testified that in the entire time he was working in British Columbia, all contracts were obtained by bid. He never received a direct award of a contract.

[77] . An example of the lack of exclusivity in the bidding process was when Consbec was invited to place a bid on Taitinger Developments Ltd.'s Langvista 2 project ("Langvista 2") in Victoria. Rock Construction was also invited to submit a bid.

Proprietary and Confidential Information

[78] Consbec alleges that Peter took and used proprietary and confidential information so that the Rock Companies could compete against Consbec. This information consists of the bid document, the client list, and the Microsoft Excel spreadsheet.

[79] Peter testified that the bid document was created by him for Consbec in about 1997 or 1998, when he was working in the Eastern Division. He stated that it was a formatted document that Microsoft put in all its computers. The Consbec bid document and the Rock Construction bid document are virtually the same, except in Consbec's it is clear that it is Consbec's document and in Rock Construction's document it is clear that it is Rock Construction's bid. I find that the bid document is not proprietary to Consbec and it is hardly confidential. As I have mentioned earlier, there was no evidence given on which to ascertain that Peter maintained a client list, never mind that he stole one.

[80] Richard developed Consbec's Microsoft Excel spreadsheet. It was referred to as Consbec's "playbook". Its purpose was to make bids quickly and present them in a timely fashion. Bids could be calculated by hand, but the spreadsheet reduced the time in making the calculations.

[81] Richard testified that inserted in the spreadsheets were formulas for four categories of costs: labour, equipment, material, and miscellaneous. An amount for overhead was not in the spreadsheet's formulas.

[82] Richard acknowledged that the figure spit out by the spreadsheet after the addition of the gross profit was not the final figure. If the job was riskier, an additional percentage was added. If the job was strategic or opportunistic, then the margin would be lowered "a bit".

[83] Richard testified that a lot of information went into the spreadsheets. He stated that 20 or 30 variables, together with the 30 percent profit margin, affected the price of the job. In summary, he stated:

> The price, essentially the formulas, the internal rates, the engineering project parameters that you can see up at the top. All of this data is input to provide you with the resulting price up on the top right.

[84] Richard claimed that 90 percent of the time in Consbec's accepted bids it made a 30 percent margin. However, the defendants were able to demonstrate that the 30 percent margin varied in contract bids in British Columbia in excess of 30 percent. That was not particularly helpful as there was no evidence whether the 90 percent included other regions for Consbec.

[85] Richard testified that he would not show the formulas in court as they are "where some of our costs were today". These costs changed from month to month. Each month the controller would update the costs. They were not significant changes, but over a period of time they could be.

[86] Richard stated that Peter would know the production rates of Consbec drills. He testified that the largest cost component for drilling and blasting is equipment. According to Richard, anyone seeing these rates, such as explosive rates, drill hole diameter, patterns and the necessity of matting, and the use of large or small drills would know what Consbec would bid.

[87] Richard testified that labour costs in the spreadsheet would be either union or non-union rates based on either a 10-hour or 12-hour day.

[88] Under material, explosives are a cost item. Monitoring the engineering cost is sometimes a cost when a contractor or owner requires an independent firm to monitor the project. This is also contained in the spreadsheet.

[89] Richard stated that as a result of using the spreadsheet repeatedly, you would know all of Consbec's costs.

[90] Richard stated that Consbec's drilling capability is not the same as every other drilling and blasting contractor. Consbec's drills firstly are hydraulic and, secondly, the bids have been modified by Rick. In the spreadsheet, the capabilities of the drills are reflected.

[91] Consbec alleges that Peter took the spreadsheet. Richard acknowledged that he had no direct evidence as to Peter taking the spreadsheet. The court is asked to draw an inference based on Trevor's evidence and that of Mr. Mitchell that Peter took the spreadsheet. Trevor's evidence is that he travelled to Kamloops to take over management of the office and he determined that the computer had been wiped clean. Peter denies taking the spreadsheet and wiping clean the computer. Trevor's evidence is not sufficient to find that Peter took the spreadsheet. There was sufficient technology in existence at that time to determine the truth of this allegation. There is a difference between wiping a computer clean and deleting items. Further, no one has explained how Peter's resignation letter - the one that was not sent, came from Peter's computer, if the computer was wiped cleaned. Richard testified explaining how the letter of resignation that was not sent had the date September 24, 2007 on it. He stated:

> Q And to start at the top, the date is curious. This appears to be another resignation letter so it says September 24th, 2007. Can you help us understand what that date indicates?
>
> A My understanding that is the date that was placed on that document. It was the date that it was extracted, I guess, from a laptop that had been scrubbed. So a forensic firm of some sort had pulled this off of that laptop and that was the date that was put on that.

[92] No such expert evidence was presented by Consbec. I can only conclude that this expert evidence would not have supported Consbec's allegations that Peter wiped the computer clean and took the spreadsheet.

[93] Mr. Mitchell's evidence is based on suspicion. Both Consbec and Rock bid on the Langvista 2 project, which was near the Langvista 1 project. Rock's bid was successful. Consbec's bid was second to Rock's and $46,000.00 more than Rock's. Mr. Mitchell testified that he recalculated the bid using Consbec's Excel spreadsheet. By performing this task, the end result of his calculations was that the Rock bid on the Langvista 1 project was about $4,000.00 more than the recalculation Mr. Mitchell performed. Mr. Mitchell testified that he used the spreadsheet to calculate the Langvista 2 project for Consbec. He stated that upon completing the calculation, he made a secondary calculation, pinpointing the number he wished to bid.

[94] I take from this that Consbec could have had the bid had they used the numbers that the spreadsheet spit out.

[95] Spreadsheets are not exclusive to Consbec. Mr. Mitchell stated that prior to being employed by Consbec, he worked for a construction firm. He worked with his employer's spreadsheets. He stated he would never think of taking it with him and he viewed it as belonging to his former employer. Peter agreed with that principle.

[96] Peter testified that he did not have the same drilling equipment as Consbec and initially relied on Galina's equipment. He then rented drilling equipment from Finning, an equipment parts and service company, and it was not until 2006 that he purchased his own equipment. Any formulas relating to drilling equipment in the spreadsheet would not be relevant. Further, Peter's evidence is that he does not use a spreadsheet to prepare his bids. He demonstrated, when he was on the stand, that he could do a bid by hand. Peter also testified, while working for Consbec, that in most instances he did a hand calculation, then tested that hand calculation against Consbec's spreadsheet before presenting his proposed bids to Richard.

[97] Based on all of the evidence, I cannot conclude that Peter had Consbec's Excel spreadsheet and used it to compete against Consbec.

Rock Companies Contracts

[98] Consbec seeks that Rock Construction disgorge itself of profits on a number of drilling and blasting contracts that the Rock Companies undertook with companies that Consbec alleges are their clients. Consbec alleges they lost income from each of these contracts.

[99] Mr. Mackay provided an expert report assessing the loss of profits that Consbec says they lost. They relate to the following projects: Sproule Creek Holdings Ltd. ("Sproule"), Galina, Taitinger Developments Ltd. ("Langvista 2"), Selkirk Paving Ltd. ("Selkirk"), Skanska-Chant Joint Venture ("Skanska-Chant"), I.G. Machine and Fibres Ltd. ("I.G. Machine"), Campbell Construction Ltd. ("Campbell Construction"), and Ledcor Civil Mining Ltd ("Ledcor").

[100] Mr. Mackay reviewed financial records of the Rock Companies and various memorandums and documents, as well as the pleadings in this action and discussions with Mr. Sawdon, which are listed in Appendix A.

[101] Mr. Mackay provided two approaches to the court in assessing Consbec's alleged damages. Using the Rock Companies revenues from the projects listed above, less direct costs for each of the fiscal periods from May 31, 2003 through to May 31, 2006, with adjustments described in paragraphs 8.04 and 8.05 of Mr. Mackay's report, he concludes that the loss to Consbec was $1,490,000.00.

[102] The second approach Mr. Mackay undertook, assumes that if Consbec undertook the projects, it would have earned an average gross profit percentage of 30 percent. It was assumed that Consbec's overhead expenses and amortization expense that would have been incurred by Consbec would not necessarily have been the same as was incurred by the Rock Companies. Using this method, the projected loss of income to Consbec would have been $1,820,000.00.

[103] These two approaches are summarized in Schedule 9 of Mr. Mackay's report.

[104] The period of time that the Rock Companies earned this money and on which Mr. Mackay bases his conclusions are 11 months ending May 31, 2003 and 12 months each ending May 31, 2004, 2005 and 2006. These revenues are specifically set out in Schedule 3 of Mr. Mackay's report.

[105] I make the following findings of fact on each of the projects that the Rock Companies bid and secured.

Sproule Creek Holdings Ltd.

[106] Richard testified that Consbec bid and obtained a contract with Sproule while Peter was employed by Consbec. He stated that Consbec lost money on the project because Sproule did not pay its account.

[107] Rock Construction bid a project for Sproule which appeared on B.C. Bid. Mr. Allen was aware of this project as it was in the East Kootenays. The project was a forestry contract – a logging road. Peter testified that he was unfamiliar with this kind of contract, so Ralph Allen and George Pete bid the project. The labour and equipment used for the project belonged to Galina. Rock Construction succeeded in its bid. Richard testified that Consbec also bid on the contract.

Galina Contractors Ltd.

[108] Galina's principal was Ralph Allen. Galina was the successful bidder on the Pingston Creek Hydro Electric project outside of Revelstoke. Galina had the capacity to do the drilling and blasting as it had its own equipment but instead of doing the drilling and blasting work itself, Consbec was asked to submit a bid and the bid was successful. This bid was prepared by Peter. It was during this project that Peter came to know Ralph Allen.

[109] In Mr. Mackay's report, Rock Construction received a payment of $1,292.00 from Galina. Given the small amount, it does not appear to be a drilling and blasting contract. Peter speculated that this amount might have been a payment relating to

equipment transferred between Rock Construction and Galina. After Peter's departure from Consbec, Rock Construction did not enter into any contracts with Galina and did not perform any physical work for them.

I.G. Machine and Fibres Ltd.

[110] While Peter was with Consbec, he had never bid a project for I.G. Machine. I.G. Machine requested that Galina make a bid on a project. At that time, Galina, Peter, and Tracy were the shareholders of Rock Construction. Peter calculated the bid. The bid was successful. The work was completed between October 2002 and January 2003.

[111] Mr. Mitchell testified that Ralph Allen telephoned him and asked him to make a bid on behalf of Consbec for the I.G. Machine project. Consbec placed a bid to Galina. Mr. Mitchell alleges that Ralph Allen called him for the sole purpose of finding out what Consbec's bid was so that Rock Construction could beat it. Ralph Allen was never called to testify, nor was there any evidence to support this theory presented by Mr. Mitchell.

Campbell Construction Ltd.

[112] There were three projects that Rock Construction bid to Campbell Construction resulting in contracts: the Astoria Hotel, the Marriott Hotel and the Belvedere. These projects consisted of three lots in a row. Richard testified that he did not know whether Consbec had done any work for Campbell Construction when Peter was at Consbec. Mr. Mitchell stated that he submitted, on behalf of Consbec, a bid to Campbell Construction. There was no documentation or any other evidence to support this.

The Marriott Hotel

[113] Peter learned of this job as Campbell Construction had contacted Ralph Allen. Ralph Allen passed the bid documents to him. Peter testified that Ralph Allen did this because he primarily worked in the Kootenays and, at that time, he was busy with several large forest companies in the Kootenays.

The Astoria Hotel

[114] The Astoria followed the Marriott. Peter testified that George Zimmer of Campbell Construction asked him to submit a bid. Peter testified that he prepared his bid based on the information described by Mr. Zimmer. Rock Construction had the successful bid.

The Belvedere

[115] As with the Astoria, Peter learned of this job through Mr. Zimmer. He compiled his bid based on information provided by Mr. Zimmer, which is how he says he bid all three properties.

Taitinger Developments Ltd., also known as Langvista 2

[116] Consbec won the bid to perform the Langvista 1 project. The contract was with Timber Construction Ltd. The owner was Taitinger Developments Ltd. The project was on Vancouver Island. Peter prepared the bid. During the performance of the contract for Langvista 1, Peter left his employment with Consbec.

[117] Langvista 2 was a separate project from Langvista 1 and it required a separate bid. Consbec, through Mr. Mitchell, was contacted by Timber Construction Ltd. to place a bid for Langvista 2. Timber Construction Ltd. was replaced on the project by Draycor following a disagreement between Taitinger Developments Ltd. and Timber Construction Ltd. A few days later, Mr. Mitchell was contacted by Draycor to provide a bid for Langvista 2. Consbec had never worked for Draycor.

[118] Peter was working on the Marriot project when the owner of Draycor asked him if he, on behalf of Rock Construction, would put in a bid on Langvista 2, which was right across the road Langvista 1. Rock Construction had the successful bid. Peter testified that he calculated the bid by hand, as he demonstrated it in the courtroom. Consbec's bid position was second, as I mentioned earlier in these reasons.

Selkirk Paving Ltd.

[119] Consbec alleges that, while Peter was employed by them, Consbec was successful in bidding and receiving three Selkirk projects. One of those contracts was not a project, but rather the leasing of equipment to Selkirk.

[120] To put it in perspective, while Peter was working in the Western Division, he bid and received for Consbec 14 projects. Of those 14 projects, three were Selkirk, which includes the lease. While working for Consbec, Peter dealt with Sante Pulice at Selkirk. As shown in Schedule 3 of Mr. Mackay's report, after Peter left Consbec, Rock Construction bid Selkirk projects.

[121] Richard testified that Consbec, through Peter, learned of a drill and blast project called Long Hill Quarry. Consbec submitted the same bid to two different contractors, one of whom was Selkirk. In the end, Consbec contracted with Selkirk to do the Long Hill Quarry project. That was the same bidding situation as when Consbec bid Langvista 2 project (however, with a different outcome).

[122] This illustrates that Consbec was prepared to make bids to contractors who were attempting to bid the project with the owner. Simply put, they did not prefer Selkirk as a contractor; it was the job that they wanted.

[123] After Peter quit Consbec, and at different times, Trevor met Mr. Pulice as did Mr. Mitchell. Both of them described the reception from Mr. Pulice as being "cool". Mr. Pulice did not tell Trevor or Mr. Mitchell that they did not want to receive Consbec's bids. There was no evidence before the court that Consbec bid Selkirk projects following Peter's departure from Consbec.

[124] Selkirk had a project called Kabatoff Pit in Castlegar, B.C. in 2006. The project was quarry production and Peter learned of it through Mr. Pulice. Peter testified that he calculated the bid by hand and in the manner he demonstrated in court. The bid was successful.

Skanska-Chant J.V. and the Brilliant Dam Project

[125] The Brilliant Dam project in B.C. was a hydroelectric project.

[126] Richard testified that Brilliant Dam was identified by him as a corporate opportunity for Consbec after he received a telephone call from John Mulcahy, the senior manager of McNamara Construction in Eastern Canada. Mr. Mulcahy told Richard that they would be bidding the Brilliant Dam project. At a later date, Mr. Mulcahy called back and indicated they had changed their mind and they were no longer going to bid it. At this time, it was unknown as to who the general contractor would be.

[127] In the second telephone conversation that Richard had with Mr. Mulcahy, Mr. Mulcahy told Richard that two other general contractors or engineering groups were going to bid Brilliant Dam. Mr. Mulcahy gave Richard the names "Kiewit" and "Chant -Skanska". Consbec had not worked for Kiewit. Richard believed that it did its own drilling and blasting subcontract work and did not contract such work out. Consbec had no business relationship with Kiewit. Richard testified he knew nothing of Chant. He had heard of Skanska as it was known as an international company based out of one of the Scandinavian countries. Consbec had never worked for either Skanska or Chant.

[128] Richard testified that he told Peter of his conversations with Mr. Mulcahy. Richard claims that with Peter's input, he developed a strategy to work closely with Selkirk so as to achieve the Brilliant Dam bid. Richard did not say when he had these conversations with Mr. Mulcahy.

[129] Richard testified that he met Mr. Pulice in early 2002 on one of his trips out west. Richard testified that the meeting with Mr. Pulice took place for about 20 to 30 minutes. Peter was present. There is no evidence before me from Richard that he, Peter and Mr. Pulice discussed the Brilliant Dam project.

[130] Richard testified that, after the meeting, he and Peter discussed the Brilliant Dam project. He testified that Peter agreed with his strategy.

[131] Counsel for Consbec asked Richard this question and Richard gave this answer:

> Q Any thought when you're talking to him about Brilliant Dam at any point in time that he was going to leverage his personal relationship with Selkirk and Sante Pulice and compete with you on Brilliant Dam as a former employee? Did that thought ever cross your mind?
>
> A Never crossed my mind. He was family. He'd been with us for five years. We opened up the Eastern Division together. He was moving out [w]est. He was opening the Western Division. Never crossed my mind.

[132] Peter has a different version of events. He testified that the Brilliant Dam project was very public, it had been on B.C. Hydro's website from 1999 forward. He said everybody was waiting for this project, but it could not go forward until environmental permits, design completion and public hearings were completed so that a general contractor could be announced. The ultimate successful general contractor was Skanska-Chant.

[133] Peter had no contact with either Skanska-Chant. Peter testified that he was uncertain whether Richard brought Brilliant Dam to his attention or whether it was in the news in British Columbia, as it was a big job. Peter had no recollection of Richard telling him of his conversation with Mr. Mulcahy of McNamara Construction.

[134] Peter acknowledged that Richard talked about Brilliant Dam, but no action had been taken as the general contractor had not been chosen.

[135] Peter testified that when he learned who the general contractor was, he travelled to Castlegar in January 2003. The contractor had opened an office near the river. Peter spoke to Matts Alexanderson, the project manager, whom he had never met before. They discussed fishing and the project.

[136] Peter came away with a bid package. Peter testified that the calculations were a lot more technical than he had done before. He testified that he had used Ralph Allen's equipment rates. Finning supplied one piece of equipment to start the job and another piece of equipment part way through. Peter testified that his

explosive rates were from Explosives Limited. Peter testified there was no involvement with Selkirk.

[137] Consbec, through Mr. Mitchell, placed a bid for Brilliant Dam. It was made directly to Skanska-Chant, who selected the drilling and blasting contractor.

[138] Rock Construction's bid was successful.

[139] I reject Richard's evidence regarding the bidding strategy as it was not until about six months after Peter resigned from Consbec that the general contractor became known.

[140] At the time Peter left his employment with Consbec, the general contractor was unknown. Brilliant Dam was not the mature opportunity as that in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, discussed below. A mature business opportunity is described in *Pizza Pizza Ltd. v. Gillespie*, [1990] O.J. No. 2011 (QL) at paras. 81-82, 75 O.R. (2d) 225 (Gen. Div.) as follows:

> By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored as Overs was doing. Moreover, all the evidence indicates that a substantial amount of initiative was taken by Gillespie in preparation and development of the chicken business. He retained Luke Sklar to do market research; he retained Robert Gorrie to design his marketing; he raised money through private placement (the partners herein). The evidence demonstrates that the Chicken Chicken business is a result of Gillespie's initiative and planning, not the result of appropriation of a corporate opportunity from Pizza Pizza.
>
> In summary, the evidence of Mr. Gillespie and other evidence tendered by him establishes that the distinctive marketing characteristics of Pizza Pizza and the terms of its franchise system are in the public domain and are of a generic nature. This is not rebutted by specific facts adduced by Pizza Pizza which show the use of confidential information by Gillespie in the development of Chicken Chicken's marketing methods, its franchise agreement or in the selection of its franchise locations.

Brilliant Dam Viewpoint

[141] Peter testified that he learned of this project through B.C. Bid. It was right across the river from the dam. Its purpose was a widening in the road where the dam could be viewed.

[142] Peter testified that he sent his bid for the Viewpoint to Acme Contractor, Civil Tech Services, and. After submitting a bid, Rock Construction was invited to a post-tender meeting. It was at this meeting that Peter learned that Selkirk had the excavation part of the contract. Rock Construction's bid was successful.

Ledcor

[143] Richard testified that when Consbec first came west to establish its division in British Columbia, he and Peter went to see a man named George Hoar of Ledcor. The visit took place in Vancouver. The purpose of the visit was to introduce Consbec to Ledcor. There was no project on offer at that time. Peter testified that he had no memory of that meeting. That does not mean that it did not take place.

Rutherford Project

[144] Consbec has never done work for Ledcor. There was some suggestion that, while Peter was working for Consbec, there was a job called the Rutherford Project. Mr. Mitchell testified that a bid was put in for this project while Peter was working for Consbec. Mr. Mitchell testified that he assisted Peter in putting this bid together. He testified that Peter was in a helicopter for the purpose of looking over the job. Peter denies that he was ever in any helicopter for any Consbec job. Peter testified that he had no recollection of Mr. Mitchell assisting him, but he made it clear that he is not denying that may have happened. However, there is no documentation before me that Consbec ever received the contract from Ledcor.

Brandy Wine Creek

[145] Ledcor had a small drilling and blasting job to do relating to Brandy Wine Creek. Ledcor called Finning to rent a drill to deal with the creek that was overflowing its banks. Ledcor learned that the drill had been rented to Rock Construction and that it was not available to it. Ledcor asked Rock Construction to bid. Rock Construction's bid was accepted. The job took a couple of days.

Tumbler Ridge

[146] Ledcor called Peter and asked that Rock Construction submit a bid on a project called Tumbler Ridge. Rock Construction was successful with the bid in November of 2005, and the job started that month. The job was drilling and blasting overburden off of coal seams.

[147] Peter testified that it was his belief that he was asked to submit a bid appreciation for assisting Ledcor on the Brandy Wine project.

[148] Peter testified that to his knowledge all projects that Rock Construction bid went to the lowest bidder.

[149] There was no evidence before me that Peter, while employed by Consbec, learned of projects which he bid for Rock Construction.

Employees of Consbec

[150] Peter is accused of hiring Consbec employees to work for Rock Construction. Those employees named by Consbec are drillers, blasters, and labourers who worked on drilling and blasting projects for Rock Construction and for Consbec.

[151] When Consbec hired these employees, they were hired for a project and then laid off. They were not exclusive employees of Consbec. They were union workers. There was no evidence produced by Consbec that Peter, on behalf of Rock Construction, enticed any of these people to work for Rock Construction while they were working for Consbec. Richard testified that he knew of no occasions where Rock Construction hired employees when they were working for Consbec.

[152] I find that Rock Construction did not hire the hourly drillers, blasters and labourers away from Consbec.

Ron Thomas and Dave Fisk

[153] At the completion of Richard's cross-examination, I asked Richard some questions relating to Ron Thomas and Dave Fisk as follows:

Q So Ron Thomas. Now, did he move around in Canada from project to project on which Consbec had contracts?

A Yes, he did.

Q And he was on salary?

A He was not on salary. He was an hourly foreman.

Q Would he have been laid off between projects?

A He would rarely be laid off between projects. We would have him working from project to project.

Q Then he wasn't free to go off and work for somebody else?

A I guess he would be free, but he stayed and continued to work for us.

Q Okay. Now I think you answered this question yesterday, but I'm going to ask it just to make sure I understood it, were the[re] projects in British Columbia where an area supervisor such as Ron Thomas was not used?

A Yes, some of the initial projects in British Columbia, Ron Thomas would not have been the supervisor. My sense it would have been a BC supervisor. There would have been a gentleman out here that would have been on that job site such as a Dave Fisk.

Q Okay. So you did run with a Dave Fisk?

A Yeah, there would have been a supervisor on the jobs.

Q Okay.

A Yes.

Q Now, we talked about Dave Fisk this morning?

A Yes.

Q So he would be laid off from time to time; is that correct?

A Yes, he would.

Q And he'd be free to go work with others?

A He would.

[154] Peter best described these workers in his discovery of October 16, 2009 as follows:

Q Were any of them discharged from Consbec that you're aware of for anything other than lack of work?

A Not that I recall.

Q Did any of them, when they were employed by Rock Construction or a successor company, quit Rock?

A Quit?

Q Quit.

A Yes.

…

Q And what were their reasons?

A These fellows are opportunistic. They'll work for whoever is paying the highest, whichever job has the longest duration. I've had -- of the six of them, I can count -- Keith Burroughs, for one, has quit on me twice and is now back on working for me.

[155] I find that Rock Construction did not hire Ron Thomas and Dave Fisk or any other works away from Consbec.

Stuart Mitchell

[156] Consbec alleges that Rock Construction on two occasions attempted to hire Mr. Mitchell while he was working in the Western Division for Consbec.

[157] Mr. Mitchell testified that the first occasion Peter offered him a job was when Peter came to Consbec's office and they went for coffee. Mr. Mitchell did not recall why Peter was there. Mr. Mitchell testified that it was after the I.G. Machine contract. He recalls that Peter slapped him on the shoulder and said "Don't worry Stu, you will get the next one".

[158] The second occasion was in Trail, B.C. at a pre-tender site meeting for general drill, blast, and subcontractors. Mr. Mitchell testified that Peter came up to him, gave him a shot in the arm, and put his arm around him and said "if you ever get tired of those guys, come and see me".

[159] Peter has no memory of meeting for coffee. He denies that he made such an offer to Mr. Mitchell. I conclude that Peter and Mr. Mitchell did meet on the two occasions. However, the alleged offers of employment were made in jest. On the first occasion, Peter had a successful bid and on the second occasion, Peter was being competitive and had an audience.

[160] I find that Peter did not try to hire Mr. Mitchell away from Consbec.

Was Peter in a fiduciary relationship with Consbec and did he owe a fiduciary duty to Consbec?

The Law

[161] There is no definition on which an individual can be said to be a fiduciary that does not rely on examining the role they played in the relationship. The most obvious fiduciary relationships are senior employees and directors of corporations, lawyers and clients, and trustees and their beneficiaries.

[162] In *Canadian Aero Service*, the plaintiff had identified a project which it wished to eventually bid. There was no assurance that the plaintiff would receive the contract. The two defendants who were senior management employees had been working on behalf of the plaintiff corporation, and visiting the foreign country where the contract was to be performed. Over two years had been expended by the plaintiff company planning and preparing for seeking the contract. Political conditions caused the plaintiff to suspend its efforts to obtain the contract. About a year later, the plaintiff resumed its interest. The plaintiff, along with others, was invited to bid.

[163] After the plaintiff resumed its interest in the business opportunity, two of the defendants became major shareholders, directors, and officers of a company whose purpose was to pursue the contract that had been developed and pursued by the plaintiff. The defendant employees had resigned after taking up the shares and the positions with the new company. The new company, along with another company, were invited to bid. In the end, they were successful in obtaining the contract in an amount that one of the defendant employees had recommended to its employer, the plaintiff.

[164] The court concluded at 605-606 that it did not matter that the defendants were not directors of the company:

> Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and

> responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, Principles of Modern Company Law, 3rd ed., 1969, at p. 518 as follows:
>
> > ... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.

[165] In *Canadian Aero Service*, the court concluded that the defendant employees were, though subject to supervision of the officers of the company, in a fiduciary relationship with the plaintiff. The court went on to say at 620:

> The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[166] *Frame v. Smith*, [1987] 2 S.C.R. 99 is frequently cited when considering whether a relationship is fiduciary. It describes a fiduciary relationship as possessing three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power,

(2) That discretion or power can be exercised unilaterally so as to impact the beneficiary's legal or practical interests, and

(3) The beneficiary is particularly vulnerable to the fiduciary holding the discretion or power.

[167] *Frame* is a family law case in which the court had to determine whether existing fiduciary principles should be extended to family law matters relating to custody and the access of parents, in the face of family law litigation.

[168] In *Physique Health Club Ltd. (c.o.b. Physique Fitness Store) v. Carlsen*, [1995] 192 A.R. 330 (Q.B.), rev'd on other grounds, 1996 ABCA 358, an uncle, the principal of the plaintiff, hired his nephew to operate and manage a store in Calgary, Alberta. The other store was located in Edmonton, which the uncle primarily operated.

[169] The nephew was given considerable latitude in operating the Calgary store. He prepared bids for institutional customers. He wrote cheques, negotiated product prices and had cheque signing authority, including writing his own pay cheques and commission cheques. He decided when to take trips to check equipment and to attend trade shows. In running the Calgary store, the nephew purchased 40 percent of the inventory for it. He hired and fired employees, determined the advertising and promotions, and negotiated a lease for the Calgary store. The court found that the nephew had considerable information about the business, which included the plaintiff considering relocation of the Calgary store.

[170] Within two weeks of March 15, 1992, the nephew quit his employment and the nephew and his wife set up a competing business to that of the uncle, 18 blocks from the Calgary store.

[171] On the facts of the case, the court found the nephew to be a fiduciary despite his managerial role due to the nature of the duties he performed and the extent of the authority and latitude given to him as well as the initial relationship of trust that existing between the uncle and the nephew. Further, the court found the nephew did not give the uncle proper notice of his resignation.

[172] The Court of Appeal set aside the finding that the nephew breached those fiduciary obligations by concluding that the nephew did not take a maturing business opportunity from the plaintiff, take confidential business information, or actively solicit

his employer's clients or acquire special or unique knowledge of the industry, making his employer more vulnerable to competition.

[173] In *Barton Insurance Brokers Ltd. v. Irwin*, 1999 BCCA 73, the defendant, Marion Irwin, was employed by the plaintiff holding the title and position of general office supervisor, a position she held for quite some time. The plaintiff had acquired the shares of her previous employer. The plaintiff and her previous employer sold a large volume of household insurance.

[174] Ms. Irwin was on salary. She was often referred to in the litigation as a manager. However, the court viewed her position more as "office administrator" or "supervisor". She did not have the power to hire or fire. She was not a corporate officer, director or shareholder of the plaintiff or its predecessor. She required the permission of the regional administrator for significant expenditure or decisions related to the plaintiff's business.

[175] Ms. Irwin quit her position, taking a position with a competing business. She used her memory to solicit customers of her former employer. It was argued that Ms. Irwin was a fiduciary and that she had breached those duties. The appellate court upheld the trial judge's finding that Ms. Irwin was not a fiduciary. She was an employee instead of a manager, she had minor supervisory duties, and she had no dealings with or responsibility for anything beyond the branch in which she worked. The trial judge found that Ms. Irwin was a "mere employee" and she owed her employer a duty not to take client lists and confidential information, but she was entitled to use her memory and a telephone book to ask people she had dealt as an employee whether they wished to do business with her: para. 20.

[176] In *Barton Insurance*, Mr. Justice Hall, writing for the Court of Appeal observed at para. 18:

> Clearly, an employee has duties to a present employer not to divulge trade secrets or to work against the interests of his or her employer but the duty is not just limited to current employment. After leaving employment, an employee may be obligated not to pursue certain activities to the detriment of the former employer. For instance, it has been usually reckoned to be unfair conduct to permit a former employee to take with him or her customer lists to

> use for solicitation of business or to divulge trade secrets or to seek to appropriate maturing business opportunities of the former employer. On the other hand, I suppose to avoid what might otherwise be a condition of almost involuntary servitude, it has long been held that an employee is free to compete for [customers] with a former employer. As usual in human affairs, the difficulty is in the details and it is often difficult to know where to draw the line.

[177] In *Cariboo Press (1969) Ltd. v. O'Connor*, [1996] B.C.J. No. 275, 1996 CanLII 1553 (C.A.), two employees, Mr. O'Connor and Mr. Campbell, and their company were sued by their former employee, the plaintiff. Mr. O'Connor was the publisher and he had the responsibility for two of his employer's newspapers. Mr. Campbell was described as publisher and marketing director for the plaintiff and for another newspaper. The court stated:

> [4] While [their] titles connote considerable power and authority, and O'Connor's employment contract is framed in expansive terms, there was evidence that these two men were closely controlled by Mr. Grainger. In fact, there is ample evidence to support the following findings of the learned trial judge that:
>
> > Similarly, with the authority of Mr. O'Connor and Mr. Campbell they could not write cheques, they had no company credit cards and they did not even have a petty cash float. Mr. O'Connor and Mr. Campbell were controlled by Mr. Grainger… and no[t] one of them had any independent discretion on company policy or direction.
> >
> > ***
> >
> > Neither O'Connor nor Campbell were either officers or directors of the company and they were not even under the direction of an officer or director since Mr. Grainger was not a director of the company at that time. The evidence is clear that neither Mr. O'Connor nor Mr. Campbell were top management or senior management, and they were management in name only.

[178] A business opportunity arose while Mr. Campbell and Mr. O'Connor were working for their employer to purchase a newspaper with which the plaintiff competed. Both Mr. Campbell and Mr. O'Connor were enthusiastic about an offer of sale of that newspaper and provided Mr. Granger with pro forma projections based on the amalgamation of the newspapers in which they were involved. The plaintiff company rejected the offer and Mr. Granger told Mr. O'Connor and Mr. Campbell to work harder and "blow them out of the water through competition". The plaintiff ceased any interest in purchasing this newspaper. About six months later, Mr.

O'Connor and Mr. Campbell purchased the interest in the business. Mr. O'Connor did not disclose at the time he had an interest in the newspaper and remained with his employer for another six months.

[179] The trial judge concluded, because of their limited authority, Mr. Campbell and Mr. O'Connor were not fiduciaries. The Court of Appeal agreed with the trial judge's findings. The court found that Mr. O'Connor and Mr. Campbell were not prohibited from pursuing the business opportunity of purchasing the newspaper as the court found the plaintiff was not intending to pursue it. What troubled the court was the failure of Mr. O'Connor to disclose his interest in the newspaper while continuing to work for the plaintiff. The court awarded nominal damages against Mr. O'Connor.

Analysis

[180] Peter initially worked exclusively in the Eastern Division. Upon his transfer to the Western Division, he worked exclusively there. Peter had no influence in and did no work in the other divisions of Consbec.

[181] All documents, bids, payrolls, payables, and receivables were sent to and from head office. Peter had no influence over payments, other than to sign off from time to time, as did the superintendent, Ron Thomas, as to the hours worked by the hourly employees on a project. Through Richard, Consbec was aware of all bids that Peter was making.

[182] Peter made no corporate decisions, nor was he asked to participate in corporate meetings. Peter was not party to corporate decisions, making policy for Consbec, hiring and firing employees of Consbec, determining salaries or bonuses, or determining non-union wages in his division. He received no company financial records, or financial statements, and he was not entitled to do so. On behalf of Consbec, Peter could not sign cheques. He could not direct the payment of accounts electronically, or move and transfer Consbec's money from its bank accounts. Peter could not influence the payment of accounts or the transfer of funds. Nor could he

direct Consbec employees, such as Mr. Sawdon, to make payments or transfer funds. Peter had no corporate credit card.

[183] Richard and Peter were in telephone communication, at minimum, daily. Peter was required to prepare a bid for a project he had located using the Excel spreadsheet. He would provide Richard with other information about the project. Richard, using the Excel spreadsheet, would, independent of Peter, calculate a bid. They then discussed their respective bids with each other, made the necessary adjustments and agreed on a bid to submit. If there was a disagreement, Richard made the final decision.

[184] Richard testified that a contract less than $50,000.00 did not require Peter to pass it by him. Richard was unable to identify any such contracts that Peter bid. Mr. Mitchell describes it differently. He testified that the standard practice of Consbec was that Richard allowed managers to take on close, small projects.

[185] There were two exceptions to Peter acting only under Richard's authority. Firstly. Peter sold explosives to Sproule. He asked head office to send an invoice to Sproule for $581.81. Secondly, Peter also sent a letter to Sproule encouraging them to purchase a rock truck. However, Richard testified that providing explosives directly to a customer and encouraging a customer to purchase a truck were not company policy. In other words, Peter was not authorized to take these actions independent of Richard.

[186] In summary, Peter can best be described as an estimator, though Consbec described him as a manager. His duties were limited to managing his own daily activities of work and sometimes project site management and making arrangements for labour.

[187] Prior to working for Consbec, Peter had knowledge and experience in the construction industry. He learned the blasting and drilling business while working for Consbec. In bidding for contracts for Consbec, the information as to Consbec's costs were determined solely by Consbec and Peter had no influence. Peter's job was to

identify projects, to obtain bid plans, and to obtain as much information as possible as to the area where the blasting and drilling was to take place, which would then be measured by Consbec's costs, pre-determined by them.

[188] In April of 2001, the Western Division sales of Consbec were three percent of Consbec's total sales. By April of 2002, they were five percent of Consbec's total sales.

[189] I find that Peter was not a fiduciary. Peter's obligations to Consbec were that of an employee.

Was Peter free to compete with his former employer upon terminating his employment with Consbec?

[190] Peter, together with his wife, Tracy, and Galina incorporated Rock Construction on July 5, 2002. This was a drilling and blasting company that would compete directly with Consbec and other companies in British Columbia. Peter and his wife, Tracy, held fifty percent of the shares and Galina held the other fifty percent. Tracy and Peter were both employed by Rock Construction. Tracy was on the payroll, but did not provide services to Rock Construction.

[191] Galina operates mainly in the Kootenays. Early on, when operating Consbec's Western Division, Peter successfully bid a drilling and blasting contract with Galina on behalf of Consbec. Peter relayed to Richard that Ralph Allen had offered him a job. Peter did not pursue this and, at that time, I conclude he had no intention of pursuing this offer. In one of the discoveries where Peter was questioned, he was asked whether Ralph Allen offered him a business opportunity. Peter said "Yes." This question was really two questions in one: whether Peter had been offered a job and/or a business opportunity. Based on this evidence and Richard's testimony, I have concluded that Ralph Allen did not offer him a business opportunity, but rather offered him a job, a fact that Peter reported to Richard. There was no evidence that Peter pursued it.

The Law

[192] A former employee is entitled to compete with his former employer so long as they are not a fiduciary, are not subject to a restrictive covenant, and do not use confidential information. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, Chief Justice McLachlin for the majority of the court stated at paras. 17-19:

> [17] …The trial judge… took the view that the employees continued to be under a general duty not to compete with their former employer during the notice period.
>
> [18] The majority of the Court of Appeal, by contrast, held that once the investment advisors left RBC, they were no longer under a duty not to compete with it… Generally, an employee who has terminated employment is not prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice (Southin J.A. for the majority). To this general proposition Rowles J.A. may be read as adding the qualification that a departing employee might be liable for specific wrongs such as improper use of confidential information during the notice period. This appears to be consistent with the current law, which restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant: see G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), vol. 2, s. 11.141. Neither of the latter duties is at issue here.
>
> [19] For the purposes of this case, the law may be accepted as summarized by the preceding paragraph. The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.

[193] Competition and mobility is favoured among employees. The court in *Barton Insurance* stated at para. 39:

> [T]he general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, as I noted from the earlier authorities referred to, the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment.

[194] All employees are free to take away with them the skill and knowledge that they learned and acquired on the job. In *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312, the Court of Appeal stated at para. 72:

> [72] A former employee, other than a senior or key employee with fiduciary-like obligations, is free to compete with his or her former employer and to make use of the knowledge and experience acquired while employed so long as he or she does not disclose or make use of the former employer's confidential information, including customer lists removed from the former employer's premises. However, a former employee is entitled to solicit customers of the former employer recalled from his or her memory: see *TOS Insurance Services Ltd. v. Dale & Co. Ltd*., [1988] B.C.J. No. 504 (S.C.), quoted with approval in Barton, supra, at para. 37.

[195] An employee cannot use confidential business information of the employer obtained either before or after the employment has ended. This is exemplified in *Barton Insurance*, where the Court of Appeal, at para. 20, adopted a statement of the trial judge that when Ms. Irwin's employment ended:

> In short, Ms. Irwin was, for the purposes of this case, a mere employee. As such, she owed her employer a duty not to take client lists and confidential information, insofar as these items were recorded in documents and not to make unfair use of the information she acquired while employed by Howat/Barton. She was, however, entitled to recall the people she had dealt with, aided by a telephone book, and ask them if they wished to do business with her in her new location.

[196] Hall J.A. added that "[i]t should not be forgotten that the relationship of employer and employee is based on contract": para. 21.

[197] The test as to whether information is confidential is set out in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, where Mr. Justice La Forest stated at 635-636:

> I can deal quite briefly with the breach of confidence issue. I have already indicated that Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A. N. Clark (Engineers) Ltd.,* [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it...
>
> This is the test applied by both the trial judge and the Court of Appeal. Neither party contends that it is the wrong test. Lac, however, forcefully argued that the courts below erred in their application of the test. Lac submitted that "The real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

[198] As to the third element of the test, there must be proof of the information's misuse of confidential information, and there must be real evidence of its misuse: *Chevron Standard Limited v. Home Oil Company Limited*, [1982] 3 W.W.R. 427 (Alta. C.A.) at 443-444.

[199] Although not automatic, it is possible for employee conduct that fits into the category of future planning to be considered a breach of fiduciary duty to the employer. In *Restauronics Services Ltd. v. Nicolas*, (*sub nom Restauronics Services Ltd. v. Forster*), 2004 BCCA 130, Madam Justice Ryan for the court found the defendant's conduct in bidding on a BCCW contract while employed with Restauronics had crossed the line into a breach of fiduciary duty. At para. 50, citing Geoffrey England, the court set out where the line must be drawn:

> [50] The authors of *Employment Law in Canada* note at [s.]11.131:
>
> > Difficulties have arisen in determining the exact point at which planning and preparation by an employee who is still employed to set up himself or herself in competition with the employer will violate his or her implied duty of fidelity. . . . After all, if it is lawful for an employee to engage in post-termination competition with an employer, it hardly makes sense to hold it unlawful to plan the form that such competition will take. In more recent decisions on point, the courts have held that merely planning to establish a competing business does not *ipso facto* violate the duty, unless it is clear that the employee has already determined to abuse the employer's confidential information or trade secrets in his or her future business or has already begun to canvass the employer's customers or entice fellow employees of the employer to join him or her in the new business. [*Corporate Classic Caterers v. Dynapro Systems Inc.*

> (1998), 33 C.C.E.L. (2d) 58 (B.C.S.C.); *Leith v. Rosen Fuels Ltd*. (1984), 5 C.C.E.L. 184 (Ont. H.C.J.), esp. at 195.]
>
> [Emphasis in the original].

[200] In *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322, Madam Justice Russell stated:

> [198] In any case, I do not find it particularly important when the defendants contemplated the purchase of equipment or when the equipment was actually purchased. I do not find either of these acts fall within the rubric of competition with Zoic BC, even if done by a current employee. They are mere planning.
>
> [199] Counsel for the plaintiff also attempted to establish that in fact Leviathan was negotiating to lease a studio around February 15, well before March 11, 2010, when a lease was actually signed. Again, even if true, this is mere preparation.
>
> [200] Support for this position can be found in *Aquafor v. Whyte, Dainty and Calder*, 2010 ONSC 2733. While the court here was determining whether the personal defendants had breached a fiduciary duty, it discussed what constituted "mere planning." Three engineers who were employed by the plaintiff had leased a premise, commenced building improvements and prepared a business plan in order to establish a new engineering firm. After resigning, but while still employed, they incorporated their company, registered a domain name and applied for the proper authorization certificate. They also advertised for an office assistant. The court found this to be mere planning.
>
> [201] In Ms. Gannon's case, mere planning turned into competition with Zoic BC when Leviathan signed a contract with GEP Productions on February 17, 2010, for work on Eureka season 4. While the contract was signed on behalf of Leviathan by Mr. Adams, Ms. Gannon became an officer and director of Leviathan when it was incorporated on February 22. She was still employed by Zoic BC until March 4, 2010. Certainly, by February 22 at the latest Ms. Gannon was in competition with Zoic BC.
>
> [Emphasis added].

Analysis

[201] I found that Peter did not sabotage Consbec's computer in the Kamloops office, nor did he destroy Consbec's contact list. Consbec provided no proof that Peter took the Excel spreadsheet or the contact list. In fact, it was never established that there was a contact list, or who or what information was on such a list.

[202] Consbec makes much of Peter, through Rock Construction, competing with its customers and clients for whom it has provided drilling and blasting services. However, a successful bid does not make the client or customer the property of Consbec, thus preventing Peter and his companies from making bids for that client or customer's work. Peter testified that approximately 95 percent of the projects for which he bid came from B.C. Bids. A successful bid did not secure repeat business in the blasting and drilling business.

[203] Even where a business concerns contracts such as insurance that are likely to be renewed, an employee may be entitled to solicit business from its former employer's customers: *Barton Insurance*. However, an employee cannot compete with his or her employer during the employment relationship: *Cariboo Press*.

[204] At the same time, this does not prevent the employee from planning for future employment. Although, some actions taken by an employee may impose liability: *Restauronics Services*.

[205] I conclude that Peter, prior to leaving his employment with Consbec, intended to continue in the drilling and blasting business. The "Ralph" on the list found by Trevor could have been Ralph Larson or Ralph Allen, the latter to join in business, the former seeking commercial property for a new business. Peter was in the mere planning stage: See *Restauronics Services Zoic Studiod* . There is no evidence that Peter started to look for work when he was still employed by Consbec. Nor is there any evidence that Peter knew of drilling and blasting opportunities that he was in the process of bidding for Consbec, or knew that Consbec would bid, that he took for Rock Construction. Nor is there any evidence that he was canvassing Consbec's past customers for whom it had done drilling and blasting. I conclude that Peter, after leaving Consbec, relied on B.C. Bids and Ralph Allen to obtain work for Rock Construction. In *Restauronics Services Ltd.*, the court sets out where the line must be drawn:

[206] I dismiss Consbec's claim for damages that Peter breached his contractual responsibilities as an employee.

Was Peter constructively dismissed from his employment with Consbec?

The Law

[207] In order for the court to find that an employee was constructively dismissed, the court must find that the employer made a unilateral change to the essential terms of the employment contract. The question is whether a change was made, and whether the change or breach made was a repudiation of the contract of employment.

[208] In *Farber v. Royal Trust Co*., [1997] 1 S.C.R. 846 at 858-859, Mr. Justice Gonthier for the court stated:

> Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> …
>
> To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

[209] In *Farber*, the defendant eliminated 11 of the 12 regional managers' positions, one of which was Mr. Farber's position. The company offered Mr. Farber some money and a managerial position in a branch that had problems that would cause significant decrease in Mr. Farber's income. The court found that Mr. Farber had been constructively dismissed.

Analysis

[210] I have found that the purpose of Peter's job was to obtain contracts by bidding. His job was not to supervise Consbec's projects, although that occurred from time to time. The only time that this became an issue was when Peter learned that Ron Thomas would report to head office rather than to him. Peter acknowledged that no other terms or conditions of his employment changed during the course of his employment.

[211] I find that Peter was not constructively dismissed.

Was Peter obliged to give Consbec notice of his resignation?

[212] Peter was obliged to provide Consbec with notice of his resignation. He did not give notice.

The Law

[213] The purpose of notice is to provide time for the employer to make arrangements to have the work that the departing employee looked after by others, or to find another employee.

[214] In *Aquafor Beech Ltd. v. Whyte,* 2010 ONSC 2733 at para. 36, the court stated:

> [36] The obligation to give reasonable notice is a general obligation of all employees. Failure to give reasonable notice is not in itself a breach of fiduciary duty, nor does it give rise to the remedies which flow from a breach of fiduciary duty.

[215] In *Aquafor Beech*, the defendants were senior engineers and partners in the business who left the plaintiff company and established their own firm and the court found them to be fiduciaries based on their seniority, responsibilities, and authority to deal with clients. In that case, the plaintiff failed to establish that the three to four weeks period of notice of resignation was insufficient in the circumstances to establish breach of fiduciary duty with respect to notice or breach of general employee duty to give reasonable notice.

[216] In *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.*, [1993] 45 C.C.E.L. 276 (Ont. Gen. Div.) at 281-282, Mr. Justice Chapnik found:

> An employee is obligated by law to give reasonable notice of termination to his or her employer, even absent a written contract of employment. If the resignation is voluntary, the notice to which the employer is entitled becomes a matter of law, not merely a matter of conscience or responsibility on the part of the employee. The main purpose of the notice of resignation is to allow the employer a reasonable time to find a replacement.

[217] At the appellate level, in *Physique Health Club,* the Alberta Court of Appeal dealt with the notice required of a fiduciary. Citing the principles in *Sure-Grip*, the court found the appellant was obliged to give his employer six weeks' notice. This was despite the fact that the appellant was not replaced, other employees took on some of the appellant's responsibilities, and a second sales person was hired.

[218] In *RBC Dominion Securities*, the court accepted the trial judge's finding that the investment assistant's notice period should be two and a half weeks.

[219] The length of notice is dependent upon the employee's responsibilities, length of service, salary, and the time it would reasonably take the employer to replace the employee, or steps to adapt to the loss as a result of the employee's departure: *Sure-Grip* at 282.

Analysis

[220] Peter worked for Consbec for approximately five years. He was hired to "grow the business", and that never changed during the entire time that Peter worked for Consbec. He was dispatched to the Maritimes and later to the Western Division to open up opportunities for Consbec in the drilling and blasting business. In order to do so, he was required to look for business. After locating a project and searching for information about the project, in consultation with Richard, a bid was made. The bid was made based on Consbec's cost. Although Peter was the only employee, both in the Maritimes and in the west, it was necessary to have an employee in the area so as to do the work that I have described.

[221] Peter owed Consbec notice to give Consbec sufficient time to replace him. As a result of Peter's abrupt exit, Consbec sent Trevor to assess the situation and make sure that potential customers knew that, despite Peter's departure, Consbec was still doing business in the west. Mr. Mitchell was moved in quickly and took the position that Peter held. Had Peter given the notice that he was required to give, at law, Consbec may have hired a new employee. They argue that they were left with no other choice but to move Mr. Mitchell, who was experienced in the Central Division, to Kamloops to look after Consbec's business interests.

[222] There is no point in trying to determine the proper notice that Peter should have given Consbec. All that would do would lead to speculation as to what Consbec would have done and whether the notice was sufficient, given the factors set out in *Sure-Grip*.

[223] Consbec seeks damages on the cost of bringing Trevor to Kamloops and moving Mr. Mitchell and his family to Kamloops.

[224] Peter argues that Consbec must prove its damages. He argues that the notice he should have been required to give is two weeks. He argues that there was little disruption in business for Consbec as all the information for active projects was known at head office. The foreman was on site at the Langvista 1 project and was reporting to Jeff Walker. I conclude that there was no disruption to the Langvista 1 project. Further, Peter pointed to the fact that there is no loss of earnings as a result of his not giving reasonable notice.

[225] However, that is not the test. The test is one of opportunity, as stated in *Sure-Grip* and demonstrated in *Aquafor Beech* at para. 40:

> The notice period gave Mr. Maunder an opportunity to work through transition matters with Mr. Whyte and Mr. Dainty. It gave him an opportunity to retain Brad Beech to take over some of Mr. Whyte's projects. It gave him an opportunity to retain a headhunter to hire new employees, although it is clear to me that Mr. Maunder did not do so until well after the notice period. There is nothing to suggest that a longer notice period was required or would have made any difference.

[226] This opportunity was not given to Consbec.

[227] Consbec has been unable to provide the receipts for travel for Trevor and Mr. Mitchell to Kamloops. When Consbec moved its office in 2012 to its present location, the documents were accidentally thrown out. Mr. Sawdon, in consultation with Mr. Mitchell and Trevor, was able to estimate those expenses.

[228] Peter objects to these estimates since, knowing that these documents existed, at no time in its list of documents, did Consbec list them. I am prepared to consider Mr. Sawdon's evidence as to these costs, as well as Mr. Mitchell's evidence, who was able to recall his expenses and their specifics as reimbursed by Consbec.

[229] What I must assess are the damages that Consbec suffered as a result of Peter leaving his job without notice.

[230] Mr. Sawdon estimated the cost of having Trevor come to British Columbia at $11,135.00. It took Trevor two and a half days to drive from Sudbury to Kamloops. He remained in Kamloops for approximately one month. Mr. Sawdon calculated Trevor's costs in his testimony as follows:

> Q And what types of expenses did you include in those calculations?
>
> A Beginning with Trevor, Trevor drove to British Columbia. It's approximately 3600 kilometres. Our per kilometre payment is about well it is at that time 40 cents.
>
> Q 40?
>
> A 40.
>
> Q 40 cents per kilometre?
>
> A 40 cents per kilometre.
>
> Q Okay?
>
> A He would have been unproductive as he was driving out and he would have been paid at approximately $40 per hour, assuming he drives a hundred kilometres an hour it would have been 36 hours and he would have had a per diem of approximately $125 a day to cover his room and board for the three days that it took him to come out. And that simply would be multiplied by two to reflect his return to Sudbury. And while he was in Kamloops, I believe his Sudbury to Sudbury time was 43 days, I believe, and so 37 of those days he would have been actually in Kamloops, and I simply went by the per diem of $125 a day which appears reasonable.

[231] I find Mr. Sawdon's calculations and estimations reasonable Consbec incurred a cost of $11, 135.00 to place Trevor in British Columbia.

[232] Mr. Mitchell testified that Consbec reimbursed him $9,781.11 for expenses he incurred in selling his house in the Sudbury area. Those expenses consisted of $8,167.00 for a commission he incurred and the balance was for legal expenses. These expenses were documented. Mr. Mitchell testified that he incurred moving expenses in the amount of $12,000.00 to $13,000.00 with AMJ Campbell Movers to move the Mitchells' possessions to British Columbia. Mr. Mitchell said he paid for these expenses and was reimbursed by Consbec. Mr. Mitchell said he incurred the sum of $5,000.00 for the land transfer tax for the purchase of his home in Kamloops and Consbec reimbursed him. Mr. Mitchell said he was paid approximately $29,700.00 for travel expenses between Sudbury and Kamloops. That amount represents nine trips by air, six of which were promised by Consbec to the six-member Mitchell family to return to Ontario for Christmas. The Christmas trip represents about $12,000.00. This totals $56,981.11. Taking an average of the proposed moving expenses and excepting flying the Mitchell family back to Ontario for Christmas, I find that, as a result of Peter's departure and failure to give notice to Consbec, that Consbec incurred damages in the amount of $44,981.11 to replace Peter with Mr. Mitchell.

[233] Had Peter given reasonable notice to Consbec of his resignation, this amount might have been less. Consbec may have hired somebody in British Columbia. Peter's actions prevented them from making that choice and considering other options.

[234] I assess damages against Peter for the failure to give reasonable notice in the amount of $56,116.11.

Did Peter and Tracy engage in a fraudulent conveyance of properties so as to avoid a potential judgment?

[235] When the Ontario lawsuits were started, Tracy and Peter were married. Tracy was not named as a defendant in the lawsuits. At that time, they owned two pieces

of real property (together, the "Old Stage Coach Road Property"), their principal residence located in Knutsford, near Kamloops, British Columbia. On October 30, 2008, Peter and Tracy transferred the Old Stage Coach Road Property to Tracy.

[236] Tracy testified that she recalled the transfer of the property to her, but had no recollection as to why the real property was transferred to her. There was no consideration for the transfer from Tracy to Peter. She testified to receiving no independent legal or accounting advice.

[237] Peter claims that the transfer to Tracy was a result of accounting advice received by Peter and Rock Construction's chartered accountants, KPMG. KPMG became Peter and Rock Construction's accountants after he purchased Galina's interest in Rock Construction. To support his claim that the transfer occurred as a result of accounting advice, Peter entered as an exhibit a letter dated November 2, 2010 from KPMG and signed on behalf of KPMG by Brent Ashby, a partner of KPMG. The letter is addressed to Peter. The letter states:

> We confirm that on October 31, 2008 the property located at 5877 Old Stage Coach Road in Knutsford, BC, held jointly by Peter Walker and Tracy Walker, was transferred to full ownership by Tracy. We had advised the Walkers to complete this transfer as part of personal tax planning for them.
>
> The property is 320 acres in size and a portion of the property is leased for grazing purposes, In addition, a number of pieces of equipment owned by P&T Walker Capital Ltd. (P&T) are stored on this property and rent is charged to P&T for this service. Tracy is in a lower tax bracket than Peter and as a result some tax savings exist by having the rental and grazing income reported by Tracy rather than Peter.
>
> The property may also quality for the $750,000 capital gains exemption if it meets the criteria as Qualified Farm Property at some point in the future. We anticipate that Peter may use his lifetime capital gains exemption by selling shares of a qualified small business corporation and that Tracy may be able to utilize her lifetime capital gains exemption on the sale of the Knutsford property if it meets the appropriate criteria. Again, this could result in significant tax savings for the Walkers as a result of this property transfer.
>
> If you have any questions with regards to this matter, please do not hesitate to contact the writer.

[238] Mr. Ashby testified. He stated that he provided tax advice to Peter and the Rock Companies starting in or about 2004 or 2005. Prior to that, another accountant,

now retired with the firm, provided the accounting services. Mr. Ashby also reviewed the personal income tax returns of Peter and Tracy that KPMG prepared for them.

[239] Mr. Ashby wrote the letter at the request of Peter. At the time of writing the letter, he was unaware of the allegations of fraudulent conveyance or fraudulent preferences in the Ontario action or this action, and he remained unaware until he spoke to defendants' counsel. He was not aware that Tracy was a defendant in this lawsuit until he was asked to testify, which was three or four months prior to this trial.

[240] Despite Consbec asking counsel for the defendants to have Mr. Ashby bring his entire file relating to Rock Construction, Tracy, and Peter, Mr. Ashby was unable to state when the tax advice set out in the letter was given. Mr. Ashby knew that the advice had not been given to Tracy as he had not met her. A review of the file confirmed that Tracy had no meetings with other accountants in the firm.

[241] Mr. Ashby was asked to come back with his entire file. He took the stand again, said he had reviewed the file and he had the file with him. Mr. Ashby testified that there were no discussions about the transfer of the Old Stage Coach Road Property. He looked back from 2006 through 2009 and, although there were some general comments on tax planning, there was no reference to the transferring of the Old Stage Coach Road Property as a tax plan for Tracy and Peter. He confirmed that there were no notations in the file from Peter providing KPMG with instructions to transfer from Peter and Tracy to Tracy as a tax plan. I can only come to one conclusion; that is, that Peter placed this letter before the court so as to deceive the court.

[242] In order for the court to conclude that the transfer of the Old Stage Coach Road Property was a fraudulent conveyance pursuant to the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, Consbec must show the transfer was intended to delay, hinder, or defraud creditors:

> **Fraudulent conveyance to avoid debt or duty of others**
>
> **1** If made to delay, hinder or defraud creditors and others of their just and lawful remedies

> (a) a disposition of property, by writing or otherwise,
>
> (b) a bond,
>
> (c) a proceeding, or
>
> (d) an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[243] In *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.*, [1995] B.C.J. No. 1814 at paras. 25-26, 34 C.B.R. (3d) 241 (S.C.), Madam Justice Baker, at paras. 25-26, stated that the applicant:

> [25] …need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made. *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).
>
> [26] All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others. *Canadian Imperial Bank of Commerce v. Ash*, (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); *C.I.B.C. v. Boukalis*, (1987) 11 B.C.L.R. (2d) 190 (C.A.).

[244] Peter and Rock Construction were involved in litigation in Ontario with Consbec at the time the Old Stage Coach Road Property was transferred. No reason has been placed before the court for the transfer. It was not truthful that it was for tax planning purposes, which is the explanation that Peter gave for its transfer. No other explanation has been given. I find that Tracy did not know why it was transferred to her.

[245] I find that the transfer is void as against Consbec. However, much of this is now moot. Peter, subsequent to this transfer, purchased land in his name alone. Since the transfer, he and Tracy have separated. They entered into a separation agreement dated June 4, 2013. In that agreement, Tracy agrees that she will transfer the Old Stage Coach Road Property to Peter. At the time of trial, this had yet to take place.

[246] As requested by Consbec, I order that the southeast ¼ of Section 9, Township 18, Range 17, W6M, KDYD and Lot 1, Section 3, 4 and 10, Township 18,

Range 17, W6M, KDYD, Plan KAP86396 shall not be disposed of by either Tracy or Peter, or further encumbered until this judgment is satisfied and the appeal period has expired.

Punitive and exemplary damages against Peter and the defendants

[247] Consbec seeks punitive and exemplary damages against the defendants, save for Tracy. When I asked Consbec's counsel which of the defendants it was seeking judgment against, I was told the two primary defendant companies, Rock Construction and P&T Walker Capital Ltd. (now PA Walker Capital Ltd.). When I asked about the other three; that is, 1627436 Ontario Limited, 0794940 B.C. Ltd. and Walker Investments Ltd., I was told that the Ontario numbered company, the B.C. numbered company and Walker Investments Ltd. were all subject to disclosure and they were named so as to prevent the transfer of assets among the companies.

[248] I also asked what claim they were seeking against Tracy. Counsel for Consbec advised that it related only to the fraudulent conveyance, as Tracy no longer had an interest in Peter's companies.

[249] I exclude Tracy when I refer to the defendants, except as it relates to the fraudulent conveyance.

[250] The purpose of punitive and exemplary damages is stated in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. The court stated at 1208-1209 that, in contrast with aggravated damages, punitive damages are not compensatory in nature:

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?
>
> [Emphasis added]

[251] In this case, the only damages I award are damages that reflect the cost to Consbec to replace Peter when he did not provide notice to Consbec upon quitting its employment.

[252] I concluded that Peter was not fiduciary. I also concluded Peter did not take client lists or take Consbec's spreadsheets so as to compete unfairly against Consbec. I found he did not breach his contractual obligations to Consbec, other than failing to give Consbec notice.

[253] I did find that the transfer of the Old Stage Coach Road Property was a fraudulent conveyance. However, that is a discreet issue and can be dealt with in an award of costs. It does not lend itself to the assignment of punitive damages.

[254] I make no award for punitive damages. This claim is dismissed.

Outstanding Issues

Consbec's Sproule Creek Holdings' Write-Off in the amount of $28,069.94

[255] Consbec seeks that Peter pay the outstanding Sproule account that Consbec wrote off. This claim was not mentioned in Consbec's written submissions, nor was there evidence that supported such a claim. It is dismissed.

Tracy's Salary from Rock Construction

[256] The plaintiff is claiming $120,000.00 for four years of Tracy's salary that was paid to her unlawfully. As I did not award the over $1 million damages sought by Consbec, I need not deal with this claim. I will leave this matter to Tracy, Peter, Rock Construction, and the Canadian Revenue Agency to sort out.

[257] Peter, at one of his examinations for discovery, was not truthful about the work that Tracy did for Rock Construction. He described a number of duties that Tracy performed for Rock Construction but, in another discovery, he acknowledged that Tracy did not provide any work for Rock Construction. At trial, he acknowledged that also.

Peter's Relationship with Rick Walker and his Sons

[258] Rick testified that he and Peter's father no longer speak and no longer enjoy the hunting cabin together.

[259] Consbec provided evidence which, by inference, was an attempt to paint a negative picture of Peter, none of which I accept. Some examples are as follows:

[260] While Peter was a manager in the Maritimes, he was involved in a motor vehicle accident in one of Consbec's vehicles. Peter was on his way to work and the accident happened on a slippery road. Richard was aware of it, as was Tracy. There was no evidence that Peter was negligent or misbehaved behind the wheel or failed to report it. There were no personal injuries as a result of the accident.

[261] Richard gave evidence that there was a problem on one of the jobs in the Eastern Division that required him to travel to the Maritimes to attend to the problem. Consbec, apparently, was kicked off one of its projects. The contract was not lost. Richard acknowledged in cross-examination that Peter reported it to him. Richard also acknowledged that it was a situation that was not caused by Peter.

[262] Consbec made much of Peter using a "shot-gun" clause in the agreement with Ralph Allen to buy Ralph Allen's interest in Rock Construction. The questions put to Peter and the inference to be drawn from that fact was that Peter could not have pursued the Rock Construction business opportunity without Ralph Allen. Peter acknowledged this. However, the inference is that Peter participated in a sharp business practice. I do not see sufficient evidence to support this.

[263] George Pete and Dixie Pete both worked for Galina.

[264] Dixie worked for Rock Construction and Galina billed Rock Construction for her services. When Rock Construction bought out Galina, Mrs. Pete was hired by Rock Construction. Peter testified that this was with Mr. Allen's consent. George Pete was also offered a job with Rock Construction by Peter, which he accepted. Peter testified that he did not speak to Ralph Allen in advance about hiring George Pete. I gather that I was to infer that Mr. Allen was upset about this and that this was a sharp business practice. Ralph Allen was not called by Consbec to confirm whether he was offended by this or not. Peter testified that he and Mr. Allen are still good friends, and there was no evidence before me to the contrary.

Costs

[265] Neither the plaintiff nor the defendants were totally successful. Consbec was successful in obtaining damages for Peter not giving proper notice to Consbec when he quit his job. Consbec was successful against Peter for the damages he sought for wrongful dismissal. Consbec was successful in the fraudulent conveyance claim. Peter and Rock Construction were successful against Consbec in the large claim for breach of fiduciary duty, damages against Peter for his employment obligations, and punitive damages.

[266] I would ask that counsel arrange to address me on the matter of costs.

Summary

[267] In summary:

1. Peter was not a fiduciary of Consbec; he was an employee;

2. Peter did not breach his contractual responsibilities with Consbec;

3. There are no damages to be calculated in accordance with a breach of fiduciary duty or a breach of contractual responsibilities;

4. Peter was obliged to give his employer, Consbec, notice terminating his employment. Consbec is awarded damages in the amount of $56,116.11 for Peter's failure to give notice;

5. Peter's claim for damages for constructive dismissal is dismissed;

6. Peter engaged in the fraudulent conveyance and the southeast quarter of Section 9, Township 18, Range 17, W6M, KDYD, and Lot 1, Sections 3, 4, and 10, Township 18, Range 17, W6M, KDYD, Plan KAP86396 shall not be disposed of by either Tracy or Peter, or further encumbered until this judgment is satisfied and the appeal period has expired; and

7. Counsel is to address me on costs.

"H.C. Hyslop J."

HYSLOP J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Consbec Inc. v. Walker,*
2016 BCCA 114

Date: 20160311
Docket: CA42390

Between:

Consbec Inc.

Appellant/
Respondent on Cross-Appeal
(Plaintiff)

And

Peter Walker, Rock Construction & Mining Inc.,
and P&T Walker Capital Ltd.

Respondents/
Appellants on Cross-Appeal
(Defendants)

And

Tracy Walker, 1627436 Ontario Limited, 0794940 B.C. Ltd.,
and Walker Investments Ltd.

(Defendants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated November 4, 2014 (*Consbec Inc. v. Walker*, 2014 BCSC 2070, Kamloops Docket 44716).

Counsel for the Appellant: N.A. Keith
G. Cameron

Counsel for the Respondents: R.V. Aldridge
M.D. Preston

Place and Date of Hearing: Vancouver, British Columbia
November 5, 2015

Place and Date of Judgment: Vancouver, British Columbia
March 11, 2016

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Goepel

Summary:

Appeal and cross-appeal involving an employment relationship. Consbec argues that the trial judge erred in finding that W. was not Consbec's fiduciary and that W. did not breach the common-law duties of confidentiality, good faith, and fidelity that he owed Consbec as its employee. In the cross-appeal, W. argues that the judge erred in determining the amount of damages he owes Consbec for his failure to give notice before terminating his employment. Secondly, W. argues that the evidence does not support the judge's finding that he engaged in a fraudulent conveyance. Held: Appeal dismissed; Cross-appeal allowed. The judge's factual findings support that W. was not Consbec's fiduciary and did not breach his common-law duties as Consbec's employee. In making those findings, the judge was entitled to accept some, none, or all of W. evidence. Regarding the cross-appeal, the judge erred in awarding Consbec damages for W.'s failure to give reasonable notice. While W. should have given Consbec one month's notice, the damages Consbec suffered as a result of his failing to do so were totally offset by what Consbec saved in not having to pay his salary during that period. In concluding there was a fraudulent conveyance, the judge misapprehended the evidence.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

[1] This appeal and cross-appeal arise out of the termination of an employment relationship between Consbec Inc. and Peter Walker ("Peter"). Consbec is a family-owned company, whose president and director is Peter's uncle, Reginald Walker ("Rick"). Richard Walker ("Richard") and Trevor Walker ("Trevor") are Rick's sons. Richard is the general manager and vice-president of Consbec. Tracy Walker ("Tracy") was Peter's wife at the time of the events in issue. For narrative convenience, I will refer to members of the Walker family by the names they commonly use.

[2] Consbec employed Peter for five years, the last three of which Peter worked in British Columbia. In 2002, Peter left Consbec without giving notice and went into competition with Consbec though his company, Rock Construction & Mining Inc.

[3] Consbec commenced an action against Peter for breach of fiduciary duty, breach of confidence, and breach of contract; Tracy and Peter's companies were also named as defendants. Within that action Consbec alleged that Peter had

fraudulently conveyed his interest in real property to Tracy to avoid a potential judgment. Peter counterclaimed for wrongful (i.e., constructive) dismissal.

[4] The trial judge, Madam Justice Hyslop of the Supreme Court of British Columbia, dismissed the majority of Consbec's claims and Peter's counterclaim. She held that Peter was not Consbec's fiduciary and had not breached his common-law duties as an employee. However, the judge held that Peter had failed to give Consbec reasonable notice before terminating his employment; the judge awarded Consbec damages in that regard. The judge also found that Peter had fraudulently conveyed property to Tracy; the judge voided that transfer as against Consbec. The judge's reasons are indexed as 2014 BCSC 2070.

[5] In its appeal, Consbec contends that the trial judge committed a number of errors in dismissing Consbec's claim against Peter for breach of fiduciary duty. In the alternative, Consbec argues the judge erred in finding that Peter had not breached his common-law duties of confidentiality, good faith, and fidelity he owed as an employee.

[6] In his cross-appeal, Peter contends that the trial judge erred in: (a) finding he had engaged in a fraudulent conveyance; (b) the manner in which she determined damages for his failure to give reasonable notice; and (c) her ruling on costs.

[7] For the reasons that follow, I would dismiss the appeal and allow the cross-appeal.

FACTUAL BACKGROUND

[8] What follows is intended as general background. Other aspects of the trial record are discussed later, in relation to specific grounds of appeal.

Peter's Role with Consbec

[9] Rick founded Consbec as a federally-incorporated company in 1980. Consbec offers blasting and drilling services to the open pit mining industry, as well as to pipeline, quarrying, and other operations that require rock excavation.

Consbec's head office—Central Division—is in Northern Ontario. Consbec has an Eastern Division in the Maritimes.

[10] In 1997, Rick hired Peter to work for Consbec. Initially, Peter worked at Consbec's head office. In June 1998, Peter went to Moncton, New Brunswick, as manager of the Eastern Division. In May 1999, Consbec opened a Western Division and Peter went to Kamloops, British Columbia to manage that office. The Western Division office was a 5-foot square space in front of a welding shop. The Western Division closed in 2009.

[11] Peter did not have a contract of employment with Consbec and his duties and responsibilities were never reduced to writing. Although Consbec sought to portray Peter as a "manager", the trial judge found that he "can best be described as an estimator", whose duties were "limited to managing his own daily activities of work and sometimes project site management and making arrangements for labour": para. 186.

[12] Peter's role was to solicit blasting and drilling contracts. Peter determined which projects were available to bid on from BC Bid, a website that lists public sector projects that provincial government departments, municipalities, etc. are undertaking. Peter then determined which contractors would likely bid on a particular project and contacted them to determine whether they would like a bid (i.e., quote) from Consbec. To prepare a bid, Peter found out as much information as he could about a particular job.

[13] Peter prepared bids using a Microsoft Excel spreadsheet that Richard had developed for Consbec. Peter provided Richard with the information he obtained about a particular project and Richard used the spreadsheet to independently prepare a bid. Peter and Richard discussed their respective bids and, if necessary, made adjustments; Richard had the final say. Richard was aware of all the bids Peter made. In the event that a formal contract was required after a bid was accepted, that contract was signed at Consbec's head office.

[14] From time to time, Peter signed-off with respect to the hours persons hired for a specific project worked. He sent all payroll and accounting documents to head office.

[15] Peter received an annual salary ($73,000 in the last full year); bonuses were discretionary. Peter did not have any influence over bonuses. Peter did not have a company credit card; he charged Consbec-related expenses to his personal credit card and was reimbursed. Peter used a company truck that head office paid for directly. Consbec's head office also paid directly for the office space in Kamloops.

[16] Peter made no corporate decisions, nor was he asked to participate in corporate meetings. He did not have authority to sign Consbec cheques or make electronic transfers or payments from the company's accounts.

Peter's Departure from Consbec and its Aftermath

[17] On June 10, 2002, Peter sent Rick a resignation letter dated that day. Neither Rick nor Richard had prior notice that Peter was planning to leave. Peter left the office that day and did not return or have any further contact with Consbec as an employee. He left the company truck locked and parked at the office.

[18] The trial judge rejected Consbec's claim that Peter took with him office equipment and a blasting machine. She also rejected Consbec's claims that Peter took Consbec's Excel spreadsheet, took or destroyed Consbec's client (contact) list, and wiped an office computer clean.

[19] As a result of Peter's resignation, Consbec temporarily relocated Trevor to Kamloops. Trevor drove to Kamloops from Sudbury, Ontario and remained in Kamloops for a little over one month. He then drove back to Sudbury.

[20] Based on documents Trevor found at the Western Division office and a draft resignation letter later found on Peter's computer in that office, the trial judge found that Peter had been making plans to go into the drilling and blasting business either on his own, or with Ralph Allen, the principal of Galena Contractors Ltd.

[21] After Trevor went to Kamloops, Richard asked Stuart Mitchell, the then manager of the Central Division, if he was interested in becoming manager of the Western Division. Mr. Mitchell agreed to move to Kamloops. In late June or early July 2002, Mr. Mitchell flew to Kamloops to run the Western Division office. He later purchased a home in Kamloops and drove there from Sudbury with his wife and children.

[22] The trial judge rejected Consbec's claim that Peter twice attempted to hire Mr. Mitchell while Mr. Mitchell was managing the Western Division. By the time of trial, Mr. Mitchell had returned to Ontario to manage the Central Division.

[23] On July 5, 2002, Peter incorporated Rock Construction in British Columbia. Peter and Tracy owned 50% of the shares of Rock Construction. Gelana Contractors owned the remaining 50% of the shares. Like Consbec, Rock Construction was in the blasting and drilling business and the two companies competed for work.

[24] Peter purchased Galena Contractors' shares in Rock Construction in August 2003. In December 2003, Peter incorporated a federal company under the same name and changed the name of the provincially incorporated company to P&T Walker Capital Ltd.

Related Litigation in Ontario and the Fraudulent Conveyance Claim

[25] Based on the material filed on this appeal it is difficult to set out a complete and accurate chronology relevant to the fraudulent conveyance claim Consbec brought; i.e., the litigation between Consbec and Peter in both Ontario and British Columbia, and Peter's transfer to Tracy of his interests in several properties. Direct testimonial support for some of the dates can be found in the trial transcript. However, there were several occasions on which witnesses were unable to recall whether a date counsel suggested to them was correct. As well, on occasion, counsel would refer in submissions to when an event occurred on the basis, it would appear, that the date was uncontroversial. Based on all available information,

including judgments rendered in the Ontario litigation, I consider the timeline that follows to be accurate.

- December 19, 2002: Peter and Tracy purchase property on Gleneagles Drive in Kamloops in joint tenancy.
- April 10, 2003: Consbec commences an action in the Ontario Superior Court of Justice against Peter and his companies. (See *Consbec v. Walker*, [2006] O.J. No. 5044 at para. 1 (S.C.J.) [*Consbec Ont. #1*]. Reference is made in para. 3 of *Consbec Ont. #1* to a counterclaim Peter filed on July 21, 2003.)
- January 5, 2004: Peter transfers his interest in the Gleneagles Drive property to Tracy.
- October 27, 2006: Consbec's Ontario action is dismissed on procedural grounds, i.e., for failure to comply with a discovery-related order: see *Consbec Ont. #1* at para. 6.
- November 17, 2006: Consbec commences a new action in the Ontario Superior Court of Justice against Peter and his companies. (See: *Consbec Ont.* #1 at para. 7.)
- December 18, 2006: A judge of the Ontario Superior Court of Justice dismisses Peter's application to have Consbec's second action dismissed as an abuse of process and grants Consbec's application to consolidate that action with Peter's earlier counterclaim: see *Consbec Ont. #1* at para. 28.
- 2006 and 2007: Peter and Tracy purchase two properties on Old Stage Coach Road in Knutsford, near Kamloops, in joint tenancy.
- October 31, 2008: Peter transfers his interest in the Old Stage Coach Road properties to Tracy.
- September 15, 2010: Consbec commences the present action in the Supreme Court of British Columbia and obtains certificates of pending

litigation against the Old Stage Coach Road properties. In its notice of civil claim Consbec alleges Peter fraudulently conveyed those properties to Tracy.

- May 12, 2011: Consbec's Ontario action is stayed. (See: *Consbec Inc. v. Walker*, 2011 ONSC 2944; the stay was based on British Columbia being the *forum conveniens*.)
- April 20, 2012: Peter purchases property in Knutsford for $400,000. That property is registered solely in his name.
- September 2012: Peter and Tracy separate. They entered into a separation agreement in which Tracy agrees to transfer the Old Stage Coach Road properties to Peter.
- December 2013: Tracy transfers the Old Stage Coach Road properties to Peter. (The trial judge was in error in para. 245 of her reasons when she stated those transfers had not taken place as of May 4, 2014, the date on which she reserved judgment.)

[26] In finding that Peter's transfer of his interest in the Old Stage Court Road properties to Tracy in 2008 was a fraudulent conveyance the trial judge rejected evidence Peter called that the transfer was made for income-tax-related purposes on the advice of Peter's accountant.

GROUNDS OF APPEAL / CROSS-APPEAL

[27] In its factum, Consbec states its grounds of appeal as follows:

> 43. The trial judge erred in relying on Peter Walker's evidence in respect of any material issue, having found that he was untruthful, that he gave contradictory evidence on discovery and at trial, and that he had attempted to deceive the court.
>
> 44. The trial judge erred in finding that Peter Walker was not a fiduciary. In particular, the trial judge ignored relevant factors and over-emphasized irrelevant factors in reaching her conclusion, and erred in relying on any aspect of Peter Walker's evidence.

> 45. The trial judge erred in failing to place the onus on Peter Walker to rebut Consbec's claim for a damages or an equitable remedy for breach of fiduciary duty.
>
> 46. The trial judge erred in finding that Peter Walker did not breach his fiduciary duties and use Consbec's confidential information. In particular, the trial judge erred in relying on any aspect of Peter Walker's evidence.
>
> 47. The trial judge erred in finding that Peter Walker did not breach his contractual duties of loyalty, good faith and fidelity. Again, the trial judge erred in relying on any aspect of Peter Walker's evidence.
>
> 48. In light of these errors, the trial judge erred in failing to awarding [*sic*] a remedy for Peter Walker's breach of fiduciary duty, breach of confidence, and breach of contract.

[28] On the cross-appeal, Peter contends that the trial judge: (a) misapprehended the evidence his accountant gave concerning why he transferred his interest in the Old Stage Coach Road properties to Tracy in 2008; and (b) erred in determining the damages arising out of his failure to give Consbec reasonable notice that he was terminating his employment.

ANALYSIS

Consbec's Appeal

Reliance on Peter's Evidence

[29] The principal theme of several of Consbec's grounds of appeal is that it was not open to the trial judge to rely on any of Peter's evidence. The lynchpin of Consbec's argument is the fact that the judge rejected Peter's evidence that he transferred his interest in the Old Stage Coach Road properties to Tracy for tax-planning reasons. In making that finding the judge found that Peter tendered a letter his accountant wrote in 2010 about the property transfers in order "to deceive the court": para. 241. Consbec's position is that Peter was a person who "was prepared to say anything that served his purposes" and that "[h]is evidence should not have been credited in any respect."

[30] Later in these reasons I will explain why the trial judge's finding that Peter attempted to deceive the court was based on a misapprehension of evidence and,

therefore, cannot stand. However, even with that specific finding, the door was not closed to the judge accepting other aspects of Peter's evidence.

[31] The trial judge's reasons contain a detailed and comprehensive review of the evidence. In the course of finding the facts she accepted some but not all of the various witnesses' testimony. Examples of this are:

- The judge rejected Peter's evidence that before he came to work for Consbec, Richard promised him that eventually he would be appointed the company's general manager; the judge preferred the testimony of Richard and Rick that no such promise was made: para. 48.
- The judge preferred Mr. Mitchell's evidence to that of Trevor in regard to the state of the Western Division office after Peter left: para. 70.
- The judge found Richard overemphasized the importance of certain information to a successful bid and inaccurately used the word "clients" to describe companies that had accepted a Consbec bid: para. 76.
- The judge rejected Richard's evidence that Peter had used Consbec's confidential information in preparing a successful bid on behalf of Rock Construction: para. 139.
- The judge rejected evidence Consbec called in an effort to paint a negative picture of Peter, some of which Richard gave: paras. 258-264.

[32] It is well-established that trial judges are best placed to determine issues of credibility; they occupy a "singular perch" in that regard: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. As Mr. Justice Dickson (as he then was) stated in dissent in *Taylor v. Asody*, [1975] 2 S.C.R. 414 at 423, a trial judge has,

> the great advantage of seeing and hearing the witnesses, of observing demeanour, noting nuances of expression, detecting dissimulation. These are aids to judgment which cannot be reflected in the written record of a case and are, therefore, aids denied to an appellate court.

[33] To use an axiom, the trial judge is the "master of the facts": *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 at 572. Because of this, their findings of fact are

entitled to considerable appellate deference. It is clear from the Supreme Court of Canada's decisions "that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence": *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 72.

[34] It is also axiomatic that that a trier of fact is entitled to accept some, all, or none of a witness's evidence, and that an adverse credibility finding with respect to one aspect of a witness's testimony will not automatically infect all of that person's testimony: *Graham v. Galaxie Signs Ltd.*, 2013 BCCA 266 at para. 46, 45 B.C.L.R. (5th) 305, leave to appeal ref'd [2014] 1 S.C.R. viii; *R. v. Kinney*, 2013 YKCA 5 at para. 19, 2 C.R. (7th) 203; *SEP Holdings Ltd. v. Cambridge (City)*, 2014 ONCA 907 at para. 7, 88 C.E.L.R. (3d) 179.

[35] Consbec's reliance on *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) is misplaced. That case involved an appeal from conviction on charges of criminal harassment, sexual assault, and assault; the complainant was Mr. Howe's former girlfriend. At trial, Mr. Howe led evidence of incidents that post-dated the alleged offences from which it could be inferred that the complainant had a motive to falsely accuse him. The Crown called the complainant in reply and she denied those incidents had occurred.

[36] In the first part of his reasons, the trial judge in *Howe* said that the complainant had no motive to fabricate her evidence. However, later in his reasons, the judge accepted that the post-offence incidents had taken place and, in so doing, rejected the complainant's denials. The Court of Appeal considered the rejection of the complainant's denials to be an implied finding that the complainant did have a motive to fabricate. However, as Mr. Justice Doherty explained, the judge's failure to recognize and reconcile his initial finding that the complainant did not have a motive to fabricate with his later finding that she lied about the incidents and, by implication, did have a motive to fabricate, amounted to an error. The trial judge in the case at bar made no such error.

[37] For these reasons, I reject Consbec's argument that it was not open to the trial judge to accept any of Peter's evidence.

Was Peter a Fiduciary?

[38] Consbec contends that the trial judge erred in law and in principle in failing to find that Peter was a fiduciary. Consbec says that contrary to the judge's finding that Peter was an estimator, Peter was in fact a key employee in whom Consbec placed considerable trust and confidence. Consbec further says that notwithstanding the judge found otherwise, it is clear that when Peter left he took advantage of the relationships he had established on the company's behalf. In effect, Consbec's position is that, as pleaded in its notice of civil claim:

> [Peter] was a key employee and had access to confidential business information and other proprietary information, including strategy, targeting and marketing techniques, costing and pricing information, and client lists (collectively the "Confidential Business Information").

[39] Consbec's arguments, individually and collectively, amount to an attempt to have this Court retry the case and make findings of fact that differ from the trial judge's findings. That is something this Court can do only in limited circumstances. As Mr. Justice Tysoe said in *Manjit International Development Ltd. v. Ng*, 2009 BCCA 429, 85 C.L.R. (3d) 182:

> [10] The role of this Court is not to retry the case. This Court is a court of review and of error correction. It does not receive evidence or hear witnesses. That is the role of the trial court. Consequently, this Court will not interfere with findings of fact by a trial judge, absent palpable and overriding error "plainly seen": *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

See also: *Galambos v. Perez*, 2009 SCC 48 at para. 49, [2009] 3 S.C.R. 247: "Absent an error of law or a palpable and overriding error of fact, the trial judge's conclusion that a fiduciary duty did not exist must be upheld on appeal".

[40] In coming to a conclusion with respect to Peter's role with Consbec the trial judge made detailed and comprehensive findings:

[180] Peter initially worked exclusively in the Eastern Division. Upon his transfer to the Western Division, he worked exclusively there. Peter had no influence in and did no work in the other divisions of Consbec.

[181] All documents, bids, payrolls, payables, and receivables were sent to and from head office. Peter had no influence over payments, other than to sign off from time to time, as did the superintendent, Ron Thomas, as to the hours worked by the hourly employees on a project. Through Richard, Consbec was aware of all bids that Peter was making.

[182] Peter made no corporate decisions, nor was he asked to participate in corporate meetings. Peter was not party to corporate decisions, making policy for Consbec, hiring and firing employees of Consbec, determining salaries or bonuses, or determining non-union wages in his division. He received no company financial records, or financial statements, and he was not entitled to do so. On behalf of Consbec, Peter could not sign cheques. He could not direct the payment of accounts electronically, or move and transfer Consbec's money from its bank accounts. Peter could not influence the payment of accounts or the transfer of funds. Nor could he direct Consbec employees, such as Mr. Sawdon, to make payments or transfer funds. Peter had no corporate credit card.

[183] Richard and Peter were in telephone communication, at minimum, daily. Peter was required to prepare a bid for a project he had located using the Excel spreadsheet. He would provide Richard with other information about the project. Richard, using the Excel spreadsheet, would, independent of Peter, calculate a bid. They then discussed their respective bids with each other, made the necessary adjustments and agreed on a bid to submit. If there was a disagreement, Richard made the final decision.

[184] Richard testified that a contract less than $50,000.00 did not require Peter to pass it by him. Richard was unable to identify any such contracts that Peter bid. Mr. Mitchell describes it differently. He testified that the standard practice of Consbec was that Richard allowed managers to take on close, small projects.

[185] There were two exceptions to Peter acting only under Richard's authority. Firstly, Peter sold explosives to Sproule. He asked head office to send an invoice to Sproule for $581.81. Secondly, Peter also sent a letter to Sproule encouraging them to purchase a rock truck. However, Richard testified that providing explosives directly to a customer and encouraging a customer to purchase a truck were not company policy. In other words, Peter was not authorized to take these actions independent of Richard.

[186] In summary, Peter can best be described as an estimator, though Consbec described him as a manager. His duties were limited to managing his own daily activities of work and sometimes project site management and making arrangements for labour.

[187] Prior to working for Consbec, Peter had knowledge and experience in the construction industry. He learned the blasting and drilling business while working for Consbec. In bidding for contracts for Consbec, the information as to Consbec's costs were determined solely by Consbec and Peter had no influence. Peter's job was to identify projects, to obtain bid plans, and to

> obtain as much information as possible as to the area where the blasting and drilling was to take place, which would then be measured by Consbec's costs, pre-determined by them.
>
> [188] In April of 2001, the Western Division sales of Consbec were three percent of Consbec's total sales. By April of 2002, they were five percent of Consbec's total sales.
>
> [189] I find that Peter was not a fiduciary. Peter's obligations to Consbec were that of an employee.
>
> [Emphasis added.]

[41] Consbec's challenge to the trial judge's findings is undermined by the fact that the testimony of Consbec's own witnesses, particularly Richard, supports the judge's findings. As Consbec's claim that Peter was a fiduciary is based on a factual matrix it failed to prove at trial, there is no need to discuss the law relating to fiduciaries in detail. Suffice it to say that on the facts the trial judge found, Peter was not a person whom Consbec entrusted with discretionary powers that could affect Consbec's interests: see *Galambos* at para. 83. Much like Ms. Gannon in *Zoic Studios B.C. Inc. v. Gannon*, 2015 BCCA 334 at paras. 60-64, 386 D.L.R. (4th) 662, who was found not to be a fiduciary even though she held the position of "executive creative director and visual effects supervisor", Peter's authority was circumscribed and head office made all key decisions regarding the Western Division's operations.

[42] For these reasons, I reject Consbec's argument that the trial judge erred in finding that Peter was not a fiduciary.

Did Peter Breach his Duties of Loyalty, Good Faith, and Fidelity?

[43] Consbec contends that even if Peter was not a fiduciary, he nevertheless breached his unwritten contractual duties as an employee. In its notice of civil claim Consbec pleaded that Peter:

> [B]reached his duty of confidence when he misused the Confidential Business Information of Consbec for his personal advantage and for the advantage of [his companies].
>
> …
>
> While under the employ of Consbec [engaged] in the act of soliciting the Clients and prospective clients.
>
> …

> Profit[ed] from his illegal conduct, having secured the Clients based on his improper use of the Confidential Business Information, and other proprietary information.

[44] The trial judge rejected those claims. Consbec says that in so doing the judge erred because it was not open to her to accept Peter's evidence that he: (a) did not put his plans into effect while in Consbec's employ; (b) did not take advantage of business opportunities he became aware of while employed; and (c) did not make use of confidential information. However, that argument is grounded principally in Consbec's erroneous premise that the judge's finding that Peter had attempted to deceive the court with respect to the transfer of the Old Stage Coach Road properties precluded her from accepting anything Peter said in the witness box.

[45] Once again, Consbec seeks to have this Court retry the case and make findings of fact that differ from the trial judge's findings. For example, Consbec challenges the judge's finding that Consbec failed to prove Peter took the Excel spreadsheet and used it to compete. In making that finding the judge referred not only to Peter's denial but also to Consbec's failure to present any direct evidence that Peter took the spreadsheet or expert evidence to support its allegation that someone took the spreadsheet and wiped a computer clean: paras. 91-97. In addition, the judge found that Consbec failed to prove even the existence of the contact list it alleged Peter took: para. 201.

[46] In rejecting Consbec's allegation that Peter was canvassing Consbec's "clients" before he left, the trial judge said this:

> [205] I conclude that Peter, prior to leaving his employment with Consbec, intended to continue in the drilling and blasting business. The "Ralph" on the list found by Trevor could have been Ralph Larson or Ralph Allen, the latter to join in business, the former seeking commercial property for a new business. Peter was in the mere planning stage: See [*Restauronics Services Ltd. v. Nicolas*, 2004 BCCA 130, 239 D.L.R. (4th) 98; *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322]. There is no evidence that Peter started to look for work when he was still employed by Consbec. Nor is there any evidence that Peter knew of drilling and blasting opportunities that he was in the process of bidding for Consbec, or knew that Consbec would bid, that he took for Rock Construction. Nor is there any evidence that he was

> canvassing Consbec's past customers for whom it had done drilling and blasting. I conclude that Peter, after leaving Consbec, relied on B.C. Bids and Ralph Allen to obtain work for Rock Construction. In *Restauronics Services Ltd.*, the court sets out where the line must be drawn.

[47] In effect, the trial judge found that all that Peter took with him when he left Consbec were the general skills and knowledge he had acquired while working for that company. That is something he was entitled to do: *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 at para. 72, 30 B.C.L.R. (4th) 73.

[48] As the findings the trial judge made were open to her on the evidence, I reject Consbec's argument that Peter breached his common-law duties of loyalty, good faith, and fidelity.

Peter's Appeal

Was there a Fraudulent Conveyance?

[49] Peter contends that the trial judge made a palpable and overriding error in finding that he fraudulently conveyed the Old Stage Coach Road properties to Tracy. Peter says that error resulted from the judge's misapprehension of the evidence given by his accountant, Brent Ashby. As I will explain, I agree the judge so erred.

[50] Peter was the first of the defendants' witnesses. His evidence was interrupted to accommodate Mr. Ashby testifying. As a result, Peter did not testify with regard to why he transferred his interest in the Old Stage Coach Road properties until Mr. Ashby completed his evidence.

[51] Mr. Ashby is a chartered accountant and partner in the Kamloops office of KPMG, a business services firm. Mr. Ashby testified that Peter had been KPMG's client since the mid-2000s. Mr. Ashby became the lead accountant on Peter's file in 2008 or 2009, providing Peter with corporate and personal tax-planning advice.

[52] In his examination in-chief, Mr. Ashby identified a letter he wrote to Peter on behalf of KPMG on November 2, 2010, confirming tax-related advice Mr. Ashby gave to Peter in 2008. The body of that letter reads:

> We confirm that on October 31, 2008 the property located at 5877 Old Stage Coach Road in Knutsford, BC, held jointly by Peter Walker and Tracy Walker, was transferred to full ownership by Tracy. We had advised the Walkers to complete this transfer as part of personal tax planning for them.
>
> The property is 320 acres in size and a portion of the property is leased for grazing purposes. In addition, a number of pieces of equipment owned by P&T Walker Capital Ltd. (P&T) are stored on this property and rent is charged to P&T for this service. Tracy is in a lower tax bracket than Peter and as a result some tax savings exist by having the rental and grazing income reported by Tracy rather than Peter.
>
> The property may also qualify for the $750,000 capital gains exemption if it meets the criteria as Qualified Farm Property at some point in the future. We anticipate that Peter may use his lifetime capital gains exemption by selling shares of a qualified small business corporation and that Tracy may be able to utilize her lifetime capital gains exemption on the sale of the Knutsford property if it meets the appropriate criteria. Again, this could result in significant tax savings for the Walkers as a result of this property transfer.
>
> If you have any questions with regards to this matter, please do not hesitate to contact the writer.
>
> [Emphasis added.]

[53] Mr. Ashby said that the advice set out in the letter was not unusual for persons in the couple's position. With respect to his recollection of giving that advice, Mr. Ashby testified in-chief as follows:

> Q Just to be clear, is this advice that you gave to who?
>
> A To Peter.
>
> Q And when did you give that advice to Peter?
>
> A Well, based on the contents of the letter it was back in 2008.
>
> Q I see. So you raise a point, so when you were writing this letter, did you have a better memory of the events then or now?
>
> A Then.
>
> Q At the time you wrote this letter, how was your recollection of the events that you speak about in the letter?
>
> A It was clear as to what our conversation was back in 2008.
>
> Q Is this letter an accurate depiction about what you talked about back in 2008?
>
> A Yes.

[54] In cross-examination, Mr. Ashby said he was professionally responsible for the contents of the letter but did not have a present, direct recollection of meeting

with Peter to discuss the transfer of the Old Stage Coach Road properties. He agreed his file and time sheets might assist in that regard. Mr. Ashby said he was not aware Peter was involved in a lawsuit with Consbec when Peter asked him to write the letter. A law firm did the conveyancing.

[55] Mr. Ashby's cross-examination was stood down and he was asked to return the following day with his file and time sheets. Peter then continued his evidence in-chief.

[56] Mr. Ashby returned the next morning with his file and time sheets. The brief cross-examination that then took place included the following:

> Q Could you tell us in the file you have with you in your review of your billing and dockets and file with respect to Peter Walker and Rock Construction yesterday or this morning, what were you able to find?
>
> A There was no specific references in any of the -- I looked back from 2006 through 2009 effectively. <u>There wasn't any specific references to the discussion of the transfer of the property</u>. There was some general comments on tax planning, meetings re tax planning, but nothing specific.
>
> …
>
> Q And there's no notations in those time dockets, I take it from what you've said, of Peter Walker providing you and KPMG with instructions to assist him in the accounting and financial and assessments aspects of such a transfer assessment before it was done; is that fair?
>
> A That's correct.
>
> [Emphasis added.]

[57] When Peter's examination in-chief resumed he testified that the transfers of the Gleneagles property (in 2004) and the Old Stage Coach Road properties (in 2008) were made on the basis of tax-planning advice. He denied manipulating Mr. Ashby into writing the letter.

[58] Tracy testified she recalled the transfer to her of Peter's interest in the Old Stage Coach Road properties but had no recollection as to why it was done. She said she did not receive any independent legal or accounting advice with respect to that transfer.

[59] In finding that Peter had fraudulently conveyed the Old Stage Coach Road properties, the trial judge said, in part:

> [235] When the Ontario lawsuits were started, Tracy and Peter were married. Tracy was not named as a defendant in the lawsuits. At that time, they owned two pieces of real property (together, the "Old Stage Coach Road Property"), their principal residence located in Knutsford, near Kamloops, British Columbia. On October 30, 2008, Peter and Tracy transferred the Old Stage Coach Road Property to Tracy.
>
> …
>
> [241] Mr. Ashby was asked to come back with his entire file. He took the stand again, said he had reviewed the file and he had the file with him. Mr. Ashby testified that there were no discussions about the transfer of the Old Stage Coach Road Property. He looked back from 2006 through 2009 and, although there were some general comments on tax planning, there was no reference to the transferring of the Old Stage Coach Road Property as a tax plan for Tracy and Peter. He confirmed that there were no notations in the file from Peter providing KPMG with instructions to transfer from Peter and Tracy to Tracy as a tax plan. I can only come to one conclusion; that is, that Peter placed this letter before the court so as to deceive the court.
>
> …
>
> [244] Peter and Rock Construction were involved in litigation in Ontario with Consbec at the time the Old Stage Coach Road Property was transferred. No reason has been placed before the court for the transfer. It was not truthful that it was for tax planning purposes, which is the explanation that Peter gave for its transfer. No other explanation has been given. I find that Tracy did not know why it was transferred to her.
>
> [Emphasis added.]

Peter contends that the underlined portions of paras. 235 and 241 reflect that the trial judge misapprehended the evidence.

[60] With respect to para. 235, Peter says the trial judge erred in saying that he and Tracy owned the Old Stage Coach Road properties when Consbec commenced its actions against him in Ontario. Rather, Peter and Tracy acquired those properties after Consbec commenced those actions.

[61] Although the exact dates on which Peter and Tracy acquired the Old Stage Coach Road properties is not clear from the material filed on this appeal—one was in 2006, the other in 2007—it does appear that Peter is correct, as Consbec commenced its first action in Ontario in 2003. However, given that Peter transferred

his interest in both Old Stage Coach Road properties to Tracy after Consbec commenced its second action in Ontario, I do not view the trial judge's error as material, and nothing more need be said about it.

[62] With respect to para. 241, Peter says the trial judge erred in stating that when Mr. Ashby returned to the witness box he testified "there were no discussions about the transfer of the Old Stage Coach Property"; in effect, that he had not given Peter any tax-planning advice in 2008 with respect to those properties. To do so would have been a recantation of the evidence Mr. Ashby gave the previous day.

[63] Consbec acknowledges that the trial judge's recital of Mr. Ashby's evidence in para. 241 is inaccurate. It says that recital may just have been a slip on the judge's part. Consbec's position is that the evidence as a whole supports the judge's finding that Peter engaged in a fraudulent conveyance. In advancing that argument Consbec refers to 11 "facts" it says could support such a finding. Consbec does not suggest Mr. Ashby acted unprofessionally in writing the letter. Rather, Consbec says that after it commenced the action against Peter in British Columbia, Peter manipulated Mr. Ashby into writing that letter.

[64] In my view, para. 241 demonstrates a misapprehension of the evidence. Mr. Ashby did not testify he had not discussed transferring the Old Stage Coach properties with Peter. What Mr. Ashby said was that there was no specific record in the documents he examined of any such discussions having taken place. That the trial judge misconstrued Mr. Ashby's evidence is also reflected in her reasons for judgment on costs (indexed as 2015 BCSC 410), in which she ordered Peter to pay special costs for three days of the trial. In those reasons, the judge described Mr. Ashby's evidence as follows (in para. 25):

> Mr. Ashby testified at court. Despite his letter, counsel for Consbec insisted that he return to his office, pick up the full file regarding the defendants, and return the next day to report what he found in his file and to be cross-examined. Mr. Ashby gave evidence the following day. He testified that Tracy and Peter had not been given the advice as set out in his letter.
>
> [Emphasis added.]

[65] The trial judge's misapprehension of Mr. Ashby's evidence was fundamental to her finding that Peter had placed Mr. Ashby's letter in evidence for the purpose of deceiving the court; this finding was, in turn, central to her reasoning process in finding that Peter fraudulently conveyed the Old Stage Coach Road properties. By reason of that misapprehension both findings are tainted by palpable and overriding error: see *Swiss Reinsurance Company v. Camarin Limited*, 2015 BCCA 466 at paras. 61-62.

[66] I would, therefore, accede to this ground of appeal. For reasons that I will explain later, there is no need to order a retrial of the fraudulent conveyance claim.

Were Damages Properly Assessed?

[67] The trial judge awarded damages against Peter for his having left Consbec without giving Consbec reasonable notice; what Mr. Justice Robertson in *Ainscough v. McGavin Toastmaster Ltd.* (1974), 45 D.L.R. (3d) 687 at 699 (B.C.C.A.), aff'd [1976] 1 S.C.R. 718, referred to as "a wrongful quitting". Peter accepts he was required to give reasonable notice: see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54 at paras. 18-19, [2008] 3 S.C.R. 79; *Physique Health Club Ltd. v. Carlsen* (1996), 141 D.L.R. (4th) 64 at 71 (Alta. C.A.), leave to appeal ref'd [1997] 2 S.C.R. xiii; *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.* (1993), 45 C.C.E.L. 276 at 281-282 (Ont. Ct. (G.D.). What Peter challenges is the quantum of damages the judge awarded. Peter's primary argument is that Consbec failed to prove it suffered any damages arising from his failure to give notice. In addition, Peter argues that the judge's methodology for assessing damages was flawed.

[68] At the outset for her analysis of the damages issue, the trial judge said:

> [221] Peter owed Consbec notice to give Consbec sufficient time to replace him. As a result of Peter's abrupt exit, Consbec sent Trevor to assess the situation and make sure that potential customers knew that, despite Peter's departure, Consbec was still doing business in the west. Mr. Mitchell was moved in quickly and took the position that Peter held. Had Peter given the notice that he was required to give, at law, Consbec may have hired a new employee. They argue that they were left with no other choice but to move

> Mr. Mitchell, who was experienced in the Central Division, to Kamloops to look after Consbec's business interests.
>
> [222] There is no point in trying to determine the proper notice that Peter should have given Consbec. All that would do would lead to speculation as to what Consbec would have done and whether the notice was sufficient, given the factors set out in [*Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.* (1993), 45 C.C.E.L. 276].
>
> [Emphasis added.]

[69] Consbec sought to recover all of its costs associated with sending Trevor and Mr. Mitchell to Kamloops. Consbec, however, was unable to provide any receipts for these travel costs as it had accidentally thrown those receipts out in 2012. As a result, Consbec sought to prove the travel costs through the testimony of Mr. Mitchell and Brian Sawdon, Consbec's controller. The trial judge accepted that evidence over Peter's objection: paras. 227-228. Mr. Sawdon also testified that Trevor was paid approximately $40 per hour and Mr. Mitchell was paid $35 per hour. Mr. Sawdon did not say whether those amounts were true hourly-wage rates or extrapolations based on annual salaries.

[70] The trial judge awarded Consbec $56,116.11 in damages. That amount was the total of the costs and expenses the judge allowed in connection with Trevor's temporary assignment to Kamloops and Mr. Mitchell's relocation to Kamloops with his family. The judge determined those amounts as follows:

> Trevor ($11,135)
>
> - Round-trip mileage Sudbury / Kamloops: $0.40/km. x 7,200 = $2,880.
> - *Per diem* on travel days (room and board): $125 x 6 days = $750.
> - Pay during travel days (unproductive time): $40/hr. x 72 hrs. = $2,880.
> - *Per diem* while in Kamloops: $125 x 37 days = $4,625.
>
> Mr. Mitchell ($44,981.11)
>
> - Travel expenses including return air fares (Sudbury / Kamloops): $17,700.
> - Real estate commission and legal expenses relating to the sale of Mr. Mitchell's Sudbury home: $9,781.11.

- Land transfer tax relating to Mr. Mitchell's purchase of a home in Kamloops: $5,000.
- Moving expenses: $12,500.

[71] I agree with Peter that the trial judge's approach to damages was flawed. To award Consbec damages, the judge was required to first determine the notice Peter should have given Consbec and then determine what damages, if any, Consbec had proven it suffered due to Peter's failure to give that notice.

[72] Neither Consbec nor Peter made any submissions to assist this Court in determining the appropriate notice period.

[73] As discussed in *Physique Health Club Ltd.* and *Sure-Grip Fasteners Ltd.*, the main purpose of the notice requirement is to give the employer a reasonable time to adjust to the employee's departure. In determining the appropriate notice period regard should be had to the employee's duties and responsibilities, salary, length of service, and the time it would reasonably take the employer to have others handle the employee's work or to hire a replacement.

[74] Based on the trial judge's finding that Peter was essentially an "estimator" who exercised very little independent authority, I consider a notice period of one month reasonable. Peter was a "manager" in name only; beyond knowing how to use a computerized spreadsheet his position did not require any specialized skills and training.

[75] What must be determined next is what damages, if any, flow from Peter's failure to give Consbec one month's notice. To paraphrase what was said in *Bradley v. Carleton Electric Ltd.* (1998), 37 C.C.E.L. (2d) 144 at para. 2 (Ont. C.A.), the measure of damages is not the cost to Consbec as a result of Peter leaving the company, but the cost to Consbec as a result of Peter's failure to give notice.

[76] Citing *Henderson v. Westfair Foods Ltd.*, [1992] 1 W.W.R. 632 at paras. 8 and 17 (Man. C.A.), Peter says it was not enough for Consbec to show his unexpected departure inconvenienced the company; what Consbec had to prove

was that it incurred costs or expenses or damages in excess of what it saved by not having to pay Peter's salary during the notice period. Peter further says Consbec failed to meet its burden in that regard.

[77] It was reasonable for Consbec to immediately send Trevor to Kamloops to run the Western Division office. Peter's unexpected departure left Consbec without anyone in that office and it needed someone "on the ground" to carry on its business in western Canada without interruption. However, the record does not support the entirety of the damages the trial judge awarded in relation to Trevor.

[78] To begin, I have been unable to find any evidence that would justify the full amount of the $2,880 round-trip mileage claim. Consbec led no evidence to explain why it was necessary for Trevor to drive from Sudbury to Kamloops and back as opposed to flying, which is something Mr. Mitchell did more than once. Consbec had a truck in Kamloops available for Trevor to use.

[79] According to Mr. Sawdon, Consbec paid $2,000 for each of Mr. Mitchell's round-trip air tickets. I fail to see why Consbec should be entitled to more than that with respect to Trevor's direct transportation costs. I would also not allow the amount claimed for Trevor's "unproductive time" or all of the *per diems*. Trevor would have been paid regardless, the travel days were unnecessary, and there is no evidence that Consbec hired anyone to replace Trevor in the Central Division while he was temporarily in Kamloops. The *per diem* expenses should be limited to the notice period.

[80] In the result, I consider Consbec is entitled to recover $5,875 in relation to Trevor, determined as follows:

- Transportation (Sudbury / Kamloops): $2,000.
- *Per diem* expenses: $125 x 31 days = $3,875.

[81] Consbec is not entitled to recover anything associated with Mr. Mitchell's relocation to Kamloops. Although Consbec argues, as it did at trial, that it had no option or choice but to relocate Mr. Mitchell, an existing Consbec employee, to

Kamloops, it led no evidence to support that claim. In any event, Consbec would have incurred the costs and expenses of relocating Mr. Mitchell to Kamloops to permanently replace Trevor even if Peter had given one month's notice.

[82] Although Consbec validly incurred costs and expenses of $5,875 as a result of Peter's failure to give one month's notice, it also saved $6,083 by not having to pay Peter's salary during that period (i.e., $73,000/12). Accordingly, it suffered no damages as a result of Peter's failure to give notice.

[83] I would, accordingly, set aside the award of damages in Consbec's favour.

Is a Retrial Necessary on the Fraudulent Conveyance Claim?

[84] Consbec brought the fraudulent conveyance claim in support of its broader claims for monetary damages. As set out in para. 2 of the trial judge's reasons, Consbec sought damages of $1.82 million for breach of fiduciary duty and total damages in excess of $2.27 million. Not only did Consbec seek an order declaring Peter's transfer of his interest in the Old Stage Coach Road properties to Tracy null and void, it also sought an order for the sale of those properties with Consbec having conduct of the sale.

[85] As all of Consbec's substantive claims against Peter have failed, and the Old Stage Coach Road properties have been transferred back into Peter's name, the fraudulent conveyance claim is now academic. Accordingly, a new trial of that issue would serve no purpose.

Costs

[86] In her costs reasons, the trial judge stated Consbec's fiduciary duty claim was the significant issue at trial and that the litigation of that issue took up the majority of the trial. She also stated that litigating Peter's counterclaim for wrongful dismissal accounted for a small portion of the trial. The judge awarded Peter the costs of a six-day trial in relation to the fiduciary issue. She awarded Consbec the costs of a one-day trial in relation to the notice issue and special costs of a three-day trial in

relation to the fraudulent conveyance issue. The judge made no specific costs order with respect to Peter's counterclaim.

[87] Given that litigating Conbsec's unsuccessful claims took up the vast majority of the trial, I am of the view that Peter and the other defendants are entitled to one set of costs for the entire trial. Peter and the other respondents are entitled to one set of costs in this Court with respect to both the appeal and the cross-appeal.

DISPOSITION

[88] I would dismiss Consbec's appeal, allow Peter's cross-appeal, and award Peter (and the other respondents) one set of costs with respect to both appeals.

[89] I would vary the formal order entered in the Supreme Court of British Columbia on April 23, 2015, by deleting the declarations and orders in paras. 1-8, and substituting the following:

> THIS COURT ORDERS that:
>
> 1. The Plaintiff's notice of civil claim is dismissed.
> 2. The Defendants' counterclaim is dismissed.
> 3. The Plaintiff shall pay to the Defendants one set of costs, to be assessed pursuant to Scale B of Appendix B of the *Supreme Court Rules* for the trial.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Goepel"

COURT FILE NO.: 06-CL-006733
DATE: 20070213

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:	)	
	)	
DONOR GATEWAY INC.	)	*Arie Gaertner*, for the Plaintiff/Applicant
	)	
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
DANIELA PASSERO and PGD CANADA INC.	)	*Mark Veneziano* and *Nadia Campion*, for the Defendants/Respondents
	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** January 26, 2007
	)	**JUDGMENT:** February 13, 2007

REASONS FOR DECISION

ECHLIN J.:

INTRODUCTION:

[1] Johann Wolfgang van Goethe (1749-1832), the German poet, dramatist, and philosopher observed that, "Life is short, judgment difficult, and opportunity transient."

[2] This application involves a corporate opportunity that arose between two business partners. The Plaintiff, Donor Gateway Inc., seeks an interlocutory injunction restraining the defendants PGD Canada Inc. and its principal, Daniela Passero, from selling access to a database of names of individual charitable donors and the recipients of such donations called the Personal Giving Directory.

[3] In 2003, Emily McKinnon met Daniela Passero at the Centre for Addiction and Mental Health ("CAMH") in Toronto. They became good friends and began to collect names off the

Internet for a Directory of Non-Profit Directors. In the next year, they entered into a partnership agreement. Eventually they incorporated a company called Donor Gateway Inc. on October 3, 2005. Less than two months later, however, on November 24, 2005, the relationship between Passero and McKinnon deteriorated and they decided to part company. They each signed a mutual release.

[4] On November 14, 2006, D.G.I. sued P.G.D. and Passero regarding the Personal Giving Directory, which it admits is not competitive with D.G.I.'s directors directory. Rather, D.G.I. asserts that it is complimentary to its Directory of Non-Profit Directors database which is still in the course of being developed.

[5] While P.G.D. registered "Personal Giving Directory of Canada" pursuant to the *Copyright Act* on December 21, 2005, D.G.I. asserts that the idea for such a directory first arose at a time when Passero was working with McKinnon. D.G.I. claims that Passero has breached her fiduciary duty to it and appropriated the Personal Giving Directory database idea. It further asserts that it requires an interlocutory injunction to protect its commercial interests.

[6] Should an interlocutory injunction be granted in these circumstances? Both counsel agree that in determining this issue, I must apply the 3-part test contained in *RJR Macdonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311:

1) Is there a serious question to be tried? That is, can the plaintiff establish that it has a "strong *prima facie* case"?

2) Will the plaintiff suffer irreparable harm which cannot be compensated for by monetary damages?

3) Does the balance of convenience favour the plaintiff?

a) A SERIOUS QUESTION TO BE TRIED:

[7] D.G.I. asserts that Passero is precluded from obtaining for herself property which it alleges belongs to it. A threshold question to the determination of this issue is whether the concept of a Personal Giving Directory was the property of the plaintiff. Was the idea a "maturing corporate opportunity"? Did D.G.I. establish that it was pursuing this alleged maturing business opportunity? Was the opportunity "ripe" and "specific"? Balanced with these inquiries is the contextual consideration that D.G.I. is asking the Court to deprive an individual of a contributory role in society and a means of financial support. D.G.I. must have a strong *prima facie* case before injunctive relief may be granted which may have the practical effect of resulting in a final determination of this dispute.

[8] The question of whether Ms. Passero, as a fiduciary, breached her duty to D.G.I. is a question of fact that turns on a number of factors including the nature of the corporate opportunity, its ripeness, its specificness, the circumstances in which it was maintained, whether

it was special or private, and a host of other considerations, as set out by the Supreme Court of Canada in *Canadian Aero Service* v. *O'Malley*, [1974] S.C.R. 592 at paras. 14-15.

[9] In these circumstances, and based upon the evidence presented, I am unable to find that the idea of a directory of personal giving was pursued by D.G.I. in anything approximating a timely or diligent fashion. While D.G.I. asserts that a giving directory had been in development since as early as 2001, no evidence or documentation was presented to support such assertion. Notably, there was no direct evidence from Emily McKinnon who is alleged to have been gathering data in connection with the database in 2001. While there was evidence that a donor directory was discussed from time to time, the evidence fails to show that D.G.I. evinced an intention to seize the opportunity and run with it during the four years prior to Passero's departure. There was little or no evidence of D.G.I.'s efforts or thought given to pricing, product development, contact lists, and a host of other matters. In *Omega Digital Data Inc*. v. *Airos Technology Inc*. (1996), 32 O.R. (3d) 21 (Ont.Ct. (Gen.Div.)) a significant amount of time and money had been expended in research and development of the product. There was no such evidence in this case. A proposed timeline was created, but not adhered to. The database was not in development, nor was information being collected between 2001 and 2005.

[10] In an October 2, 2005 e-mail, Robert McKinnon acknowledged that the project had "not yet started". While the timeline plan contemplated 1,000 charities having being researched by June of 2006, by January 18, 2007, a little over a week before this Motion was heard, a mere 223 charitable organizations had been researched, all after Passero's resignation in November of 2005. There is no evidence of how much time or money was spent by D.G.I. in getting this information.

[11] The information sought to be included was not particularly "private" or "special" but generally available on the Internet. Similar directories exist in the United States of America.

[12] A mere idea is not sufficient to constitute a maturing corporate opportunity. A plaintiff must be able to prove that it was actively pursuing the maturing business opportunity at the time when the defendant is alleged to have diverted it. See: *CCH Canadian Limited* v. *Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

[13] In *Pizza Pizza* v. *Gillespie* (1980), 75 O.R. (2d) 275 (Ont.Ct.(Gen.Div.)), Henry J. stated:

> By "ripe", I understand the caselaw to mean that the opportunity available to the corporation is a prize ready for immediate grasping – not a general course of future conduct which is merely being explored…(at para.82)

[14] In this instance, by D.G.I.'s own admission, it will not be launching its website until the spring or summer of 2007, if not later. I cannot and do not find that the donor database was "a prize ready for immediate grasping".

[15] Notably, in order to satisfy the *RJR* tests, D.G.I. must establish that there is competition. In the case at bar, D.G.I. has yet to develop and implement the product it seeks to enjoin. The Record fails to disclose a description of the personal giving directory database or any other particulars of it. Accordingly, it is impossible for this Court to compare the D.G.I.'s enterprise with that of P.G.D.'s about which it complains.

[16] Evidence was led of a Mutual Release executed by the parties on November 24th, 2006, relating to "all manner of actions, causes of actions…whatsoever…which…each of us…shall or may have…existing up to and including…the date of this indenture." The parties clearly intended to end their relationship and go their separate ways. While D.G.I. argued that the actions complained of occurred after Ms. Passero's departure, the concept giving rise to this action is alleged to have arisen well before the execution of the Mutual Release.

[17] Finally, sight must not be lost of the fact that D.G.I. does not allege that the defendants took advantage of any confidential information acquired from it.

[18] Ms. Passero is entitled to use her skills, talents and knowledge that she brought into the relationship after she left that employment: See: *Fibron Machine Corp.* v. *Sawley*, [1999] B.C.J. No. 367 (S.C.). In my view, D.G.I. has failed to establish that there is a strong *prima facie* case in order to permit the injunctive relief sought.

b) IRREPARABLE HARM:

[19] D.G.I. alleges that the small Canadian market cannot support two identical services; that the Personal Giving Directory is complimentary to its Non-Profit Directors Directory and that it would be difficult to ascertain D.G.I.'s alleged losses. Finally, it is asserted that the Passero's alleged fiduciary duties give rise to a negative covenant not to appropriate the concept of a donor directory.

[20] I find that, (as a *MacDonald Ohm Insurance Brokers Ltd*. v. *Gillmore*, [2000] O.J. No. 2745 (S.C.J.)), while damages can be difficult to ascertain, D.G.I. has not discharged its onus to establish irreparable loss and that damages would not be an adequate remedy. Further, this application really appears to be a battle over who is first into the market as was the case in *Dialadex Communications* v. *Crammond*, [1987] O.J. No. 88 (H.C.J.). I reject the assertion that the nature of Ms. Passero's alleged duties to D.G.I. give rise at law to something akin to restrictive covenant obligations. As indicated in *Lyons* v. *Multari* (2000), 50 O.R. (3d) 526 (C.A.), to constitute a valid restraint of trade, there must be a proprietary interest deserving of protection and reasonable restrictions, both temporarily and geographically. The injunctive relief sought in this instance is in no way limited and D.G.I. has failed to establish that there exists a property interest deserving of protection. Accordingly, I find that the existence of irreparable harm has not been made out.

c) THE BALANCE OF CONVENIENCE:

[21] In making a determination on the balance of convenience , I must examine which of the two parties will suffer a greater loss from the granting of or refusal to grant an interlocutory injunction pending a trial on the merits.

[22] In *Fibron Machine Corp*. v. *Sawley*, *supra*, the Court dismissed a plaintiff's application for an interlocutory injunction in part because if the injunction were granted, it is likely that the defendants would be put out of business and it would be unlikely that this case would proceed to trial. I harbor similar concerns in this instance. Similarly, the result of a failure to obtain an injunction in this instance will only result in D.G.I. enduring competition for a relatively short period of time until trial.

[23] In my view, the balance of convenience favours the defendants.

CONCLUSION:

[24] Accordingly, for the above reasons, no interim injunction shall lie. The application for such relief is dismissed.

COSTS:

[25] Defendants' counsel sought the sum of $15,000.00 for costs, a sum agreed to be reasonable by D.G.I.'s counsel. I find such amount to be appropriate and within the reasonable contemplation of the parties, and fix and award costs payable by the Plaintiff to the Defendants in the amount of $15,000.00 within 30 days.

_____

Echlin J.

Released: February 13, 2007

COURT FILE NO.: 06-CL-006733
DATE: 20070213

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

DONOR GATEWAY INC.

- and -

DANIELA PASSERO and PGD CANADA INC.

REASONS FOR JUDGMENT

Echlin J.

Released: February 13, 2007

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Foote v. Canada (Attorney General),* 2012 BCCA 253

Date: 20120613
Docket: CA039721

Between:

Nathan Clark Foote
and
Elly Foote

Appellants
(Plaintiffs)

And

Attorney General of Canada
and
Canada Revenue Agency

Respondents
(Defendants)

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: Supreme Court of British Columbia, February 3, 2012,
(*Foote v. Canada (Attorney General)*, 2012 BCSC 177,
Prince George Docket No. 1036823)

The Appellants:	In person, by telephone
Counsel for the Respondent:	J.W. Levine & L.H. Chun
Place and Date of Hearing:	Vancouver, British Columbia May 23, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 13, 2012

Reasons for Judgment of the Honourable Madam Justice Bennett:

NATURE OF THE APPLICATION

[1] The appellants, Nathan Clark Foote and Elly Foote, apply for indigent status in their appeal from the order Mr. Justice Savage pronounced on February 3, 2012, in which he dismissed some of their claims against the respondents as statute-barred under the *Limitation Act*, R.S.B.C. 1996, c. 266 [the *Act*]. The respondents, the Canada Revenue Agency (the "CRA") and the Attorney General of Canada (the "AG"), apply for security for costs.

BACKGROUND FACTS AND PROCEEDINGS BELOW

[2] In March 2006, the CRA audited Mr. Foote. As a result, it commenced a criminal investigation of Mr. Foote for tax evasion. A search warrant was executed at the Footes' residence on March 14, 2007. The Footes obtained a copy of the Information to Obtain the search warrant the following day.

[3] In 2008, the CRA issued Mr. Foote Notices of Assessment for the tax years 2000-2005, to all of which Mr. Foote filed objections. He declared bankruptcy in April 2008. As Mr. Foote learned by letter dated March 17, 2009, the criminal investigation into his financial dealings ended on February 25, 2009 with no charges laid against him. He abandoned his objections to the Notices of Assessment in March 2009.

[4] The Footes initiated their claims against the AG and the CRA on March 31, 2010. The claims are founded in tort, alleging negligence in assessments and investigation, breach of privacy, false imprisonment, trespass, and misfeasance/abuse of public office. On July 8, 2011, Mr. Justice Dley heard the CRA's application to strike the Footes' claims against it as a collateral attack on the Notices of Assessment. For reasons delivered on August 15, 2011 and indexed at 2011 BCSC 1062, Dley J. struck the Footes' claims in negligence and part of their *Charter* breaches claim, leaving intact the claims for misfeasance in public office, breach of privacy, trespass, and the remaining part of the *Charter* breaches claim.

[5] On January 31, 2012, Savage J. heard the AG's application to dismiss the Footes' remaining claims as out of time and statute-barred under the *Act*. For reasons delivered on February 3, 2012 and indexed at 2012 BCSC 177, Savage J. struck the Footes' claims for breach of privacy, *Charter* breaches, trespass, and false imprisonment as statute-barred under the *Act*. He declined to strike the Footes' sole remaining claim of misfeasance in public office, holding that there is a triable issue as to whether the limitation period's commencement with respect to that claim was postponed pursuant to s. 6 of the *Act*.

ERRORS ALLEGED

[6] The essence of the Footes' appeal are three grounds:

a) the application before Savage J. was a collateral attack on the decision by Dley J.;

b) Savage J. erred in finding that the commencement of the limitation period was not postponed with respect to their actions for breach of privacy, trespass and false imprisonment; and

c) the question of limitation periods for the alleged *Charter* breaches.

LEGAL TEST – INDIGENT STATUS

[7] The criteria to be satisfied upon an application for indigent status are derived from Rule 56 of the *Court of Appeal Rules*, B.C. Reg. 297/2001. Rule 56 serves to prevent arguably meritorious appeals from being heard merely because the moving litigants are impecunious. Thus, if the Footes are found to be indigent, they must be ascribed indigent status unless their appeal "lacks merit, is scandalous, frivolous, or vexatious, or is otherwise an abuse of the process of the court". (See *Trautman v. Baker*, [1997] B.C.J. No. 452 (QL) (C.A. Chambers) at para. 4; *Duszynska v. Duszynski*, 2001 BCCA 155 (Chambers) at para. 3; *Kawana v. Sung*, 2010 BCCA 414 (Chambers) at para. 2; *Terrapin Mortgage Investment Corp. v. Ruby Lake*

Country Developments Ltd., 2011 BCCA 4 (Chambers) at para. 14; *Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 (Chambers) at para. 10.)

Financial status

[8] A litigant is indigent when possessed of some means, but such scanty means that he or she is needy or poor. The question to be answered is whether the litigant's "financial situation is such that requiring him to pay the fees would deprive him of the necessaries of life or effectively deny him access to the courts". Significant assets may defeat an application for indigent status irrespective of income. (See *Griffith v. House*, 2000 BCCA 371 (Chambers) at para. 3; *Ancheta v. Ready*, 2003 BCCA 374 (Chambers) at paras. 6-7; *Owners, Strata Plan VR 2000 v. Grabarczyk*, 2008 BCCA 405 (Chambers) at para. 11; *Kawana* at paras. 10-12; *Terrapin Mortgage* at paras. 15-16; *Rapton* at paras. 13-14.)

Merits of the appeal

[9] Where a litigant's appeal has no chance of success or is bound to fail, or even if it has no reasonable basis or prospect of success, indigent status will not be granted (*Kohlmaier v. Campbell*, 2003 BCCA 61 (Chambers) at paras. 3-5; *Strata Plan VR 2000* at para 11; *Kawana* at para 4; *Rapton* at para. 12; *Balaj v. Xiaogang*, 2012 BCCA 211 (Chambers) at para. 9).

LEGAL TEST – SECURITY FOR COSTS

[10] A chambers justice may order an appellant to advance security for costs pursuant to s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

[11] Lowry J.A. provided a concise statement of the relevant criteria on an application for security for costs of the appeal in *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 (Chambers):

> [9] The jurisdiction to order security for costs of an appeal is found in s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. The appellant against which such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4

> (C.A. Chambers), Smith J.A. Generally, the considerations are the appellant's ability to post security and the likelihood of costs awarded being recovered from it, as well as the merits and the timeliness of the application: *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 (C.A.); *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125 (B.C.C.A. Chambers), Seaton J.A.; and *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. Chambers), Esson J.A.

[12] In *Lu v. Mao*, 2006 BCCA 560 (Chambers), Ryan J.A. explained:

> [6] In determining whether security for costs should be ordered, the ultimate question to be answered is whether the order would be in the interests of justice. In this regard, Madam Justice Rowles in *Ferguson v. Ferstay* (2000), 81 B.C.L.R. (3d) 90 at para. 7, 2000 BCCA 592 (Chambers), identified the following as relevant considerations:
>
> (1) appellant's financial means;
>
> (2) the merits of the appeal;
>
> (3) the timeliness of the application; and
>
> (4) whether the costs will be readily recoverable.

[13] The onus is on the appellant to establish that the interests of justice require that security not be ordered: *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 at para. 3 (Huddart J.A. in Chambers); considered and followed in *Aikenhead v. Jenkins*, 2002 BCCA 234 (Ryan J.A. in Chambers), *Recchia v. Macintosh*, 2002 BCCA 445, 40 C.C.L.I. (3d) 245 (Smith J.A. in Chambers), and *Daymax Management Inc. v. WHA 820 Holdings Ltd.*, 2004 BCCA 414 (Saunders J.A. in Chambers).

DISCUSSION

[14] Mr. and Mrs. Foote depose to being retired farmers and ranchers, aged 72 and 68, respectively. Both declare monthly income equal to their monthly expenses. They depose pensions as their sole source of income. Mrs. Foote deposes to owning a ¼-share in a farm, valued at $69,500. Mr. Foote's sole major asset is a nine-year-old pickup truck he values at $10,000. According to his affidavit, he does not own real property.

[15] Exhibits to the affidavit of Christina McMullan, filed by the AG, suggest that Mrs. Foote has a joint tenancy ownership interest in four parcels of real property. Mr. Foote apparently transferred his interest in the real property to his daughters and his wife in 2002 for consideration of $1.00. The McMullan affidavit also suggests that the Footes own horses, and own and operate a business offering clients horseback riding lessons. The AG's materials also indicate that the Footes are co-authors of a book related to horses and horseback riding.

[16] The Footes explained the transfer of the property to their children in 2002 as part of an estate planning procedure. According to Mrs. Foote, when a farmer reaches the age of 62 the law allows him or her to pass qualified farm property to qualified heirs without incurring tax.

[17] The income from horses and horseback riding is minimal as it is earned to maintain their status as a farm for tax purposes. Any income is more than set-off by their expenses.

Indigent Status

[18] The question is whether ownership of a property valued at $70,000 located in Burns Lake, B.C., prevents a determination that the Footes qualify for indigent status.

[19] In *Strata Plan VR 2000 supra*, Donald J.A., in considering an application for indigent status by a person who owned property with equity of $311,000, said this at para. 11:

> ... Moreover, the applicant's evidence of indigency is unsatisfactory. While her income is modest – she receives $722.57 a month from social assistance and a disability pension which barely cover her expenses – she owns the strata unit, which she values at $311,000. She did not provide any evidence that she tried and was unable to raise money on her property to fund the proposed appeal.

[20] Similarly, the Footes did not lead any evidence that they tried and were unable to raise money on Mrs. Foote's property to fund their appeal. Mrs. Foote

pointed out in submissions that it would be difficult to obtain a mortgage on the property; however, they have not made any effort to do so.

[21] I am not satisfied the Footes have met the financial aspect of the test for indigent status.

Security for Costs

[22] The application of the test for security for costs includes the financial circumstances of the Footes, which is limited, and whether the AG will likely recover costs if they are successful. Mrs. Foote's property ownership interest constitutes assets potentially available to cover the costs if the Footes are not successful in their appeal. The AG argues that the costs are not "readily recoverable" given the property is owned by four people. I do not disagree with this position, and it is a factor to consider.

[23] In terms of the merit, in my view, the appeal is not bound to fail. Both the postponement issue with respect to the time limitations and the *Charter* issues meet the low threshold of merit applied in these circumstances.

[24] In all of the circumstances, I am not satisfied that it is appropriate to make an order for security for costs in this case.

DISPOSITION

[25] In summary, I dismiss both the application for indigent status and the application for security for costs.

"The Honourable Madam Justice Bennett"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gardezi v. Positive Living Society of British Columbia,* 2018 BCCA 84

Date: 20180223
Docket: CA44894

Between:

Shella Gardezi

Appellant
(Petitioner)

And

The Positive Living Society of British Columbia, Ross Harvey, Alexandra Regier, Canadian Union of Public Employees, Local 3495

Respondents
(Respondents)

Before: The Honourable Madam Justice Garson
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 20, 2017 (*Gardezi v. Positive Living Society of British Columbia*, 2017 BCSC 1883, Vancouver Registry S1510156).

Oral Reasons for Judgment

Appearing on her own behalf:	S. Gardezi
Counsel for the Respondent, Canadian Union of Public Employees, Local 3495	M. Shapiro
Place and Date of Hearing:	Vancouver, British Columbia February 21, 2018
Place and Date of Judgment:	Vancouver, British Columbia February 23, 2018

Summary:

The respondent labour union applies for security for costs of the appeal. The union says the appeal lacks merit. It also says it will struggle to recover costs if successful on appeal. Held: Application granted. The appellant's financial means are limited. She has failed to pay costs awarded against her in related proceedings. The union demonstrated that recovering costs of the appeal will be difficult if the union succeeds, raising a presumption in favour of costs. Although the appeal is not necessarily bound to fail, the appellant failed to rebut this presumption by showing the appeal has obvious merit.

Introduction

[1] **GARSON J.A.**: The Canadian Union of Public Employees, Local 3495 ("Union"), one of the respondents to the appeal, applies for an order pursuant to s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, requiring the appellant to post security for the costs of the appeal in the amount of $2,352. The Union says Ms. Gardezi's appeal has no merit. It also submits that recovering costs of the appeal will be difficult, particularly in light of Ms. Gardezi's failure to satisfy previous costs orders made against her.

[2] The underlying proceeding is an appeal of a judicial review of two orders of the British Columbia Human Rights Tribunal (the "Tribunal") dismissing Ms. Gardezi's human rights complaints as untimely. The Tribunal concluded in its first decision, found at 2015 BCHRT 143, that her complaint was late-filed and that it was not in the public interest to accept the complaint under s. 22(3) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. This decision was affirmed on Ms. Gardezi's application for reconsideration (2015 BCHRT 163). A Supreme Court judge dismissed her petition for judicial review of the Tribunal's decisions (2017 BCSC 1883).

[3] There is also a related proceeding arising from Ms. Gardezi's unsuccessful complaint to the British Columbia Labour Relations Board ("LRB") alleging that the Union had breached its duty of fair representation pursuant to s. 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. Ms. Gardezi was ordered to pay security for costs of the appeal of the order dismissing her petition for judicial review of the LRB order. She has not paid the security for costs and her appeal remains stayed.

Factual Background

[4] The underlying appeal as well as the related LRB judicial review proceeding arises out of the termination of Ms. Gardezi's employment by the respondent, the Positive Living Society of British Columbia ("Employer"), in 2014.

[5] On March 19, 2014, Ms. Gardezi filed a bullying and harassment complaint against her Employer. The Employer retained an independent investigator to investigate her complaints. In a report dated June 13, 2014, the investigator concluded that Ms. Gardezi's complaints were unsubstantiated, and the Employer terminated her employment on June 17, 2014.

[6] The Union grieved the termination. On September 26, 2014, the Union informed Ms. Gardezi that it had entered into a settlement agreement with the Employer on her behalf. The agreement did not include reinstatement of her employment. On October 29, 2014, the Union's appeal committee upheld the settlement agreement and it was finalized on November 5, 2014.

The Labour Relations Board Proceedings

[7] On November 3, 2014, Ms. Gardezi filed a complaint with the LRB. She alleged that the Union had breached its duty of fair representation under s. 12 of the *Labour Relations Code*. The LRB dismissed the complaint on March 14, 2015. On June 18, 2015, Ms. Gardezi's application for leave and reconsideration of the LRB's decision was dismissed. The background circumstances underlying the LRB proceeding are the same as those that underlie the Human Rights Tribunal proceeding.

[8] Ms. Gardezi sought judicial review of the LRB's reconsideration decision but was unsuccessful (see 2016 BCSC 421). Ms. Gardezi appealed the order dismissing her application for judicial review. On June 17, 2016, Justice Fenlon ordered Ms. Gardezi to post security for the costs of her appeal in the amount of $1,800 ("2016 Order") (*Gardezi v. Canadian Union of Public Employees, Local 3495* (June 17, 2016), CA43571). A division of this Court dismissed Ms. Gardezi's

application for review of Fenlon J.A.'s order on November 14, 2016 (see 2016 BCCA 462). Ms. Gardezi sought leave to appeal the order affirming the 2016 Order of Fenlon J.A. to the Supreme Court of Canada. Leave was refused with costs to the respondents on April 13, 2017 ([2017] S.C.C.A. No. 16). Ms. Gardezi says she intends to appeal to an international forum.

[9] Ms. Gardezi has not paid the costs of the judicial review of the LRB proceedings, now taxed at $3,696. She has not paid the costs of the unsuccessful appeal to the Supreme Court of Canada, which have been taxed at $1,047.

The Human Rights Tribunal Proceedings

[10] On April 22, 2015, almost six months after filing the LRB complaint, Ms. Gardezi filed a complaint with the Tribunal alleging discrimination on the basis of mental disability by the Employer, the Union, and two of the Employer's employees. She alleged that the Employer terminated her employment on the basis of her mental disability and that the Union failed to support her in her bullying complaint, suspension, and termination because of its perception that she has a mental disability.

[11] On September 11, 2015, the Tribunal dismissed Ms. Gardezi's complaints in reasons found at 2015 BCHRT 143 ("Original Decision"). The Tribunal concluded that Ms. Gardezi's allegations were late-filed and declined to exercise its jurisdiction to accept them.

[12] The Tribunal summarized Ms. Gardezi's complaint as follows:

> [23] A sets out her complaint in a 15-page chronology of events covering the time span September 5, 2013 to April 7, 2015. Some of the entries contain only contextual information. In summary, A alleges that the Society discriminated against her by discrediting her feelings and her bullying complaint based on the Society's perception that she had a mental illness. Further, the Society allowed other employees to treat her poorly, did not deal with her complaints and failed to recognize its duty to accommodate her. Her allegations against the individual Society employees are similar and further allege that they said that she impacted the safety and well-being of others which was stigmatizing for her. She specifically alleges that being suspended during the investigation of her complaint had an adverse impact on her.

> [24] A's allegations against the Union are that she did not receive support from the Union to help her keep her job and therefore she lost her job. She alleges that the amount of gossiping by Union executives caused her to lose her sense of dignity. She alleges that Union members alleged that she was mentally ill, that she was physically violent without any evidence and that two female co-workers and Union members stated that A should be removed for the members' protection. A alleges that the Union socially isolated her on the grounds that she was intimidating. A co-worker and Union member told the employer that she could not support or represent A because of [the co-worker's] perception of A's "mental instability". The incidents referred-to in this portion of A's complaint concern the period of time related to the investigation and the termination. The actual dates of the allegations against the Union in A's chronology span the time period March 3, 2014 to September 28, 2014.

[13] Section 22 of the *Code* provides that complaints must be filed within six months of the alleged contravention or within six months of the last alleged instance of a continuing contravention. The Tribunal may accept all or part of a late-filed complaint if it determines that it would be in the public interest to do so and no substantial prejudice would result to anyone because of the delay: *Code*, s. 22(3).

[14] As I said, Ms. Gardezi filed her complaint on April 22, 2015. As a result, allegations of contraventions occurring before October 22, 2014, were late-filed unless they formed part of a continuing contravention that continued after October 22, 2014. The Tribunal concluded that there was no continuing contravention of the *Code*. It found that events referred to in the complaint that occurred after October 22, 2014, could not, if proved, constitute a contravention of the *Code.*

[15] The Tribunal held that it would not be in the public interest to accept Ms. Gardezi's late-filed complaint. Most of her complaints were at least four months late-filed, which the Tribunal considered to be a "lengthy" delay. The Tribunal rejected Ms. Gardezi's argument that her delay was justified because she was waiting for the LRB to issue its decision. The Tribunal noted that she had filed other complaints under the *Code* and could be "presumed to be knowledgeable about its time limitations": para. 40.

[16] Ms. Gardezi also argued that she did not receive evidence revealing the existence of a potential human rights complaint until after October 22, 2014. She said this late-acquired evidence justified her delay in filing a complaint with the Tribunal. The Tribunal noted that the discovery of new information does not restart the clock for the time limit for filing complaints, but rather is a factor in determining whether it would be in the public interest to accept a late-filed complaint under s. 22(3).

[17] The Tribunal said the late-acquired evidence in this case did not justify the acceptance of Ms. Gardezi's late-filed complaints. The Tribunal did not accept that Ms. Gardezi was unaware of grounds for a discrimination complaint prior to October 22, 2014. The Tribunal found at para. 42 that Ms. Gardezi:

> … was aware that she may have grounds for a complaint and, indeed, did file an internal complaint of bullying and harassment [on March 19, 2014] due to a perception of mental disability.

[18] On September 14, 2015, Ms. Gardezi requested reconsideration of the Tribunal's decision. The Tribunal issued its reconsideration decision, found at 2015 BCHRT 163, on October 27, 2015 ("Reconsideration Decision"). The Tribunal found that Ms. Gardezi had failed to show procedural unfairness justifying reconsideration of its Original Decision.

[19] On December 8, 2015, Ms. Gardezi filed a petition for judicial review seeking to set aside the Tribunal's Original Decision and Reconsideration Decision.

Reasons for Judgment on Judicial Review

[20] Ms. Gardezi appeals the order of Madam Justice Burke, pronounced October 20, 2017, dismissing her application for judicial review of the Tribunal's decisions. The chambers judge's reasons are found at 2017 BCSC 1883.

[21] The chambers judge's reasons noted that, under s. 32(q) of the *Code*, the applicable standard of review for the Tribunal's decisions is found in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[22] As the decision to accept a late-filed complaint under s. 22 of the *Code* is discretionary, the chambers judge concluded that the applicable standard of review under s. 59 of the *Administrative Tribunals Act* was patent unreasonableness. She also noted that the question of whether a continuing contravention of the *Code* exists is a question of fact or a matter involving a discretionary decision.

[23] On the application for judicial review, Ms. Gardezi maintained that information revealing the basis for her complaint did not come to light until October 23, 2014. She said her original bullying complaint, filed March 19, 2014, contained no reference to mental illness and could not be relied on as evidence of her awareness on that date of discrimination on the basis of mental disability. She also maintained that events occurring after October 22, 2014, amounted to instances of a continuing contravention. She argued that the Tribunal provided no reasons for rejecting her position in this regard.

[24] The chambers judge concluded that the Tribunal's decision was not patently unreasonable. She found that Ms. Gardezi was aware of possible grounds for a complaint before she received additional disclosure on October 23, 2014. The chambers judge reiterated the Tribunal's finding that Ms. Gardezi had "filed an internal complaint of harassment due to a perception of mental disability" on March 19, 2014: para. 36. The chambers judge also relied on the following passage from Ms. Gardezi's complaint:

> In October I received a letter and three emails that revealed the extent to which mental illness played a role in the adverse treatment I received. Although I was aware of discrimination, I did not have enough evidence of grounds.
>
> [Emphasis added.]

[25] The chambers judge found that the Tribunal provided adequate reasons for rejecting the existence of a continuing contravention arising out of the forwarding of emails in March 2015. The Tribunal had explained that this allegation was unconnected to a protected ground or statement of adverse impact, making the

forwarding of the emails incapable of amounting to a contravention of the *Code*. The chambers judge held that this conclusion was not patently unreasonable.

[26] The chambers judge also briefly addressed the Reconsideration Decision, noting that Ms. Gardezi had not identified anything improper in that decision.

[27] The chambers judge awarded costs to the respondents.

The Application for Security for Costs

[28] The jurisdiction to order security for the costs of an appeal is found in s. 24(1) of the *Court of Appeal Act*. Importantly, on such an application, it is the appellant who bears the burden of showing why security is not required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers).

[29] This Court generally considers five factors in determining whether to make an order for security for costs of the appeal. The first factor is the appellant's financial means. If ordering security for costs would prevent the appellant from pursuing a meritorious appeal, it may not be in the interests of justice to make the order: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 (Chambers). However, the Court may require the appellant to post security for costs of the appeal even if obtaining the funds would be difficult: *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at para. 21 (Chambers).

[30] The second factor is whether the costs of the appeal will be readily recoverable if the respondent succeeds. If the applicant shows there is a serious question that recovery may be difficult, a presumption in favour of granting security for costs arises, unless the appellant can demonstrate the appeal has obvious merit: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers); *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers).

[31] The third factor is the timing of the application for security. Because the appeal is usually stayed until security is posted, injustice would result if the

respondent applied for security for costs on the eve of the appeal: *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. in Chambers).

[32] The fourth factor is the merits of the appeal. If the appeal is "virtually hopeless" or "bound to fail", security for costs may be ordered even if the order prevents the appellant from pursuing the appeal: *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 97 B.C.A.C. 81 at paras. 5, 7 (Chambers); *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers). On the other hand, the Court will not order security for costs if it would prevent the appellant from pursuing a meritorious appeal: *Creative Salmon Company Ltd.* at para. 12.

[33] The fifth and ultimate factor is whether the order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).

Application

[34] Turning to Ms. Gardezi's financial means, she deposes that she has insufficient income or assets to post security for costs. In her submissions on this application she says she will not be able to pursue her appeal if she must post security.

[35] Ms. Gardezi has full-time employment earning net income (after taxes) of $2,600 per month. She has credit card debt totaling about $14,000. She also deposes that her rent is $896 per month. Her only asset is a car of minimal value.

[36] In reasons for the 2016 Order in the LRB proceeding, Fenlon J.A. observed that Ms. Gardezi had few financial means. Since that time, Ms. Gardezi's income and expenses appear to have changed little. I am satisfied, as was Fenlon J.A., that an order for security for costs may well preclude Ms. Gardezi from pursing her appeal.

[37] I am also satisfied, however, that the Union will have difficulty recovering its costs of this appeal if it is successful. In her reasons for the 2016 Order, Fenlon J.A. similarly concluded that the material supported a finding that recovery of costs would

probably be difficult for the respondents. Ms. Gardezi's failure to pay previous costs awards supports such a conclusion in this application.

[38] This application has been made in a timely manner before any significant steps have been taken on the appeal.

[39] I come to the merits stage of the analysis. Ms. Gardezi's application materials suggest that she will raise two primary grounds of appeal: (a) the Tribunal erred in finding that she was aware of the existence of a complaint for discrimination on the grounds of mental disability prior to receiving disclosure of additional information on and after October 23, 2016; and (b) the Tribunal erred in finding that no continuing contravention took place after October 22, 2014. In my view, there is no obvious merit to this appeal, particularly given the deferential standard of review usually applicable to discretionary decisions like this one. I have set out the evidence in some detail, but nothing has been drawn to my attention that would seem to support the arguments made by Ms. Gardezi – at least not on this application.

[40] I conclude that the interests of justice weigh in favour of the respondents on this application. The Union has shown there is a serious question that recovering costs will be difficult, which raises a presumption in favour of ordering security for costs. Although I am not prepared to say the appeal is bound to fail, Ms. Gardezi has not rebutted the presumption by showing obvious merit in the appeal.

[41] The Union seeks security for costs in the amount of $2,352. I accept that this amount is significant to Ms. Gardezi. In an effort to balance Ms. Gardezi's interests in pursuing the appeal with the interests of the respondents, I would order that Ms. Gardezi post a lesser amount than that sought by the Union. I order that she post $1,500.

[42] In accordance with the usual practice in this Court, as described in *The Pitt Polder Preservation Society v. The District of Pitt Meadows*, 1999 BCCA 593 at para. 5 (Chambers), I would stay the appeal until Ms. Gardezi has posted the requisite security.

"The Honourable Madam Justice Garson"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance,* 2022 BCCA 384

Date: 20221101
Docket: CA48363

Between:

Gonzales Hill Preservation Society

Appellant
(Petitioner)

And

Victoria (City) Board of Variance, City of Victoria, Karen Madro and Walter Madro

Respondents
(Respondents)

Before: The Honourable Mr. Justice Fitch
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated May 24, 2022 (*Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2022 BCSC 1090, Victoria Docket S210414).

Oral Reasons for Judgment

Counsel for the Appellant (appeared via videoconference November 1, 2022):	J.E. Shragge
Counsel for the Respondent, Victoria (City) Board of Variance (appeared via videoconference November 1, 2022):	M.R. Voell
Place and Date of Hearing:	Vancouver, British Columbia October 31, 2022
Place and Date of Judgment:	Vancouver, British Columbia November 1, 2022

Summary:

The Applicant seeks leave to appeal a final costs order in an underlying judicial review proceeding. If leave is granted, the Respondent seeks an order that the Appellant post security for costs of the appeal and of the underlying petition. Held: The application for leave to appeal is granted; the applications for security for costs are dismissed. The question of whether boards of variance are exempt from the general rule that administrative tribunals neither receive nor are awarded costs in a judicial review proceeding engages a broad question of principle that is of significance to the practice. The Applicant has an arguable ground of appeal that the chambers judge erred by relying on Mak v. Vancouver (City) Board of Variance, 2018 BCSC 895 for the proposition that where a board of variance argues the merits of a judicial review application—as the Board clearly did in this case—it should be treated as an ordinary party that can be awarded, or ordered to pay, costs the way other parties can be. The appellant is not in a financial position to post security for costs. Ordering them to do so would foreclose prosecution of a meritorious appeal; the appellant has accordingly displaced the presumption that where recoverability of costs may prove difficult, security of costs should be ordered. The application to order security for costs of the underlying petition is also dismissed.

FITCH J.A.:

I. Nature of the Application

[1] The Gonzales Hill Preservation Society (the "Society") applies for leave to appeal a final order awarding costs to the Board of Variance of the City of Victoria (the "Board") in the underlying judicial review proceeding.

[2] If leave is granted, the Board applies for orders that the Society post security for the Board's appeal costs in the amount of $15,000, and costs awarded to the Board in the court below in the amount of $10,000. The Board seeks an order that security be posted within 30 days of the orders being made and that the appeal be stayed until the Society posts security.

[3] The Society's application for leave to appeal is brought pursuant to ss. 13(2) and 31 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*]. The order sought to be appealed is a limited appeal order under Rule 11(f) of the *Court of Appeal Rules*, B.C. Reg. 120/2022. Leave is, therefore, required.

[4] The Board's application for security for costs is brought pursuant to ss. 30 and 34(1) of the *Act* and Rule 58 of the *Rules*.

[5] For the reasons that follow, the application for leave to appeal is granted. The application for security for appellate costs and costs awarded in the underlying proceeding is dismissed.

II. Background

[6] The Society, which is entirely member funded, was incorporated for the purposes of preserving Gonzales Hill Regional Park (the "Park"), its unique ecosystem, and Garry Oak meadow, for the enjoyment of visitors.

[7] The Society sought judicial review of a Board decision that granted a minor variance to the individual respondents, Walter and Karen Madro (the "Madros"), which reduced the rear yard setback on the Madros' property. The Madros' property is adjacent to the Park.

[8] The petition was dismissed on October 26, 2021, on grounds that the Society did not have standing. Reasons are indexed as 2021 BCSC 2091.

[9] Both the Madros respondents and the Board sought costs from the Society. On May 24, 2022, in reasons indexed as 2022 BCSC 1090, Justice Giaschi awarded the Madros respondents and the Board costs against the Society at Scale B.

[10] In his reasons for judgment, the chambers judge said this:

> [8] The petitioner refers me to *Martin v. Vancouver (City)*, 2008 BCCA 197, at para. 58, where it was held that a Board of Variance is quasi-judicial tribunal.
>
> > [58] There is no dispute about the description of the Board as a quasi-judicial tribunal. The provisions of the *Vancouver Charter* governing the functions of the Board grant it some court-like features: it hears appeals from persons aggrieved by zoning decisions of the Director of Planning (s. 573(1)(a)); it makes decisions that cannot be appealed (s. 573(6)); its members are not allowed to hold any municipal office (s. 572(4)); its members have a three-year tenure (s. 572(2)); it has the power to grant exemptions and to grant or deny appeals from decisions of the Director of Planning (s. 573(1)(b) and (e)); it must provide notice to persons affected and post public notice (s. 573(3));

> and it conducts hearings in open meetings (s. 573(4)). Its procedure is informal, however: evidence is not taken under oath, members may make site visits, and it does not give reasons for its decisions.
>
> [9] The petitioner then submits "[t]he general rule is that, absent misconduct or extraordinary circumstances, a quasi-judicial tribunal that is involved in proceedings to review its decisions neither receives nor pays costs". In support of that general rule, the petitioner relies on *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494, at paras. 37-54 [*Thibeau*]; *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 [*Lang*]; and *A.A.A.M. v. Director of Adoption*, 2017 BCSC 87, at paras. 8-12 [*A.A.A.M*].
>
> [10] However, these authorities do not fully support the general rule the petitioner proposes. They all concern whether and under what circumstances costs can be awarded against a tribunal. The general rule being that a tribunal is immune from an award of costs. None of them concern whether or under what circumstances a tribunal might be entitled to costs. Nevertheless, they do contain *dicta* supporting a general rule as proposed by the petitioner.

[11] The chambers judge also took note of *Lang v. British Columbia (Superintendent of Motor Vehicles),* 2005 BCCA 244 [*Lang*]. In *Lang* this Court appeared to endorse the proposition that, as a general rule, an administrative tribunal is neither entitled to or ordered to pay costs: at para. 11.

[12] The chambers judge accepted that *Lang* and other cases including *Feil v. Certified General Accountants Association of British Columbia*, 2015 BCSC 489, and *Hannos v. Registered Nurses Association of British Columbia*, [1996] B.C.J. No. 1484, [1996] B.C.W.L.D. 2078 (S.C.), "do tend to support the existence of a rule that administrative tribunals, specifically quasi-judicial tribunals, are not generally entitled to costs", subject to exceptions as in the case of professional disciplinary bodies: at para. 15.

[13] In granting the Board costs, the chambers judge relied on *Mak v. Vancouver (City) Board of Variance*, 2018 BCSC 895 [*Mak*] at para. 2, for the proposition that where a board of variance argues the merits of a judicial review application—as the Board clearly did in this case—it should be treated as an ordinary party that "…can be awarded, or ordered to pay, costs the way other parties can be…".

[14] While the chambers judge acknowledged that *Mak* represents an "apparent contrast" to the general rule set out in *Lang*, he noted that other cases decided

both before and after *Mak* have similarly held that a board of variance is entitled to costs, albeit with no or minimal discussion of the issue: see *Metchosin (District of) v. Metchosin Board of Variance*, 81 B.C.L.R. (2d) 156, 1993 CanLII 2882 at paras. 62–63 (C.A.) [*Metchosin*]; *O'Connell v. Burnaby (District)*, 1990 CanLII 876 (B.C.S.C.); *Saanich (Corp. of the District of) v. Kalfon*, 1992 CanLII 1535 (B.C.S.C.); *Medicanna Medicinal Cannabis Dispensary v. Vancouver (City)*, 2018 BCSC 896 [*Medicanna*]; and *Steemson v. Burnaby* (17 July 2020), New Westminster S222379 (B.C.S.C.) at para. 41.

[15] As counsel for the Society pointed out in argument, the result in *Metchosin* appears to be tied to the unique statutory context of the case. Further, some of the other cases cited by the judge predate *Lang*.

[16] Despite the apparent contrast between *Mak* and *Lang*, the chambers judge accepted the Board's position that he was bound to follow *Mak* given the "horizontal rule of *stare decisis*" in *Hansard Spruce Mills Limited (Re),* [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) [*Hansard Spruce*], recently adopted in *R. v. Sullivan*, 2022 SCC 19 at para. 75 [*Sullivan*].

[17] *Mak* has now been followed in both *Medicanna* and the case at bar.

[18] The Society seeks leave to appeal the decision of the chambers judge on the basis that "*Mak* has created an unprincipled, anomaly in the law … which is contrary to the weight of authority".

III. Leave to Appeal

[19] The Society bears the onus to establish that leave to appeal should be granted: *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 4 B.C.L.R. (2d) 8, 1986 CanLII 1089 at para. 5 (C.A.) (Chambers).

[20] The usual factors to be applied on an application for leave to appeal were set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers):

> [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

[21] However, on an appeal of a final costs order, where the underlying litigation has concluded, the test is modified. This is because the appeal cannot hinder the progress of the action or be of significance to the action itself, since the underlying matter has concluded: *Gichuru v. Pallai,* 2019 BCCA 282 at para. 7 (Chambers) [*Gichuru*].

[22] Additionally, because of the highly discretionary nature of a costs order, the merit requirement receives added emphasis and leave is generally not granted unless an identifiable question of principle is involved or the result is so clearly wrong as to amount to an injustice: *Neufeld v. Foster*, 2000 BCCA 485 at para. 14 (Chambers); *Yung v. Jade Flower Investments Ltd.*, 2012 BCCA 168 at paras. 18–20 (Chambers); *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2016 BCCA 339 at paras. 7–9.

[23] In *Gichuru* at para. 10, Justice Hunter summarized the specific factors for consideration on applications for leave to appeal a costs order:

> (1) whether the proposed appeal raises questions of principle that extend beyond the parameters of the particular case;
>
> (2) whether the questions of principle are of significance to the practice; and
>
> (3) whether the proposed grounds for appeal are arguable.

(1) Whether the appeal raises a question of principle that extends beyond the parameters of this case

[24] I agree with the position of the Society that the question raised on this application engages a point of principle. The Society relies on *Lang*, as well as this Court's decisions in *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494, *Laursen v.*

Director of Crime Victim Assistance, 2017 BCCA 8, and *Crook v. British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192, as authority for the proposition that, as a general rule, costs are not awarded against or to administrative tribunals. I agree with the Society that the issue in this case raises a broad question of principle.

(2) Whether the questions of principle are of significance to the practice

[25] I accept that the question of whether boards of variance are exempt from the general rule that administrative tribunals neither receive nor are awarded costs in judicial review proceedings—and, if so, in what circumstances—raises a question of significance to the practice. Whether *Mak* correctly states the law is a matter that, in my view, transcends this appeal. I am also of the view that the issue raised by the Society is one that should be addressed by this Court to promote clarity in the law and consistency in its application.

(3) Whether the proposed grounds of appeal are arguable

[26] On an application for leave to appeal, the question is whether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of the Court: *A.L.J. v. S.J.M.*, 46 B.C.A.C. 158, 1994 CanLII 2614 at para. 10 (C.A.) (Chambers).

[27] The Society submits that its proposed appeal is not only "arguable", but "substantially meritorious". In addition to arguing that *Mak* is out of step with governing jurisprudence, the Society notes that this Court held in *Gichuru v. British Columbia (Attorney General)*, 2020 BCCA 374, that the Attorney General should not receive or pay costs when appearing pursuant to the *Constitutional Question Act* R.S.B.C. 1996, c. 68, because the Attorney is not an "ordinary litigant". By analogy, the Society argues that the Board, which it characterizes as a quasi-judicial tribunal, similarly assumes a special role on judicial review of one of its decisions. Given the Court's reasons in *Gichuru*, the Society submits that "there is a substantial likelihood that a division…will…reaffirm *Lang* and allow the instant appeal".

[28] The Board submits that there is no merit in the appeal. It argues that *Lang* at para. 2 allows costs to be "awarded for and against a tribunal" where the tribunal "is a full participant in a judicial review and makes submissions on the merits of the judicial review application". Respectfully, I do not read *Lang* as resolving whether a tribunal is entitled to its costs in this context and, if it is, the circumstances in which such an order might be appropriate. Further, the Board submits that, "there is a long line of authority whereby municipalities and associated administrative bodies (such as Boards of Variance), behave and are treated in all respects as a conventional party (often as the primary respondent) in judicial review proceedings, including with respect to the awarding of costs". Accordingly, the Board says that the chambers judge was bound by *Mak* and correctly followed it. I have not, however, been taken to a considered decision of this Court that resolves the issues raised on this application.

[29] In my view, the Society has raised an arguable case as to whether *Mak* was correctly decided. I am satisfied the Society has demonstrated there is at least a reasonable possibility a division of this Court would grant the appeal on its merits: *MacRae v. Woermke*, 2019 BCCA 355 at para. 4 (Chambers), citing *Webb v. Canada (Attorney General)*, 2019 BCCA 288 at para. 15 (Chambers). Accordingly, I grant leave to appeal.

IV. Security for Costs of the Appeal

[30] The criteria considered on an application for security for appellate costs were summarized and explained in *Gardezi v. Positive Living Society of British Columbia,* 2018 BCCA 84 (Chambers):

> [28] The jurisdiction to order security for the costs of an appeal is found in s. 24(1) [now s. 34(1)] of the *Court of Appeal Act*. Importantly, on such an application, it is the appellant who bears the burden of showing why security is not required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers).
>
> [29] This Court generally considers five factors in determining whether to make an order for security for costs of the appeal. The first factor is the appellant's financial means. If ordering security for costs would prevent the appellant from pursuing a meritorious appeal, it may not be in the interests of justice to make the order: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C.

> 198 (Chambers). However, the Court may require the appellant to post security for costs of the appeal even if obtaining the funds would be difficult: *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at para. 21 (Chambers).
>
> [30] The second factor is whether the costs of the appeal will be readily recoverable if the respondent succeeds. If the applicant shows there is a serious question that recovery may be difficult, a presumption in favour of granting security for costs arises, unless the appellant can demonstrate the appeal has obvious merit: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers); *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers).
>
> [31] The third factor is the timing of the application for security. Because the appeal is usually stayed until security is posted, injustice would result if the respondent applied for security for costs on the eve of the appeal: *M.(M.) v. F.(R.)* (1997), 1997 CanLII 22835 (BC CA), 43 B.C.L.R. (3d) 98 at 101 (C.A. in Chambers).
>
> [32] The fourth factor is the merits of the appeal. If the appeal is "virtually hopeless" or "bound to fail", security for costs may be ordered even if the order prevents the appellant from pursuing the appeal: *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 1997 CanLII 2838 (BC CA), 97 B.C.A.C. 81 at paras. 5, 7 (Chambers); *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers). On the other hand, the Court will not order security for costs if it would prevent the appellant from pursuing a meritorious appeal: *Creative Salmon Company Ltd.* at para. 12.
>
> [33] The fifth and ultimate factor is whether the order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).

[31] The existing and well-established jurisprudence decided under the security for costs provisions of the former Act continues to apply to the Act now in force: *Martyn v. Walton,* 2022 BCCA 351 at para. 17. (Chambers); *Morden v. Pasternak,* 2022 BCCA 268 at para. 36 (Chambers).

(1) The Society's Financial Means

[32] The Board relies on the fact that the Society raised over $36,000 to judicially review the variance decision. The Board says that while the Society has no assets, it can raise funds to post security. In the circumstances, the Board submits that I should not credit the Society's claim that a requirement to post security would frustrate its ability to pursue the appeal. The Board relies on *D. Bacon Holdings Ltd. v. Naramata Vines Inc.,* 2010 BCCA 427 at para. 21, for the proposition that even if it is onerous to do so, an appellant may be required to post appeal costs.

[33] The Society argues that it is not in a position to post security and that the appeal is meritorious. The Society's director, Scott Chapman, deposes that the membership of the Society donated $36,776.75 toward the legal fees of the judicial review, but that its ability to raise additional funds moving forward is now "tapped out".

[34] Mr. Chapman deposes that the Society still owes the Madros respondents $4,250 for the costs awarded to them. He says the Society is not in a position to pay these costs, let alone post security for appellate costs. Mr. Chapman deposes that the Society has had to obtain *pro-bono* counsel to pursue the appeal and that, if it is ordered to post security for costs in any amount, the appeal will not proceed.

[35] On the evidence of Mr. Chapman, I accept that the Society is not in a financial position to post security for costs of the appeal, and that ordering them to do so would foreclose pursuit of a meritorious appeal that raises an important question of principle. This factor weighs against granting security for costs of the appeal: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198, 1997 CanLII 4110 at para. 18 (C.A.) (Chambers).

(2) The Board's Ability to Recover Costs

[36] Should the appeal be dismissed, the Board says that since the Society does not have assets, it is unlikely to recover costs. This is a serious concern, and one to which I have given anxious consideration. Mr. Chapman readily acknowledges that the Society has no ability to pay an award for costs to the Board arising from either the judicial review or this appeal. The Society nevertheless submits that it should not be required to post security for appellate costs in this case as its appeal has obvious merit.

[37] Where there is a "serious question" as to the recoverability of costs—as there is here—the presumption generally favours granting security: *Edwards v. Moran,* 2003 BCCA 443 at para. 14. However, this presumption can be displaced where the appellant can establish that the merits of the appeal are apparent as opposed to

being merely arguable: *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers). I am satisfied that the presumption has been displaced by the Society in this case.

(3) Timeliness of the Application

[38] Both parties agree that this factor is not in issue as the security for costs application has been brought in a timely way alongside the Society's leave application.

(4) The Merit of the Society's Appeal

[39] As I have noted, where ordering security for costs effectively forecloses a meritorious appeal from proceeding, it may not be in the interests of justice to make the order: *Creative Salmon Company Ltd. v. Staniford,* 2007 BCCA 285 at para. 12 (Chambers).

(5) The Interests of Justice

[40] For the foregoing reasons, I accept that the Society has met its burden of showing why security for appeal costs should not be ordered in this case.

[41] Having considered all of the factors in a collective way, I conclude that the interests of justice favour dismissal of the Board's application for security for appellate costs.

V. Security for Costs in the Underlying Action

[42] Security for costs of the underlying action are ordered less readily than those of an appeal: *Siekham v. Hiebert*, 2008 BCCA 299 at para. 13 (Chambers).

[43] The factors to be considered in deciding whether to grant security for costs of the underlying judgment were set out in *Aikenhead v. Jenkins*, 2002 BCCA 234 at para. 30:

> 1. The onus is on the applicant to show that it is in the interests of justice to order posting for security of a trial judgment and/or of trial costs;
>
> 2. The applicant must show prejudice if the order is not made; [and]

> 3. In determining the interests of justice the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

[44] In the matter before me, the parties have not yet had costs attributable to the underlying petition assessed. As I said in *Eisler Estate v. GWR Resources Inc.,* 2020 BCCA 111:

> [44] There is … a well-developed line of authority suggesting that this Court "should have the benefit of the trial court's disposition on costs before deciding whether and in what amount security should be ordered": *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.,* 2007 BCCA 272 at para. 4 (Chambers); *Buchy v. Villars*, 2008 BCCA 237 at para. 3 (Chambers); *Lu v. Mao,* 2006 BCCA 560 at para. 19 (Chambers).

[45] Where an application for security for costs in an underlying action is brought prior to costs being assessed, I would ordinarily be inclined to adjourn the application until an assessment is performed. However, given the reasons for my dismissal of the Board's application for security for costs of the appeal—that requiring the Society to post security would preclude it from prosecuting a meritorious appeal—I am likewise satisfied that requiring the Society to post security for any amount of costs in the underlying action would effectively foreclose pursuit of the appeal.

[46] Consequently, I dismiss the Board's application for security for costs of the underlying action.

VI. Disposition

[47] I grant the Society leave to appeal the May 24, 2022 order of the chambers judge that granted costs of the judicial review to the Board. I dismiss the Board's application for security for costs of the appeal and security for costs of the underlying judicial review proceeding.

"The Honourable Mr. Justice Fitch"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pereira v. Klonarakis,* 2023 BCCA 454

Date: 20231201
Docket: CA49408

Between:

Corinne Pereira

Appellant
(Plaintiff)

And

Margaret Klonarakis

Respondent
(Defendant)

Before: The Honourable Justice Marchand
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 11, 2023 (*Pereira v. Klonarakis*, 2023 BCSC 1760, Terrace Docket 21140).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):	C. Pereira
Counsel for the Respondent:	B.S. Dumanowski
Place and Date of Hearing:	Vancouver, British Columbia December 1, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 1, 2023

Summary:

The applicant seeks an order for security for costs. Held: Application granted. The appellant has the financial means to satisfy an award of costs and has paid a costs award in another matter. Further, her appeal is arguable. Nevertheless, there is a serious question as to whether recovery of costs of this appeal may be difficult and an order for security for costs will not create an injustice to the appellant or prevent her from pursuing the appeal. In all of the circumstances, an order that the

appellant pay security for costs in the amount of $9,000 within 30 days is in the interests of justice.

MARCHAND J.A.:

Introduction

[1] The applicant, Margaret Klonarakis, seeks an order that the appellant/application respondent, Corinne Pereira, pay security for costs of the appeal in the amount of $17,845, within 30 days, failing which Ms. Klonarakis has leave to apply to dismiss the appeal as abandoned.

Background

[1] Beginning in May 2019, Ms. Klonarakis and Ms. Pereira were employed by Dexterra Group Inc. (doing business as Horizon North) in Kitimat. On September 23, 2020, Ms. Pereira was terminated for cause. Since that time, Ms. Pereira has commenced a number of legal proceedings against various parties, including: her former employer, the union to which she belonged, the B.C. Labour Relations Board, the B.C. Workers' Compensation Board and Ms. Klonarakis.

[2] The appeal underlying Ms. Klonarakis' application for payment of security for costs arises from an order made on October 11, 2023 dismissing Ms. Pereira's defamation action against Ms. Klonarakis under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. The *PPPA* is frequently referred to as the "anti-SLAPP" legislation. It seeks to curb strategic litigation against public participation ("SLAPP"). The chambers judge's reasons for judgment are indexed at 2023 BCSC 1760.

[3] Ms. Pereira submitted a notice of appeal on October 12, 2023. The hearing of the appeal is currently scheduled for a full day on January 29, 2024.

Law

[4] A single justice has jurisdiction to order security for costs on appeal: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 34(1)(a), (b) [*Act*]. The appellant against whom the order is sought—here, Ms. Pereira—bears the onus of showing why security should not be required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA

285 at para. 9 (Chambers). In conducting its analysis, the Court must decide whether the order would be in the interests of justice, having regard to:

a) the appellant's financial means;
b) the merits of the appeal;
c) the timeliness of the application; and
d) whether the costs will be readily recoverable.

(*Alam v. Matsqui Institution (Warden)*, 2023 BCCA 12 at para. 10 (Chambers); *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers), citing *Furguson v. Ferstay*, 2000 BCCA 592 at para. 7 (Chambers); *Creative Salmon* at para. 9.)

[5] When an appellant is ordered to pay security for costs, this Court usually stays the appeal until security is posted and orders that security be posted within 30 days*: Alam*, citing *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 1999 BCCA 593 at para. 5 (Chambers), *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at para. 24 (Chambers).

[6] Under s. 36 of the *Act*, a respondent may apply to dismiss an appeal as abandoned if security is not posted within the time ordered.

Analysis

Ms. Pereira's financial means

[7] In her affidavit, Ms. Pereira has provided bank statements that indicate she has the financial means to pay Ms. Klonarakis' costs on appeal, if awarded.

Merits of the appeal

[8] In assessing the merits of the appeal in the context of an application for security for costs, the task is to assess the appellant's potential inability to pay costs against the merits of the appeal: *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 6 (Chambers). An appellant should not be barred from bringing an arguable appeal by an order for security for costs.

[9] Ms. Pereira raises several grounds of appeal including that the chambers judge erred by: misapplying the legal test for determining if a matter attracted public interest; misapprehending factual matters; failing to consider legislative

intent regarding the *PPPA*; and narrowing the focus of his analysis to a single allegation instead of looking at her allegations globally.

[10] Ms. Klonarakis submits that the appeal is without merit. She maintains that the chambers judge properly assessed the evidence and applied the law correctly. She submits that to show palpable and overriding error on the part of the chambers judge will present Ms. Pereira with a "considerable challenge".

[11] I do not intend to engage in a detailed consideration of the merits of Ms. Pereira's appeal. In my view, it suffices to say that Ms. Pereira's appeal is arguable.

Timeliness of the application

[12] The requirement that the applicant file a timely application for security for costs is intended to protect the appellant from injustice. Generally, such an order can be made without injustice to the appellant if the application is made at the earliest stages of the appeal: *M. (M.) v. F. (R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (Chambers). Of course, whether that is so depends on the circumstances of the appeal: *Ducharme v. Rempel*, 2015 BCCA 437 at para. 18 (Chambers).

[13] Ms. Pereira filed her notice of appeal on October 12, 2023 and her appeal record, appeal book and factum on October 18, 2023. Counsel for Ms. Klonarakis filed a notice of appearance on October 17, 2023, and notified Ms. Pereira of her intention to apply for security for costs on October 20, 2023. On November 17, 2023, Ms. Klonarakis filed a factum and a book of authorities. She filed her application for security for costs on November 23, 2023. As mentioned, the hearing of the appeal is currently scheduled for January 29, 2024.

[14] Ms. Pereira submits that the purpose of security for costs is to aid respondents who may otherwise be compelled to defend a meritless appeal in which they will not be able to recover costs. Ms. Pereira submits that this is not such a case. As evidence, she points to the fact that Ms. Klonarakis filed her factum and appeal materials before she brought the application for security for costs.

[15] Ms. Pereira also refers to the "unfair burden" of having to post security for costs, especially at this time of year. At the same time, she acknowledges that the

timing of Ms. Klonarakis' application has not caused her prejudice.

[16] While it is somewhat unusual that Ms. Klonarakis did not bring this application in advance of preparing and filing her factum, she gave Ms. Pereira very early notice of her intention to apply for security for costs. And, in any event, the question before me regarding timeliness is not whether Ms. Klonarakis has taken any potentially unnecessary steps but rather whether the timing of Ms. Klonarakis' application for security for costs will create an injustice for Ms. Pereira.

[17] Given how quickly Ms. Pereira filed her appeal record, appeal book and factum (six days after filing her notice of appeal), Ms. Klonarakis did not have an opportunity to apply for security for costs in advance of Ms. Pereira taking these steps. In the circumstances, while it may be difficult or inconvenient, I am satisfied that ordering security for costs at this stage will not create an injustice for Ms. Pereira.

Likelihood of recovering costs

[18] There is a presumption in favour of granting security for costs where there is a serious question as to whether recovery may be difficult: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers).

[19] Ms. Klonarakis submits that the ongoing litigation is evidence of Ms. Pereira's "hostility" towards her. For that reason, she submits that it is likely Ms. Pereira will resist attempts to collect on costs in the event that the appeal is unsuccessful.

[20] Ms. Pereira argues that the Canadian legal system is adversarial, and that any animosity she might have towards Ms. Klonarakis is not relevant to the question of security for costs. Ms. Pereira maintains that she has paid an award of costs in another matter against a defendant who she swears she "absolutely hates". She further submits that a third party is funding the litigation for Ms. Klonarakis and that Ms. Klonarakis is not, at law, eligible to collect costs from her.

[21] It is commendable that Ms. Pereira has paid costs awarded against her in another matter. It is also reassuring that she appears to have sufficient funds to

satisfy an award of costs if her appeal is unsuccessful. However, the terms of Ms. Klonarakis' retainer with her counsel are subject to solicitor-client privilege. I am, therefore, not in a position to address Ms. Pereira's argument that no costs could be awarded to Ms. Klonarakis.

[22] Of significance, the banking information Ms. Pereira has provided relates to a joint account which would not be subject to garnishment. In other words, if Ms. Pereira is unsuccessful on appeal and resists paying costs, Ms. Klonarakis may be unable to enforce (i.e., collect) a costs award. I am, therefore, satisfied that there is a serious question as to whether it will be difficult for Ms. Klonarakis to recover appeal costs, if awarded.

Conclusion and Disposition

[23] Whether to order security for costs in this case is difficult because there are factors which pull in both directions. On the one hand, Ms. Pereira has an arguable appeal, some financial means and a history of satisfying a costs award in a previous matter. On the other hand, Ms. Klonarakis has brought a timely application that creates no injustice for Ms. Pereira, and has satisfied me that there is a serious question as to whether recovery of costs of this appeal may be difficult. Further, an order for security for costs will not prevent Ms. Pereira from pursuing her appeal.

[24] In all of the circumstances, Ms. Pereira has not shown why security for costs should not be required. Put differently, I am satisfied that *some* measure of security for costs would be in the interests of justice in this case.

[25] In the past, security for costs orders have typically ranged from $5,000 to $7,500: see e.g. *Alam* at para. 38; *A.B. v. C.D.*, 2020 BCCA 57 at para. 26; *Bhimani v. Beninteso*, 2020 BCCA 79 at para. 28. However, the dollar value of costs tariff items has recently almost doubled. As a consequence, security for costs orders should be expected to increase to between $9,000 and $14,000.

[26] Here, Ms. Klonarakis has provided a draft bill of costs on appeal of $17,845. In my view, $9,000, which is at the low end of the range, is an adequate and appropriate amount for Ms. Pereira to post as security.

[27] For all of these reasons, I order that Ms. Pereira post security for costs of the appeal in the amount of $9,000 within 30 days. I stay the appeal until security is posted. Costs of this application will be in the cause.

"The Honourable Justice Marchand"

Pizza Pizza Ltd. v. Gillespie, Chicken Chicken Inc., Chicken Chicken Limited Partnership, Chicken Chicken GP Inc., Chicken Chicken Management Inc., McNally, Folk, Stevens, Solomon, Mason, Carter, Johnston, Hunter, Fudge, Lochaine Ltd., Gordon Capital Partners, 669392 Ontario Ltd., Framlance Properties Ltd., United News (Wholesalers) Ltd., Cardar Investments Ltd., Wilfrid Industries Ltd., Fleiser, Goad, Curry, Nelson, Sildva, Wilson, Potovsky, Westaway, Kraus, Albo, Thompson (in trust), Blanchette and Blanchette

Indexed as: Pizza Pizza Ltd. v. Gillespie
(Gen. Div.)

75 O.R. (2d) 225
[1990] O.J. No. 2011
Action No. 46296/90

ONTARIO
Ontario Court (General Division)
Henry J.
October 2, 1990.*

*Released October 30, 1990.

Civil procedure -- Summary judgment -- Availability -- Plaintiff claiming that defendants had breached non-competition agreement and had misused confidential information -- Defendants moving for summary judgment -- Judge on motion deciding that case not meriting trial -- Summary judgment granted -- Rules of Civil Procedure, O. Reg. 560/84, Rule 20.

The plaintiff PP Ltd. owned and franchised restaurants which sold pizza for take-out and home delivery. The defendant G had been an employee, officer and director of the plaintiff from 1978 to 1988. G formally left the plaintiff following the settlement of litigation between himself and the chairman of

the plaintiff. As part of the settlement, G signed a non-competition agreement that he would not carry on any business which was competitive with PP Ltd. in the pizza business. G incorporated the defendant CC Inc. under the name "Chicken Chicken" to own and franchise restaurants for take-out and home delivery of barbecued chicken. The defendant CCM Inc. managed the franchise system and the defendant CCLP was a limited partnership formed to develop the Chicken Chicken franchise system. The plaintiff alleged that by establishing Chicken Chicken, G had breached the non-competition agreement and that G had misused confidential information received from the plaintiff. The plaintiff sued for, among other things, damages and an injunction. The defendant G and certain other defendants moved under Rule 20 of the Rules of Civil Procedure for summary judgment. The plaintiff submitted that summary judgment was not available because the evidence before the court was contradictory.

Held, the motion should be granted and the action should be dismissed against all defendants.

The developing case law under Rule 20 established that the judge on the motion must decide whether the case merits reference to a judge at trial. The thrust of the preferable case law was that Rule 20 contemplates a radically new attitude to motions for judgment. The objective is to screen out claims that, in the opinion of the court, ought not to proceed to trial because they cannot survive scrutiny. There are no arbitrary or fixed criteria that the motions judge must apply. It is a case by case decision made on the law and facts that the judge is able to find on the evidence submitted. It is not sufficient for the responding party to say that more and better evidence will or may be available at trial. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial. Apparent factual conflict in the evidence does not end the inquiry. The court may, on a common sense basis, draw inferences and may look at the overall credibility of the plaintiff's action. Matters of credibility requiring resolution in a case of conflicting evidence ought to go to trial but the court must take a hard look at the merits to decide if any conflict is more apparent

than real. Motions under Rule 20 must be made sparingly and judiciously.

Avery v. Value Investment Corp., Ont. H.C.J., Doc. No. 43996/89, Farley J., May 25, 1990, [1990] O.J. No. 843, [summarized at 21 A.C.W.S. (3d) Paragraph488]; Greymac Trust Co. v. Reid (1987), 19 C.P.C. (2d) 134 (Ont. Master), affd (1988), 31 C.P.C. (2d) 211 (Ont. Div. Ct.); 209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135 (Ont. H.C.J.); Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242, 10 C.P.C. (2d) 205, 10 C.P.R. (3d) 492 (H.C.J.), folld.

The claim based on the non-competition agreement concerned the interpretation of the language of the agreement. This was a question of law that could be decided under Rule 20. The language was clear and confined G not to compete with PP Ltd. in the sale of pizzas and pizza franchises. There was no patent or latent ambiguity and there was no justification for going beyond the language adopted by the parties or for having resort to the rules of construction or to extrinsic evidence. It was not open to the plaintiff to seek postponement to trial to perfect the evidence. The plaintiff did not make a case for breach of the agreement because the defendants' activity in engaging in the chicken business did not constitute competing in the pizza business.

Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co., [1969] 1 O.R. 469, 3 D.L.R. (3d) 161 (H.C.J.); TransCanada Pipelines Ltd. v. Northern & Central Gas Corp. (1983), 41 O.R. (2d) 447, 146 D.L.R. (3d) 293 (C.A.), folld

As for the claims that G had breached a fiduciary duty or a duty of confidentiality, while there was no dispute that G was a fiduciary, the evidence did not establish any breach of duty. There was no substance to the allegation that the franchise agreements were confidential. The know-how necessary to

implement the delivery system was personal to G and not derived from confidential information and he was free to use it so long as he did not make use of trade secrets, customer lists or ripening commercial opportunities of the plaintiff -- none of which were alleged. The evidence was that the Chicken Chicken business was a result of G's initiative and not the result of appropriation of a corporate opportunity. The plaintiff did not provide specific or coherent evidence to support the allegation that Chicken Chicken copied the Pizza Pizza software nor did the plaintiff show that G had done anything improper in entering the chicken market or by using the name Chicken Chicken.

Other cases referred to

Alvi v. Lal, Ont. H.C.J., Then J., May 9, 1990, [1990] O.J. No. 739, [summarized at 20 A.C.W.S. (3d) Paragraph1063]; Arnoldson y Serpa v. Confederation Life Assn. (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641, [1974] I.L.R. Paragraph1-606 (C.A.); Berkey Photo (Canada) Ltd. v. Ohlig (1983), 43 O.R. (2d) 518, 2 C.C.E.L. 113, 76 C.P.R. (2d) 121 (H.C.J.); Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, [1980] I.L.R. Paragraph1-1176, 32 N.R. 488; Dialadex Communications Inc. v. Crammond (1987), 57 O.R. (2d) 746, 14 C.P.R. (3d) 145, 34 D.L.R. (4th) 392 (H.C.J.); Greenbaum v. 619908 Ontario Ltd. (1986), 11 C.P.C. (2d) 26 (Ont. H.C.J.); G.W.E. Consulting Group Ltd. v. Schwartz (1990), 72 O.R. (2d) 133, 66 D.L.R. (4th) 348 (H.C.J.); Indian Molybdenum Ltd. v. R., [1951] 3 D.L.R. 497 (S.C.C.); Mensah v. Robinson, Ont. H.C.J., Watt J., February 22, 1989, [1989] O.J. No. 239, [summarized at 14 A.C.W.S. (3d) 53]; Mitsui Construction Co. v. Hong Kong (Attorney General) (1986), 71 N.R. 285 (P.C.); National Trust Co. v. Maxwell (1989), 34 C.P.C. (2d) 211, 3 R.P.R. (2d) 263 (Ont. H.C.J.); Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381, 115 Sol. Jo. 654 (H.L.); Quantum Management Services Ltd. v. Hann (1989), 69 O.R. (2d) 26, 43 B.L.R. 93, 25 C.P.R. (3d) 218 (H.C.J.); Riviera Farms Ltd. v. Paegus Financial Corp. (1988), 29 C.P.C. (2d) 217 (Ont. H.C.J.) [leave to appeal to Ont. Div. Ct. granted (1988), 32 C.P.C. (2d) 164]; 309925 Ontario Ltd. v. Tyrrell (1981), 127 D.L.R. (3d) 99 (Ont. H.C.J.); Tran v. Wong (1989), 37 C.P.C.

(2d) 145 (Ont. H.C.J.)

Statutes referred to

Business Corporations Act, 1982, S.O. 1982, c. 4
Copyright Act, R.S.C. 1985, c. C-42, s. 3 [am. R.S.C. 1985, c. 10 (4th Supp.), s. 2; am. 1988, c. 65, s. 62(1)]
Courts of Justice Act, 1984, S.O. 1984, c. 11
Limited Partnerships Act, R.S.O. 1980, c. 241

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rule 20, rules 20.01(3), 20.04(1), (2), (4)
Rules of Practice, R.R.O. 1980, Reg. 540, Rule 58(2)

MOTION for an order of summary judgment dismissing a claim against the moving defendants in an action for damages and for injunctive and other equitable relief pursuant to Rule 20 of the Rules of Civil Procedure.

Terrence J. O'Sullivan and Markus Koehnen, for the plaintiff/ respondent.

Claude R. Thomson, Q.C., for the defendants/moving parties John Gillespie, Chicken Chicken Inc., Chicken Chicken Limited Partnership, Chicken Chicken GP Inc., and Chicken Chicken Management Inc.

Richard A. Conway, for all the defendants/moving parties other than John Gillespie, Chicken Chicken Inc., Chicken Chicken Limited Partnership, Chicken Chicken GP Inc., Chicken Chicken Management Inc., Barbara Blanchette and Theresa Blanchette.

HENRY J. (orally):-- This is a motion by the defendants John Gillespie, the corporate Chicken Chicken defendants and Chicken Chicken Limited Partnership for an order for summary judgment

dismissing all or part of this action as against the moving defendants.

For convenience, I shall sometimes refer to the plaintiff as Pizza Pizza, to the first individual defendant as Gillespie and to the Chicken Chicken Limited Partnership and the corporate Chicken Chicken defendants collectively as Chicken Chicken; and to the remainder as the partners, except Barbara Blanchette and Theresa Blanchette who are not represented.

THE ACTION AND PARTIES

This action is for damages, and for injunctive and other equitable relief set out in the statement of claim. The plaintiff Pizza Pizza is incorporated under the laws of Ontario and carries on the business of owning and operating take-out restaurants and franchising such restaurants, which offer for sale pizza and other food items for take-out and home delivery.

The defendant John Gillespie resides in Toronto and was employed by Pizza Pizza as an employee, officer and director from September 1978 to May 1988.

The defendant Chicken Chicken Inc. was incorporated under the laws of Ontario and owns a franchise system which operates under the name Chicken Chicken, serving barbecued chicken, wings and other food items for take-out and home delivery.

The defendant Chicken Chicken Management Inc. is an Ontario corporation which manages the franchise system of Chicken Chicken.

The defendant Chicken Chicken Limited Partnership was formed and registered under the Limited Partnerships Act of Ontario, R.S.O. 1980, c. 241, to develop the Chicken Chicken franchise system. Chicken Chicken GP Inc. is the general partner and the remaining defendants appearing are the limited partners.

The relief claimed in the action is both legal and equitable being set out in the statement of claim as follows:

1. The plaintiff, Pizza Pizza Limited ("Pizza Pizza") claims from the defendants jointly and severally:

(a) damages in the amount of $10,000,000.00;

(b) in the alternative, an Order directing that the beneficial ownership of the assets of Chicken Chicken Inc. ("Chicken Chicken") be transferred to Pizza Pizza;

(c) a permanent injunction restraining the defendants or any of them from continuing the business of Chicken Chicken or the franchises of Chicken Chicken;

(d) an interlocutory injunction enjoining the defendants or any of them from selling, opening or operating any franchises other than those opened and operating as of the date of the service of the statement of claim until the trial of this action;

(e) in the further alternative, an Order that any interest of John Gillespie ("Gillespie"), direct or indirect in Chicken Chicken or in any of the general or limited partners of Chicken Chicken be transferred to Pizza Pizza;

(f) in the further alternative, an accounting of all monies received and expended by Chicken Chicken from the date of its inception until the trial of this action and an Order for payment of all profits earned by Chicken Chicken to Pizza Pizza;

(g) an Order that Gillespie account for and pay to Pizza Pizza all monies received directly or indirectly by Gillespie or companies with which he is associated in connection with the affairs of Chicken Chicken;

(h) punitive damages against Gillespie in the amount of $1,000,000.00;

(i) pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, 1984, S.O. 1984, c. 11, as amended;

(j) costs of this action on a solicitor and client basis; and

(k) such further and other relief or Order as this Honourable Court may permit.

The action was commenced by the issue of the statement of claim on March 1, 1990, and first came before me by way of a motion by the plaintiff for an interlocutory injunction, inter alia, restraining the defendants from continuing the business of Chicken Chicken or the franchises of Chicken Chicken; and enjoining the defendants until trial from selling or opening any franchises other than those existing at the date of service of the statement of claim. For written reasons endorsed on June 4, 1990, I dismissed that motion. It was at that time understood that I would then hear the defendants' cross-motion set down for the same day for an order for summary judgment, which I heard on June 7 and 8, 1990, and upon which I reserved judgment to this time.

THE MOTION

The motion is for summary judgment under Rule 20 of the Rules of Civil Procedure, O. Reg. 560/84. For the purpose of the motion, Pizza Pizza's claims against Gillespie and Chicken Chicken may be broken down into its constituent parts as follows:

(a) Gillespie has breached a non-competition covenant not to compete with Pizza Pizza in the pizza business.

(b) Gillespie has misused confidential information received in confidence from Pizza Pizza, consisting of:

(i) the know-how necessary to establish a fast food business with a "30 minutes or free" delivery guarantee;

(ii) Pizza Pizza's franchise agreement;

(iii) Pizza Pizza's computer program;

(iv) the name Chicken Chicken;

(v) Pizza Pizza's marketing methods.

(c) Gillespie was and is a fiduciary of Pizza Pizza and Gillespie breached his fiduciary duty as an officer, director and employee by:

(i) acquiring the name Chicken Chicken;

(ii) entering the fast food chicken take-out and delivery business in a form similar to that contemplated by Pizza Pizza.

The fundamental submission of the moving parties Gillespie and Chicken Chicken is that when the various elements of the claim are individually analyzed, the action cannot be sustained on the evidence before the court.

The fundamental submission of Pizza Pizza as set out in its factum is that summary judgment is not available to the defendants in this action because the evidence which has been adduced to date is contradictory. The motion requires the court to weigh conflicting evidence and to make findings of credibility which are inappropriate on a motion for summary judgment.

As against the limited partners who have each provided financing to the partnership for the purpose of developing and marketing the Chicken Chicken franchise business, Pizza Pizza asserts that the limited partners are constructive trustees for any monies received by them from Chicken Chicken. No allegations of wrongdoing are asserted against the limited partners in connection with these proceedings.

BACKGROUND FACTS

Pizza Pizza is a pizza take-out and delivery business and was established by its chairman, Michael Overs, in 1967 in Toronto. It now is a franchisor of pizza franchises which guarantee delivery on a "30 minutes or free" basis. It has over 200 franchisees who have invested in and have run their own

franchised businesses in Metropolitan Toronto, Montreal, Guelph, Kitchener-Waterloo, Hamilton-Burlington, Ottawa, Barrie and elsewhere. Pizza Pizza sells pizza, pasta, Italian sandwiches and soft drinks.

Chicken Chicken Inc. was created in 1988 and with its affiliates began operations at retail in Metropolitan Toronto in December 1989. The Chicken Chicken defendants sell barbecued chicken, chicken wings, salads, potatoes and soft drinks and guarantee delivery on a "30 minutes or free" basis.

John Gillespie is the president and chief executive officer of each of the Chicken Chicken defendants, except the partnership. He was formerly a shareholder and the president of Pizza Pizza; he left that company in mid-1987 following a shareholders' dispute with Michael Overs, the chairman. Gillespie formally resigned from his position with Pizza Pizza on December 6, 1988, after settlement of litigation resulting from that dispute.

Gillespie's association with Pizza Pizza began in September 1978, when he joined as director of franchising. His prior adult life had been devoted to franchising and to the fast food industry. From 1971 to 1978, he was a franchisee and later Ontario franchisor of Pizza Delight Limited which grew from three to 80 outlets in Ontario. Michael Overs then invited him to sell franchises for Pizza Pizza. Gillespie deposes that he joined Pizza Pizza in 1978 on the understanding that he would ultimately receive an equity interest in Pizza Pizza which quite evidently he did.

He further deposes that when he joined Pizza Pizza in 1978 that company had approximately 20 outlets. He progressed through the ranks of the company and in March 1983 was appointed president and Overs became chairman. By the time Gillespie left the company it had approximately 130 outlets open or committed (Overs says the expansion was from 26 to 112 outlets).

In early 1987, Overs and Gillespie had a falling out. Overs sought to dismiss Gillespie and acquire his shares in Pizza

Pizza; and the matter gave rise to the earlier litigation mentioned which consisted of an application by each party for oppression remedies under the Business Corporations Act, 1982, S.O. 1982, c. 4 (O.B.C.A.), brought by both Overs and Gillespie and their holding companies. That litigation was settled by the parties while it was before the Divisional Court.

I do not intend, as it is unnecessary, to plot the course of that litigation and the pith and thrust of the settlement negotiations. I need only say that one of the terms of the settlement was the execution by Gillespie of the non-competition clause which is alleged in the statement of claim in this action to have been breached by him.

AVAILABILITY OF SUMMARY JUDGMENT

At this point it is appropriate to refer to the provisions of Rule 20 of the Rules of Civil Procedure pursuant to which this motion is brought. The pertinent provisions are:

> 20.01(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
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> . . . . .
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> 20.04(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
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> 20.04(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.
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> 20.04(4) Where the court is satisfied that the only genuine

issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

This rule was introduced with the new Rules of Civil Procedure promulgated pursuant to the Courts of Justice Act, 1984, S.O. 1984, c. 11 and replaces former Rule 58(2) of the Rules of Practice, R.R.O. 1980, Reg. 540 under which only a plaintiff could move for summary judgment on a specially endorsed writ. The new Rule 20 makes a significant departure from the former rule and sets up an approach to summary judgment that is new in Ontario. The new rule has been analyzed in several decisions of the High Court of Justice, to three of which the moving parties (defendants) have particularly referred; and upon others on which the plaintiff relies.

August 5, 1986

In Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242, 10 C.P.C. (2d) 205, 10 C.P.R. (3d) 492 (H.C.J.), Boland J. on August 5, 1986, in a most helpful decision on the principles and extent of the new regime held that the court on a Rule 20 motion for summary judgment has a duty to take a hard look at the merits of the action at this preliminary stage and may freely canvass the facts and law in order to determine whether or not there is a genuine issue for trial (pp. 246-47 O.R.). Summary judgment was granted.

August 14, 1986

In Greenbaum v. 619908 Ontario Ltd. (1986), 11 C.P.C. (2d) 26 (Ont. H.C.J.), at p. 48, Sutherland J., in granting summary judgment in part, held that in deciding whether to grant a motion for summary judgment the court should approach the issue with less diffidence and more assurance than under the former rules. The new rules provide a broad evidentiary basis for decision and confer on the parties a broad entitlement to adduce evidence material to the issue before the court (pp. 47-48). This contrasts with the former narrow scope of the court's authority as expressed in Arnoldson y Serpa v.

Confederation Life Assn. (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641, [1974] I.L.R. Paragraph1-606 (C.A.) where it was held that the court ought not to decide on a motion matters of law or fact which are in serious controversy, and, more generally, that the court should not grant judgment on such a motion unless the case is so clear that there is no doubt as to what the results of a trial would be. Sutherland J. does not refer to the decision of Boland J. in Vaughan delivered August 5, 1986.

May 19, 1987; affd July 26, 1988

Furthermore, in response to a motion for summary judgment the responding party must place before the court coherent evidence and an organized set of facts showing that there is a real issue for trial. See Greymac Trust Co. v. Reid (1987), 19 C.P.C. (2d) 134 (Ont. Master), affd by Ont. Div. Ct., Boland J. (1988), 31 C.P.C. (2d) 211.

January 8, 1988

In 209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248, 8 P.P.S.A.C. 135 (Ont. H.C.J.) (the C.I.B.C. case), Anderson J. on January 8, 1988, in granting summary judgment under the new Rule 20, adopted Boland J.'s summary in Vaughan of the changes under the law as it previously existed, and her principle that the court has authority "to freely canvass the facts and law in order to determine whether there is a genuine issue for trial". Anderson J. then added at p. 261 C.P.C.:

> No doubt the extent to which it is appropriate for the Court on a motion such as this to investigate questions of fact, and the nature of the issues of fact which will comprise "a genuine issue for trial," will vary from case to case and will have to be determined upon a case-to-case basis. As a matter of present impression, I see nothing in the language of the rule, or in the review of the law contained in Vaughan, to suggest any clear or arbitrary limit, although it seems safe to say that, where there are contested issues of fact involving the credibility of

witnesses, the only appropriate forum remains a trial Court. A lawyer or a Judge schooled in the tradition that almost any substantial issue was to be determined at trial requires a material change in attitude to give appropriate effect to the rule.

The case law continued to develop rapidly, so much so that it is apparent that some judges have been unaware of all the previous decisions when interpreting Rule 20.

I continue chronologically.

September 7, 1988

Following the decision of Anderson J. in the C.I.B.C. case, there was an oral judgment of Campbell J. in Riviera Farms Ltd. v. Paegus Financial Corp. (1988), 29 C.P.C. (2d) 217 (Ont. H.C.J.) [leave to appeal to Ont. Div. Ct. granted (1988), 32 C.P.C. (2d) 164]. Campbell J. reviewed a decision of the master on motion for summary judgment who held there was no genuine issue for trial. He held that the master erred in principle in making his decision in the face of overlapping issues of fact and of mixed fact and law. He said at p. 221 C.P.C.:

> On this kind of motion the Court must take a hard look at the facts and a hard look at the merits. It is not, however, the job of the Court on this kind of motion to decide which competing inferences should be drawn from disputed facts or indeed from primary facts that are not in dispute. That is the job of the trial Judge.

February 22, 1989

In Mensah v. Robinson, Ont. H.C.J., February 22, 1989, [1989] O.J. No. 239, [summarized at 14 A.C.W.S. (3d) 53], Watt J. in a characteristically thorough and thoughtful judgment expresses the test thus at p. 16 of his reasons:

> Upon a motion for summary judgment by a defendant under sub-rule 20.04(2), it is my respectful view that the standard to be applied is whether the claim in respect of which

summary judgment is sought has about it an air of reality in light of the evidence upon which reliance is placed on the motion. The requirement that there be a "genuine issue" or, put in the negative, "no genuine issue" for trial, involves more, however, than simply a determination of whether there is some evidence to support the claim. To be certain, the question of whether there is some evidence to support the claim in respect of which summary judgment is sought is an integral part of the test to be applied. The critical issue, however, is whether, assuming the evidence in support of the claim to be true, it is sufficient to justify the consideration of the claim by the trier of fact. The evidence will be sufficient for such purpose where there is at least some evidence upon the basis of which a reasonable trier of fact, properly instructed, could find in favour of the responding party upon the issue at trial.

In practical terms, the sufficiency of proof upon a particular issue by a party bearing the onus in respect of that issue can be but rarely adjudged on the basis of controverted affidavit material even with cross-examination. Indeed, it has been elsewhere said that when there are controverted facts relating to matters essential to a decision, such facts cannot be found by an assessment of the credibility of deponents who have been neither seen nor heard by the trier of fact. See R. v. Jetco Manufacturing Ltd. and Alexander (1987), 31 C.C.C. (3d) 171 (Ont. C.A.), at p. 176. It is nonetheless so where what is being determined is whether summary judgment should issue where the facts which underlie the claim or defence are controverted. As it would appear to me, it will be a comparatively rare case where controverted factual issues may be resolved upon a motion for summary judgment. If indeed they could be so as a matter of routine, one might be forgiven for wondering as to the purpose of a trial. It may be, for example, that even accepting a view of the facts most favourable to the responding party, the claim or defence cannot be sustained as a matter of law. Such cases aside, it would appear generally more appropriate to leave such controverted issues to the trial forum where the trier of fact has a fuller evidentiary record, as well as the opportunity of being an ear and eye

> witness to the testimony given, the better to assess credibility and weight. To the extent that the earlier excerpted passages from the decision of Boland J. in Vaughan v. Warner Communications, supra, invites a weighing of competing affidavit material, I am, with respect, unable to agree. I do not disagree that the matter must be closely examined. The examination, however, in my respectful view, cannot involve findings of credibility based on controverted affidavit material or an assessment of evidentiary sufficiency as against the burden of persuasion applicable at trial. To so hold would render trials the exception, rather than the rule by which such matters are determined.

(Emphasis original)

He then, in my opinion, reverts to the test under the prior rule as set out in Arnoldson y Serpa v. Confederation Life Assn., supra. It also appears that he was not referred to Anderson J.'s judgment in the C.I.B.C. case.

March 9, 1989

In National Trust Co. v. Maxwell (1989), 34 C.P.C. (2d) 211, 3 R.P.R. (2d) 263 (Ont. H.C.J.), Doherty J. followed the statement of Boland J. in Vaughan (the hard look approach) and added, at p. 217 C.P.C., that:

> An apparent factual conflict in the evidence put before me does not end this inquiry under R. 20.

July 18, 1989

In Tran v. Wong (1989), 37 C.P.C. (2d) 145 (Ont. H.C.J.) O'Driscoll J. cited Anderson J.'s reasons in the C.I.B.C. case at length with its endorsement of Vaughan and concluded that a trial would be unlikely to add anything to what was already presented before the District Court and O'Driscoll J.; credibility was a negligible factor because of the need to use an interpreter.

May 9, 1990

In Alvi v. Lal, Ont. H.C.J., May 9, 1990, [1990] O.J. No. 739, [summarized at 20 A.C.W.S. (3d) Paragraph1063], Then J. followed the test as expressed by Watt J. in Mensah. He set out two principles (which Mr. O'Sullivan asks me to adopt) as follows:

> 1. Where there are controverted issues of fact involving the credibility of witnesses, it could not be said that there are "no genuine issue for trial"; summary judgment should not be granted. The trial is the only proper forum for the resolution of disputed facts through the hearing and testing of viva voce evidence.
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> 2. Where there are no disputed facts in issue, the court must nevertheless be satisfied that on the evidence there is no basis on which a reasonable trier of fact, properly instructed, could find in favour of the responding party before summary judgment should be granted.

I have no difficulty with para. 1 as part of a general test; para. 2, however, in my opinion (and I say it respectfully) emasculates the developing concept of new Rule 20.

May 25, 1990

On May 25, 1990, Farley J. released the most recent judgment to which I was referred (by Mr. Thomson) in Avery v. Value Investment Corp., Ont. H.C.J., Doc. No. 43996/89, [1990] O.J. No. 843, [summarized at 21 A.C.W.S. (3d) Paragraph488], in which he reiterated the basic principles in Rule 20 set out in the Vaughan and Greymac decisions, supra, and cited [at pp. 16-17 of the reasons] the following language from Boland J. in Vaughan, p. 247 O.R., p. 211 C.P.C.:

> The specific changes to the summary judgment rule and the spirit in which other rules are changed indicates in my respectful view that Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion. The responding party has a positive responsibility to go beyond mere supposition

and the court now has the duty to take a hard look at the merits of an action at this preliminary stage.

And [he cited at p. 17 of the reasons in Avery] from Greymac per the Divisional Court at p. 212 C.P.C., quoting Master Donkin's reasons at p. 140 C.P.C.:

> It seems to me that in filing an affidavit in response to a motion for judgment, the defendant must place before the Court some set of coherent affidavit evidence which sets out in the affidavit, an organized set of facts, showing that there is a real issue to be tried on evidence which will probably be admitted. In my view the responding defendants have not done so in this action.

Farley J. concluded at pp. 32-33 [of his reasons in Avery]:

> I would conclude that all three sets of defendants have satisfied the onus on them to show that there is no genuine issue for trial. However in a motion under Rule 20 there is an evidentiary burden (and only an evidentiary burden) on the plaintiffs to present affidavit material or other evidence to support the allegations of their pleadings. (See Kaighin Capital Inc. v. Canadian National Sportsmen's Shows et al. (1987), 17 C.P.C. (2d) 59 (Ont. H.C.J.) at p. 62). However, in this case the plaintiffs did not present in any coherent fashion such affidavit material or other evidence to support their allegations. The plaintiffs were required to take into account the comments of Anderson J. at p. 266 of the 209991 case:
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> "The provisions of rule 20.04(1) should put a party responding to a motion for summary judgment on notice that the action or defence is in jeopardy and that it is necessary to put a best foot forward, as failure to do so may be fatal. Resort to such a motion is susceptible of abuse, and should be had sparingly, discreetly and advisedly, if it is not to be yet another cumbersome and expensive interlocutory proceeding, of which the litigation process already has quite enough."

> The plaintiffs did not place their best foot forward. Indeed their feet appear to have been hidden. In this case then the plaintiffs (as well as the defendants) should be spared the agony and expense of a long and expensive trial after some indeterminate wait.

I also observe that at pp. 27-28 [of the Avery reasons] he referred to the drawing of inferences and the issue of credibility in the following language:

> Pursuant to Fasken v. Time/System International APS (1986), 12 C.P.C. (2d) 1 (Ont. H.C.) I would draw the adverse inference by rule 20.02 that all plaintiffs but Hitchlock relied on Hitchlock and his view of things, they did not rely on the prospectus or other material emanating from the defendants.
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> I find it a fair inference that the plaintiffs relied on Hitchlock who had considerable experience as a stock brokerage employee. Hitchlock recommended the purchase of the warrants to his clients. He apparently did so for virtually the full life of the warrants. ... In taking a good hard look at the facts, I do not find it credible that the plaintiffs would advance their claims on the basis indicated. Assuming that the evidence in support of their claim was true, was it sufficient to justify the consideration of the claim by the trier of fact? I must answer in the negative as I did not find that the evidence was such that a reasonable trier of fact, properly instructed, could find in favour of the plaintiffs at trial on these issues.

As I have indicated, counsel for the defendants rely on the decisions starting with Vaughan and following the approach of Boland and Anderson JJ.

Mr. O'Sullivan, on the other hand, urges me to follow the decisions in Mensah, Alvi and Riviera Farms. It may well be that when one accepts that on a motion such as this the court must decide to grant or refuse summary judgment on a case by case basis there will be no difficulty in following the thread of the case law. However, it does appear to me that the

decisions in Mensah and Alvi (which adopted it) to the extent that they revert to the more rigid test under the former rule do not express the intent of Rule 20 as developed in Vaughan, Greymac Trust, C.I.B.C. and Avery. If I have to make a choice, it is in my judgment more appropriate to apply the seminal concept in the latter decisions.

While Farley J. seems to invoke Watt J.'s test he does not say it is the only test. There can be no question that if the case of the responding party fits into the former test, the court should give summary judgment as did Farley J. on the facts before him; as I read his reasons, however, he endorsed the seminal decisions of Boland and Anderson JJ. as I do here.

In my opinion, there is a lower threshold that is contemplated by the new Rule 20 and the case law developing. It is that the court, in taking a hard look at the merits, must decide whether the case merits reference to a judge at trial. It will, no doubt, have to go to trial if there are real issues of credibility, the resolution of which is essential to determination of the facts. That aside, however, the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward. The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting "a genuine issue for trial"; the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties "should be spared the agony and expense of a long and expensive trial after some indeterminate wait" (per Farley J. in Avery).

In my view, the general thrust of the seminal decisions of the court on Rule 20, where the moving party is the defendant, may be summarized thus for present purposes:

Rule 20 contemplates a radically new attitude to motions for judgment; the objective is to screen out claims that in the opinion of the court, based on evidence furnished as directed

by the rule, ought not to proceed to trial because they cannot survive the "good hard look".

There is no arbitrary or fixed criterion that the motions judge must apply. It is a case by case decision to be made on the law and on the facts that he is able to find on the evidence submitted to him in support of the claim or defence, whether the plaintiff has laid a proper foundation in its affidavit and other evidence to sustain the claims made.

It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial.

Apparent factual conflict in evidence does not end the inquiry.

The court may, on a common sense basis, draw inferences from the evidence.

The court may look at the overall credibility of the plaintiff's action, i.e., does the plaintiff's case have the ring of truth about it such that it would justify consideration by the trier of fact?

Matters of credibility requiring resolution in a case of conflicting evidence ought to go to trial; however, that depends upon the circumstances of the case; the court in taking the "hard look" at the merits must decide if any conflict is more apparent than real, i.e., whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits.

Motions under Rule 20 must be made sparingly and judiciously; the court will control abuse of this process if necessary by its order for costs.

With these preliminaries I turn now to a consideration of the viability of the action in respect of the plaintiff's claims as

I have summarized them above.

THE NON-COMPETITION COVENANT

The covenant in question was entered into by Gillespie as part of the settlement of the litigation between Overs and Gillespie under the oppression remedy provisions of the Business Corporations Act, 1982 (both parties having initiated such proceedings). There is no need to discuss the course of this litigation except to say that while it was before the Divisional Court it was settled. As one term of the settlement Gillespie executed the following covenant in favour of Pizza Pizza Limited on December 6, 1988, pursuant to the settlement made on July 12, 1988, in the course of argument before the Divisional Court.

> To Pizza Pizza Limited,
>
> I agree that for a period of 36 months commencing on July 12, 1988, I shall not, either alone or in conjunction with any individual, firm, corporation, association or other entity, directly or indirectly, carry on or be engaged in or concerned with, or interested in any business or activity which is competitive with Pizza Pizza Limited in the pizza business anywhere within either the Province of Ontario or the Province of Quebec.
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> Dated this 6th day of December 1988.

I am in no doubt whatever that this document was delivered and accepted on closing on December 6. It is described by Mr. Overs as the non-competition agreement. There is no dispute that the words above are correct. The dispute concerns the interpretation of the language of the clause. Mr. Overs takes the position that, as he deposes in his affidavit, it represents an undertaking by Gillespie "not to compete in any business or activity which is competitive with pizza business carried on by Pizza Pizza in Ontario or Quebec for a period of 36 months" (emphasis added).

Mr. O'Sullivan, in oral argument put his position thus: "We

hope to show only an arguable case for our construction". He put his position on the principle that the trial judge should apply the business purpose test to the clause based on evidence of surrounding circumstances at the time the clause was executed. I shall refer to this in due course.

The defendants' position is that the language actually used is clear and unambiguous; Gillespie agrees not to engage in a business or activity which is competitive with Pizza Pizza Limited "in the pizza business".

This is a question of law which under Rule 20 I am prepared to decide now. In my opinion, the defendants are right.

First, the language is clear. As written it confines the undertaking to competition in the sale of pizzas (and no doubt pizza franchises). The language is not apt to go beyond that. The plaintiff's position on the other hand, seeks to place before the court evidence of an intention by Overs that the defendant should not compete with the plaintiff's business through sale of other food items, namely, chicken and by extension other fast foods. This is not what the plain wording says.

Second, the plaintiff's submissions amount to an attempt to have the court alter the plain meaning to suit the plaintiff's purpose. That would require the introduction of extrinsic evidence which, in my opinion, would be inadmissible. I can find no patent or latent ambiguity in either the meaning or the application of the language and, if that be so, there is no justification for going behind the language the parties have adopted.

Third, the plaintiff's counsel submits that the court ought to interpret the agreement in the light of its business purpose and to apply the interpretation which promotes a sensible commercial result. This business purpose, he says, can only be established after all the evidence is heard at trial. I cannot agree. There is no ambiguity and there is no need to resort to the rules of construction or extrinsic evidence. Mr. O'Sullivan, while acknowledging that the court ought not to

admit extrinsic evidence (which is common ground among all counsel), in reality is asking the court to do so. He says that the case ought to go to trial because the evidence can be completed and the trial judge may find a patent or latent ambiguity. This approach is not acceptable under the new rule. It is not open to the plaintiff to seek postponement to trial to perfect the evidence; its obligation is to put its best foot forward now. The affidavit evidence now submitted by the plaintiff does not justify either the admission of extrinsic evidence nor recourse to the rules of construction.

The foregoing principles that govern the introduction of extrinsic evidence are well known and are found in decisions referred to by counsel, inter alia, Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co., [1969] 1 O.R. 469, 3 D.L.R. (3d) 161 (H.C.J.) and particularly the analysis of Gale C.J.O. at pp. 523-24 O.R., pp. 215-16 D.L.R.; TransCanada Pipelines Ltd. v. Northern & Central Gas Corp. (1983), 41 O.R. (2d) 447, 146 D.L.R. (3d) 293 (C.A.), at pp. 452-53 O.R. See also Indian Molybdenum Ltd. v. R., [1951] 3 D.L.R. 497 (S.C.C.), at pp. 502-03 where the majority of the Supreme Court of Canada (Cartwright J. dissenting) stated the principle that extrinsic evidence including surrounding facts and circumstances could be admissible to explain an ambiguity. That I believe to be the proper rule and I think it is not displaced by anything said by Gale C.J.O. in Texas Gulf or by the Court of Appeal in the TransCanada Pipelines case. The point is that the court must first find an ambiguity in the meaning or application of the language.

Reference is made by counsel for the plaintiff to a decision of the House of Lords in Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381, 115 Sol. Jo. 654. If that decision is at variance with the rule in the cases I have cited (which I do not find) it is a departure that is not applicable to Canada at present.

On the affidavit material filed, the plaintiff does not show any patent or latent ambiguity in either the meaning or application of the language of the clause. What Mr. Overs deposes to is his intention at the time of the settlement which

is not admissible; nor can I find that it would be justifiable to send the matter to trial in order to perfect the evidence; the relevant evidence ought under Rule 20 to be before the court now assuming that it turns out to be admissible.

I was also referred by the plaintiff's counsel to two decisions in which the court looked for a business or commercial purpose of the contract which counsel urged me to follow and send the case to trial so that evidence for that purpose may be perfected. See Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, [1980] I.L.R. Paragraph1-1176, 32 N.R. 488; Mitsui Construction Co. v. Hong Kong (Attorney General) (1986), 71 N.R. 285 (P.C.).

I need only say that as I read those decisions the principle invoked is really one that is intended to resolve an ambiguity in the meaning or application of the contractual language. In the Consolidated Bathurst case, the Supreme Court of Canada put it this way at p. 901 S.C.R.:

> Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to

obtain insurance protection nugatory, should be avoided.

The Mitsui case is to much the same effect but is, of course, not binding here.

The affidavit material does not set out facts, as it must, to show that the plain meaning of the non-competition covenant does not comport with the true intent of the parties in settling the litigation; or that to apply it would bring about an unrealistic result; or one which would not be contemplated in the commercial atmosphere; or that the result is unfair or unreasonable or that the plain words do not produce a sensible commercial result. The court, in short, ought not to interfere with the plain meaning of the clause where it is not ambiguous; or if it is, it ought not to interfere as a matter of construction where the result is neither unreasonable nor unrealistic commercially so as to raise doubt in the mind of the court that that meaning and application advances the intention of the parties.

The evidentiary material before the court does not lead to this conclusion, as I understand counsel for the plaintiff acknowledge, because they say that the necessary evidence may be forthcoming at trial. For the reasons I have given earlier it is not appropriate on a motion under the new Rule 20 to refer the matter to trial to enable the plaintiff to perfect the case there when it should have set out the facts specifically, and in an organized way, on this motion.

The plaintiff accordingly does not make a case for breach of the non-competition covenant because the defendants' activity in engaging in the chicken business does not constitute competing with the plaintiff ''in the pizza business".

To avoid misunderstanding I add that, in my opinion, the non-competition clause agreed to by the parties crystallized any duty that Gillespie had as a senior or fiduciary employee in law or equity not to compete with his former employer; see the helpful analysis of this principle in Quantum Management Services Ltd. v. Hann (1989), 69 O.R. (2d) 26, 43 B.L.R. 93, 25 C.P.R. (3d) 218 (H.C.J.) per Ewaschuk J. at p. 33 O.R.

Gillespie's obligation thereafter was as defined by the clause agreed to.

The claim of Pizza Pizza based on the allegation that the defendant Gillespie breached the terms of the non-competition covenant involves a question of law which I accordingly determine adversely to the plaintiff. I find that this is not a genuine issue for trial.

To recapitulate the issues as set out in the plaintiff's factum at para. 8: in the statement of claim dated March 1, 1990, the plaintiff alleges against Gillespie and the other defendants that Gillespie had: (a) breached his non-competition agreement with Pizza Pizza; (b) breached his duty of confidentiality to Pizza Pizza; (c) breached his fiduciary obligations to Pizza Pizza.

I have decided the first issue against the plaintiff and I turn now to the second and third which are appropriately considered together.

BREACH OF DUTY OF CONFIDENTIALITY BY MISUSE OF CONFIDENTIAL INFORMATION

I will take the elements of the plaintiff's complaint in the order and manner set out in the plaintiff's factum. Its position is that in starting up Chicken Chicken, Gillespie has made use of proprietary information which is confidential to Pizza Pizza and which he obtained in his capacity as a fiduciary of Pizza Pizza. I say at once that there is little doubt or dispute that by reason of his status and/or functions while he was with Pizza Pizza, Gillespie is shown on the evidence to be a fiduciary.

It may be of assistance to quote Mr. Overs' first affidavit where he summarizes his evidence in this respect (at para. 39):

> I believe that Gillespie has used the ideas and concepts learned at Pizza Pizza while in a fiduciary position with Pizza Pizza to develop Chicken Chicken. The information gained by Gillespie concerning the operations of Pizza Pizza,

its franchise system, its plans to expand into the chicken business and all information in the nature of "know how" regarding the operation of Pizza Pizza were given in circumstances where Pizza Pizza reasonably expected that the information would be kept confidential. Furthermore, Gillespie's entry into the chicken business is in direct breach of his covenant not to compete with Pizza Pizza.

(i) The franchise agreement

The plaintiff's allegation is that its franchise agreements are confidential documents and are so designated on their face. Its affidavit material alleges that Gillespie has used large portions of the Pizza Pizza franchise agreement and that the Chicken Chicken franchise agreement is almost identical to that used by Pizza Pizza at the time of Gillespie's departure.

As to this, the thrust of the evidence is that the plaintiff's franchise agreement is a public document. It is in the hands of many franchisees in the marketplace and is freely available through court records as the affidavit of Reid Lester deposes. Moreover, it is also in evidence that Gillespie had the Chicken Chicken agreement drafted by a solicitor, David Tenant in the firm of McCarthy, Tetrault, who is experienced in franchising. The agreement was not copied from the plaintiff's agreement but was custom-prepared to accommodate Chicken Chicken's business requirements as Mr. Gillespie deposes. There is also evidence that the plaintiff's agreement was prepared by the same law firm McCarthy, Tetrault. Even assuming that the plaintiff's document was used, absent an assignment of the copyright, as I see it, the law firm held the copyright and could use the draft in preparing the agreement for Gillespie, using it as "boiler plate" or as a model where applicable as is common among practitioners.

There is accordingly no substance to this allegation and it will be rejected.

It is noteworthy that Mr. Overs himself in his affidavit does not, so far as I can see, make any case regarding the contracts as confidential apart from deposing that the documents are so

labelled.

(ii) Methodology of the 30 minutes delivery program and other marketing methods

The plaintiff's position is that the success of a "30 minutes or free" delivery program depends on a variety of factors such as the location of franchise outlets, the territories which they serve, effective management of a delivery fleet, a sophisticated computer phone-ordering system and trained operators. Mr. Overs says that the information necessary to implement these factors is confidential. He elaborates by saying that the confidential information relates to criteria for selection of store locations, the delineation of store territories training and staffing. I cannot find this to be either confidential or proprietary information. It is simply a matter of experience and know-how.

While Overs deposes to the foregoing generalities, nowhere in its evidence does the plaintiff allege (except for the computer software and franchise agreement) that the know-how necessary to implement the "30 minutes or free" policy by Chicken Chicken was obtained by the wrongful taking of confidential documents or business records; nor is it alleged that the skills necessary to implement the Chicken Chicken policy were not personal to Mr. Gillespie as developed by him before and during his association with the plaintiff.

Mr. Gillespie's affidavit and cross-examination on the other hand, make it clear that the successful development of the "30 minutes or free" franchise system is principally a matter of nerve, know-how, common sense and hard work. (Computer software and the franchise agreement are factors dealt with separately.)

The positive evidence is that the know-how necessary to implement a "30 minutes or free" system for Chicken Chicken is personal to Gillespie and not derived from confidential information. While Gillespie brought in and also developed his know-how while associated with Pizza Pizza, even as an officer or employee owing a fiduciary duty to the plaintiff, he was at liberty once he left to use it because it had become personal

to him as part of his intellectual make-up. I need only refer in this respect to the analysis by Trainor J. in 309925 Ontario Ltd. v. Tyrrell (1981), 127 D.L.R. (3d) 99 (Ont. H.C.J.) and the authorities there cited. I add that the evidence adduced by the defendants establishes that the "30 minutes or free" delivery concept is not unique to Pizza Pizza and did not originate with it. Its marketing methods have become widely publicized and known, are in the public domain and are of a generic nature.

Mr. Coke who has specialized for many years in the business of franchising, sums up the matter in his affidavit thus:

> In conclusion, the concepts and systems which form the basis of fast food franchising are commonly known and frequently imitated. The concept and systems described by Overs in his affidavit are well-known within fast food franchising. Indeed, if any of these concepts were at one time unique to Pizza Pizza they became generic in short order.

I do not understand this assessment to be controverted.

The plaintiff does not show by specific facts the use by Gillespie of true confidential information in the development of Chicken Chicken's marketing methods, franchise agreement or the selection of its franchise locations. The law is that defendants are at liberty to use the know-how Gillespie had or acquired while with the plaintiff including its marketing methods so long as they did not make use of trade secrets, customer lists or ripening commercial opportunities of the plaintiff -- none of which are alleged in this case.

In this connection it is worth referring to the following passage by White J. in Berkey Photo (Canada) Ltd. v. Ohlig (1983), 43 O.R. (2d) 518, 2 C.C.E.L. 113, 76 C.P.R. (2d) 121 (H.C.J.) where he analyzed the law concerning the fiduciary obligations of directors and senior officers of a corporation at pp. 530-32 O.R.:

> The law is clear that directors and senior officers of a corporation have fiduciary obligations to the corporation

which include the observance of a strict ethic of the duty of loyalty, good faith and avoidance of conflict of duty and self-interest ...

. . . . .

A director or officer of a corporation cannot obtain for himself either secretly or without the approval of the company any business advantage or opportunity belonging to the corporation. He cannot use his position and influence in the corporation and opportunities afforded by his employer to set up a competing business or to solicit the corporation's employees to join him ...

. . . . .

The fiduciary duties of a director or senior officer may extend in time beyond his resignation or his removal as a director ... Furthermore, it is not a precondition to relief on a claim for damages for a breach of a fiduciary's duty that the corporate employer of the fiduciary would not itself have obtained or maintained the business opportunity in question ...

. . . . .

On the other hand, upon cessation of employment, an employee, including one in a top management position, may immediately go into competition with his former employer and solicit the former employer's customers so long as there is no misuse of confidential information such as trade secrets or lists of customers ... A former employee, including one in a top managerial position, may make use of his skills, general knowledge and any personal goodwill acquired during the course of his employment in competing with his former employer ... It is not a theft of a corporate opportunity if a party who had an ongoing business relationship with a former employer decides to deal in the future with a former employee ...

. . . . .

> For competition by a former employee to be a breach of fiduciary duty where there is not misuse of confidential information, there must be acts committed before the cessation of employment which formed at least part of the wrongful conduct complained of. There must also be the acquisition of a business opportunity or advantage which was available to the employer and not readily available to the employer's competition. An example is a fresh corporate opportunity which has developed to a point where it is about to ripen. In that situation, if the employee quits so as to pick the fruit of the opportunity personally his conduct is improper and gives rise to liability. ... It is not a breach of fiduciary duty where a former employee obtains a business opportunity rejected by the former employer ...

In particular, it is open to a former employee, including a fiduciary, to take advantage of a business opportunity where that opportunity was not mature or specific to the corporation and where the employee did not resign to pursue that opportunity; moreover, the opportunity must be "ripe". See Tyrell, supra, and Dialadex Communications Inc. v. Crammond (1987), 57 O.R. (2d) 746, 14 C.P.R. (3d) 145, 34 D.L.R. (4th) 392 (H.C.J.).

By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored as Overs was doing. Moreover, all the evidence indicates that a substantial amount of initiative was taken by Gillespie in preparation and development of the chicken business. He retained Luke Sklar to do market research; he retained Robert Gorrie to design his marketing; he raised money through private placement (the partners herein). The evidence demonstrates that the Chicken Chicken business is a result of Gillespie's initiative and planning, not the result of appropriation of a corporate opportunity from Pizza Pizza.

In summary, the evidence of Mr. Gillespie and other evidence tendered by him establishes that the distinctive marketing

characteristics of Pizza Pizza and the terms of its franchise system are in the public domain and are of a generic nature. This is not rebutted by specific facts adduced by Pizza Pizza which show the use of confidential information by Gillespie in the development of Chicken Chicken's marketing methods, its franchise agreement or in the selection of its franchise locations.

Nor is the evidence tendered by Gillespie that he retained a design consultant at arm's length to develop marketing design material for Chicken Chicken rebutted by specific facts adduced by Pizza Pizza which show the use of confidential information by Gillespie in the development of Chicken Chicken's marketing design material.

(iii) Computer software information

Mr. Overs in his first affidavit, para. 36, deposes that the computer software used by Chicken Chicken is "apparently identical to the software used by Pizza Pizza". The marketing strategy of Chicken Chicken, he says, includes a computerized one-number telephone ordering system and the "30 minutes or free" guaranteed delivery and free delivery; these features are all hallmarks of the Pizza Pizza system. The Pizza Pizza software was custom-designed for the plaintiff's requirements with confidential material. The affidavit plainly implies that Gillespie stole the plaintiff's software and had it copied for use in the Chicken Chicken marketing scheme.

Mr. Gillespie acknowledges that the computer software is confidential to Pizza Pizza and ought not to be copied. If in fact he stole the software when he left the plaintiff, that would be improper conduct and in breach of his duty to the plaintiff as a fiduciary on the same level as taking away customer lists and trade secrets. Mr. Gillespie acknowledges that prior to his leaving the plaintiff he had taken away a copy of the computer programs in question on the advice of the plaintiff's solicitor for safekeeping, which the solicitor corroborates. Gillespie, however, states that he did not copy the information but destroyed it after the settlement.

The evidence of copying alleged by Overs is a comparison made by a law student, a Mr. Michaud, between reports generated by the computer software of both parties. He finds a substantial number of these reports to be identical in function and purpose. Frankly, I have no information as to the expertise of Mr. Michaud in this field and no basis for judging whether this information is in fact a matter of copying. That would require further evidence which should be before the court now under Rule 20.

Thus there is evidence of some similarity and an inference drawn by Overs that the plaintiff's computer software was copied. There is an acknowledgement by Gillespie that he had possession of the software at the time he left the plaintiff company but that he destroyed it without copying it; that is not controverted.

Second, Gillespie's evidence on his cross-examination is that the Chicken Chicken software was developed by Rayman's Consulting Services Limited. Fred Rayman, the president, testified that his company writes computer software and programming. It developed the software for Pizza Pizza and continues to the present to update it. He or his firm has also developed computer software for one-number telephone ordering systems for other companies in the fast food business, including chicken. In the summer of 1989, he was asked by Gillespie to quote on a computerized order entry system for Chicken Chicken. His evidence is that he had told Overs of this and Overs, who, he understood, already knew of Gillespie's plan, had no objection to Rayman developing a computer system for Chicken Chicken "as long as it was unique". Overs does not deny this. He (Rayman) said Overs then took back the software copies that Rayman had in his possession for storage and so far as he knew his firm had retained no further "discs, source codes, printouts or computer tapes" pertaining to Pizza Pizza software.

It is obvious to me that Rayman is an expert in the field of computer programming and development of computer software -- at least in the fast food business. He is the only witness who can speak knowledgeably both generally and at first-hand

specifically about Overs' allegations of copying the plaintiff's software.

Rayman testified that the development of both Pizza Pizza software and that of Chicken Chicken were custom jobs -- each tailored to the specific requirements of the client. He specifically said that he was not provided with any of the Pizza Pizza computer material by Gillespie or anyone and that he had received instructions from Gillespie and gave assurances that the Chicken Chicken software was original and custom-designed and that the systems were different.

Rayman testified as to specific differences in the requirements and programming of the two clients and then summed it up thus:

> Q. 126 Can you tell me, please, in terms of the effort involved, what would be the programming differences and the technical differences between designing those two systems?
>
> A. They are entirely different. It's a whole different computer communications problem ...

I need not elaborate but I refer to two reasons given by Rayman for the need to design a different computer system for Chicken Chicken:

(a) The fact that 90 per cent of Pizza Pizza's business is generated through the one-number telephone ordering service whereas in the case of Chicken Chicken only 60 per cent is by phone-ahead orders and 40 per cent is walk-in trade;

(b) The difference in preparation time of the respective foods -- preparation of pizza requiring less lead time than preparation of chicken products. These are reflected in the reporting functions.

He was also clear in stating that mere similarities in functions relied on by the plaintiff do not mean that they are identical or that one system has been copied (Questions 108-09).

I do not find this evidence to be controverted except by the generalities alleged by Mr. Overs and the observations of Mr. Michaud. The plaintiff does not as required by Rule 20 submit any specific and coherent evidence to support the allegations that Chicken Chicken copied the Pizza Pizza software. What is submitted is speculation.

Moreover, although counsel for the plaintiff submit that there are here issues of credibility which can only be resolved by a trier of fact hearing and observing the witnesses, I cannot find that there is any credibility issue as to the evidence to which I have just referred. The plaintiff's evidence is a generalization drawn from unsupported evidence whereas the positive evidence tendered by the defendants is specific and given from first-hand knowledge and expertise.

I have no hesitation in finding that the plaintiff has failed to raise a triable issue as to the alleged copying of the plaintiff's software.

In any event, if in fact Rayman made use of some or all of the plaintiff's software and programming, he and/or his firm would be entitled to do so because as the author of the plaintiff's program and software they own the copyright in that work. No evidence is submitted by the plaintiff to show that the copyright was assigned to Pizza Pizza by the author; thus by s. 3 [am. R.S.C. 1985, c. 10 (4th Supp.), s. 2; am. 1988, c. 65, s. 62(1)] of the Copyright Act, R.S.C. 1985, c. C-42, Rayman's Consulting is free to reproduce and sell the Pizza Pizza software with or without the plaintiff's consent.

To summarize, the evidence of John Gillespie and Fred Rayman that the computer software system developed by Rayman for Chicken Chicken is a unique system and materially different from the system developed by Rayman for Pizza Pizza is not rebutted by specific facts adduced by Pizza Pizza in affidavit or other evidence. The affidavit of Pierre Michaud, which is based on a functional comparison of the titles of the reports produced by the two systems, merely establishes that there is a similarity in some but not all of the titles and reports

produced by the two systems. It does not establish the use of confidential information by the defendant Gillespie in the development of Chicken Chicken's computer system. It is not a matter of conflicting evidence or credibility of the witnesses.

(iv) The name Chicken Chicken and its use by the defendants

Pizza Pizza takes the position in its factum (p. 15) that Gillespie acquired knowledge of the name Chicken Chicken as a fiduciary of Pizza Pizza and that he is therefore barred from using it for his own benefit.

The evidence is that while at Pizza Pizza Gillespie encouraged Overs to start a chicken take-out and delivery business. Some steps were taken in the early 1980s that might eventually lead to the plaintiff's entry to the chicken business. In particular, the company acquired trademark rights for the name "Chick N' Feed" in 1981; it applied for the trademark "Chicken Chicken" in late 1982 and had discussions with other entrepreneurs concerning possible entry to the chicken business. Mr. Overs says that at all material times Gillespie was aware of his and the plaintiff's interest in entering the chicken market.

However, the plaintiff's affidavit material, even taken as uncontradicted and credible, does not go farther than to establish that a chicken business in a form similar to Pizza Pizza's was anything more than an idea or a concept which Overs was exploring. There is no evidence of confidential business plans or of a "ripe" corporate opportunity. Overs' evidence is simply that he is "presently exploring a number of alternative ways of realizing this long-held objective".

In 1987, according to Overs' affidavit the trademark Chick N' Feed was deemed by the regulatory authorities to be abandoned because the plaintiff could not show any present use.

The trademark application for the name Chicken Chicken filed by the plaintiff in 1982 was made on the basis of proposed use; to obtain it would require Pizza Pizza to undertake a chicken business under that name. The application was deliberately

allowed by Overs to lapse (as was the Chick N' Feed mark) in June 1987. The plaintiff's trademark counsel (Clarke) deposes that he was instructed by Overs that his Chicken Chicken and Chick N' Feed files "are closed or to be closed immediately". It was his understanding the plaintiff had no plan to enter the chicken business.

Gillespie deposes that he found the name Chicken Chicken attractive but knew that Overs had applied for this name. In August 1988, he had a trademark search made and discovered that the plaintiff had allowed the application to lapse. On October 11, 1988, his assistant applied through a numbered company for trademark rights to the name Chicken Chicken. In July 1989, the application was allowed by the trademarks office subject to commencement of its use.

To summarize the effect of this evidence, the plaintiff does not show any use by it of the name Chicken Chicken as its trademark whether registered or unregistered; it shows no proprietary interest in either the idea or the name; Overs deliberately instructed that the application was to lapse and counsel's files to be closed; the plaintiff shows no "ripe" corporate opportunity in the chicken business or to use the name, nor that Gillespie left the plaintiff in order to seize such a "ripe" opportunity; indeed there can be no dispute that Gillespie left as a result of the shareholders' litigation and its settlement. The plaintiff makes only a bald allegation that the plan to enter the chicken market and to use the name were confidential and that Gillespie knew of it as a fiduciary.

The plaintiff does not by specific facts show that Gillespie, as a fiduciary or otherwise, has done anything improper in entering the chicken market and using the name Chicken Chicken. What the positive evidence shows is that Gillespie took this action having discovered that the plaintiff's idea or project had at that time been abandoned. He cannot be faulted for this: see e.g., Berkey Photo, supra, p. 532 O.R. I add that the plaintiff's interest in the chicken business and the name was not confidential information -- the trademark application is a matter of public record.

The evidence of Gillespie, Clarke and other evidence tendered by him establishes that Overs and Pizza Pizza had no settled intention or concrete plans to enter the chicken business, and that Overs deliberately allowed the application for the Chicken Chicken trademark to lapse; he also instructed his trademark counsel Gordon Clarke to close his files relating to the trademark rights. This evidence is not rebutted by specific facts adduced by Pizza Pizza which show the use of proprietary confidential information or the breach of fiduciary obligation by Gillespie in the development of Chicken Chicken.

I can summarize the foregoing by finding that Pizza Pizza has not, in answer to this motion for summary judgment, shown, as it must under Rule 20, that there is a triable issue relating to the misuse of confidential information by Gillespie as a fiduciary or otherwise for the following reasons:

(a) Pizza Pizza has failed to tender any cogent evidence showing that Chicken Chicken software is copied from Pizza Pizza's;

(b) Pizza Pizza has failed to tender any evidence showing that it possesses the copyright to the software which would enable it to prevent copying in any event;

(c) Pizza Pizza's franchise agreement is a public document, is not confidential and therefore its use cannot be restrained; moreover, there is nothing to show that the copyright has been assigned to Pizza Pizza by the law firm which drafted it which firm also prepared the Chicken Chicken franchise agreement;

(d) The other marketing methods and systems used by Pizza Pizza in the course of its business are commonly known and do not derive from any confidential documents or trade secrets; Pizza Pizza has failed to tender any coherent evidence establishing that they were imparted or communicated to Gillespie in circumstances which would give rise to an obligation of confidence.

The plaintiff similarly fails to show, as I have explained above, that Gillespie by adopting and using the name Chicken

Chicken and by entering the fast food take-out and delivery business in a form similar to that contemplated by Mr. Overs, has breached his obligation as a fiduciary to the plaintiff.

CONCLUSION

First, I have taken a hard look at the evidence and law and find that the plaintiff responding does not discharge the onus under Rule 20 to tender an organized set of facts showing that there is a genuine issue for trial. With respect to the specific issues raised herein, its evidence consists of bald allegations or speculation and demonstrates a failure to respond specifically and cogently to the evidence tendered on behalf of Gillespie.

Second, I have also taken a hard look at the plaintiff's case generally, and on a practical and common sense view of the allegations and the evidence and the law, I am unable to find that the plaintiff has raised a case that ought to be tried. To put it bluntly, the case against the defendants lacks credibility as an assertion of rights and injury claimed for the plaintiff.

The cross-motion will therefore be allowed and the action is dismissed as against all defendants. The action cannot stand as against the partnership and the partners once it is disposed of as against the other defendants: see G.W.E. Consulting Group Ltd. v. Schwartz (1990), 72 O.R. (2d) 133, 66 D.L.R. (4th) 348 (H.C.J.), at p. 142 O.R. per Austin J.

Having heard counsel on the matter of costs, I have endorsed the record as follows:

The defendants appearing will have costs of the action to be assessed on the party-and-party scale, to be paid by plaintiff. Junior counsel representing Gillespie et al. may be allowed a fee for preparation but not for his attendance at the motion since he was not gowned, being a witness.

Reasons. This is not a case for solicitor-and-client costs. The allegation of fraud is imprecise. As to the partnership

parties, they were properly added even though no allegations of wrongdoing were made.

Judgment for defendants.

CITATION: Roppovalente v. Danis, 2020 ONSC 5290
COURT FILE NO.: CV-20-82646
DATE: 2020/09/04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Robert Roppovalente	)	Andrew Lister, for the Applicant
Applicant	)	
– and –	)	
T'Sheal Danis	)	Wade Smith, for the Respondent
Respondent	)	
	)	**HEARD:** July 24 and 29, 2020

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] This is a motion in Mr. Roppovalente's oppression application under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). Mr. Roppovalente and Ms. Danis are directors of and the vice-president and president, respectively, of BCO Group Inc. Each party owns 50 per cent of the shares of BCO Group. BCO Group operates the "Brass Club", a private members' spa, from premises on Queen Street, in Ottawa.

[2] The parties were married in September 2016. They separated in June 2019.

[3] The animosity between the parties is high. Neither trusts the other. They are not on speaking terms. Each party alleges wrongdoing by the other in the management and operation of BCO Group. Each party alleges the other has misappropriated funds from the company. Mr. Roppovalente claims that in December 2019, Ms. Danis broke into "his" residence – she says that it is the matrimonial home – and removed boxes of corporate documents and his personal documents. As a result of this incident, Ms. Danis was charged with mischief to property and theft; these charges were withdrawn in April 2020. In January 2020, Mr. Roppovalente initiated

this oppression application. Shortly thereafter, Ms. Danis commenced an application in family court against Mr. Roppovalente.

[4] On February 7, 2020, I made an interim order (the "Order") relating to the co-management and general operations of BCO Group pending the hearing of the oppression application in June. The application did not proceed as scheduled because of the COVID-19-related suspension of the court's regular operations.

[5] The relationship between the parties has deteriorated further since February. In March, Mr. Roppovalente was charged with publication of an intimate image of Ms. Danis without her consent. On this motion, Mr. Roppovalente claims that Ms. Danis has breached her fiduciary duties as an officer and a director of BCO Group by unilaterally causing BCO Group to lose its right to extend its lease (the "BCO Lease") and by entering into a lease on her own account for the same premises (the "New Lease"). Mr. Roppovalente requests an order imposing a constructive trust on the New Lease for the benefit of BCO Group. Mr. Roppovalente also says that Ms. Danis has "repeatedly and defiantly" breached the terms of the Order. He asks that I find Ms. Danis in contempt of court.

[6] Ms. Danis' position is that the breakdown of the parties' relationship has resulted in an effective deadlock with no means by which the parties can resolve disagreements relating to the operation and management of the company. There is no shareholders' agreement. Ms. Danis is unwilling to continue in business with Mr. Roppovalente and she is unwilling to agree to extend the BCO Lease. Ms. Danis denies the contempt allegations levelled against her. She requests the consolidation of the oppression application and the family law proceedings, a timetable for both applications, and the appointment of a business valuator.

[7] I heard the motion in my capacity as case management judge for both the oppression application and the family law application. I am mindful that I will not be the application judge for either matter. Accordingly, I have restricted my findings of fact to those necessary for the determination of this motion. I address the issues in the following order: (i) the lease extension issue; (ii) the contempt allegations; and (iii) the requests for consolidation, a timetable, and the appointment of a business valuator.

The Right to Extend the Lease

The Evidence

[8] The BCO Lease commenced on February 22, 2016 and expires on April 30, 2021. Paragraph 17.24 of the BCO Lease provides for a right to extend the term of the Lease:

> If the Tenant has duly and regularly and punctually performed its covenants and obligations under this Lease and is not then nor has habitually been in default, the Tenant shall have the right, upon giving to the Landlord notice in writing at least two hundred and seventy (270) days prior to the expiry of the Term but no earlier than three hundred and sixty-five (365) days prior to the expiry of the Term, to extend this Lease

> for a further period of Five years at a Fixed Minimum Rent to be agreed upon and on otherwise the same terms and conditions as herein set forth, including, without limitation, the provisions in respect of Additional Rent, but without
>
> (a) the right of further renewal,
>
> (b) any free rent, allowances, credits or other inducements provided to the Tenant, and
>
> (c) [t]he Fixed Minimum Rent in the extended term may not be less than that last paid.
>
> If the Tenant and Landlord, within 30 days of the abovementioned Notice given by the Tenant, fail to agree on the Fixed Minimum Rent for the renewal term the Landlord may lease the Premises to another party without any further liability to the Tenant.
>
> If the Tenant fails to exercise its right to extend within the period provided therefore in this Section 17.25 [*sic*], the option shall be forever extinguished.

[9] The parties agree that the last day upon which BCO Group could provide notice to the landlord of the company's intention to extend the BCO Lease was August 3, 2020. For this reason, Mr. Roppovalente's motion was scheduled to be heard on an urgent basis.

[10] Ms. Danis' evidence is that she is unwilling to continue in business with Mr. Roppovalente after the BCO Lease expires on April 30, 2021; she would like to see BCO Group dissolved at that time. In addition to her claims that Mr. Roppovalente has misappropriated funds from the company, she says that he has bullied, sexually harassed, and verbally abused the company's employees. The parties cannot communicate regarding the company; Ms. Danis describes their relationship as "toxic." In the absence of a shareholders' agreement, there is no mechanism to address the deadlock between the parties. I note that the Order reflects the parties' agreement to undertake to negotiate and sign a shareholders' agreement that includes a "shotgun clause." Given the high level of distrust between the parties, it is not surprising that the parties were unable to fulfill this undertaking.

[11] On April 8, Ms. Danis emailed BCO Group's landlord. In her email, Ms. Danis stated, "I know the lease for BCO is coming up", and she asked the landlord to give her a call. Several hours later, Ms. Danis' counsel emailed Mr. Roppovalente's former lawyer in the family law application, Any Mayer, stating:

> I have not heard from you as regards the valuator for the business or next steps. My understanding is that the commercial lease is ending this month. I need to hear from you regarding your client's position.

[12] No response was received to the email sent to Ms. Mayer. Ms. Mayer has provided an affidavit in which she states that she never received the email. There is evidence that the other recipients of the email received a copy.

[13] Ms. Danis concluded that Mr. Roppovalente did not respond to the email because he was not interested in continuing the business on his own. On April 21, she emailed the landlord and asked, "[w]hat will you need from me to sign a new lease at 246 Queen St. Suite 400 under a different corporation?" On May 19, Ms. Danis, through a numbered company, entered into the New Lease for the Queen Street premises from May 1, 2021 to April 30, 2026. Ms. Danis' evidence is that the new business will not be affiliated with BCO Group and that she intends to change the name of the business to make it clear that it is no longer the "Brass Club."

[14] Mr. Roppovalente's evidence paints a very different picture of events. On May 27, Mr. Roppovalente's counsel wrote to Ms. Danis' counsel to advise that Mr. Roppovalente intended to extend the BCO Lease on behalf of the company and to seek Ms. Danis' consent. Having received no response, Mr. Roppovalente's counsel wrote again on June 18. Again, no response was received. Mr. Roppovalente first learned of the New Lease during the June 30 case conference. Mr. Roppovalente's evidence is that the premises represent BCO Group's largest asset and that he has invested approximately $189,000 in the premises. He says that, by securing the New Lease for her numbered company, Ms. Danis will be the sole beneficiary of his investment in the premises. Mr. Roppovalente maintains that he is ready to "undertake" the BCO Lease.

The Letter from the Landlord

[15] On the second day of the hearing, Mr. Roppovalente sought to introduce a letter regarding the landlord's position in relation to the relief sought by Mr. Roppovalente on this motion. The letter was from the landlord's counsel, and appeared to be an accepted settlement offer. The letter was not sworn evidence.

[16] Mr. Roppovalente's request to admit the letter into evidence is denied. Mr. Roppovalente was keenly aware of the relevancy of the landlord's evidence in relation to the relief sought on this motion. In his affidavit, Mr. Roppovalente states that "[s]ince BCO, as tenant, holds the right for renewal, I am unaware of the representations Danis may have made to the landlord towards securing the New Lease." Moreover, in his notice of motion, Mr. Roppovalente included a request for an order permitting him to examine the landlord regarding the formation of the New Lease. However, at no time prior to the hearing did Mr. Roppovalente seek to obtain the landlord's evidence. It would be unfair and prejudicial to Ms. Danis to admit unsworn evidence at such a late stage.

The Corporate Opportunity Argument

[17] Mr. Roppovalente submits that Ms. Danis engaged in secret negotiations with the landlord, abused her position as an officer, director, and fiduciary of BCO Group, and placed herself in a conflict of interest for the purpose of usurping a corporate opportunity – the lease extension – properly belonging to the company. Mr. Roppovalente submits that Ms. Danis has

breached the duty set out by the Supreme Court of Canada in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. In *Canaero*, at pp. 606-7, Laskin J., as he then was, described the fiduciary relationship as follows:

> O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

[18] There is no question that Ms. Danis and Mr. Roppovalente are both fiduciaries of the company. As such, they owe the company the duties set out in s. 122 of the *CBCA* and described in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, at para. 35 and *Salesco Limited v. Lee Paige*, 2007 CanLII 37463 (Ont. S.C.J.), at paras. 237-239. The issue in this case is whether the lease extension was a corporate opportunity that Ms. Danis appropriated in breach of her fiduciary duty.

[19] I have concluded that Ms. Danis did not breach her fiduciary duty to BCO Group in pursuing the New Lease. In my view, the lease extension was not a maturing corporate opportunity.

[20] At the time Ms. Danis signed the New Lease on May 19, 2020, BCO Group was not pursuing the lease extension. There had been no discussions between the parties or negotiations with the landlord. Ms. Danis had reached out to Mr. Roppovalente on April 8, asking him about his intentions regarding the BCO Lease. She did not receive a response. I accept that Mr. Roppovalente's counsel did not receive the April 8 email; at the same time, I accept that the email was sent. When Ms. Danis did not receive a response to the email, she was entitled to proceed on the basis that Mr. Roppovalente was apparently not interested in the lease extension. The fact that Ms. Danis did not follow up with Mr. Roppovalente does not alter my finding that Ms. Danis proceeded in good faith. Both parties were equally aware of the lease extension provisions in the BCO Lease.

[21] I also find that the lease extension was not an opportunity that was open to BCO Group to pursue given that the parties have been deadlocked on all issues relating to the management and operation of the company for months. Just as the parties were unable to negotiate and agree upon a shareholders' agreement, neither party could force the other to negotiate and agree to a lease extension on behalf of BCO Group. The evidence in the record is that the landlord was very much aware of the breakdown in the parties' marital relationship and business relationship. There is no evidence that the landlord would have been prepared to negotiate with BCO Group in the present context. A director is precluded from obtaining for herself, directly or beneficially, a "maturing" or "ripe" business opportunity, immediately available to the corporation, for which

the company has been negotiating; conversely, a director may pursue a business opportunity that the corporation has rejected, or that the corporation is unable or unwilling to pursue: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.), at pp. 246-7; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673. I find that because of the parties' deadlock, BCO Group was both unwilling and unable to pursue the lease extension.

The Conflict of Interest Argument

[22] On July 30, in advance of BCO Group's August 3 deadline to notify the landlord of its intention to extend the Lease, I provided the parties with a brief endorsement, with reasons to follow, in which I denied Mr. Roppovalente's request for an order voiding the New Lease and an order compelling BCO Group to extend the BCO Lease.

[23] These are my reasons for denying the request for an order voiding the New Lease.

[24] First, I find that Ms. Danis was not in a conflict of interest when she negotiated and concluded the New Lease. I reach this conclusion for the same reasons that I find she did not appropriate a maturing corporate opportunity in breach of her fiduciary duty.

[25] Second, s. 120 of the *CBCA*, upon which Mr. Roppovalente relies in support of the relief requested, does not apply to the facts before me. Section 120 provides in part:

> (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer
>
> (a) is a party to the contract or transaction;
>
> (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
>
> (c) has a material interest in a party to the contract or transaction.
>
> ...
>
> (8) If a director or an officer of a corporation fails to comply with this section, a court may, on application of the corporation or any of its shareholders, set aside the contract or transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or do both those things.

[26] Section 120(1) captures material contracts or transactions, or proposed material contracts or transactions, with the corporation – in this case, BCO Group. The s. 120 conflict of interest

regime applies where a director or officer has an interest in a material contract with the corporation. Mr. Roppovalente submits that s. 120(8) provides this court with authority to set aside the New Lease because Ms. Danis did not comply with the disclosure requirements. I disagree. Read in the context of the section as a whole, it is plain that the "contract or transaction" referred to in s. 120(8) that may be set aside must be (a) material, (b) with the corporation, and (c) one in which the director or officer is, directly or indirectly, a party, or has a material interest. The New Lease is not a contract to which BCO Group is a party.

[27] Third and finally, I would not have made an order "compelling" BCO Group to extend the BCO Lease. At most, such an order could only require the company to negotiate with the landlord. The landlord is not a party to these proceedings and the court has no jurisdiction to make orders affecting the landlord. There is no evidence before the court as to the landlord's position.

[28] An extension of the BCO Lease would require not only the landlord's agreement but also that of both parties as equal shareholders. The evidence before the court is overwhelming that these parties cannot agree on any aspect of the company's operation and management. Counsel acknowledged this fact during their submissions. With respect, even if I had the jurisdiction to make the order requested, it would be pointless to compel these deadlocked parties to continue in a long-term relationship beyond the expiry of the current Lease.

The Constructive Trust Remedy

[29] Given my finding that Ms. Danis did not breach her fiduciary duty by entering into the New Lease, it is not necessary for me to address in detail Mr. Roppovalente's primary request for an order imposing a constructive trust on the New Lease for the benefit of BCO Group. I do, however, make the following observations.

[30] The remedy of constructive trust treats the person holding the property as a trustee of it for the wronged party's benefit, even though there is no "true trust" created by intention. A constructive trust is "imposed by law not only to remedy unjust enrichment, but also to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 17. In this manner, justice in the case before the court is served and the "relationships of trust and the institutions that depend on these relationships" are protected: *Soulos*, at para. 17.

[31] As the Supreme Court of Canada held in *Soulos*, at para. 45, the requirements to impose a constructive trust for wrongful conduct are the following:

> (i) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in her hands;

(ii) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of her equitable obligation to the plaintiff;

(iii) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

(iv) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[32] Mr. Roppovalente relies on *Keech v. Sandford* (1726), 25 E.R. 223 (Ch. D.) and *Quong v. Pong* (1925), 56 O.L.R. 616 (S.C. App. Div.), aff'd [1927] S.C.R. 271, where the courts imposed a constructive trust over a contract or legal right that was wrongfully diverted or assumed by a fiduciary.

[33] In this case, however, Ms. Danis did not wrongfully divert a contractual or legal right. The factual circumstances before me are entirely different than those in *Bedard v. James* (1986), 10 C.P.R. (3d) 339 (Ont. Dist. Ct.), aff'd 14 C.P.R. (3d) 288 (Ont. Div. Ct.), upon which Mr. Roppovalente relies. In awarding damages for loss of goodwill, the court in *Bedard* found that the plaintiff would have had no difficulty in renewing the lease and that the defendant knew it was the plaintiff's intention to renew the lease. The same cannot be said in this case.

[34] In addition, even if I had found that Ms. Danis breached her fiduciary duty to BCO Group, Mr. Roppovalente has not shown why damages (as in *Bedard*) or an accounting for profits (as in *Canaero*) would not have been a sufficient remedy. Returning the parties to their prior position – effectively, a state of deadlock in relation to the operations of BCO Group – would serve no practical purpose. Mr. Roppovalente says that Ms. Danis' company will reap the benefit of the investments he made to improve the premises. The extent to which each party contributed to the success of BCO Group, including through financial investments, will be a matter for the application judge to determine.

Contempt Allegations

The Requirement for Personal Service

[35] Mr. Roppovalente asks that I find Ms. Danis in contempt based on her breach of "virtually every condition of the Order (sometimes repeatedly)." Ms. Danis was not served personally with Mr. Roppovalente's motion materials as required by Rule 60.11(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. "Procedural protections on motions for civil contempt are generally strictly enforced": *Susin v. Susin*, 2014 ONCA 733, 379 D.L.R. (4th) 308, at para. 28. However, as the Court of Appeal for Ontario stated in *Susin*, at para. 28: "[p]rocedural protections that are meaningless in a particular case ought not to trump substantive compliance where the purpose of personal service has been met in the circumstances and there has been no substantial wrong or miscarriage of justice."

[36] The rationale underlying the requirement for personal service in contempt proceedings stems from the quasi-criminal nature of the proceedings. I am satisfied that the rationale has been satisfied in this case. Ms. Danis had full knowledge of the Order. She had full knowledge of Mr. Roppovalente's motion and filed her own affidavit in response. She was cross-examined in connection with the motion, and she was present throughout the hearing. In short, Ms. Danis knew what she was facing and was provided with a full opportunity to respond and to be heard.[1]

The Test for Contempt and the Terms of the Order

[37] The criteria which apply to a finding of guilt of contempt of court are well-established. As set out by the Supreme Court of Canada in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at paras. 32-35, civil contempt has three elements, each of which must be established beyond a reasonable doubt:

> (i) the order alleged to have been breached must state clearly and unequivocally what should and should not be done;
>
> (ii) the party alleged to have breached the order must have had actual knowledge of it; and
>
> (iii) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

[38] The Order incorporated 14 terms. The specific terms engaged on this motion are the following:

> 1. THIS COURT ORDERS that the parties shall jointly manage the day-to-day business operations of BCO Group Inc. (the "Business") in the manner described hereinafter unless otherwise agreed in writing or until further order of this Court;
>
> 3. THIS COURT ORDERS that the Respondent provide keys to permit access to the Business Premises to the Applicant (through his lawyer) forthwith, and the Respondent shall restore the Applicant's access to all accounts relating to the Business including, but not limited to, all email accounts, all social media accounts, the security system (and any related camera system), the banking, the electronic credit care processing services, the safe on the Business Premises, and the appointment booking application by February 10, 2020 at 5:00 PM. Neither party shall impede the other in having access to the accounts relating to the Business, nor will either party change any password to limit access to any said accounts;

[1] In her written submissions, Ms. Danis also asked that I find Mr. Roppovalente in contempt. During oral submissions, counsel confirmed that Ms. Danis was not pursuing the contempt allegations against Mr. Roppovalente at the present time.

6. THIS COURT ORDERS that the Applicant shall pay from the Business' bank account all reasonable and necessary expenses of BCO Group Inc. from the corporate revenues in the usual and ordinary course of business, including but not necessarily limited to the following expenses:

    a. Employee salaries;

    b. Bookkeeping costs;

    c. Tax liabilities, including source deductions and HST;

    d. Utilities;

    e. Rent;

    f. Cleaning of the Business Premises;

    g. Inventory;

    h. Business supplies;

    i. The Respondent's dividend of $7,000 per month; and

    j. The Applicant's dividend of $3,000.00 per month.

7. THIS COURT ORDERS that all cheques drawn on the Business's bank account shall be countersigned by both parties;

8. THIS COURT ORDERS that any revenue or expenses of the Business shall be recorded so that it can be provided to a bookkeeper agreed to by the Parties so that the bookkeeper can prepare a summary on a weekly basis for the parties, until the parties otherwise agree in writing or until further order of this Court;

9. THIS COURT ORDERS that any extraordinary business expenses, which are not in the usual and ordinary course of business, exceeding $2,500 shall not be incurred by either party without the other party's prior written consent, which consent shall not be unreasonably withheld;

10. THIS COURT ORDERS that the Respondent will deposit all cash in the Term account for any cash taken from the daily cash by using "daily sheets" to be left with the cash) at the end of each night and the Applicant will pick-up the cash from the safe at the Business Premises in the morning and deposit it in the Company's bank account on a daily basis, until the parties otherwise agree in writing or until further order of this Court;

11. THIS COURT ORDERS the Respondent to return all documents and personal items which were taken from the Applicant's residence to the Applicant's

> lawyer's offices by no later than 5:00 PM on February 14, 2020. The originals are to be returned to the Applicant, and the Respondent may make copies of all documents relating to the Business.

[39] It is not necessary for me to address each of the contempt allegations in detail to dispose of the motion. I am mindful that some of these same allegations may be raised at the hearing of the oppression application and that the application judge will be required to make the necessary findings of fact on a complete record. The evidence before me falls far short of establishing civil contempt. I find Ms. Danis not guilty of contempt of court.

Inability to Jointly Manage the Company

[40] Mr. Roppovalente submits that Ms. Danis has wilfully breached term 1 of the Order by "purposefully excluding and circumventing [his] role with the Company." The record before me demonstrates, overwhelmingly, that the parties are unable to work together. Neither party is blameless in their inability to jointly manage the operations of the company.

Changing Passwords

[41] Mr. Roppovalente alleges that Ms. Danis has changed passwords to corporate email accounts, modified the security alarm system, and changed the locks at the premises, contrary to term 3 of the Order. Ms. Danis' evidence is that she provided Mr. Roppovalente with access to all corporate email addresses, social media accounts, and the appointment booking system; she has not provided him with access to non-company accounts. Ms. Danis admits that she discontinued Mr. Roppovalente's access to the security cameras after he was charged with publication of an intimate image of her without her consent. Although her conduct in this regard may have been contrary to the Order, it was not, in the circumstances, contemptuous of the Order.

Cleaning the Premises

[42] Mr. Roppovalente alleges that Ms. Danis breached term 6 of the Order by "completing the Applicant's designated duties, such as the cleaning of the Premises." Ms. Danis alleges that it is Mr. Roppovalente who has failed to perform his obligations as set out in the Order. Ms. Danis' evidence is that Mr. Roppovalente has failed to regularly clean the premises since February 7 and that she left him cleaning checklists to encourage him to do so. Ultimately, Ms. Danis resorted to a cleaning contract for the premises, conduct that Mr. Roppovalente claims is a breach of term 9.

[43] Term 6 provides that Mr. Roppovalente is to pay from the company's account all reasonable and necessary expenses of the company incurred in the usual and ordinary course of business. Those expenses include cleaning of the business premises. Ms. Danis' conduct does not constitute a breach of term 6 of the Order.

[44] With respect to the cleaning contract and term 9 of the Order, Ms. Danis asserts – not unreasonably – that the cleaning of business premises is an expense incurred in the usual and

ordinary course of business. Mr. Roppovalente suggests that it was an extraordinary expense because cleaning had never before been addressed through an external contract. The wording of term 6 supports Ms. Danis' position. In any event, in order for there to be a finding of contempt, the order must be clear and unequivocal as to what must be done or not done. The Order does not unequivocally address the specific circumstances that arose in this case.

Failure to Countersign Cheques

[45] Mr. Roppovalente submits that I should find Ms. Danis in contempt for her failure to countersign cheques as required by term 7. I reject this submission. Ms. Danis did not deliberately breach the Order: she admitted that it was a mistake for her to have failed to countersign the rent cheques and she explained that the cheques payable to employees were already in sealed envelopes which she did not want to open.

Daily Cash Sheets and a Second Safe

[46] Ms. Danis is said to have breached term 10 of the Order by "defacing" the daily cash sheets and introducing a second safe to the company's premises. Ms. Danis' evidence is that she and a staff member have signed the daily cash sheets used to report to Mr. Roppovalente. She purchased a second safe to store float money, the key to which is in the safe's door. None of this behaviour is prohibited by term 10.

Elite Accounting

[47] The parties are at odds over Ms. Danis' retainer of Elite Accounting to manage BCO Group's bookkeeping. Ms. Danis retained Elite in January 2020 and continued to work with Elite until June 2020. Although Mr. Roppovalente characterizes Ms. Danis' conduct in contracting with Elite as "unilateral", I find that at the time she retained Elite, Ms. Danis was acting in accordance with the company's by-law which authorizes any director or officer alone to execute contracts.[2] Term 8 of the Order requires that the company's revenues and expenses be recorded so that they can be "provided to a bookkeeper agreed to by the Parties." Mr. Roppovalente's position is that under term 8, the parties agreed to consider retaining Elite on a go-forward basis, conditional on his review and approval of Elite's costs and the quality of their work. He says that despite his requests, no sample of Elite's work was provided.

[48] Mr. Roppovalente's assertion that he could not communicate with Elite is contradicted by email correspondence in the record expressly stating that he and his counsel could contact Elite directly. The retainer agreement with Elite was included as an exhibit to Ms. Danis' affidavit sworn February 4, 2020. On June 5, Mr. Roppovalente terminated BCO Group's contract with Elite. Ms. Danis says that he did so unilaterally and without implementing any plan for the company's bookkeeping and payment of the company's tax liabilities.

[2] Mr. Roppovalente makes similar arguments concerning Ms. Danis' retainer of Toptal, an online booking software and management system. The retainer of Toptal, like that of Elite, predated the Order.

[49] Mr. Roppovalente states that term 8 of the Order remains "unfulfilled" due to Ms. Danis. I disagree. Ms. Danis is not solely, or even predominantly, responsible for the parties' issues with Elite. It follows that I make no finding of contempt against Ms. Danis on this basis.

Misappropriation Allegations

[50] Mr. Roppovalente alleges that Ms. Danis has transferred company funds to her personal account without his consent, in breach of terms 6 and 9 of the Order. Ms. Danis maintains that she has not used cash revenues from the company for her personal benefit. Each party has made allegations of misappropriation of company funds against the other. These allegations are matters that will be determined on the application, based on a complete record.

The Return of Documents and Personal Items

[51] Finally, Mr. Roppovalente alleges that Ms. Danis has wilfully breached term 11 because she has not returned any of his personal documents or documents relating to his other business ventures. Mr. Roppovalente asserts that there remains a "large discrepancy" between the items returned and the items Ms. Danis was seen on video taking from his residence in December. Ms. Danis' evidence is that she did not take any of Mr. Roppovalente's personal belongings, most of the items she took were her personal items, and she has returned all items, other than her personal belongings, in accordance with the Order. Mr. Roppovalente's assertions do not establish beyond a reasonable doubt that Ms. Danis breached term 11.

Remaining Issues

Consolidation and Timetable

[52] Ms. Danis renews her request that her family law application and Mr. Roppovalente's oppression application be consolidated. She also seeks a timetable for the conduct of both proceedings.

[53] Under the Order, the parties were required to prepare a timetable order. They have not done so. In my view, the issues of consolidation and timetabling are better addressed at a joint case management conference.

Business Valuator

[54] The sole matter on which the parties agree is the appointment of a business valuator. The Order already requires the parties to retain an independent business valuator to assist in the valuation of BCO Group's business. The parties agree that J.C. Plonte should be retained. Subject to Mr. Plonte's agreement and availability, the parties are directed to finalize his retainer by no later than the joint case management conference.

Conclusion

[55] For these reasons, Mr. Roppovalente's motion is dismissed. The parties are directed to schedule a joint case management conference before me through the Trial Coordinator's Office.

[56] If the parties are unable to agree on costs of this motion and Ms. Danis' motion to remove Mr. Lister as lawyer of record for Mr. Roppovalente, they may make written submissions limited to a maximum of three pages. Ms. Danis shall deliver her costs submissions by September 18, 2020. Mr. Roppovalente shall deliver his responding submissions by October 2, 2020. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs between themselves.

Madam Justice Robyn M. Ryan Bell

Released: September 4, 2020

CITATION: Roppovalente v. Danis, 2020 ONSC 5290
COURT FILE NO.: CV-20-82646
DATE: 2020/09/04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Robert Roppovalente

Applicant

– and –

T'Sheal Danis

Respondent

REASONS FOR DECISION

Ryan Bell J.

Released: September 4, 2020

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sateri (Shanghai) Management Limited v. Vinall,* 2017 BCSC 491

Date: 20170324
Docket: S111963
Registry: Vancouver

Between:

Sateri (Shanghai) Management Limited, Sateri International (Singapore) Pte. Ltd. and Bracell International Co. Ltd.

Plaintiffs

And:

Peter Vinall, Fortress Paper Ltd. and Fortress Specialty Cellulose Inc.

Defendants

Corrected Judgment: The text of the judgment was corrected at paras. 428 and 481 on April 4, 2017

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Plaintiffs:	J. McArthur M. Good
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Place and Dates of Trial:	Vancouver, B.C. September 28-30, October 1-2, 5-9, 13-15, and 20-23, 2015
Plaintiffs' Further Written Reply Submissions Received:	October 30, 2015
Place and Date of Judgment:	Vancouver, B.C. March 24, 2017

INTRODUCTION

[1] The plaintiffs suggest that fidelity is at the heart of this case. The fidelity owed by a director-employee who partakes in clandestine and wrongful actions aimed at diverting a corporate opportunity to a third party competitor and obtains new employment for himself in the process. The cornerstone of the claim is that the director-employee was the plaintiffs' fiduciary. Also front and centre is the question of the concomitant liability of the participating third party and its parent company.

[2] The defendants counter that the fidelity in issue is not of the kind portrayed by the plaintiffs. Casting the dispute in a vastly different light, they claim the nature of the fidelity is the brand of unflinching employee loyalty exacted by the plaintiffs, who are using the court process as a platform to display outrage over an employee's alleged defection and to punish him for his departure to a potential competitor. More to the point, say the defendants, this case is about finding the line between an employee's implied contractual duty of fidelity to the employer and the employee's entitlement, during the currency of employment, to take steps in anticipation of securing a position with a potential competitor.

[3] As will be seen, the contours of this hard-fought dispute were nuanced and complex and engaged legal issues beyond employee fidelity, with tens of millions of dollars in the balance. In the end, however, because I have concluded that the director-employee does not owe fiduciary obligations to any of the plaintiffs, the claims tied to his asserted fiduciary status fall by the wayside.

BACKGROUND

[4] Not all of the important facts in this case were controversial. The following summary reflects factual findings that I have made based on evidence that was not in dispute or, where the evidence was in dispute, based on a consideration of the totality of the evidence, and the weight that it warrants. I have explained the reasoning underlying my findings where the evidence has conflicted in a significant way on material points, or where a party has urged that a particular inference be drawn from the evidence.

[5] In assessing the evidence, I have appreciated that caution should be exercised in determining the chronology of events in reliance on the dates and times shown on the emails in evidence, due to the different time zones from which they originate.

The Plaintiffs and Other Sateri Companies

[6] The Sateri organization is an international conglomerate consisting of several corporations. It has three main components to its business. One of its chief undertakings is the production of dissolving wood pulp, including a specialty acetate grade. Dissolving wood pulp is a natural raw material that contains cellulose and is used in the production of viscose staple fibre (rayon), an ingredient found in a wide range of everyday items, such as baby wipes, sunglass frames, food items, pharmaceuticals and industrial products. In 2009, Sateri was ranked as one of the largest manufacturers of wood-based dissolving pulp in the world. At the material time, the dissolving pulp business represented a substantial component of the EBITDA, (essentially a cash-flow metric meaning, earnings before interest, taxes, depreciation and amortization), of the Sateri organization.

[7] In the industry, the manufacture of dissolving wood pulp is known as the "upstream" business, and the conversion of that pulp into the various end-products is known as the "downstream" operation. The case at hand concerns the upstream business facilitated by a dissolving pulp mill (the "Bahia Mill") and a eucalyptus plantation that harvests the wood supplied to that mill. Both are located in Brazil. The downstream side of the enterprise is carried on in plants in Asia.

[8] The two other primary business endeavours of the Sateri group of companies are employee management and human resources and services, and buying and selling products.

[9] A schematic depiction of the corporate relationship among the Sateri companies is shown in Appendix "A" to my Reasons. Of the eight corporations shown, only three of them are plaintiffs in this action.

[10] The nature of the plaintiffs' particular business operations and their practical and business-related connections with each other and with the five remaining Sateri companies (beyond their share ownership) received cursory attention at trial.

[11] Positioned at the top of the Sateri structure is the plaintiff, Bracell International Co. Ltd. At the material times, it was known by its former name, Sateri International Co. Ltd., and I will refer to it as "Sateri International Co." in my Reasons.

[12] Sateri International Co., is primarily a holding company and owns 100% of the shares in the following corporations:

- the plaintiff, Sateri International (Singapore) Pte. Ltd. ("Sateri Singapore");
- Sateri Specialty Cellulose Limited ("Sateri Cellulose"); and
- Sateri Copener Limited ("Sateri Copener").

[13] The plaintiff, Sateri Singapore (being a wholly owned subsidiary of Sateri International Co.), owns 100% of the third plaintiff, Sateri (Shanghai) Management Limited ("Sateri Shanghai"). Sateri Shanghai and Sateri Singapore provide management and human resources services to the other corporate entities within the Sateri enterprise. In essence, they "hold" and manage the Sateri employees who are allocated to one or the other of them.

[14] Sateri Cellulose owns DP Marketing International Limited ("DP Marketing") and Sateri Bacell Limited ("Sateri Bacell"). DP Marketing is a trading company that buys and sells products used in the specialty cellulose business. Sateri Bacell owns the shares of Bahia Specialty Cellulose S.A. ("Bahia Specialty"). Beyond that, the evidence did not shed light on the business purpose of Sateri Bacell. Bahia Specialty, in turn, owns the Bahia Mill and, along with Sateri Copener, owns the shares of Norcell S.A. ("Norcell"). Norcell owns the eucalyptus plantation that grows the trees that are converted into dissolving wood pulp at the Bahia Mill.

[15] The companies under the Sateri umbrella were incorporated in various jurisdictions throughout the world. Sateri International Co., Sateri Copener, Sateri

Bacell and DP Marketing were set up in the British Virgin Islands. Sateri Singapore is a Singaporean company; Sateri Shanghai was formed in China; and Sateri Cellulose was incorporated in the Cayman Islands. Bahia Specialty and Norcell were established in Brazil.

[16] Although not shown on Appendix "A", the Sateri corporations are part of, and receive management services of some kind from, companies within a massive corporate network referred to as Royal Golden Eagle (the "RGE Group"). The RGE Group (previously known as RGM) is involved in the palm oil business, the oil and gas sector, and in the pulp and paper industry. It also provides management services to APRIL, which is an acronym for Asia Pacific for Resources International Limited. APRIL is a conventional pulp and paper company and is said to be a "sister" company to the Sateri corporations. It owns plantations, manufacturing facilities that convert wood into pulp and pulp into commodity paper, and a trading group that sells and distributes the end-product.

[17] At the apex of this vast empire in the relevant timeline sat members of the Tanoto family, headed by its patriarch, Sukanto Tanoto. Mr. Tanoto enjoyed the highest level of authority at the RGE Group as its Chairman and majority shareholder. He also wielded the ultimate authority as the controlling shareholder of the Sateri assembly of companies, including the plaintiffs, and of APRIL.

[18] Mr. Tanoto was also the majority shareholder of Toba Pulp Lestari ("Toba"), which owned a swing mill (producing both pulp and dissolving pulp) in Indonesia (the "Toba Mill"). Toba was a separate company that, technically speaking, did not form part of the RGE Group, APRIL or the Sateri organization.

[19] Throughout the course of trial, counsel and many witnesses frequently referred to one or more of the companies in the Sateri organization, either individually or collectively, as "Sateri", the "Sateri group", the "Sateri International group" and/or "Sateri International". Depending on the context in which those references were used, it appeared that, at various times, they were intended to

encompass one or more of the plaintiffs, one or other of the non-plaintiff Sateri corporations, or an unspecified combination of those discrete groupings.

[20] The indiscriminate use of such untidy terminology in submissions and in the evidence posed a challenge to the analysis of key issues.

[21] In my Reasons, I have used the designation "Sateri" where the evidence as a whole did not reliably clarify the particular company or companies within the Sateri collection that were being referenced.

The Defendant, Peter Vinall

[22] Peter Vinall is an Australian-trained mechanical and electrical engineer. He also holds a Master of Business Administration from Tulane University in New Orleans. Mr. Vinall has accumulated many years of experience in and extensive knowledge about the global pulp and paper industry, including the manufacture of dissolving pulp and the conversion of a conventional mill to a dissolving pulp facility.

[23] The Aditya Birla Group ("Birla") originates from India and is the largest producer of rayon from dissolving pulp in the world. Starting in about 1998, Birla entered into various joint ventures with Tembec, a large Canadian forest company. One of their shared undertakings in 2005 was the acquisition and turnaround of a bankrupt mill in Nackawic located in southern New Brunswick.

[24] At the commencement of the relevant time period, Mr. Vinall was the President and CEO of Birla's Canadian operations. One of his primary responsibilities was to revive the Nackawic mill and convert it into a dissolving pulp plant.

Chadwick Wasilenkoff

[25] Chadwick Wasilenkoff is a successful contrarian investor, meaning that he purchases distressed business assets, often in declining or unpopular markets, at a bargain and uses them to establish new businesses. The acquisitions are usually made through a corporate vehicle.

[26] Mr. Wasilenkoff keeps current about potential opportunities and market/business trends through his daily routine of reading several newspapers and magazines across a diverse array of subject areas, and by reviewing a variety of news feeds that report on the forestry industry in North America, Europe and elsewhere. Adhering to his unconventional investment model, Mr. Wasilenkoff has bought, built and sold between 12 and 20 companies in diverse market sectors, such as mining, oil and gas, copper and plastics manufacturing. It is typical for Mr. Wasilenkoff to pursue several potential business prospects at any given time.

The Defendant, Fortress Paper Ltd.

[27] Fortress Paper Ltd. ("Fortress Paper") is not a conventional pulp and paper company. It manufactures specialty pulp used to make paper products such as currency, passports, visas and other government documentation.

[28] In 2006, the newly incorporated Fortress Paper purchased and restructured a facility in Switzerland that made specialty paper for banknotes (the "Landqart Mill") and a mill in Germany that produced specialty-grade wallpaper (the "Dresden Mill"). Those repurposed mills thrived under Fortress Paper and proved to be extremely financially successful. At that time, Mr. Wasilenkoff was the single largest shareholder of Fortress Paper.

Preliminary Remarks about Credibility

[29] As I have previously observed, assessing the credibility and reliability of a witness is fundamental to the judicial task, and yet is notoriously difficult. It has been acknowledged that the determination is not a purely intellectual exercise, and is more an art than a science. The factors involved can be challenging to verbalize: *R. v. R.E.M.*, 2008 SCC 51 at para. 49.

[30] A clarifying passage summarizing the factors to be considered in the art of the assessment is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)*

> (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) ...; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[31] A witness may sincerely believe that she is telling the truth, but lack the sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. Alternatively, a witness "may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours the desired outcome": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. There is also always the possibility that a witness may simply choose to lie about certain matters out of self-interest, to protect others or for any host of reasons.

[32] Consistency is often an important factor in assessing credibility. However, some inconsistency is expected given the inherent frailty of memory. An individual's memory may be stimulated by other evidence which may also assist a witness to recall an event or details of it that he or she had seemingly forgotten.

[33] The plaintiffs waged an all-fronts attack on the credibility of Messrs. Vinall and Wasilenkoff. They assert that their testimony on disputed matters was variously implausible, inconsistent and, at its core, was wholly untruthful. The plaintiffs' approach in cross-examination was to attempt to reveal those individuals as deeply flawed witnesses who thought little of pitching concocted stories to the Court to try to portray their deceptive actions as relatively benign events.

[34] The plaintiffs contend that Mr. Vinall selectively destroyed documents that were not helpful to his position and that would have augmented the evidence of the secret dealings between himself and Mr. Wasilenkoff. They likewise accuse the Fortress defendants of failing to produce all relevant emails and other documents

and of mingling their emails with the documents of another, making it virtually impossible to confidently single out the documents that were in the possession of the former at any given time. Although the plaintiffs are dissatisfied with Mr. Wasilenkoff's explanation for the absence of emails sent and received by the Fortress defendants in critical time periods, they concede that there is insufficient evidence to find an intentional destruction of evidence on the part of the Fortress defendants. Even so, the plaintiffs say that the defendants' failure to produce a full documentary picture of their secret dealings is to be taken into account in weighing the testimony of Messrs. Vinall and Wasilenkoff on all controversial matters.

[35] The plaintiffs also urge the Court to regard Messrs. Vinall and Wasilenkoff as witnesses of bad character and to discount their evidence unless corroborated by reliable independent testimony or cogent documentary evidence.

[36] I share the plaintiffs' view that the credibility of each of Mr. Vinall and Mr. Wasilenkoff was impeached in some important factual areas. I will not stop here to detail examples of the instances of tainted credibility, preferring instead to address them throughout my Reasons in the context in which they arise chronologically or by subject matter. At the same time, however, I found each of them to be truthful and their evidence reliable as it concerned other significant contentious points. There were many instances where their disputed evidence was supported by the weight of other probative evidence.

[37] Although cumulatively my concerns compel me to approach the testimony of Messrs. Vinall and Wasilenkoff with extra caution and scepticism, assessment of their credibility is not an all or nothing proposition. Despite my misgivings about some aspects of their evidence, I am not prepared to conclude that either one of them is a fundamentally discreditable witness unworthy of belief entirely. Nor do I require there to be corroborative documentary evidence in order to accept their testimony on all matters of controversy.

Early Dealings between Vinall and Wasilenkoff

[38] In late summer 2006, Mr. Wasilenkoff was looking to hire a president/CEO to run Fortress Paper's operations.

[39] Mr. Vinall was recommended as a potential candidate. Mr. Wasilenkoff took introductory steps and Mr. Vinall was receptive. Over the next few months, they discussed the opportunity on the telephone, in person and over dinner with their spouses. Their conversations moved along positively and they eventually launched into a series of more pointed negotiations, ultimately reaching agreement about the key terms of Mr. Vinall's employment. I find that it was during these discussions that Mr. Wasilenkoff's attention was first drawn to the business of dissolving pulp in a general way.

[40] Shortly before Mr. Vinall's employment agreement was finalized, Mr. Wasilenkoff informed him that the bankers behind Fortress Paper's initial public offering were insisting that Mr. Wasilenkoff personally take the helm.

[41] This unwelcome turn of events was disappointing. Messrs. Vinall and Wasilenkoff nonetheless remained on good terms and stayed in touch by periodically communicating about business topics of shared interest in the forestry and pulp industries.

Communications between Vinall and Wasilenkoff in 2007 and 2008

[42] On June 16, 2007, Mr. Vinall sent Mr. Wasilenkoff an email in which he raised two business opportunities related to Birla's desire to increase its supply of dissolving pulp. One prospect concerned the possibility of a joint venture between Birla and Fortress Paper in relation to Skeena, a pulp mill in northern British Columbia. The second related to a pulp and ground wood mill called Edmunston located in New Brunswick. Edmunston's sister paper mill, Madawaska, was situated over the river in the state of Maine. Because the Madawaska mill was in the business of making paper, it occurred to Mr. Vinall that Fortress Paper might have

an interest in acquiring it. His joint venture concept envisioned that Birla would buy the Edmunston mill and Fortress Paper would take the Madawaska plant.

[43] The Edmunston and Madawaska mills were owned by Fraser Papers. Fraser Papers also owned a kraft pulp mill located in Quebec (the "Thurso Mill"), which is the centerpiece of this litigation.

[44] In his email to Mr. Wasilenkoff, Mr. Vinall explained that Fraser Papers was experiencing financial difficulties with the Edmunston and Madawaska mills. He noted that the Edmunston facility could be converted to a dissolving pulp mill more quickly and for less cost than a kraft plant, such as Skeena or Nackawic. Mr. Wasilenkoff expressed interest in Mr. Vinall's proposition and asked him to supply more information about the products those mills manufactured.

[45] Later that June, Mr. Vinall forwarded Mr. Wasilenkoff a press release issued by Fraser Papers concerning its upgrade and optimization plan for the Edmunston/Madawaska mills. Mr. Wasilenkoff asked that Mr. Vinall keep him posted.

[46] A day or so later, Fortress Paper announced that it had raised $40 million as a result of its initial public offering. I accept Mr. Wasilenkoff's testimony, as reflected in the press release, that a strong feature of Fortress Paper's public offering was its stated intention to expand via more niche-type forestry acquisitions.

[47] By email dated June 29, 2007, Mr. Vinall congratulated Mr. Wasilenkoff on Fortress Paper's successful launch. Among other things, he reported that he had approached the CEO and the CFO of Fraser Papers for a general introductory discussion and learned that Fraser Papers was trying to "ride out the storm" for a while. He mentioned the price of dissolving pulp in China and the fact that Birla was balking at the Skeena mill. I am satisfied that within this general timeframe Mr. Wasilenkoff pursued his own lines of inquiry into the viability of the Skeena mill as a candidate to convert to dissolving pulp and was discouraged by the problems associated with its unreliable wood supply.

[48] Jaakko Poyry ("Poyry") is a major international consulting firm that services several business sectors, including pulp and paper. Appreciating that Fortress Paper was in an acquisition mode after the success of its initial public offering, on August 3, 2007 Mr. Vinall emailed Mr. Wasilenkoff the name of Poyry's London contact with whom Mr. Vinall had discussed acquisition opportunities in the past. He advised that the contact could provide Mr. Wasilenkoff with a "solid list of potential targets as well as a process of establishing criteria for assessing potential on a number of dimensions".

[49] Mr. Wasilenkoff followed up with the Poyry contact. In the meantime, Mr. Vinall sent him a copy of Birla's press release announcing its expansion plans for the production of its dissolving pulp operations in New Brunswick.

[50] I find that Mr. Wasilenkoff also undertook his own research about the Edmunston/Madawaska mills. He reviewed the publicly available information about Fraser Papers and spoke to various analysts he knew in the field, together with members of the operational teams at the Dresden Mill and Landqart Mill. Mr. Wasilenkoff formed the view that while the Edmunston mill was a good conversion candidate, it was not the most obvious choice because it came saddled with the Madawaska plant. He explained that one of the negatives of Madawaska was that it was merely one of a number of commodity paper mills that were losing money, whereas Fortress Paper was a specialty paper company.

[51] In his March 4, 2008 email, Mr. Wasilenkoff told Mr. Vinall that some analysts had informed him that the Edmunston/Madawaska mills would have a tough time turning a decent financial return. Wishing to better ascertain the level of Mr. Wasilenkoff's interest in pooling resources with respect to the Edmunston/Madawaska venture, Mr. Vinall told him that he had "heard a whisper" that Fraser Papers was looking for a buyer.

[52] On May 14, 2008, Mr. Wasilenkoff forwarded Mr. Vinall an email he had received from his contact at PricewaterhouseCoopers Inc. who specialized in companies that are bankrupt or under creditor protection. The contact reported that

an interim receiver of Pope & Talbot, a failing forest products company, was soliciting offers in respect of the assets of its mills in British Columbia. In his cover email Mr. Wasilenkoff asked Mr. Vinall, "Do you know much about these mills? Wanna start a pulp company?" Mr. Wasilenkoff testified, and I accept, that he had no desire to buy the sawmill assets in receivership; he was interested in Mr. Vinall's thoughts on whether the mills were solid dissolving pulp conversion candidates.

[53] Mr. Vinall promptly replied, "for starting up a pulp company I am definitely your man". His response was serious in the sense that he was always on the lookout for new employment prospects. Mr. Vinall identified the Harmac mill, an asset of Pope & Talbot located on Vancouver Island, as the only option because it could be converted to a dissolving pulp mill. Mr. Vinall offered an update on the status of the Skeena mill and investments in wood assets generally, and told Mr. Wasilenkoff he would think some more about pulp opportunities. Significantly, he also disclosed that Birla had commissioned Poyry to perform an evaluation of opportunities in the pulp industry worldwide and that its report had yielded some very interesting analyses.

[54] In addition to the opportunities in dissolving pulp conversion that were surfacing in early 2008, Mr. Vinall gathered information about a biodiesel plantation in the Philippines that Mr. Wasilenkoff had spoken about as a potential business target. In or around that time period, Messrs. Vinall and Wasilenkoff also re-canvassed the prospect of Mr. Vinall joining Fortress Paper.

The 2008 Poyry Report

[55] Poyry was a relative newcomer to the dissolving pulp industry. As noted, in April 2008 Poyry prepared an extensive report on dissolving pulp outlining global opportunities for converting paper pulp mills into dissolving pulp facilities as part of Birla's wider study (the "2008 Poyry Report"). It was this report that Mr. Vinall had alerted Mr. Wasilenkoff to in their email exchange of May 14.

[56] The 2008 Poyry Report contained a detailed analysis of pulp mills located around the world that might be candidates for conversion to dissolving pulp facilities.

Edmunston and the Thurso Mill were among the many prospective mills identified. After applying select screening criteria, the 2008 Poyry Report identified the Thurso Mill among the mills with low wood costs and stated:

> Thurso mill is believed to be available at very low investments. It is estimated to have cost-cutting potential, and conversion project is estimated to be profitable as such. Cost cutting potential decisive.

[57] When he initially reviewed the 2008 Poyry Report, Mr. Vinall made checkmarks next to statements it contained with which he agreed. He also wrote comments about points he disagreed with or queried and added criteria to supplement certain of Poyry's content based on his own knowledge and experience. Specifically, he circled the reference to the Thurso Mill and wrote the following notation next to it, "Also may be opportunity to consolidate wood supply".

Solicitation of Investors in the Thurso Mill

[58] By June 2008 or sooner, Fraser Papers was actively looking for investors in relation to the conversion of its Thurso Mill to a dissolving pulp facility. In July 2008, as part of its mandate to try to partner with a third party on that project, Fraser Papers prepared a presentation outlining the Thurso Mill opportunity and made it available to prospective investors. To that end, Fraser Papers, through its general manager of pulp sales at the Thurso Mill, directly solicited Saiccor Sappi ("Sappi"), a global leader in the production of dissolving pulp. Some degree of communication among representatives of the two companies ensued, including a teleconference in early September 2008. Evidently, nothing concrete came of those discussions.

[59] In July 2008, as Birla was completing the conversation at the Nackawic mill, Mr. Vinall emailed Mr. Wasilenkoff hinting that he would be looking for new employment in a few months. Mr. Wasilenkoff responded that he was still working on numerous potential acquisition fronts but that the projects were mostly European-based, with a possible opportunity in North America months down the road. In this series of emails, Mr. Vinall ended one of his with, "Would be good to catch up sometime for a beer".

Sateri's Recruitment of Vinall – Summer/Fall 2008

[60] Coinciding with the near completion of the Nackawic mill in the late summer or early fall of 2008, Mr. Vinall was contacted by Keith Anderson with Russell Reynolds Associates, an international head-hunter firm, to gauge his interest in joining a Sateri company. Early on in their discussions, Mr. Anderson provided Mr. Vinall with a detailed written outline of the specifications of the position being offered. The title was said to be, "President Upstream – Sateri International Group RGM International".

[61] In the outline supplied to Mr. Vinall, Russell Reynolds referred to the prospective employer interchangeably as Sateri International Group and Sateri International and described it as:

> … one of several operating companies that are part of RGM International, a global group of highly successful, socially responsible companies operating in the resources development area including oil and gas; engineering, construction and procurement; agriculture; and pulp, paper and fiber.

[62] Russell Reynolds specified that the position included "full P & L responsibility for all aspects of operations in China, Brazil and Indonesia" and would require Mr. Vinall to lead:

> …development and execution of a strategy to increase company EBITDA significantly, initially through the expansion of production capacity and then through strategic management of product mix and pricing.

[63] Mr. Vinall testified, and I find, that "full P & L responsibility" meant complete responsibility for the profit and loss of the entire upstream business, including forestry and mill operations, sales and marketing, research and development, staff positions and technical roles.

[64] The overture piqued Mr. Vinall's interest. The interview process involved multiple meetings up the chain of command, including meetings with the head of APRIL, members of the management team in the human resources division of the Sateri organization, Will Hoon and Mr. Tanoto himself. This is a convenient place to note that the evidence lacked clarity about Mr. Hoon's position in the Sateri

enterprise. Some evidence pointed to him being the acting CEO of Sateri International Co. Other evidence, primarily in the form of the testimony of Sammie Li Xue Mei, a long-time analyst in Sateri's strategic planning department, indicated he was the CEO of Sateri Singapore. The probabilities of the evidence support the finding that Mr. Hoon was the acting CEO of Sateri International Co.

[65] I find that despite being actively engaged in negotiations with Sateri, Mr. Vinall had not given up on the notion of orchestrating a joint undertaking between Birla and Fortress Paper or otherwise becoming involved in one of Mr. Wasilenkoff's business endeavours. For that reason, he maintained periodic contact with Mr. Wasilenkoff.

Wings and Beer Meeting – October 2008

[66] In early September 2008, Don Roberts provided Mr. Wasilenkoff with a copy of a report by CIBC World Markets titled, "Future Opportunities for the Forest Products Industry in New Brunswick". Mr. Roberts was a corporate finance banker who supplied market reports to Mr. Wasilenkoff on a regular basis. I accept Mr. Wasilenkoff's testimony that he understood this report to conclude that the dissolving pulp sector was the best and most valuable use of forestry opportunities in New Brunswick and that he discussed its contents with Mr. Roberts.

[67] Mr. Wasilenkoff forwarded Mr. Roberts' email to Mr. Vinall. Mr. Vinall was aware of the report and in his reply portrayed himself to Mr. Wasilenkoff as having been "heavily consulted" in relation to it. At trial, Mr. Vinall admitted that he had inflated the depth of his involvement in the report as a means of trying to impress Mr. Wasilenkoff. As I will return to later in my Reasons, Mr. Vinall was prone to embellishment of his abilities and/or credentials in several of his writings in evidence.

[68] Over the next couple of days, Messrs. Vinall and Wasilenkoff traded emails about arranging a face-to-face meeting in Vancouver in early October. Both men claim that in October 2008, they met at a restaurant/pub in Vancouver where they ate chicken wings and drank beer as they caught up on each other's family and work lives. They testified that the meeting spanned several hours and that they discussed

a range of potential business opportunities, most prominently, the dissolving pulp industry generally and the Edmunston/Madawaska mills specifically.

[69] Mr. Vinall attested that when he met Mr. Wasilenkoff on this occasion, he brought along his copy of the 2008 Poyry Report, or the pertinent pages of it showing the notations he had made on his initial review, and a second clean copy in hand. Mr. Wasilenkoff recalled that Mr. Vinall handed him a full copy of the 2008 Poyry Report at the meeting and also remembered having seen handwritten comments on Mr. Vinall's copy. Both men testified that they pored over the 2008 Poyry Report and discussed it in great detail. Mr. Wasilenkoff stated that, in the process, he received an intense "crash course" about the dissolving pulp business. He confirmed that Mr. Vinall's focus continued to be on the Edmunston/Madawaska opportunity.

[70] Mr. Wasilenkoff testified that during the meeting he made his own comments and highlighted portions of the 2008 Poyry Report in several spots. In particular, he emphasized the references to the Edmunston mill on a number of pages, noting that it was a batch digester mill. Mr. Wasilenkoff did not mark any references to the Thurso Mill. Like Edmunston, the Thurso Mill was a batch digester mill. It is not controversial that it is more cost-effective to convert a batch digester mill to a dissolving pulp facility than the more modern digester type mill.

[71] Even though the Edmunston mill had not made it to the short list of desirable candidates in the 2008 Poyry Report, Mr. Wasilenkoff noticed that the report supported what Mr. Vinall had been telling him about the viability of Edmunston and dissolving pulp conversion at large.

[72] The plaintiffs dispute that this get-together between Messrs. Vinall and Wasilenkoff, which has been dubbed the "wings and beer meeting" in this litigation, ever occurred. If it did, they say it is simply untrue that Mr. Vinall shared the 2008 Poyry Report with Mr. Wasilenkoff at that time. To that latter point, the plaintiffs contend that it was not until October or November the following year, long after Mr. Vinall was hired by Sateri Shanghai and when Sateri was considering the Thurso

Mill as a potential acquisition, that he showed Mr. Wasilenkoff a copy of the 2008 Poyry Report. For convenience of analysis, I will resolve this factual dispute in the context of determining the matters discussed by Messrs. Vinall and Wasilenkoff during their telephone conversation in October 2009.

Vinall's Acceptance of Employment with Sateri Shanghai

[73] Mr. Vinall credibly testified that as he progressed through the interviewing stages at Sateri, significant differences emerged between the job duties set out in the Russell Reynolds' outline and Sateri's expectations of his function being presented through drafts of his proposed employment contract. The primary discrepancy was that by cycle two or three of the draft contract, Sateri's written conception of his role lacked particularization beyond conferring the title of "President – Upstream", and seemed to be formulated along the lines that Mr. Vinall was generally expected to perform whatever functions and assignments may be determined by management from time to time. The expansive profit and loss responsibilities initially detailed by Russell Reynolds were not reflected.

[74] Mr. Vinall was troubled by the omissions. He voiced his concern and disappointment both to Mr. Anderson and to members of Sateri management and pushed hard for adjustments to be made to his contract. Mr. Anderson also lobbied for greater specification on Mr. Vinall's behalf. Despite those efforts, no changes were forthcoming.

[75] According to Mr. Vinall, one or more of Sateri's management told him he would assume the high-level management functions described in Russell Reynolds' proposal even though they had not been particularized in his employment agreement. He was left with the impression that he ought not to be troubled by the general, even vague, description of his role in his employment contract, as it simply reflected standard Sateri practice. Mr. Vinall testified that Sateri management told him that he would be required to concentrate his efforts on the Bahia Mill for the first six months of his employment only, and after that he would relocate to the head office in Shanghai and take on the complete profit and loss role. Based on those

assurances, he accepted the offer of employment. I accept Mr. Vinall's evidence on these matters.

[76] On December 2, 2008, Mr. Vinall entered into an employment agreement with Sateri Shanghai (the "Sateri Employment Contract"). His commencement date was January 12, 2009.

Overview of Vinall's Sateri Employment Contract

[77] The Sateri Employment Contract contained several provisions of importance. It incorporated a separate declaration made by Mr. Vinall (the "Declaration") and the provisions of the Sateri staff handbook that was said to form an integral part of the contract, but was not tendered into evidence.

[78] The Sateri Employment Contract is explicit that Mr. Vinall's employer was Sateri Shanghai and that his term of employment was for three years, unless extended by mutual agreement. At the time, the Sateri head office was located in Shanghai and Sateri Shanghai employed most of the management employees who, like Mr. Vinall, were located outside of Singapore.

[79] Clause I.1 of the Sateri Employment Contract entitled "Position of Work & Reporting Relationship", described Mr. Vinall's title as the "President Upstream (Director Level) reporting to the Acting CEO, Sateri". It stipulated that his "…job description and specific assignments will be decided and communicated by" his superior. Another interesting feature was the entitlement of Sateri Shanghai to assign Mr. Vinall to work for any of its subsidiaries, associated or affiliated companies, which are collectively defined in the agreement as the "Group". It provided that, from time to time, Mr. Vinall would be assigned "to work for or be seconded to any of the [Group] in a position compatible with his skills and experience, whether on a project or term basis and in countries where the Group's businesses are located".

[80] Mr. Vinall's obligations in that regard were expanded upon under the heading, "Performance of Duties" in clause XV, which reiterated that he was required to carry out:

> …such duties and responsibilities as may be assigned by [Sateri Shanghai] and/or the Group including, without limitation:
>
> (i) carrying out the duties of his/her appointment on behalf of any company within the Group;
>
> (ii) acting as a director of any company within the Group or hold any other appointments or office as nominee or representative of [Sateri Shanghai] or any company within the Group; and
>
> (iii) carrying out such duties and the duties attendant on any such appointment as if they were duties to be performed by him/her on behalf of the company and/or the Group. [Mr. Vinall] shall at all times faithfully and diligently attend to these in compliance with policy and procedures and will endeavour, at all times, and to the best of his/her ability, to protect the interests of [Sateri Shanghai].
>
> [Underlining added]

[81] The Sateri Employment Contract clarified that, notwithstanding Mr. Vinall's secondment to another company within the Group, he "shall at all material times" remain under the employment of Sateri Shanghai and be subject to the terms and conditions of the Sateri Employment Contract and the applicable corporate policies.

[82] The Sateri Employment Contract allowed for changes to Mr. Vinall's position, assignments and reporting requirements upon mutual agreement. Such changes were not to affect the terms and conditions of his employment unless the parties agreed they would. There were also detailed provisions concerning Mr. Vinall's duty of confidentiality and prohibiting his competition and participation in activities of other entities, which I discuss later. The Declaration likewise contained provisions pertaining to those matters and provided that its terms were to prevail over the terms of the Sateri Employment Contract to the extent of any conflict.

[83] An addendum to the Sateri Employment Contract outlined the criteria to be applied in assessing Mr. Vinall's entitlement to an annual performance bonus. His bonus was dependent on the evaluation of key performance indicators, referred to as "KPIs", across four business quadrants pertaining to the Bahia Mill and plantation.

It was contemplated that, by the second month of Mr. Vinall's employment, he and Sateri Shanghai would set and agree upon the critical KPIs. I accept Mr. Vinall's evidence that when he commenced his employment his KPIs for 2009 had already been fixed without his input and he had simply inherited them.

[84] Very soon into the job it became plain to Mr. Vinall that the goals embedded in the applicable KPIs were likely unattainable.

Life at the Bahia Mill

[85] Mr. Vinall and his wife decided that he alone would move to Brazil where, as he understood it, and the Sateri Employment Contract stipulated, he would be stationed for the initial six-month period of his employment. It was intended that Mrs. Vinall and the younger children would remain in New Brunswick for that duration and after Mr. Vinall's stint on the ground in Brazil, which coincided with the end of the school year, he and his family would relocate to Shanghai. Aiming to maximize time spent with his family, Mr. Vinall did his best to travel to his home base in New Brunswick every fourth week or so.

[86] Before Mr. Vinall's arrival, the Bahia Mill had undergone a significant expansion at the cost of approximately $1.2 billion to install a second production line equipped to produce a specialty acetate pulp. The operation was in an overall weak state when Mr. Vinall came aboard. The project had experienced a rough start-up and had significantly overrun its budget. The existing team was just emerging from a very demanding year and the employees were fatigued.

[87] When he joined Sateri, Mr. Vinall's paramount work tasks were to stabilize the operations of the newly upgraded Bahia Mill and ensure that the product being manufactured matched customer expectations so that sales would flourish. In addition, but secondary to those dual priorities, he was to work on improvements of mill efficiencies and output, especially of the very high-grade specialty acetate pulp, and to ensure that the product was transported to a Sateri downstream location (essentially, an internal customer) in a timely and cost-effective way.

[88] Mr. Vinall undertook no other work assignments at Sateri during that crucial six-month period. Little by little, operations at the Bahia Mill began to streamline and improve incrementally. However, progress was achieved at a much slower pace than had been envisioned.

Mr. Hoon and Mr. Goh

[89] As the acting CEO of Sateri International Co., Mr. Hoon managed the Sateri budgeting process and delegated work assignments to a large number of subordinate management personnel, including Mr. Vinall. He was stationed in Singapore and was not directly active in the ground operations.

[90] Lin Piao Goh was a member of upper management of the RGE Group. Mr. Goh explained that senior executives within the RGE Group were occasionally temporarily assigned to select projects for different companies within Mr. Tanoto's larger corporate enterprise, including APRIL and the Sateri network. In the fall of 2009, being several months into Mr. Vinall's employment, Mr. Goh was seconded to Sateri International Co. as the "acting group executive director". He reported to Mr. Hoon.

[91] The primary reason for Mr. Goh's secondment to Sateri International Co., and his chief mandate while there, was to prepare it for listing on the stock exchange. Attaining that key goal required that Mr. Goh hire staff and evaluate and optimize performance throughout the enterprise as a whole, including the procurement of materials and services along the supply chain of the Sateri businesses, such as the Bahia Mill. He completed his secondment and returned to the RGE Group at the end of December 2010 after Sateri International Co. became a publicly traded company.

[92] Mr. Hoon did not testify at trial. Mr. Goh was the most senior employee of the Sateri organization to give evidence.

[93] Mr. Goh testified that the line of command was organized so that subordinate management and/or business heads reported to Mr. Hoon or to him, depending

upon the particular area in which the employee worked. With respect to Mr. Vinall, for example, he mainly reported directly to Mr. Hoon but was also required to report to Mr. Goh in relation to the functions for which Mr. Goh was chiefly responsible.

Tragedy Strikes the Vinall Family

[94] In May 2009, Mr. Vinall and his wife were in the process of finalizing the sale of their home in New Brunswick in preparation of the family relocating to the Sateri head office. The telephone rang in the middle of the night with the news that Mr. Vinall's stepson, M., was in intensive care. M. lived in Vancouver with his older sister.

[95] Mr. and Mrs. Vinall and their three younger children flew to Vancouver on the first available flight. They learned that M. had been involved in an altercation with two other males who were subsequently charged with manslaughter. By the time they arrived at the hospital, M. was on life support and soon died. He was 21 years old. The family was devastated.

[96] Mr. Vinall remained in Vancouver for a few weeks to support his family and to make arrangements concerning M. His initial reaction was that it would not be possible to go forward with the family's planned move and pondered what steps he might take with respect to his future. As the weeks passed, he and his wife reassessed the situation and came to the decision that the new environment offered by the move could prove a welcome distraction for the family. Some practical considerations also favoured relocation: the Vinalls had already sold their home and vehicles in anticipation of the move and Mr. Vinall needed to continue to earn an income.

[97] In or around this time, the head office shifted from Shanghai to Singapore. As far as Mr. Vinall was concerned, Singapore was a far more attractive destination for the family. At no time had Mr. Vinall worked out of the Shanghai head office.

[98] The Vinalls took the plunge and moved their household to Singapore in about July 2009. Mr. Vinall's stepdaughter remained in Vancouver.

Vinall's Secondment/Transfer to Sateri Singapore

[99] By letter written on letterhead titled, "Sateri International Group", Mr. Vinall's transfer from Sateri Shanghai to Sateri Singapore was confirmed to be effective on August 1, 2009. It had been prepared at Mr. Vinall's request as confirmation that his remuneration, other benefits and employment terms would not be altered.

[100] The letter described Mr. Vinall's designation as the "President Specialty Cellulose" and indicated his internal level was as "director". It referred to his transfer as being "in pursuance of the Management's decisions", and characterized it as a "new assignment". The letter confirmed that Mr. Vinall's transport and housing allowances, salary and the other terms and conditions of the Sateri Employment Contract would remain unchanged.

[101] My impression was of a consensus among the parties that this letter denoted that Mr. Vinall actually left the employ of Sateri Shanghai and had become an employee of Sateri Singapore. However, when read in conjunction with the Sateri Employment Contract and Declaration and interpreted in light of the surrounding circumstances, the letter readily admits of another view. That is, Mr. Vinall was being temporarily seconded to Sateri Singapore, an occurrence that was expressly envisaged in his Sateri Employment Contract, and that Sateri Shanghai remained his employer. Either way, nothing of significance turns on this point.

[102] After his family took up residence in Singapore, Mr. Vinall continued to work primarily at the Bahia Mill. He did his best to keep up his pattern of returning home from Brazil approximately every fourth week.

[103] Mr. Vinall recalled that he was at the Singapore office on twelve occasions, at most, throughout his entire employment. While there, he was expected to continue to direct substantially all of his effort and attention to the operations of the Bahia Mill, and he did so. Mr. Vinall convincingly testified that when Mr. Tanoto spotted him at the Singapore office, he would grill him about the Bahia Mill operations and then would instruct him to "get on a plane and go back to Brazil", declaring that he "shouldn't be" at the head office.

[104] Mr. Vinall began to doubt whether his executive management position at head office was going to materialize.

Fraser Papers under Creditor Protection

[105] In June 2009, Fraser Papers filed for creditor protection in Canada and bankruptcy in the United States. Its dire financial situation was covered in the general media and the news feeds about the forest industry that Mr. Wasilenkoff regularly received.

[106] Fraser Papers' monitor in bankruptcy, PricewaterhouseCoopers Inc., openly marketed the Thurso Mill as an acquisition opportunity. In a news release, the monitor reported that Fraser Papers was prepared to either sell the Thurso Mill or its assets. It offered to make the Thurso Mill business plan available to interested third parties on the execution of a confidentiality agreement.

[107] The numerous confidentiality agreements in evidence between Fraser Papers and various third parties speak to the fact that the Thurso Mill opportunity became widely known throughout the industry.

[108] Mr. Wasilenkoff testified he had been keeping an eye on Fraser Papers' decline. He became aware it had come under creditor protection around the time that it occurred and the monitor began to solicit interest in the Thurso Mill. He considered that event to be a game-changer in terms of the acquisition opportunities it presented because it meant that the assets of Fraser Papers could be broken up and sold separately, free from crushing pension liabilities. Given the convincing evidence that Mr. Wasilenkoff was seeking to acquire forestry-related assets for Fortress Paper, I find his testimony entirely plausible.

Wasilenkoff's Discussions with Sappi

[109] In early June 2009, Mr. Wasilenkoff visited Sappi's headquarters in South Africa. He met with high-level Sappi representatives to pursue discussions that had commenced some months earlier about a potential business collaboration between Fortress Paper's Landqart Mill and Sappi to manufacture banknote paper. Other

meetings with Sappi had also taken place at the Landqart Mill and the discussions were ongoing.

[110] Mr. Wasilenkoff testified that, in the course of his exchanges with Sappi executives, they talked about opportunities in the dissolving pulp business. He recalled having had a tour of Sappi's research and development facility where its breakthrough testing of dissolving pulp was on display.

[111] Mr. Wasilenkoff, on behalf of the Landqart Mill, and Sappi entered into a confidentiality agreement dated June 3, 2009 in relation to their communications (the "Sappi Confidentiality Agreement"). With some exceptions, the Sappi Confidentiality Agreement provided that the confidentiality obligations would endure until December 31, 2014.

[112] Mr. Wasilenkoff claimed that while visiting Sappi's headquarters in June 2009, and in the context of a more general conversation about the dissolving pulp sector, he raised the financial troubles of Fraser Papers and asked whether Sappi had ever looked at the Edmunston mill. He testified that the Sappi people answered that they had not, but disclosed that they had considered the Thurso Mill and proceeded to share their thoughts on its suitability for conversion to a dissolving pulp facility.

[113] The veracity of Mr. Wasilenkoff's evidence on this latter point was challenged by the plaintiffs. For logical convenience, I will resolve this factual dispute later in my Reasons in the context of determining the matters that Messrs. Vinall and Wasilenkoff discussed during their telephone conversation in October 2009.

Vinall's Trips to Mills in Asia

[114] In early fall 2009 or thereabouts, Mr. Vinall was directed to review the Toba Mill in Indonesia with a view on how to debottleneck its operations. I find that Mr. Vinall spent no more than one day at the Toba Mill to complete his review and to compose a short report of his technical suggestions. So far as Mr. Vinall was aware, nothing came of his report.

[115] At a later date, Mr. Vinall was asked to accompany a group of individuals, which included Mr. Tanoto, to APRIL's mill in Sumatra. Mr. Vinall spent a full day at that facility where he was introduced to members of the APRIL team and observed a performance review. No follow-up tasks were assigned to him as a result of that meeting. Evidently, in conjunction with this trip, Mr. Vinall travelled to the Toba Mill a second time.

Identifying Mill Candidates for Conversion to Dissolving Pulp

[116] Mr. Goh explained that in contemplation of becoming a public company, Sateri International Co. was looking to expand its operations. One mode of growth was to buy a closed mill at a reasonable price and convert it to a dissolving pulp facility.

[117] Members of the strategic planning divisions of the RGE Group, Sateri and APRIL tended to work collaboratively. On about October 5, 2009, Mr. Tanoto instructed Wanyan Shaohua, who was the department head of strategic planning at APRIL, to provide a list of pulp mills that had closed within the preceding three years. Mr. Shaohua completed his assignment the same day and reported to Mr. Tanoto by email, copied to the president of APRIL, the CFO of APRIL and others.

[118] In Mr. Tanoto's email reply to Mr. Shaohua the next day, he added Sammie Li Xue Mei (whom I will refer to as Ms. Li), Mr. Hoon and Mr. Goh as recipients to the string. In that email, Mr. Tanoto instructed Mr. Shaohua and Ms. Li to place the mills Mr. Shaohua had identified "in the Canada and [Country] map" and to check each mill's processing and digester information.

[119] As stated earlier, Ms. Li was an in-house strategic planning analyst for Sateri based in the Singapore office. She was not as senior as Mr. Vinall or Mr. Shaohua. Her function was to collect and analyze data that was publicly available or provided by industry consultants for use on discrete work assignments. Some of those industry consultants included Poyry, RISI and Hawkins Wright (also known as HW).

[120] Ms. Li understood that Sateri was considering increasing its upstream capacity by purchasing and converting an existing dissolving pulp facility or by building a new one. Working together, she and Mr. Shaohua compiled one map showing the closed pulp mills in North America and another indicating closures throughout Europe, as had been requested. On each map, they colour-coded mills that Rick Van Lee, then the technical director of APRIL, determined had the potential for conversion and were in close proximity to seaports. The separate list naming the closed mills also highlighted the mills that Mr. Van Lee considered to be potential conversion targets. Although the Thurso Mill was shown as a mill candidate on both the list and the map, it had not been highlighted by Mr. Van Lee as having either attribute. On October 6, the list and maps were sent to the expanded email group; another version with immaterial revisions was forwarded on October 7.

[121] Although Mr. Vinall was not a recipient of that email chain, more or less contemporaneously, Mr. Hoon enlisted his assistance to compile information about recent mill closures in North America. Mr. Vinall happened to be in the Singapore office at the time and recalled this task as one of his few work assignments that was unrelated to the Bahia Mill.

[122] In accordance with Mr. Hoon's instructions, on October 6, 2009 Mr. Vinall sent Ms. Li an email informing her about his assignment and asking that they meet to review whatever helpful background materials she may have to contribute. Ms. Li informed Mr. Vinall that Mr. Tanoto had already made a similar request of her and that he was looking at a mill in Spain and some other pulp mills that had recently closed. It was common practice for Mr. Tanoto to assign different employees with the same tasks to see how their results would compare.

[123] Mr. Vinall and Ms. Li met in the office and discussed the assignment in general terms. Mr. Vinall learned then that Mr. Shaohua had also been tasked with the same assignment. He mentioned to Ms. Li that, while at Birla, he had engaged in an analysis of acquisitions and knew of target mills in North America.

[124] As a matter of routine for close to a decade, Mr. Vinall had maintained a comprehensive inventory of electronic files in which he stored materials, articles and other data regarding the commodity and specialty pulp industries. He testified that he typically obtained the information from industry reports and publicly available sources, and that it was neither confidential nor proprietary. From time to time he drew on his extensive catalogue of information to create charts and perform various analyses respecting the paper pulp and dissolving pulp industries. As I will return to, Ms. Li maintained her own database containing publicly accessible information and industry reports.

[125] After meeting with Ms. Li, Mr. Vinall emailed her and Mr. Hoon some of the content from his data files. Included were extracts of the 2008 Poyry Report enumerating the evaluative factors Poyry had developed and applied to the surveyed mills, the comments he had added to the report when he first reviewed it, along with a summary of enhanced criteria that he had formulated at Birla. Mr. Vinall's summary named the mills that had made it to the final list in the 2008 Poyry Report, together with four additional mills that Mr. Vinall thought warranted consideration. The Thurso Mill was one of the four. The evidence indicated that, by this point in time, the assessment criteria endorsed by Poyry regarding mill conversion to the manufacture of dissolving pulp were fairly well-known in the pulp sector.

[126] With respect to the Thurso Mill, Mr. Vinall had made a notation that its "wood supply overlaps with SSCC Pontiac", and "if can consolidate wood supply would be positive". At trial, Mr. Vinall explained that his comments addressed the fact that the Thurso Mill and the Pontiac mill were essentially in competition for the same wood supply and that, at some future point, one of them would have to close. His belief was that because the economics of the Thurso Mill were superior to Pontiac's, it would survive in the end and, therefore, had the future potential for a lower cost wood supply.

[127] In the same email, Mr. Vinall requested an opportunity to discuss the focus of his assignment with Mr. Hoon and raised additional factors for consideration. I accept Mr. Vinall's testimony that he was never provided with a framework for how the expansion project by way of purchase and conversion was envisioned to proceed. Nor had he yet been given the list of mill closures and accompanying maps prepared by Ms. Li and Mr. Shaohua.

[128] From the information that Ms. Li received from Mr. Vinall and Mr. Shaohua, but based predominately on her discussion with Mr. Vinall, she narrowed the North American candidates appearing on Mr. Shaohua's list to three Canadian mills and created a one-page chart comparing their respective features. The three mills were: Crofton in British Columbia and Pontiac and the Thurso Mill, both in Quebec. Ms. Li's understanding was that Mr. Vinall was leaning in favour of the two east coast mills. The chart showed three sources for the information: RISI, HW, and a 2007 report by Poyry. At trial, Ms. Li clarified that she had relied on the 2008 Poyry Report provided to her by Mr. Vinall, and that she had mistakenly referred to the year as 2007. On a separate document, Ms. Li pinpointed the location of the mills on a map of Canada.

[129] Mr. Vinall reviewed Ms. Li's chart, altered some of the information it contained and added data that he considered germane to the assessment. More particularly, he noted that the Quebec government would be financially supportive of conversion of the Thurso Mill and the Pontiac mill. He based that assertion on his knowledge that the Quebec government endorsed jobs in the forestry sector and had a history of assisting provincial mills that were not competitive. Along the way, a fourth candidate was included in the chart, namely the Harmac mill, located on the west coast of Canada. Mr. Vinall emailed his supplemented version to Ms. Li.

[130] On October 7, someone casually mentioned to Mr. Vinall that the Canadian mill candidates were going to be discussed at an upcoming meeting. That was quickly followed by Mr. Hoon's formal request that Mr. Vinall make a presentation at that meeting scheduled for the next day.

[131] Meanwhile, the family turmoil created by M.'s death remained fresh. Mr. Vinall's wife was becoming increasingly depressed and his stepdaughter was struggling on her own in Vancouver. Overlaying the grief and deterioration on the home front was Mr. Vinall's emerging dissatisfaction with his job. The time spent in Brazil had far exceeded the initial six months anticipated and the distance had posed increasing difficulty for Mr. Vinall and his family after M.'s death. He had not expected the working conditions and work culture at the Sateri organization to be so unpalatable. Also fueling his disenchantment was his growing concern that his ascension to the profit and loss function in upper executive management might ever come about. He was interested in returning to Canada and found the possibility of the Sateri organization expanding via the acquisition and conversion of a Canadian mill an exciting prospect.

October 8, 2009 Meeting

[132] Mr. Goh explained that the annual budgeting/strategic planning process for the Sateri companies was divided into three phases. At the first stage, the focus was on growth and the strategic direction to be taken in the coming year(s). It was commonplace for Mr. Tanoto to take an active role in this phase.

[133] During the next stage, detailed budget numbers were circulated and discussed. Mr. Tanoto did not ordinarily involve himself in this step. He did, however, participate directly in the third phase, where the board proposed strategic initiatives and addressed most of the corresponding budget numbers.

[134] Phase one of the 2010 budget process took place at a meeting in Singapore on October 8, 2009 (the "October 8 Meeting"). Among those present were: Mr. Tanoto; his wife; Mr. Hoon; Mr. Goh; Ms. Li; Mr. Vinall; Mr. Sia (the CFO of the RGE Group); a person who worked for Mr. Sia; another member of the strategic planning team of APRIL or the RGE Group; a member of the RGE Group who was "focused on Sateri"; and an independent individual experienced in sales and the market in China with specialization in the downstream business. It was not made clear on the evidence whether this was an actual meeting of board members or not.

[135] By this time, Mr. Vinall was about nine months into the job. He had not previously attended a meeting of this kind. He understood that he was expected to explain the materials that he and Ms. Li each had a hand in compiling with respect to potential Canadian mill acquisition opportunities. At this juncture, Mr. Vinall was still in the dark about the list of mills and maps compiled by Ms. Li and Mr. Shaohua.

[136] Minutes of the October 8 Meeting in evidence record, and Mr. Goh confirmed, that Mr. Tanoto lead the meeting by providing an overview of the Sateri organization and a forecast of its future. Concentrating his remarks on the downstream side of the enterprise, Mr. Tanoto spoke about the burgeoning rayon market in China and commented on things like how to hedge against the risks that may arise in the marketplace. Mr. Tanoto also addressed the main strategic objectives of the Sateri companies. In the context of that discussion, nine matters were identified as requiring some post-meeting follow up.

[137] The final item raised was "M & A opportunities in America Presented by [Mr. Vinall]". The minutes record Mr. Vinall's presentation, in relevant part, this way:

> precondition to convert from BKP to [dissolving pulp] is "Batch Digester"
>
> – West Coast opportunities recommended by [Mr. Vinall]:
>
> 1.→Crofton Mill (400 kt integrated) located in Vancouver island, Soft-wood fiber, having additional capacity […] which can increase the yield of [dissolving pulp], wood cost around C$50/m3
>
> 2.→Harmac mill (400 kt) located in Vancouver island, Soft-wood fiber, old assets. Competing wood supply with Crofton
>
> – East Coast opportunities recommended by [Mr. Vinall]:
>
> Thurso mill (250 kt) and Pontiac mill (232 kt), both Hard-wood fiber
>
> Thurso has a batch digester, government supported. Production cost might be lower than West Coast mills but with higher logistic cost.

[138] Mr. Goh testified that the minutes accurately summarize Mr. Vinall's presentation. The evidence as a whole, including Mr. Vinall's testimony, satisfies me that Mr. Goh has a poor recollection of the event, and that the minutes were incomplete as they concerned Mr. Tanoto's reaction to Mr. Vinall's subject.

[139] Mr. Vinall recounted that he opened his topic by addressing the mill conversion opportunities on the east coast of Canada. In discussing the Thurso Mill, I accept that he started to canvass the bullet points on the chart he and Ms. Li. had prepared showing the four Canadian mill targets. He also explained the wood supply issue and reported, as a positive feature, that the owner of the Thurso Mill (Fraser Papers) was in bankruptcy, which he had discovered in carrying out his assignment.

[140] Mr. Vinall persuasively testified that before he was able to finish his remarks about the two Quebec prospects, Mr. Tanoto interrupted him and exclaimed that he was not interested in mills in Quebec and that no one ever made money there. He then pounded the table with his hand for emphasis. Mr. Vinall recalled that after Mr. Tanoto's outburst, no one in the room said anything about the east coast mills. As far as Mr. Vinall was concerned, Mr. Tanoto's forceful message left no room for doubt that he was not willing to do business in Quebec.

[141] Mr. Vinall claimed that, in light of Mr. Tanoto's unequivocally negative position about the candidates in Quebec, he skipped forward in his remarks and discussed the two west coast mills. He recalled there being little reaction to his comments. After he fielded a couple of questions, he and Mr. Shaohua were instructed to take some straightforward action in follow-up.

[142] Mr. Vinall explained, and the minutes of the October 8 Meeting reflect, that Mr. Shaohua's task was to ascertain the identity of the bankers for the west coast mills and determine whether they were concerned about their investment for use as leverage in a possible acquisition. He was not instructed to do likewise with regard to the Quebec mills. Mr. Vinall was directed to check with Craig Barker, who was in Sateri management on the downstream side, about whether he had a preference for wood pulp from hardwood or softwood and what wood type would fit with production at the Sateri viscose mill in China. There were no further directions from Mr. Tanoto or any other attendee at the meeting regarding the mill acquisition item.

[143] Mr. Goh did not remember much about the discussion that took place at the October 8 Meeting or what Mr. Vinall had said about the Thurso Mill or any details about Mr. Tanoto's comments or conduct.

[144] Ms. Li kept her own notes of the meeting. She stated that at the end of Mr. Vinall's presentation, Mr. Tanoto said he had always thought that the West Coast was better because its superior proximity to Asia meant that delivery of the product to the downstream mills would be more cost-effective and timely. According to her, Mr. Tanoto indicated that Mr. Vinall's presentation as it pertained to the east coast mills "was not strong enough" and that he would need to do "more studies" to convince Mr. Tanoto that they were better than the west coast targets. Much of Ms. Li's testimony on this point was compatible with Mr. Vinall's evidence that at the October 8 Meeting Mr. Tanoto rejected the east coast mills out of hand. To the extent, however, that she intended to suggest that Mr. Tanoto wanted Mr. Vinall to perform further "studies" or investigations about the Quebec mills or that he was possibly receptive to east coast targets, I do not accept it. There was no suggestion in the minutes, Ms. Li's notes or any other document that Mr. Vinall, or anyone, was to take further steps along those lines.

[145] Ms. Li added that she had not seen Mr. Tanoto pound the table during this or any other business meeting she had attended. I find that Ms. Li had either forgotten Mr. Tanoto's gesticulation during the October 8 Meeting, or as a current employee of his corporate empire, felt too constrained to recount it to the Court. Moreover, and despite Mr. Vinall's obvious self-interest, his description about Mr. Tanoto's response to his presentation concerning the mills in Quebec was persuasive.

[146] Mr. Vinall testified to the effect that at the end of the October 8 Meeting, he was not clear about what was to happen next with respect to the potential mill conversion matter, other than Mr. Hoon would be making a presentation to the board about it at the next meeting. I do not interpret Mr. Vinall's evidence on this discrete point to imply that after the October 8 Meeting he was uncertain about whether the Thurso Mill was still under consideration as a candidate for conversion by Sateri, as

plaintiffs' counsel submitted in closing argument. Mr. Vinall was consistent in his testimony that the Thurso Mill was categorically rejected out of hand as an expansion by Mr. Tanoto at the October 8 Meeting.

[147] In cross-examination, Mr. Vinall candidly acknowledged that it was within the realm of possibility that Sateri could change its mind about conversion of the Thurso Mill at some future point. His acknowledgement of the existence of such a possibility was intended in the general sense, namely that such an event - like any number of future happenings - could not be said to be wholly impossible. I attach no probative value to that piece of evidence.

[148] Mr. Vinall testified that at no time after the October 8 Meeting was the subject of the Thurso Mill or the possible acquisition of the Quebec candidates more generally, raised with him by Ms. Li, Mr. Hoon, Mr. Goh, Mr. Tanoto or any other person at Sateri, the RGE Group or APRIL. The exception to this is the telephone and email communications that touched on the matter in early March 2010. As I will discuss, those communications supported Mr. Vinall's testimony about Mr. Tanoto's rejection of the Thurso Mill.

[149] The preponderance of the evidence satisfies me that on the heels of the October 8 Meeting (and not before), Ms. Li forwarded to Mr. Vinall, the emails written between October 5 and October 7, 2009 that had been circulated variously among her, Mr. Tanoto, Mr. Shaohua, and others. Mr. Vinall had not previously received that email string. When he received it and saw the map, he immediately noticed that the Thurso Mill was shown as an inland plant. To his mind, that depiction was inaccurate because the Thurso Mill was located only 100 kilometres from Montreal, the largest eastern port in Canada. He promptly advised Ms. Li of the oversight by way of email the following day, which was shortly before the meeting of the board was set to convene in Shanghai on October 16, 2009. As it happened, that meeting was rescheduled to the following week (the "Second October Meeting").

Telephone Discussion between Vinall and Wasilenkoff – October 2009

[150] On or about October 17, 2009, Mr. Vinall sent a cryptic email to Mr. Wasilenkoff in which he stated, "It would be good to have a quick call as I see an interesting opportunity". At some point between October 20 and October 22, Messrs. Vinall and Wasilenkoff chatted over the telephone (the "October 2009 Call"). The "interesting opportunity" that Mr. Vinall referred to and the content of the October 2009 Call is intensely contentious.

[151] The plaintiffs asserted that the "interesting opportunity" was the prospect of purchasing the Thurso Mill for conversion to dissolving pulp. Mr. Vinall insisted that was not the case. He instead professed that the "interesting opportunity" was the bankruptcy of Fraser Papers, which he believed might re-ignite Mr. Wasilenkoff's interest in the Edmunston/Madawaska project.

[152] Mr. Wasilenkoff gave corroborating testimony that during the October 2009 Call, Mr. Vinall reported on Fraser Papers' creditor protection status and again raised the Edmunston/Madawaska takeover. He testified that he told Mr. Vinall that he was already aware of Fraser Papers' financial decline and that it had not revived his interest in Edmunston/Madawaska because he foresaw too many problems inherent in that venture. According to Mr. Wasilenkoff, he then shared the idea that the Thurso Mill might be a worthwhile prospect in light of Fraser Papers' downturn and disclosed to Mr. Vinall the discussions he claimed to have had about the Thurso Mill with Sappi in June 2009. He said he asked Mr. Vinall, in a somewhat tongue-in-cheek manner, whether he would be interested in returning to Canada. With that, says Mr. Wasilenkoff, Mr. Vinall's excitement level increased materially; it seemed to be what Mr. Vinall had been hoping to hear.

[153] At trial, Mr. Vinall said he was "shocked" when Mr. Wasilenkoff mentioned the Thurso Mill possibility. He maintained that it was only after Mr. Wasilenkoff brought up the Thurso Mill that he informed him that Sateri had passed on it as a possible conversion candidate because it was situated in Quebec. Mr. Wasilenkoff said he

did not find Sateri's reported stance to be unusual because Quebec was widely perceived as a uniquely challenging place to do business on several fronts.

[154] In order to determine what it was that Mr. Vinall and Mr. Wasilenkoff discussed during their October 2009 Call, it is helpful to resolve two factual disputes. First, whether the wings and beer meeting took place in October 2008 and, if it did, whether Mr. Vinall supplied Mr. Wasilenkoff with a copy of the 2008 Poyry Report at that time or soon afterward. Second, whether Mr. Wasilenkoff and representatives of Sappi discussed the Thurso Mill in June 2009 or otherwise before the October 2009 Call.

- **When did Wasilenkoff receive a copy of the 2008 Poyry Report?**

[155] The combined evidence of Messrs. Vinall and Wasilenkoff and their communications by email in July and September 2008 satisfy me that they met in Vancouver for wings and beer in October 2008.

[156] As referenced earlier, the plaintiffs assert that Mr. Vinall first furnished a copy of the 2008 Poyry Report to Mr. Wasilenkoff after the October 2009 Call in which they say Mr. Vinall alerted Mr. Wasilenkoff to the Thurso Mill opportunity. In support of their theory of events, the plaintiffs emphasized that Mr. Vinall's evidence about what he provided to Mr. Wasilenkoff at the wings and beer meeting was internally inconsistent and incompatible with Mr. Wasilenkoff's own recollection. I agree there were some mild inconsistencies.

[157] Mr. Vinall initially testified that he had brought along a second clean copy of the 2008 Poyry Report and handed it to Mr. Wasilenkoff at the wings and beer get-together in October 2008. Then, in cross-examination, he said he may have only brought a clean copy of the pages of that report that dealt with the dissolving pulp industry. Still later in cross-examination, Mr. Vinall allowed that he may not have brought a clean copy or clean pages with him after all, and that he and Mr. Wasilenkoff may have together reviewed his one marked-up copy. Purporting to expand on that recollection, Mr. Vinall said he believed that days or weeks after the

meeting, he sent Mr. Wasilenkoff a clean copy of the 2008 Poyry Report, together with the pages containing his commentary. When it was pointed out that he had not produced an email showing the transmission of those documents (and nor had Mr. Wasilenkoff), he answered that he suspected that he or his secretary had simply photocopied the pages and mailed them to Mr. Wasilenkoff. While Mr. Vinall agreed it was possible that he had scanned and emailed the 2008 Poyry Report and pages containing his handwritten remarks to Mr. Wasilenkoff, he was "pretty sure", that they had been sent by regular mail.

[158] Mr. Wasilenkoff testified that Mr. Vinall had supplied him with a separate copy of the 2008 Poyry Report at the wings and beer meeting. He confirmed that he was also given the pages with Mr. Vinall's handwritten comments, although he did not seem to pinpoint when it was that he received them (i.e. during or after the wings and beer meeting).

[159] To fortify their position, the plaintiffs also point to an email from Mr. Wasilenkoff to Mr. Vinall dated November 3, 2009 (the "November 3 Email"):

> I have not had a chance to review the material yet. Please feel free to make the introduction to your QC guy. I can be the "front guy". We should come up with a framework or structure for our group relatively soon.

[160] It is the plaintiffs' contention that the "material" being referred to was the 2008 Poyry Report along with the pages showing Mr. Vinall's handwritten notes, which they say Mr. Vinall provided to Mr. Wasilenkoff for the first time shortly after the October 2009 Call. There is no dispute that the "QC guy" Mr. Wasilenkoff mentioned was Pierre Monahan. Mr. Monahan had been a CEO of a forest products company in Quebec and he would come to figure prominently in the ultimate acquisition of the Thurso Mill by the corporate defendants.

[161] Mr. Vinall could not remember specifically what "material" Mr. Wasilenkoff was speaking of, but denied that it was the 2008 Poyry Report, maintaining that he had given it to Mr. Wasilenkoff when they met for wings and beer a year earlier. At

the same time, Mr. Vinall agreed, as did Mr. Wasilenkoff, that the material being referred to probably in some way related to the Thurso Mill and I find that it did.

[162] Periodically over the years, Messrs. Vinall and Wasilenkoff had talked about working together in a venture in the pulp and/or pulp and paper industry. In 2006**,** Mr. Wasilenkoff backed Mr. Vinall as the President and future CEO of Fortress Paper and, but for the intervention of third party bankers, Mr. Vinall would have likely assumed that position. Since mid-2007 or so, they had discussed the possibility of doing a shared project involving the Edmunston/Madawaska mills and had several communications about the dissolving pulp business. At the time of the wings and beer meeting, Fortress Paper was well into acquisition mode and dissolving pulp had been gaining Mr. Wasilenkoff's interest as a niche business possibility.

[163] Mr. Wasilenkoff's actions were consistent with his emerging interest. Quite independently of Mr. Vinall, he had made his own enquiries regarding the viability for conversion of the Skeena mill and the Edmunston/Madawaska mills. He had also gathered information about Fraser Papers and, on Mr. Vinall's recommendation, communicated with the Poyry London contact to discuss potential acquisition targets. Shortly before they met for wings and beer, he had discussed Mr. Roberts' report on dissolving pulp with Mr. Vinall.

[164] The evidence leaves the strong impression that, of the two men, Mr. Vinall's desire for a business collaboration of some kind was greater than Mr. Wasilenkoff's corresponding interest, and that he kept a lookout for opportunities that might bring that association about. Mr. Vinall had previously let Mr. Wasilenkoff know that he was looking to leave Birla (which he ultimately did a few months later). At the time of their wings and beer meeting, Mr. Vinall was motivated to inform Mr. Wasilenkoff more fully about the opportunities in dissolving pulp in the hope that a job opportunity might materialize. Mr. Vinall had received the 2008 Poyry Report that contained a comprehensive analysis of dissolving pulp on a global scale and had mentioned it to Mr. Wasilenkoff during one of their email exchanges several months earlier. For many reasons favourable to Mr. Vinall's interests, the 2008 Poyry

Report was an obvious document to share with Mr. Wasilenkoff at the wings and beer meeting in October 2008.

[165] In weighing the evidence, including Mr. Vinall's testimonial inconsistencies, I conclude that the wings and beer get-together occurred in early October 2008. I find that most probable scenario was either that Mr. Vinall handed Mr. Wasilenkoff a full copy of the 2008 Poyry Report during that meeting and supplied him with the pages showing Mr. Vinall's handwritten notations at the same time or shortly afterward; or reviewed his copy of the 2008 Poyry Report and his handwritten comments with Mr. Wasilenkoff and not long afterwards gave him copies. The bottom line is that Mr. Vinall provided Mr. Wasilenkoff with a copy of the 2008 Poyry Report along with the pages showing his notations in about October 2008, approximately one year before the October 2009 Call took place.

[166] The preponderance of the evidence further indicates that Mr. Wasilenkoff came away from the wings and beer meeting in 2008 with a greater knowledge of the dissolving pulp industry and an elevated interest in it as a niche opportunity for Fortress Paper.

- **Did Sappi and Wasilenkoff discuss the Thurso Mill in 2009?**

[167] The conversion of a conventional mill to a dissolving pulp plant as a future business endeavor for Fortress Paper had been percolating in Mr. Wasilenkoff's mind for some time before he met with the representatives of Sappi in June 2009. By then, he had reviewed the 2008 Poyry Report, engaged in several dialogues with Mr. Vinall about the dissolving pulp industry, received information on dissolving pulp from business advisors and analysts, made his own inquiries about the dissolving pulp business and specific mills, and had seen Birla's press release outlining its expansion plans for dissolving pulp operations. He was also aware that Fraser Papers had been teetering on the brink of significant financial failure for some time, and that it was about to enter, or had recently come under, creditor protection proceedings.

[168] This backdrop combined with the important fact that Sappi was the largest dissolving pulp manufacturer in the world, favours a high probability that dissolving pulp was among the topics canvassed by Mr. Wasilenkoff and the representatives of Sappi during their discussions in June 2009. I find this to be so even though the centrepiece of their business relationship was the banknotes venture. That said, Mr. Wasilenkoff's assertion that they talked about the Thurso Mill specifically, gives me significant pause.

[169] At his first examination for discovery on May 31, 2013, Mr. Wasilenkoff was questioned about the conversations he had with the Sappi people in around June 2009. Mr. Wasilenkoff answered that by then he was looking at the Thurso Mill and, although it was not a top priority, he would not have revealed his interest to a direct competitor like Sappi. He characterized his communications with Sappi in June 2009 as "not relevant" to the case at bar and said "it was a different type of discussion". Mr. Wasilenkoff elaborated that he was not at liberty to say whether he had partaken in discussions with Sappi respecting the conversion of an existing conventional mill to a dissolving pulp facility due to the constraints of the Sappi Confidentiality Agreement.

[170] When confronted with the discrepancies between his evidence on this point at trial compared to his first examination for discovery, Mr. Wasilenkoff attempted to explain them away by saying that at his discovery he had been constrained by the Sappi Confidentiality Agreement, which was no longer in effect at the time of the trial. However, the Sappi Confidentiality Agreement clearly does not purport to classify discussions on the subject of dissolving pulp as confidential and to prohibit their disclosure. Challenged on that point, Mr. Wasilenkoff claimed to have not reminded himself of the ambit of the Sappi Confidentiality Agreement in advance of his discovery and to have simply presumed that it forbade disclosure of conversations that he said were embarked upon concerning dissolving pulp. He stated that when he subsequently reviewed the Sappi Confidentiality Agreement a couple of weeks before trial, he realized that it did not restrain communications about dissolving pulp. I do not find that plausible. It is in Mr. Wasilenkoff's nature to

be accurately attuned to the details of his possible business pursuits and I find he would have readily recalled the parameters of any agreed suppression of his freedom to discuss business prospects.

[171] On August 6 and 7, 2009, Fortress Paper held a board meeting at the Landqart Mill. The Fortress defendants advised by way of answers to requests made of Mr. Wasilenkoff at his examination for discovery, that the minutes of this board meeting did not contain any relevant information and, therefore, would not be produced in the action. Counsel later had a change of mind and disclosed the minutes partway through Mr. Wasilenkoff's evidence in-chief. They record that at the meeting Mr. Wasilenkoff reported on various growth strategies for Fortress Paper, including Sappi. There is nothing in the minutes with respect to the Thurso Mill, dissolving pulp or any discussions with Sappi beyond reference to the potential combined endeavour concerning banknotes. If Mr. Wasilenkoff had discussed the Thurso Mill opportunity with Sappi in June 2009, it is difficult to understand his steadfast position that the board minutes were irrelevant given that they reflect that he provided an update on Sappi at that time.

[172] During his evidence in-chief, Mr. Wasilenkoff, for the first time, professed to have relayed Sappi's analysis of the Thurso Mill to Mr. Vinall during the October 2009 Call. No time while testifying about that conversation during his examinations for discovery, did he suggest he had done so. It remains to add that, while on the one hand Mr. Wasilenkoff cited the Sappi Confidentiality Agreement as the reason he had not given more fulsome answers at his May 31, 2013 discovery concerning the content of his discussions with Sappi, on his own evidence he had no compunction sharing that information to Mr. Vinall during the October 2009 Call. Also informative is that in Mr. Vinall's detailed account of the October 2009 Call, he said nothing about Mr. Wasilenkoff relaying any prior discussion he may have had with Sappi respecting the Thurso Mill.

[173] All things considered, I do not accept Mr. Wasilenkoff's evidence that he discussed the Thurso Mill with Sappi prior to the October 2009 Call. It follows that

he was also untruthful when he testified that he had disclosed Sappi's observations about the suitability of the Thurso Mill conversion with Mr. Vinall during their discussion. None of that happened.

- **Summary of the Content of the October 2009 Call**

[174] I return now to the discussion between Messrs. Vinall and Wasilenkoff during the October 2009 Call.

[175] In reviewing the potential mill targets for Sateri, Mr. Vinall had been somewhat bullish on the two candidates in Quebec, one of which was the Thurso Mill. His assessment of the Thurso Mill as a favourable acquisition was partly informed by the fact that Fraser Papers was under creditor protection. It is unlikely that Mr. Vinall would have used Fraser Papers' creditor protection status, an event that by then was more than four months old, as a springboard to communicate with Mr. Wasilenkoff and segue into yet another discussion about the Edmunston/Madawaska prospect. Mr. Vinall was sufficiently acquainted with Mr. Wasilenkoff's business acumen to know that he would have been aware of Fraser Papers' status around the time it happened.

[176] Mr. Vinall also knew that Mr. Wasilenkoff had been cultivating an interest in the dissolving pulp business. Indeed, Mr. Vinall had been actively promoting it for some time. The potential involvement of Fortress Paper in a dissolving pulp conversion underlay many of their communications in 2007 and 2008. They had several times exchanged thoughts on the topic when they spoke about the Skeena mill and the prospect of an Edmunston/Madawaska venture, shared written information about dissolving pulp and talked about that industry at length when they reviewed the 2008 Poyry Report together in the fall of 2008.

[177] I am satisfied that Mr. Vinall genuinely and correctly believed that Mr. Tanoto and, hence Sateri, had vetoed the very idea of pursuing a mill in Quebec. He had a personal interest in finding a bridge back to Canada due to his mounting family crisis and growing discontentment with his current job, and foresaw that the conversion of the Thurso Mill might pave his return. In his own self-interest, Mr. Vinall reached out

to Mr. Wasilenkoff to that end. That is not to say that further discussion about a possible venture involving Edmunston was necessarily off the table. However, the Thurso Mill prospect was at the forefront and was indeed the interesting opportunity that Mr. Vinall wished to raise with Mr. Wasilenkoff and the reason he arranged the October 2009 Call.

[178] Mr. Wasilenkoff was well aware of the Thurso Mill as a dissolving pulp target and had not discounted it as a potential acquisition for Fortress Paper. I find that all of Fraser Papers' forestry assets, including the Thurso Mill, became of greater interest to Mr. Wasilenkoff when Fraser Papers entered into creditor protection proceedings in June 2009. However, I do not accept Mr. Wasilenkoff's testimony that he was actively working on the pursuit of the Thurso Mill at the time of the October 2009 Call. What I do find is that he was interested in the Thurso Mill and, on this occasion, Mr. Vinall's timing was right. The fact that Mr. Vinall indicated a potential willingness to make himself available to lead the technical side of the conversion was appealing to Mr. Wasilenkoff, elevating his degree of interest and focusing his attention.

[179] I find that during the October 2009 Call, Mr. Wasilenkoff indicated his interest in giving the Thurso Mill a closer and serious look, while at the same time cautioning Mr. Vinall that these were very preliminary days and many unsettled pieces would have to come together in order to formulate a preliminary plan sufficient to secure Fortress Paper's involvement. That was understood by Mr. Vinall. Mr. Wasilenkoff went on to float the idea that if Fortress Paper were to decline the venture, it may be attractive enough for him to consider pursuing through another corporate entity.

[180] Reflecting that he had given some thought to the pulp mill business climate in Quebec, Mr. Wasilenkoff suggested that it may be preferable to approach the Quebec government with a proposal before involving Fraser Papers' monitor. Mr. Vinall told Mr. Wasilenkoff about a senior executive he knew who was well-connected with the Quebec government and experienced in the forest industry. He offered to contact him in confidence. Mr. Wasilenkoff was keen to have the

involvement of someone who understood the "lay of the land" and who could help make inroads to the government.

[181] Mr. Vinall did not tell Mr. Wasilenkoff that the executive he referred to was Pierre Monahan. I find that he chose not to divulge Mr. Monahan's name at that time because he was playing his cards close to his vest in the hope that Mr. Wasilenkoff would perceive his continued involvement to be of value.

[182] In this time frame, Mr. Vinall had also been eliciting input from others about a potential Thurso Mill deal. Before the October 2009 Call, he sent an email to his close friend in which he said, "good talking and scheming will let you know how my calls pan out…". After the October 2009 Call, Mr. Vinall updated his friend that, "[Mr. Wasilenkoff] is in – so we are on first base… Spoke briefly with [Mr. Monahan] and he is interested as well but we didn't get to any specifics yet".

[183] Mr. Vinall gave unconvincing testimony that when he emailed his friend he and Mr. Wasilenkoff were still contemplating the possibility of a venture involving the Edmunston/Madawaska mills. The content and timing of Mr. Vinall's emails to his friend, and particularly his reference in one of them to Mr. Monahan, further bolstered the inference that the Thurso Mill was the "interesting opportunity" that Mr. Vinall explored with Mr. Wasilenkoff during the October 2009 Call.

Second October 2009 Meeting

[184] Messrs. Tanoto, Hoon and Goh were among those present at the Second October Meeting. Mr. Vinall had not been asked to attend and did not do so.

[185] One of the documents placed before those in attendance was a one page summary titled "Strategic Focus + Main Objectives for 2010" which was divided into eight subtopics, one of which was headed "Growth". Three options for growth of the upstream arm of the business were identified as:

(i) Debottleneck the Bahia Mill;

(ii) Debottleneck the Toba Mill in Indonesia; and

(iii) Acquire paper pulp mill in North America or Europe for conversion to producing rayon-grade pulp.

[186] Mr. Goh confirmed that those options were the critical strategic points that the board was trying to reach consensus on for the coming year. Curiously, he was unable to provide any useful evidence about the discussions that ensued on those topics.

[187] During the Second October Meeting, Mr. Hoon presented slides that showed the potential mill candidates. Although Ms. Li claimed to have rectified the map to reflect Mr. Vinall's clarification about the proximity of the Thurso Mill to a seaport, it was unclear when she did so. More to the point, the preponderance of the evidence established that the materials reviewed at the Second October Meeting contained Mr. Van Lee's uncorrected version of the map that did not identify the Thurso Mill as being close to a port or as a mill that could be converted to produce dissolving pulp. Here, I would add, that except for Mr. Vinall's correction concerning the location of the Thurso Mill, there was no evidence that Mr. Van Lee's technical assessment of the suitability of the identified mills (and the unsuitability of the Thurso Mill) was ever changed or challenged.

[188] Mr. Goh professed a vague recollection that there had been some discussion surrounding the handouts prepared by Ms. Li and Mr. Shaohua about the potential mill targets at the Second October Meeting. He could not recall any of the specifics and provided no evidence as to whether the Thurso Mill was raised for discussion and, if it was, what was said. Remarkably, given that Mr. Goh was the most senior ranking executive in the Sateri organization to testify, he had no recollection as to whether any decision about purchasing a mill was reached at that meeting or at any time thereafter. The plaintiffs called no other attendee of the Second October Meeting as a witness and did not tender the minutes of that meeting.

[189] Mr. Vinall was curious about the outcome of the Second October Meeting as it concerned the mill acquisitions and asked Mr. Hoon about it. He testified that Mr. Hoon replied with words to the effect, "Let's just keep looking". In my view,

Mr. Hoon's response was equivocal. On the one hand, it is capable of being interpreted as discrediting Mr. Vinall's assertion that Mr. Tanoto, and thus Sateri, had already dismissed the Thurso Mill as a contender at the October 8 Meeting. On the other, it may be construed as confirming that the plaintiffs' plan to expand by converting an existing mill to a dissolving pulp plant continued to be a live strategy, and, because a suitable target had not yet been found, scouting for a candidate would continue. This interpretation is consistent with Mr. Vinall's testimony that Mr. Tanoto vetoed only the Quebec prospects at the October 8 Meeting. After all, Mr. Tanoto had not abandoned the entire strategic model; he had only rejected mills, like Thurso, located in Quebec. I prefer the latter interpretation of Mr. Hoon's remarks.

[190] The Second October Meeting was held just days before the performance review of the Bahia Mill got underway in Brazil, as discussed below.

Performance Reviews at the Bahia Mill – October 2009

[191] Mr. Tanoto was not a mere figurehead of his business empire. It is common ground that no strategic decision of any consequence concerning the Sateri organization, the RGE Group, APRIL or Toba was made without his knowledge and approval. Mr. Goh testified to the effect that, unlike strategic matters, Mr. Tanoto typically did not involve himself in the operational side of the Sateri businesses. I do not accept his evidence as it concerns the granular nature of Mr. Tanoto's participation relative to the Bahia Mill.

[192] Mr. Tanoto travelled to Brazil in the spring of 2009 and again in late October that year to hold performance review meetings. On each occasion, the meetings took place at the Bahia Mill and in rooms booked at a local hotel over a period of approximately four days. Mr. Tanoto was normally accompanied by his personal bodyguards, Mr. Hoon, an analyst and/or other assistants, an employee from the corporate finance department of Sateri International Co. Mr. Goh was part of the entourage at the October 2009 review.

[193] Mr. Vinall credibly recounted that Mr. Tanoto ran these review meetings in a demanding manner. The manager from each department was required to make a formal presentation summarizing the departmental achievements year-to-date and formulating steps to be taken to improve performance. Mr. Tanoto was detail-oriented and would spend a few hours with members of each department, questioning them about the operations they were in charge of and why KPIs were not being attained. Mr. Vinall, who was present throughout, claimed that in the course of those exchanges, Mr. Tanoto would frequently berate Mr. Vinall and others for perceived inadequacies. He would sometimes signal his displeasure by folding his arms across his chest and turning away from the participants and/or by pounding the table. Occasionally, he screamed at Mr. Vinall, calling him a dumb Australian.

[194] By the end of those marathon meetings, Mr. Tanoto would have unilaterally stretched the performance goals and altered certain of the KPIs in a way that Mr. Vinall considered to be even more unrealistic.

[195] Mr. Vinall convincingly testified that, in addition to his observations regarding Mr. Tanoto's punishing review style at the Bahia Mill, he witnessed him ridicule and degrade other employees of his larger business enterprise, including the president of APRIL.

[196] Mr. Vinall understood Mr. Tanoto to be a rags-to-riches figure who had become one of the wealthiest industrialists in Indonesia, and who was a very powerful man. He claimed that Mr. Tanoto had a reputation for being a bully who insisted on unflinching personal loyalty from all who worked for him. I am not making a finding as to the truth of whether Mr. Tanoto possessed these attributes or of his character in general. I do conclude, however, that Mr. Vinall truthfully testified about his genuinely-held beliefs about Mr. Tanoto. I am also satisfied that despite his awareness of Mr. Tanoto's unfavorable reputation, Mr. Vinall was not prepared for and was unaccustomed to his grueling management approach.

[197] As I will discuss in a later section, Mr. Vinall's negative perception of Mr. Tanoto very much influenced the secretive manner in which he comported

himself while assisting Mr. Wasilenkoff with Fortress Paper's pursuit of the acquisition of the Thurso Mill.

[198] Minutes of the April/May performance review of the Bahia Mill were not tendered; however, those kept of the October review were in evidence. They are the plaintiffs' documents. The October minutes comprise 19 typewritten pages and record Mr. Tanoto's detailed interest and involvement in a wide array of operational matters of the Bahia Mill. The minutes state that he obtained information about, and gave instructions and directions pertaining to, sales, marketing, wood supply, research and development, improvements to the specialty pulp grade being produced at the Bahia Mill and other technical subjects. Mr. Vinall credibly testified that at no time over the course of those days and meetings in October did Mr. Tanoto or any other participant raise the topic of the Thurso Mill, and it was not mentioned in the detailed minutes.

[199] At the material time, Mr. Tanoto was keeping a close eye on and control over the operations of the billion dollar Bahia Mill. I am satisfied that he also travelled to other mills, such as the Toba Mill, to participate in managerial performance reviews that entailed a similar degree of operational and strategic detail.

Carrying out the Actions Assigned at the October 8 Meeting

[200] In accordance with the instructions he received at the October 8 Meeting, Mr. Vinall contacted Mr. Barker, who did not express a strong preference for either softwood or hardwood. Mr. Vinall remembered reporting on their discussion to the larger group, and I find that he did so in a timely way.

[201] Pursuant to the follow-up action assigned to Mr. Shaohua at the same meeting, on October 21, 2009 he emailed an overview of the ownership of the Crofton and Harmac mills to several recipients, including Mr. Tanoto, Ms. Li, Mr. Hoon and Mr. Goh. Ms. Li, in turn, forwarded his email to Mr. Vinall.

[202] The next day, Mr. Vinall emailed Mr. Shaohua, copied to Ms. Li, asking that he run a "Cornerstone model" and provide him with projected costs and flow sheets

for five mills including, Thurso and Edmunston/Madawaska. Ms. Li credibly explained that the Cornerstone model is a method of detailed financial analysis that was developed by RISI. In her view, the information that such an analysis would yield was "totally different" from the scope of the follow-up tasks that Mr. Vinall had been assigned at the October 8 Meeting. I am persuaded of that. I find that the information Mr. Vinall asked Mr. Shaohua to collect was unrelated to the actions Mr. Vinall was tasked with at the conclusion of the October 8 Meeting.

[203] Although the Cornerstone data Mr. Vinall sought may have had an ancillary usefulness for him in his position at Sateri, his primary motivation at that stage was to have it made available for his use in the pursuit of the Thurso Mill possibility.

Fraser Papers' News Release

[204] On November 2, 2009, Fraser Papers' monitor circulated a news release announcing that enough funding had been obtained from the Quebec government to maintain the Thurso Mill until February 1, 2010.

[205] Mr. Wasilenkoff read this release around the time that it was issued. The February 1, 2010 deadline signalled to him that the Thurso Mill had been given a very short financial lifeline. In this regard, Mr. Wasilenkoff explained that once the cost of keeping the lights on at the Thurso Mill was no longer covered, the final leg of the mill shutdown would occur, and at that point it would be too costly to turn things around. If he was going to go forward with a proposal to acquire the Thurso Mill, he would have to act quickly. He needed to meet with the members of his board.

Fortress Paper Board Meeting – November 5 and 6, 2009

[206] The directors of Fortress Paper convened a meeting on November 5 and 6, 2009. Mr. Vinall and Mr. Wasilenkoff traded emails in the hope of arranging a telephone call in advance of the meeting, but were unable to connect.

[207] The minutes of the November meeting record that Mr. Wasilenkoff gave updates about several possible growth strategies. One of them was in reference to Sappi although, once again, there were no particulars of that update noted in the

minutes. He also introduced "a new potential dissolving pulp project in Quebec", which was the prospective purchase and conversion of the Thurso Mill.

[208] Mr. Wasilenkoff walked the board through aspects of the Thurso Mill opportunity and relevant surrounding information, such as the background he had compiled on Fraser Papers and highlights of the 2008 Poyry Report. At his discovery, Mr. Wasilenkoff did not recollect whether he told the board about Mr. Vinall's involvement specifically. At trial, he recalled that he had informed the board about Mr. Vinall's breadth of knowledge in the dissolving pulp field and his desire to be the operational leader of the project. It is not an unusual occurrence for a witness to have an improved recall on matters of marginal significance after being steeped in trial preparation. That was Mr. Wasilenkoff's explanation for his discrepancy in recalling this small point, and I accept it.

[209] Mr. Wasilenkoff was interested in obtaining guidance and input about the Thurso Mill idea from his fellow directors, who were experienced in a range of businesses. One of the directors in particular, Per Gundersby, was an engineer and the former chair and CEO of Poyry Worldwide. He was knowledgeable in the pulp and paper sectors and, coincidentally, had been involved in some capacity in the dissolving pulp conversion at the Bahia Mill.

[210] While the board favoured Mr. Wasilenkoff continuing to pursue the opportunity, the transaction was considered to be too premature in its development for Fortress Paper to make a firm commitment.

Inquiries about the Kemijarvi Mill Equipment

[211] In October 2009, Mr. Van Lee obtained information about the sale of used pumps, digesters and other assets by the inactive Kemijarvi mill in Finland. Like the Thurso Mill, Kemijarvi was a batch digester plant. On October 30, 2009, Mr. Van Lee emailed his findings to Mr. Tanoto and copied Mr. Vinall and Marcelo Leite. Mr. Leite led the technical team at the Bahia Mill.

[212] I find Mr. Van Lee included Messrs. Vinall and Leite in his email report to Mr. Tanoto to inform them of the availability of the Kemijarvi equipment so they could determine whether any of it might be useful at the Bahia Mill.

[213] Soon after he received Mr. Van Lee's email, Mr. Vinall passed it along to Mr. Wasilenkoff. The probabilities of the evidence suggest that the contents of Mr. Van Lee's October 30 email to Mr. Vinall, forwarded to Mr. Wasilenkoff, may have been the "material" referred to by Mr. Wasilenkoff in the November 3 Email. Most likely when they spoke on November 5, Messrs. Vinall and Wasilenkoff discussed the used mill equipment that might be desirable to purchase for the Thurso Mill and the kinds of questions that should be asked of the Kemijarvi contact.

[214] In mid-November, Mr. Vinall separately initiated communication with Mr. Leite. He advised that Sateri was "confidentially" looking at the possibility of acquiring and converting a conventional mill to a dissolving pulp facility and asked him questions about the compatibility for conversion of some of the Kemijarvi equipment. As a second possibility, Mr. Vinall raised the notion that the Kemijarvi digesters might be suitable for the Bahia Mill and the rest of its equipment could be used at the Toba Mill. Between November 18 and 19, Mr. Vinall and Mr. Leite exchanged additional emails on the topic. Mr. Leite raised an issue concerning wood density to which Mr. Vinall replied that a possible wood supply would be eastern hardwood like maple. That was the wood type used at the Thurso Mill.

[215] Almost to the day, Mr. Wasilenkoff also made inquiries of the Kemijarvi project manager about the Kemijarvi equipment. According to Mr. Wasilenkoff, Mr. Gundersby had drawn his attention to the equipment sell-off and had provided him with the contact information. By email dated November 18, 2009, Mr. Wasilenkoff offered to purchase a list of super batch equipment from Kemijarvi.

[216] Mr. Wasilenkoff maintained that Messrs. Gundersby and Monahan had assisted him in creating a list of the desirable Kemijarvi equipment that could be compatible with the conversion of the Thurso Mill, which formed the foundation of his offer. While I accept that is accurate, it does not tell the full story.

[217] A feature of Mr. Wasilenkoff's demonstrated business success was his ability to surround himself with people knowledgeable in areas that he knew little about, and to delegate tasks to them within their field of expertise. Mr. Vinall's expertise was on the technical side of converting a conventional mill to a dissolving pulp mill and operating such a facility. He was the person best positioned in Mr. Wasilenkoff's circle to know what equipment at Kemijarvi might be suitable for the Thurso Mill. I find that Mr. Vinall was instrumental in arming Mr. Wasilenkoff with the information he required to present Kemijarvi with an offer to purchase on November 18.

[218] I have not overlooked that in Mr. Wasilenkoff's November 18 offer to purchase, he explicitly contemplated that he may have to discuss the purchase of other equipment with his "technical experts". I do not construe his statement as indicating that he had not already discussed the sell-off with Mr. Vinall. I find it supports the opposite conclusion and affirms that Mr. Wasilenkoff was aware that he may need to have further discussions with Mr. Vinall (and, possibly, Messrs. Gundersby and/or Monahan) once Mr. Leite had answered the follow-up questions or it came to light that there was other equipment not reflected in the offer they may wish to obtain.

[219] According to Mr. Vinall, the inquiries he made of Mr. Leite about the utility of the used Kemijarvi assets were for Sateri's business purposes. He denied that he was attempting to obtain information from Mr. Leite to further his interests to bring about a venture with Mr. Wasilenkoff in relation to the Thurso Mill. Mr. Vinall's denial is not believable when weighed against the evidence of the surrounding events. Mr. Wasilenkoff's communications with the Kemijarvi contact within this same window of time, which Mr. Wasilenkoff agreed were "more than a coincidence", further impugned Mr. Vinall's testimony on the matter.

[220] I find that Mr. Vinall's communications with Mr. Leite about the Kemijarvi equipment were legitimately in Sateri's interests to a narrow extent only and subordinate to his paramount aim. In the big picture, Mr. Vinall was using Sateri's

resources to assist Fortress in its pursuit of the Thurso Mill and in furtherance of his personal desire to return to work in Canada.

[221] Continuing throughout the ensuing months and into 2010, Mr. Wasilenkoff periodically followed up on his offer with his contact at the Kemijarvi mill.

Other Events in November 2009

[222] In his November 3 Email, Mr. Wasilenkoff had suggested that he and Mr. Vinall come up with a framework or structure for "our group" relatively soon. In his reply on November 5, Mr. Vinall proposed corporate structures that might be used to facilitate the acquisition of the Thurso Mill. Each option allowed for Mr. Vinall to take an equity position in the new enterprise. To Mr. Wasilenkoff, none of the scenarios envisioned by Mr. Vinall were realistic from a commercial perspective. In any event, as far as he was concerned, far too many variables were in flux at that time to warrant delving into much detail.

[223] By this stage, Mr. Vinall had set up the new email address of "Mr. Bio", which had no personal identifiers. He used this anonymized address in his communications about the Thurso Mill project and, in those email exchanges, began to refer to himself by his middle name, John.

[224] Mr. Vinall's desire to move cautiously and to preserve his privacy in relation to the steps he was taking did not surprise Mr. Wasilenkoff. He credibly testified that in his experience, it was fairly standard for an employee in Mr. Vinall's shoes, namely seeking to leave his current employer, to correspond by way of a non-work email address. Mr. Vinall's protective email measures seemed especially prudent to Mr. Wasilenkoff given his understanding of Mr. Tanoto's dark reputation in the industry. That said, he regarded Mr. Vinall referring to himself as John as somewhat juvenile.

[225] It was apparent to Mr. Wasilenkoff from the outset that the Quebec government would have a major say in who would be the new owner of the Thurso Mill. He also recognized the potential for the government to provide financing to

support the substantial capital investments required to transform the mill and preserve assets and jobs. Put simply, financing and approval from the Quebec government was crucial to a successful acquisition.

[226] Appreciating that reality, in or about mid-November 2009 Messrs. Wasilenkoff and Monahan started to brainstorm effective acquisition strategies. Mr. Monahan's past experience and connections with the Quebec government gave him special insight about the preferable approach to take in terms of a favourable political platform. He was also indispensable in identifying the governmental departments from whom funding could be sought, developing a position on securing the wood supply on Crown land, ensuring that the relevant parties were represented at the table in the negotiations and formulating how and when to bring Fraser Papers' monitor into the loop.

December 4, 2009 Meeting

[227] Another phase of Sateri's budget meeting was held on December 4, 2009. None of Mr. Vinall, Ms. Li or Mr. Shaohua was in attendance.

[228] Behind the scenes, Mr. Goh and others at the executive level in the Sateri organization were concentrating their efforts on ensuring that appropriate steps were being taken to have Sateri International Co. listed on the Hong Kong Stock Exchange. Achieving that goal was of the utmost importance to the entire enterprise. To that end, a number of new directors had recently been appointed to the board of Sateri International Co. and were in attendance at this budget meeting (and possibly at the preceding one).

[229] At that time, Mr. Goh's primary responsibility was to familiarize the new directors with the Sateri businesses and the organization as a whole. Once again, he was not able to recall any discussions around the Thurso Mill during that meeting or reliably say whether any decisions were made about it then or at any subsequent time. No minutes were placed into evidence.

Incorporation of Fortress Specialty and Terminology

[230] Mr. Wasilenkoff incorporated Fortress Specialty Cellulose Inc. ("Fortress Specialty") on December 16, 2009. Initially, he was its sole shareholder.

[231] In the remainder of my Reasons, I will use "Fortress" to refer to Fortress Paper and Fortress Specialty as one.

Presentation to the Quebec Government – December 2009

[232] A slide presentation entitled "AcCELLerate Quebec" (accentuating the word, cellulose), was a vital part of Fortress's introduction to the Quebec government of its proposed acquisition of the Thurso Mill. Chris Holland, with Fortress Paper, took the lead in composing the PowerPoint slides. At Mr. Wasilenkoff's request, Mr. Vinall also provided input to some of the slides, largely on the technical aspects. Several other individuals including Mr. Wasilenkoff, Mr. Monahan and Kurt Loewen, the chief financial officer of Fortress Paper, had a hand in composing the slides.

[233] The extent of Mr. Vinall's involvement in the preparation of the slides is contentious. In addition to the plaintiffs' assertion that he played a significant role in composing them while still in their employ, they allege that he wrongfully lifted content from their confidential materials and other internal data, and reproduced it in some of those slides. I will examine these allegations more closely when I address the applicable claims.

[234] The December 2009 version of the AcCELLerate PowerPoint included a slide of key personnel that recited the credentials and accomplishments of Messrs. Wasilenkoff and Monahan. Another slide headed "Undisclosed Future Operational Leader" was about Mr. Vinall, although he was not identified by name. It was based on information that Mr. Vinall had furnished. One of the bullet points on that slide described him as "the President of a global multi-mill specialty pulp company". That was a significant exaggeration of his actual designation and role in the Sateri organization.

[235] An early iteration of the PowerPoint also contained an executive summary. It described Fortress Specialty as a new company formed "… as a partnership between [Mr. Wasilenkoff], the owner of Fortress Paper, a highly successful specialty paper company, and a seasoned industry partner with specific experience in transforming these kinds of assets". Mr. Vinall was the unnamed industry partner who was said to be expected to take the leadership role in driving the transformation and operating the Thurso Mill on the conclusion of the transaction. He was also one of the unnamed dissolving pulp technical experts referred to in the slides.

[236] Mr. Wasilenkoff and Mr. Monahan met with between six and eight representatives of the Quebec government in mid-to-late December 2009 to introduce the proposal. As part of their presentation, they took the attendees through the AcCELLerate PowerPoint. Mr. Vinall was not present.

Appointment of Vinall as a Director of Sateri Companies

[237] In the short space between December 26 and 29, 2009, Mr. Vinall signed documents by which he consented to act as a director of two of the plaintiffs, namely Sateri Singapore and Sateri International Co., and in respect of other companies in the Sateri group: Sateri Bacell; Sateri Copener; DP Marketing; and Sateri Cellulose.

[238] The statutory book records of Norcell and Bahia Specialty indicate that Mr. Vinall was probably appointed as a director of those companies effective November 17, 2009, although his written consents to act as such were not in evidence.

[239] In addition to signing the consents, between December 29 and 31, 2009, Mr. Vinall signed eight directors' resolutions in relation to four of the Sateri companies: Sateri International Co., D.P. Marketing, Sateri Cellulose and Sateri Singapore. On their face, the subject matter of most of those resolutions appeared to concern the approval of the transfer and/or exchange of certain shares, particularly as between Sateri International Co. and Sateri Cellulose, as part of an internal corporate reorganization. Aside from that, one resolution confirmed and

approved Sateri Cellulose's annual return and another accepted the resignation of certain directors.

[240] The only resolution in evidence signed by Mr. Vinall beyond this December timeline was that of Sateri Cellulose, dated March 22, 2010, by which its financial statements were presented and approved.

Events in January 2010

[241] In December 2009 or early January 2010, Fortress Paper's proposal regarding the Thurso Mill project obtained qualified support from the Quebec government.

[242] Unbeknownst to Mr. Wasilenkoff, at some point after Fortress had presented the AcCELLerate PowerPoint, Fraser Papers' monitor instructed Marco Veilleux, the former mill manager of the Thurso Mill, to contact 14 other strategic pulp companies and four biofuel companies as potential buyers of the Thurso Mill. There was no evidence that Sateri was among those approached, or that Sateri had made any overture to Fraser Papers or its monitor.

[243] In mid-January 2010, Fortress Specialty entered into a letter of intent relating to the Thurso Mill acquisition. Mr. Wasilenkoff solicited input from Mr. Vinall and others in relation to the contents of the letter.

[244] As an essential adjunct to the negotiations, Fortress also executed a series of confidentiality and non-disclosure agreements with ministers of various governmental departments and third parties. Those third parties included the firm mandated by the Quebec government to evaluate Fortress Specialty's business plan, and the engineering company engaged to undertake an analysis of the potential conversion. Substantially all communications with the government representatives were directed to be made primarily through Mr. Wasilenkoff and secondarily through Mr. Monahan.

[245] At the same time that Fraser Papers entered into a confidentiality agreement with Fortress, it also signed a virtually identical confidentiality agreement with another interested party.

[246] With these agreements in place, Mr. Wasilenkoff was able to access previously unavailable and detailed data about the Thurso Mill, such as its cost structures, maintenance schedules, flow rates and a full internal evaluation about the conversion. The information also shed light on a co-generation plan that the Thurso Mill employees wanted. The concept was that, in addition to converting the plant to a dissolving pulp facility, a co-generation power plant would be constructed on the site to provide the Thurso Mill with electricity at a preferred rate. Mr. Veilleux was a strong proponent of the co-generation element.

[247] Relatively soon into the process, the parameters of the project expanded to incorporate the co-generation feature. In response to a request by a government representative, on January 20, 2010 Mr. Wasilenkoff asked Messrs. Vinall and Veilleux to modify the plan to include the co-generation component. A quick turnaround was essential. In Mr. Wasilenkoff's words to Messrs. Vinall and Veilleux:

> ... You need to quickly build a new model and finalize the expected costs of our new combined business plan. All conversion costs. All expected working capital requirements. Start talking about candidates to fill management gaps. Wood supply requirements. And most important what money is required as a minimum so that I know what to use in a potential new structure. Then we can re ask the government with more firm numbers that has combined dissolving and [co-generation].
>
> Also any thoughts or requirements to utilize all the federal grants and credits so that we can ensure we are structured properly to qualify.

[248] Mr. Wasilenkoff's request spawned a flurry of emails about the revised business plan variously among himself and Messrs. Vinall, Veilleux, and Monahan. The PowerPoint was modified along the way to incorporate Mr. Veilleux's input on the co-generation component. Slides and/or a separate document were prepared to reflect the newly formulated combined business model and were used in subsequent meetings primarily as an investor tool.

[249] Jeffery MacHan was the Regional Director for Quebec's Ministére de L'Economie del'Innovation et des Exportations at the material time. He explained that it was important to the Quebec government that Fortress have in-house expertise relating to the conversion and business of dissolving pulp. Based on pronouncements made by Messrs. Wasilenkoff and Monahan, Mr. MacHan was satisfied that Fortress had the requisite technical experience, largely in the form of an expert advisor called "John". Mr. MacHan confirmed that the man he knew initially as John turned out to be Mr. Vinall. He was under the impression that "John" was involved on behalf of Fortress.

[250] I find that representations made on the part of Fortress to the effect that a person possessing Mr. Vinall's technical know-how and experience would be part of the project, was an important factor in securing a green light from the Quebec government to move forward with the next stages of the transaction.

[251] While the parties worked toward putting a deal together, the government agreed to continue to fund the cost of heating the Thurso plant and extended the February 1 shutdown deadline to March 1, 2010. Fortress agreed that, if a binding agreement was achieved, it would cover the post-February maintenance costs, estimated to be in the range of $2.4 million.

Fortress Paper Board Meeting – January 25, 2010

[252] A special board meeting of Fortress Paper was called on January 25, 2010 exclusively to discuss the Thurso Mill opportunity. Mr. Wasilenkoff took the board through a version of the AcCELLerate PowerPoint either slide-by-slide or discussed their contents in a more general way.

[253] The board gave its approval to proceed with the project and authorized the dispatch of a due diligence team to Quebec. Mr. Vinall was not part of that team.

[254] As mentioned, the shares in Fortress Specialty had originally been issued to Mr. Wasilenkoff personally. On Mr. Wasilenkoff's motion at the meeting, legal title to the shares was transferred to Fortress Paper.

Events in February 2010

[255] The Thurso Mill acquisition continued to take shape throughout February. Ongoing discussions culminated in the signing of one or more amended letters of intent. By no measure, however, was the transaction yet a *fait accompli.*

[256] The evidence establishes that on operational and technical aspects of the proposed transaction, Mr. Wasilenkoff generally deferred to the experience of Messrs. Vinall and Veilleux and others. However, several weighty matters fell squarely onto Mr. Wasilenkoff's shoulders and to persons other than Mr. Vinall. Those matters included orchestrating the entire financial underpinnings of the transaction and the ultimate structure of the deal as a whole, negotiating with the Ministry of Natural Resources for access to Crown-allocated lands and taking other steps to ensure access to an adequate wood supply, negotiating with the three affected unions, overseeing completion of the substantive due diligence, and obtaining final approval by the Quebec government, Fraser Papers' monitor and by the Court.

[257] At the Fortress Paper board meeting on February 11 and 12, 2010, Mr. Wasilenkoff provided a progress update of the project.

[258] At about this time, Mr. Vinall's involvement behind the scenes began to heighten and, according to Mr. Wasilenkoff, he was becoming increasingly important in the general scheme of things, particularly assisting the technical team at Fortress. This resulted in Mr. Vinall being included in more email communications with Messrs. Wasilenkoff, Monahan and Veilleux and being consulted to help troubleshoot technical and operational issues with greater regularity. He also exchanged a number of emails with Mr. Veilleux about a range of other matters that had bearing on the Thurso Mill project.

[259] The evidence shows that throughout the course of the negotiations, Mr. Vinall did not attend any of the actual meetings with government officials or any other stakeholders. However, he did participate as "John" in one or two telephone conferences to address technical features of the project.

[260] Mr. Vinall had made it known to Mr. Wasilenkoff at the start that he was hoping for some shares in Fortress. That expectation had been reflected in the descriptions about him in all versions of the AcCELLerate PowerPoints in evidence.

[261] From Mr. Wasilenkoff's standpoint, once Fortress Paper assumed ownership of the shares in Fortress Specialty the door closed to the possibility that Mr. Vinall would become a shareholder. The remuneration and equity position that Mr. Vinall was seeking were not in line with the acceptable commercial terms that Fortress Paper had to adhere to as a public company. Although Mr. Wasilenkoff wanted Mr. Vinall to take on a formal role in the project, he was not able to give his blessing to the compensation package that Mr. Vinall had in mind.

[262] Responsibility for negotiating Mr. Vinall's compensation was handed off to Harjit Sangra, counsel for Fortress. Mr. Sangra responded very negatively to Mr. Vinall's notion that he be allotted an equity interest, informing him by email of February 12, 2010 that it was:

> …so far off base on the economics as not to be of much help. Fortress needs to ensure a market deal for a North American public company in the forest products space. This [is] nowhere near that standard".

[263] Mr. Vinall responded with a lengthy email lauding the value he professed to bring to the project, which he asserted distinguished him from an ordinary employee. In a particularly self-praising portrayal conveyed by email dated February 15, 2010, he stated, in part:

> The concept I took to the Quebec government was that [Mr. Wasilenkoff] and I were full partners in creating this opportunity. The notion of me as an employee was secondary as I had created the concept, I had done all the work preparing and have the unique industry network to attract the required people.
>
> …
>
> What I bring is a unique access to this marketplace as I am responsible for the single largest "spot" operator in the business… and I have an extensive network of both salespeople and customers. With this knowledge we will build our own sales team over the next 12 months. I have people ready and have already forged a contact with China's leading viscose maker who is interested in pursuing a take-off.

[264] Several of Mr. Vinall's other emails had a similar boastful thrust.

[265] Mr. Vinall insisted that he deliberately overplayed his credentials and inflated the importance of his involvement in the project to persuade Mr. Sangra of the value of his expertise and thereby enhance his bargaining position on remuneration. There is truth to that. But it is not the whole truth. Puffery to the side, there was some accuracy to Mr. Vinall's conceit.

[266] Mr. Sangra continued to push back in the negotiations. At one point he somehow led Mr. Vinall to believe that Mr. Wasilenkoff had already cleared the Thurso transaction with the Quebec government without Mr. Vinall's knowledge or involvement. Mr. Vinall blasted Mr. Wasilenkoff in an email of February 24, 2010 accusing him of stealing "our deal" and saying he felt "totally screwed". Mr. Wasilenkoff told Mr. Vinall that there had been a misunderstanding and that he had done nothing to exclude him from the project. Although Mr. Vinall derived some comfort from Mr. Wasilenkoff's assurance and the belief that Mr. Sangra was bluffing as a negotiation tactic, he felt disadvantaged in continuing to negotiate directly with Mr. Sangra and retained his own counsel to do so on his behalf.

[267] Within this time period, Mr. Veilleux sent Mr. Wasilenkoff a draft organizational chart. An earlier chart had left the CEO position blank. On this rendition, Mr. Wasilenkoff was shown as holding that office. I accept Mr. Wasilenkoff's evidence that his name was inserted because the employment negotiations with Mr. Vinall had not been going well. As much as Mr. Wasilenkoff strongly preferred that Mr. Vinall remain involved, it was not looking certain that would come about. Once Mr. Vinall had his own counsel, his expectations about compensation shifted to better align with Mr. Wasilenkoff's perception of commercial reality. The negotiations continued.

Events in March 2010

[268] At a special meeting of the directors of Fortress Paper convened on March 5, 2010, Mr. Wasilenkoff reviewed the key terms of the draft purchase agreement of the Thurso Mill. Time was of the essence because it was anticipated

that the transaction would close in mid-March. Although the board approved the terms of the draft purchase agreement in all material respects, some loose ends persisted even at this late date. One of them was an unexpected request that Fraser Specialty assume a landfill site with possible environmental implications as part of the deal.

[269] As the agreement had been approved in principle, Mr. Wasilenkoff was eager to get the word out to investors. He instructed Mr. Holland to be ready to post news of the acquisition on Fortress Paper's website and to prepare slides for that purpose by amending the existing AcCELLerate presentation. He also asked Mr. Vinall to cast his eyes over the slides and confirm certain numbers.

[270] Mr. Wasilenkoff persuasively explained that everything Fortress Paper released into the public domain was first scrutinized by its legal team to ensure that the information was properly sourced and that the requisite approvals had been obtained. Because the original AcCELLerate PowerPoint had been prepared for the Quebec government and was not intended for the public's eyes, it had not been reviewed by Fortress's legal counsel. However, its legal counsel reviewed the version of the slides that were being modified for circulation to investors and had not expressed any concerns about the contents. Mr. Vinall, on the other hand, "freaked out" when he saw the slides and immediately fired off this warning to Mr. Wasilenkoff via an email of March 6, 2010:

> There is just no way we can put out a presentation anything like this particular one in the public domain. I would say 40% to 50% will need to be heavily modified as there are concepts and material that is very similar to what my company has used internally. I will be dead meat immediately and this will naturally flow to Fortress quickly as my company will then have a strong case that you have taken their plan. I took a hell of a risk sharing some of this with parties under CA's. Public domain is entirely different there are ways to avoid this and get what you need – let's discuss today.

[271] At trial, Mr. Vinall professed to have deliberately exaggerated the urgency of the situation and used extreme language in his email in order to "spook" Mr. Wasilenkoff into paying attention. He testified that he also was trying to leverage the situation to exert pressure to have his compensation package finalized in his

favour. Mr. Vinall went on to say that, although he did not believe he had divulged any information confidential to Sateri, he recognized there may be some grey areas and was concerned about the similarities in content between some of the AcCELLerate slides and certain charts internal to Sateri. He claimed that his "dead meat" description pertained to his fear that if the PowerPoint was circulated without amendment, members of Sateri management, and ultimately Mr. Tanoto might see and recognize some of the contents and discover that he was planning to leave. He did not want his position at Sateri to be compromised before he was ready to resign on the off-chance his intended alliance with Fortress did not materialize.

[272] I accept Mr. Vinall's explanation as far as it goes. But there was more to it than that. I find that he voiced his concern to Mr. Wasilenkoff because he was worried about his entitlement to use certain graphs, charts and other information, some of which he had lifted directly from Sateri's documents. As I will return to, what Mr. Vinall did not appreciate in the moment was that, for the most part, the body of information he was likely concerned about was not confidential to the plaintiffs in any event.

[273] I am satisfied that Mr. Vinall had never indicated to Mr. Wasilenkoff that he may have used some of Sateri's internal and/or confidential information or work product in any of the AcCELLerate slides that he prepared or helped to compose. I find that Mr. Wasilenkoff's receipt of this email was when he first became aware of the possibility that some portion of the slides based on information supplied by Mr. Vinall, might contain Sateri's internal information. In Mr. Wasilenkoff's email response, he expressed relief that he had checked with Mr. Vinall and instructed that any offending content be changed. He was not prepared to forge ahead in light of Mr. Vinall's concerns.

[274] Meanwhile, the criminal case against the two youths accused of killing M. was moving along, and Mr. Vinall's family situation had continued to deteriorate. His stepdaughter had uttered some "suicidal things" and his wife's well-being was progressively worsening. Mr. Vinall convincingly testified to his realization that, in

light of this, he may have little choice but to resign from Sateri even without having the security of a binding employment agreement with Fortress. He decided to take matters into his own hands. On March 7, 2010, Mr. Vinall emailed Mr. Wasilenkoff directly. He complained that he could not leave Sateri without an agreement in place with Fortress, but that the negotiations had stagnated. He proposed that he would tell Sateri that he had to deal with a family crisis in Canada, which he described as "not stretching the truth far". Mr. Vinall proposed that Mrs. Vinall would join him in Vancouver and a day or two later he would tender his resignation "citing family challenges etc". He continued:

> This story is much more likely to hold up if I act now and as you know I have been planting the seeds for this plan with my company for some time so it won't be a complete shock. I must avoid a confrontation with Sateri at all costs as if I am exposed then the risk for Fortress escalates as well.

[275] The remainder of Mr. Vinall's email reiterated his proposed terms of employment.

[276] Mr. Vinall was asked to clarify the nature of the risk facing Fortress referred to in his email. As I understand his answer, he believed that if he did not become an employee of Fortress and thus was not assisting with the Thurso Mill project, Fortress was at risk because it may not be in a position to successfully implement the dissolving pulp conversion without him. Mr. Vinall's explanation did not logically mesh with the tenor of his caution to Mr. Wasilenkoff. That was not the risk that worried him. Rather, the evidence as a whole indicated that what was troubling Mr. Vinall was his appreciation that he had likely overstepped the bounds of what he was permitted to do in terms of assisting Mr. Wasilenkoff and/or Fortress with the Thurso Mill proposal while still employed at Sateri. As mentioned earlier, he also had misgivings about his liberal use of some of the information he had taken from documents composed by Sateri for its internal use.

[277] Messrs. Vinall and Wasilenkoff exchanged emails on March 9, 2010. It is clear that Mr. Vinall's remuneration had still not been settled to his satisfaction at that time. Mr. Vinall itemized the outstanding issues and, without the involvement of

lawyers, he and Mr. Wasilenkoff came to an agreement in principle about his compensation package, subject to approval by Fortress's compensation committee and its board.

[278] It was around this time that Mr. Wasilenkoff reminded Mr. Vinall that he needed an acceptable PowerPoint presentation for the website and investors and asked him to bear in mind that legal counsel had now approved the last version and would need to do so again if any major changes were made.

Mr. Tanoto's Inquiry – March 2010

[279] On March 8, 2010, Mr. Hoon called Mr. Vinall to relay that Mr. Tanoto wanted him to start looking at mills in Canada again. Mr. Vinall's verbal response to Mr. Hoon was accurately captured in his reporting email to Mr. Hoon sent the next day. It read, in relevant part:

> [...]
>
> Since our last discussion with [Mr. Tanoto] I believe October, I spent some time looking at West Coast Canada opportunities as you recall, [Mr. Tanoto] made it clear he has no interest in Eastern Canada.

[280] Mr. Vinall included a summary of the mills in British Columbia that had been considered with a short analysis and possible next steps relating to each.

[281] Mr. Hoon forwarded Mr. Vinall's email to Mr. Tanoto. Mr. Tanoto's response consisted of a brief instruction to Mr. Hoon to, "Pls. check with [A.J. Devanesan], who recent [sic] we hire some manager from BC to Rizhao mill". As noted, Mr. Devanesan was the president of APRIL and the Rizhao mill was APRIL's new pulp mill in China. Mr. Tanoto copied his email directly to Mr. Vinall, Mr. Devanesan and another individual.

[282] Mr. Vinall apprised Mr. Wasilenkoff of these exchanges by email the next day:

> […]
>
> I had a call from my boss yesterday saying [Mr. Tanoto] wants me to start looking at Canadian mills again as viscose is looking even tighter now. I was a bit spooked as you were telling me at the same time there was a leak…

> I told my boss that I had looked at West Coast mills only as [Mr. Tanoto] wanted nothing to do with the Eastern mills. He agreed that [Mr. Tanoto] was clear on that and asked me for a note giving an update. I had sent the note and in the note – to test – I confirmed that [Mr. Tanoto] had no interest in the East plus gave an update on West Coast mills.
>
> My boss forwarded the note to [Mr. Tanoto]…and he replied directly – saying that I should talk to a new hire at APRIL from BC.
>
> This exchange is powerful reinforcement that [Mr. Tanoto] has passed on Thurso and other eastern mills and if the issue ever comes up this is perfect evidence.
>
> I have copied you on the email exchange in strictest confidence.
>
> You may want to pass on to Winston.

[283] "Winston" referred to Winston Yee, one of Mr. Sangra's colleagues.

[284] I accept Mr. Vinall's evidence that he followed up with Mr. Devanesan, who advised that the manager from B.C. referred to by Mr. Tanoto had no detailed knowledge of any of the west coast mills mentioned in Mr. Vinall's email.

[285] The evidence indicates that nothing further came of Mr. Tanoto's inquiries. Ms. Li and Mr. Goh were not even made aware of them and the issue was not broached with Mr. Vinall again.

Completion of the Thurso Mill Transaction

[286] The agreement between Fortress and Fraser Papers (as well as a co-vendor) in the form of an asset purchase transaction was sealed on March 18, 2010. The agreement received court approval on April 13, 2010 and the transaction closed at the end of that month.

[287] The final purchase price paid for Thurso Mill's assets was $3 million, net of certain amounts. The Quebec government advanced a secured loan in the amount of $102.4 million for the conversion.

Vinall's Resignation

[288] In mid-March 2010, Mr. Vinall made a pre-arranged trip to Vancouver where he joined his wife and stepdaughter and attended a memorial for M. He remained in

Vancouver with his family for close to two weeks. On March 18, while Mr. Vinall was still in Vancouver, Fortress issued a press release announcing the Thurso Mill transaction.

[289] News of the deal travelled quickly throughout the industry. On the same day, a salesperson with a Sateri company sent an email to Mr. Hoon, Mr. Vinall, Ms. Li and others attaching information about a "new project". The attachment was not in evidence but the probabilities indicate that it pertained to the freshly inked Thurso Mill acquisition. There was no evidence that any of Messrs. Tanoto, Hoon, Goh, Shaohua or Ms. Li was taken aback by the news, discussed it among themselves or had any reaction to it one way or another. Certainly, none of them raised the topic with Mr. Vinall.

[290] Feigning ignorance, Mr. Vinall responded to the email by professing that the news was a "bit of a surprise". He could see it was neither personally nor professionally sustainable for him to stay with the Sateri enterprise any longer.

[291] Mr. Vinall's employment contract with Fortress Specialty was still unsigned and in draft form as of March 26, 2010. However, he had secured a non-binding employment term sheet. Although not ideal in Mr. Vinall's estimation, particularly given that the other job offer he had received from Mr. Wasilenkoff had fallen apart at the last minute, it gave him enough confidence to sever his employment with Sateri Shanghai.

[292] By email dated March 26, 2010, Mr. Vinall provided his formal letter of resignation to Mr. Hoon. In the letter, Mr. Vinall cited as the reason for his resignation, the hard toll taken on him and his family by M.'s murder and the need for him to relocate to Canada for the sake of his family and his marriage. He represented that the "imminent" murder trial made it essential that he focus all his efforts on supporting his family. Mr. Vinall stated that his resignation was to be effective immediately, and asked that the company treat his three weeks of owed vacation time as his abbreviated notice period. The criminal trial was hardly

imminent when Mr. Vinall tendered his resignation. While a pre-trial conference was on the near horizon, the actual trial was not set to start until several months later.

[293] Mr. Goh made some inquiries to try to come up with an arrangement that would allow Mr. Vinall to use Canada as his work base for an extended period to allow him to support his family, while maintaining his employment with Sateri. Mr. Vinall was not receptive.

[294] The Sateri Employment Contract provided that Mr. Vinall was to give six months' notice of termination or pay in lieu. Clearly, he did not do so. There was no evidence that the plaintiffs insisted that he comply with the payment in lieu of notice stipulation. Instead, in light of the Vinalls' family circumstances, Mr. Goh and others at Sateri were trying to obtain special permission that Mr. Vinall be paid his bonus, despite the fact that the Bahia Mill had not achieved all of its targets.

Events in the Aftermath of Vinall's Resignation

[295] The evidence shows that Mr. Vinall spent approximately the last three weeks of April 2010 in Ottawa and at the Thurso Mill. In this period and into May, he continued to be in contact with various individuals in the Sateri organization, including Mr. Goh, to tidy up matters that lingered after his departure. Some of the communications concerned the logistics of Mr. Vinall returning his access cards, phone and company laptop to head office. In early May 2010, Mr. Vinall stopped through Singapore on a flight to or from Australia and left his laptop and access cards at his former apartment. He informed Mr. Goh he had done so and proposed that he arrange for their delivery by courier to head office. Mr. Goh confirmed "that would work".

[296] Letters of resignation of his appointment as a director also required his signature. Not all of them were in evidence. Oddly, on two of the resignations in evidence, the name and signature that purported to be made by Mr. Vinall were not his. That hinted that someone at Sateri had the authority to sign on Mr. Vinall's behalf. However, no evidence on the matter was elicited and I have drawn no inference.

Fabricated Email Exchange

[297] Mr. Vinall testified that although he believed he had applied an appropriate confidentiality filter with respect to Sateri's internal information, he felt a nagging discomfort that Mr. Tanoto might react irrationally to his departure. Mr. Vinall claimed it was for that reason that he composed false email correspondence to make it appear as though he had initiated contact with Mr. Wasilenkoff after he had returned to Canada in March in the hope of obtaining a position with Fortress. At Mr. Vinall's request, Mr. Wasilenkoff went along with the scheme and wrote back a phoney email reply.

[298] Mr. Vinall perpetuated the deceit about the nature and timing of his involvement with Fortress in an email to Mr. Goh of May 9, 2010. In it, he wrote that he had been focusing his time developing employment options in Vancouver and that Fortress had approached him after becoming aware of his "situation recently" and that he had "just taken" a suitable position with that company. In cross-examination, Mr. Vinall testified that his statement about trying to develop employment options in Vancouver was accurate and insisted that he had spoken to employment recruiters during that time. His evidence was wholly implausible when examined in light of his actions and those of others in the surrounding circumstances. Another taint to his credibility.

[299] At trial, Messrs. Vinall and Wasilenkoff both expressed regret about orchestrating such a charade and agreed it had been foolish. Their dishonest conduct and willingness to manufacture documents to protect their interests cast a negative light on their character and, as I have said, served to compromise the trustworthiness of their evidence. But it did not have the effect of discrediting their testimony across the board as the plaintiffs advocated it should.

Involvement of Tecbiz

[300] Alarm bells sounded when Mr. Goh learned that Mr. Vinall had joined a company that Mr. Goh understood was a dissolving pulp competitor. Following his instinct, Mr. Goh notified Alex Tiong in the internal audit department of the RGE

Group. Mr. Tiong, on behalf of the RGE Group, retained Tecbiz, an expert forensic computer company, to perform a forensic evaluation of Mr. Vinall's laptop. The RGE Group frequently used Tecbiz to conduct computer forensics of that kind.

[301] On about June 8, 2010, Tecbiz provided a computer forensic examination report and an analysis for the RGE Group.

[302] The defendants objected to the admissibility of the Tecbiz documents on the footing that they contained opinion evidence of which the defendants had not received proper notice, and also because the author was not being called as a witness. Plaintiffs' counsel confirmed they were not purporting to tender the documents for the truth of their contents, and clarified that their relevance was confined to explain the actions taken by Mr. Goh after he received it. The documents were admitted for that limited evidentiary purpose. For sake of clarity, they were not admitted into evidence for the truth about what Tecbiz may have located or not located from its evaluation of Mr. Vinall's laptop.

Vinall's Fortress Employment Contract

[303] An employment agreement between Mr. Vinall and Fortress Specialty was signed effective June 3, 2010 (the "Fortress Employment Contract"). In overview, Mr. Vinall's compensation was comprised of:

(i) A one-time relocation allowance of a maximum of $30,000;

(ii) An annual base salary of $350,000;

(iii) An annual discretionary cash bonus not to exceed 50% of his base salary;

(iv) A participation bonus based upon Fortress Specialty achieving certain financial targets generated from the Thurso Mill after completion of the conversion, with a cumulative cap of $12 million in the first five years and a call option in favour of the company;

(v) Issuance to Mr. Vinall of 75,000 restricted share units ("RSUs") in Fortress Paper, of which 12,500 vested immediately. The vesting of the balance

was tied either to the occurrence of a date or of a milestone achievement; and

(vi) Pension benefits and like perquisites.

[304] Although the Fortress Employment Contract was not approved by the Fortress board until late May 2010 and not signed until the first week of June, it is clear from the totality of the evidence that Mr. Vinall's employment with Fortress Specialty began before then. That Mr. Vinall visited the Kemijarvi mill where he inspected the digesters and pumps that Mr. Wasilenkoff had previously offered to buy, and finalized the purchase of them for Fortress Specialty near the end of April 2010, is reflective of that finding. He also sought reimbursement of expenses that he incurred between March 12 and May 1, 2010 on Fortress's behalf. The majority of the expenses, which totalled close to $21,000, related to the cost of airline tickets, accommodation, meals, vehicle rentals and fuel, spent mostly on behalf of Mr. Vinall, and exceptionally for members of his family. Based on some kind of a side arrangement, Fortress Specialty reimbursed Mr. Vinall for the expenses he incurred from April 1 onward. Additionally, by early May, Mr. Vinall had established and was using a Fortress Specialty email address. Most telling is that effective May 7, 2010, Mr. Vinall was appointed as the President and CEO of Fortress Specialty.

[305] I find that by about April 13, 2010, coinciding with the receipt of court approval of the transaction, Mr. Vinall had become an employee of Fortress Specialty for all intents and purposes. After that date, the execution of the Fortress Employment Contract was a mere formality.

Operations at the Thurso Mill after Acquisition

[306] Fortress's intention was to convert the Thurso Mill into a commercially viable facility. The end date for completion of the dissolving pulp conversion was originally forecasted as May 2011. However, unanticipated factors delayed the production of dissolving pulp until December 2011. Exacerbating the fallout caused by the delay, was that certain building block assumptions contained in Fortress's business plan for

the Thurso Mill did not materialize as anticipated. For example, Fortress had projected cash costs of $536 per air-dried metric tonne (ADMT) of pulp by September 2011; however, the actual cost in the fourth quarter of 2014 was significantly more at $808 per ADMT. Another major unforeseen obstacle was China's introduction of an interim anti-dumping duty applied to Canadian, American and Brazilian companies.

[307] Problems, such as the unavailability of the equipment that had initially been earmarked for the facility, also plagued the co-generation side of the Thurso Mill, significantly delaying its operation.

[308] I accept Mr. Wasilenkoff's testimony that the confluence of these factors "nearly bankrupted the company", and effectively compelled Fortress Paper to sell certain assets, including its Dresden Mill and the farmland and co-generation facility at the Landqart Mill, to keep the Thurso Mill afloat. Fortress Paper flowed those sale proceeds through to Fortress Specialty by way of loans.

[309] Until production of dissolving pulp finally started in December 2011, the revenue attributable to the Thurso Mill came from the manufacture and sale of non-bleached hardwood pulp. I find that, except in 2010 when it was producing and selling only that hardwood pulp, the Thurso Mill suffered substantial operating losses. After December 2011, the Thurso Mill operated as a swing mill, manufacturing both dissolving pulp and the hardwood pulp.

[310] Due to the significant delays in production and cost overruns, some of the terms of Mr. Vinall's Fortress Employment Contract were renegotiated.

[311] In December 2014, when it was apparent that Fortress would not be able to repay the loan from the Quebec government that was about to mature, it renegotiated the debt. The maturity date was extended until December 31, 2026. As at December 31, 2014, more than $106 million remained owing under that loan.

[312] The recent financial evidence indicated that Fortress Specialty expended approximately $294 million on its capital assets. Including the significant debt it

owes to Fortress Paper as a result of its ongoing cash injections, it is carrying long-term debt of more than $415 million.

[313] The plaintiffs did not meaningfully challenge the validity of the above figures or the dismal financial performance of the Thurso Mill on the dissolving pulp side. Indeed, as will be seen, their argument for an accounting and disgorgement of gain inherently recognizes that no actual profits attributable to the dissolving pulp arm of the Thurso Mill were realized in those years.

Disposition of Vinall's Restricted Share Units

[314] As mentioned, Mr. Vinall received an immediate vesting of 12,500 RSUs as a signing bonus when he joined Fortress Specialty. He described them as a "complete disaster" to his personal financial picture. Mr. Vinall elaborated that for significant blocks of time Fortress Paper was engaged in various corporate activities that resulted in blackout periods that prevented the sale of his RSUs. Despite these outside constraints on his ability to sell, within a short time after each grouping of RSUs vested he was deemed to have disposed of them at a set value and was required to pay the corresponding income taxes. Mr. Vinall's predicament was significantly worsened by the fact that the market value of the RSUs started to decline and then fell precipitously. He attested that although he was able to sell some of his RSUs to pay some of his taxes, he still had to borrow to cover his tax indebtedness. According to Mr. Vinall, at the end of the day the value of the RSUs he was allocated was nowhere close to the amount of tax he paid, and that the net result to him was a whopping loss of close to $800,000.

[315] While it would have been preferable to have documentary back-up of Mr. Vinall's testimony on this matter, his evidence was plausible and was not weakened in cross-examination. I accept that he gained no overall benefit from the receipt of is RSUs.

[316] Mr. Vinall's employment with Fortress Specialty was terminated effective March 27, 2013. There was not much evidence about his termination or the circumstances giving rise to it, except that more or less contemporaneously,

Fortress Specialty retained the services of Mr. Vinall's company as a consultant on a contract basis.

DISCUSSION

The Thurso Mill "Opportunity"

[317] The plaintiffs maintain they have not brought a claim for the misappropriation of the Thurso Mill opportunity in its conventional doctrinal form. Yet, the nub of their complaint is that Mr. Vinall's knowledge about the Thurso Mill as a possible conversion candidate came to him as a fiduciary and was recommended by him to Sateri in that capacity and in breach of the duties of his high office, he assisted Fortress acquire that opportunity. In so doing, the plaintiffs say that Mr. Vinall placed himself in an impermissible conflict between his personal interest and the fiduciary obligations he owed to them and must account.

[318] Despite the plaintiffs' disavowal of advancing a traditional claim of appropriation of corporate opportunity, their complaint is a classic averment of the corporate opportunity doctrine. As well, a considerable amount of the evidence at trial was elicited to fit that evolving legal paradigm. Further, a recurring connective theme of the plaintiffs' submissions is the characterization of the Thurso Mill as a Sateri "opportunity" that Mr. Vinall wrongfully disclosed to Fortress and that all defendants seized upon for their mutual benefit.

[319] The corporate opportunity ethic is demanded of corporate and employee fiduciaries. It does not extend to non-fiduciary employees who, for example, may have breached their implied contractual duties of fidelity and loyalty. While there may be an overlap of the factual circumstances that trigger disputes concerning alleged breaches of duty by fiduciary and non-fiduciary employees, they are properly determined by the engagement of different principles.

[320] For sound reasons given the rationale and application of the doctrine, the majority of the plaintiffs' submissions impugning the defendants' involvement in relation to the Thurso Mill were constructed on the premise that Mr. Vinall owed

them fiduciary obligations. In the next section of my Reasons I conclude that Mr. Vinall was not in a fiduciary relationship with any of the plaintiffs and did not owe them any fiduciary duties.

[321] In light of my determination that Mr. Vinall lacks fiduciary standing, it would ordinarily be unnecessary to determine whether the Thurso Mill was an opportunity taken and wrongfully exploited by him. That said, because some of the plaintiffs' accusations of wrongful conduct against the defendants vis-à-vis the Thurso Mill "opportunity" were expressed in propositions that are not dependent on Mr. Vinall's status as a fiduciary, and the relief sought implicates the doctrine, it is appropriate that the Court make a determination. Accordingly, for thoroughness, I will briefly overview the legal principles of the corporate opportunity doctrine and summarize my factual findings with respect to what can only be fairly described as the passing glance paid by the plaintiffs to the Thurso Mill.

- **Overview of Legal Framework**

[322] The corporate opportunity doctrine is a simple label for a complex construct. It derives from the evolvement of the fiduciary's duty to avoid conflicts of interest and not to profit from the fiduciary office. The gravamen of the wrong and the fundamental basis of liability under the corporate opportunity rubric is that the fiduciary has permitted self-interest for profit to collide with the heightened duties owed by virtue of his or her fiduciary stature: *Canadian Aero v.* O'Malley, [1974] SCR 592 [*Canaero*]

[323] The leading authority on the modern articulation is *Canaero.* Disapproving of the narrow scope of the test found in its earlier decision in *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673, relied upon by Mr. Vinall, the Supreme Court of Canada in *Canaero* revived a strict adherence to the cornerstone duties of good faith, loyalty and trust that define the fiduciary office.

[324] *Canaero* held that a corporate fiduciary was forbidden to usurp for personal use or divert to another with whom the fiduciary was associated, a maturing business opportunity that the company was actively pursuing. Speaking for the

Court, Laskin J. cautioned that attempting to lay down a rigid test of the doctrine would be reckless and repugnant to the fluid and expansive nature of the fiduciary concept. Instead, his Lordship preferred, as a starting point, consideration of a non-exhaustive list of factors, stating at 620:

> ... Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[325] Thus, the question of whether a fiduciary has appropriated a corporate opportunity to self or diverted it to another in breach of the no conflict and no profit rules is evaluated on a case-by-case basis taking into account the *Canaero* factors and others pertinent to the particular case at hand.

[326] In *Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337 at paras. 174-179 [*Pan Pacific*], Sigurdson J. commented that the terminology used in *Canaero* of a "maturing business opportunity" that the corporation is "actively pursuing", and the phrase, "ripening business opportunity" used in subsequent cases, are probably misleading insofar as they suggest that fiduciaries are only forbidden from taking opportunities that the corporation is willing and able to pursue. The doctrine has a much wider grasp: *Pan Pacific* at para. 177. At para. 176, Sigurdson J. concluded that for liability to attach, the corporation does not have to establish that *but for* the fiduciary breach it would have pursued the opportunity and would have made the profit in question. The rigour of the principle referred to by Sigurdson J. was affirmed by the Court of Appeal in *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318 [*Canadian Metals*], which held, at para. 19, that a fiduciary may not make personal use of an opportunity even where the corporation is unable to take it up or has declined to pursue it: see also, *3464920 Canada Inc. v. Strother*, 2007 SCC 24.

[327] The business opportunity in question does not have to be confidential: *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 at paras. 127 to 127, aff'd 2014 BCCA 214.

[328] The extent to which the business opportunity must have "matured" is unsettled. In a case that Mr. Vinall relies on, *Donor Gateway Inc. v. Passero*, 2007 Carswell Ont. 724 at para. 14 (Ont S.C.J.), the court held that the business opportunity had to be a "prize ready for immediate grasping". However, in *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2009 BCCA 34 at para. 61, the Court of Appeal, without deciding the issue, postulated:

> If and when the point is ever argued, then, a Canadian court might well take the view that the appropriation of an opportunity "belonging to" a corporation by a director or former director merit equitable intervention even where the opportunity is not a "mature" one.

- **Analysis**

[329] Mr. Vinall had been aware of the suitability of the Thurso Mill as a potential conversion mill long before he joined Sateri. In performing his work assignment at Sateri, he learned that Fraser Papers was under creditor protection, a fact that was within the public domain. Like Mr. Wasilenkoff, Mr. Vinall regarded Fraser Papers' financial descent as a significant plus in terms of the attractiveness of acquiring the Thurso Mill and was one the reasons he recommended the Thurso Mill to Sateri.

[330] It warrants repetition that Mr. Goh was unable to offer much evidence about the discussions and decisions that occurred within the Sateri organization touching on the fate of the Thurso Mill. To the extent that he had any recollection, it was nonspecific. That was perhaps not surprising given that he was concentrating on preparing the organization for a public offering and had first learned about the assignment to identify mill candidates more or less when Mr. Vinall did. Indeed, there was very little evidence of Mr. Goh's participation in strategic decision-making regarding Sateri's expansion options. In the circumstances, I consider it unsafe to give credit to Mr. Goh's half-hearted statement that "no decision" was ever made by the plaintiffs regarding the Thurso Mill.

[331] Ms. Li's testimony that suggested the plaintiffs had not ruled out the east coast mills at or after the October 8 Meeting was meek and unconvincing.

[332] On the whole, the combined evidence of Mr. Goh and Ms. Li was less probative and persuasive than Mr. Vinall's forceful testimony on the matter. It was also at odds with the convincing probabilities of the evidence that go the other way.

[333] By contrast, Mr. Goh's evidence to the effect that no strategic decision was ever taken in the Sateri organization without Mr. Tanoto's prior knowledge and approval was definite and compatible with other cogent evidence. It is uncontroversial that the expansion of the upstream business via the conversion of a conventional kraft pulp mill was a strategic decision.

[334] Mr. Van Lee considered the Thurso Mill to be unsuitable as a target before Ms. Li and Mr. Vinall even received their assignments. Unaware of Mr. Van Lee's assessment, Mr. Vinall had put forward the Thurso Mill, along with others, as a Canadian mill for consideration. The only evidence of any remarks being made about the Thurso Mill by Mr. Tanoto, the chief strategic decision-maker, were those he expressed at the October 8 Meeting. It was not clear on the evidence the October 8 Meeting was even a meeting of the actual board. Mr. Vinall was instructed to attend that meeting at the last minute, and not as a decision-maker, but as someone with stock technical knowledge of mills in Canada.

[335] During the October 8 Meeting, little more than introductory remarks had been made about the Thurso Mill before Mr. Tanoto halted the discussion by expressing his unqualified and unchallenged rejection of it. Also significant, is the absence of evidence to indicate that Mr. Tanoto underwent a change of mind on the matter after the October 8 Meeting or that the plaintiffs subsequently adopted a different stance. The very notion of the Thurso Mill as a candidate for conversion by Sateri was preliminary and superficial; it was essentially over before it began and did not even rise to the threshold of being the subject matter of a considered discussion.

[336] The evidence about whether the plaintiffs had reached a decision concerning the Thurso Mill was not inconclusive as it was in *Canadian Metals* referred to by the plaintiffs. Quite the opposite, the totality of the evidence strongly supports the finding that although the strategy of growth by way of converting an existing mill had not been discarded by the plaintiffs, any idea of converting a mill located in Quebec had been scrapped. I find that with Mr. Tanoto's unequivocal decree of rejection of the Thurso Mill at the outset, it was not even raised as a possible prospect before the board at the Second October Meeting, the subsequent board meeting in December 2009, or ever.

[337] The private assessment made by Mr. Vinall to Mr. Wasilenkoff to the effect that his communications involving Mr. Tanoto and Mr. Hoon in early March 2010 would be a powerful reinforcement of Mr. Tanoto's rejection of the Thurso Mill, has proved to be prescient. That neither Mr. Hoon nor Mr. Tanoto disagreed with Mr. Vinall's stated understanding that Mr. Tanoto had indicated disinterest in a mill located in Eastern Canada, and did not pursue the point further, stands as compelling confirmatory evidence of Mr. Vinall's testimony. I do not interpret Mr. Vinall's suggestion to Mr. Wasilenkoff to forward that email string to Fortress's counsel as evidence of his belief that the Thurso Mill may have been a misappropriated corporate opportunity that belonged to Sateri. In any event, even had Mr. Vinall owed the plaintiffs fiduciary duties, under an interpretation of the facts most generous to them, the Thurso Mill was not their corporate opportunity within the meaning of the jurisprudence.

[338] The plaintiffs complained about the paucity of documentation produced by the defendants concerning communications that might be expected to have been exchanged among them at crucial events along the timeline. A few of their grievances have merit; but many others were of no moment or were satisfactorily explained by evidence of the server malfunction experienced by Fortress in early 2010, Mr. Wasilenkoff's preferred use of a Blackberry device over email and other evidence.

[339] The same criticism can be levied about the dearth of documentary evidence from the plaintiffs in relation to their internal consideration of the Thurso Mill both before and after they learned that it had been acquired by a third party, and that Mr. Vinall had taken up employment with a company that planned to enter the dissolving pulp business. As a further deficiency in the plaintiffs' case, the defendants cite their failure to call witnesses who could have spoken more directly to what took place at the October 8 Meeting and the Second October Meeting and afterward, as it relates to the Thurso Mill. Linked to that assertion is the defendants' submission that this Court ought to draw an adverse inference from the plaintiffs' failure to call Mr. Tanoto, who was the most obvious choice to speak definitively on whether the Thurso Mill had been ruled out.

[340] Given the healthy state of the evidence on the issue presented, including my acceptance of Mr. Vinall's convincing testimony of Mr. Tanoto's authoritative veto of the specter of the Thurso Mill as a possibility, I need not consider whether such an inference ought to be drawn.

[341] As an aside, I will close this discussion by noting that at the date of trial the plaintiffs had not purchased a pulp mill for conversion.

The Fiduciary Duty Claim against Vinall

- **Overview of Legal Framework**

[342] The doctrine of fiduciary duty finds its origin in the classical trust where one party, the trustee (fiduciary), holds legal title to property on behalf of another, the beneficiary.

[343] Relationships outside the realm of trust law have been recognized as giving rise to the duties that equity imposes upon trustees. Relationships that fall within these other categories include solicitor-client and principal-agent: *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574 at 646 [*Lac Minerals*]. The director-corporation relationship has also long been classified as a traditional fiduciary relationship: *Lac Minerals* at 597; *Owen Sound Lumber Co. (Re)* (1917), 38

O.L.R. 414 (Ont. C.A.). These traditional or status-based relationships are sometimes referred to as *per se* fiduciary relationships: *Lac Minerals* at 631, Wilson J. concurring; *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377 at 409 [*Hodgkinson*]; *Galambos v. Perez*, 2009 SCC 48 at para. 36 [*Galambos*].

[344] The hallmarks of the conventional trust-beneficiary relationship, being complete trust, absolute fidelity/loyalty and confidence reposed toward another, form the pillars of all fiduciary relationships: *Hodgkinson* at 405, La Forest J., and at 461, Sopinka J. and McLachlin J. (now C.J.C.). Equity presumes that the inherent purpose or factual and/or legal incidents attributable to fiduciaries are present in *per se* fiduciary relationships.

[345] In *Lac Minerals*, Sopinka J., writing for the majority on the fiduciary issue, explained at 597-599 that the establishment of a fiduciary relationship on the basis of the status of the involved parties is not absolute. His Lordship elaborated that when the nature and degree of the characteristics accepted as being innate to a fiduciary relationship are not present in a traditional fiduciary relationship, the presumption that such a relationship imposes fiduciary obligations may be rebutted. A related precept is that not every act performed by a fiduciary will carry a fiduciary obligation. At 597, Sopinka J. expounded on these foundational propositions:

> The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See J.C. Shepherd, *The Law of Fiduciaries* at pp. 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature. Southin J., in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361, observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence. She issued this strong caveat against the overuse of claim for breach of fiduciary duty (at p. 362):
>
> > Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But

> 'fiduciary' comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

[346] The extract from J. C. Shepherd's text referred to approvingly by Sopinka J. in the above passage states the principle that no identifiable relationship, not even as between trustee and beneficiary or director and corporation, is necessarily in all cases fiduciary in nature. Sopinka J. resumed his considered pronouncement of the law at 598, as follows:

> When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice.

[347] The law also recognizes that the established categories of fiduciary relationships, which presume the existence of fiduciary characteristics, are not exhaustive of the principle: *Hodgkinson* at 461. Accordingly, relationships that have not classically been regarded as fiduciary may be found to be so and may attract fiduciary obligations: *Lac Minerals*; *Hodgkinson; Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*].

[348] In her instructive, and now widely-accepted, dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136 [*Frame*], Wilson J. enumerated three characteristics or indicia to assist the court in identifying fiduciary relationships:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> > (1) The fiduciary has scope for the exercise of some discretion or power.
> >
> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[349] Wilson J.'s three-part analysis is not intended as an absolute code or to be applied mechanically as a litmus test to identify fiduciary relationships. Rather, her conceptual formulation, adopted in *Lac Minerals*, is a "rough and ready guide" in determining whether a particular relationship engages the special degree of trust, selfless loyalty and confidence sufficient to warrant the intervention of equity: *Lac Minerals* at 577-578, Sopinka J.*; Hodgkinson* at 408, La Forest J.

[350] It follows that it is possible for a fiduciary relationship to arise even where not all of the elements outlined by Wilson J. are present. The converse is also true: the presence of all criteria will not invariably establish a fiduciary relationship: *Lac Minerals* at 599, Sopinka J.

[351] Fundamental to the trustee-beneficiary dynamic and crucial to any fiduciary relationship, is that the fiduciary has a discretionary power to affect the other's legal or practical interests such that the latter is vulnerable to the actions of the former: *Galambos* at para. 83, citing *Guerin* at 384 and 387.

[352] In addressing the essential criteria for a fiduciary relationship, the majority on the issue of breach of fiduciary duty in *Lac Minerals*, considered the qualities of dependency and vulnerability as indispensable. La Forest J. at 662, dissenting on this issue, placed less emphasis on the vulnerability feature with his observation that vulnerability is not a necessary ingredient in every fiduciary relationship. At 664, La Forest J. also noted that power and discretion in this context mean only the ability to cause harm. He expanded on these remarks in his majority decision in *Hodgkinson* at 430 where he noted:

> Vulnerability is nothing more than the corollary of the ability to cause harm, viz the susceptibility to harm. For this reason, it is undesirable to overemphasize vulnerability in assessing the existence of a fiduciary relationship.
>
> [Emphasis in original]

[353] In *Hodgkinson* at 405, La Forest J. discussed the contours of the element of vulnerability in relation to the establishment of fiduciary status. He commented that, from a conceptual standpoint, fiduciary duty was a species of a more generalized duty by which the law aims to protect vulnerable individuals in transactions with others. In the same passage, his Lordship noted how the component of vulnerability is not the hallmark of a fiduciary relationship, describing it instead as "the golden thread" that unites claims such as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

[354] The Supreme Court of Canada in *Hodgkinson* at 409 and in *Galambos* at paras. 66, 71 and 77-78, clarified that essential to the existence of a fiduciary duty in both *per se* and *ad hoc* fiduciary relationships is that the alleged fiduciary has given an undertaking of responsibility to act utterly selflessly in accordance with the strict duty of loyalty.

[355] There can be no question but that the presence of vulnerability of one party's legal, economic and vital practical interests to the discretionary power held by the fiduciary remains significant relative to the imposition of fiduciary obligations. However, vulnerability alone is not enough to sustain a fiduciary claim: *Galambos* at para. 67; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 28 [*Elder Advocates*].

[356] The settled principles reflect that ultimately it is the attributes of the particular relationship, and not the label or categorization applied to it, that are determinative: *Hodgkinson* at 422, La Forest J.; *Galambos* at para. 70, citing *Guerin* at 384. Accordingly, whether a relationship is of the exacting character classified as fiduciary is a question of fact to be informed by examining the surrounding circumstances and

the unique features of the relationship on a case-by-case basis: *Frame* at 135-136, Wilson J.; *Lac Minerals* at 598-599; *Elder Advocates* at paras. 27-36.

[357] I turn next to discuss more specifically the circumstances in which an employee, who is not a director of the employer, may be held to owe fiduciary obligations to his or her employer.

[358] Every employee (fiduciary and non-fiduciary) owes the employer an implied contractual duty of loyalty, fidelity and good faith, which compels faithful service in many forms, often with far-reaching implications. In *McMahon v. TCG International Inc.*, 2007 BCSC 1003 [*McMahon*], Fisher J. succinctly summarized the content of the duty:

> [51] The implied duty has been held to include the following:
>
> 1. to serve his employer faithfully;
> 2. not to compete with his employer;
> 3. not to reveal confidential information;
> 4. not to conceal from his employer facts which ought to be revealed;
> 5. to provide full-time service to his employer.

[359] Generally speaking, however, an employee is not a fiduciary and, therefore, is not held to the exacting duties of that office. There are exceptions to that general rule. An employee who wields a sufficiently high degree of management control and authority over the employer's affairs or is otherwise functionally integral or "key" to the operations of the business may be impressed with fiduciary obligations.

[360] *Canaero* is the seminal decision on the characteristics of the employer-employee relationship that serve to distinguish an ordinary employee from the category of a "top management" employee who may owe fiduciary duties to the employer. The top management test formulated in *Canaero* was subsequently broadened to encompass "key" employees. Even where an employee is said to be "key" to the employer, it does not necessarily follow that such key employee and employer are in a fiduciary relationship: *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54 [*RBC Dominion Securities*].

[361] In *Pan Pacific,* Sigurdson J. carefully surveyed *Canaero* and other appellate authorities on the approaches taken by the courts in determining whether an employee owed fiduciary duties to his or her employer:

> [72] In *Canadian Aero* the court found that "top management" of a company owed that company a fiduciary duty, even if they were supervised by officers of the company and did not hold positions in the company, such as director, that fell within the usual categories of those who had fiduciary duties.
>
> [73] That said, *Canadian Aero* has provided useful guidance in distinguishing "mere employees" or servants from those employees who, whatever their title, owe a higher duty. Laskin J., as he then was, made the distinction at p. 381-82 when he wrote:
>
> > Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed., 1969, at p. 518 as follows:
> >
> > > ... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.
> >
> > The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon which the Ontario Court of Appeal concluded that O'Malley and Zarzycki were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, <u>their positions as senior officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants</u>.
>
> [emphasis added]
>
> [74] In applying the top management test set out in *Canadian Aero*, courts have focused on the powers and functions of the employee. As might be expected from the emphasis on "initiative and responsibility" in *Canadian*

Aero and on the ability of the agent to "alter the principal's legal position", there is, as Ellis notes at 16-8, "some judicial sentiment toward restricting the interpretation of "top management" to very senior persons exercising a substantial amount of autonomous power". Titles, on the other hand, are almost irrelevant, since the title of "manager" or "vice-president" can have as many meanings as does "agent".

[75] For example, in *Empire Stevedores (1973) Ltd. v. Sparringa* (1978), 19 O.R. (2d) 610 (H.C.), the plaintiff sought an injunction after the defendant, who was nominally a vice-president during his final years with the plaintiff, left the company, purchased another stevedoring company and successfully bid against Empire for a number of contracts. The court declined to issue the injunction sought by Empire and noted that, despite his title, the defendant remained a "walking boss", whose duties were limited to supervision of the performance of the plaintiff's contracts. Among the factors identified by the court in doubting that he qualified as "top management" were that he was not able to bid on jobs by himself, did not play a significant role in the planning or financial side of the plaintiff's business, and indeed, could not even make minor variations in equipment contracts and that, as the defendant stated in his affidavit, he did not have "any known prospects of advancement within Empire to an off-the-dock post".

[76] Our Court of Appeal came to a similar conclusion regarding Paul Darc, the erstwhile chief operating officer and chief financial officer of the plaintiff company in *3464920 Canada Inc. v. Strother* (2005),38 B.C.L.R. (4th) 159, 2005 BCCA 35. It declined to interfere with the trial judge's finding that Mr. Darc was not a fiduciary, citing the following comments from the trial decision at para. 65:

> [Mr. Darc's] duties related to internal accounting and administrative matters. He held the title of Chief Financial Officer and managed a small staff, but he was not a director, he held no equity, and Monarch was a small company where impressive titles were readily available. He had no cheque signing authority. He was not the company's contact with either the studios from which production was obtained or its agents who sold its tax shelters to investors.

[77] In *Valco Cincinnati v. Dibe*, [1987] 35 B.L.R. 281, the defendant had been the branch manager and sole Canadian employee of the plaintiff American company; the court looked at the ability of the alleged fiduciary to exercise control and to alter the legal position of the company. Callon J. of the Ontario High Court of Justice noted that while the defendant solicited business while employed by the plaintiff, head office retained control over pricing and credit approval, the selection of products to be made available and most of the decisions about day to day operation, including the make, model and features of the company car driven by the defendant. As such, Dibe was found to be a "mere employee" who did not owe a higher duty, either by virtue of being top management or as an agent.

[78] Another way of looking at this test is that "top management" is limited to those employees who have "the power and the ability to direct and guide the affairs of the company": *R. W. Hamilton Ltd. v. Aeroquip Corp.* (1988), 65

O.R. (2d) 345 (H.C.J.) In *Alberts v. Mountjoy* (1977), 16 OR. (2d) 682, the Ontario High Court found that the defendant Mountjoy had such powers and ability and was thus top management of the plaintiff insurance business and did owe it a fiduciary duty. At pp. 685-86, Estey C.J.H.C. (as he then was) contrasted the duties of Mountjoy with those of his co-defendant Butts:

> The defendant Mountjoy was the undoubted general manager or chief executive of the plaintiff. In fact the plaintiff at all relevant times until its acquisition by SincLir and Cockburn appears to have been operated by absentee owners through the defendant Mountjoy who, in so far as day-to-day operational matters are concerned, in effect managed the business as a sole proprietor. That is not to say he had authority to hire and fire or interfere with the capital assets of the business, but it is clear that operationally he reported to nobody.
>
> Butt, on the other hand, was a salesman or an account supervisor whose duties were much less responsible than Mountjoy to whom he reported. His salary was about one-half that of Mountjoy and there is no evidence he received anything like the very substantial year-end bonus paid to Mountjoy.

[79] Another part of the "top management" test has, as Ellis notes, been widened to include the adoption of the "key personnel" test. "Key personnel" looks at the relative role the employee plays in the enterprise as opposed to the control and authority that come with the position.

[80] In *Barton Insurance Brokers v. Irwin*, *supra*, our Court of Appeal rejected the argument that the defendant, whose job title was "general office supervisor", was a "key employee" and thus barred from soliciting the clients of her former employer. The court noted that she was on salary, earning about $36,000 per annum, did not have the power to hire and fire, had never been a corporate officer, director or shareholder, and required approval from her superior for any significant expenditure. Hall J.A. considered the decision in *Tree Savers International Ltd. v. Savoy* (1991), 81 Alta. L.R. (2d) 325 (Q.B.), aff'd on the "key employee" point at (1992), 84 Alta. L.R. (2d) 384 (C.A.), as well the case of *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, [1996] 7 W.W.R. 736, another decision of the Alberta Court of Appeal. In that case, the defendant Kelly was an officer, director and shareholder in Anderson, the plaintiff customs broker, as well as the manager of its Edmonton office, before jumping ship and joining World Wide in 1989. The trial judge found that Kelly was "an integral part of the Plaintiff's Edmonton operation", and characterized him as a "key employee" but declined to find that he owed a fiduciary duty to the company. The Alberta Court of Appeal held this to be an error and held that as an employee – quite apart from his position as director and officer – he was a fiduciary. Among the factors it cited was that he was the manager and only non-clerical employee of Anderson's Edmonton operations and was thus in a position to unilaterally exercise his delegated authority to affect the appellant's legal and economic interests. The court summarized the underlying principles at para. 20:

> … To put it another way, in his capacity as a director and officer and manager of the Appellant's Edmonton office, Kelly possessed the kind of authority typically found in a relationship of dependency or vulnerability. It was the kind of relationship in which equity will intervene to protect the dependant or vulnerable party by acting on the conscience of the fiduciary.
>
> [81] In other words, while the Court relied on the designation of Kelly as a "key employee" who could "unilaterally exercise his delegated authority to affect the Appellant's legal and economic interests", its decision was based not solely on the finding that he fell into that category, but on the same underlying principles articulated by Wilson J. in *Frame v. Smith*.

[362] Continuing at para. 82, Sigurdson J. reasoned that there was little substantive difference between the categorical model applied by both the *Canaero* and the key employee line of authorities, and the principled approach outlined in *Frame* as endorsed in *Lac Minerals* and *Hodgkinson* and their judicial lineage.

[363] In *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322 at para. 186 [*Zoic*], rev'd on other grounds, 2015 BCCA 334 [*Zoic CA*], Russell J. agreed with Sigurdson J.'s conclusion and, at para. 112, identified the ability of the employee to control the legal and/or economic interests of the employer (effectively, the measure of the employer's vulnerability) as an important functional characteristic of the fiduciary under both analyses. The Court of Appeal agreed with Russell J.'s analysis on the law of fiduciary duty.

[364] There is a danger of engaging in a reverse-engineering type of logic when assessing whether an employee has fiduciary status in situations where the employee has acted in a disloyal or self-interested way or has otherwise violated the implied duties of good faith, loyalty and fidelity expected of all employees. The point was instructively made by Paul Perrell in his article, "Fiduciary Obligations or is it a Breach of Fiduciary Duty to Accept an Appointment to the Bench?" (2004) 28 Advoc. Q. 471 at 479:

> ...a fallacy may occur in the determination of whether a person should be classified as a fiduciary. The fallacy is that of determining fiduciary status and fiduciary duty by reasoning from misbehaviour or from remedy to duty. This result-driven reasoning process begs to question of whether a person has fiduciary status by moving from the breach of a duty or the desired remedy to a finding that the person had a duty. For example, a finding that a person was

> disloyal and that harm was caused may have the tendency to lead to the fallacious conclusion that the person had a fiduciary's duty to be loyal. Although they disagreed about the nature of fiduciary status, both La Forest J. and Sopinka J. warned against this kind of reasoning in [*Lac Minerals*] where La Forest J. said that using the term "fiduciary" as a conclusion to justify a result "reads equity backwards" and Sopinka J. said: "[T]he presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty."

- **The Parties' Positions concerning Vinall's Liability *qua* Fiduciary**

[365] With reference to the plaintiffs' pleadings and closing submissions, two bases are put forth which they submit clothe Mr. Vinall as a fiduciary.

[366] First, the plaintiffs contend that – and this is their primary contention – there is a *per se* fiduciary relationship between Mr. Vinall and Sateri Singapore and Sateri International Co. flowing from his appointment as a director of each. They say it is irrelevant whether or not Mr. Vinall ever executed his powers as a director because the law does not differentiate between a "legitimate" director and a "dummy" or a "nominal" one.

[367] The second ground asserted is that, quite apart from his status as a director, Mr. Vinall derived his fiduciary obligations from his role as a senior officer and a member of high-level management in the Sateri enterprise. They submit that Mr. Vinall qualifies as a fiduciary under the top management and key employee tests and, by implication, via application of the *Frame* factors. Mr. Vinall's duty is said to be owed to more than merely his direct employer, Sateri Shanghai.

[368] In their notice of civil claim the plaintiffs state that they operate under the designated trade name of the "Sateri International Group", which they go on to define as *Sateri International* (italicized in this section for clarity). They allege that the five other non-plaintiff companies within the Sateri organization are "part of or in affiliation with" *Sateri International*. In other words, for purposes of the plaintiffs' pleadings, they and the other Sateri companies are sometimes lumped together as one by use of the defined designation, *Sateri International*.

[369] The plaintiffs allege that, at all material times until his resignation, Mr. Vinall was employed by Sateri Shanghai. It is difficult to square this averment with their subsequent allegation that Mr. Vinall was a trusted officer and employee of *Sateri International*, which, as I have highlighted, by definition encompasses the plaintiffs and one, more or all of the other non-plaintiff Sateri companies.

[370] The plaintiffs further allege that Mr. Vinall:

a) was responsible for identifying business opportunities for *Sateri International*, as well as for establishing and maintaining relationships with customers and vendors for the benefit of *Sateri International*;

b) was empowered to exercise his discretion unilaterally with respect to which business opportunities to pursue so as to affect *Sateri International*'s legal or practical interests, or both, and that *Sateri International* was, at all material times, subject to a vulnerability to the exercise of his discretion that he possessed as an incident of his position as a director, trusted officer and employee; and

c) by virtue of his position and authority within *Sateri International,* owed a fiduciary duty to *Sateri International*.

[371] To sum up, the plaintiffs plead that Mr. Vinall's fiduciary obligations are owed to *Sateri International*, a term that embodies the plaintiffs as well as the non-plaintiff companies that are "part of or in affiliation with" *Sateri International*. In supplementary closing submissions, the plaintiffs contended, for the first time, that for purposes of determining Mr. Vinall's contractual and fiduciary obligations, the common employer doctrine applied and demonstrated that he had more than one employer. I will return to that proposition later in my Reasons.

[372] On the premise that Mr. Vinall had fiduciary standing, whether as a director, a top management/key employee and/or under *Frame*, the plaintiffs submit that he owed duties of loyalty, fidelity, honesty and good faith, elements of which include:

a) **selflessness**: to act exclusively in their best interests and relinquish his own self-interest in matters concerning the plaintiffs;

b) **avoidance of conflicts of interest**: not to enter into transactions or undertakings in which his personal interests or obligations to third parties might conflict with the best interests of the plaintiffs;

c) **not to profit**: not to profit from his fiduciary position or from an opportunity or knowledge resulting from it beyond his agreed remuneration;

d) **candour**: to make full disclosure of any interests or duties that might conflict with his duty to act in the plaintiffs' best interests and to disclose material matters of relevance to his relationship to them;

e) **exclusivity**: not to compete with the plaintiffs, and to develop business opportunities solely for them; and

f) **confidentiality**: to refrain from using information obtained through his office for his own benefit or the benefit of third parties.

[373] The plaintiffs argue that Mr. Vinall breached all such fiduciary duties through his secret relationship with Fortress by:

a) entering that relationship with the aim of setting up a business that would compete with them;

b) assisting Fortress in establishing a competing business while he was still employed by them;

c) profiting from the Thurso Mill opportunity that came to his attention by virtue of his position with them;

d) using their resources, confidential information and work product in pursuing the Thurso Mill opportunity and providing the same to Fortress; and

e) withholding material facts from them regarding both his involvement with Fortress and the nature of the opportunity that he and Fortress were pursuing.

[374] Mr. Vinall counters that he was a director of Sateri International Co. and Sateri Singapore in name only and solely for corporate convenience. His position is that, as a director of those two plaintiffs, he was a mere signatory to a small number of resolutions about which he knew virtually nothing, that he attended no director meetings and possessed none of the characteristics integral to the office of a fiduciary. More specifically, Mr. Vinall submits that he did not have the ability to exercise independent discretion, power or authority to direct or guide the plaintiffs' respective affairs or to affect their legal, economic or vital practical interests in any manner that rendered them vulnerable to his conduct.

[375] Mr. Vinall's overarching submission in disputing liability as a director-fiduciary is that the factual circumstances in this case are of the exceptional kind contemplated by Sopinka J. in *Lac Minerals* that serve to rebut the presumption that he is a fiduciary of the two plaintiffs of which he was appointed a director. His companion assertion is that it would be wholly inequitable to hold a director who, like himself, is in all practical reality unable to exercise the basic directorial powers as the guiding mind of the company, to the fiduciary standard.

[376] In answer to the plaintiffs' claim that he owes fiduciary obligations by application of the top management/key employee tests and/or the *Frame* guideposts, Mr. Vinall builds upon his argument by which he urged rebuttal of the presumption that his directorships invested him with the attributes innate to the fiduciary relationship. While he acknowledged that he held an important position in managing the operations at the Bahia Mill, he aligned his role to that of a typical mill manager by North American standards in the sense that his functions were predominately technical and operational in nature. Expanding on that point, Mr. Vinall argued that when he was recruited by Sateri it was anticipated that he would assume the broad scope of high-level management responsibilities commensurate with a full profit and loss role in the enterprise. As things turned out, that never came to pass and, according to him, his authority was largely consigned to the operations of the Bahia Mill. Even then, decisions and actions of

consequence were invariably subject to the control of a higher layer of executive management.

[377] Mr. Vinall says that if he is found to have owed fiduciary duties to one or more of the plaintiffs, he performed them honestly, with fidelity and in good faith. He conceded an exception in two inconsequential instances.

- **Application of the Top Management/Key Employee Tests and the *Frame* Guidelines**

[378] Mr. Vinall was not appointed a director of Sateri Singapore and Sateri International Co. until he signed consents to act as such effective December 26, 2009. At that time, he had been working at Sateri for close to one year. He was never appointed a director of his employer, Sateri Shanghai.

[379] By virtue of signing the consent respecting Sateri Singapore, Mr. Vinall purported to agree that he would abide by the duties, responsibilities and liabilities specified in the *Companies Act* of Singapore, and under the any applicable common law. None of the parties made any submissions or elicited any evidence about this provision. I take that to mean they do not consider it to be relevant, and I will say no more about it.

[380] Several of the specific allegations of breach of fiduciary duty against Mr. Vinall pertain to his alleged misconduct that occurred before his first directorship, for example, planting the seeds to appropriate the Thurso Mill opportunity and to secretly compete with his employer. The plaintiffs concede that Mr. Vinall's appointments as director did not have any retrospective effect and did not impose fiduciary obligations in the pre-directorship period. With respect to that period (and afterward), the plaintiffs rely on *Canaero*, the key employee test and the *Frame* analysis to establish Mr. Vinall's elevated stature of a fiduciary.

[381] It strikes me as logical to begin the discussion by determining whether Mr. Vinall owed fiduciary duties to any of the plaintiffs before he entered into a *per se*

fiduciary relationship with Sateri International Co. and Sateri Singapore as a result of being appointed a director.

[382] As a matter of helpful backdrop, I am reminded that long before Mr. Vinall was hired by Sateri Shanghai, he had acquired extensive experience in and knowledge of the operation of conventional and dissolving pulp mills and of the conversion of the former to the latter. Indeed, I find that he was recruited by Sateri because of the breadth of his credentials in those areas.

[383] I accept Mr. Vinall's evidence that it was his understanding from the interview process with Sateri that, because the Bahia Mill had gotten off to a faltering start, he would be required to exert a strong technical and operational focus and be present at the Brazil site for the first six months. That six month stipulation was contained in his Sateri Employment Contract. It was anticipated that the operational objectives at the Bahia Mill would be met within that six-month window. Thereafter, and assuming that Mr. Vinall passed his probation period, he understood that he would move to the head office and assume an executive management function by taking charge of the profit and loss responsibilities for the entire upstream side of the business. I am satisfied that the expansive profit and loss management responsibilities that Mr. Vinall discussed with Mr. Tanoto, Mr. Hoon and others in executive management and that he was expected to assume once the Bahia Mill was sorted out operationally, were to extend beyond the Bahia Mill and the plantation. I find that those functions would entail enhanced executive management responsibility and authority for the mill operations, forestry operations, upstream sales, marketing, research and development, and strategic initiatives, together with the peripheral functions related to those duties, in Brazil, Indonesia and possibly China.

[384] Mr. Vinall was aware that he was courting some personal risk in accepting Sateri's offer because his Sateri Employment Contract was so vague about the specific responsibilities attached to his position, and stipulated that his work projects and assignments were essentially at the discretion of management. Although the lack of specificity worried him, in weighing it out he felt reasonably confident that

soon enough he would be exercising the high-level profit and loss authority of the primary facets of the upstream arm of Sateri's businesses in Brazil and farther afield, which he understood to be commensurate with his title of "President of Upstream".

[385] As it happened, Mr. Vinall's position in the organization did not unfold in the manner that he and Sateri executive management had envisaged. He never did ascend to the upper management role equivalent to full profit and loss responsibility. This was mainly due to the fact that the effort required to stabilize and improve the running of the Bahia Mill was considerably more challenging and time-consuming than had been forecast. For Mr. Vinall, this meant he little choice but to continue to concentrate on the day-to-day mill operations long after the initial six month period had elapsed, and even after his family had moved to Singapore and indeed, throughout the tenure of his employment.

[386] Once the Vinall family relocated to Singapore, Mr. Vinall maintained his routine of working roughly three weeks of the month at the Bahia Mill and returning to his family base approximately every fourth week. When he and Mr. Tanoto crossed paths at head office, Mr. Tanoto would promptly order Mr. Vinall to return to the Bahia Mill. I find that substantially all of the business he engaged in while at the Singapore head office pertained to operational issues of the Bahia Mill. There were less than a small handful of exceptions to this. One of them was the short-lived assignment he received in early October 2009 to provide input and collaborate with Ms. Li to identify potential mill candidates for conversion. Another involved his relatively casual involvement with the Toba Mill, described earlier and below.

[387] Mr. Goh was a credible witness in many areas, but less so in others. He left the impression that his testimony was tainted with a sense of personal anger and/or betrayal that he felt over what he believed was Mr. Vinall's lack of candour about the reasons for his departure from Sateri, and his clandestine activity with Fortress. With his negative mindset simmering below the surface, Mr. Goh appeared prone to skew his evidence and offer sweeping generalizations aimed at portraying Mr. Vinall in a disadvantageous light. A crucial subject area in which this was displayed was

Mr. Goh's embellishment of Mr. Vinall's functions and authority at the Bahia Mill and within the Sateri enterprise at large.

[388] I have previously observed that Mr. Goh's testimony was not entirely reliable on certain pivotal issues. That observation holds true with respect to his evidence about the nature and scope of Mr. Vinall's power and authority in the Sateri organization. In this regard, I emphasize that Mr. Goh had no involvement in the hiring of Mr. Vinall, did not join Sateri until September or October 2009 and had no firsthand knowledge of Mr. Vinall's responsibilities prior to his arrival. It must also be kept in mind that the paramount reason for Mr. Goh's secondment from the RGE Group was to ensure that Sateri International Co. became listed on the stock exchange by a fixed deadline. It was a demanding and time-sensitive assignment, with much riding on his successful attainment. Understandably, his attention and efforts were primarily directed toward that objective which burdened him with many responsibilities unconnected to matters that Mr. Vinall reported to him about.

[389] I turn next to a more detailed treatment of the evidence concerning the nature and parameters of Mr. Vinall's power, discretion and authority and the plaintiffs' corresponding vulnerability.

[390] Both Mr. Vinall and Mr. Goh gave evidence about the number of employees who worked under Mr. Vinall at the Bahia Mill and the plantation. I prefer Mr. Vinall's testimony that there were in the range of 450 to 500 employees to Mr. Goh's higher estimation. In addition to the reliability and credibility shortcomings of Mr. Goh, another basis for my preference on this point is that Mr. Vinall's testimony on the topic was more precise and detailed, differentiating between staff at the plantation and those at the Bahia Mill. Additionally, I am satisfied that on account of his nearly daily presence there, Mr. Vinall was in a better position to calculate the number accurately and did so. Either way, the bottom line is that a significant number of employees worked below Mr. Vinall. However, the sheer number of employees at the Brazilian facilities, as important as it makes Mr. Vinall appear to be, is by no means conclusive of his fiduciary status.

[391] Mr. Vinall came within the human resource category of senior employee at the director level. Seven members of the management team at the Bahia Mill reported to him directly. They consisted of a production manager, maintenance manager, mill manager, technical manager, human resources manager, and the respective heads of forestry as well as research and development. Although the head of finance was shown on paper as reporting to Mr. Vinall, that individual actually reported to executive management in Singapore. So too did the on-site lawyer, Savio Andrade.

[392] Mr. Goh explained that at Sateri a "direct report" management employee, like Mr. Vinall, was typically the head of a business or the head of certain functions within a business. He conceded that "direct reports" were not necessarily part of Sateri's upper executive management group.

[393] There was little cogent evidence about the nature of Mr. Vinall's authority over his managers. Despite the fact that they reported directly to him, he was not allowed to make any staff changes in respect of them unless he first obtained approval from head office. He was likewise not entitled to independently hire or terminate other senior employees at the Bahia Mill, or an employee who worked across jurisdictions. The ambit of his authority with respect to the hiring and firing of lower-level staff was also constrained. He was only permitted to fill vacancies at the Bahia Mill in respect of jobs that ranged from entry-level to mid-management, although not for all departments. Even then, he was without authority to increase the overall employee headcount; that decision was reserved for head office management.

[394] All decisions pertaining to the salaries and wages of the employees at the Bahia Mill and the plantation were set and controlled by human resources in Shanghai or Singapore, and not by Mr. Vinall. He had no involvement in hiring senior staff or management level employees to fill positions at head office or outside the Bahia Mill and plantation.

[395] Mr. Goh thought it likely that Mr. Vinall had been involved in some of the hiring decisions for positions in sales and/or marketing relative to the Bahia Mill.

However, he was not able to provide any details in that regard and his meager evidence on the issue seemed more the product of guesswork than of knowledge.

[396] Mr. Vinall's authority relative to financial matters pertaining to the Bahia Mill and the plantation was also circumscribed. There was a puzzling lack of evidence explaining his entitlement to access bank accounts for the Bahia Mill or the plantation, or the nature of his signing authority on any such accounts. Mr. Goh's evidence was to the effect that Mr. Vinall was not involved in any banking matters or raising financing with respect to the Bahia Mill or any Sateri company. The financial side of the Brazilian operations were managed centrally in Singapore and, as noted, the designated financial employee on the ground at the Bahia Mill did not answer or report to Mr. Vinall.

[397] Mr. Goh testified that Mr. Vinall had limited authority to commit to capital expenditures in respect of the Bahia Mill. However, he was unclear about the restrictions placed on that aspect of Mr. Vinall's authority. I accept Mr. Vinall's evidence that his authority to independently commit to outlays could not exceed the sum of $30,000 or possibly up to $50,000, without pre-approval from head office. In the scheme of things, and in light of the substantial value of the Bahia Mill, the monetary ceiling imposed upon Mr. Vinall's entitlement to incur capital expenditures was relatively modest.

[398] Although Mr. Goh could not say precisely what approvals or counter-signatures Mr. Vinall would have been required to obtain to commit Sateri financially to capital outlays above his limit, he acknowledged that Mr. Vinall would have to secure a "matrix of authorizations" in that regard.

[399] The preponderance of the evidence is that Mr. Vinall's participation in sales and marketing of the dissolving pulp produced at the Bahia Mill was indirect and very limited with respect to Sateri's internal customer base (a captive market). His involvement had an operational focus that took the form of merely ensuring that the product yielded by the Bahia Mill met the needs of the customers. He attended informal sales forecast meetings once in a while.

[400] Mr. Vinall's involvement was virtually non-existent with respect to the external upstream customers. The small role he played in developing a relationship with an American company as a potential purchaser of a specialty pulp grade was a one-off. Even then, it amounted to little more than engaging in two or three conference calls with the technical personnel of that company. Mr. Goh's testimony by which he purported to implicate Mr. Vinall in the sales part of the upstream business was lacking any reasonable semblance of specificity. I find that the sales end of dissolving pulp, by which I mean contacting, meeting and routinely communicating with customers and potential customers about their product needs, developing a new client base and expanding the existing one, was managed predominately from Shanghai and/or Singapore with little meaningful input from Mr. Vinall. I accept Mr. Vinall's evidence that Mr. Tanoto himself was known to take an active interest in that endeavor.

[401] Mr. Vinall was expected to and did make recommendations to the executive management echelon concerning operational matters and some business-related improvements respecting the Bahia Mill and the plantation. For example, he proposed changing some suppliers of materials and modifying aspects of the processing line. But he had no unilateral authority to execute his recommendations; he submitted them to his superiors and they had the final say. His recommendations were ordinarily accepted provided they did not add any extra cost.

[402] Mr. Vinall did not collaborate in the making of any higher level financial and economic decisions, for example, how to hedge against marketplace risk relative to any of the plaintiffs or Sateri's businesses. He did not play a role of any importance in the budgetary process in respect of any of the plaintiffs.

[403] Mr. Vinall testified that the strategic processes of the Sateri enterprise at large were managed by others, like Mr. Hoon, stationed above him in the upper executive group. He claimed to have no real access to Sateri's internal files, such as its research data, strategic plans, business plans and the like because he was not involved in those processes. He clarified that on a rare occasion he would receive a

copy of a business plan of some kind by way of email, typically from Ms. Li. There was no evidence adduced as to the purpose in providing him with those business plans, what their contents might have been, what he was expected to do with them or, in fact, did with them.

[404] Mr. Vinall was questioned about his access to a computer portal of a shared database for sales and marketing that was launched at Sateri in the spring of 2009. He initially denied that he had access. In cross-examination, he was shown emails that suggested he was given or could be given access to that database. At that point, Mr. Vinall agreed that he may have had access to that portal but reiterated that he had never accessed it because he was not involved in sales and marketing and, therefore, the data it contained held little interest. There was a lack of evidence about the nature of the information in the shared files of the portal or who else in the Sateri organization had access. I found Mr. Vinall's testimony plausible on this matter.

[405] I have concluded that Mr. Vinall played a very small role with respect to the sales and marketing of the upstream business and am persuaded that, although he may have had access to the sales and marketing portal, there was little need or advantage to be gained in his accessing its contents and he did not bother to do so.

[406] Mr. Vinall did not participate in any internal discussions of the plaintiffs or of the other Sateri companies concerning the development of external marketing plans or business strategies. He did not participate in devising capabilities to expand, manage or diversify Sateri's global businesses. It has not been shown that Mr. Vinall had broad access to financial and strategic confidential information of the nature and import that, if disclosed, left any of the plaintiffs susceptible to material harm or had the potential of significantly impairing their competitive advantage.

[407] Mr. Vinall's participation in the identification of mill candidates for conversion to dissolving pulp does not stand as an exception. He was not part of management's pre-discussions as to whether and why a mill conversion might be a prudent growth mode for the organization. The strategic decision to explore that

option as a possibility had already been made by those ranking above Mr. Vinall at the executive management level of Mr. Hoon and others, and by Mr. Tanoto himself, before he became aware of the matter and received instructions to carry out his small part. Mr. Vinall's assignment was simply to compile a list of recommended mill targets in collaboration with others and, on short notice, make a presentation at an early stage of the budgeting process. The assignment was not unique to Mr. Vinall; Ms. Li, Mr. Shaohua and probably Mr. Van Lee, each had received similar instructions.

[408] In evidence was a Letter of Appointment dated December 3, 2009 to Mr. Vinall from the "Management Committee" of an unspecified entity, whose chairman was noted to be Jet Lee. The Letter of Appointment informed Mr. Vinall that effective January 1, 2010, he would be appointed as a technical advisor to support "Toba" (the owner of the Toba Mill). At that time, Toba was being evaluated as a potential acquisition by Sateri International Co. before it became a public company. I accept that Mr. Vinall received next to no background information about that potential purchase, which did not come to pass.

[409] The plaintiffs referred to Mr. Vinall's appointment to provide technical advice at the Toba Mill to bolster their assertion that he functioned as a high-level Sateri executive beyond the bounds of the Bahia Mill. Yet, Mr. Goh admitted to being unaware of what tasks Mr. Vinall was or might have been called upon to perform in connection with that work assignment. Moreover, the evidence demonstrated that Mr. Vinall's few dealings with Toba, and specifically the Toba Mill, were basically limited to assisting in two areas. He provided his thoughts on the debottlenecking issue and input on technical matters as well as the preparation of two brief draft press releases all in connection with the idea that the Toba Mill might shift to a permanent production of dissolving pulp. There was no persuasive evidence that Mr. Vinall even carried out the priorities articulated in the Letter of Appointment, apart from those matters.

[410] As is apparent from the discussion at hand, but for a few inconsequential exceptions, all of the evidence elicited concerning Mr. Vinall's employment responsibilities in both the pre- and post-director scenarios, examined his functions and scope of authority, power and discretion in relation to the Bahia Mill and, minimally, with respect to the plantation.

[411] The Bahia Mill is not itself a stand-alone corporation and nor is it a plaintiff. It is a business owned by Bahia Specialty, which is also not a plaintiff. Bahia Speciality is owned by Sateri Bacell, which is owned by Sateri Cellulose, which is, in turn, owned by the plaintiff, Sateri International Co. Accordingly, the only plaintiff with any interest in the entity that owns the Bahia Mill (Bahia Specialty) does not stand as a parent to its subsidiary; rather, it is three degrees removed and equivalent to a "great-grandparent" company. With respect to Norcell, which owns the plantation, Sateri International Co. is both a further step removed as a great-great-grandparent through Bahia Specialty, and a further step closer as a grandparent company through Sateri Copener.

[412] To say that Mr. Vinall was charged with duties and responsibilities greater than the role of a mere servant is not, of itself, a helpful observation. Clearly, he was not a lowly servant at the Bahia Mill. But the focus of the analysis is to evaluate the nature and extent of Mr. Vinall's unilateral authority, power and discretion over the plaintiffs' vital affairs, and assess the vulnerability of their legal, economic and practical interests to his exercise of it.

[413] Mr. Goh's testimony stood out as remarkably skimpy as it concerned the nature of the businesses and internal management of each of the plaintiffs and Mr. Vinall's corresponding involvement, authority and impact. Significantly, Mr. Goh acknowledged that Mr. Vinall did not participate in overseeing the operations or the affairs of Sateri Shanghai or Sateri Singapore. Overall, the evidence revealed very little about how any of the plaintiffs might be vulnerable, even in theory, to the exercise of power or discretion granted to Mr. Vinall.

[414] The Sateri organization followed a classically top-down management model, with a multi-layer hierarchy of management and authority over its various business interests. Although Mr. Vinall ran the Bahia Mill, he was not a member of the plaintiffs' upper management empowered to make decisions of consequence with regard to that business operation or any other. Although he was given the impressive title of "President of Upstream" and later "President Specialty Cellulose", Mr. Vinall was not an actual corporate officer of any plaintiff. The restrictions imposed upon his discretion, power, and authority were very much by design and his actions were significantly overseen by the superior ranks of executive management for the purpose and in a manner that effectively safeguarded the plaintiffs' interests and the valuable Bahia Mill. Though Mr. Vinall was expected to assume a significantly more enhanced management role once the Bahia Mill was running satisfactorily, for reasons already canvassed, that eventuality did not come about. Instead, and despite his impressive title, Mr. Vinall's power and authority remained narrow and highly controlled and his discretion significantly fettered and constrained. Had he been conferred with the extensive and high-level profit and loss power and authority for the upstream operation he had been recruited to do, he may well have owed fiduciary obligations to the plaintiffs. But he had not been.

[415] In all, an examination of the nature and scope of the power, authority and discretion delegated to Mr. Vinall and his responsibilities with respect to the Bahia Mill, the planation and, more crucially, relative to the plaintiffs (and the other companies within the Sateri collection) shows that Mr. Vinall was not imbued with the distinguishing hallmarks of the fiduciary dynamic before he was appointed as a director. That is to say, he was not vested with the autonomy to exercise his limited delegated power, authority or discretion in a manner that could genuinely direct, affect or alter the legal, economic or vital practical interests of any of the plaintiffs or steer the management of their affairs. He did not undertake to act in an utterly selfless manner so as to elevate him to the stature of a fiduciary where no other basis to do so existed. Mr. Vinall's controlled and constrained authority did not leave the plaintiffs in a position of vulnerability. To borrow the parlance of Wilson J. in *Frame,* the plaintiffs were not at his mercy. While I recognize it is possible for a

fiduciary relationship to exist even where the elements under the *Frame* "rough and ready guide" are not present, that has not been established in this case.

[416] As will be seen in the following sections, Mr. Vinall's conduct was not above reproach. He violated provisions of the Sateri Employment Contract and Declaration and breached his implied contractual duties of fidelity, good faith and loyalty. It is incumbent on the Court to avoid the trap of reading equity backwards by reasoning that, on account of that misconduct, Mr. Vinall owed fiduciary duties to the plaintiffs.

[417] Mr. Goh testified that Mr. Vinall's responsibilities and those of other senior management cut "across multiple companies" in the Sateri "Group". I do not accept his evidence as remotely accurate. Nevertheless, the plaintiffs asserted that based on his assertion, the language of the Sateri Employment Contract that links most of Mr. Vinall's contractual obligations to the wider "Group", and pursuant to the common employer doctrine, Mr. Vinall's fiduciary obligations (as well as his contractual ones) are owed to all members of the "Sateri International Group".

[418] In support of their assertion, the plaintiffs offered the following passage authored by Stacey Ball in the 1999 edition of his text, *Canadian Employment Law*, adopted by the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 at para. 1, leave to appeal refused, [2001] S.C.C.A. No. 397 [*Downtown Eatery*]:

> The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

[419] In the 2013 update of Mr. Ball's text, *Canadian Employment Law*, loose-leaf (Toronto: Canada Law Book, 2013-) at §13.30.3(5), he writes:

> Fiduciary obligations referred to in *Canaero* have been found to be owed not merely to the employee's immediate employer, but also to related companies of a corporate employer. Consequently, just as the courts will go behind the corporate veil and find an employee to be employed by a "group enterprise", fiduciary obligations can be owed to a "corporate group". This approach is

> sound in that, since corporate groups can owe employees common law obligations, there is nothing in policy or principle against a fiduciary employee owing obligations which extend beyond the technical employer in appropriate cases.

[420] Mr. Ball did not expand on what might count as an appropriate case. However, he cited two authorities for the propositions he endorsed: *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277 (Ont. C.A.) [*Manley*], and *Imperial Sheet Metal Ltd. et. al. v. Landry and Gray Metal Products Inc.*, 2007 NBCA 51 [*Imperial Sheet Metal*]. No submissions were made in relation to either case.

[421] In *Imperial Sheet Metal* at para. 65, the court simply approved of the passage from Mr. Ball's text without addressing whether it applied in the case before it.

[422] In *Manley*, the defendant employee was employed by Manley Popcorn of Canada Limited, which was a wholly-owned subsidiary of Manley Incorporated. The subsidiary dismissed the employee when it discovered that during the course of his employment he had established a business that competed with the parent company, although technically not with the subsidiary. The trial judge determined that in so doing the employee had breached his fiduciary duty to the employer-subsidiary.

[423] On appeal, the employee conceded that although the business he set up may have been competing with the parent, it was not competing with his actual employer, the subsidiary. He argued that the trial judge had failed to distinguish between the parent and the subsidiary in this important context. At paras. 5-6, the Court of Appeal rejected his argument:

> [5] Several issues were raised in Mr. Roebuck's able argument, but we need only refer to those upon which we called for argument by the respondents. The first point is the failure of the learned trial judge to make a distinction between the two respondent companies. It was submitted that the appellant's personal enterprise did not compete with or injure the business carried on by Manley Popcorn Canada Limited, the appellant's employer, as this company did not deal in the type of snack product machines sold by the appellant's enterprise. We are satisfied that in a case of this kind, it is open to the court to regard the Manley companies as constituting one business enterprise. In our view, it would undermine the requirement of fidelity to allow an employee to successfully argue that, while his activities may have injured the parent company of his employer, it did not in fact injure his employer.

> [6] This is a case where the court is not precluded from lifting the corporate veil, and, in effect, regarding the closely related respondent companies as essentially one trading enterprise, in the interests of the affiliated companies, in a circumstance where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust. Cases where this derogation of Salomon's case (*Salomon v. Salomon & Co.*, [1897] A.C. 22) is permitted are collected in Professor Gower's textbook, Modern Company Law, 2nd ed., particularly in c. 10 entitled "Lifting the veil". There is a reference there to *Holdsworth & Co. v. Caddies*, [1955] 1 W.L.R. 352, also reported at [1955] 1 All. E.R. 725. This is a decision of the House of Lords which in our opinion supports the author's analysis, which we adopt because of its brevity, as set out at p. 206. In referring to the essential unity of a group enterprise, he says:
>
> > Perhaps the most remarkable illustration is afforded by *Holdsworth & Co. v. Caddies*. There, Mr. Caddies had been appointed managing director of the parent company upon the terms that he should 'perform the duties and exercise the powers in relation to the business of the company and the businesses ... of its existing subsidiary companies ... which may from time to time be assigned to or vested in him by the board of directors of the company.' After disagreements between him and the board he was directed to confine his attentions to one of the subsidiaries only. This was held not to be a breach of contract by the company, notwithstanding that it prevented him from working for the company employing him. The argument that the subsidiary companies were separate legal entities each under the control of its own board of directors' was described as 'too technical,' since 'an agreement in re mercatoria ... must be construed in the light of the facts and realities of the situation,' which were that the parent company had full control of the internal management of its subsidiaries.
>
> The "group enterprise" concept must obviously be carefully limited so that companies who seek the advantages of separate corporate personality must generally accept the corresponding burdens and limitations.

[424] The common employer doctrine originated to enable the court to treat legally separate but interrelated entities as a single employer to protect the interests of employees against unjust treatment: *Downtown Eatery*. It frequently arises in wrongful dismissal cases.

[425] The plaintiffs did not make submissions about the judicial reception in this province of the group enterprise approach taken in *Manley* or, more broadly, the circumstances in which the court may be prepared to apply it or the common

employer doctrine to extend an *employee's* liability for employment-related obligations among related companies in ways that ignore the separate legal entities.

[426] Additionally, there was a dearth of evidence of the factors that typically inform the analysis of whether corporations should be regarded a one, such as the integration of their businesses, directorships, management and financial matters, apart from their shareholdings and Mr. Tanoto's supreme control: see generally, *Bartholomay v. Sportica Internet Technologies Inc*., 2004 BCSC 508.

[427] Despite the holding in *Manley*, I am skeptical of the *quid pro quo* reasoning that says simply because related corporate entities can owe duties to an employee of one of their affiliated companies, the employee may, in return, owe fiduciary duties to the corporate group as a whole. My thinking is that it would be a most exceptional, even rare, case that would justify finding that an employee owed a fiduciary duty to an affiliated company of the actual employer, solely on the basis of the interrelation between those companies, and where there is an absence of factors that support a fiduciary relationship with the affiliate in the first place.

[428] If the employee does not exercise a robust level of unilateral power, authority and discretion over the affiliate's vital interests and affairs and the affiliate is not vulnerable to the employee, it does not seem equitable to impose a fiduciary duty on that employee as regards the affiliate. In doing so, the so-called fiduciary employee, who is unable to meaningfully participate in the management of the affiliate or influence its affairs, is held to a stringent standard of conduct without being granted any of the powers normally associated with such a burden. The affiliated company thus reaps the benefit of being owed a fiduciary duty without ever assuming the risk of making itself vulnerable to the exercise of the discretion, power and authority of the employee in question.

[429] In my opinion, adherence to the foregoing approach would allow for a back door to create a fiduciary relationship where one would not otherwise exist and run afoul of the carefully developed jurisprudence on the principled approach to the fiduciary doctrine articulated by our highest court.

[430] Moreover and in any event, Mr. Ball's remarks indicate that in order for the doctrine to apply, the employee must first owe fiduciary duties to his or her immediate employer. Only where that threshold exists, would the principle apply in appropriate cases to lift the corporate veil of the other corporations of the corporate group so as to extend the fiduciary employee's fiduciary obligations beyond the "technical employer" to the wider corporate group. That threshold connection has not been proven in this case.

- **Vinall's Directorships**

[431] Sateri's policy required satisfaction of only two preconditions before an employee could qualify for appointment as a director. First, he or she had to successfully pass the applicable probation period. In Mr. Vinall's case, that occurred in about July 2009. Second, the employee had to hold a reasonably senior position.

[432] Mr. Vinall testified that Mr. Andrade, the lawyer at the Bahia Mill who did not report to him, routinely presented him with a stack of documents received from head office for signature with little and often no explanation of their contents. It was typical for Mr. Vinall to sign whatever documents Mr. Andrade placed before him without discussion.

[433] The evidence indicated that some of the consents to act as director were emailed to Mr. Vinall for signature on about January 14, 2010 by an executive assistant in Singapore. I find that, except for those emailed documents, the consents to act as director and the few resolutions he signed were presented to Mr. Vinall among the batches of paper unceremoniously put under his nose by Mr. Andrade, although not necessarily on the dates shown.

[434] Mr. Vinall was aware that the Sateri Employment Contract stated he could be appointed a director of any company that fell within the broadly defined Sateri "Group" of companies, and that he was required to accept the appointment. He therefore gave it little thought and assumed that he was being appointed as a mere matter of corporate convenience and expediency.

[435] Mr. Goh did not play any part in Mr. Vinall's directorship appointments. He had no insight into the reason behind those appointments and was unable to explain why they came about, other than to surmise that the board of Sateri International Co. had simply decided they were to be made. There was no evidence to indicate that Mr. Vinall was advised about the appointments in advance or after they were made, or was told what they entailed. He was not provided with any of the documents referred to in the consents, such as the memoranda and articles of incorporation. Mr. Vinall convincingly disavowed any knowledge of the subject matter of the resolutions, including the internal reorganization of Sateri International Co. that was recited in many of them. He was not given copies of the documents mentioned in those resolutions, such as the share exchange agreement and corporate bonds.

[436] Mr. Vinall did not attend an official board meeting of any of the plaintiffs or any Sateri company of which he was made a director. He was not kept informed as to whether any such meetings had been convened, and was not supplied with an agenda or meeting minutes.

[437] As mentioned, the plaintiffs assert that the law of fiduciary duty does not recognize a nominal, passive or dummy director. Their contention is that, as a matter of law, all directors owe fiduciary duties to their respective corporations. To that point and for the proposition that the existence of a director's fiduciary obligations does not depend upon his or her level of engagement in the management of the company, the plaintiffs place heavy reliance on *101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp*., [2011] 9 W.W.R. 757 (Sask. C.A.) [*718 Saskatchewan*].

[438] *718 Saskatchewan* involved an interlocutory application for an injunction that arose in relation to the applicants' claim that two former directors and officers, Medge and Mann, had breached their fiduciary duty by failing to disclose corporate opportunities and acting in a conflict of interest.

[439] The chambers judge considered the three-prong test for injunctive relief set out in *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-*

MacDonald]. He denied the injunction on the ground that there was no serious question to be tried as to whether Medge and Mann were fiduciaries and because the applicants failed to demonstrate that irreparable harm would occur if the injunction was not granted. In concluding there was no serious question to be tried, the chambers judge reasoned that Medge and Mann had fulfilled the primary tasks they had been instructed to carry out as directors and that, thereafter, they owed the applicants "minuscule" fiduciary duties only. Also relevant to the chambers judge was that, for some of the time, one of the directors had been totally excluded from participating in activities, negotiations or responsibilities for the corporate applicants.

[440] The Saskatchewan Court of Appeal readily found that the chambers judge had erred in law by concluding there was no serious question to be tried in relation to the fiduciary duties owed by the directors. At paras. 14 and 15 the panel reasoned:

> [14] [The chambers judge] reached his conclusion in part because he failed to appreciate the argument that the fiduciary duty owed by a director arises simply by virtue of the individual being elected or appointed to office, remains throughout the duration of the director's tenure and may only be restricted by unanimous shareholders agreement (see ss. 117(1), 117(3) and 140(4) of *The Business Corporations Act*, R.S.S. 1978, c. B-10 (the "*SBCA*")). As to what that fiduciary duty requires of a director, the Supreme Court of Canada, in *Re People's Department Stores* 2004 SCC 68, [2004] 3 S.C.R. 461 ("*Re People's*"), described the fiduciary duty set forth in the concordant section of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (s. 122(1)(a)), in the following general terms:
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> > [35] The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: …
>
> [15] On the basis of this preliminary investigation based on just those facts which were not in dispute (see above), the statutory fiduciary duty of a director as defined under the *SBCA* and the Supreme Court's decision in *Re People's*, in my judgment, this matter gives rise to a serious question to be tried.

[441] The Court of Appeal added at para. 16:

> [16] … there is also a serious question to be tried as to whether the *SBCA* recognises categories of directors who owe greater or lesser duties to their corporations depending on the nature or status of the tasks undertaken by or assigned to the director. To this point, the law has not typically recognised an animal such as a "nominal", "passive", "dummy", "puppet" or "eunuch" director.

[442] Continuing at para. 18, the Court concluded:

> [18] Mr. Medge and Mr. Mann were directors of the Appellants. As directors, they owed a fiduciary duty to the Appellants. As part of a director's fiduciary duty, the director must avoid conflicts of interest with the corporation and otherwise serve the corporation selflessly, honestly and loyally. Mr. Medge and Mr. Mann are directors of the corporate Respondents. The corporate Respondents appear to have been competing with the Appellants. The Chambers judge need not have gone further than that limited review of the facts and the law to conclude this matter demonstrates a serious question to be tried.

[443] The chambers judge also held that the applicants had not proved the ingredient of irreparable harm, being the mandatory second branch of the *RJR-MacDonald* test. The Court of Appeal did not interfere with that finding and on that basis, upheld the ruling of the chambers judge and dismissed the applicants' appeal.

[444] In assessing the precedential value of *718 Saskatchewan*, it is significant that the Court of Appeal was called upon to determine whether the chambers judge erred when he concluded that there was no serious question about whether the directors owed fiduciary duties to the corporate applicants; it was not asked to and did not purport to decide the serious question itself. Under that first stage of the *RJR-McDonald* analysis, the test merely requires the court to determine whether there was a serious question to be tried on the basis of common sense and an extremely limited review of the case on the merits. It is a low threshold. Basically, unless the case on the merits is frivolous or vexatious, the court is generally required to find the existence of a serious question to be tried and to move onto the next stages of the test: *RJR-McDonald* at 348.

[445] Accordingly, neither the chambers judge in *718 Saskatchewan* nor the Court of Appeal was required to consider the jurisprudence on the law of fiduciaries in any depth. In particular, neither Court addressed the principle articulated by Sopinka J. in *Lac Minerals* that, in special circumstances, the presumption that a director is imbued with the attributes recognized as inherent in the fiduciary relationship is rebuttable. While the Court of Appeal remarked that the law has not typically recognized "nominal" or "dummy" directors, it did not adjudicate that issue.

[446] Another point of distinction that weakens the precedential weight to be accorded *718 Saskatchewan* in deciding the case at hand, is that the Court of Appeal relied on the statutory provisions of the applicable provincial legislation that informed the fiduciary duty of the corporate directors. Whether Mr. Vinall was subject to similar statutory duties, and if yes, pursuant to what jurisdiction, was never raised or argued by any party.

[447] In the end, I consider *718 Saskatchewan* to be of negligible assistance in determining the central issue of whether Mr. Vinall owed a fiduciary duty to the plaintiffs of whom he was a director owing to his appointment as such.

[448] Similarly, in my assessment, the decision in *Three Ports Fisheries Limited v. Jeffrie*, 2014 NSSC 228 (S.C.) [*Three Ports*], which the plaintiffs and Mr. Vinall rely upon, does not advance the determination.

[449] The plaintiffs appear to interpret *Three Ports* as authority for the proposition that, as a matter of law, a director is invariably a fiduciary of and owes fiduciary obligations to the corporation that he or she serves. In my view, that interpretation is overbroad and cannot be sustained on a considered reading of the case.

[450] The court in *Three Ports* cited secondary authority that suggested courts do not need to undertake an analysis to determine whether a fiduciary duty exists between a director and corporation in each suggested instance of a breach of such duty. In doing so, however, the court did not pronounce that such duty cannot be rebutted through evidence that shows the characteristics typically underlying such a

relationship are missing. Indeed, the court specifically referred to the rebuttable presumption in *per se* fiduciary relationship. Furthermore, at para. 25 *Three Ports* explicitly referred to Sopinka J.'s discussion in *Lac Minerals* to the effect that the presumption of the presence of fiduciary characteristics in traditional categories of fiduciary relationships is rebuttable in exceptional or special circumstances. Later in the judgment, the court acknowledged that the presumption that a director owes a fiduciary duty to the corporation may be rebutted with convincing and cogent evidence to the contrary.

[451] Moreover, the core issue engaged in *Three Ports* was not whether the director stood in a fiduciary relationship to his corporation but, rather, the point at which he had effectively ceased being a director and, thus, no longer owed the corporation any fiduciary duties, even though a formal resignation had not been implemented and he remained a director in name only. The court did not analyze, nor purport to decide, the issue of whether the presumed fiduciary obligations between a director and corporation could be rebutted where the attributes innate to such a relationship were not present from its inception.

[452] I have concluded that Mr. Vinall was not a fiduciary in relation to the plaintiffs and did not owe them fiduciary duties, under *Canaero*, the key employee test or *Frame*. It is to be emphasized that his responsibilities and the nature and ambit of his power, autonomy and discretion did not change after he was appointed a director of Sateri International Co. and Sateri Singapore or the non-plaintiff companies.

[453] Mr. Vinall's *per se* fiduciary relationship with Sateri International Co. and Sateri Singapore borne out of his directorships of those corporations did not carry the essential characteristics inherent in a fiduciary relationship. I would add that the fact that Mr. Vinall had little choice under the provisions of the Sateri Employment Contract but to accept those appointments lends support to the finding that he did not enjoy the rank of a true fiduciary. So too does the fact that his job description and work assignments could be determined by his superiors at any time, and that he

could be seconded to any of the companies within the "Group" at the pleasure of management.

[454] I conclude that this is an exceptional case of the kind envisaged by Sopinka J. in *Lac Minerals* where the presumption that Mr. Vinall's status as a director imposed fiduciary obligations upon him, has been rebutted by cogent evidence. Mr. Vinall's stature as a director of Sateri International Co. and Sateri Singapore simply does not suffice. This conclusion does not stem from a refashioning of any legal principle relative to the *per se* fiduciary relationship of director and corporation; it is the result of the application of an established one.

[455] To conclude, in the material timeline Mr. Vinall was not in a fiduciary relationship with, and owed no fiduciary obligations to, any of the plaintiffs.

Allegations of Breach of Fiduciary Duties against Vinall and Knowing Assistance Claim against Fortress

[456] In light of my findings, it is axiomatic that I need not consider whether Mr. Vinall acted in breach of his fiduciary duties. My conclusion that Mr. Vinall is not a fiduciary and owes no fiduciary duties to the plaintiffs, is likewise fatal to the plaintiffs' claim that Fortress is jointly and severally liable for Mr. Vinall's alleged breaches of fiduciary duty based on the doctrine of knowing assistance in breach of trust.

[457] The plaintiffs did not proceed with their conspiracy claim and Mr. Vinall abandoned his counterclaim by which he sought payment of his 2009 bonus.

[458] Left for consideration on the issue of liability are the plaintiffs' claims for breach of confidence, breach of contract (of both Mr. Vinall's implied and explicit contractual obligations) and the tort of inducement to breach contract.

[459] Also controversial are the availability and application of certain remedies.

Claims of Misuse of Plaintiffs' Confidential Information

- **Overview of Legal Framework**

[460] The wrongful use or disclosure of confidential information may give rise to a number of causes of action. In the employment context, the claims may be grounded in the discrete but overlapping wrongs of breach of confidence, breach of an express term of an employment contract, and breach of the employee's implied contractual duty of good faith, fidelity and loyalty: *RBC Dominion Securities; McMahon*. Such claims are frequently accompanied by a claim against a third party for misuse of the plaintiff's confidential information. All of these causes of action are alleged by the plaintiffs in this case.

[461] The plaintiffs also alleged that Mr. Vinall's misuse of their confidential and proprietary information constituted a breach of his fiduciary duty. Because I have concluded that Mr. Vinall does not owe fiduciary obligations to the plaintiffs, I have not considered the breach of confidentiality claims within that frame of reference.

[462] Breach of confidence is a *sui generis* hybrid claim with roots in the common law and in equity: *Cadbury Schweppes Inc. v. FBI Foods Ltd.,* [1999] 1 S.C.R. 142 at para. 20 [*Cadbury*]**.** The three-part test for the claim of breach of confidence was affirmed by La Forest J., for the majority on this point, in *Lac Minerals* at 635-635:

> The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:
>
> > In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case [*Saltman Engineering Co v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.)] on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it…

[463] In *Lac Minerals* Sopinka J. provided this succinct iteration of the test at 608:

> 1. the information must have a necessary quality of confidence about it;
>
> 2. the circumstances under which the information was imparted must give rise to an obligation of confidence; and,
>
> 3. the defendant must have made unauthorized use of the information.

[464] At 610, Sopinka J. adopted the oft-cited definition of the meaning of necessary quality of confidence from the following passage in *Saltman Engineering Co. v. Campbell Engineering Co*. (1948), 65 R.P.C. 203 (C.A.) (leave to appeal to House of Lords refused) at 610:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[465] Sopinka J. endorsed two general categories of confidential information: information that is confidential because it has not been made public; and information that may have been assembled from publicly available materials, but amounts to a confidential work product because its assembly required the application of some independent thought process: *Lac Minerals* at 610.

[466] There is also authority for the proposition that information generally known within a particular industry may not qualify as confidential: *Monarch Messenger Services Ltd. v. Houlding* (1984), [1984] A.J. No. 1018, 56 A.R. 147, (Alta. Q.B.) at para. 18; *Lake Mechanical Systems Corp. v. Crandell Mechanical Systems Inc.*, [1985] B.C.W.L.D. 2373, [1985] B.C.W.L.D. 2422.

[467] The threshold for establishing confidentiality is a low one. However, the law recognizes a continuum of specialness with respect to confidentiality, and that the

placement of such information on that continuum may affect the remedy awarded for a breach: *Cadbury* at paras. 75-76.

[468] In *No Limits Sportswear Inc. v. 0192139 BC Ltd.*, 2015 BCSC 1698 [*No Limits*], Griffin J. provided a helpful overview of the principles that inform the second constituent ingredient of a breach of confidence claim, namely that the circumstances in which the information was conveyed give rise to an obligation of confidence:

> [15] An obligation to keep information confidential may arise by express contract, or by implication based on the circumstances and relationship of the parties.
>
> [16] Even if no mention of confidentiality is made, a communication may be considered to have been made in confidence if there was a mutual understanding that the parties were working towards a joint venture or some other business arrangement: *Lac Minerals* at 612-613.
>
> [17] In *Lac Minerals* at 612-613, and at 642, the Court adopted the following passage of the judgment of Megarry J. in *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41. at 48:
>
> > In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence….

[469] In *Lac Minerals,* La Forest J. confirmed that a party's receipt of confidential information in circumstances of confidence established a duty that the recipient party will not use that information. The use of confidential information other than in the permitted way therefore constitutes misuse. At 642, La Forest J. explained that where it is shown that the confidential information was used by the defendant, the burden then falls to the defendant to demonstrate that it was a permitted use.

[470] In *Sabre Inc. v. International Air Transport Assn.*, 2011 ONCA 747, it was argued that, as a matter of law, the passage from *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 cited approvingly by La Forest J. in *Lac Minerals,* established the "doctrine" that the legal or ultimate burden moves from the plaintiff to the

defendant where certain factual prerequisites are made out. In rejecting that interpretation, Doherty J.A. explained the proper approach:

> [26] I do not read the passage as intending to move the legal burden of proof. In my view, an approach that would shift the burden upon certain facts being established would undermine the fact-sensitive inquiry demanded by the determination of whether a reasonable person in the circumstances would understand that the information was given in confidence. The evidentiary weight to be given to any particular fact or constellation of facts must depend on the trier of fact's assessment of the entirety of the factual picture. To regard certain facts as always shifting the legal burden of proof is to distort the reasonable person inquiry.
>
> [27] I think Megarry J. in *Coco* was describing his assessment of the impact of certain important facts on the confidentiality claim made in the case before him. His Lordship was satisfied that the value of the information, the business-like basis upon which the information was provided, and the joint venture nature of the discussions in which the information was provided, combined to place a heavy evidentiary burden on the defendant. Megarry J. was responding to the evidence he heard and the nature of the confidentiality claim made in that case. He was not pronouncing any legal doctrine. Nor do the references to the passages from *Coco* in *LAC Minerals Ltd*. elevate Megarry J.'s comments to the status of legal doctrine.

[471] This third mandatory element appears to contemplate that the misuse of the information must be to the detriment of the confider of the information. In the words of La Forest J., if confidential information is used by the recipient for a purpose other than that for which it was conveyed, "and detriment to the confider results, the confider will be entitled to a remedy": *Lac Minerals* at 638-639.

[472] In *No Limits*, Griffin J. observed, at paras. 25-30, that the law is unsettled on whether the feature of detriment is essential to complete the cause of action of breach of confidence. In the course of her thoughtful analysis, her Ladyship commented that while the Court in *Cadbury* did not rule on whether detriment was a requisite ingredient to establish the claim, the reasoning of Binnie J., for the Court, at paras. 52-54, was supportive of the principle that general damages for breach of confidence cannot be awarded where the plaintiff has asserted, but failed to prove, that the breach caused financial loss:

> F. Relevance of Detriment
>
> [52] La Forest J. said in Lac Minerals that if the plaintiff is able to establish that the defendant made an unauthorized use of the information <u>to the detriment</u> of the party

> communicating it, the cause of action is complete (at pp. 635-36 and 657; see also ICAM Technologies Corp. v. EBCO Industries Ltd. (1991), 36 C.P.R. (3d) 504 (B.C.S.C.), affirmed (1993), 52 C.P.R. (3d) 61 (B.C.C.A.), per Toy J.A., at pp. 63-64; Ontex Resources Ltd. v. Metalore Resources Ltd. (1993), 13 O.R. (3d) 229 (C.A.); 655 Developments Ltd. v. Chester Dawe Ltd. (1992), 42 C.P.R. (3d) 500 (Nfld. S.C.).
>
> [53] The issue of detriment arises in this case because the trial judge made a specific finding that the respondents had not suffered financial loss, yet she proceeded to find liability and award damages "in the interest of fairness". While La Forest J. in Lac Minerals considered detriment to be an essential element of the breach of confidence action (Sopinka J. did not express a view on this point in his discussion of the applicable principles), it is clear that La Forest J. regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information (see, e.g., Argyll (Duchess) v. Argyll (Duke), [1967] Ch. 302. In the Spycatcher case, supra, Lord Keith of Kinkel observed, at p. 256, that in some circumstances the disclosure itself might be sufficient without more to constitute detriment:
>
> > So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.
>
> [54] The concept of detriment need not be explored on this occasion because, as the Court of Appeal correctly emphasized, the parties had agreed prior to trial that any evidence regarding losses allegedly suffered by the plaintiff would be deferred to a post-trial reference. This arrangement obviated the need for the respondents to lead evidence of detriment at the liability trial. In the end, however, having elected the remedy of financial compensation, the respondents will obviously have to demonstrate at the reference the nature and extent of any detriment suffered to establish the basis for a monetary award.
>
> [Emphasis in original]

[473] At para. 31, Griffin J. concluded where the only remedy sought is compensation for losses, the plaintiff's failure to prove such loss meant there was a failure to prove entitlement to a remedy.

[474] The critical issue of detriment received no meaningful attention in this trial.

[475] A collection of principles that have come to be known as the springboard doctrine are relevant in assessing information that is partly public and partly confidential, or was disclosed in confidence but subsequently made its way into the public domain: *Cadbury* at para. 67. The doctrine recognizes that the receipt of information derived from one or more public sources may save a defendant substantial time, effort and expense in searching for and gathering it himself or herself and, therefore, may be regarded as confidential even though the defendant

could have collected it from sources available to the public. The information is viewed as having offered the defendant a "springboard" in the sense that it has eliminated the bother of having to do the groundwork to source it out and compile it, and has some degree of value because it has given the defendant a head start in the endeavor at hand: *Lac Minerals* at 610; *Cadbury* at para. 67.

[476] The springboard doctrine was instructively summarized by Griffin J. in *No Limits*:

> [19] Where information is the creation of work product and it can give the reader of the document a "head start" or a "springboard" and advantage to the detriment of the information-provider, the information may have the necessary quality of being confidential and give rise to liability for its use even if the information later becomes public: *Lac Minerals* at 610; *Cadbury* at para. 67.
>
> [20] In this regard, Sopinka J. in *Lac Minerals* held at 610-611:
>
> > *Seager & Copydex Ltd.,* [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At pages 931-32, Lord Denning M.R. stated:
> >
> > > When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.
>
> [Emphasis in original]

[477] As mentioned, a breach of confidence claim in equity may be available against a third party. In this case it is brought against Fortress, who, the plaintiffs say, knowingly came into possession of confidential information via Mr. Vinall's breach of confidence. As explained in *Cadbury* at para. 19:

> Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

[478] Mr. Vinall was subject to express contractual obligations to maintain the confidence of the plaintiffs' information. Contractual terms that negate or limit an employee's obligation in respect of confidential information take precedence and will restrict or may even exclude a breach of confidence claim. This important point was articulated in *Cadbury* at para. 36, in Binnie J.'s analysis of the appellants' argument that the contractual terms in that case limited or circumscribed the equitable duty of confidentiality:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C.C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v. The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:
>
> > ...the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

[479] In *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.*, 2013 ABQB 273 at paras. 89-93, aff'd 2015 ABCA 51, Martin J. analysed the interplay between the breadth of the meaning of confidential information in a claim for breach of confidence and explicit contractual provisions that have a more expansive definition of the term:

> [89] Scott also argues that it has a claim for breach of confidence apart from the MCA. However, Scott makes the novel argument that instead of this Court asking what information is confidential under that avenue of recovery,

this Court should use and incorporate the broader definition in the MCA into the otherwise existing principles to grant a constructive trust. Scott argues that the MCA operates to expand the idea of what qualifies as Scott's confidential information for the purposes of a breach of confidence action. By doing so Scott therefore essentially asserts rights and equities over the Penn West confidential information by virtue of the fact that the MCA included both Scott's confidential information and Penn West's confidential information. In essence, Scott claims the parties expanded by contract the definition of confidential information to give Scott greater rights. The effect is that the parties' agreed upon definitions become incorporated by reference into the breach of confidence action. Scott argues that the MCA definitions prevail such that everything Scott gave to Finavera is protected as either Scott's "Confidential Information" or "Proprietary Data" in a breach of confidence claim.

90 At the base of this argument is an assertion that the parties are free to stipulate what will be confidential to them in a breach of confidence action. Scott argues that the passage quoted in Cadbury Schweppes at para 36 stands for the proposition that parties can modify the elements of a breach of confidence by private contract. I agree that parties may create the law between them in a breach of contract action. However, any such breach will sound in contract. In contrast, there is no authority for the proposition that the parties may impose their own criteria when the action is one of breach of confidence, which has its roots in equity. While this specific point is not addressed in the case law cited, all authorities suggest that Scott's argument is not sound. Outside a binding contract, it is not open to the parties to modify what the courts have set as the test for information having the quality of confidence for a breach of confidence action.

[91] What Scott may claim under a breach of confidence action are only those things that the law, not the parties, recognize as confidential. In a breach of confidence action Scott cannot modify by contract the confidential information he has ownership over or equity in simply by including an expansive definition of such confidential information in the MCA. As in *Drake International Ltd. v. Miller* (1975), 9 O.R. (2d) 652, 61 D.L.R. (3d) 420 (Ont. H.C.): "matters do not become confidential merely because the contract states them to be so".

[92] Although I accept the legal principle that a contract can limit or negate a general duty implied by tort law or by equity, it does not therefore follow that a private contract can also expand the law of tort or equity to make confidential information that which does not bear the hallmarks of confidentiality when the action is one of breach of confidence and not breach of contract. More specifically, para 36 of Cadbury Schweppes cited above, does not support the proposition that a party can expand the definition of confidential information in a breach of confidence action.

[93] Further, given that I found there is no breach of contract, Scott is trying to combine contract, tort and equity principles to secure for itself something it did not bargain for. Scott's claims in relation to the misuse of its confidential information therefore needs to be determined under the principles established under a breach of confidence claim.

[480] A broad range of remedies is available for a breach of confidence, including damages, expectation damages, injunctive relief, an accounting of profits, and a constructive trust. While the court's jurisdiction to grant a remedy is not limited by whether a breach of confidence has a contractual, tortious, proprietary or trust flavour, that factor may nonetheless inform the appropriateness of the remedy: *Cadbury* at para. 26; *Lac Minerals* at 612 per Sopinka J.; *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319 at paras. 95-99.

[481] Ultimately, the court will adopt a flexible approach in fashioning a remedy having regard to the facts of the case and mindful that "[t]he objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach": *Cadbury* at para. 61.

- **Confidentiality Provisions in the Sateri Employment Contract**

[482] Paragraphs 1, 2, 6 and 8 of clause XVI of the Sateri Employment Contract, headed Confidentiality, read as follows:

> XVI
>
> CONFIDENTIALITY
>
> 1. [Mr. Vinall] shall observe strict confidentiality with regard to all matters directly or indirectly related to his work and all matters concerning [Sateri Shanghai's] or the Groups's shareholders, and shall not disclose or divulge to any one any confidential information related to [Sateri Shanghai's] or the Group's business or its customers which may come within [Mr. Vinall's] knowledge or possession in the course of his employment, and which should not be disclosed or made public save with the consent of [Sateri Shanghai] or in the course of his duties as an Employee of [Sateri Shanghai].
>
> 2. As [Mr. Vinall] can appreciate, much of the value of [Sateri Shanghai] or the Group rests in the intellectual property used to conduct its businesses. To help protect the value of [Sateri Shanghai] and/or the Group, and its products and services, this type of information, in addition to being treated confidentially must be used only for the benefit of [Sateri Shanghai] or the Group, as applicable. When [Mr. Vinall] joins [Sateri Shanghai], the Employee shall have access to information about [Sateri Shanghai's] or the Group's businesses, including but not limited to information about [Sateri Shanghai's] or the Group's business practices and products, intellectual property rights, services, cost information, processes, finances, employees, compensation, client lists and their employees, drawings, marketing plans and strategies, investment strategies, techniques, know-how, pricing, methodologies, internal resources, research and development, software and other technology as well as information and products resulting from his work. By accepting [Sateri

> Shanghai's] offer of employment, the Employee agrees to use such information for its intended business purpose only for the benefit of [Sateri Shanghai] or the Group, as applicable.
>
> 3. During [Mr. Vinall's] employment with [Sateri Shanghai], [Mr. Vinall] may develop or help to develop services, products, materials, know-how or other intellectual capital related to [Sateri Shanghai's] or the Group's businesses. [Mr. Vinall] hereby assigns to [Sateri Shanghai] his rights and interests in all intellectual property rights ("IP Rights") whether or not patentable or registrable under copyright or similar statutes, conceived or learned by him, either alone or jointly with others, during the course of his employment with [Sateri Shanghai]. Inventions assigned to [Sateri Shanghai] pursuant to this paragraph shall include in particular such IP Rights developed using [Mr. Vinall's] equipment, facilities, resources or trade secret and information. [Mr. Vinall] understands and agrees that [Sateri Shanghai] or the Group, as applicable, owns all intellectual property rights, including all copyright and trade secret rights, to such work.
>
> …
>
> 6. [Mr. Vinall] undertakes not to retain any documents or storage media containing any confidential information in his possession or subject to his control at such time and shall return all company documents, files and properties, whether physical or electronic, in good condition during or after the termination of his employment, and ensure proper hand-over to the appointed employees. [Mr. Vinall] agrees to sign further declarations of confidentiality and non-retention of [Sateri Shanghai's] and/or the Group's documents, files and properties, whether physical or electronic, when so required by [Sateri Shanghai's] and/or the Group's policy or officers.
>
> ...
>
> 8. The provisions of this clause on confidentiality shall survive the termination of this employment.

[483] The Declaration defines Confidential Information and Proprietary Assets in widely-encompassing terms:

> "Confidential Information" includes, but shall not be limited to the following:
>
> (a) any and all non public information regarding the business of the Group, the Company or any Group Company, including without limitation, marketing plans and strategies, investment strategies, techniques, know-how, processes, confidential operations, cost information, client lists, drawings, information in connection with products and services, whether or not part of my work, whether or not resulting from my work or otherwise obtained in the course of my work;
>
> (b) any and all confidential information acquired by the Group, the Company or any Group Company from third parties; and
>
> (c) any and all Proprietary Assets,

> provided that any information that is, or becomes, available to the public other than as a result of breach of my obligations herein and in the Employment Documents, shall not be deemed "Confidential Information".
>
> "Proprietary Assets" means assets belonging to the Company, the Group or a Group Company, including without limitation, any and all non-public, information, intellectual property rights, patents, copyright, trademarks, trade secrets, processes, designs, concepts, know-how, techniques, notes, marketing plans, strategies, forecasts, financial and cost information, customer lists and other similar information not generally known to the public, together with all developments therefrom and improvements thereon".

- **Confidential Information in Issue**

[484] As noted, the plaintiffs' claims against Mr. Vinall sound in breach of confidence, breach of express contract and breach of his implied contractual duties of good faith, loyalty and fidelity. Their paramount contention is that Mr. Vinall misused their confidential information in the wrongful pursuit of the so-called Thurso Mill opportunity and in aid of his wrongful competition with them while still employed, for the benefit of himself and Fortress.

[485] The specific components of the plaintiffs' averments of breach of confidence is that during Mr. Vinall's employment, he:

i. converted and misappropriated the confidential and proprietary information learned and otherwise obtained during his employment with Sateri International (as that designation was broadly defined in the notice of civil claim);

ii. disclosed, used, removed and published to others confidential and proprietary information, without the consent or license of Sateri International; and

iii. negotiated new employment terms with Fortress.

[486] Most of the plaintiffs' documents in evidence alleged to contain their confidential information are marked as "confidential and intended solely for the use and information of the addressee". The testimony of Ms. Li and Mr. Goh suggested that they understood that documents displaying that confidential warning were

confidential in fact. However, the designation of confidentiality was merely a page template that Ms. Li automatically applied to every document that she created for the plaintiffs, irrespective of content. Consequently, the appearance of that standard warning is not probative of whether the information contained in the imprinted documents was confidential under the applicable jurisprudence or pursuant to the Sateri Employment Contract or the Declaration.

[487] Mr. Vinall's counsel sought particulars of the alleged confidential information through letters dated January 3, 2012 and May 31, 2013. Plaintiffs' counsel provided a partial reply by letter of January 13, 2012, and then just a week before the commencement of trial, supplied additional and more specific particulars.

[488] The particulars divide the alleged breaches into two main classifications. They distinguish confidential and proprietary information said to be misused by Mr. Vinall, from information alleged to have been wrongfully converted by all of the defendants into a Fortress presentation. I will refer to the documents containing the alleged confidential information comprising the former grouping as category one documents, and the latter as category two documents.

1. Category One Documents

[489] The plaintiffs assert that the category one documents contain confidential and proprietary information about their business plans, including the plan for expansion of their cellulose business and consideration of the opportunity to acquire the Thurso Mill. Mr. Vinall is said to have copied these documents from his work laptop to a USB stick.

[490] The plaintiffs particularized six such documents in all. Two of them were not introduced into evidence. The remaining four are:

1. The list prepared by Mr. Shaohua of the closed mill candidates with the accompanying map of North America showing the respective locations and proximity to seaports of the mills, both bearing Mr. Van Lee's highlighting. Mr. Shaohua did not testify. The only evidence as to the sources of the

information he used to compose the list were his notations on the document crediting RISI and Hawkins Wright. There was no evidence to suggest that any information in the list was not within the public domain. Ms. Li did not know how long Mr. Shaohua would have taken to prepare these documents. She agreed he may have spent "a long time" or may have pulled them together in "only a few minutes". She conceded that preparation of the map of North America would have taken only a few minutes and that the information could be obtained by using Google;

2. An email exchange attaching the chart prepared by Ms. Li showing three potential Canadian mill candidates and a map of Canada pinpointing their locations;

3. The minutes of the October 8 Meeting; and

4. The same map of North America referred to above in item 1, but with a different heading, which was circulated for purposes of the Second October Meeting, together with the agenda of that meeting.

[491] Mr. Vinall credibly explained that he organized the data he kept on his laptop by subject matter: Sateri information, industry information and personal files. He stated that he routinely backed up all data to an external hard drive as a precaution against losing the information in the event his laptop was stolen or damaged while he travelled between Brazil, Canada and, latterly, Singapore. He would often leave the external hard drive at the head office.

[492] Mr. Vinall continued that, in addition to using an external hard drive and as an extra safeguard, it was his practice to use a USB stick/thumb drive to copy weeks or perhaps a month's worth of the most current data on his laptop. He did so to ensure that he would always have handy a copy of the most current files he was working on should his laptop be lost or damaged. He viewed his actions as prudent in light of his pace of travel and his awareness of one or more instances of computer theft in Brazil, and believed it to be as much for the plaintiffs' benefit as for his.

[493] Mr. Vinall testified that after he resigned from Sateri Shanghai, he deleted all Sateri files from his hard drive. Around the same time, he transitioned to a cloud service in respect of his remaining computer files (personal and industry), and believed he had probably discarded the hard drive in the process. He explained that his collection of USB sticks/thumb drives had all been overwritten many times and, in any event, would not have held anything of relevance.

[494] At his discovery, Mr. Vinall was asked whether he copied hundreds of documents relating to Sateri's businesses to an "external storage media". He answered that he periodically backed-up certain directories onto his portable hard drive. The plaintiffs seized on the fact that at his discovery Mr. Vinall neglected to mention his use of a USB stick or thumb drive to back-up his laptop. They urged that the conveniently-timed amplification of his evidence on this matter at trial provided another example of his tenuous relationship with the truth. I do not see it that way. Indeed, the plaintiffs' approach to this issue was somewhat puzzling given that their particulars make plain that, before trial, they were well aware or, at a minimum had an adequate basis to allege, that Mr. Vinall had copied documents from his laptop onto a USB stick. In any case, I am not troubled by the difference in Mr. Vinall's evidence on discovery and at trial on this point as it does not amount to a material omission or inconsistency of any consequence.

[495] Mr. Vinall testified that he did not believe that he had retained hard copies of the category one documents or of any of the plaintiffs' documents when he left his employment. In January 2011, he received a letter from plaintiffs' New York counsel demanding that he identify the Sateri documents in his possession. The demand prompted him to go through unpacked moving boxes located in the basement of his new residence in Ottawa. Through that process he claimed to have uncovered a "couple of folders" that held the category one documents. He produced them to the plaintiffs in the course of this litigation.

[496] Mr. Goh's evidence on this topic was not far-reaching. He testified that after Tecbiz identified what had been removed from Mr. Vinall's laptop or had been

copied to another device, the data was sent to the strategic planning division in order to determine "what the damage was in terms of information leakage or potential risk to Sateri".

[497] In the summer of 2010, Mr. Goh instructed Ms. Li to review the documents on Mr. Vinall's laptop that had been routed to a shared folder. Her objective was to see whether any of those documents contained "Sateri internal information". At the conclusion of her review, Ms. Li had no knowledge as to whether any of the documents in the shared folder, apart from the documents that have been identified as falling within category two and a trip report form, were used by Mr. Vinall for a purpose other than the plaintiffs' business. Nor was she able to say whether Mr. Vinall had provided any of them to a third party. Mr. Goh provided no insight on this crucial point either. He did not testify as to whether the data from the laptop had been sent to a device other than Mr. Vinall's external storage device, and if it had, the destination of the data. Nor did he say anything about whether any of the information had been leaked, whether the plaintiffs had suffered any corresponding damage or whether they were at any risk as a result of the copying or backup by Mr. Vinall of his laptop files.

[498] Yet, Mr. Goh made the sweeping claim that he had gleaned an understanding based on the Tecbiz information that Mr. Vinall's laptop appeared to have been modified. He did not clarify the manner in which it may have been modified or how such modification might relate to any of the plaintiffs' claims in this action. Instead, Mr. Goh left dangling the implication that Mr. Vinall had somehow wrongfully altered the content on his laptop.

[499] Assuming that the information contained in the category one documents qualifies as confidential, the argument nonetheless falters on the sheer absence of cogent evidence that Mr. Vinall improperly disclosed or otherwise misused such information. That is a full answer to the claims asserted on all grounds with respect to the information alleged to be confidential in the category one documents.

2. Category Two Documents

[500] The evidence surrounding the plaintiffs' claims concerning the confidentiality of the contents of the category two documents was nearly as underwhelming.

[501] In carrying out her examination of the documents in the shared folder, Ms. Li found two multi-page Fortress presentations that she concluded contained Sateri's internal information. One presentation was called, Dissolving Pulp Price and Drivers, dated February 2010, and the other was the AcCELLerate PowerPoint at different stages of evolvement between approximately December 2009 and March 2010. Ms. Li was the plaintiffs' sole witness regarding the creation and source of the information alleged to be confidential and used in the category two documents.

[502] As a means of identifying the information contained in one or both of the Fortress presentations that Ms. Li believed originated with Sateri, she inserted clouds that encapsulated her commentary on the perceived offending pages. She promptly supplied Mr. Goh with the results of her comparative analysis.

[503] The plaintiffs' response to Ms. Li's findings is of interest. Evidently, they were too pre-occupied by Sateri International Co.'s public offering to address the misuse of their confidential information thought to be discovered by Ms. Li in a timely way. It was not until several months afterwards, in January 2011, that a general issue regarding Mr. Vinall's alleged misuse of confidential information was raised by the plaintiffs. A similar complaint was sent to Mr. Wasilenkoff on February 22, 2011.

[504] It is difficult to reconcile the plaintiffs' uncontroverted evidence that Mr. Tanoto and the Sateri organization as a whole were highly protective of Sateri's internal and confidential information, with their prolonged inaction to Ms. Li's apparent discovery of misuse. Although by no means conclusive, the plaintiffs' casual reaction, especially in those crucial early months, is not an entirely neutral factor in the analysis. It suggested that they were not overly concerned about the defendants' disclosure or use of the information in question.

[505] Like Mr. Vinall, Ms. Li maintained her own database of information about the dissolving pulp industry that she gathered from various publicly accessible sources on an ongoing basis. Many of her sources were industry consultants that Sateri subscribed to, such as RISI, Hawkins Wright and Poyry. She also amassed publicly available information circulated by competitors, as well as a "great deal" of information from the Internet, including data from governmental agencies like the U.S. Department of Agriculture ("USDA").

[506] Ms. Li drew on the information she stored in her database to perform her work assignments. Many of her graphs, charts and other work product were used by Sateri for "decision-making purposes". She was methodical in her approach. For each assignment, she would create a separate electronic file to hold her finalized work product, together with the backup data that she had relied upon for its compilation.

[507] Ms. Li agreed that she was able to conveniently access the underlying sources in her electronic files. She further agreed that, in any given instance, by comparing that underlying backup information in her database against her final work product, it would be readily apparent what additional evaluation, assembly or analysis, if any, she may have carried out and incorporated into her work product. Unfortunately, and I would venture to say inexplicably, none of Ms. Li's source data was in evidence. That omission has proved to be a serious impediment to the plaintiffs' claims.

[508] Summarized below are the contents of the category two documents that the plaintiffs assert embody their confidential and/or proprietary information:

1. A table listing several mills and their respective capacities for dissolving pulp on a page titled, Current and Planned Dissolving Pulp Capacity (the "Fortress Table");

2. A vertical bar chart showing the proportionate market share of synthetic fiber, cellulose fiber and natural fiber respectively from 2002 to 2008 (the "Fortress Market Share Chart");

3. A bar graph expressing world cotton production over a period of time (the "Fortress Cotton Production Graph") and a two-line linear graph comparing the cotton yield worldwide with the cotton yield for China (the "Fortress Cotton Yield Graph");

4. A bullet point statement and a formula expressing the yield potential of wood-based fiber as compared to cotton-based fiber (the "Fortress Yield Information"); and

5. A projection and correlation reflecting a prediction of the future demand for rayon in different parts of the world (the "Fortress Correlation").

(i) The Fortress Table

[509] It is common ground that Mr. Vinall reproduced the Fortress Table from an appendix to an internal report that Ms. Li had prepared for Sateri. She had provided the report to Mr. Vinall and others in management in about November 2009. I accept Ms. Li's testimony that the appendix was not made available outside of the Sateri organization and its group of corporate affiliates. Mr. Vinall does not deny that he received the internal report, with the appendix, in confidence.

[510] Mr. Vinall admitted that he had "grabbed the page" (i.e. the appendix) and claimed to have inadvertently used it to create the Fortress Table. He unconvincingly attested to his belief that the entire page contained information derived from his database, until he came to realize shortly before trial that two of the mills referenced, Sateri Rudong and Tiger Forestry & Paper mills, would not have been available from public sources. Tiger Forestry & Paper is Ms. Li's English translation of a Chinese company that had no official name, and the Sateri Rudong project had never been publicly announced.

[511] RISI (2009) is credited as the public source of the information displayed in the Fortress Table. Mr. Vinall explained, and I find, that he cited RISI (2009) because "a lot" of the data contained in the Fortress Table was accessible to the public from RISI and to enhance the perception of credibility of the Fortress Table.

[512] Ms. Li testified that she based the appendix exclusively on Sateri's internal records. She later back-peddled somewhat by her acknowledgement that RISI produced a similar table, although not all of the numbers appearing in the RISI source matched the numbers she used. The evidence showed that some of the information set out in the appendix was also available from Fisher International, another industry source that Ms. Li used from time to time. I find implausible Ms. Li's assertion that the information contained in the appendix was based entirely on Sateri's internal records. The probabilities of the situation show that the appendix contained a mix of a substantial amount of publicly accessible data that Ms. Li had not altered, as well as a small bit of information that was uniquely hers and was confidential to the plaintiffs. The information within that latter category consisted chiefly of the references to the Tiger Forestry & Paper and Sateri Rudong mills and, to a much lesser extent, to the dissolving pulp capacities of a few of the mills. The totality of such confidential information carries a low grade of specialness.

[513] The Fortress Table was one of 47 pages of the AcCELLerate PowerPoint presented to the Quebec government by Messrs. Wasilenkoff and Monahan. I am satisfied that during the course of that presentation, they did not discuss the content of the slides item-by-item. I consider it unlikely that they would have highlighted or placed any emphasis on the few marginally special features of the Fortress Table that were confidential to the plaintiffs, or that the representatives of the Quebec government in attendance even noticed that information.

[514] The feature of detriment as a constituent element of a breach of confidence claim was not developed in the evidence or in argument. My rejection of the plaintiffs' allegations that the Thurso Mill was a taken opportunity and that Mr. Vinall was a fiduciary effectively dispels the legitimacy of any assertion that they suffered a form of detriment stemming from the misuse of the bits of confidential information in the Fortress Table. For reasons to be explained, any suggestion that the plaintiffs' detriment took the form of their professed loss of a share of the dissolving pulp market in China occasioned by the Thurso Mill competing in that market, is similarly groundless for an abundance of reasons.

[515] The plaintiffs have not shown that they sustained any detriment, whether financial or of another kind, as a result of the misuse of the confidential information in the Fortress Table. The absence of a demonstrated detriment is fatal to this aspect of their claim sounding in breach of confidence.

[516] For completeness, I would add that the springboard principle has no application.

[517] Nonetheless, Mr. Vinall's misuse of such confidential information does constitute a breach of his Sateri Employment Contract and his implied contractual duty of good faith, loyalty and fidelity.

(ii) The Fortress Market Share Chart

[518] The Fortress Market Share Chart consists of seven vertical bars that express the market share of three different kinds of fiber: synthetic, cellulosic and natural. A separate colour is ascribed to each fiber so that each individual bar is made up of three colours to denote the proportionate market share of the three fibers.

[519] The Fortress Market Share Chart is the same as a market share chart that appears in a Sateri document prepared by Ms. Li. Ms. Li testified that she had created her chart from information in her database that had been compiled by CIRFS, a fiber society in Europe. That information was publicly available. Yet, Ms. Li had not credited any external source on her chart. That omission was at odds with her evidence that she always identified her external sources on the internal documents she prepared.

[520] The Fortress Market Share Chart cited the USDA (2009) as its source. According to Ms. Li, the USDA would only be a partial but not a complete source for the information because that agency does not compile information on the global production of rayon (i.e. cellulosic fiber). That said, she went on to acknowledge that data about the world rayon supply expressed in market shares was publicly available. Ms. Li further agreed that information about the worldwide market share of the three fibers in question is readily available in the public domain from sources

other than the fiber society she relied upon or the USDA. One such source was Oerlikon.

[521] As I have alluded to, Ms. Li's computer subfile that stored the information upon which she based her market share chart (which, on her testimony, would include the CIRFS data she used) was not in evidence. That omission has made it most difficult to assess whether Sateri's version of the market share chart is any different from a chart accessible in the public domain, except possibly with respect to the colour scheme of the graph bars.

[522] Ms. Li ordinarily used an Excel computer program to create her graphs and charts. When it came to colouring them, she would either choose the particular colours or leave it to the Excel program to insert colours in default of her making a selection.

[523] Whether, and to what extent, if any, Ms. Li brought to bear her own thought-process or unique treatment or assembly of the public information she used to create the plaintiffs' market share chart was, at best, murky on the evidence. In the end, Ms. Li's primary assertion seemed to be no better than she "thought" she had at least chosen the tri-colour scheme of the bars. In this regard, I would note that while the colours in Ms. Li's graph were not identical to the colours in the sample Oerlikon graph in evidence, they were not entirely dissimilar.

[524] Even assuming that Ms. Li did take a moment to choose the colour scheme of the bars in the chart she prepared, the straightforward act of using an Excel computer program to select those colours did not require that she exercise an independent thought process of the kind contemplated in *Lac Minerals* so as to imbue her composition with the requisite threshold of confidence. In this instance, re-colouring bars that are accessible in the public domain had no substantive effect, and was in the nature of an inconsequential aesthetic tweaking. In my opinion, it would upend the governing principles and confuse the underlying policy rationale in this area of law were I to accept that the threshold of confidentiality lays that low.

[525] In conclusion, the plaintiffs' market share chart does not contain confidential information within the meaning of the breach of confidence authorities or pursuant to the provisions of Mr. Vinall's Sateri Employment Contract or the Declaration. It follows that the Fortress Market Share Chart does not contain the plaintiffs' confidential information.

(iii) Fortress Cotton Production Graph and Fortress Cotton Yield Graph

[526] The Fortress Cotton Production Graph and Fortress Cotton Yield Graph are virtually identical to graphs that appeared in a pre-existing Sateri document titled, Upside Risks, prepared by Ms. Li. The USDA is shown as the source on the face of both the Sateri and Fortress documents.

[527] Mr. Vinall testified that he stored USDA information and charts concerning cotton yield, cotton production and the like in his database. He insisted that he had relied upon his collected data to prepare the Fortress Cotton Production Graph and the Fortress Cotton Yield Graph. He also had a recollection of having collaborated with Ms. Li in creating a very similar chart for use in a Sateri presentation. Although I accept that Mr. Vinall collected such USDA information in his database, the preponderance of the evidence is that he created the two Fortress graphs in issue simply by cutting and pasting the graphs from the Upside Risks document prepared by Ms. Li. But were the graphs used by Sateri the plaintiffs' confidential or proprietary information?

[528] Introduced into evidence were two USDA graphs. One depicted world cotton production and the other expressed cotton yield globally and for China. Both of them were accessible on the Internet. There were two differences between the USDA cotton production graph and the one prepared by Ms. Li, namely the colour coding and the years used to bookend the vertical bars. There were also differences in the colours, timeline and a few of the plot points used in the USDA graph in evidence reflecting the cotton yields, as compared to Ms. Li's graph capturing those

yields. The difference in years was readily explainable by the fact that the USDA version had been obtained from the Internet at a later point in time.

[529] Ms. Li explained that the USDA has a comprehensive website that reports on worldwide cotton production reaching back to the 1970's. She had a vast body of publicly available USDA material at her fingertips and agreed that the USDA source materials she used to prepare the plaintiffs' charts were publicly available online at no cost. She denied, however, that she had merely reproduced USDA graphs in order to create hers. Instead, Ms. Li said that she had downloaded data from the USDA website and compiled the plaintiffs' two charts based on that data.

[530] Ms. Li stopped short of providing any useful details about the nature of the USDA data that she downloaded onto her computer. Nor did she clarify what it was that she had done in relation to such data in order to arrive at the plaintiffs' graphs.

[531] That the plaintiffs' graphs are not identical to the two USDA graphs in evidence, does not necessarily mean that the plaintiffs' graphs were not among the extensive publicly available materials on the USDA website, and relied upon by Ms. Li, at the time she prepared them.

[532] The confounding exercise of attempting to ascertain whether the graphs prepared by Ms. Li contained the plaintiffs' confidential information provides a striking illustration of how the absence of documentary evidence of Ms. Li's underlying source materials has hampered a coherent evaluation of the plaintiffs' claims.

[533] On the deficient evidence put before me, I am left to speculate on whether, and to what extent, if any, Ms. Li may have applied her own brain power or signature treatment or assembly of the USDA data that she downloaded and used in preparing the plaintiffs' cotton production and cotton yield graphs. In the end, the evidence does not establish that those graphs contained the plaintiffs' confidential information by any standard. Accordingly, I find that the Fortress Cotton Production Graph and the Fortress Cotton Yield Graph do not contain the plaintiffs' confidential or

proprietary information. The springboard doctrine has no application in this instance either.

(iv) The Fortress Yield Information

[534] The Fortress Yield Information is comprised of a statement and a formula.

[535] The statement reads as follows:

> Limited growth of cotton output due to competing land usage and yield restraint

[536] The formula is expressed this way:

- Wood based fibre yield (~6 MT/Ha, assuming 25 MAI & 5.5m3/- ADMT) vs. cotton yield < 1.5 2 MT/Ha

[537] Sateri's pre-existing Upside Risks document contained an identical statement and a practically identical formula. The Sateri formula reads as follows:

- Wood based fiber yield (~6 MT/Ha, assuming 35 MAI & 5.5m3/ ADMT) vs. cotton yield < 2 MT/Ha

[538] The formula in the Sateri document reflected the wood-fibre output of the Bahia Mill as compared to a cotton-based yield; the formula in the Fortress Yield Information expressed the output of the Thurso Mill.

[539] Neither document credited an external source for the statement or the formula.

[540] Mr. Vinall agreed that he had basically typed out the Fortress Yield Information from a Sateri document he had on hand. He then changed the spelling of "fiber" to "fibre" and lowered the MAI factor from 35 to 25 to account for the difference in the expected yield from maple-based fiber (the Thurso Mill) as opposed to eucalyptus (the Bahia Mill). Those changes then altered the final outcome number. Ms. Li acknowledged that the MAI in the equation would vary depending on the wood variety and the geography of the wood source, and that such a variation would result in a different yield outcome.

[541] According to Ms. Li, the statement and formula represented her uniquely conceived work product. She maintained that no aspect of it was publicly available. In cross-examination Ms. Li appeared to be uncertain about whether this information had been included in Sateri International Co.'s public prospectus and allowed that it might have been. Her allowance posed only a faint concern and was not sufficient to sustain a finding that the plaintiffs' statement and formula had been released into the public domain and, therefore were exempted from the definition of confidential information under the Sateri Employment Contract and the Declaration.

[542] Mr. Vinall, on the other hand, was adamant that the formula used in the Fortress Yield Information, as well as the formula appearing in the plaintiffs' document, reflected an accepted industry-wide calculation regularly used to contrast the wood yield of fiber to the cotton fiber yield. He persuasively maintained that he had used the formula many times in the past, and that there was nothing special about the concept it conveyed. As for the statement appearing above the formula, Mr. Vinall conceded that he had copied it verbatim straight from Sateri's Upside Risks document because he "agreed with it" and considered it to be an "elegant" way of communicating the point.

[543] I find it more probable than not that the formula used by Ms. Li was widely known and applied broadly in the industry to calculate the difference in fiber yields, subject simply to variations in the inputting of the MAI factor and the consequential change to the yield outcome.

[544] Ms. Li testified that the formula she used was essentially the source for her statement appearing above it. I understood her to mean that the statement represented the verbalization of the conclusion proved by the formula. Still, her statement was an "elegant" articulation of information demonstrated by application of the formula that she composed using her thought process and was not publicly accessible.

[545] I conclude that the statement (but not the formula) in the Fortress Yield Information was confidential to the plaintiffs. In terms of specialness, the statement falls at the lowest end of the continuum.

[546] The Fortress Yield Information appeared in the AcCELLerate presentation and in the Dissolving Pulp Price and Drivers document. The evidence concerning the use made by Fortress of the latter document was undeveloped apart from indicating that it may have been provided to one or more investors.

[547] For the reasons already given in my discussion of the Fortress Table, there is no evidence to support a finding that the plaintiffs experienced a detriment of any kind on account of the defendants' misuse of the confidential statement contained in the Fortress Yield Information. Accordingly, the plaintiffs' claim for breach of confidence fails. As in the case of the Fortress Table, Mr. Vinall's misuse of the confidential statement was in violation of his contractual obligations.

(v) The Fortress Correlation

[548] Based on data of the historical GDP of China, India, Thailand, Indonesia, North America and Western Europe, Ms. Li prepared a projection of the rayon markets and analysed the data to find a correlation between GDP and the output of rayon in those regions. She then applied that correlation to project future demand for the downstream rayon market and, based on that, extrapolated the future demand on the upstream side. To explain her projection and correlation, Ms. Li used a combination of text, a bar chart and six box charts each containing formulae presented on a one-page document.

[549] Ms. Li credibly assured that she had devised this methodology of projection and correlation of output, and that it was not in the public domain.

[550] In the course of conducting her review of Fortress's Dissolving Pulp Price and Drivers presentation, Ms. Li noticed a slide that showed a linear graph reporting rayon production in China, India and five other continents or partial continents. That

graph was accompanied by the following two bullet points of text that I have defined as the Fortress Correlation:

- Projections based on expected GDP growth per OECD (2009)
- Correlation between historical GDP growth and Rayon Consumption is over 0.80 which is higher costs and most have closed

[551] The Fortress Correlation caught Ms. Li's keen eye. To her, it did not relate to the information shown in the line graph appearing underneath. This perceived disconnect caused Ms. Li to become suspicious that the Fortress Correlation may have been based on a "takeoff" of the methodology of projection and correlation she had conceived and used for Sateri.

[552] On their face, there are no obvious similarities between the information in the Fortress Correlation and Ms. Li's methodology of projection and correlation of output.

[553] Ms. Li did not offer any specifics to better explain how the Fortress Correlation was said to relate to or be derived from her methodology of projection and correlation. On balance, her evidence was lacking in basic and material detail to reasonably sustain a finding to align with her suspicion that the Fortress Correlation represented a misuse of the plaintiffs' confidential information.

[554] The claim that the Fortress Correlation contains the plaintiffs' confidential information has not been made out.

- **Other Allegations of Misuse of Confidential Information**

[555] Some months after Mr. Vinall joined Fortress, he asked his former Sateri colleague, Michael Laberge, to supply him with an example of a technical trip report used at Sateri. The evidence suggested that Mr. Laberge was still an employee of Sateri at the time and may have been interested in joining Fortress. Obliging Mr. Vinall's request, Mr. Laberge emailed him a seven page trip report that he had prepared for Sateri. The trip report set out Mr. Laberge's observations and recommendations concerning steps to be taken by Sateri's downstream facility in

China to improve the quality of its viscose product. Much of the report's content appears to be technical in nature and the relevance of it was not explained at trial. Mr. Goh pointed to a few portions of the trip report that were not public, would not normally be disclosed by Sateri and he claimed were confidential. His evidence was not challenged and I accept that the information he identified was confidential. Mr. Vinall appeared to concede as much.

[556] Without giving it much thought, Mr. Vinall forwarded the trip report to Mr. Veilleux as a sample. The ultimate use, if any, made of the report was not clarified.

[557] The trip report did not come to Mr. Vinall in the course of his employment with Sateri and Mr. Laberge's disclosure of it to him did not occur in circumstances that imparted an obligation of confidence upon him. Mr. Vinall's receipt and treatment of the Sateri trip report, was not in breach of confidence on Mr. Vinall's part.

[558] The probabilities of the evidence persuade me that Mr. Vinall became aware of the existence and use of such reports in the course of his employment with Sateri. The Sateri Employment Contract stipulated that his covenants pertaining to confidentiality survived the termination of his employment for 12 months. I find that Mr. Vinall's provision of the trip report to Mr. Veilleux within that time period constituted a breach of contract to the extent that it contained the pieces of confidential information highlighted by Mr. Goh.

[559] The plaintiffs contend that perhaps the most valuable information conveyed by Mr. Vinall to Fortress was his own conclusion that the Thurso Mill was an appropriate candidate for conversion. They say that, because he made that determination in the course of and as a result of his employment, it was confidential to the plaintiffs. The plaintiffs' assertion was made in the context of their larger argument that Mr. Vinall breached several of his fiduciary duties and was hinged to his status as a fiduciary. Even so, I wish to briefly address it.

[560] I agree that Mr. Vinall's assessment of the suitability of the Thurso Mill for Sateri was confidential to the plaintiffs; so too was his disclosure to Mr. Wasilenkoff that Mr. Tanoto, and thus Sateri, had passed on it as a conversion prospect.

[561] Mr. Wasilenkoff was a seasoned entrepreneur with a proven track record of successful business achievements. Mr. Vinall was not. It is implausible that Mr. Wasilenkoff would have been prepared to move on the Thurso Mill assets merely on Mr. Vinall's say so during the October 2009 Call, as the plaintiffs suggest.

[562] The points canvassed in my earlier discussion regarding the lack of any demonstrated detriment in relation to Mr. Vinall's misuse of the confidential information in certain category two documents has application in this instance. I find an absence of detriment stemming from Mr. Vinall's disclosure to Mr. Wasilenkoff. Although a breach of confidence claim cannot be made out, Mr. Vinall's disclosure of this confidential information was made in violation of his contractual obligations.

- **Breach of Confidence Claim against Fortress**

[563] With a domino-like effect, the dismissal of the claim of breach of confidence against Mr. Vinall defeats the claim in equity against Fortress for allegedly knowingly coming into possession of information obtained in breach of confidence.

[564] With respect to the category two documents, it remains to add that, in any event, proof that Fortress had knowledge at the time that the Fortress presentations were composed and used that such information was confidential to the plaintiffs was not established on the evidence. To the contrary, what the evidence demonstrated was that Fortress first learned of the possibility that Mr. Vinall had used the plaintiffs' internal and/or confidential information in its presentations from Mr. Vinall's "dead meat" email sent to Mr. Wasilenkoff on March 6, 2010. Allowing the status quo to persist was unacceptable to Mr. Wasilenkoff. He immediately instructed Mr. Vinall to purge the offending material and have Fortress's lawyer review the amended version.

Claim that Vinall Competed with Sateri and/or Assisted Fortress While Employed by Sateri

- **General Comments**

[565] In the preceding section of my Reasons, I concluded that Mr. Vinall's misuse of the plaintiffs' confidential information violated his contractual obligations. Other contractual breaches have also been alleged. The most serious of them is that Mr. Vinall breached his implied contractual duty of fidelity by undertaking steps in active competition with the plaintiffs' upstream dissolving pulp business while still an employee of Sateri Shanghai.

[566] It was further contended that Mr. Vinall's conduct in that regard separately constituted a breach of several of his express contractual obligations. In differing ways and in varying degrees, those obligations forbade Mr. Vinall from engaging in commercial-type activities outside the businesses of the broadly defined Sateri "Group", which included the plaintiffs. The express contractual provisions that Mr. Vinall is said to have violated are his obligations:

a) not to engage directly or indirectly in another business or occupation, except with Sateri Shanghai's written permission, pursuant to clause XV.2 of the Sateri Employment Contract;

b) not to be employed by, hold positions with, nor be engaged in activities on behalf of others, unless with other Sateri "Group" companies or with approval, pursuant to clause XVIII.1 of the Sateri Employment Contract; and

c) not to compete against the plaintiffs or any "Group" companies in any way during the term of the Sateri Employment Contract and for 12 months following termination of employment pursuant to clause XVIII.2.

[567] Before turning to the specific allegations of breach, I would emphasize that predominantly all of the plaintiffs' submissions concerning Mr. Vinall's alleged misconduct in this area, including their selection of case authorities, presupposed that he owed them fiduciary duties and that the Thurso Mill was the plaintiffs'

opportunity wrongfully appropriated by Mr. Vinall and pursued by Fortress. Comparatively little was said by the plaintiffs concerning Mr. Vinall's liability as a non-fiduciary employee and the majority of the submissions made on the point were essentially statements of conclusion.

- **Implied Contractual Duty to Refrain from Competing**

[568] Subsumed within an employee's bedrock duty of fidelity, good faith and loyalty is the obligation to refrain from actively competing with his or her employer's business during the subsistence of the employment relationship: *McMahon*; *Zoic*; *Restauronics Services Ltd. v*. *Forster*, 2004 BCCA 130 [*Restauronics Services*]; *RBC Dominion Securities*. In those instances, protection of the employer's interests is given precedence over the employee's entitlement to pursue self-betterment.

[569] An employee's obligation is not so strict as to preclude him or her from tilling the soil for future employment opportunities or ventures and undertaking some planning and preparatory steps in that regard during the currency of employment: *Zoic* at paras. 187 and 188; *RBC Dominion Securities*. The challenge lies in determining the boundary between acceptable planning and preparation on the one hand, and impermissible competition with one's employer on the other. The lack of clarity as to when the actions of a current employee cross the line from the tolerable to the improper has been lamented in the authorities. Whether or not the employee is also a fiduciary informs the analysis.

[570] In *Fleming v. Calyniuk*, 2007 SKCA 85 [*Fleming*], relied upon by the plaintiffs, the Saskatchewan Court of Appeal canvassed several appellate decisions that considered what steps aimed at competing with the employer may be permissible of a fiduciary employee in contrast to an ordinary employee. The court's discussion speaks to the difficulty in finding the line between acceptable and unacceptable conduct.

[571] Included among the cases surveyed in *Fleming,* is *Torcana Valve Services Inc. v. Anderson*, 2007 ABQB 356 [*Torcana*], which Mr. Vinall relies upon. In

Torcana, Graesser J. examined the scope of permissible conduct of an ordinary employee and a fiduciary employee, concluding at paras. 54 and 55:

> [54] It appears clear from the case law that it is not a breach of duty for an ordinary employee to plan his or her departure from the employer's employment, nor is it problematic for the employee to make plans with other employees. A caveat on that is that these activities should not occur during normal working hours nor on the employer's premises, and should not involve any inducements to breaching contractual duties. Failing those impediments, however, there are generally no restrictions on employees planning to leave and set up a competing business (other than issues relating to misuse of confidential or proprietary information after they have gone). Are things different for a fiduciary employee?
>
> [55] The answer to that question is fact driven and not always clear. It would generally be contrary to public opinion and contrary to common sense, to prohibit a fiduciary from contemplating leaving and working for the competition, while still employed. So long as the fiduciary can fulfil his or her employment obligations, I see no difficulty in concept with a fiduciary making plans and indeed acting on them in a preparatory way. Getting legal advice, getting accounting and tax advice, arranging for premises, arranging for staff and other normal things involved in setting up a business might be done without any breach of fiduciary duty (so long as they are done on the fiduciary's own time, off the employer's premises, and while the fiduciary is still faithfully performing his or her job).
>
> [Underling added]

[572] In *Fleming,* the Court expressed uncertainty as to whether the authorities went so far as to support the underlined portion of the above passage in *Torcana*, without imposing an obligation on the fiduciary to inform and obtain consent from the current employer. Acknowledging that Graesser J. made those comments in *obiter*, the Court in *Fleming* did not make a determination one way or the other.

[573] *Fleming* did not indicate disagreement with the comments of Graesser J. made in para. 54 concerning the steps that are acceptable for an ordinary employee to undertake in advance of leaving the present employer. If Graesser J.'s comments are interpreted to mean that it is permissible for an ordinary employee to actually set up a competing business while still employed, as opposed to taking preparatory planning steps to set it up, I have reservations about their accuracy. The term "set up" strikes me as somewhat ambiguous in this context, and, if given a broad construction, could conceivably sanction the employee actively implementing an

operating competing business and taking similar steps that would encroach over the line drawn in *RBC Dominion Securities*, discussed below.

[574] Returning to *Fleming*, the appeal was decided on the footing that the employee in question owed his employer a fiduciary duty. At para. 24 the Court held that, although the distinction between the implied duty of fidelity and fiduciary duties was not obvious, something more is required of an employee who owes fiduciary duties than of one who owes only a duty of fidelity. Jackson J.A. concluded that a fiduciary employee may not be in breach where he or she is "simply in the preliminary stage of either contemplating or casually discussing with others the possibility of developing his or her own competing business": at para. 25. Expanding on that proposition, Jackson J.A. noted that there were no cases that have held that "preparatory steps of an embryonic nature only, and taken on one's own time, constitute a breach of an employee's fiduciary duty of loyalty such that they must be disclosed": at para. 28. Where the conduct of a fiduciary employee goes beyond such preparatory steps, he or she is likely duty-bound to inform the employer and obtain the employer's consent. Jackson J.A. reasoned that this obligation stemmed from the fiduciary's fundamental duty to avoid conflicts of interest and to disclose them when they arise, and distinguished the fiduciary employee from the ordinary employee.

[575] In *RBC Dominion Securities,* the Supreme Court of Canada considered the contours of an employee's implied duty of good faith in the context of the actions of a branch manager who had orchestrated his departure to join a competing firm with the majority of his investment advisors in tow, causing a "near-collapse" of the employer's investment department.

[576] At paras. 18-19, 37 and 39-41, McLachlin C.J.C. and Abella J., respectively, affirmed the proposition that as soon as the employment comes to an end employees are generally free to compete with their former employer's business. There are exceptions where there is a valid restrictive covenant limiting post-employment competition, the employee owes a fiduciary duty to the former

employer and where the employee misappropriates the former employer's confidential information or trade secrets and exploits them for the purposes of competition. McLachlin C.J.C., for the majority, affirmed the decision of the Court of Appeal that an employee who has terminated employment is not prevented from competing with his or her employer during the notice period. In those circumstances, the employer is confined to damages to compensate for the employee's failure to give reasonable notice. To this general proposition, the Court reiterated, at para. 18, the important qualification that a departing employee might nonetheless be liable for specific wrongs, such as improper use of confidential information during or after the notice.

[577] Madam Justice Abella, dissenting on the conclusion of the majority that the branch manager breached his implied duty of good faith in the manner of his departure, discussed the kinds of steps that an employee is entitled to take to seek new employment with a competitor during the currency of his or her employment:

> [57] … It seems to me that a necessary corollary to an employee's undisputed right to compete following the termination of the employment relationship is the right to plan for future employment opportunities while still employed. This is subject, of course, to the duty not to breach an employer's confidentiality. But it is not, in my view, a breach of an employee's implied duty of good faith to search for alternative job opportunities, to negotiate with a competitor, or to talk to co-workers about his or her intentions. (See Stacey R. Ball, *Canadian Employment Law* (loose-leaf), vol. 1, at p. 15-2, footnote 9.) I agree with Macklin J.'s observation in *Westcan Bulk Transport Ltd. v. Stewart* (2005), 373 A.R. 236, 2005 ABQB 97, that:
>
> > Every individual has the fundamental right to earn a livelihood... . Reasonable restrictions [on that right] do not include those reasonable steps the employee must take to prepare to earn a livelihood as soon as possible following the termination of employment with the employer. [para. 83]
>
> (See also *Leith v. Rosen Fuels Ltd.* (1984), 5 C.C.E.L. 184 (Ont. H.C.J.), at p. 195.)

[578] Abella J.'s reasoning was informed by the trial judge's finding, which was not appealed, that the branch manager did not owe a fiduciary duty to the employer. She acknowledged that fiduciary employees are held to a higher and more exacting standard: at paras. 46 and 47.

[579] In *Zoic*, at para. 187, Russell J. referred to the instructive discussion of the distinction between planning and preparation and competition by the authors of Geoffrey England, *Employment Law in Canada*, vol. 2, 4th ed. (loose-leaf, updated June 2012, release 38) (Markam Ont.: LexisNexis Canada Inc., 2005) at §. 11.137. The equivalent passage in the updated loose-leaf version dated December 2016, release 68 at §.11.137, reproduced below, endorses the principles articulated by Abella J. in *RBC Dominion Securities* concerning the bounds of unobjectionable conduct of a non-fiduciary employee in planning for a new job with a competitor:

> Difficulties have arisen in determining the exact point at which planning and preparation by an employee who is still employed to set up himself or herself in competition with the employer will violate his or her implied duty of fidelity. In two older cases, the courts held that the implied obligation was breached when employees met with a competitor, or between themselves, to discuss setting up in business to compete directly with their employer. It is submitted, however, that these decisions should be viewed with circumspection. After all, if it is lawful for an employee to engage in post-termination competition with an employer, it hardly makes sense to hold it unlawful to plan the form that such competition will take. In later decisions on point, the courts have held that merely planning to establish a competing business does not *ipso facto* violate the duty, unless it is clear that the employee has already determined to abuse the employer's confidential information or trade secrets in his or her future business or has already begun to canvass the employer's customers or entice fellow employees of the employer to join him or her in the new business. The two earlier decisions can be explained on the ground that the employees in question, in addition to planning to set up a competing business, had decided firmly to misuse their employer's confidential information. The principle expressed in the later decisions is the better view, for as Sloan C.J.B.C. stated in his dissenting opinion in one of the earlier decisions, the oppositive view would tread:
>
> > … dangerously close to saying that in a free enterprise society a man's thoughts and conversation of an intention to attempt to better his position in life by leaving his present position and undertaking another even in competition with his employer is an actionable wrong…
>
> Nor does it violate the duty of fidelity for an employee to search out alternate employment with a competitor organization, to respond to a competitor's offers of employment and to accept an offer of alternate employment, the policy being to facilitate labour mobility. While written in the context of a dissent over a finding that a branch manager not in a fiduciary relationship had nonetheless breached an implied duty of good faith in leading an exodus of investment advisors to a new firm, Abella J. in [*RBC Dominion Securities*] sets out, it is submitted, the applicable principles for employees planning on moving to a new employer or starting up their own ventures. The learned justice noted that non-fiduciary employees regularly leave their employers

> and, in the absence of any competition during their employment or improper use of confidential information, it is not a breach of an employee's implied duty of good faith "to plan for future employment opportunities while still employed". This includes an employee searching for alternative job opportunities, negotiation with a competitor or talking to co-workers about his or her intentions.
>
> [Footnotes omitted]

- **Express Contractual Provisions to Refrain From Competing and Similar Activities**

[580] A preliminary issue for determination is whether Mr. Vinall was subject to a valid non-compete covenant under the Sateri Employment Contract and/or the Declaration, as alleged by the plaintiffs.

[581] The provision of the Sateri Employment Contract that Mr. Vinall is said to have breached in this regard reads, in relevant part:

> XVIII.2. Subject to any existing non-restraint of trade legislation, [Mr. Vinall] shall not, at any time during the term of his employment with [Sateri Shanghai] and for a period of **12 months** after the termination of his/her employment with [Sateri Shanghai], do or permit any of the following without the prior written consent of [Sateri Shanghai]:
>
> > (i) directly or indirectly carry on or be engaged or interested in any capacity in any occupation similar to that of [Mr. Vinall] when [Mr. Vinall] was employed by, held positions with and/or was engaged in activities with the business or businesses of [Sateri Shanghai] or any Group companies;…
>
> [Bolding in original]

[582] The non-compete covenant is not confined in its geographic coverage. However, a geographic limitation is imposed by the corresponding non-compete restriction found in paragraph 4.2.1 of the Declaration:

> Subject to compliance with law, I shall not, at any time during the term of my employment with [Sateri Shanghai] and for a period of **twelve (12)** months after cessation of my employment with [Sateri Shanghai], do or permit any of the following without the prior written consent of [Sateri Shanghai]:
>
> > 1. be engaged in any activity or employment, similar to the scope and contents of my work whilst I was employed by [Sateri Shanghai], <u>in any country where [Sateri Shanghai] has offices or plants;</u> ...
>
> [Underlining added]

[583] It will be remembered that the Declaration stipulates that, to the extent of any conflict between its terms and those of the Sateri Employment Contract, the terms of the Declaration prevail.

[584] The non-compete provisions set out in clause XVIII.2 of the Sateri Employment Contract and those in paragraph 4.2.1 of the Declaration are in plain conflict as they pertain to the geographic reach of Mr. Vinall's obligations. The former does not impose a limitation, and the latter does. Accordingly, the provisions of the Declaration apply.

[585] There is no evidence that Sateri Shanghai has, or ever did have, a plant or office in Canada so as to trigger application of the non-compete provision contained in the Declaration. That is also true with respect to the two other plaintiffs and the non-plaintiff Sateri companies.

[586] In the result, the restraints set out in clause XVIII.2 of the Sateri Employment Contract and in paragraph 4.2.1 of the Declaration have no application to Mr. Vinall.

[587] Mr. Vinall's employment agreements contain other provisions that purport to impose relatively extensive limitations on his entitlement to directly or indirectly engage in certain activities during the course of his employment.

[588] Clauses XV.2 and XVIII.1 of the Sateri Employment Contract respectively stipulate:

> XV.2
>
> [Mr. Vinall] will not, except with written permission from [Sateri Shanghai], engage directly or indirectly in any other business or occupation whether as principal, agent or otherwise, except where appointed to positions and duties within other Group companies, or engage in any activity to the detriment, whether direct or indirect, of [Sateri Shanghai's] or the Group's interests.
>
> […]
>
> XVIII.1
>
> [Mr. Vinall] shall not during the term of his/her employment with [Sateri Shanghai] be employed by, hold positions with, nor be engaged in activities on behalf of other employers or principals unless approved in writing by [Sateri Shanghai] or unless engaged in such manner by other Group companies.

[589] A parallel and more expansive curtailment is contained in paragraph 4.1 of the Declaration:

> I agree that I shall not during the term of my employment with [Sateri Shanghai] be employed by, hold positions with, nor be engaged in activities on behalf of any principals or entities, or be engaged in my own enterprise whether by myself or jointly with other persons, directly or indirectly in any capacity whatsoever, unless approved in writing by [Sateri Shanghai] or unless engaged in such manner by other Group companies.

[590] Read together, the foregoing provisions have a wide grasp. I will consider their application in the analysis below.

- **Analysis**

[591] To set the discussion I will say that Mr. Vinall's credibility suffered more in relation to this disputed subject area than in all others. He repeatedly minimized the nature, regularity and importance of his participation in Fortress's acquisition of the Thurso Mill. His insistence that he provided limited and only technical input to Fortress on the conversion feature and its overlap with the co-generation element, which he claimed totalled not more than the equivalent of seven full days on his own time, is implausible on any considered weighing of the evidence. Although I accept that Mr. Vinall repeatedly exaggerated the overall importance of his role in the transaction as a negotiating tactic to maximize his compensation, there was more than a kernel of accuracy in his self-promoting communications to Mr. Sangra and to Mr. Wasilenkoff.

[592] Mr. Vinall's dominant interest in arranging the October 2009 Call was to secure new employment that would facilitate resettlement in Canada with as lucrative an employment arrangement as possible and, ideally, with an equity position in the new venture. In order for his goal to be realized, Fortress had to acquire the Thurso Mill. With that vital objective at the forefront and in some respects comporting himself with the mindset of a future owner, Mr. Vinall helped to lay the groundwork to bring it about. He furnished his assistance over a period of nearly six months while still working at Sateri.

[593] By its nature, the proposed Thurso Mill project was complex and multifaceted, entailing the negotiation and achievement of a series of decisive milestones along the way to completion. Obtaining a financial commitment from the Quebec government was the linchpin of the entire transaction. The AcCELLerate PowerPoint was an important part of Fortress's introduction to the Quebec government and Mr. Vinall was instrumental in the composition of some of the slides. That said, the evidence does not go so far as to establish that the PowerPoint presentation played a significant role in Fortress securing the deal – not by any means. It was merely one factor in a complex scenario that helped introduce Fortress to the government and obtain a greenlight to move to the next stage. Fortress's successful track record in the forestry sector likely played a greater role in gaining a credible foothold with the Quebec government. But it was not decisive either. In the context of this discussion, it cannot be overlooked that weeks after the AcCELLerate presentation, the monitor instructed Mr. Veilleux to contact several other companies as potential buyers and Fraser Papers entered into at least one confidentiality agreement relative to the Thurso Mill transaction with another third party.

[594] Mr. Vinall readily shared his technical and operational expertise when called upon and by his own initiative. In addition to misusing the small bits of confidential information in the category two documents and sharing the trip report, Mr. Vinall took advantage of some of the plaintiffs' internal resources. For example, he obtained the Cornerstone model data from Mr. Shaohua, passed along information about the Kemijarvi assets he had obtained from Mr. Leite and used other internal information, such as the tree trunk graphic. A further example is found in Mr. Vinall's request in December 2009 to a Sateri marketing employee to share data compiled by an industry consultant called PCI. At trial, Mr. Vinall testified that over the years he had collected materials prepared by PCI into his database and that he "knew the principal at PCI very well". However, it is plain from his own email to the Sateri employee that he did not know who PCI was at that time. Mr. Vinall's explanation for this inconsistency was unsatisfactory. He wanted the PCI data in furtherance of the Thurso Mill project.

[595] Mr. Vinall also took steps to bring Mr. Monahan aboard and with some regularity throughout the timeline, communicated with him, Mr. Veilleux and others about a range of technical and operational matters facing the project. After the Quebec government confirmed its preliminary interest and the deal began to unfold, the nature and frequency of Mr. Vinall's involvement expanded. Mr. Wasilenkoff treated Mr. Vinall as though he was part of the Fortress team. They were in regular contact to discuss technical concerns, as well as other matters of substance (for example, Mr. Vinall reviewed and commented upon one or more of Fortress's proposed letters of intent to the Quebec government). I find that Fortress shared information with Mr. Vinall under the Fraser Papers' confidentiality agreement because it looked upon him as acting in a consultative-like role. Fortress also introduced Mr. Vinall to Mr. MacHan who understood that "John" would be Fortress's lead technical person for the conversion. Having confidence that Fortress had that in-house technical expertise was of importance to the Quebec government.

[596] Mr. Vinall was kept apprised of the major developments in the transaction as they occurred, including some of the unanticipated problems that erupted along the way. He participated as a technical advisor of sorts to Fortress in at least two telephone conferences with the stakeholders. Along with Mr. Veilleux, he assisted in the development of a modified business plan for the project to address matters raised by the government. He also helped rewrite information for inclusion in presentations for potential investors. He even provided input on engineering matters related to the conversion. As far as Mr. Vinall was concerned, he began to incur travel expenses on behalf of Fortress in early March 2010, although Fortress declined to reimburse him.

[597] It is the case that Mr. Vinall played no significant role in negotiating the details of the transaction with the Quebec government or the monitor. Nor did he assist Fortress in overcoming the many non-technical hurdles it confronted in trying to close the deal, such as achieving agreement with the trade unions, resolving an unexpected environmental problem and obtaining the approval of the monitor and of the court. But that does not diminish the fact that Mr. Vinall's assistance behind the

scenes was steady and crucial. Because the Thurso Mill had been virtually inoperative and running with a skeletal staff to "keep the lights on" for a prolonged period, the substantive technical and operational decisions he was part of to restart the plant and implement the conversion were vital.

[598] In any event, the applicable test does not ask whether Mr. Vinall made the largest or the most significant contribution in bringing the potentially competitive venture to fruition. What is of interest is whether his conduct trespassed into the impermissible realm of actively assisting in the creation and implementation of a transaction by which it was understood his new employer would become a competitor in the upstream dissolving pulp business.

[599] Fairly early on Mr. Vinall used his middle name and an alias email to shield his identity and thus his involvement with Fortress to the outside world. I find that he was initially motivated to do so because there was no guarantee the Fortress deal would pan out and he worried that his job at Sateri would be jeopardized if his intention to join Fortress was exposed. As the months passed and his assistance to Fortress intensified, the veil of secrecy became all the more essential as Mr. Vinall could see that the nature and extent of his involvement had crossed the line of what was acceptable pre-resignation planning and preparation. Mr. Wasilenkoff went along with Mr. Vinall to evade detection by the plaintiffs for the same reasons. Mr. Vinall's fear of reprisal by Sateri and his insight into his dereliction of duty not to compete with his current employer, and Mr. Wasilenkoff's appreciation of those two factors, were also behind their phoney email string that gave the impression that Mr. Vinall's connection with Fortress arose after he resigned. Another factor driving Mr. Vinall's covert conduct was his concern over his liberal use of the plaintiffs' internal (although not necessarily confidential) information.

[600] Among the prime excuses offered by Mr. Vinall in defence of his conduct was that, because Fortress had not obtained court approval to seal the deal and was not actually producing dissolving pulp at the Thurso Mill when he resigned, he cannot be said to have been competing with the plaintiffs in the upstream business. It is of

significance that the competitive enterprise in this case was not a ready-made business. Rather, it could only materialize through the successful navigation of a complex transaction. To sanction such a narrow conception of an employee's act of competition would be misguided in the circumstances at hand. It could allow an employee to cross the line for the purpose of facilitating a third party's acquisition of a competitive business that would soon employ the employee, without violating his or her implied contractual duty so long as such business did not activate until after the employee's resignation. Concurrence in that approach poses a danger of eroding the parameters of the employee's implied duty and does not resonate with the rationale for prohibiting employees from competing with their current employer.

[601] The fact that partway through Fortress's negotiations with the Quebec government, the project was changed to incorporate a co-generation element does not make Fortress any less a potential competitor. Converting the Thurso Mill to a dissolving pulp plant remained a mainstay throughout.

[602] The preponderance of the evidence amply demonstrated that, while still employed by Sateri Shanghai, Mr. Vinall's actions between mid-to-late October 2009 and his resignation on March 26, 2010, exceeded allowable planning and preparation to leave his employment and take up new employment with a competitive business. That, however, does not end the analysis.

[603] As an employee of Sateri Shanghai Mr. Vinall was duty-bound to refrain from competing with it during the subsistence of his employment. Sateri Shanghai is in the business of human resources management; it is not directly involved in the upstream side of the dissolving pulp business. In my view, it is too tenuous a factual stretch to find that Mr. Vinall was competing with the business of his actual employer. The same holds with respect to his actions in competition *vis-à-vis* Sateri Singapore, the only other plaintiff that, arguably, was Mr. Vinall's direct employer, as it too is solely in the business of managing personnel.

[604] The plaintiffs looked to the common employer doctrine as a means of overcoming that factual disconnect. They contended that its application would

extend the implied duty owed by Mr. Vinall to Sateri Shanghai (or, arguably, to Sateri Singapore) to the entire Sateri group of companies. In effect, the plaintiffs relied on the doctrine to import into Mr. Vinall's implied contractual duty the broad reach of the Sateri Employment Contract that obligated him to the Sateri group at large. This is a convenient place to remark that none of the parties asserted that Mr. Vinall's express contractual provisions overtook Mr. Vinall's implied obligation to not compete.

[605] As has been gone through, the Bahia Mill is owned directly by Bahia Specialty. It seems obvious that Fortress Specialty was the corresponding potential competitor of Bahia Specialty. Even if Bahia Specialty was considered to be Mr. Vinall's employer pursuant to the common employer doctrine and he was found to have actively competed with that entity, it is not a plaintiff. It must surely be the case that, in addition to extending Mr. Vinall's duty not to compete to all of the Sateri corporations, there must still be a finding of fact that he breached that duty with respect to a plaintiff. In this regard it is noteworthy that in *Manley*, where the court disregarded the corporate veil to widen the employee's duty and liability beyond his direct employer to the employer's parent company, both the parent and the subsidiary were plaintiffs and the employee was in fact in competition with the parent.

[606] Another way to consider the issue might be to ask whether the concept of acting in competition in these circumstances ought to be given the widest possible interpretation so as to find that Mr. Vinall's conduct *vis-à-vis* Fortress was in competition with the holding company, Sateri International Co. on the logic that it has an indirect interest in Bahia Specialty. However, that link relies on a very distant relationship involving three degrees of legal corporate separation between Sateri International Co. and the active company, Bahia Specialty. Further muddying the cohesiveness of that analysis is the fact that Sateri International Co. has indirect interests in other Sateri operating businesses, such as the downstream branch of dissolving pulp and the sale of products.

[607] To expand the common employer/group enterprise doctrine for the purpose of compromising the interests of employees, rather than in furtherance of its original purpose of protecting the interests of employees, engages significant policy considerations and carries potentially far-reaching ramifications for employees. It is also fraught with conceptual and practical difficulties, some of which may have been attenuated by including Bahia Specialty as a plaintiff. That is not to say that the doctrine is necessarily to be forever consigned to enlarging the concept of employers for the benefit of employees. However, in the case at hand, none of these pivotal considerations were addressed by the evidence or the underdeveloped submissions presented.

[608] For the foregoing reasons and having regard to the desirability of carefully limiting the application of these doctrines, I find that I am without a sufficient evidentiary or principled foundation to conclude that Mr. Vinall engaged in competition against any of the plaintiffs in breach of his implied duty of fidelity, loyalty and good faith.

[609] My conclusion likely has little practical effect (and, in saying this, I have considered the remedy side of the equation). This is because Mr. Vinall's conduct under discussion clearly amounted to a breach of his obligations under the Sateri Employment Contract. By contract, he expressly agreed that those obligations were owed to the Sateri "Group" at large, and are not restricted merely to the act of competing with his employer. Mr. Vinall's conduct that I have summarized above, can fairly be characterized as engaging:

a) "…indirectly in any other business…" in the capacity of "…otherwise", without having obtained proper approval, in violation of clause XV.2 of the Sateri Employment Contract; and

b) "…in activities on behalf of other…entities…indirectly in any capacity whatsoever", without approval, in breach of clause XVIII.1 of the Sateri Employment Contract as augmented by paragraph 4.1 of the Declaration.

[610] In the aforesaid way and to that extent, Mr. Vinall breached clauses XV.2 and XVIII.1 of the Sateri Employment Contract and paragraph 4.1 of the Declaration.

Alleged Breach of Six Month Notice Requirement

[611] Clause XIX.6 of the Sateri Employment Contract required Mr. Vinall to provide six months' notice of his resignation or pay a sum in lieu of notice. The same clause also empowered Sateri Shanghai, in its sole and absolute discretion, to waive the notice requirement. As mentioned, when Mr. Vinall tendered his resignation the plaintiffs gave no indication to him that he was to adhere to his obligation to pay in lieu of proper notice. They did an about-face long after they first became aware that he had joined Fortress.

[612] As I understand it, the thrust of the plaintiffs' argument is that Mr. Vinall resigned on the pretext of his tragic family situation and, in that way, misled them about the real reason for his departure. They assert that because he misrepresented why he was leaving, his contractual obligation to pay in lieu of notice should be enforced. The plaintiffs did not direct me to any case authorities of assistance or further develop their sparse submissions.

[613] There was more than one reason behind Mr. Vinall's decision to leave Sateri. He had grown dissatisfied with his employment there for an array of reasons, particularly the unexpected protraction of his commitment to be in Brazil and his revelation that he may never ascend to the upper management post for which he had been recruited. Intertwined with those reasons and driving his desire to return to Canada, were Mr. Vinall's delicate family circumstances.

[614] In Mr. Vinall's own words to Mr. Wasilenkoff, portraying his family crisis to Sateri as the reason for his departure was not "stretching" the truth far - and I find it was not. Although Mr. Vinall over-emphasized the urgency and degree that his family situation played in his overall decision to resign to Mr. Goh, it was nonetheless a genuine and significant interwoven factor. He had no obligation to elaborate on his reasons or to divulge that he was joining Fortress.

[615] By May 9, 2010, the plaintiffs were aware that Mr. Vinall had joined Fortress. Later that summer, Ms. Li concluded that Mr. Vinall had used the plaintiffs' confidential information. As mentioned, the plaintiffs did nothing about Mr. Vinall's perceived misconduct until January 2011. Even at that juncture, their counsel did not raise Mr. Vinall's short notice of termination. Indeed, it was not clear on the evidence precisely when the plaintiffs first identified it as an issue.

[616] All things considered, I conclude that the plaintiffs effectively waived the requirement that Mr. Vinall provide them six months' notice or that he pay any portion of his salary in lieu thereof. He did not breach his contractual obligation under clause XIX.6.

Alleged Breach of Obligation not to Retain Confidential Information

[617] The plaintiffs allege that Mr. Vinall retained documents or storage media that contained confidential information in contravention of his obligation under clause XVI.6 of the Sateri Employment Contract, which stipulates:

> [Mr. Vinall] undertakes not to retain any documents or storage media containing any confidential information in his possession or subject to his control at such time and shall return all company documents, files and properties, whether physical or electronic, in good condition during or after the termination of his employment, and ensure proper hand-over to the appointed employees…

[618] The clause is clumsily worded. While, on the one hand it purports to prohibit Mr. Vinall from retaining documents or storage media that contain confidential information, it also contemplates that the return of such items may be made *after* the termination of his employment. That point to the side, it is not disputed that after he left Sateri, Mr. Vinall found the category one documents in his basement. He appeared to concede that his retention of those documents put him in technical breach of this clause, and I find that to be the case.

[619] I am satisfied that Mr. Goh agreed to Mr. Vinall's proposed timetable of the post-resignation delivery of his laptop to the Singapore head office and, accordingly, find that Mr. Vinall was not in breach of this clause on that basis.

[620] Finally, I accept Mr. Vinall's testimony concerning his post-resignation treatment of the confidential information on his USB/thumb drives and of the devices themselves, which occurred long before he was put on notice by the plaintiffs to preserve their confidential information. The probabilities of the evidence do not tip in the plaintiffs' favour to warrant a finding that Mr. Vinall retained confidential information on those devices after his resignation in breach of this clause.

Claim against Fortress for Inducing Breach of Contract

- **Overview of Legal Framework**

[621] The plaintiffs allege that, based on the tort of inducing breach of contract, Fortress is jointly and severally liable with Mr. Vinall for his breaches of the Sateri Employment Contract.

[622] The tort of inducing breach of contract can be broken down into five constituent elements. Each must be proved to establish liability:

a) the existence of a contract between the plaintiffs and a third party (i.e. Mr. Vinall) and a breach of it by the third party;

b) the defendant had knowledge of the existence of the contract;

c) the defendant's conduct was intended to cause the third party to breach the contract;

d) the defendant's conduct caused the third party to breach the contract; and

e) the plaintiff suffered damage as a result of the breach.

See: *Correia v. Canac Kitchens*, 2008 ONCA 506 at para. 99 [*Correia*]; *Super-Save Enterprises Ltd. v. Del's Propane Ltd.*, 2004 BCCA 183 at para. 2; *International Sausage House Ltd. v. Hammer Estate*, 2015 BCSC 1155 at para. 229.

[623] That there existed a contract between Mr. Vinall and Sateri Shanghai was properly admitted by Fortress. Whether the remaining ingredients recited above in (b) through (d) are sufficiently made out engages a thornier inquiry. In this case,

however, I need only consider whether the final compulsory element to the cause of action has been established, namely whether the plaintiffs suffered damage as a result of the alleged breach. That is because proof of damage poses an insurmountable hurdle to the plaintiffs and is fatal to their claim.

[624] The tort of inducing breach of contract derives from an action on the case. Therefore, as part of establishing the cause of action the plaintiffs must prove that damage resulted from Fortress's wrongful inducement of Mr. Vinall's contractual breaches: *Posluns v. Toronto Stock Exchange* (1964), 46 D.L.R. (2d) 210 (Ont. H.C.); *Correia* at para. 99.

[625] Unlike a claim for breach of contract, damage is a mandatory element of proving the tort. Failure to prove damage in consequence of Fortress's conduct amounts to a failure to prove the cause of action.

[626] Only where the cause of action has been proven, do damages as a remedy become available. In this context, damages are said to be "at large", meaning they are "not limited to specific or special damage" and may include exemplary or punitive damages and elements for injured feelings, loss of reputation, and the bad or good conduct of either party, where no precise limit can be set: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 at paras. 42-43 (add'l reasons at 2007 ONCA 485).

- **Analysis**

[627] I understood the plaintiffs to suggest that, in light of the recent decision in *Zoic CA*, it may be unnecessary to prove that they suffered a resultant loss or damage as a constituent element of the tort and in respect of remedial damages at large. If my understanding is correct, their submission as it pertains to proof of damage as an ingredient of the tort confuses the analysis. The ground of appeal of relevance in *Zoic CA* concerned the remedies for breach of a non-fiduciary employee's implied contractual obligation of fidelity and loyalty. The Court of Appeal's discussion of damages was confined to damages in the remedial sense and it was within that frame of reference that it considered the availability of an equitable accounting as a

remedy. The tort of inducing a breach of contract was not before the panel and was not considered.

[628] What then do the plaintiffs submit was the harm or damage they suffered in consequence of Fortress's alleged inducement to Mr. Vinall to commit the contractual breaches I have found (and assuming, for purposes of this discussion, that the other elements of the tort set out in (b) through (d) could be established)?

[629] The plaintiffs assert two types of damage. Their primary contention is that the damage suffered was a diminution of their share of the dissolving pulp market in China, where the Bahia Mill was the largest supplier, resulting from Fortress's entry into that sector as a new player in December 2011. In a different context in their submissions, the plaintiffs argued that a loss to them of sales, revenues and customers was a "natural consequence" of Fortress's new presence in the upstream dissolving pulp market. They submit that, given those so-called natural consequences, it would be reasonable to infer that "some portion" of Fortress's $88.5 million in sales of dissolving pulp in 2012 shown on its financial statements, represents a loss to the plaintiffs.

[630] Offered as a further indication that they suffered some type of damage, the plaintiffs pointed to Mr. Vinall's acknowledgement at trial that China was the main market for dissolving pulp and, as there were a limited number of buyers in China, a new competitor in the market place would necessarily overlap with existing suppliers. He also agreed with the proposition that it would not be in Sateri's interests for Fortress to enter the market. It is difficult to quarrel with Mr. Vinall's statements as general observations, but they carry no probative value to the more exacting issue at hand. It remains to add that Mr. Vinall also credibly testified that the quality of the grades of dissolving pulp manufactured at the Thurso Mill and the Bahia Mill were different and would not appeal to the same buyers.

[631] The plaintiffs blamed the defendants for the lack of available documentary evidence relevant to the issue of damage. Their accusation failed to acknowledge that proof of any detrimental impact to the plaintiffs' financial bottom line stemming

from Fortress's intrusion into their market share was very much in their control. The plaintiffs could have opened their books, customer lists, relevant financial statements and the like to reveal their "before and after" financial picture as a rudimentary measure of their loss. I suspect that tracking the sales, streams of revenue and profit generated by the upstream dissolving pulp business through the web of Sateri companies and into the hands of the plaintiffs is a more complex endeavour than that. If so, an appropriate expert could have been retained. However, the plaintiffs chose not to tender any financial information along those lines or supply an expert or other cogent evidence to support their assertion of damage.

[632] It is also relevant to the plaintiffs' contention that Sateri had its own internal downstream customers in China who purchased some percentage of the dissolving pulp produced at the Bahia Mill. It is reasonable to infer that Fortress's foray into that market in China would not have made a speck of difference to the segment of the plaintiffs' market comprised of those captive buyers.

[633] The unadorned essence of the plaintiffs' submission is that, starting in December 2011, they sustained damage by the mere presence of Fortress as a vendor of dissolving pulp in the Chinese market. On the evidence presented that contention is hopelessly speculative and, frankly, simplistic.

[634] These significant evidentiary frailties to the side, there is an overarching deficiency in the plaintiffs' assertion of damage stemming from an alleged loss of market share. Their assertion is tethered to the unproven underpinnings that Mr. Vinall was their fiduciary and misappropriated the Thurso Mill opportunity, a project that neither he nor Fortress were at liberty to pursue and use as a vehicle to enter the dissolving pulp market in December 2011. In the result, the plaintiffs' assertion of damage flowing from a loss of market share is not sufficiently connected to the specific contractual breaches committed by Mr. Vinall and alleged to have been induced by Fortress.

[635] The plaintiffs' other assertion of damage relates to the payments made to Tecbiz in respect of their forensic evaluation of Mr. Vinall's laptop.

[636] In the summer of 2010, Tecbiz rendered three invoices in the total sum of $26,937.25 in Singapore dollars. Each invoice was issued to RGE Pte. Ltd., which I take to be a company within the RGE Group.

[637] Mr. Goh was the only witness to testify about the Tecbiz invoices. Although he had no direct knowledge that any of them had been paid, he assumed that they had been based largely on the fact that he had signified his approval for payment on the face of two of them.

[638] It is evident from Mr. Goh's testimony that none of the plaintiffs paid the Tecbiz invoices directly. What Mr. Goh described were the "accounting practices" between Sateri and the RGE Group with respect to invoices. He testified that Sateri outsourced a bundle of services to the RGE Group in accordance with an arrangement that Sateri would pay the RGE Group for its services. Mr. Goh offered no detail beyond that bare-bones description. He did not elaborate on the mechanism by which one or other of the plaintiffs would have ultimately ended up paying such invoices if, in fact, any of them did so. Nor did Mr. Goh confirm that the ultimate payor was one of the plaintiffs; he merely referred to "Sateri" with no further specificity.

[639] On balance, the evidence is not sufficient to reasonably sustain the finding that any of the plaintiffs indirectly paid the Tecbiz invoices by reimbursing the RGE Group for services at a subsequent time. Having reached that conclusion, it is unnecessary for me to consider the nice question of whether out-of-pocket expenditures of this character would constitute damage for the purpose of proving this tort.

[640] There was no suggestion in the evidence or in closing argument that the requisite damage may have taken the form of Mr. Vinall's substandard job performance or inattention to his work assignments while he was assisting Fortress with the Thurso Mill venture in the pre-resignation period.

[641] This claim against the Fortress defendants is dismissed.

REMEDIES

General Comments

[642] At the close of the evidence, the plaintiffs elected to pursue an accounting and disgorgement remedy over damages and made extensive submissions in support of their position. They also sought punitive damages in conjunction with the accounting.

[643] The plaintiffs' argument for disgorgement was mainly postulated on the unproven premises that Mr. Vinall owed them fiduciary duties that he breached in relation to the Thurso Mill project and in other ways, and that Fortress was jointly and severally liable to account in respect of such breaches by application of the doctrine of knowing assistance in breach of trust. The failure to prove liability against the Fortress defendants on any ground or to establish Mr. Vinall's fiduciary standing and the Thurso Mill's status as a corporate opportunity leaves the plaintiffs to pursue relief solely against Mr. Vinall in respect of his breaches of contract. Those contractual breaches pertain to his misuse and post-resignation retention of confidential information and participation in prohibited activities *vis-à-vis* Fortress while still employed by Sateri.

Overview of Legal Framework

[644] The traditional remedy for breach of contract is expectation damages. Damages of that sort focus on the plaintiff's loss and are intended to put the plaintiff in the position it would have been in had the breach not occurred. As I will return to below, in appropriate cases it is open to the court to depart from the usual measure of damages and order an equitable accounting of the gain enjoyed by the party in breach.

[645] In *Jostens Canada Ltd. v. Gibson Studios Ltd*. (1996), 65 C.P.R. (3d) 520 (B.C.S.C.) [*Jostens*], the plaintiff brought an action for the wrongful appropriation of a lucrative school photography business against a former manager and representative with whom it had a contractual relationship of agency. The trial judge dismissed the action. In the first of two decisions, the Court of Appeal upheld the trial judge's

decision that none of the alleged fiduciary obligations had survived the termination of the contractual relationship between the parties. However, it concluded that Jostens had a right to relief based on the respondents' breach of contract that bound them to devote their full time and best efforts to the promotion of Jostens' business: *Jostens Canada Ltd. v. Gibsons Studio Ltd.*, [1998] 5 W.W.R. 403 at para. 31 (C.A.). On that footing, the Court held that Jostens was entitled either to damages for breach of contract or to an accounting in equity of the respondents' profits.

[646] The determination of relief was remitted back to the lower court. It granted an accounting of the defendants' gain as a result of their breach of contract. On the defendants' appeal of the award, the Court of Appeal held that damages had been properly assessed on an equitable basis corresponding to the defendants' gain at the time of the breach: *Jostens Canada Ltd. v. Gibsons Studio Ltd.*, 1999 BCCA 273 [*Jostens CA No.2*].

[647] In *Restauronics Services,* the Court of Appeal considered the nature of recovery by an employer where, in addition to competing with his or her employer, a non-fiduciary employee had misused confidential information or trade secrets. Ryan J.A., for the Court, commented:

> [73] The case-law seems to indicate that where there has been a misuse of confidential information or trade secrets, the employer may recover damages against the employee for profits it has lost as a consequence of the breach or, instead of damages, elect to take judgment for an account of the profits the employee has obtained through the wrongful exploitation of the material in question. The employer is free to choose whichever method will result in greater compensation. (e.g., *57134 Manitoba Ltd. v. Palmer* (1985), 65 B.C.L.R. 355 at 371 (S.C.), aff'd (1989), 37 B.C.L.R. (2d) 50 (C.A.).)

[648] Referring to *Restauronics Services* and other case authorities, Sigurdson J. summarized the animating principles in *Pan Pacific*:

> [62] To summarize briefly, employees generally owe their employers an implied contractual duty of loyalty and in certain circumstances may owe a greater and more exacting duty, a fiduciary duty. If an employee competes with his or her employer without permission, it will generally be a breach of the implied term of loyalty entitling the employer to damages for breach of contract. When that breach of contract involves the misuse of trade secrets or confidential information the plaintiff may elect judgment for the profits

> earned by the employee by the wrongful exploitation of the confidential material in question. However, if the employee's improper competition is also a breach of fiduciary duty, the employer may seek the equitable remedy of disgorgement of the profits made by the employee.

[649] In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, the Supreme Court of Canada acknowledged the potential of a gain-based recovery for a breach of contract in exceptional cases where expectation damages may be inadequate.

[650] The Court of Appeal recently revisited the availability of an equitable accounting for breach of contract in *Zoic CA*. There, it was argued that an equitable accounting was justified against an employee who had breached her implied contractual duty of fidelity (competing with the existing employer) on the basis that she was a "near fiduciary".

[651] Chiasson J.A., for the Court, made the important observation, at paras. 69 and 71, that the "fiduciary relationship should not drive the analysis", and declined to "import into the consideration of remedies for breach of contract the prophylactic objective of equitable remedies for breach of fiduciary duty". He affirmed the trial judge's discretion to grant an equitable accounting in respect of a breach of contract, stating at para. 72:

> In my view, the appellant's position is supportable on the basis that in appropriate circumstances the court may order an equitable accounting when damages are not an adequate remedy for breach of contract. That was the fundamental basis of the House of Lords' decision in *Attorney General v. Blake*, [2001] 1 A.C. 268. In *Blake*, a former member of the English security and intelligence service violated a contractual obligation of confidentiality by publishing an autobiography. By the time it was published, the information no longer was confidential. No loss could be established. Lord Nicholls stated:
>
> > … An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is

> whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

The court ordered disgorgement of Mr. Blake's gains.

[652] Chiasson J.A. returned the matter to the trial judge to consider whether an equitable accounting should be ordered. There is no record of any subsequent hearing or order in respect of that matter.

[653] In addition to approving of the approach taken by the House of Lords in *Attorney General v. Blake* (2000), [2001] 1 A.C. 268 (U.K.H.L.) [*Blake*], Chiasson J.A. noted that support for ordering an equitable accounting in respect of a breach of contract when damages are not an adequate remedy, could be found in the earlier decisions of our Court of Appeal in *Jostens CA No.2* and *Smith v. Landstar Properties Inc.*, 2011 BCCA 44.

[654] In *Blake,* Lord Nicholls, for the majority, reasoned that an accounting of profits as a remedy for breach of contract ought to be granted only in exceptional cases. Turning his mind to the situations that may qualify as exceptional his Lordship wrote at 285:

> ...No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. It would be difficult, and unwise, to attempt to be more specific.

[655] Lord Nicholls agreed with the reasoning of Lord Woolf MR in the Court of Appeal that the following factors would not individually stand as an adequate reason for ordering an account of profits:

(a) the breach was cynical and deliberate;

(b) the breach enabled the defendant to enter into a more profitable contract elsewhere; and

(c) by entering into a new and more profitable contract, the defendant put it out of his power to perform his contract with the plaintiff.

[656] Further, Lord Nicholls rejected the proposition endorsed by Lord Woolf MR to the effect that an account of profits should be available in circumstances where the defendant had obtained his profit by doing the very thing he was contracted not to. In Lord Nicholls' view, that category was defined too widely to be of assistance, and something more was required before an account of profits would be the appropriate remedy.

[657] The pivotal factual premise underlying the whole of the analysis by the Court of Appeal and the House of Lords in *Blake* was that the defendant had acquired ill-gotten profits as a result of his breach of contract.

[658] In *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 at para. 518, aff'd 2013 ABCA 111, Romaine J. posited that the "something more" contemplated by Lord Nicholls may be as identified in John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at 974:

> The principal argument in favour of granting this form of relief in a contractual context is that some breaches of contract are as offensive or wrongful as many breaches of fiduciary obligation or breaches of confidence.
>
> Accordingly, just as the accounting of profits remedy is available in these other contexts, so too it should be available in the context of a heinous or unusually wrongful breach of contract. A further and perhaps more persuasive argument in support is that courts will, in any event, order disgorgement of profits in a case of contract breach where any other result would be unjust, even in the absence of an explicit doctrine permitting the granting of such relief.

Analysis

[659] The plaintiffs' discussion of the gain to be disgorged centered almost exclusively on three categories of benefit that they assert was enjoyed by Fortress as a result of Mr. Vinall's alleged breaches of fiduciary duty and Fortress's duplicity. It is self-evident, that the dismissal of all claims against the Fortress defendants leaves the plaintiffs with no remedy against them.

[660] Accordingly, the only relief to be granted is in relation to Mr. Vinall's breaches of contract, for which the plaintiffs have elected the extraordinary remedy of an equitable accounting of his so-called gain. The question thus raised is whether this case is so exceptional that I should exercise my discretion to grant such a remedy?

[661] In assisting Fortress while still at Sateri, Mr. Vinall misused a few pieces of the plaintiffs' confidential information in breach of contract. The law does not take kindly to an employee's wrongful use of the employer's confidential information. Still, in considering whether an accounting is an appropriate remedy the court will take into account several factors, such as the nature of the information, the impact of its misuse and its degree of specialness and the nature and depth of the misconduct of the party in breach. Here, there was nothing very special about any of the confidential information misused by Mr. Vinall and, in the overall scheme, its disclosure was inconsequential. Mr. Vinall's wrongful post-resignation retention of the confidential information contained in the category one documents, which I doubt was deliberate, was also inconsequential.

[662] After Mr. Vinall resigned, he breached the Sateri Employment Contract by providing the Sateri trip report to Mr. Veilleux. Although I have accepted Mr. Goh's testimony that some contents of that report were confidential, the evidence does not reasonably permit a finding that it was anything other than slightly special. Moreover, there was no cogent evidence as to what came of the receipt of that trip report.

[663] Aside from Mr. Vinall's disclosure of that unimportant bit of confidential information, it has not been shown that, after he joined Fortress, he misused the other snippets of low-grade confidential information that forms the basis of his breaches of contract. Nor did Mr. Vinall exploit significant categories of confidential information, such as trade secrets, client lists, pricing information, protected mill conversion data or the like to assist Fortress.

[664] The expectation that Mr. Vinall would act as the future lead on the actual conversion of the Thurso Mill was important to the Quebec government. However,

the preponderance of the evidence does not show that his involvement in that future capacity or the assistance he provided to Fortress in the pre-resignation period was crucial to Fortress's ultimate acquisition of the Thurso Mill, in the sense that the government would not have entered into or continued with the deal had Mr. Vinall not been involved or had subsequently pulled out or been excluded. Put another way, but to the same effect, Mr. Vinall's participation and continued involvement *vis-à-vis* Fortress relative to the Thurso Mill deal was not a pre-requisite to Fortress's successful acquisition.

[665] The evidence falls significantly short of establishing that Mr. Vinall's misuse of the plaintiffs' confidential information played anything more than a *de minimus* role, in Fortress's interest in pursuing or its attainment of the Thurso Mill project.

[666] The Sateri Employment Contract prohibited Mr. Vinall from participating in substantially all of the activities in which he engaged relative to Fortress between mid-to-late October 2009 and the date of his resignation. Those constraints disappeared upon his resignation.

[667] In any event, I would again observe that assessing the matter through an analytical model that springs from the faulty theory that Fortress's opportunity to acquire the Thurso Mill was the product of Mr. Vinall's breach of fiduciary duties and Fortress's wrongful assistance, or was the result of his contractually prohibited disclosures and activities, is ill-conceived.

[668] The plaintiffs' election for an equitable accounting is readily explained by the fact that they did not suffer any compensable loss in respect of Mr. Vinall's breaches of contract. Yet, it is not precisely clear what gain or benefit Mr. Vinall can be said to have obtained as a result of his contractual breaches. In closing submissions, the plaintiffs argued that one of the ways to assess the value to Fortress of the Thurso Mill acquisition was with reference to the compensation and related benefits that Messrs. Vinall and Wasilenkoff each received from Fortress in relation to that transaction. Although the context of the argument concerning Mr. Vinall's compensation was intended as a partial yardstick to measure Fortress's gain, no

other quantification of Mr. Vinall's gain or benefit was asserted. I therefore take the plaintiffs' position to be that Mr. Vinall's ill-gotten gain stemming from his contractual breaches for which they seek disgorgement is reflected in his compensation with Fortress and, in particular, the receipt of his RSUs.

[669] The plaintiffs calculated Mr. Vinall's 2010 compensation to be worth more than $2.16 million, consisting of a salary, bonus and his RSUs when valued as at the date they were issued. I have accepted Mr. Vinall's evidence that he suffered large financial losses in relation to his RSUs, which vested variously in 2010 and 2012. They did not constitute a benefit or gain to him; in fact, the reverse was true.

[670] Closer to the point, the notion that Mr. Vinall's negotiated employment compensation for services rendered is in the nature of a wrongfully-obtained gain available for disgorgement does not find support in the authorities placed before me. The repercussions of accepting such a proposition could be catastrophic for employees in Mr. Vinall's circumstances in a way that does not resonate with the applicable equitable paradigm.

[671] Unlike the defendants in *Blake* and *Jostens,* as a result of his contractual breaches Mr. Vinall did not derive any profit or gain of the kind that would properly be the subject matter of an equitable accounting. Moreover, his breaches of contract, either singly or cumulatively, were not remotely sufficiently offensive or egregious to militate in favour of the exercise of my discretion to grant an equitable accounting. A demand for disgorgement from Mr. Vinall who has enjoyed no gain or profit, by plaintiffs who have suffered no harm or form of loss, can find no reward in equity.

[672] In the circumstances, it would not be unjust to the plaintiffs to decline to order the exceptional remedy they seek. In contrast, it would be unduly harsh and manifestly unjust to Mr. Vinall to grant the remedy sought.

[673] Finally, Mr. Vinall's conduct was not reprehensible in the sense of deserving of punishment by an award against him of punitive damages: see generally, *Vorvis*

v. Insurance Corporation of British Columbia, [1989] 1 SCR 1085; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

DISPOSITION

[674] The plaintiffs' claims against Mr. Vinall grounded in breach of contract have succeeded in part. All other claims against him are dismissed. An order for an equitable accounting is denied. The plaintiffs' election for an accounting disentitles them to an award of damages. Even if that election had not been made, an award of nominal damages only would be warranted.

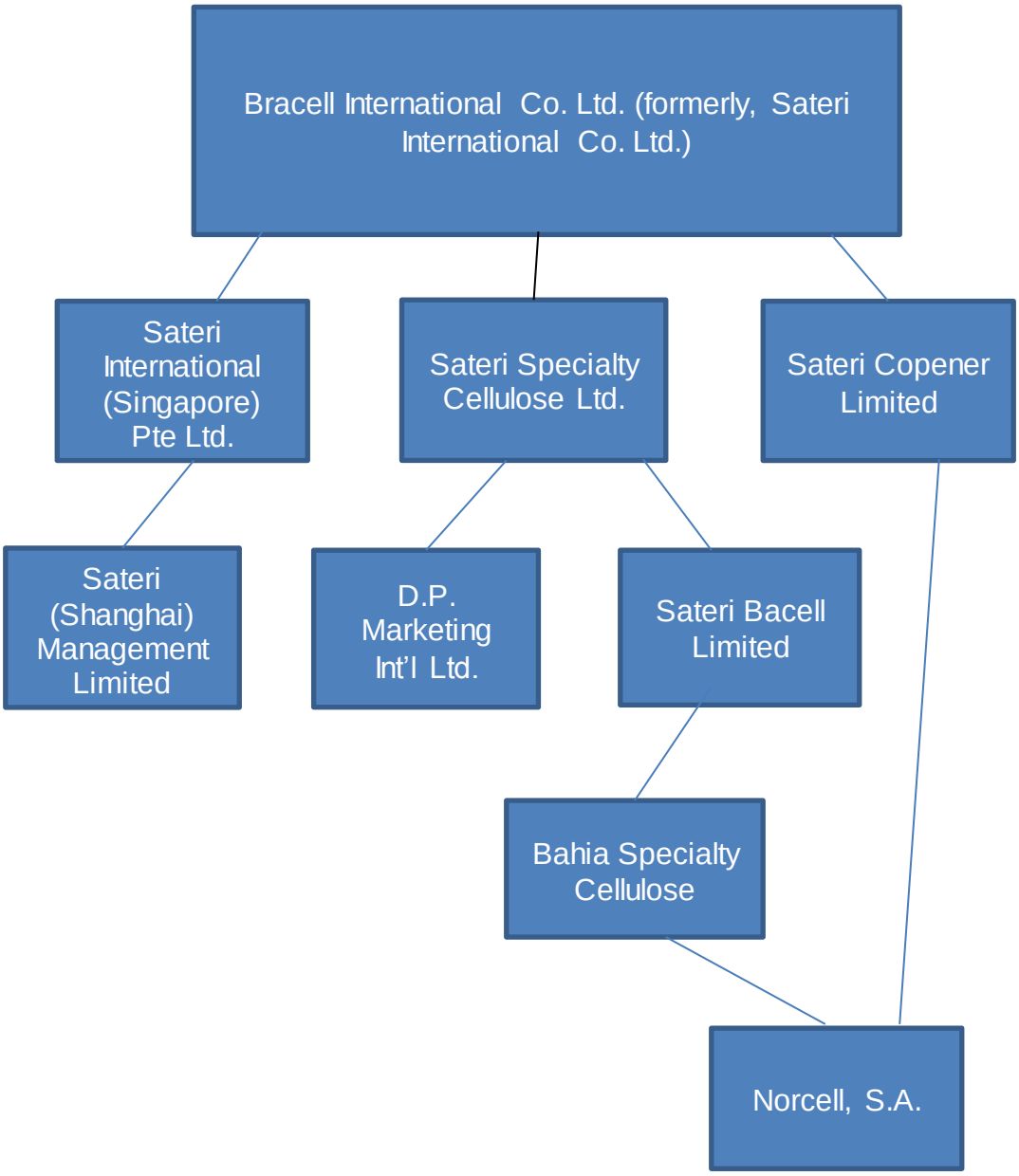
[675] The plaintiffs' claims against the Fortress defendants are dismissed in their entirety.

COSTS

[676] If the parties are unable to reach an agreement on costs, they may file written submissions implementing a timetable of their choosing that incorporates a final deadline of June 16, 2017.

"Ballance J."

Schedule "A"



CITATION: Tracey v. Tracey, 2012 ONSC 3144
DIVISIONAL COURT FILE NO.: 11-DV-1777
DATE: 2012/06/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Aston, Whitten and Corbett JJ.

B E T W E E N:	)	
	)	
MARK TRACEY	)	*Dana P. Tierney and Sabina J. Veltri* for the Respondent
Applicant (Respondent in Appeal)	)	
- and -	)	
ELIZABETH TRACEY, KENNETH TRACEY, JOHN TRACEY, TOM TRACEY, GERALD TRACEY, KATHLEEN TRACEY, DANIEL TRACEY	)	*Judith E. Wilcox* for the Appellants
Respondents (Appellants in Appeal)	)	
	)	Heard in Ottawa: April 20, 2012

REASONS FOR DECISION

CORBETT J.

[1] This case concerns control of a family-owned ice cream business, known as "Centreside Dairy".

[2] The trial, before Roy J., concerned a longstanding deadlock between the two owners of the business, Elizabeth Tracey and her eldest son, Mark. As noted in paragraph 1 of Roy J.'s reasons for judgment (the "Reasons"):

> All the parties are in agreement that the Corporation is in a state of deadlock and that the only practical solution is for all of the shares to be transferred to either the applicant [Mark Tracey] or the respondent Elizabeth Tracey.

[3] Roy J. then summarized the long history of family conflict. He concluded:

> In considering what has taken place over the last ten years one can readily appreciate why all of the parties would agree that there exists a deadlock for the management and control of the dairy. (Reasons, para. 13)

[4] Roy J. then characterized the legal dispute as follows:

> The *Ontario Business Corporations Act*, sections 207 and 248 give the court a very broad discretion to fashion a remedy to rectify a problem such as this one. Clearly in this case the actions of the parties at various times have been burdensome, harsh or wrongful. The parties' conclusion that there is a state of deadlock is certainly justified. The fact that this is a family owned corporation and there no longer exists any trust and confidence amongst the members of the family means the corporation cannot continue to function and meet the reasonable expectation[s] of the shareholders. The just and equitable remedy will be to either wind up the company pursuant to section 207 of the *Act* or to have one shareholder buying the others' shares at a reasonable price. The parties are unanimous that the corporation should not be wound up and accordingly that leads to the only other remedy, that of a forced sale. In other words, should [the] applicant Mark Tracey be ordered to transfer his 49 shares to Elizabeth Tracey for reasonable consideration or should Elizabeth Tracey be ordered to sell her 51 shares to Mark Tracey? (Reasons, para. 15)

[5] The appellants do not contest this characterization. At paragraph 9 of their factum, they state:

> It was agreed by all parties at trial that both sides were at loggerheads and that one faction or the other i.e. Mark or Elizabeth ought to end up owning Centreside Dairy.[1]

[6] Accordingly, the inquiry at trial was focused on three issues:

(a) which side should be required to sell his/her shares to the other side?

(b) What should the sale price be?

(c) What terms and ancillary orders are appropriate?

---

[1] This was agreed at the outset of the trial, in clear terms: Trial Transcript, May 4, 2009, pages 47-48.

[7] Roy J. concluded that Elizabeth should be required to sell her shares to Mark for the fair market value of $271,830. He made several ancillary orders to give effect to this judgment, to give Mark time to arrange financing to purchase Elizabeth's shares, to enforce a continuing term in a shareholders' agreement, and to prevent future interference in the business by the respondents.

[8] In respect to costs, Roy J. noted the protracted nature of the proceedings. He relied upon offers to settle made by Mark, which were more favourable for the appellants than the trial judgment. Mark claimed over $285,000 in costs. Roy J. fixed costs at $175,000, payable jointly and severally. He also ordered that the costs could be set-off against the purchase price, leaving it to Elizabeth to seek contribution and indemnity from the other appellants for their shares of the costs.

Issues On Appeal

[9] The appellants raise the following issues on appeal:

(1) The trial judge erred in ignoring Elizabeth's "reasonable expectations as a shareholder";

(2) The trial judge erred in ignoring Elizabeth's security interest over the business's assets;

(3) The trial judge erred in dismissing Elizabeth's claim respecting Mark's alleged misappropriation of corporate opportunity and/or self-dealing by creating and operating an ice cream distribution company known as "Tracey's Dairy";

(4) The trial judge erred in his award of costs.

[10] During argument of the appeal, the court sought to clarify the appellants' position on the three issues that were before the trial judge, as described in paragraph 6 above. Initially, it appeared the appellants were not challenging the trial judge's decision that Elizabeth should be required to sell her shares to Mark. As argument proceeded, it emerged that the appellants consider that Justice Roy erred in ordering the sale by Elizabeth to Mark. This issue was raised in the notice of appeal, and was a central concern for the appellants at trial. Fundamental to the appellants' position on this issue is their argument that Mark was never the legal owner of the 49 shares upon which his claim is based in this proceeding, or alternatively, that he had agreed in 1999 to surrender all or some of his shares to other members of the family for no compensation.

Structure of these Reasons

[11] I start with this court's jurisdiction and the applicable standard of review. I then address, as preliminary issues, the appellants' claims that Mark is not entitled to his shares at all. I then organize these reasons around the primary issues decided by the trial judge.

Jurisdiction

[12] The appellants brought this appeal first to the Court of Appeal. Appeal properly lay to this court[2] and so the Court of Appeal transferred the appeal to us.

Standard of Review

[13] The standard of review on this appeal is correctness for questions of law, and "palpable and overriding error" for questions of fact. Questions of mixed fact and law are subject to the "palpable and overriding error" standard unless there is some error of law or principle that can be identified independent of the judge's application of law to the facts of the case. If the error of law is extricable from questions of mixed fact and law, it must be separated out and correctly applied to the findings of fact.[3]

Issue One: Should Elizabeth be required to sell her shares to Mark?

(a) Preliminary Issue #1: 2 shares or 100 shares?

[14] The appellants argued before the trial judge that there are only two shares in the business, both owned by Elizabeth.

[15] The business was acquired by Kenneth Tracey and another man in 1980. Each owned one share in the business. In 1981, Kenneth acquired his business partner's share.

[16] In the late 1980's, at various times, Kenneth proposed to issue shares to his sons Mark and John, to the effect that they would each own a one-third interest and he would retain a one-third interest. It seems this was much discussed, but never implemented.

[17] In 1990, Kenneth and Elizabeth separated, and there were family law proceedings. Also in 1990, Kenneth caused the company to issue 49 shares to each of Mark and John. Elizabeth learned of this and in 1992 commenced proceedings against Mark, John, Kenneth and the company, claiming a constructive trust interest in the business, and seeking to set aside the share issuance to John and Mark as a fraudulent attempt to defeat her claims against Kenneth.

[18] The constructive trust action was settled in 1997. In the settlement, Elizabeth abandoned her claims against Mark and entered into an agreement with him that subsequently served as a shareholders' agreement. John agreed to transfer the shares issued to him back to Kenneth. Thus, after the settlement, Mark retained 49 shares and Kenneth had 51 shares. Elizabeth's legal proceedings then continued against Kenneth.

[19] The legal proceedings between Elizabeth and Kenneth concluded with the judgment of Sedgwick J. in 1998, who ordered that Kenneth transfer 25 shares to Elizabeth, left 26 shares

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[2] *Ontario Business Corporations Act*, R.S.O. 1980, c.B.16, s.255.
[3] *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 3-5,8,10,11,14,23,25. See also *Mason* v. *Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.).

with Kenneth, and confirmed Mark's shareholding of 49 shares. Sedgwick J. also ordered that Kenneth's 26 shares would stand as partial security for an equalization payment that Kenneth owed to Elizabeth. In November 1998, Elizabeth realized on this security, and thereby came to own 51 shares.

[20] Given this history, Roy J. concluded that "there is no basis for the court to conclude that there are only two shares in the company and they belong to Elizabeth Tracey". I agree. The issue of Mark's ownership of 49 shares is *res judicata* as among Mark, John and Elizabeth. Tom was not a party to the prior proceedings, but he was certainly aware of them. Moreover, he has not asserted a claim for constructive trust on his own behalf. Any claim by Tom at this late stage would be precluded by either the *Limitations Act* or the doctrine of laches. The trial judge preferred to base his decision on a factual conclusion. That conclusion is based on the evidence. There is no palpable and over-riding error; there is no error of law.

(b) Preliminary Issue #2: did Mark agree to "give up" his shares?

[21] Before Roy J., Elizabeth Tracey "continue[d] to insist that Mark Tracey's shares should be transferred to the family without consideration" (Reasons, para. 18); "[Elizabeth Tracey] still maintains that she should have Mark Tracey's 49 shares for nothing" (Reasons, para. 17); the appellants argued that "Mark had agreed to give up his 49 shares" (Reasons, para. 20).

[22] Roy J. concluded that Mark never agreed to give up his shares: "[t]he overwhelming evidence indicates otherwise" (Reasons, para. 20). Roy J.'s conclusion is a factual finding, firmly rooted in the evidence. There is no palpable and over-riding error, and I accept this conclusion.

[23] I would add that the appellants' conduct from 1999 to 2007 was largely inconsistent with their position on this issue. They engaged in substantial self-help, but did not assert a claim that Mark was contractually bound to transfer any or all of his shares to them as a result of an alleged agreement in 1999. Any claim for breach of contract is now long out of time under the *Limitations Act*.

(c) Should Elizabeth be required to sell her shares to Mark?

[24] The learned trial judge considered a number of factors in coming to his conclusion that Elizabeth ought to be required to sell her shares to Mark:

(1) Who has the best ability to continue the business?

(2) What shareholder has contributed the most to the deadlock?

(3) Who has the ability to purchase the other's shares?

(4) What weight should be accorded Elizabeth's majority holding (51 shares) and Mark's minority position (49 shares) in the company?

(5) What effect will the order have on the continued viability of the company?

(6) What effect will the order have on other stakeholders in the company, such as its long-term employees, customers and suppliers?

[25] These are appropriate factors that may be considered in deciding which party ought to be required to sell to the other.[4]

[26] The appellants do not challenge this list of relevant factors. Rather, they argue that the learned trial judge failed to consider, or to place appropriate weight upon, certain aspects of the evidence while assessing these factors. In particular, they argue:

(a) Roy J. failed to consider oppressive conduct by Mark towards Elizabeth in various ways, including failing to call regular shareholders and directors meetings, thus excluding Elizabeth from meaningful participation in a company in which she held a majority of the shares. This combined with the other circumstances (such as Elizabeth's status as the majority shareholder) led Roy J. to err by disregarding Elizabeth's "reasonable expectations as a shareholder" in ordering that she sell her shares to Mark;

(b) Roy J. failed to consider Mark's oppressive conduct in creating and operating "Tracey's Dairy" to distribute ice cream products, including those of Centreside Dairy, a corporate opportunity from which Elizabeth was wrongfully excluded;

(c) Roy J. failed to consider or to place appropriate weight upon Elizabeth's status as a security-holder and creditor of Centreside Dairy; and

(d) Roy J. failed to place sufficient weight on the fact that Elizabeth was the majority shareholder.

[27] The appellants argue that these errors, individually and cumulatively, should tip the balance in favour of an order that Mark sell to Elizabeth, rather than the other way around.

[28] I do not accept these arguments.

[29] First, the arguments raised by the appellants do not affect Roy J.'s findings under factors (1), (3), (4), (5) and (6), described at paragraph 24, above. The learned trial judge concluded that:

(i) Mark has the best ability to continue to operate Centreside Dairy effectively;

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[4] See *Liao* v. *Griffioen* (2001), 20 B.L.R. (3d) 61 (Ont. S.C.J.) at paras. 14-20; *Gold* v. *Rose*, [2001] O.J. No. 12 (Ont. S.C.J. [Commercial List]), at paras. 18-28; *Jansezian* v. *Hotoyan* (1999), 1 B.L.R. (3d) 56 (Ont. S.C.J.) at paras. 4, 12; *Viner* v. *Poplaw* (2003), 38 B.L.R. (3d) 134 (Ont. S.C.J.) at paras. 33-34.

(ii) Mark has the wherewithal to purchase Elizabeth's shares, but there is good reason to doubt that Elizabeth could pay for Mark's shares;

(iii) the continued viability of the business would be jeopardized by removing Mark and placing control in Elizabeth's hands;

(iv) the financial risk to the company would imperil the chances of Elizabeth being able to pay for Mark's shares;

(v) long-term employees and other stakeholders in the company would be placed at risk if Mark was removed and Elizabeth placed in control of the business;

(vi) even though Elizabeth holds a majority of shares, this factor is overwhelmed by the factors that weigh in favour of requiring her to sell her shares to Mark.

[30] There was ample evidence to support the trial judge's conclusions respecting points (i) to (v). Point (vi) involves a weighing of the various factors, and was a conclusion available on the evidence.

[31] The arguments raised by the appellants appear to relate to the second factor considered by Roy J., that is, which side was more responsible for the deadlock in the company. Roy J.'s findings respecting this issue were as follows:

> Like in most disputes the blame is not only one-sided. Undoubtedly over the years Mark Tracey has not been easy to work with. It is obvious from the evidence that Mark and Melany's[5] attitude towards other family members can be categorized as condescending and impatient. Given the history of this business they could have shown more tolerance. Nevertheless Elizabeth Tracey, with the assistance of other family members, has engaged in a course of conduct which was oppressive and prejudicial to Mark Tracey's interests. Much of that conduct has been detailed earlier.[6] Some of it borders on being dysfunctional. The holding of a directors meeting without notice, repeated firing of Mark Tracey and Melany Tracey, cutting off the burglar alarm and changing the locks or occupying the premises with strangers for three days are just some of the most obvious incidents. Elizabeth Tracey has consistently refused to abide by earlier agreement[s] or court orders in refusing to sell her shares. She still maintains that she should have Mark Tracey's 49 shares for nothing. There is no doubt that her conduct with the assistance of family members is mainly responsible for the present deadlock. (Reasons, paragraph 19).

[32] The evidence discloses that "blame is not one-sided", as noted by the learned trial judge. Mark's failure to hold regular meetings of directors or shareholders is subsumed in the trial

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[5] Melany Tracey is Mark Tracey's wife.
[6] See Reasons, paragraphs 2-12.

judge's findings that Mark was "condescending and impatient" and "not… easy to work with". It was not necessary for the learned trial judge to consider whether this conduct constituted, in law, "oppression" of Elizabeth in her capacity as a shareholder. Had meetings been held, given the overall history, they would have been further occasions for strife. And the absence of meetings did not lead to some other oppression of Elizabeth in her capacity as a shareholder. This was all "part of the mix" of events, and the absence of specific reference to these facts does not mean that they were disregarded by the learned trial judge. With respect, the appellants have engaged in a consistent pattern of self-help that crossed the line into lawlessness on more than one occasion. There was a firm foundation for Roy J.'s conclusion that the appellants were more to blame for this deadlock than was Mark.

[33] I discuss the "security interest" issue in more detail below. I conclude that Elizabeth did not continue to have a security interest in the assets and undertaking of Centreside Dairy as of the time of trial, and so of course it was no error for the trial judge to fail to give this issue any weight. However, had I concluded otherwise, it would not have been material to whether Elizabeth should be required to sell her shares to Mark. If the security interest continued to exist, then its sole significance related to the price and ancillary terms upon which Mark would be permitted to purchase Elizabeth's shares.

[34] I also discuss the issue of alleged misappropriation of corporate opportunity in more detail below. I do not consider that this issue has any bearing on whether Elizabeth should be required to sell her shares to Mark. Rather, it may bear upon the price for Elizabeth's shares, or alternatively, may entitle her to a separate remedy for loss of participation in the corporate opportunity Mark pursued without her participation.

[35] I am satisfied that Roy J. properly identified the factors to be considered in deciding whether Mark should sell to Elizabeth, or whether Elizabeth should sell to Mark. Factors (1), (3), (5) and (6) weighed strongly in favour of Elizabeth being required to sell to Mark. On Roy J.'s analysis, factor (2) also weighed in this direction. I see no palpable and over-riding error in Roy J.'s review of the evidence or findings of fact on this issue, or with his conclusion that Elizabeth was more to blame for the deadlock than was Mark. Even if it was thought that the "balance of misconduct" was more equivocal than as found by the trial judge, however, this still would not have changed the overall balance of the factors. Indeed, in the context of this case, Mark is clearly the preferable choice on the basis of the practicalities of the case.

[36] Accordingly, I would not interfere with the learned trial judge's decision that Elizabeth should be required to sell her shares to Mark.

(d) calculation of the sale price

[37] There were two expert reports before the court on the issue of the fair market value of Centreside Dairy. One concluded that the value of the company, as of December 31, 2006, was $533,000.[7] The other placed the value of the company at $566,000 as of December 31, 2008.[8]

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[7] Reasons, paragraph 22. Exhibit 2, tab 4.

The valuation date used by the trial judge was January 31, 2007, and that approach was not contested on appeal.

[38] There was no evidence of any incremental increase in value of the company in the one month between December 31, 2006 and the valuation date of January 31, 2007. The later report, which showed a modest increase in the value of the company between December 31, 2006 and December 31, 2008, reinforces the reasonableness of the value ascribed in the earlier report. The learned trial judge accepted the $533,000 figure as the value as of the valuation date. He calculated that the fair market value of Elizabeth's 51% of the shares was, therefore, 51% of $533,000, being $271,830.

[39] These findings of fact were available on the evidence. Indeed, there was no other evidence on which the learned trial judge could determine fair market value in this case.

[40] The appellants argue that the learned trial judge should have adjusted the price for Elizabeth's shares on the basis of three issues:

(1) Elizabeth held a security interest in the assets and undertaking of the business to secure payment to her of the balance of the equalization payment owed to her by her late husband, Kenneth;

(2) Centreside had an equitable interest in, or Elizabeth had an equitable interest in, the distribution business owned by Mark, because he had misappropriated the corporate opportunity of that business. Thus the calculation of the value of the shares in Centreside ought to have reflected the value of the distribution business;

(3) Elizabeth's "reasonable expectations" as the majority shareholder should be compensated by some payment beyond the strict arithmetical calculation of share value relied upon by the learned trial judge.

[41] For the reasons that follow, I would not give effect to any of these arguments. I conclude that:

(1) The security interest, and the underlying debt which it secured, were both extinguished in 1998 when Elizabeth foreclosed upon Kenneth's 25 shares in Centreside Dairy. In any event, it appears that the underlying debt was discharged by receipt by Elizabeth of proceeds of sale of the matrimonial home and Kenneth's life insurance policy. Alternatively, the appellants failed to prove that any balance remains outstanding.[9]

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[8] Reasons, paragraph 22. Exhibit 3, tab 3.

[9] As noted by the learned trial judge during the trial, it seems unlikely that Sedgwick J. intended that the judgment securing the assets of Centreside did anything more than further secure Kenneth's 26% interest in that company. Otherwise, Kenneth's debt would have been payable, beneficially, 25% by Elizabeth, a result that makes no sense. However, it is not necessary to decide this issue, given that the security interest has been extinguished in any event.

(2) The appellants did not establish that Mark misappropriated a corporate opportunity that should have been available to Centreside, or that any self-dealing by Mark was wrongful or caused any damage to Centreside.

(3) In some circumstances, the fair market value of a controlling shareholding in a company may include a premium reflecting the value of holding, or gaining, control. This issue was not raised before Roy J., and there is, in any event, no evidence on which to increase the assessment of the fair market value of Elizabeth's shares on this basis.

(1) Elizabeth's alleged security interest

[42] Sedgwick J. found that, after applying his decision on the constructive trust claim, Kenneth owed Elizabeth an equalization payment of $158,834 (including prejudgment interest of about $59,000).[10] Sedgwick J. ordered that the net proceeds of sale of the matrimonial home be paid to Elizabeth on account of equalization. Sedgwick J. ordered that the balance of the equalization payment be secured by:

(a) A pledge in favour of [Elizabeth] of all the common shares of [Centreside] beneficially owned by [Kenneth];

(b) A security interest… in favour of [Elizabeth] in all present and future real and personal property and assets of [Centreside] (including its goodwill); and

(c) An assignment and/or beneficiary designation to [Elizabeth] of the insurance policy on the life of [Kenneth] in the face amount of $91,000….[11]

[43] Elizabeth failed to lead evidence of the amount she received on account of the equalization payment from the net proceeds of sale of the matrimonial home. She also failed to lead evidence of the life insurance proceeds she received after Kenneth died.

[44] On the basis of Sedgwick J.'s judgment, it appears that Elizabeth received at least $22,500 on account of the equalization payment from Ken's portion of the net sale proceeds from the matrimonial home.[12] This would have reduced the balance owed to her on account of equalization to no more than $136,334, plus post-judgment interest.

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[10] The figure of $99,000 mentioned by Roy J. did not include interest. Prejudgment interest ran for over eight years, at a rate of 7.75%, for total prejudgment interest of $59,058.75.
[11] Judgment of Sedgwick J., paras. 20, 33-35.
[12] The net proceeds were $85,000. $40,000 was paid out to Kenneth and Elizabeth prior to the trial before Sedgwick J., leaving a balance held in trust of $45,000. Half of this would have belonged to Elizabeth, so the balance of $22,500 would have been held for Ken's benefit. These calculations do not include any interest that may have accrued on this money while it was held in trust.

[45] On the basis of Sedgwick J.'s judgment, the benefit payable under the insurance policy should have been $91,000. If this payment was received, then the balance owing on the equalization payment would have been $45,334, plus post-judgment interest.

[46] Elizabeth exercised her security and took ownership of Kenneth's shares in Centreside on November 11, 1998. Since that time, Elizabeth has acted as the owner of those shares; indeed, much of her complaint in this proceeding is based on her argument that she owns a majority of the shares in Centreside, a claim predicated on her having had ownership of Ken's 26 shares in 1998.

[47] Assuming that Elizabeth received the life insurance benefit and Kenneth's share of the remaining net proceeds of sale of the matrimonial home, the value of Kenneth's 26 shares would have exceeded the balance owing for the equalization payment.

[48] It seems likely, therefore, that the equalization debt was retired. This has not been proved on the record before Roy J. But neither has Elizabeth proven that any balance does remain outstanding.

[49] In any event, the *Personal Property Security Act* provides that a creditor may do one of two things when realizing upon security for payment of a debt: (a) she may seize and sell the security and apply the net sale proceeds against the debt; or (b) she may accept the collateral in satisfaction of the indebtedness.[13]

[50] It is apparent that Elizabeth received and kept Kenneth's 26 shares. Clearly she did not sell them. And there is no evidence that she retained the shares for the purpose of selling them. Indeed, she subsequently pledged the shares, and in cross-examination acknowledged that she considers herself the owner of the shares. In these circumstances, the equalization payment was satisfied as a result of Elizabeth's foreclosure against the shares.

(2) Alleged Diversion of Corporate Opportunity and/or self-dealing

[51] The appellants argue that Mark appropriated a business opportunity that properly belonged to Centreside when he established and operated "Tracey's Dairy", a distribution company. They also argue that "Tracey's Dairy" diverted income and benefits from Centreside, and that this constituted self-dealing by Mark at the expense of Elizabeth, unfairly disregarding Elizabeth's interests as a shareholder of Centreside.

[52] The appellants did not prove these claims at trial.

(a) No Misappropriation of Corporate Opportunity

[13] *Personal Property Security Act*, R.S.O. 1990, c.P.10, ss. 63(1) and 65(2).

[53] A director of a company has a fiduciary relationship to his corporation that requires him to be loyal to the corporation, to act in good faith, and to avoid conflict of duty. The nature and extent of fiduciary duties are examined in the overall context in which they arise.[14]

[54] A director may not obtain for himself without the knowledge or consent of the company any property or business advantage which belongs to the company.[15]

[55] A director is precluded from obtaining for himself, directly or beneficially, a maturing business opportunity for which the company has been negotiating, especially where the director has been negotiating for the business advantage on behalf of the company.[16]

[56] A "mere idea" is not a business opportunity in this context. It is a "maturing" or "ripe" business opportunity, immediately available to the corporation, that constitutes a business advantage or opportunity that the fiduciary may not appropriate to himself. On the other hand, a director may pursue a business opportunity that the corporation has rejected, or that the corporation is unable or unwilling to pursue.[17]

[57] Roy J. concluded that Tracey's Dairy established its operations to distribute some of Centreside's products, as well as products from other manufacturers, such as Breyers. The products distributed by Tracey's were complementary rather than competitive. This opportunity was not available to Centreside: its banking restrictions would not have permitted it to raise the capital necessary to embark on this business. BRR Logistics, the master distributor of Breyer's in Ontario, would not have agreed to distribution through Centreside. Finally, Roy J. concluded that the appellants had no intention of operating a distribution company, or distributing Centreside products through Centreside itself.

[58] On the basis of these findings, Roy J. concluded that the appellants and Centreside did not lose out on a business opportunity because Mark pursued Tracey's Dairy.

[59] There was ample evidence for these findings; there is no palpable and overriding error.

(b) No Self-Dealing

[60] Mark caused Centreside to enter into an agreement with Tracey's Dairy for the distribution of Centreside's products. This agreement is not at arm's length and so is a form of self-dealing: Mark caused one company, in which he was a 49% shareholder, to enter into a contract with another, in which he and his privies beneficially held 100% of the shares.

[61] This arrangement was in place for roughly seven years by the time of trial.

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[14] *Canadian Aero Services* v. *O'Malley*, [1974] S.C.R. 592 (*CanAero*), at paras. 24-25.
[15] *CanAero*, at para. 48.
[16] *CanAero*, at para. 48.
[17] See *Pizza Pizza Ltd.* v. *Gillespie* (1990), 75 O.R. (2d) 225 (S.C.J. (Gen. Div.)), at para. 82; *Donor Gateway Inc.* v. *Passero* (2007), 28 B.L.R. (4th) 309 (Ont. S.C.J. [Commercial List]), at para. 12; *Peso Silver Mines Ltd. (N.P.L.)* v. *Cropper*, [1966] S.C.R. 673.

[62] Given Justice Roy's finding that Centreside had neither the ability nor the intention to distribute its own products, the issue for trial is whether Mark's self-dealing was wrongful, and if it was, whether it caused any damages to Centreside.

[63] There are no specific findings relating to these questions, because they were not raised specifically by the appellants. I have reviewed the entire trial proceedings and have not located any evidence that would bear on when Mark disclosed the distribution arrangements to Elizabeth, and when she objected to them. There is no evidence of how Centreside might otherwise have distributed its products, and how it would have made more money if it had done so. There was some evidence about trucks owned by Centreside being repainted with a "Breyer's" logo, but no evidence of conversion or use of Centreside property for the use of Tracey's Dairy on commercially unreasonable terms.

[64] On the record at trial, I conclude that it is not established that Mark's self-dealing here was wrongful. If it was disclosed and approved by the shareholders of the company, either expressly or by acquiescence, then there was no wrongdoing. Further, there is no evidence that Centreside suffered any damages as a result of distributing its products through Tracey's Dairy.

[65] Considerable latitude was accorded to the appellants at trial in the presentation of their case, as was appropriate for self-represented litigants. But it still remained for them to bring the evidence forward at trial to support their claims. Centreside's accountant, Mr. Dempsey, testified that he scrutinized the arrangements between Centreside and Tracey's Dairy and concluded that they were not disadvantageous to Centreside. He was not challenged on this evidence, nor was any evidence adduced to the contrary.

[66] Given the lack of evidence adduced by the appellants on this issue, Roy J. committed no palpable and overriding error in concluding that, on the facts, this claim was not made out.

(c) No basis for a control premium

[67] The issue of a premium for control of Centreside was not raised at trial. The expert reports do not address this issue. This issue cannot be raised for the first time on appeal, without evidence.

Additional Issue: alleged breach of the shareholders' agreement by Mark

[68] In their factum, the appellants raise an issue about Mark's alleged breach of the shareholders' agreement. They say that Mark was obliged to pay Elizabeth $30,000, and that he failed to do so.

[69] The appellants have not indicated clearly why they say this issue is relevant to the primary issues in this case. On a broad reading of the factum, they could be arguing that:

(a) Mark was permitted to purchase shares from Elizabeth under an option to purchase in the shareholders' agreement, and that his failure to comply with the terms of the option disentitle him from purchasing her shares now;

(b) Mark had a positive obligation to pay Elizabeth $30,000, in any event, and that his failure to do so is an example of his oppressive conduct towards Elizabeth.

[70] These arguments are without merit. Mark had an option to purchase 26 shares from Elizabeth pursuant to the shareholders' agreement. If Mark wished to exercise this option, he was required to pay Elizabeth $30,000 within fifteen months as a non-refundable deposit towards the purchase of the 26 shares.

[71] Mark did not make the $30,000 payment.

[72] As a consequence of not making the $30,000 payment, presumably Mark's option to purchase the 26 shares was extinguished.[18] This termination did not preclude Mark from seeking to purchase Elizabeth's shares on a basis other than his rights under the shareholders' agreement, just as Elizabeth was not precluded from seeking an order permitting her to purchase Mark's shares, even though she did not have a contractual right to do so.

[73] The language of the shareholders' agreement respecting the $30,000 payment is clear on this point. The payment is not a freestanding obligation, but rather a condition precedent to the exercise of the option. Mark was not in breach of the shareholders' agreement in failing to make the payment.

Costs of the Trial

[74] Costs are discretionary. This court should not interfere with Roy J.'s costs award unless we conclude that Roy J. considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion.[19]

[75] Roy J. considered and applied the factors in Rule 57.01, and the effect of the offers to settle made by Mark in accordance with rule 49.10. The litigation was protracted, and the actually incurred legal expenses, for Mark, were high relative to the monetary value of the issues between the parties. Mark sought costs of $286,613.14, a figure lamentably close to the value of Elizabeth's 51% interest in Centreside.

[76] The appellants did not provide a bill of costs to Roy J. They were not obliged to do so. However, a costs award should reflect "what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant".[20] It is difficult to say that the costs claimed by Mark were more than

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[18] I say "presumably" because this issue was not litigated before Roy J., and His Honour made no findings to this effect. Mark had sought to enforce his purchase option in the action tried before Roy J., but withdrew this aspect of his claims at the outset of trial: see Trial Transcript, May 4, 2009, pages 37-39, 43.
[19] *Boucher* v. *Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 29 (C.A.), at para. 19.
[20] *Zesta Engineering Ltd.* v. *Cloutier* (2002), 21 C.C.E.L. (3d) 161 (C.A.), at para. 4.

the appellants would have expected to pay, since we do not know what they, themselves, paid in legal expenses.

[77] As noted by Roy J., the appellants' costs submissions were of very little help in the exercise of fixing costs. The appellants focused their submissions on their substantive complaints against Mark, and not the issue of costs – what Roy J. aptly described as "a long diatribe against [Mark] about what they categorize as injustices over the last 30 years… irrelevant to the issue of costs".[21]

[78] Roy J. discounted Mark's claimed costs significantly, from over $286,000 to $175,000. This discount reflects the value of the issues to the parties, and Roy J.'s assessment of the reasonable expectations of the losing parties. I see no error in this exercise of discretion.

Disposition and Costs of the Appeal

[79] At trial, the appellants focused on the preliminary issues: whether Mark owned his 49 shares, and whether he should be required to give up his shares, without consideration, to other members of the Tracey family.

[80] These issues were not the focus of Roy J.'s reasons. He disposed of them rather summarily. This was no error by the learned trial judge. Throughout the trial, Roy J. sought to assist the appellants, within the bounds of what a trial judge may do for self-represented litigants. He told them, several times, that he saw little merit to their arguments that he should go behind the judgment of Sedgwick J. The appellants did not heed these suggestions, and so the trial judge considered their evidence of events in the Tracey family going back to the 1970's. In my view, the trial judge showed patience and forbearance in giving the appellants every opportunity to prove their case. The learned trial judge repeatedly directed the appellants to issues he considered of central importance in the case, but despite these suggestions, the appellants neglected to direct sufficient evidence to the central issues for decision.

[81] The trial judge correctly disposed of the preliminary issues. He identified the true issues for trial. He considered the evidence before him on those issues. He made no palpable and overriding error in coming to his factual findings. He correctly applied the law those findings. I see no error.

[82] I would dismiss the appeal.

[83] The parties agreed that costs of the appeal shall be $35,000, inclusive. The appellants shall pay this amount to Mark on the same basis as ordered by Roy J.

D.L. Corbett J.

[21] Costs Endorsement of Roy J., para. 1.

I agree: _____
Aston J.

I agree: _____
Whitten J.

Released: June 14, 2012

CITATION: Tracey v. Tracey, 2012 ONSC 3144
DIVISIONAL COURT FILE NO.: 11-DV-1777
DATE: 2012/06/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

MARK TRACEY

Respondent

- and –

ELIZABETH TRACEY et al.

Appellants

REASONS FOR DECISION

Aston, Whitten, Corbett JJ.

Released: June 14, 2012