

third chair and hire a Dawn Morton, a hygienist, to work out of that chair. So the Plaintiff had every reason to believe that what he was doing with respect to his third chair was within the framework of the Partnership Agreement.

46 Dr. Yates was not advocating a change in the revenue sharing formula for the hygiene department as spelled out in the Partnership Agreement nor the elimination of the hygiene department. In fact, Dr. Yates was emphatic that he was and had every intention of contributing patients to the hygiene department. But Dr. Yates was not allowed to explain this to his partners. They and in particular Dr. Sankoff cut him off. It was at this point the Plaintiff slammed his fist on the table and stated "I'm telling you as I see it." The June 5, 1991 minutes do not reflect this but I find the Plaintiff to be totally credible on his interpretation of the June 5, 1991 meeting.

47 Once Dr. Yates had left the June 5, 1991 meeting, he had thought it was over. It is clear from his testimony that he still thought that perhaps when things had cooled down the partners could then have a rational discussion on the matter. He knew at the June 5, 1991 meeting there was no point in discussing the issue further because Dr. Sankoff in particular wasn't going to listen to him. Unbeknownst to Dr. Yates that rational discussion was not to occur. The June 5, 1991 minutes are very revealing on this. It was decided by the three remaining partners at the June 5, 1991 meeting that they were left with no recourse but to expel the Plaintiff from the partnership.

48 The Plaintiff was never given a copy of the June 5, 1991 minutes nor were its contents disclosed to him. Therefore, when Dr. Yates received the Notice of June 13, 1991, he had no clue his other partners were considering expelling him at the June 20, 1991 meeting. Although Dr. Yates indicated he had met with Doctors Schmidt and McCashew following the June 5, 1991 meeting, none of those individuals ever indicated to him the seriousness of the hygiene issue which if not resolved could mean his expulsion. In fact, he stated they were "non-committal" in their responses to him. He was not aware that the partners and in particular Dr. McCashew had consulted the partnership's lawyer for legal advice concerning his expulsion and the drafting of the Notice. So when the Plaintiff did receive the Notice on his desk, he knew something was up but thought the scheduled meeting referred to in the Notice was to sort out the problem of the hygiene department income allocation. I find this to be a reasonable and plausible explanation on the part of Dr. Yates.

49 Dr. Yates arrived at the June 20, 1991 partners' meeting and was confronted by his partners asking him if he had changed his mind on reversing the hygiene revenues earned from his third chair. From my review of the June 20, 1991 minutes and the evidence given by the Plaintiff and the Defendants who testified, I conclude Dr. Yates was not given the opportunity to fully explain his interpretation of the Partnership Agreement to his partners at that meeting. The minutes reflect that "he felt that no alternative proposals had been put forth by any of the other partners. Dr. Yates stated that he felt that the 'Hygiene Dept.' was not clearly defined in the terms of the Partnership Agreement. He felt that he had not breached any of the terms of the Agreement. He stated that he felt that he had a fundamental right as a practising dentist to practice in his chairs as he saw fit." According to Dr. Yates he told his partners he was prepared to go to arbitration on the issue. The notes of the meeting he took at the time reflect this and I believe him. But his partners were not listening - his expulsion was a fait accompli. Because he would not agree to reverse the hygiene revenues, his partners moved to expel him. Naturally Dr. Yates was shocked that he had been expelled and felt "blindsided" by the Defendants. I have to say I agree that he had been "blindsided." The Defendants had not heard nor were they willing to hear and appreciate his position. Dr. Yates had practised with NCDA for over 13 1/2 years and had been a major contributor and yet his partners were quick to expel him without exploring the possibility of taking the hygiene revenue issue to arbitration. The Defendants' explanation that they did not see the hygiene revenue issue as a matter to be arbitrated as it did not deal with "the calculation of partner income distribution", is not acceptable. They had sought legal advice on the Notice and were well aware of the terms of the Replacement Partnership Agreement. I find it hard to accept that they would not have been aware of paragraph 8.01 of the Replacement Partnership Agreement, which paragraph dealt with the matter of arbitration in the event of a dispute on the calculation of partner income distribution. The only conclusion I can reach on this is that they wanted to take the easy way out and expel Dr. Yates. They did not want to have to deal with him on the thorny issue of arbitration. In so proceeding in this fashion, they breached their duty of good faith as partners to the Plaintiff. As Drake J. of the British Columbia Supreme Court in *Pegusch v. Kerr et al* at [53 C.P.R. \(3d\) 188](#) points out at page 192: "No doubt partners are fiduciaries of each other, and the law requires them to act in good faith and fairness as such:"

50 The Defendants did not carry out their duty to act in good faith and fairness as partners to the Plaintiff. It did not help and certainly compounds the difficulty of the Defendants convincing this Court they acted in good faith when there is evidence the Defendants prearranged for the changing of the locks and the running of an ad prior to the actual expulsion of the Plaintiff. The Defendants' behaviour is further exacerbated by the fact the Plaintiff had to seek Court Orders extending the time of his departure from the partnership and authorizing the removal of charts and records for copying.

51 Defendants' counsel argues that after the June 5, 1991 meeting when Dr. Yates stormed out of the meeting, the Defendants were at a crossroads. Surely they had a right to determine whom they practised with? I do not quarrel with that. However as noted earlier, the Defendants did not give the Plaintiff a full and fair hearing on the matter and further compounded their problems by not giving notice in accordance with paragraph 11.05 of the Replacement Partnership Agreement.

52 The Defendants had given the Plaintiff seven days notice of the June 20, 1991 meeting specifying the place, the day and hour of the meeting. Therefore, their form of Notice fell within the provisions of paragraph 11.05. However, in indicating in the Notice that the general nature of the business proposed to be discussed at the meeting was "Hygiene Dept. Income Allocation", I find that the Defendants deliberately omitted telling the Plaintiff he ran the risk of being expelled. This was no accidental omission to give notice to the Plaintiff of his pending expulsion, which if it had been would not have invalidated the ordinary resolution to expel him. This was not a mere technical breach of the Partnership Agreement - this was a substantive breach. Dr. McCashew in his testimony was very forthright on the issue. Specifically on cross-examination, he acknowledged he did not want Dr. Yates out of the partnership in April and May 1991 but he did want the Plaintiff out after the June 5, 1991 meeting. That is why NCDA's solicitor was consulted by Dr. McCashew and one other nameless partner with respect to the expulsion and the drafting of the Notice. Further, Dr. McCashew acknowledged that he fully expected Dr. Yates would not agree to reverse the hygiene revenues from his third chair and the inevitable result would be the Plaintiff's expulsion from the partnership.

53 Dr. Li states the reason he did not want to put the Plaintiff's possible expulsion in the Notice was that the partnership did not want to threaten or coerce him. According to Dr. Li, the partners wanted to give the Plaintiff another chance at the June 20, 1991 meeting. I do not accept this because clearly the Defendants had put the wheels in motion prior to June 20, 1991 to expel Dr. Yates when they had prearranged for the changing of the locks and the running of the ad on that day. There was no mistake in what the Defendants were doing. They were deliberate in their actions and knew full well before the June 20, 1991 meeting they would expel the Plaintiff. In so doing they not only breached their partners duty to act in good faith but also the terms of the Partnership Agreement.

54 Defendants' counsel asserts that under paragraph 11.04 of the Replacement Partnership Agreement, they could have circulated a resolution to expel the Plaintiff without calling for a meeting. Further under paragraph 11.06, a partners' meeting could have been convened to discuss and vote on the Plaintiff's expulsion on notice less than seven days or without any notice. Defendants' counsel therefore argues failure to include the possible risk of Plaintiff's expulsion in the Notice is not critical and does not constitute a breach of the Partnership Agreement. I do not hold to this view. Once the Notice was prepared within the ambit of the wording of paragraph 11.05 of the Partnership Agreement and delivered, it must comply with paragraph 11.05. Such was not the case for the reasons I have earlier enunciated.

III ACCOUNTING TO PLAINTIFF

Hygiene Revenues

55 Prior to dealing with the issue of what, if any, damages are to be awarded to the Plaintiff as a result of the Defendants' breach of their duty of good faith and the terms of the Partnership Agreement, I will deal with the matter of determining whether the Plaintiff is entitled to the hygiene revenues that were earned in his third chair for the

months of April, May, June and July 1991. As well, there are various other items that are to be accounted for as a result of the Plaintiff's expulsion from the NCDA partnership.

56 Dr. Li acknowledged he instructed Ms. Evans, NCDA's accountant, to reverse Dr. Yate's production (revenue) for the months of April, May and June 1991. These reversals were made in June 1991 and totalled \$26,836.51. Dr. Li had apparently taken selected hygiene services performed by the Plaintiff and added them up and then reallocated \$26,836.51 to the hygiene department for equal sharing amongst the partners. This \$26,836.51 was then subtracted from the Plaintiff production (revenue) for June 1991, giving the Plaintiff a revenue figure of \$17,202.49 for that month. Further reversals of Dr. Yate's production (revenue) were made in July 1991 in the sum of \$2,909.91. The total of these reversals were \$29,746.42 and were never authorized or consented to by the Plaintiff.

57 Because there was a reversal of this hygiene revenue to the hygiene department, the Plaintiff was given a partial credit for expenses in the amount of \$8,336.10. As the revenue was attributed to the hygiene department then it followed expenses (i.e. the third chair and the salary for the hygienist) were to be shared equally amongst the partners. The partial credit of \$8,336.10 was for the salary for Ms. Sue Prior, the hygienist who worked at Dr. Yates third chair. From the evidence, there appears to have been no credit given for the Plaintiffs rental paid for the third chair during April, May or June 1991.

58 As a result of these reversals of hygiene revenues earned at the Plaintiffs third chair, the Plaintiff estimates he has suffered a loss due to this in the range of \$17,000.00 to \$18,000.00. The amount he is then entitled to receive as an expelled/withdrawing partner, which for purposes of this discussion is referred to as the "equity account balance" (See first line, Tab 20 of Exhibit "1", Page 1) should then be in the range of \$74,000.00 to \$75,000.00, not the \$56,495.33 figure as shown. Plaintiffs counsel has however pointed out this reduction of Plaintiffs production, effected through the- reversal of the hygiene revenues, would affect many calculations of expenses paid by the Plaintiff for both the prorated expenses and those borne solely by him. In the result, an accurate assessment of the impact of this hygiene reversal upon his income cannot be determined exactly without an accounting.

59 Having reviewed the evidence presented at trial and considered the arguments of Plaintiffs and Defendants' counsel, I find that I accept the Plaintiffs contention he is entitled to the revenue earned in his third chair from his hygienist, Sue Prior, during April through to July 12, 1991. Accordingly, I direct the appropriate adjustment be made to his equity account balance to reflect this. Further, to effect an accurate and correct adjustment in the Plaintiffs equip account balance, I hereby order an accounting be conducted and completed with respect to this matter within 120 days of the date hereof; the entire cost of which is to be paid for by the Defendants. For expediency's sake I direct that those accountants handling NCDA's financial affairs attend to the matter of conducting the accounting by revising the financials for April, May, June and July 1991 to incorporate and reflect the Plaintiffs hygiene production (revenue) for those months and then to determine the related expenses to be deducted therefrom. Since I have determined the Plaintiff is entitled to the entire hygiene revenue earned out of his third chair during this period, it goes without saying the Plaintiff must bear the usual expenses related to that third chair (i.e. the rent of the third chair and the salary of his hygienist). Other adjustments to the Plaintiffs equity account balance are to be made as discussed below and therefore are to be reflected in the number arrived at for the Plaintiffs equity account balance as at July 12, 1991. If further clarification or directions are required by the parties on this matter, the parties may on notice appear before this Court for the appropriate instructions.

60 In arriving at the foregoing conclusion, I have reviewed the terms and provisions of the Replacement Partnership Agreement and considered the parties' and in particular the Defendants' conduct from the date of the Port O'Call Inn meeting of November 1989 and following.

61 The Defendants contend that the Plaintiff by keeping the hygienist's revenue earned in his third chair has attempted to amend and change the Partnership Agreement without their consent. They point out no resolution was ever passed authorizing the Plaintiff to keep the hygiene revenues and that the Plaintiff unilaterally changed the distribution of this revenue to himself. I cannot agree with that assertion. The Plaintiff with the approval of his partners took on a third chair and paid for the rent of that chair. Had he hired a certified dental assistant instead of a

hygienist to work with him out of this third chair, the Defendants would have had no difficulties whatsoever. But because the Plaintiff had his own hygienist working out of this third chair, the Defendants contend the Plaintiff is in breach of the spirit and intent of the Partnership Agreement. From my reading of the Partnership Agreement there is nothing to suggest that that is the case. Under the Partnership Agreement, "hygiene department" does fall under the category of "other income," which other income is to be allocated equally amongst the partners. Although there is no specific definition for hygiene department in the Partnership Agreement, it was generally understood to mean a separate and physical area manned by trained hygienists or certified dental assistants where all dentists from NCDA could refer their patients for hygiene services. The group of dental hygienists and assistants who worked in the hygiene department were commonly employed and accessible to all dentists of NCDA. Dr. Yates was very clear in his testimony that he did not advocate the elimination of the hygiene department. In fact, Dr. Yates contributed patients to the hygiene department while operating his third chair with his hygienist, Ms. Prior.

62 The Defendants assert it was never intended that a partner would be allowed to keep the revenue earned from one's own hygienist in one's own chair. The provisions of the Partnership Agreement seem to suggest otherwise. Certain costs as set out in Schedule "C" to the Partnership Agreement are shown as being directly attributable to a partner. For example, a partner is responsible for the direct costs of salary assistants and supplies. A partner is also responsible for the net rent of the chairs he has in use on a per chair basis. These costs are then applied directly against a partner's production to arrive at his revenue/income for a particular month. There is no wording in the Partnership Agreement to suggest that a hygienist's revenue generated from a partner's chair is to be excluded from a partner's production for the purposes of arriving at the "Partner Income Distribution Calculation" set forth in Schedule "C". Furthermore, it is ironic and inconsistent on the Defendants' part to say on the one hand the Plaintiff is not entitled to one-fifth of the fair market value of NCDA's physical assets because it is not provided for in the Partnership Agreement and yet the Defendants do not follow that same logic of looking to the wording of the Partnership Agreement when it comes to the matter of the hygiene revenue issue.

63 I accept the Plaintiffs contention that this hygiene revenue dispute was an issue of revenue/expense calculation that should have gone to arbitration under paragraph 8.01 of the Partnership Agreement. It did not. What transpired is that Dr. Li undertook to incorrectly arbitrate the matter by reversing the hygiene revenue figures for the Plaintiff for the months of April to July 1991. It is therefore up to this Court to arbitrate the matter, which I have now done so.

64 I now turn to the conduct of the parties on this matter. Without reiterating the facts again, I have found the following to be compelling and persuasive in ordering the hygiene revenues to be credited to the Plaintiffs production for April to July 1991:

- (i) Other partners at NCDA proceeded to hire their own hygienists after the Port O'Call Inn meeting. Also, hygiene services were done outside of the hygiene department. Certified dental assistants worked with partners and their revenue was retained by the partner.
- (ii) Dr. Wood had been allowed to have her own hygienist and to keep the revenue earned from her services.
- (iii) Dr. Li and other partners were allowed to remove their hygiene patients from the hygiene department and thus reduce the amount to be shared equally amongst the partners from the hygiene department.
- (iv) The partners had approved of the Plaintiff taking on a third chair and bearing the entire costs of this third chair. It is only logical and reasonable the Plaintiff would be entitled to the entire revenues from that third chair.
- (v) During the period in dispute, the Plaintiff continued to forward patients to the hygiene department, even though he had a hygienist working out of the third chair.
- (vi) There is no evidence to suggest the new partner, Dr. Schmidt, objected to this approach of the Plaintiffs as he did not testify. I have drawn an adverse inference from Dr. Schmidt's failure to testify on this and conclude he must have found this approach acceptable.

(vii) There is no evidence to suggest that the Plaintiff instructed Ms. Evans to record his hygiene revenue as his own production for the months of April, May and June 1991. Unfortunately Ms. Evans did not testify at trial. I can only conclude that as Ms. Evans was present at the May 29, 1991 partners' meeting and handed out the financials she had prepared that she must have understood that the Plaintiff's hygiene revenue from the third chair was his own production as she had shown it as such on those statements. Further, the Defendants approved those statements and gave the Plaintiff an \$18,118.00 draw.

65 Added to the above factors, I find it telling that Dr. McCashew as early as the March 5, 1991 meeting had "suspicions" that the Plaintiff by taking on a third chair and hiring his own hygienist would likely be appropriating that revenue to himself. On April 7, 1991 when Sue Prior shows up at NCD and starts working in the third chair, his suspicions are confirmed and yet nothing is said. It is likely Dr. McCashew and possibly Dr. Sankoff intended to follow the same approach as the Plaintiff. At the meeting of April 9, 1991, the minutes reflect Dr. McCashew and Dr. Sankoff are to share third chair expense for new hygienist (Dawn Morton). Dr. McCashew revealed during cross-examination at trial that at that time he felt the partnership was crumbling and they would have to look after themselves. Dr. Sankoff and Dr. McCashew were having access problems with the hygiene department and had decided to hire Dawn Morton to work out of their third chair to service their patients exclusively. Dr. McCashew specifically stated he and Dr. Sankoff were to share the expenses for this third chair and initially it was also their intention to split the revenue generated by Dawn Morton. Dr. Sankoff denies it was ever his intention to share Dawn Morton's revenue only with Dr. McCashew and not his other partners. He cites as an example of this the fact that after Dawn Morton was hired in July 1991, his receptionist made a mistake and allocated Ms. Morton's production to Dr. Sankoff. It was later picked up by another receptionist who spoke to Dr. Sankoff on this and those numbers were immediately reversed. I find the motivation for this reversal by Dr. Sankoff somewhat suspect because it occurred after the Plaintiff had been expelled from the partnership. The Defendants and in particular, Dr. Sankoff, could not but have ordered this reversal given the position they had taken with the Plaintiff on the matter.

66 The Defendants and in particular Dr. Li and Dr. Sankoff asserted that there was a "hands-off/hands-on" rule that had been established relating to the hygiene department. The essence of this rule as they saw it was that if Dr. Yates had done part of the hygienist's work himself (i.e. the removal of the deposits from the patient's teeth), they would have had no problem in the Plaintiff keeping the revenue from his hygienist. According to Dr. Li the removal of the deposits in the cleaning of teeth takes a lot of time to do and that is the majority of the time of a dental appointment. So if a dentist does that work in his chair, it is "hands-on" work and he should be entitled to get the revenue from it. If a dentist's hygienist does this work in his chair, it is "hands-off" work and should be attributed to the hygiene department and not the dentist. I reject that there was such a rule established by the Partnership Agreement. Nowhere does it appear in the Partnership Agreement and further as demonstrated above, there were many exceptions to it if there was such a rule.

67 I agree with Plaintiffs counsel that the general rules on revenue allocation were as follows: if a partner did the dentistry work, that partner got the revenue; if a partner's dental assistant did the dentistry procedures in his chair, that partner received the dental assistant's revenue and likewise that should be the case if a hygienist instead of the dental assistant did the work. However, if that dentist's hygiene work was performed on his patient by a member of the hygiene department in that department, then as per Schedule "C" that revenue was shared equally amongst the partners as "other income."

68 Dr. Li contends that the Plaintiff is not entitled to this hygiene revenue of Sue Prior's because he was operating a business out of his third chair in competition with the business of the partnership and without the consent of his partners. If that was the case then the Plaintiff is in contravention of paragraph 12.04 of the Partnership Agreement. I conclude there is no basis for the acceptance of Dr. Li's contention on this whatsoever. As earlier stated, the Defendants (including Dr. Li) had approved the Plaintiff taking on a third chair. No formal objections were taken by the Defendants on the Plaintiff's practice in that third chair until the June 5, 1991 meeting. Dr. McCashew was well aware of what the Plaintiff was doing when Sue Prior showed up to work for the Plaintiff the week of April 7, 1991. Dr. Li admitted he saw Sue Prior working for the Plaintiff in his chair in April 1991 and that the Plaintiff did not hide this. Further, Dr. Li acknowledged that he could not say whether Dr. Yates had performed some of the cleaning

work with the assistance of Sue Prior. The Defendants also acknowledged that if Dr. Yates had been doing this work with a dental assistant assisting him in his third chair, they would have thought that to be fine and not in competition with NCDA's business. But because a hygienist and not the Plaintiff was doing the work in his third chair, the Plaintiff was therefore operating a competing business according to the Defendants. Since I have rejected the "hands-on/hands-off" rule put forward by the Defendants, I do not buy this competing business argument of Dr. Li's. In short, the Plaintiff was not operating a competing business and thus was not in breach of the Partnership Agreement.

Miscellaneous Items Referred to in "Continuity Schedule for Dr. Greg Yates Equity Account"

69 The July 12, 1991 accounting prepared by Ms. Evans entitled "Continuity Schedule for Dr. Greg Yates Equity Account" (See Exhibit "1"-Tab 20) (the "Schedule") also contains other unauthorized and incorrect adjustments against the Plaintiffs "equity account balance."

70 There is an item appearing as the third last entry on page 1 of the Schedule called "Donna Wood negative equity account written off - \$10,129.10." The Plaintiffs share of this item is shown as \$2,532.27. Apparently this \$10,129.10, which was written off by the Defendants after the Plaintiff had been expelled, related to accounts receivable of Ms. Wood that could not be attributed and collected from her. This write-off was not authorized by the NCDA partnership while Dr. Yates was on the premises of NCDA. There is no provision in the Partnership Agreement or in the understanding reached with Dr. Wood on her departure which authorizes this write-off to Dr. Wood. If this write-off was authorized after the Plaintiffs departure (which appears to be the case), then I concur with Plaintiff's counsel that it should not affect Dr. Yates "equity account balance" as it was done without his consent and knowledge. Accordingly, I find this item should read "Nil" rather than "(\$2,532.27)."

71 The item called "Interest charges on outstanding equity owing for the period October 1, 1991 through March 31, 1992 at 9%", is the second last entry on page 1 of the Schedule. It purports to reflect there is interest owing by Dr. Yates on outstanding equity during the specified period. No evidence was presented by the Defendants that suggested that there was outstanding equity owed by the Plaintiff for the period October 1, 1991 through March 31, 1992. Hence, it follows no interest would be earned. Further there is no provision in the Partnership Agreement or in the dealings as between partners permitting the charging of interest on such items or for the setting of interest at the rate of 9% or at any rate. This item should therefore be recorded as "Nil" rather than "(\$1,229.81)."

72 I concur with Plaintiffs counsel that the item referred to as "Surgical suite charges" found in line 3 of page 3 of the Schedule is in error. This figure for Surgical suite charges should be "\$3,456.25" rather than "\$3,844.54." As a result, the Plaintiffs "equity account balance" amount should have added to it the sum of \$388.29 (i.e. \$3,844.54 - \$3,456.25).

73 Finally, no provision was made in the Schedule to credit Dr. Yates for his share of a Canadian Dental Supply rebate in the sum of \$545.35. Such a credit of \$545.35 should have been given to him and added to his equity account balance.

74 Given these various adjustments I have directed be made with respect to the hygiene revenue earned by the Plaintiff and the items noted above, I conclude that the Plaintiff owes the Defendants approximately an amount somewhere between \$8,042.09 to \$9,042.09 and not the total sum of \$31,242.48 as the Defendants have alleged pursuant to their Statement of Claim in Action No. 9101-17401, as amended at trial. This amount owed by the Plaintiff for the purposes of the calculation done in the Schedule, is of course subject to being accurately determined through the accounting I have directed and is offset by the damages for extraordinary expenses awarded to the Plaintiff as set out below.

75 It is self evident that a Partnership Agreement is a contract like any other so that the normal remedies for breach, such as damages, are available. In this instance, I have found that not only has there been a breach of the Partnership Agreement by the Defendants but also a breach by the Defendants of their duty of good faith as partners to the Plaintiff. What damages, if any, then flow from these breaches in favour of the Plaintiff?

76 The onus is on the Plaintiff to prove the damages suffered; that is, the Plaintiff must on a balance of probabilities prove that the extraordinary expenses set out in Tab 21 of Exhibit "1" ("extraordinary expenses") arose naturally as a result of the breaches. In other words, the Plaintiff must prove the damages are not too remote. If the Plaintiff is able to prove that he has suffered damages that are not too remote, he must, so far as money can do it, be restored to the position he would have been in had those particular damages not occurred.

77 Dr. Yates submits that as a result of his wrongful expulsion from the NCDA partnership, he incurred extraordinary expenses he would not have otherwise incurred. Originally he had been given only one week to move his practice of 2000 to 2500 patients to a new location. Subsequent Court orders extended that time to noon on Friday, July 12, 1991. Given the very short time in which the Plaintiff had to move his practice, the Plaintiff found that his initial move to the Parkdale Dental Group at 7 Parkdale Crescent N.W., Calgary was a temporary one. He subsequently moved a year and a half later to a more desirable and permanent location at 220, 1620-29th Street N.W., Calgary. The temporary move to the Parkdale Dental Group resulted in extraordinary expenses to the Plaintiff, which he now claims.

78 The Defendants contend that no one partner forced the Plaintiff to take his practice once he was expelled. The Defendants indicate the Plaintiff could have taken his goodwill payment but he chose not to. I query how realistic and logical that would have been. The Plaintiff was and is a young dentist far from retirement and with a thriving dental practice. It would have been totally unrealistic for him to take his goodwill payment and then be bound by a restrictive covenant which prevented him from setting up his own dentistry practice for a two year period within the city limits of Calgary. Further, the Defendants and in particular Dr. McCashew acknowledged they were fearful of a lawsuit with Dr. Yates if they did not allow him to leave with his practice in lieu of his goodwill payment. That was the real motivation for the Defendants allowing the Plaintiff to take his dental practice and relocate within the city of Calgary.

79 The Defendants further contend that the Plaintiff would have had to incur these extraordinary expenses in any event had he moved of his own volition. They argue that the Plaintiff did operate his dentistry practice out of the Parkdale Dental Group for a year and a half before relocating to his present location and that the majority of expenses incurred in the Plaintiffs first move would have been incurred in any kind of move. I would have been sympathetic to that argument but for the fact that the Defendants handled the situation badly once they had moved to expel the Plaintiff from the partnership. The Plaintiff was initially given one week to move his sizeable practice - an impossible task to perform. The Court Orders obtained by the Plaintiff support the Plaintiffs position on this. Further, had the Plaintiff not been wrongfully expelled from the NCDA partnership and chosen instead to voluntarily withdraw from the partnership, he would have had six months to relocate his dental practice to a new location. The Plaintiff was not afforded this six month period to relocate. The Plaintiff had to move quickly over a three week period under stressful conditions to find a new location; a location which was not the Plaintiff's first choice but would have to do given the urgency of the situation. Added to that, I find that the conduct of the Defendants in dealing with the Plaintiff following his expulsion was less than desirable. This is particularly evident in how the Defendants chose to handle the matter of the copying of the Plaintiff's charts.

80 The Plaintiff advises that after his expulsion he contacted the Dental College requesting advice on how to deal with his patients' charts. The College suggested he keep his charts and records and enter into an agreement with the Defendants whereby the Plaintiff would agree to make his charts and records available to them if requested and required for liability purposes. This proposal was presented to the Defendants but they refused to accept it; thereby forcing the Plaintiff to obtain a Court Order allowing the Plaintiff to remove his charts and records for the purposes of copying same. This created additional and unnecessary expense to the Plaintiff for the Plaintiff then had to pay

both his wife, Connie Yates and a staff member, Connie Koch, to photocopy all of his charts and records before returning them to the Defendants. I find there was no need for the Defendants to react this way to the Plaintiffs proposal. All parties were professionals and should have reached agreement on the charts and records as suggested by the Plaintiff. The Defendants would not agree to the Plaintiff's request on this and thus must answer for the consequences of their actions. In the result, I find that the Plaintiff is entitled to the extraordinary expenses set out in Tab 21, Exhibit "1" and accordingly damages are awarded to the Plaintiff in the amount of \$37,259.78 to cover these extraordinary expenses. The Plaintiff is also entitled to pre-judgment interest calculated on the amount of \$37,259.78 from July 12, 1991, at the rate or rates applicable from time-to-time pursuant to the Judgment Interest Act, R.S.A. 1984, c. J-0.5 and amendments thereto.

81 The Defendants have questioned the amount in salaries paid by the Plaintiff to Mrs. Yates and Ms. Koch for photocopying charts and Dr. Yate's claim for one week's draw. The Defendants allege that the \$18,000.00 paid to Mrs. Yates over a 12 month period and the \$8,113.06 paid to Ms. Koch are excessive for what they were required to do. They claim that the expense incurred for the photocopying of approximately 1400 charts should have been about \$625.00. In support of this, the Defendants hired a Ms. Candice Spooner to randomly photocopy 1400 of their files. Ms. Spooner testified it took her 62.5 hours to photocopy 1400 files and she was paid \$10.00 an hour, for a total of \$625.00 for this task. Ms. Spooner acknowledged, however, that she only copied the records in the files. She was not required to actually look through the files and set up the files with the appropriate labels and information; nor was she required to put the files into boxes and ship them off to a record centre when she was finished with them. Strangely enough when she was finished photocopying for the day, she would throw out the photocopied stack as the Defendants had directed. I appreciate the Defendants hired Ms. Spooner to perform this task for a cost significantly less than that claimed by the Plaintiff. But I find the whole process of Ms. Spooner photocopying the contents of 1400 files and then throwing the copies in the garbage to be bizarre and wasteful to say the least. This could have been avoided if the Plaintiff had been allowed to take and keep his own charts and records in the first place.

82 Furthermore, Ms. Spooner only copied the contents of 1400 charts, not the estimated 2000 to 2500 patient records the Plaintiff took with him. Not only did Ms. Spooner's workload differ from Mrs. Yates and Ms. Koch's, but her tasks performed for the Defendants differed as well. The Plaintiffs wife, Mrs. Yates, worked for a year copying charts and dealing with matters relating to the Plaintiffs move to the Parkdale Dental Group. Seventy to eighty percent of her time was spent setting up and copying charts. Mrs. Yates performed this task every day and completed the set up of approximately 10 charts a day with 20 pages for every chart. I do not find this to be unreasonable given that she was not only photocopying but also opening and creating a file for each patient's records while at the same time being interrupted and asked to do tasks relating to the move. Ms. Koch was hired to assist Mrs. Yates on this and to cope with the move. Ms. Koch assisted in contacting the Plaintiffs patients to advise and alert them of the Plaintiffs recent move. The Plaintiff found that in the two mail-outs that were done advising of his change of address, the Plaintiff was getting a lot of returns back in the mail. Ms. Koch had to follow up on this. As well, Ms. Koch kept notes on what portions of a patient's file had been copied as it was not always necessary to copy the complete contents of a file. The Plaintiff quite understandably was very concerned following his expulsion that his patients would move with him. He had worked hard and long hours for 13 1/2 years to build up his practice at NCDA and dentistry was his livelihood. I also note that although Mrs. Yates was actually paid \$2,500.00 per month, the Plaintiff has claimed only \$1,500.00 per month for her salary expense. As well, the Plaintiff has only claimed 40% and not the full amount of Ms. Koch's salary expense. I find no reason to dispute the Plaintiffs figures on these items.

83 As for the Plaintiffs claim for a one week draw of \$4,000.00, I find this totally acceptable under the circumstances. Granted there was no loss of production to the Plaintiff when he moved his practice, in that he was able to take the majority of his patients with him to the Parkdale Dental Group. However, the Plaintiff did lose one week of his three week planned vacation in dealing with the move. This was a week spent on moving matters the Plaintiff had not contemplated when he originally scheduled his vacation time. His claim of \$4,000.00 which is based on one week of an estimated monthly draw of \$17,500.00, is reasonable and warranted in this situation.

V PLAINTIFF'S ENTITLEMENT, IF ANY, TO SHARE OF NCDA PHYSICAL ASSETS

84 The Plaintiff claims that as an expelled partner from a partnership of five partners, he is entitled to a one-fifth share of the value of NCDA's physical assets. He estimates the fair market value of this one-fifth interest to be \$102,043.00 based on an appraisal referred to as the Rosenbaum Report, which is found at Tab 9 of Exhibit "1". The Rosenbaum Report was used in the June 1, 1991 buy-in of Dr. Schmidt into the partnership. This figure of \$102,043.00 was apparently the price paid for assets by Dr. Schmidt just three weeks prior to the vote to expel Dr. Yates.

85 The Plaintiff asserts that at the time the Replacement Partnership Agreement was entered into by Gary S. Sankoff Professional Corporation, Donna M. Wood Professional Corporation and the Plaintiff, the matter of what was to be done with the partnership's physical assets in the event of a partner's expulsion or withdrawal was simply never addressed. The Plaintiff claims that at that time the partnership was preoccupied with the concerns of Dr. Wood and arriving at a workable goodwill formula and a clearer income distribution schedule. He claims that it was merely an oversight on the partners' part that the distribution of physical assets on expulsion or withdrawal was never discussed. Plaintiff's counsel therefore contends that as the physical assets were transferred from Kenchaldon to the NCDA partnership effective July 1, 1986 the expelled Plaintiff should be entitled to his share of physical assets in the partnership as at July 12, 1991 (i.e. the date of his departure from NCDA). As the Replacement Partnership Agreement is silent on the amount to be distributed and paid to the Plaintiff for his share of the physical assets, he argues that one must look to The Partnership Act for guidance, specifically sections 45(1) and 46 thereof.

86 Section 45(1) of the Act provides that.

"When a member of a firm ... ceases to be a partner and ... the continuing partners carry on the business of the firm with its capital or assets without a final settlement of accounts as between the firm and the outgoing partner ..., the outgoing partner ..., in the absence of an agreement to the contrary, is entitled at the option of himself ... to

- (a) the share of the profits made since the dissolution of the partnership that the Court finds to be attributable to the use of his share of the partnership assets, or
- (b) interest on the amount of his share of the partnership assets."

(bold wording above is my emphasis)

87 The Plaintiff advises he makes no claim for the profits referred to in section 45(1)(a) but does claim interest referred to in section 45(1)(b) on the \$102,043.00. Section 46 of the Act provides that:

"Subject to any agreement between the partners, the amount due from ... continuing partners to an outgoing partner ... in respect of the share of the outgoing partner ... is a debt accruing at the date of the dissolution ..."

(bold wording above is my emphasis)

88 Reading sections 45(1) and 46 of the Act together, Plaintiff's counsel states that once expelled the Plaintiff has effectively ceased to be a partner of the NCDA partnership without there having been a final settlement of accounts as between NCDA and the Plaintiff. Further, the retirement and expulsion of a partner, in this case that of the Plaintiff, has resulted in a technical dissolution of the NCDA partnership as at July 12, 1991 and nothing more. The distinction between technical and general dissolution of a partnership is discussed at page 591 of Lindley and Banks on Partnership:

"It does not necessarily follow from the fact that a partnership has been dissolved that its affairs will fall to be wound up in the manner prescribed by the Partnership Act 1890. It has already been seen that, as a matter of law, a change in the composition of a partnership results in a dissolution of the existing firm and the creation of a new firm; in such a case, the new firm will usually take on the assets and liabilities of the old, without any break in the continuity of the business. This is often referred to as a 'technical' dissolution and is usually, but not always, the result of agreement.

In contrast, the expression 'general' dissolution is used to denote a dissolution involving a full scale winding up, which may well have been brought about at the instance of one partner, against the wishes of the other. When a firm is referred to as 'in dissolution', this usually indicates that a general dissolution has taken place, but that the winding up of its affairs is still continuing."

89 Since according to the Plaintiff there is no agreement amongst the NCDA partners with respect to an expelled partner's share of the physical assets, the Plaintiff states sections 45 and 46 of the Act operate to provide the Plaintiff with a share in NCDA's physical assets on its technical dissolution. This amount is a debt owing to the Plaintiff equal to \$102,043.00 with accrued interest earned thereon from July 12, 1991.

90 The Defendants contend that the Replacement Partnership Agreement is clear on its terms and that all the Plaintiff is entitled to following his expulsion from the partnership is the current balance of his income account, Goodwill Amount, and any other amounts which may be mutually agreed to. As the Plaintiff chose to take his dental practice with him on his departure, it was mutually agreed he would not receive his Goodwill Amount. It is the Defendants' submission that it was not accidental nor an oversight on the part of the partnership that a clause was not inserted in the Replacement Partnership Agreement dealing with a departing partner's entitlement to NCDA's physical assets. To support this, the Defendants cite examples of how previous departing partners, Dr. McNichol and Dr. Wood, had been treated with respect to their share of the physical assets. The Defendants find it ironic and curious that the Plaintiff relied on the partner payout formula set out in the Partnership Agreement for these departing partners when it was to his advantage and then once expelled, the Plaintiff sought to contest it. Based on my review of the documentation and evidence presented at trial, I concur with the Defendants' submission on this and therefore find the Plaintiff is not entitled to a one-fifth share of the physical assets in NCDA which he estimates to be in the amount of \$102,043.00. It follows then the Plaintiff's claim for this amount of \$102,043.00 is dismissed.

91 In concluding that the Plaintiff is not entitled to a one-fifth share of the NCDA physical assets, I have examined the terms of the original Partnership Agreement and compared them with the terms of the Replacement Partnership Agreement. Paragraph 24 of the original Partnership Agreement provides that a withdrawing partner is to be paid his equity-value in the capital account, current account, goodwill, instruments and supplies of the firm in equal monthly instalments over a period of five years commencing one month after the date of withdrawal. Under paragraph 26(b) of that Agreement a withdrawing partner, such as an expelled partner, would be paid his equity value in the firm pursuant to paragraph 24. There is no definition for equity-value in this Agreement but paragraph 31 states that each partner's equity value is to be determined on an annual basis. When the Plaintiff joined the NCDA partnership in June of 1978, these provisions in the original Partnership Agreement governed the payout amount to a departing or expelled partner. As the majority of the physical assets were in the partnership holding company, Kenchaldon, and not in the partnership, an expelled partner's equity value in his capital account at that time would have been minimal. The evidence indicates that initially, a small amount of capital, being the sum of \$10,000.00 with \$2,000.00 attributed to each partner including Dr. Yates, was allocated to the dentistry instrumentation held by the partnership. Over the years that capital amount of \$10,000.00 appears to have been reduced to zero. Thus, if the Plaintiff had been expelled from the NCDA partnership prior to the existence of the Replacement Partnership Agreement, the Plaintiff likely would have received a minimal amount, if any, at all for his capital account; albeit he would have received monies from Kenchaldon for the sale of his shares in that company.

92 A Replacement Partnership Agreement effective June 25, 1987 was entered into between the partners. One of the active participants in negotiating that Agreement was the Plaintiff. Paragraph 3 of the preamble to that Agreement indicates the parties desire to rescind the Previous Partnership Agreement. The first sentence of paragraph 2.01 of that Agreement indicates that the Previous Partnership Agreement (being the original Partnership

Agreement) is superseded by the Replacement Partnership Agreement. Although there is no clause in the Replacement Partnership Agreement which specifically states that the original Partnership Agreement is rescinded, it is clear through the use of the word "superseded" that it is intended the June 25, 1987 Partnership Agreement is to replace and set aside the original Partnership Agreement. This is further supported by a Partnership Amending Agreement dated July 31, 1987 and signed by each of Gary S. Sankoff Professional Corporation, Gary Yates Professional Corporation and Donna M. Wood Professional Corporation. In the first of the two July 31, 1987 Partnership Amending Agreements under Tab 1 of Exhibit "1", both the first paragraph of the preamble to that Agreement and clause 2 thereof indicate that the Previous Partnership Agreement (being the original Partnership Agreement) is amended and superseded by the Replacement Partnership Agreement. It is clear to me that based on this wording, it was intended by all parties, including the Plaintiff, that the terms and provisions of the Replacement Partnership Agreement would be the governing provisions for the purposes of determining a payout amount to an expelled partner.

93 I do not accept the Plaintiffs submission that the absence of any reference in the Replacement Partnership Agreement to an expelled partner receiving an equal share in NCDA's physical assets, was accidental and an oversight. If the NCDA partners had intended that an expelled partner was to receive an equal share of the physical assets upon departure, specific wording reflecting that intention would have appeared in the Replacement Partnership Agreement. Certainly, the partners in the original Partnership Agreement had stated specifically in paragraph 24 thereof that a withdrawing partner was entitled to the equity value from the "capital account, current account, goodwill, instruments and supplies of the firm." Since specific wording providing for the Plaintiff's equal sharing of NCDA's physical assets does not appear in the Replacement Partnership Agreement, I conclude it was the partners' intention that an expelled partner was entitled only to the current balance of his income account and his Goodwill Amount as specified in paragraph 14.05 therein. Although there is no definition of "income account" in the Replacement Partnership Agreement, paragraph 14.06 does indicate how to arrive at the current balance of the income account of a withdrawing partner. Specifically, the current balance of the income account of a withdrawing partner to which he is entitled is the withdrawing partner's share of the income less all draws as at the effective date of the expulsion of the partner.

94 For purposes of understanding what the "income account" was, the Plaintiff referred to and used by way of example the entries shown on the April 30, 1991 Balance Sheet for NCDA. Dr. Yates's sales figure or production for the month of April 1991 was \$43,578.62. After deducting various expenses attributable to Dr. Yates from his April production, the net income to Dr. Yates for that month was \$22,025.08. The NCDA partnership's year end was the last day of February. So Dr. Yates's income for the year as at April 30, 1991, which is shown as \$45,256.97 on the statement (under the heading Partners' Equity), represents his net income amount for the months of March and April 1991. By adding this net income of \$45,256.97 for that period to the balance of his income account carried forward from the previous fiscal year (being the sum of \$35,953.62) and then deducting Dr. Yates's drawings for March and April 30, 1991, one arrives at a current balance of \$50,118.59 in the Plaintiffs income account (see Tab 13(A) of Exhibit "1"). Although the Balance Sheet for April 30, 1991 refers to this \$50,118.59 as being "Dr. Yates Equity," I am satisfied from the evidence presented that the terms equity account and income account were used interchangeably by all of the partners, including Dr. Yates. Had the Plaintiff therefore been expelled on April 30, 1991, the Plaintiff would have been entitled to the current balance in his income account as at April 30, 1991, which in this instance would have been the sum of \$50,118.59, described as "Dr. Yates Equity."

95 Furthermore, it is interesting to note that if one looks at the figure of \$286,675.87 for the Assets of NCDA on the April 30, 1991 Balance Sheet and then deduct the Total Current Liabilities of \$144,556.55 for that period, one arrives at a total Partners' Equity of \$142,119.32 as per the Balance Sheet of April 30, 1991. If then separately one adds the equity or income account figures of all partners (including Dr. Yates's Equity of \$50,118.59) listed on the April 30, 1991 Balance Sheet under Partners' Equity, one also arrives at a Total Partners' Equity amount of \$142,119.32. This Total Partners' Equity amount of \$142,119.32 is therefore allocated and apportioned amongst all partners based on the current balance of their income accounts. This apportionment of the Partners' Equity (i.e. the \$142,119.32) was not equal amongst the NCDA partners and was indirectly based on each partner's production; so that the more a partner produced (i.e. the more patients he saw), the more he was entitled to from his equity or income account and for his draws. This approach applied to the Plaintiff as well when he departed from the

partnership on July 12, 1991. At that time the accountant, Ms. Evans, as per the Schedule appears to have taken Dr. Yates Equity amount as at July 12, 1991, which would have been approximately \$32,805.33 and added to that the Plaintiff's share of Dr. Schmidt's buy-in amount of about \$23,690.00 to arrive at an income or equity account balance at July 12, 1991 for him of \$56,495.33. I note this income or equity account figure (prior to adding in Dr. Schmidt's buy-in amount) designated to the Plaintiff was greater than Dr. Li's equity amount of \$24,429.28 shown on the July 31, 1991 Balance Sheet.

96 In addition, this equity or income account amount arrived at for the Plaintiff on his departure did take account of the value of NCDA's assets as at July 12, 1991. As discussed above, the value of NCDA's assets was included in calculating the Total Partners' Equity amount available for distribution to the partners through their income or equity accounts. The Assets of NCDA shown on the July 31, 1991 Balance Sheet include the fixed physical assets of NCDA such as the surgical equipment, dental equipment, instruments, leasehold improvements, office furniture and equipment and computer hardware and software. In short, I conclude that the payment to the Plaintiff of the current balance of his income account at July 12, 1991 with such other items noted on the Schedule (as may be adjusted following the accounting), will fully and completely compensate him for any claim he may have with respect to NCDA's physical assets, and accordingly, he is entitled to no more.

97 Other evidence presented at trial supports the Defendants' contention that the expelled Plaintiff is entitled to nothing more for NCDA's physical assets than is provided for under paragraph 14.05 of the Partnership Agreement. This evidence constitutes the following:

- (i) Approximately \$51,006.00 was paid by the NCDA partnership to Kenchaldon for a transfer of all dentistry equipment to NCDA effective July 1, 1986. The Plaintiff was a shareholder in Kenchaldon at that time and presumably would have been paid his share for the transfer of these assets through any subsequent dividends he received. Although I do recognize that this acquisition of assets by NCDA was also an expense to the Plaintiff as a partner of NCDA (thereby reducing his income and monthly draw), the Plaintiff unlike Dr. Wood was reimbursed, if not fully, at least in part for this transfer of physical assets through being a shareholder in Kenchaldon. So with respect to \$51,000.00 worth of physical assets, the Plaintiff has been paid as a result of his shareholdings in Kenchaldon.

So too, the Plaintiff has received the benefit of and been paid his share of the buy-in amounts to the partnership of Doctors Li, McCashew and Schmidt and in this respect the Plaintiff has been fairly treated.

- (ii) At trial, the Plaintiff confirmed what he had earlier stated in lines 6-11 of proceedings to cross-examine him on his Affidavit sworn July 18, 1992. He acknowledged he never requested that the Partnership Agreement be amended to reflect a division of the physical assets. Apparently, it was a problem on his mind that he thought eventually would get addressed but he never communicated that to any of his partners.

(iii) The Plaintiff together with his other partners was actively involved in the negotiations with Dr. Wood when she withdrew from the partnership. Dr. Wood was not paid anything for physical assets. All she received was the current balance of her income account and her Goodwill Amount. - The Plaintiff did not have any problem with that at the time. The partnership also gratuitously arranged the release of her personal guarantee from CIBC. The Plaintiff contends that by so arranging for the release of Dr. Wood's guarantee the partnership demonstrated that it did not always confine itself strictly to the terms of the Partnership Agreement. It followed it should not do so in the case of the Plaintiff with respect to physical assets. However, as noted, the release of Dr. Wood's guarantee was merely gratuitous on the part of the remaining partners and was not something they had to do. Furthermore, it is compelling that the Plaintiff on cross-examination acknowledged that when Dr. Wood left the partnership she was not paid anything with respect to the physical assets and she did not ask for anything. Apparently that was agreeable to the Plaintiff for he stated "It's up to her to ask".

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This same approach was taken with Dr. McNichol when he resigned from the partnership. The Plaintiff indicted that when Dr. McNichol brought up the issue of physical assets he advised him that if there was anything there, he was entitled to it. The Plaintiffs attitude was it was up to Dr. McNichol if he wished to pursue the matter of physical assets. Because Dr. McNichol was a shareholder in Kenchaldon he received his payout of \$36,960.00 for his shares. As a partner in NCDA Dr. McNichol only received a goodwill payment and no other amount for partnership assets. Apparently the reason for this was his personal capital account was at or near a nil balance.

In both the departures of Dr. Wood and Dr. McNichol, the Plaintiff accepted that these partners were not paid anything for the physical assets held by the partnership. Presumably as it was to the Plaintiffs financial benefit that that occur, the Plaintiff did not object. That the Plaintiff should now seek to challenge the Defendants on this when as a partner he so readily accepted that a departing partner was not entitled to anything for physical assets, seems unfair and inequitable.

- (iv) The Plaintiff is currently being paid out by Kenchaldon through its only shareholder, Sankoff, for the Plaintiffs shares in that company. Admittedly, this has not occurred without difficulty but the Plaintiff is now receiving payments for his shares as required. Added to that, the Defendants at the Court's request following argument, were successful in obtaining from the CIBC a letter dated March 14, 1995 confirming CIBC's "full release of interest in the Guarantee given by Dr. Greg Yates, dated October 2, 1990 in the amount of \$50,000.00." Although this release of guarantee was obtained by the Defendants after the fact, it does go a long way in satisfying this Court that the Plaintiff has been put on an equal footing with Dr. Wood with respect to the payout arrangements agreed to by all parties when she withdrew from the partnership.

98 If it should be determined at a later time that I am in error on this so that the Plaintiff is entitled to a one-fifth share of the physical assets of the partnership, then is the amount of \$102,043.00 claimed by the Plaintiff for these assets accurate? The Defendants contest that amount, claiming that it is not an accurate figure at all. On this, I must agree with the Defendants.

99 The Defendants assert that determining the value of the physical assets is not a simple matter. One cannot just look to the appraisal value of these assets of \$102,043.00 which Dr. Rosenbaum has stated on page 4 of his Report dated November 21, 1990. There are liabilities attached to these physical assets. Dr. Rosenbaum recognized these liabilities. On page 39 of his Report under the heading "Liabilities" he states:

"The Practice and assets will be clear of all financial liabilities. All accounts payable and payroll will be fully paid including laboratory, supply and equipment accounts.

All loans, leases, chattels and mortgages will be paid off with the following exception, if agreeable, to all parties concerned:

The purchaser may have the option to assume the following leases at the current buy-out amount (plus tax if applicable) for an equal cash credit on the closing date.

Loan #	Purpose	Amount	Term
#1	Equipment	\$39,000	2 y
#2	Equipment	\$40,000	4 y
#3	Equipment	\$21,956	2 y"

100 The Plaintiff argues that this \$102,043.00 value for the physical assets took account of these liabilities. The wording of Dr. Rosenbaum's on page 39 of his Report puts this in doubt. Unfortunately, Dr. Rosenbaum was not called as a witness to clarify this point. Clause 3.01 of the Schmidt Buy-in Agreement (an Agreement which the Plaintiff signed), further supports the contention that certain liabilities must be deducted from the \$102,043.00 to

arrive at an accurate value for the physical assets. Clause 3.01 states that:

"As at that date of closing, the Partnership will own and possess its assets free and clear of all liens, mortgages, charges, pledges, whatsoever, with the exception of the bank loans outstanding in the amount of eighty two thousand eight hundred and seventy three dollars and fifty nine cents (\$82,873.59) as of March 31, 1991."

101 The July 31, 1991 Balance Sheet for NCDA also shows a capital loan of \$21,571.37, a Pandrex Loan of \$32,494.00, a computer loan of \$15,628.00 and various other liabilities. The Plaintiff prior to his departure from NCDA on July 12, 1991 was responsible for his share of those liabilities; the expense of which was deducted from his monthly draw. If the physical assets being disposed of by the Plaintiff and acquired by NCDA had been real property, the Plaintiff would have received net sale proceeds from that asset after deducting his share of any mortgage or loan against the real property. Likewise, it is reasonable to assume that if this Court had determined NCDA was to pay the Plaintiff for his share of physical assets, that any loans or liabilities attributable to this share would have to be taken into account and deducted from the \$102,043.00. Once that deduction takes place, it is evident the Plaintiff would have been entitled to an amount less than the \$102,043.00 which he claims.

102 The Defendants also question whether the amount arrived at by the Plaintiff for the physical assets after deducting his share of liabilities from \$102,043.00, is the correct approach at all. Specifically, they contend if the Plaintiff is relying on sections 45 and 46 of The Partnership Act for a claim of NCDA's physical assets then the Defendants state that those provisions of the Partnership Agreement dealing with its "technical dissolution" or "dissolution" should be referred to. Certainly, section 47 of The Partnership Act dealing with the distribution of assets on final settlement of accounts and following sections 45 and 46, supports that view. Since there is a clause in the Partnership Agreement dealing with dissolution (i.e. Article XV), the Defendants contend that on a technical dissolution of the kind described by the Plaintiff's counsel, one must determine those amounts payable under paragraphs 15.02(a), (b) and (c) thereof prior to an equal distribution to the partners (including the Plaintiff) of any residue of the assets. The amounts that would have to be determined and accounted for under paragraphs 15.02 (a), (b) and (c) deal with monies owed by the partnership to third parties; monies owed to partners for any advances to or personal liabilities incurred on behalf of the partnership and amounts due to partners in respect of the current balances of their income accounts. Once this accounting is completed without there being a complete dissolution or winding up of NCDA, it is questionable that the Plaintiff's figure of \$102,043.00 for his share of physical assets would be correct. On this, I concur with the Defendants so that any determination of the value of the Plaintiff's share of physical assets on a technical dissolution would have to first take into account and ascribe amounts for those liabilities listed in the priority set out in paragraphs 15.02 (a), (b) and (c) of the Partnership Agreement.

VI PUNITIVE DAMAGES AND AGGRAVATED DAMAGES

103 Following argument at trial I stated that on considering the evidence and the case law presented, this was not a case for which exemplary or punitive damages and aggravated damages should be awarded. Hence, I dismissed such a claim by the Plaintiff for these kinds of damages against all of the Defendants. I noted that in any event no such claim had been made by the Plaintiff against John K. Schmidt Professional Corporation in the Amended Statement of Claim filed with this Court on July 2, 1991.

104 In reaching this conclusion I found the case of *Vorvis v. Insurance Corporation of British Columbia*, [1989] 4 W.W.R. 218 (S.C.C.) referred to me by Plaintiff's counsel, to be most instructive. At page 230 of *Vorvis*, supra, McIntyre, J. (Beetz and Lamer, J.J. concurring) set out the distinction between punitive and aggravated damages. Specifically:

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"Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, *The Law of Damages* (1983), at pp. 562-63, para. 979, in these words:

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. 'Exemplary' was preferred by the House of Lords in *Cassell & Co. Ltd. v. Broome*, but 'punitive' has also been used in many Canadian Courts including the Supreme Court of Canada in *H.L. Weiss Forwarding Ltd. v. Omnis*. The expression 'aggravated damages,' though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes a award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may be only awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment."

Aggravated Damages

105 Although I agree that the manner in which the Defendants dealt with the Plaintiff when he was expelled from the partnership was less than desirable under the circumstances, I cannot find that such conduct aggravated the damage incurred as a result of that expulsion. The Plaintiff has already been awarded damages for extraordinary expenses he incurred following his expulsion from NCD and therefore in my opinion he has been fully compensated for the wrongful behaviour of the Defendants towards him.

Punitive Damages

106 As pointed out in *Vorvis* at page 234:

"The award of punitive damages requires that (Waddams, p. 563):

... a civil court ... impose what is in effect a fine for conduct it finds worthy of punishment, and then to remit the fine, not to the State Treasury, but to the individual plaintiff who will, by definition, be over-compensated."

107 My review of the law on this area, however, leads me to conclude that in considering an award for punitive damages one must do so with the most careful consideration. As the case of *Vorvis* indicates the discretion to award such damages should be most cautiously exercised.

108 Are punitive damages warranted in this case? The Plaintiff submits that they are and especially so against Dr. Sankoff. The Plaintiff cites the following in support of this submission:

- (i) The Defendants breached their fiduciary duty as partners to act in good faith towards the Plaintiff. Because this is a fiduciary case, it imposes a higher standard of conduct which the Defendants fell short of towards the Plaintiff.

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(ii) The actions of the Defendants and how they dealt with the Plaintiff on expulsion and following were deliberately aimed at the Plaintiff. Plaintiff was given too little time to relocate his dental practice and the Defendants made his relocation as difficult as possible. The Defendants did not like the Plaintiffs interpretation with respect to the sharing of hygiene revenues and so plotted to expel him from NCDA without attempting to resolve their differences.

(iii) Dr. Sankoff was motivated to expel the Plaintiff because by doing so he was able to gain sole control of Kenchaldon as the only remaining shareholder. Dr. Sankoff stood to gain the most by the Plaintiffs expulsion. Also such expulsion disentitled the Plaintiff to a proprietary interest of \$102,043.00 which he sought.

109 I have considered all of this and determined the conduct of the Defendants on the whole, including Dr. Sankoff's conduct, was not sufficiently offensive, malicious and deliberate to justify the imposition of an award of punitive damages. As Pace, J.A points out at page 152 of Warner v. Arsenault [\(1982\), 27 C.P.C. 200, 53 N.S.R. \(2d\) 146](#), 109 A.P.R. 146 (C.A.):

"Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified, by malice, fraud or cruelty as well as other abusive and insolent acts toward the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others."

110 There was no evidence to show that Dr. Sankoff deliberately sought to expel the Plaintiff from NCDA so he could become the sole shareholder of Kenchaldon at the expense of the Plaintiff. The Defendants submitted at the time of the Plaintiffs expulsion they believed there was a genuine disagreement amongst the parties of how to treat the hygiene revenues. After seeking legal advice they concluded that given this heated environment, it was simpler to resolve this problem by expelling the Plaintiff. The Defendants believed that what they were doing was the best for all concerned including the Plaintiff. After expulsion, they allowed the Plaintiff to take his patients with him to his new practice instead of insisting he be paid his Goodwill Amount and be bound by the restrictive covenant. Furthermore, the Defendants believed one week was more than adequate time for the Plaintiff to move his practice. They based this one week time frame on the longest outstanding dental procedure the Plaintiff was required to complete. Finally, they submit there was no loss of production to the Plaintiff as virtually all of his patients did go with him to his new location. They, on the other hand argue, they lost one of their major producers when they chose to expel the Plaintiff. There was no financial benefit to them to proceed in this manner.

111 Having assessed the conduct of the Defendants and determined why they acted the way they did, I do not consider such conduct deserving of punishment. I can find no deliberate intention to injure the Plaintiff. Although the Defendants could have handled the partnership dispute which led to the Plaintiffs expulsion in a better fashion, their actions are not deserving of punishment through an award of exemplary damages.

VII MISCELLANEOUS

112 Items 6 and 8 as set out in paragraph 25 of the Amended Statement of Claim filed on July 2, 1991 were previously dealt with by the earlier Court Orders.

113 The parties were given leave to speak to the matter of costs and accordingly I have not dealt with costs at this time. I would request therefore that if the parties have any submissions with respect to costs that they present these submissions to me.

Phillips J.

Tab 10

Saskatchewan *Partnership Act*, RSS 1978, c P-3

Section 10

Notice that firm not bound by acts of partner

10 If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Tab 11

2012 ONSC 7014
Ontario Superior Court of Justice [Commercial List]

Western Larch Ltd. v. Di Poce Management Ltd.

2012 CarswellOnt 15536, 2012 ONSC 7014, 224 A.C.W.S. (3d) 296

Western Larch Limited and Donald A. MacIver, Plaintiffs and Di Poce Management Limited, John Di Poce, Eastern Hemlock Limited, George Frankfort, Large Tooth Aspen Limited, Carmine Guglietti, Red Alder Limited, The Estate of Giovanni Guglietti, deceased, Fincourt Inc., Fincourt Partnership, Alpa Lumber Inc. and Alpa Partnership, Defendants

D. M. Brown J.

Heard: May 3, 2012; May 4, 2012

Judgment: December 11, 2012

Docket: CV-10-8587-00CL

Counsel: T. O'Sullivan, S. Laubman, for Plaintiffs / Responding Parties

P. Griffin, M. Lerner, for Moving Party Defendants, Di Poce Management Limited

John Di Poce, for Eastern Hemlock Limited

George Frankfort, for Large Tooth Aspen Limited

Carmine Guglietti, for Fincourt Inc., Fincourt Partnership, Alpa Lumber Inc., Alpa Partnership

S. Kugler, D. Templer, for Moving Party Defendants, Red Alder Limited, Estate of Giovanni Guglietti, deceased

Subject: Corporate and Commercial; Contracts; Civil Practice and Procedure

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Miscellaneous

Death of G. triggered requirement of partnership agreement that R.A. leave partnership in return for payment by remaining partners — Offeror defendants made agreement with R.A. to bring it back to partnership conditional on successful buy-out of plaintiff — Offeror defendants invoked buy-sell offer mechanism and made shot-gun buy-sell offer to plaintiff — Plaintiff disputed validity of offer — Purchase transaction closed over plaintiff's objection — Plaintiff sought declaration that offer was invalid and damages for breach of fiduciary duty, breach of contract, breach of duty of good faith and oppression — Offeror defendants brought two motions for summary judgment — R.A. defendants' motion for summary judgment was allowed in full; claims against G. estate and R.A. were dismissed in entirety — There was no genuine issues requiring trial with respect to claims concerning validity of offer, breach of fiduciary duty and oppression — It was open to offeror defendants to make offer — Offer complied with specification of value requirements contained in agreement — Defendants did not engage in oppressive conduct as alleged by plaintiff.

Contracts --- Formation of contract — Offer — Miscellaneous

Death of G. triggered requirement of partnership agreement that R.A. leave partnership in return for payment by remaining partners — Offeror defendants made agreement with R.A. to bring it back to partnership conditional on successful buy-out of plaintiff — Offeror defendants invoked buy-sell offer mechanism and made shot-gun buy-sell offer to plaintiff — Plaintiff disputed validity of offer — Purchase transaction closed over plaintiff's objection — Plaintiff sought declaration that offer was invalid and damages for breach of fiduciary duty, breach of contract, breach of duty of good faith and oppression — Offeror defendants brought two motions for summary judgment — R.A. defendants' motion for summary judgment was allowed in full; claims against G. estate and R.A. were dismissed in entirety — There was no genuine issues requiring trial with respect to claims concerning validity of offer, breach of fiduciary duty and

oppression — It was open to offeror defendants to make offer — Offer complied with specification of value requirements contained in agreement — Defendants did not engage in oppressive conduct as alleged by plaintiff.

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MOTIONS for summary judgment.

D. M. Brown J.:

I. Motions for summary judgment in a shot-gun buy-out dispute

1 The Alpa Partnership is engaged, through various corporations and partnerships, in the business of manufacturing and distributing wood products for the low-rise residential building industry in Ontario. A 1997 Amended and Restated Partnership Agreement, as amended (the "Agreement"), governed the affairs of the Partnership at the time this dispute arose.

2 On December 15, 2009, three of the partners, the defendants Di Poce Management Limited, Eastern Hemlock Limited and Large Tooth Aspen Limited (collectively, the "Offeror Defendants"), relying on the Buy-Sell provision contained in Article 6 of the Agreement, delivered a Buy-Sell Offer (the "Offer") to the other partner, the plaintiff, Western Larch Limited. Western Larch initially tried to find financing so that it could reverse the Offer and buy-out the interests of the Offeror Defendants. It was not successful in those efforts. By early February, 2010 Western Larch began to dispute the validity of the Offer. An attempt by Western Larch in May, 2010 to obtain an interlocutory injunction to restrain the closing of the Offer failed. The purchase transaction contained in the Offer closed in June, 2010 over the objection of Western Larch.

3 In this action Western Larch seeks a declaration that the Offer was invalid and of no force and effect, damages of not less than \$79 million for breach of fiduciary duty, breach of contract, breach of duty of good faith and oppression or, alternatively, an order requiring the Offeror Defendants to purchase the plaintiffs' entire interest in Alpa "based on a valuation to be performed". The plaintiffs' claim is one for damages; the plaintiffs recognize that it would be impossible for them to return as a partner of Alpa Partnership.¹

4 The defendants collectively have brought two summary judgment motions seeking the dismissal of the plaintiffs' action.

5 For the reasons set out below, I grant in full the Red Alder Defendants' motion for summary judgment, and I grant in part the summary judgment motion of the other defendants and direct the trial of three breach of contract issues before me this coming Spring.

II. The Alpa Partnership

6 Alpa Partnership and Alpa Lumber Inc. ("ALI") were formed in 1978 through a leveraged buyout of the Reed Paper Ltd. subsidiary, Reed Lumber Co. At that time the plaintiff, Donald MacIver, was the President and CEO of Reed Paper.

7 The business of the Partnership is carried on principally through the holding company, ALI, which, according to the Agreement, serves as agent for the Alpa Partnership and trustee for the partners. Including the Alpa Partnership and ALI, there were approximately 89 partnerships, sub-partnerships, limited partnerships and corporations owned, managed and controlled by the partners in the Alpa Partnership.

8 Following its creation in 1978 the number of partners in the Partnership reached as high as thirteen. In 1986 the Partnership underwent a re-organization, in which MacIver played an active role, which reduced the number of partners to five. That restructuring initiative was completed, and the amended partnership agreement was in place, as of 1988. Over the years further amendments were made to the Agreement. It is the Agreement which describes the terms of the relationship between the partners and the operation of the partnership.

9 Until September, 2009 the Alpa Partnership consisted of five partners: the plaintiff, Western Larch Limited, and the defendants, Di Poce Management Limited, Eastern Hemlock Limited, Large Tooth Aspen Limited and Red Alder Limited. The defendant, Fincourt Partnership, was a special non-voting partner that shared in the Partnership's income.

10 Each of those corporate partners was affiliated with individual shareholders who are also parties to these proceedings. Under the Agreement the "Partner Shareholder" for each "Partner" was as follows:

- (i) *Western Larch Limited* — the plaintiff, Donald MacIver;
- (ii) *Di Poce Management Limited* — the defendant, John Di Poce;
- (iii) *Eastern Hemlock Limited* — the defendant, George Frankfort;
- (iv) *Large Tooth Aspen Limited* — the defendant, Carmine Guglietti; and,
- (v) *Red Alder Limited* — the late Giovanni Guglietti.

11 As I will describe shortly, the death of Giovanni Guglietti in September, 2009 triggered certain obligations under the Agreement to buy-out the partnership interest of his company, Red Alder. Prior to Giovanni Guglietti's death, the respective interests held by the partners in Alpa Partnership were as follows:

- (i) Di Poce Management Limited: 31%;
- (ii) Eastern Hemlock Limited: 19%;

(iii) Large Tooth Aspen Limited: 19%;

(iv) Red Alder Limited, 19%: and,

(v) Western Larch Limited: 12%.

12 Turning to the operational responsibilities of the various partners, John Di Poce ("Di Poce") served at all times as the President and CEO of Alpa Partnership and its affiliate entities and was the person responsible for all operational matters. George Frankfort (Eastern Hemlock) acted as a Vice-President, with day-to-day responsibility for the Home Lumber division and, Carmine Guglietti (Large Tooth Aspen) served as a Vice-President, with day-to-day responsibility for the Argo Lumber division.

13 MacIver, who is a chartered accountant by profession, served as a senior officer of Alpa Partnership responsible for financial matters, including corporate affairs, tax planning and the periodic restructuring of the corporate organization. MacIver had an intimate knowledge of the financial dealings of the Partnership business, including its financial statements, profitability, corporate structure and partnership matters. There is no dispute that MacIver played little or no role in the day-to-day operational management of the Partnership.²

14 Prior to his death the late Giovanni Guglietti (Red Alder) was also a Vice-President of Alpa Partnership, running the Tamarack Lumber division. Since his death, his son, Riccardo Guglietti, has managed the Tamarack Lumber division.

III. A quick overview of the dispute

15 Extensive evidence was filed on this summary judgment motion. Let me provide a thumbnail overview of the key events and the plaintiffs' allegations, before reviewing the evidence in detail.

16 Giovanni Guglietti died on September 4, 2009. His death triggered requirements found in Article 8 of the Agreement that his company, Red Alder, leave the Partnership in return for the payment of stipulated sums by the remaining partners. As the mechanics of that process unfolded, two things happened. First, Di Poce Management, Eastern Hemlock and Large Tooth Aspen concluded that efforts should be made to keep the Red Alder business within the partnership; Western Larch did not agree with that approach. Second, Di Poce Management, Eastern Hemlock and Large Tooth Aspen decided to invoke the buy-sell offer mechanism in Article 6 of the Agreement and make a shot-gun buy-sell offer to Western Larch.

17 On December 11, 2010, Di Poce Management, Eastern Hemlock and Large Tooth Aspen concluded an agreement with Red Alder to bring it back into the Partnership, conditional upon a successful buy-out of Western Larch. A few days later, on December 15, 2010, Di Poce Management, Eastern Hemlock and Large Tooth Aspen delivered their shot-gun buy-sell Offer to Western Larch. In preparing the documents for the Red Alder agreement and the Offer, the Offeror Defendants received professional assistance from the Partnership's corporate counsel, Minden Gross, as well as from the Partnership's CFO, Orest Matkowsky.

18 When Western Larch received the Offer, MacIver's first reaction was to look for financing which would enable him to reverse the Offer and buy-out the interests of Di Poce Management, Eastern Hemlock and Large Tooth Aspen. To that end he placed advertisements in national newspapers and prepared solicitation packages which he sent out to some potential investors.

19 His efforts were not successful. On February 12, 2010, a few days before the deadline for responding to the Offer, Western Larch commenced this action. When Western Larch did not respond to the Offer by the deadline, the Offeror Defendants took the position that it was deemed to have accepted the transaction contained in the Offer under which they would acquire Western Larch's interests in the Partnership. In May Western Larch attempted to secure an injunction restraining the scheduled June closing of the purchase transaction. This Court dismissed the motion.

20 The closing then took place on June 14, 2010. Although Western Larch did not participate in the closing and repeated its protest that the Offer was invalid, the Offeror Defendants closed the transaction relying on powers of attorney contained in the Agreement.

21 Later in these Reasons I will describe in detail the claims advanced by the plaintiffs. At this point, in order to understand the review of the evidence which follows, let me draw on an overview description of the claims contained in an affidavit of MacIver:³

Briefly, the causes of action that form the basis for this action can be summarized as follows:

(a) **Breach of Contract** — in failing to strictly comply with the terms of the Partnership Agreement, the Buy-Sell Offer was invalid. The Defendants have breached the Partnership Agreement by removing Western Larch and myself from the Alpa Group pursuant to an invalid Buy-Sell Offer. In addition, the manner in which the Defendants conducted themselves in respect of the Buy-Sell Offer and the Closing materially breached the Partnership Agreement;

(b) **Breach of Fiduciary Duty and the Duty of Good Faith** — in addition to removing Western Larch and me from the Alpa Partnership pursuant to an invalid Buy-Sell Offer and for less than the fair value of our interest, the Defendants breached their fiduciary duty and duty of good faith by (i) secretly negotiating the Buy-Sell Offer, the terms of an agreement with Red Alder and a new partnership agreement with third parties and without my knowledge or consent, (ii) suspending the Partnership Agreement without my knowledge or consent, as described herein, (iii) using the Partnership's CFO and corporate counsel to assist with the secret planning, and (iv) withholding information and deliberately misleading me about the secret planning and arrangements until well after this litigation had commenced; and,

(c) **Oppression** — contrary to our expectations, Western Larch and I have been expelled as a shareholder, director and officer of the Alpa Group corporations, after more than 30 years' involvement and in a manner that was not consistent with the agreement between myself and the Defendants. In order to expel Western Larch and me, the Offeror Defendants abused their roles as directors, officers and shareholders of ALI, Fincourt and the Alpa Group corporate entities, including by knowingly encouraging and relying on the assistance of employees and trusted counsel to carry out their plan.

IV. The evidence

22 Let me now review the evidence of the parties material to the issues in dispute in this action.

A. The September, 2009 death of Giovanni Guglietti and Article 8 of the Agreement

23 Giovanni Guglietti, the sole officer and director of Red Alder and its Partner Shareholder for purposes of the Agreement, died on September 4, 2009. His four sons, Silvio Guglietti, Riccardo Guglietti, Marco Guglietti and John Guglietti, served as executors of his estate. Riccardo Guglietti now is the sole director of Red Alder.

24 Under the terms of the Agreement, a partner corporation could not remain as a partner after the death of its individual Partner Shareholder. Giovanni Guglietti's death triggered the succession provisions in Article 8 of the Agreement. In simplified terms, Article 8 of the Agreement, as modified by a 2000 Insurance Amendment, mandated that, upon the death of any one of the individual partner shareholders, the entire interest of the partner's corporation in Alpa would be redeemed and terminated in accordance with the following steps:

(i) The Partner would become a "Transitional Partner", and its profit-sharing interest would be reduced to 0.05%, with an accompanying reduction in its voting rights;

(ii) Proceeds from a life insurance policy maintained by one of the Alpa corporate entities on the life of the Partner Shareholder would be paid to the related Transitional Partner. The payments would be notionally grossed up to an amount equivalent to 130% of the proceeds of the associated life insurance;

(iii) A "Termination Date" was to be established for the Transitional Partner's interests tied, in part, to when the Transitional Partner made an election under Article 8.3 requiring the Partnership to pay it an Adjusted Preferential Allocation on Death. Such an election could not be made until 150 days after the death of the Partner Shareholder; and,

(iv) The Agreement, as amended by a 2000 Insurance Amendment, stipulated the amount of the insurance the Partnership would take out on the life of a Partner Shareholder and the amount of the Preferential Allocation on Death which would apply in the event of a specific Partner Shareholder. In the event the grossed up life insurance proceeds received were less than the Preferential Allocation on Death, then the Transitional Partner could give notice "to elect to require the Partnership to allocate for tax purposes and pay the Transitional Partner the Adjusted Preferential Allocation on Death". The "Adjusted" Preferential Allocation on Death represented the difference between the Agreement-stipulated Preferential Allocation on Death and the amount of the life insurance proceeds received upon the death of a particular Partner Shareholder. That Adjusted amount would be paid out over 120 months, and the remaining partners would bear, in equal shares, financial responsibility for those payments;

(v) Finally, "immediately after the Termination Date" the Transitional Partner's interest was to be redeemed by the Partnership for the price specified in section 8.2, which was \$100 for the Partnership Interest and an aggregate price of \$100 for the shares or other interests in Designated Entities.

25 Turning to the specific events of this proceeding, when Giovanni Guglietti died in early September, 2010, Article 8 required the distribution of Red Alder's 19% profit-sharing interest in Alpa Partnership in four equal shares of 4.75% to each of the remaining partners. Western Larch's interest in the Partnership thereby increased from 12% to 16.75%.

26 In exchange for the reduction of its partnership interest, under the Agreement Red Alder would receive the life insurance proceeds, together with the ten-year stream of payments under the Adjusted Preferential Allocation on Death. Section 8.3, as amended by the February 2000 Insurance Amendment to the Agreement, described how the Preferential Allocation on Death would work:

8.3 Preferential Allocation on Death

In the event that the proceeds of the Partnership Insurance on the life of the deceased Partner Shareholder received and paid over to the Transitional Partner within 150 days of the death of the Partner Shareholder multiplied by 1.3 is less than the Preferential Allocation on Death applicable to the Transitional Partner at the date of death of the deceased Partner Shareholder, then the Transitional Partner shall have the right at any time subsequent to such 150 day period by notice in writing to the Partnership (the "Notice") to elect to require the Partnership to allocate for tax purposes and pay to the Transitional Partner the Adjusted Preferential Allocation on Death. If the Notice is given to the Partnership, the Partnership shall allocate for tax purposes and pay to the Transitional Partner the Adjusted Preferential Allocation on Death, all as hereinafter provided. In that regard, *the parties acknowledge that given the quantum of the Partnership Insurance relative to the Preferential Allocations on Death and that the Partnership Agreement provides that the policies constituting the Partnership Insurance will not be renewed or replaced at the end of the term currently in effect, in the event of the death of a Partner Shareholder, it is likely that proceeds of the Partnership Insurance multiplied by 1.3 will be substantially less than the Preferential Allocation on Death then applicable...*

(emphasis added)

27 The February 2000 Insurance Amendment to the Agreement fixed the amount of Partnership Insurance on the life of Giovanni Guglietti at U.S. \$16.8 million. The 2000 Insurance Amendments altered section 1.13(n) of the Agreement

to stipulate that the Preferential Allocation on Death in the case of the death of Giovanni Guglietti was the sum of \$47.5 million. That amount was subject to change because section 13.1 of the Agreement required the Partners to meet every two years to agree on the amount of the Preferential Allocation, failing which the section set out the formula by which to calculate the Preferential Allocation. (The formula defined the value of all Partnership Interests and then applied the partner's profit-sharing interest to that value to derive the amount of the Preferential Allocation.)

28 The amendment to section 1.13(n) of the Agreement also went on to define the Adjusted Preferential Allocation on Death referred to in section 8.3 as meaning:

The Preferential Allocation on Death applicable to any particular Partner at the time of death of such Partner's Related Partner Shareholder less an amount equal to 1.3 multiplied by the amount of the Partner Share of the Insurance received and paid to such Partner within 150 days of the death of such Partner Shareholder.

29 As to the timing of the payment of the Preferential Allocation on Death, section 8.3 of the Agreement stated:

Upon receipt of the [150 day] Notice... the Partnership shall allocate and pay the Preferential Allocation on Death to the Transitional Partner in 120 equal, consecutive, monthly installments commencing 30 days following the date of receipt by the Partnership of the Notice...

The reductions in allocations of income to the remaining Partners resulting from the foregoing allocations to the Transitional Partner shall be borne by the remaining partners in equal shares. Each remaining Partner ... shall severally guarantee an equal share of the foregoing payments.

B. The events of the fall of 2009 leading up to the buy-out Offer

30 A few years before the death of Giovanni Guglietti the Partners had made efforts to put a succession plan in place. MacIver initially deposed that in 2006 the partners had reached agreement on such a plan. Frankfort disagreed, deposing that while the parties were close to reaching an agreement, consensus had not been reached on several matters and no amendment to the Agreement was ever signed.⁴ In his Second Affidavit MacIver stated that "the succession plan is not relevant to the Alpa Valuation and the legality of the Buy-Sell Offer",⁵ and on cross-examination he agreed that no amended partnership agreement resulted from the 2006 discussions nor had he complained to Di Poce in writing that the latter had reneged on any 2006 agreement.⁶

31 George Frankfort, the controlling shareholder of Eastern Hemlock, deposed that prior to Giovanni's death the partners had attempted to agree on a succession plan, but without success. According to Frankfort the relationship between MacIver and the other partners had been deteriorating, and Giovanni's death on September 4, 2009 reinforced the need to address those issues, as well as reorganizing the partnership to meet an increasingly challenging business environment.

B.1 Frankfort and MacIver meet: September 25, 2009

32 Following the death of Giovanni, at the request of Frankfort, a meeting was held on September 25, 2009 between MacIver and himself to discuss whether a solution could be reached to the impasse over succession planning. According to Frankfort, MacIver proposed a plan under which the interests of all partners would be equalized based on a \$200 million valuation of Alpa. Frankfort told MacIver he thought it was unlikely Di Poce would agree to the proposal but, if Di Poce did, then Eastern Hemlock would participate. Mr. MacIver deposed that he did not suggest that \$200 million was a fair valuation for Alpa, only that "strictly for tax purposes the valuation of the Alpa Group could not go below \$200 million."

33 According to Frankfort, during that meeting MacIver asked why the other remaining partners had not yet delivered a buy-sell offer to Western Larch. MacIver denied that he had made such a statement. MacIver, however, acknowledged

on cross-examination that he had been privy to previous discussions which suggested that he might be the recipient of a shot-gun buy/sell offer:

Q. ...Did you ever have any discussion with John Di Poce in 2008 in which he indicated to you that he was intending to deliver, or the partners were intending to deliver a buy/sell offer to Western Larch?

A. I don't recall about 2008; however, to help you I think I could state that Mr. Di Poce has suggested that the partners might deliver a buy/sell to me on a number of occasions over the last 10 years.

Q. All right.

A. Initially commencing in the aftermath of 1992.⁷

B.2 Di Poce and MacIver meet: September, 2009

34 Di Poce testified that following Giovanni Guglietti's death he met with MacIver, telling MacIver that he wanted to keep the Guglietti boys in the Partnership because of the profitability of Red Alder's Tamarack Lumber division. Di Poce stated that MacIver's objection to that course of action prompted him to then talk with the other partners about arranging to buy-out Western Larch's interest. Di Poce thought those discussions commenced about two weeks after Guglietti's death.⁸

35 Regarding that meeting MacIver deposed:

Following Giovanni's death, Di Poce told me that he wanted to make Giovanni's children full partners and have them assume Red Alder's 19% profit-sharing interest. I adamantly opposed this. I advised Di Poce of my view that Giovanni's children should only be included in Alpa Partnership on the basis of the succession plan that had been agreed-to by the partners in 2006 with respect to all of the partners' children but that Di Poce had subsequently reneged upon.

Di Poce became enraged when I told him of my opposition and told me "I will deal with you later." He also told me he would rather be partnered with Giovanni's children than with me. He now has taken steps towards that goal.⁹

36 Di Poce admitted that during the meeting he "definitely" told MacIver that "I will deal with you later".¹⁰ MacIver admitted that as a result of the discussion at the meeting, he understood that Di Poce would pursue discussions with Giovanni's children about playing a continuing role in the Partnership.¹¹

B.3 Work on the Buy-Out and the continuation of Red Alder in the Partnership

37 Orest Matkowsky was the Partnership's CFO. He testified that on September 16, 2009 he met with Frankfort, at the latter's request, to discuss some possible financial scenarios for the Partnership, including the buy-out of the Western Larch partnership interest.¹² The documentary evidence disclosed that as early as September 17, 2009, Matkowsky was working on a possible buy-out of Western Larch because on that day he emailed Frankfort a spread-sheet describing the numbers for a buy-out scenario.¹³

38 Notwithstanding that document, on cross-examination Frankfort maintained that he did not begin discussing a possible buy-out of Western Larch with his other partners until after his September 25 conversation with MacIver.¹⁴ The plaintiffs argued that Frankfort's evidence on this point was not plausible. Pointing to a July 23, 2009 email from Stephen Witten — a lawyer at Minden Gross, the Partnership's external counsel¹⁵ — to Frankfort which contained a summary of proposed terms for a buy-sell offer by Di Poce Management, Eastern Hemlock, Large Tooth Aspen and Red Alder for Western Larch's interest in the Partnership, the plaintiffs contended that plans to trigger a shot-gun buy-sell offer against MacIver were afoot before Giovanni's death. I find that Frankfort's evidence on that point was inaccurate;

in fact discussions about a possible buy-out of Western Larch had preceded Giovanni's death. However, as will become apparent from the analysis which follows, that inaccuracy in Frankfort's evidence was not material for the purposes of determining whether a genuine issue requiring a trial existed in respect of the claims alleged by the plaintiffs.

39 Over the ensuing weeks Matkowsky sent Frankfort further spread-sheets: some described buy-out scenarios under which Red Alder did not re-join the Partnership; others had Red Alder buying back into the Partnership.

40 On October 7, 2009 the remaining partners, including Western Larch, agreed on a preliminary Adjusted Preferential Allocation for Red Alder under Article 8 using estimated figures.

41 By October discussions had commenced between Di Poce Management, Eastern Hemlock and Large Tooth Aspen, on the one hand, and the estate of Giovanni Guglietti, on the other, about a deal which would see Red Alder come back into the Partnership.¹⁶ Riccardo Guglietti (Red Alder) testified that Di Poce had approached him asking if Red Alder would be interested in becoming a partner in Alpa; Red Alder was interested in re-entering the Partnership if the circumstances were right.¹⁷

42 As described by Frankfort, the reason for this overture to Red Alder lay in the close business relationship between the family of Giovanni Guglietti and the customers of Tamarack Lumber, the Alpa division which he ran: "It makes good business sense for us to keep the late Mr. Guglietti's family in Alpa Partnership. In order for this to occur, the family of the late Mr. Guglietti will be required to buy back into Alpa Partnership."¹⁸

43 Matkowsky became involved in crunching the numbers for various scenarios for that possible deal. The discussions with Red Alder had progressed sufficiently that on November 30, 2009, Stephen Witten, of the Minden Gross firm, sent Robert Finlayson at Gowlings, who represented the Gugliettis, drafts of the proposed deal, including a Master Agreement and a restated Partnership Agreement. That a buy-sell offer would be made to Western Larch also was well known within the group, for Witten wrote:

I understand that the working timetable is to finalize these agreements in sufficient time to facilitate the delivery of a buy-sell offer on or about December 15, 2009.

Frankfort acknowledged that the documentation for the proposed deal with Red Alder was prepared by Witten, with input from the lawyers for Di Poce, Guglietti and himself.¹⁹

44 In the days that followed Witten sent further drafts of both the buy-sell offer and the proposed agreement with Red Alder to the Offering Defendants, Red Alder and their individual counsel.²⁰

B.4 The December 8 partnership meeting

45 On December 8, 2009, the four remaining partners, including MacIver for Western Larch, met to confirm a value of all partnership interests in accordance with Article 13 for the purpose of determining the amount of the Preferential Allocation on Death payable to Red Alder. The partners confirmed a value for Alpa Partnership in the amount of \$323,760,000, a value previously agreed to by the partners in February, 2008.

46 Life insurance proceeds totaling \$17,417,400 were paid to Red Alder by cheque dated December 8, 2009, following the partners' meeting. Those proceeds did not fully satisfy Red Alder's entitlement under the Agreement given the 2000 Insurance Amendment. MacIver deposed that at a meeting two days later:

I was told by Orest Matkowsky ("Matkowsky"), Alpa Group's CFO, that he and Di Poce had met with Riccardo Guglietti (one of Giovanni's sons) to deliver the cheque representing the full amount of the insurance proceeds. Matkowsky also told me that, at that meeting, Di Poce had agreed to delay the closing of the transfer of the Red Alder 19% interest to the four remaining partners of Alpa Partnership beyond the 15 days provided in the

Partnership Agreement. Supposedly, the reason for the delay was that the holiday season was looming and everyone was busy.²¹

47 On a copy of the cheque MacIver wrote:

On December 10/09 AM Orest Matkowsky told DAM that he and JK had met with Ricardo Guglittetti, delivered this cheque and had agreed with him to delay the closing beyond the 15 days provided in the Partnership Agreement — i.e. to after Christmas because of the holidays & everybody was "busy".

Matkowsky confirmed he had conveyed that information to MacIver. When asked on cross-examination why he had done so when he knew that the Offer would be delivered five days later, this exchange with Matkowsky ensued:

Q. And who suggested to you, if anyone, that you say that to Don?

A. I decided to say that.

Q. And you knew at the time it wasn't true?

A. We would have closed if Don had won.

Q. But there was no...

A. But at this point in time we were not ready to close.

Q. There was no plan to close. And in fact, the offer hadn't even been delivered yet, had it?

A. No, it had not.

Q. Given that you were CFO of a partnership which Mr. MacIver was still a partner in, did you have any qualms or any concerns about making that statement to Mr. MacIver at that time?

A. I had come to the conclusion that the succession planning was the most important thing for the partnership. I had also come to the conclusion that Mr. MacIver's continuance on equalizing, there would be no agreement between the partners, and that the buy/sell was the best thing for the partnership.

Q. So is the answer that you didn't have any qualms or concerns?

A. I did not. I was looking after the partnership.

Q. Of which he was a partner?

A. M'hmm.²²

B.5 The December 11 "Minden Gross Memo"/December 14 agreement

48 Witten prepared a December 11 memorandum addressed to Di Poce Management, Eastern Hemlock, Large Tooth Aspen and Red Alder (the "Minden Gross Memo"), describing the proposed re-admittance of Red Alder into the Partnership and the planned Offer:

We have been asked to set out in memorandum form a proposal whereby RAL would continue as a "19%" partner of Alpa, EHL, LTAL and RAL would acquire the interest of Western Larch Limited and its Partner Group in Alpa and the Designated Entities through the exercise of the buy-sell provisions of the Alpa Partnership Agreement and thereafter the profit participation in Alpa would be equalized among the John Di Poce family, the George Frankfort family, the Giovanni Guglietti family and the Carmine Guglietti family (the "Proposal"). *The Proposal would be*

conditional upon EHL, LTAL and RAL being successful in acquiring such interests from WLL and its Partner Group.
(emphasis added)

The Memo was signed by the parties on December 14, 2009.

49 The memo described in detail the buy-sell offer which three partners would make to Western Larch and the terms of Red Alder's continuation in the Partnership in the event the others acquired Western Larch's interest. Under the proposal, once Western Larch had accepted, or was deemed to have accepted, the offer to buy out its interest, Red Alder would become obligated to pay certain amounts to Di Poce Management, including reimbursing the deposit it had paid to Western Larch on the buy-out, and a further amount "which shall be used by DPML to complete its portion of the Buy-Sell Closing". It is clear on the evidence that the Offeror Partners intended to continue Red Alder's participation in the Partnership in the event that they acquired Western Larch's interest under the Offer.

50 Section 7 of the Minden Gross Memo was entitled "Suspension of Partnership Agreement". It contained the following opening language:

In order to facilitate the continuation of RAL as a partner of the partnership as contemplated in paragraph 3 hereof, the undersigned hereby agree to suspend implementation of the provisions of the Partnership Agreement resulting from the death of Giovanni Guglietti except as may be reasonably required to facilitate the implementation of any of the transactions contemplated herein, until:

(a) if WLL accepts the Sale Offer, completion of the Sale Offer Closing;

(b) if WLL accepts or is deemed to have accepted the Purchase Offer or delivers a Conversion to Disability Election, Closing.

51 Western Larch pleaded that the defendants wrongfully suspended the Agreement to its detriment. The following exchange took place during the cross-examination of Frankfort:

Q. And you agreed to in effect suspend the operation of certain portions of the Partnership Agreement, did you not?

A. Not that I know of.

Q. I'll take you to page 15 of the memorandum agreement.

A. Um-hmm.

Q. Paragraph 7, do you see that, "Suspension of Partnership Agreement" title?

A. Um-hmm.

Q. It reads: (paragraph read)...

So stopping there, you'll agree with me that Mr. MacIver's three partners, you, Mr. Di Poce and Carmine Guglietti, agreed to suspend the implementation of the partnership agreement as it related to Mr. Giovanni Guglietti's death?

A. Absolutely not. I don't agree with you. It's not what it says. This says only after June the 14th. This has nothing to do with the existing — the existing Partnership Agreement is in force until the closing on June the 14th whether we are the buyers or we are the sellers. This does not take place until after that, so the partnership Agreement stands.²³

Witten testified that the purpose of that section was to defer the formal closing of the redemption of the interest of Red Alder.²⁴

52 On December 11 Witten also circulated an email describing the logistics of finalizing and delivering the Offer to Western Larch. On December 14 a draft 2010 Amended and Restated Alpa Partnership Agreement was prepared which reflected the potential buy-out of Western Larch and the re-admission of Red Alder.

B.6 The December 15, 2009 buy-out Offer

53 On December 15, 2009, the Offeror Defendants — Di Poce Management, Eastern Hemlock and Large Tooth Aspen — delivered to Western Larch a Buy-Sell Offer pursuant to Article 6 of the Partnership Agreement. The Offer was signed by Messrs. Di Poce, Frankfort and Carmine Guglietti on behalf of their respective partner companies. Neither Red Alder nor the estate of Giovanni Guglietti were parties to the Offer. Western Larch was the only "Offeree", and the Offer provided that, in the absence of any election, Western Larch would be deemed to accept the Purchase Offer pursuant to which it would be required to sell its interest in the Alpa Partnership to the Offeror Defendants.

54 I will defer reviewing the terms of the Offer and the provisions of the Agreement enabling the making of a buy-sell offer until later in these Reasons.

55 There is no dispute on the evidence that prior to the delivery of the Offer on December 15, 2009 the Offeror Defendants did not tell MacIver about the existence of the agreement with Red Alder to come back into the Partnership in the event Western Larch was bought out. There is also no dispute that Alpa's corporate counsel, Witten, had a hand in drafting the Offer.²⁵

B.8 MacIver's complaints about the role of Witten and Matkowsky

56 The plaintiffs contended that Witten, by providing that kind of legal assistance to the Offeror Defendants and Red Alder, breached fiduciary duties which he owed to Western Larch and himself. MacIver had another complaint about Witten's conduct during that period of time: MacIver believed that it was his responsibility to instruct Witten regarding the preparation of the transactional documents which would accompany the Adjusted Preferential Allocation on Death payments to Red Alder. At the time he felt that Witten was taking an inordinate amount of time to draft the necessary documents for his review. Following delivery of the Offer MacIver thought that Witten's delay in producing those documents was part of a "charade" that the redemption of Red Alder's interest would proceed while, in fact, the others "plotted" to remove Western Larch from the Partnership.

57 Frankfort testified that the Partnership did not pay the accounts of Minden Gross for its work on the Offer; Eastern Hemlock, Di Poce Management and Large Tooth Aspen paid them.²⁶

C. Western Larch's response to the Buy-Sell Offer

C.1 Western Larch attempts to find financing to buy-out the Offerors

58 At the time he received the Offer MacIver knew that the timing provisions in Article 6 of the Agreement would operate to require a closing of the resulting transaction by mid-June, 2010.²⁷ MacIver described his response to the Offer:

Forced to react to the Buy-Sell Offer, I attempted to solicit financing. My efforts included placing ads in Canada's national newspapers. My partners complained about the content of these advertisements, however, I accurately described the circumstances created by the Buy-Sell Offer and did not disclose any confidential information regarding the Alpa Group. Furthermore, when Di Poce demanded that I ensure any third parties receiving information regarding Alpa Group enter into confidentiality agreements, I agreed to that request...

Despite my efforts, I was unable to solicit any interest in providing financial support that would enable me to even consider the purchase options set forth in the Buy-Sell Offer. As I have described above, my partners were well aware that I would be unable to locate financing even at their discounted valuation for the Partnership and Alpa Group.²⁸

59 In his Second Affidavit MacIver deposed:

I felt compelled to set about exploring my options without delay. I did not immediately sit down with the Partnership Agreement to assess whether the Buy-Sell Offer was valid or retain legal advice for that purpose.²⁹

At the time the Offer was made, Western Larch had its own independent counsel from whom MacIver immediately sought advice.³⁰

60 On December 22, 2009, David MacIver, the plaintiff's son, and the plant manager of one of the Alpa companies, gave notice that he was taking a leave of absence: "I have been advised by Donald A. MacIver that my services will be required to assist in the completion of your project."

61 Starting on December 23, 2009, MacIver made written requests to the Partnership for financial and operating information.

62 The half-page ads placed by MacIver in the Globe and Mail and National Post starting December 29, 2009 announcing a "rare opportunity" described the "circumstances" of his solicitation in the following terms:

Resulting from a buy-sell offer served on the partner responsible for financial matters by the 3 surviving operating partners aged 75, 72 and 67 (in 2010), subsequent to repetitive management/ownership succession disputes...

The ads disclosed the enterprise value of the Partnership, its EBITDA as a percentage of sales, fair market value and capital expenditures. The ad ran periodically until January 12, 2010 — five times in the Globe and Mail and about three times in the National Post.³¹

63 On December 23, prior to the first ad appearing, Di Poce had written to MacIver reminding him of his obligation to keep confidential Alpa business information and to protect such confidentiality in any discussions with third parties. On December 30, after the appearance of the first ad, Di Poce wrote to MacIver complaining that the advertisement had disclosed confidential business information.

64 Before publishing the ads MacIver had sent courtesy copies to Alpa's lenders. He spoke to one of the lenders advising that he intended to do his best to accept the sale offer:³² "I intend to accept the Sale Offer and am making all necessary efforts to be in a position to do so on Feb 12/2010."³³

65 On January 4, 2010, MacIver made further written requests to Alpa for financial information. As he wrote in one of those letters:

I refer to the Buy-Sell offer delivered to the undersigned on December 15, 2009, by my partners, and wish to make timely arrangements for my potential "replacement partners" or "potential buyers" to accomplish their due diligence requirements".

On January 8 MacIver's counsel, Walter Traub, followed-up with a letter to Matkowsky stating, in part:

We understand that our client has provided to you by courier and facsimile a letter dated January 4, 2009 setting out its requirements with respect to Due Diligence Arrangements necessary to allow it to exercise its rights with respect to the pending Buy-Sell Notice in a timely and prudent manner...

Please be advised that our client requires this information and due diligence arrangements in order to respond to the Buy-sell notice in an informed and business prudent manner...

Any further delay by you in provision of the requested information and due diligence requirements will materially adversely impact our client's ability to respond to the Buy-Sell Notice in an informed and timely manner...

Any further delay or interference with our client's rights to obtain the requested information shall severely impede our clients ability to deal with the Buy-Sell Notice and shall be considered a deliberate attempt to abrogate our client's rights as they exist pursuant to the Partnership Agreement and in law.

66 A detailed response was delivered by Alpa to MacIver on January 7, 2010.

67 On January 14, 2010, Traub wrote to defendants' counsel acknowledging the spirit of co-operation which had characterized the delivery of requested materials to the plaintiffs. Mr. Traub also wrote, in part:

Our client points out that should it choose either the sale or the purchase option in the buy sell notice, it also serves its best interest to protect such confidentiality...

Our client sincerely hopes that the spirit of cooperation will continue to be maintained so as to allow our respective clients to resolve their financial arrangements in a satisfactory fashion.

68 Notwithstanding that these letters from his then counsel did not dispute the validity of the Offer and, indeed, called for conduct by the defendants enabling its performance, MacIver, in his Second Affidavit, deposed:

I first reviewed the Partnership Agreement in the context of the Buy-Sell Offer's validity in early to mid-January 2010. This was the same time that I first received legal advice regarding the legality of the Buy-Sell Offer.

I find it impossible to reconcile that evidence with the statements contained in the letters from MacIver's counsel of January 8 and 14, 2010. I do not accept MacIver's evidence on that point.

69 In the written material developed to attract potential financiers and buyers for the business, and in discussions with Alpa Partnership's bankers, the plaintiffs confirmed their intention to reverse the Offer and accept the sale offer, thereby taking out the Offeror Defendants.³⁴ For example, on December 28, 2009 MacIver sent a letter to OMERS Private Equity stating:

Alpa Lumber Group is a "Designer Cash Cow" producing taxable income and commensurate cash flow, which exits to owners via an exceptionally flexible, tax efficient structure, which would be attractive to entities with tax losses or other tax shelter for income. This may have relevance to your interests or as an investment.

That same day MacIver also wrote to ONEX/ONCAP stating, in part:

I intend to do my best to accept the buy/sell offer and close the entire transaction to ensure that the business and employees have a viable future free of ownership succession issues.

On his cross-examination MacIver described in some detail the information packages he had sent to interested investors.

70 In dealing with prospective investors or Alpa's lenders MacIver did not communicate to them any reservations about the validity of the Offer.³⁵

C.2 Western Larch attempts to enlist Eastern Hemlock in reversing the Offer

71 On December 17, 2009 (2 days after delivery of the Buy-Sell Offer) Frankfort was contacted by MacIver's son, David MacIver, requesting a meeting. David MacIver sought to enlist Frankfort and Eastern Hemlock Limited in joining with

Western Larch in reversing the Buy-Sell Offer. According to Frankfort at no point during this meeting was it suggested by David MacIver, on behalf of the plaintiffs, that the Offer was invalid. David MacIver did not provide evidence on these motions.

C.3 Western Larch's request for information from Alpa

72 Let me set out, in a bit more detail, the evidence concerning MacIver's requests for information following the receipt of the Offer. On January 4, 2010, MacIver wrote to Alpa about due diligence arrangements. Di Poce responded on January 7 indicating that Alpa intended "to take all reasonable steps to co-operate in facilitating appropriate due diligence access on a timely basis", but required appropriate confidentiality arrangements for any third party access to information. Di Poce complained that advertisements placed by MacIver had misled readers into believing that Alpa was for sale, when it was not, and had disclosed confidential information. MacIver replied, denying that he had published any misleading information and confirmed that no confidential information would be disclosed without executed confidentiality agreements.

73 On January 15, 2010, MacIver wrote to Matkowsky, Alpa's CFO, asking for information about the expected date of closing for the Red Alder transaction. In addition, MacIver sought several things in respect of the debt referred to in Alternative 2 of the Offer: (i) copies of all the debt documents; (ii) an opinion to all partners from Minden Gross, Alpa's counsel, as to whether the debt was properly included in the Alpa Valuation; (iii) a similar opinion from Matkowsky in his capacity as a CMA; and, (iv) "the official position of Alpa Partnership approved by the three Partners" on the issue. He added:

You will no doubt appreciate that it will be difficult, if not impossible to make a decision in respect of the Buy-Sell Offer in the absence of the information requested above.

74 DiPoce replied on January 19, 2010, stating that MacIver was familiar with the debt arrangements because "you were the architect, both from a corporation point of view and an accounting point of view":

For you to suggest that "it will be difficult, if not impossible to make a decision in respect of the Buy-Sell Offer in the absence of the information requested" is not credible.

Di Poce advised MacIver that it was not the role of Alpa or its CFO "to provide opinions to you in the circumstances" and he should "address any legal questions to your legal counsel, as I expect you have done."

75 Witten testified that in his view MacIver was entitled to see the Alpa debt instruments which he had requested.³⁶

76 On January 19 Matkowsky replied to MacIver providing some information on the debt owing by Termpark.

77 MacIver contended that that position taken by Di Poce on January 19 constituted a breach of fiduciary duties owed to him and a misuse by the Offering Partners of corporate assets for their own purposes:

Through his actions, Di Poce obstructed and delayed me from relying upon the very same personnel of the Partnership that he, Carmine and Frankfort relied upon for their own personal purposes in pursuing the Buy-Sell Offer. Indeed, it is my belief that Matkowsky assisted them in providing the financial data used for the Buy-Sell Offer as evidenced by his January 19, 2010 letter to me... In addition, it is my belief that Mr. Witten acted for Di Poce, Carmine and Frankfort in pursuing the Buy-Sell Offer notwithstanding the fact that he was the lawyer for the Partnership of which I was still a partner.³⁷

C.4 The plaintiffs' treatment of the deposit cheques

78 The Offeror Defendants delivered with the Offer the certified payment deposit cheques totaling \$5,046,462 required by Article 6. The plaintiffs did not proceed to cash the cheques; instead, MacIver sealed them in an envelope which he

placed in his safe.³⁸ In an affidavit in support of the injunction he stated he was prepared to place the cheques in court or take such action as directed by the Court. In the result, the cheques were cashed as part of the June closing.

C.5 The Plaintiffs commence this action and fail to obtain an interlocutory injunction

79 Under the terms of the Offer and Article 6.4 of the Agreement, Western Larch was required to advise the Offeror Defendants on or before February 13, 2010, by notice in writing, either that it had elected to purchase the Offeror Defendants' interests in Alpa Partnership or, alternatively, had agreed to sell its interests in Alpa Partnership to the Offeror Defendants. Western Larch did not deliver any such notice.

80 Western Larch had its counsel, Mr. O'Sullivan, contact Mr. Griffin, the lawyer for the Offeror Defendants, prior to February 12, 2010, to advise that the plaintiffs took the position that the Offer was invalid and they planned to commence an action. The plaintiffs issued their Statement of Claim in this action on February 12, 2010, the day before the notice delivery deadline.

81 An exchange of correspondence then ensued between counsel. On February 16 Mr. Griffin advised that his clients deemed Western Larch to have accepted the Purchase Offer on February 13 and they intended to proceed with closing the transaction on June 14, 2010. Mr. O'Sullivan responded on February 17 stating that the Offeror Defendants' expressed intent to proceed to close the Offer notwithstanding the commencement of the action was "remarkable" and the plaintiffs would seek injunctive relief. Mr. Griffin wrote on February 19 to advise that his clients intended to proceed with the closing.

82 The plaintiffs thereupon moved for an injunction to restrain the closing. Cumming J. dismissed the motion by reasons dated May 27, 2010. He held that there was no serious issue to be tried with respect to the plaintiffs' claim:

The Plaintiffs have a low threshold to meet in establishing that there is a serious issue to be tried. However, having considered all the evidence, on my preliminary assessment of the merits, there is not a serious issue to be tried with respect to the Plaintiffs' claim. The evidentiary record sets forth a complex factual history, the Plaintiffs' claim sets forth a veritable potpourri of allegations and asserted causes of action, and the Plaintiffs' assertions were well articulated and argued in the extensive submissions by their counsel. Nevertheless, I do not see any serious issue for trial based on upon my preliminary assessment of the merits on this motion for an injunction.

The plaintiffs did not appeal from that decision.

D. The post-Offer events regarding Red Alder's interest

83 As noted, on December 15, 2010, the Offer was delivered. On February 2, 2010, Red Alder provided notice to the Partnership that it elected to require the Partnership to allocate for tax purposes and to pay to Red Alder the Adjusted Preferential Allocation on Death over 120 months.

84 The remaining partners (except for Western Larch) decided not to complete the process of terminating Red Alder's interest in the Partnership until they knew what would happen with the Offer. Frankfort explained their reasoning in the following portion of his cross-examination prior to the injunction hearing:

Q. You told me earlier that the partnership provisions that relate to the termination of the Red Alder interests had not been carried out, correct?

A. It hasn't closed.

Q. It hasn't closed. And why hasn't it closed?

A. I'm sorry, sir, I answered that as well for you. The partners felt that it was too complicated to close the transaction without knowing what's going to happen on the buy/sell, it was postponed until the buy/sell provision was whether we are owning the company or Mr. MacIver owns the company.³⁹

85 As noted, MacIver wrote to Matkowsky and Di Poce on January 15, 2010, requesting information relating to "debt documents related to the amount due to Red Alder". Di Poce responded by letter dated January 19, 2010, stating that the Red Alder closing had still not taken place:

Regarding the "debt documents related to the amount due to Red Alder", closing has not occurred. As you know, payments are to commence 30 days after notice is received by Alpa from Red Alder requiring the Partnership to allocate for tax purposes and pay the "Adjusted Preferential Allocation on Death". The notice can be given at any time subsequent to the 150 day period following Mr. Giovanni Guglietti's death. I have not as yet received the notice. Once it is received, I would expect that preparation of documents would move forward at that time.

86 In an affidavit he swore for use on the injunction MacIver deposed:

I believe that, at the time of the December 8, 2009 partners' meeting, the Offeror Defendants were well aware, and failed to inform me, of:

their plan to deliver the Buy-Sell Offer to me and to discount the "Alpa Valuation" therein based on the amount the partners agreed would be due to Red Alder in the event the criteria set forth in section 8.3 was met;

...

their plan to keep Red Alder or Giovanni's children as full participating partners in Alpa Partnership in the event they succeeded in forcibly removing me as a partner via the Buy-Sell Offer. Because of this plan, I do not believe the Offeror Defendants have any intention of paying \$38,871,780 to Red Alder. I believe they will either cease any payments or recover any payments made when Red Alder or Giovanni's children are made full partners.

I believe the Offeror Defendants' have acted unfairly and unreasonably towards me, as their partner, by withholding this information and by seeking to mislead me into agreeing to pay \$38,871,780 as a preferential allocation on death amount to Red Alder. Had I known the Offeror Defendants' true intentions and had I been made aware of the information described above, I would not have agreed to pay any amount on account of a preferential allocation on death at the December 8, 2009 meeting.⁴⁰

87 Monthly instalments of the Adjusted Preferential Allocation on Death were paid to Red Alder up until the closing of the Offer.⁴¹ Di Poce acknowledged on cross-examination that Red Alder's partnership interest was never terminated⁴² and it was not intended that there would be a closing of the termination of its interest.⁴³

E. Closing of the Buy/Sell transaction

88 On June 4, 2010, ten days prior to the scheduled closing of the buy-out transaction, the Offeror Defendants sent Western Larch the closing agenda and draft closing documents prepared by Minden Gross, including a statement of adjustments and a draft of the required promissory note. Witten concluded his letter, which was forwarded to Western Larch, by writing: "Counsel should also feel free to call with any questions or comments in the interim."

89 In a response of the same date plaintiffs' counsel objected to the closing and advised that his clients would not participate. Counsel wrote that "certified cheques that will be delivered will be accepted for the sole purpose of mitigating the damages suffered by the plaintiffs as a result of the defendants' conduct".

90 Counsel for the Offeror Defendants subsequently forwarded additional closing documents to plaintiffs' counsel on June 9 and 11, 2010. The latter communication contained a June 11 letter from Witten advising that in light of the position of Western Larch that it would not participate in the closing, the Offeror Defendants "intend to utilize the power of attorney contained in the partnership agreement to execute the various closing documents on behalf of Western Larch...for purposes of completing the closing."

91 Until the day of closing the plaintiffs made no comments on the various packages of draft closing documents sent to them by the Offeror Defendants. On his cross-examination MacIver was asked why he did not comment on the draft closing documents. Here are the resulting exchanges:

Q. All right. And that would have come to your attention round about June the 4th or so of 2010?

A. Your letter did. I don't recall, particularly, reading the Minden Gross letter at that time simply because I regarded the entire closing process as invalid and unacceptable. So, it did not really matter what they had to say in their letter. The only letter that had any import was your own.

Q. Well, I am flattered. May I have this from you, then? Did you provide this material or instruct Mr. Laubman's firm to provide this material to Mr. Traub or any other corporate counsel who might play a role for Western Larch and yourself?

A. No.

Q. All right. Am I to understand that that is the case from the date that this letter came along, and with respect to the subsequent iterations that are in this brief, that the answer is the same? You didn't involve Mr. Traub?

A. That is correct.

Q. Or any other corporate counsel?

A. That is correct.⁴⁴

...

THE DEPONENT: Basically I was not all that interested from a practical point of view, in that whatever Alpa was going to do they were going to do. And I have no control over that. I might be able to complain via my counsel, but that is about it. Insofar as it being invalid and just totally improper as far as I was concerned, I did not need any advice from the Goldman firm, nor from the Lax O'Sullivan firm in that respect, and I basically said, "I have no interest in having any participation in this whatsoever and I am not interested particularly in what they are doing because it is all invalid."⁴⁵

...

Q. All right. You made no attempt to participate in the closing?

A. That is correct.

Q. All right. And that was a decision you made on behalf of yourself and Western Larch?

A. Yes.

Q. Secondly, you did ask the Goldman firm to play a role with respect to this documentation; is that correct? Directly or indirectly, either you or the Lax O'Sullivan firm on behalf of the plaintiffs? Yes or no?

MR. LAUBMAN: They were sent the documentation.

MR. GRIFFIN: What were they asked to do?

MR. LAUBMAN: They weren't asked to do anything, necessarily. They did review it, but they weren't asked to do anything with it specifically.⁴⁶

...

Q. All right. Did you receive any comments from the Goldman firm with respect to the closing documents at any time before the closing? In other words, whether directly or indirectly?

A. I don't believe so. I did raise with Lax O'Sullivan the terms of the notes that I was going to receive, which I looked at in a cursory way as a matter of curiosity. And objected to them as not being in compliance with the provisions of the partnership agreement. But other than that, I had no interest in anything that they were doing via misuse of my Power of Attorney.⁴⁷

...

Q. All right. Back to the cursory look department, just if I might for a moment, how about a cursory look in the June 4 materials at tab 1 at the pledge of interest? Did you look at that?

A. No.

Q. How about a cursory look at the sale indenture?

A. I reiterate, I did not look at these documents because they are invalid and improper.

Q. All right. So that would be the case for the entire package other than what you told me?

A. Exactly.⁴⁸

...

Q. All right. So, let's pop over to tab 3, then, which is an e-mail sent by me to your litigation counsel on June the 9th of 2010. And you will see there is a letter behind the e-mail that I have sent attaching a further letter from Minden Gross of June the 8th with further draft documents, and then dealing with the closing of the transaction. Obviously you received this on or about the date that it was sent?

A. I recall your letter. At this point in time the only letters I am paying any attention to are yours.

Q. Well, I am still flattered, but I have to get the evidence, sir. I take it, then, if you got the rest of it, it didn't matter a hoot to you?

A. Absolutely not.

Q. You agree with me?

A. Yes.

Q. And so, no cursory looks even at the stuff that is attached to the letter of June the 9th that I sent to Mr. O'Sullivan and Mr. Laubman?

A. No interest in it.⁴⁹

92 A little over an hour before the scheduled closing on June 14, 2010, plaintiffs' counsel wrote that, without prejudice to Western Larch's position that the Offer and closing were invalid, Western Larch objected to the form of the promissory note prepared for the closing:

[T]he promissory note your clients intend to deliver pursuant to the closing contains a restriction on negotiability and assignment that is not authorized by the Partnership Agreement. This term, as well as the reference to subsection 6.5(b)(iv) of the Partnership Agreement, are improper and would be unacceptable to our clients in any event.

On cross-examination MacIver was asked why his counsel communicated that position at the last minute:

Q. Do you have any explanation as to why it was that the letter that was sent dealing with the promissory notes which is at tab 5 of this brief, was sent an hour and ten minutes before the closing?

MR. LAUBMAN: That is when it was sent.

BY MR. GRIFFIN: Do you have any explanation as to why that was, Mr. MacIver?

A. No, I don't.⁵⁰

The Offeror Defendants took the position that the note complied with the Agreement.⁵¹

93 The buy-out transaction closed on June 14, 2010. Closing documents were executed on behalf of Western Larch pursuant to a power of attorney contained in section 6.11(e) of the Agreement. The Offeror Defendants informed MacIver they would make available copies of any of the closing documents he wished to receive.

94 The Partnership provided some loans to enable the Offeror Partners to buy-out the Western Larch interest.⁵² MacIver acknowledged that Western Larch had received the payments under the promissory note as scheduled.⁵³

95 As a result of the closing of the buy-out and the new partnership agreement made amongst Red Alder, Di Poce Management, Eastern Hemlock and Large Tooth, the respective interests in Alpa Partnership were as follows: Di Poce Management Limited, 31%; Eastern Hemlock Limited, 23%; Large Tooth Aspen Limited, 23%; and, Red Alder Limited, 23%.

V. Positions of the parties on these summary judgment motions

96 Drawing on their factums and filed evidence, let me summarize the positions taken by the parties on these summary judgment motions.

A. Di Poce Management Defendants

97 The Di Poce moving parties submitted that the real claims of the plaintiffs boiled down to three causes of action arising from the Offer and the defendants' conduct in planning for the plaintiffs' removal from Alpa Partnership:

(i) the Offer breached the terms of Article 6 to the Partnership Agreement for various reasons;

(ii) the defendants' breach of fiduciary duty and duties of good faith owed to the plaintiffs by secretly planning for the plaintiffs' removal from the partnership in part through enlisting the assistance of the partnership's corporate counsel and Chief Financial Officer; and,

(iii) oppression, by thwarting the plaintiffs' reasonable expectation of a continuing interest in the partnership, including the plaintiffs' complaint that they reasonably expected their interest would not be redeemed pursuant to Article 6 of the Agreement unless it was used solely in circumstances of Mr. MacIver's "mental instability" and that the plaintiffs would be paid "fair value" for their interests.

98 The Di Poce defendants argued that no genuine issue requiring a trial existed in respect of any of these allegations:

(i) the Offer and the transaction mandated by it complied with the terms of the Agreement; in the days following the delivery of the Offer, the plaintiffs affirmed its validity; and the specified value for Alpa Partnership contained in the Buy-Sell Offer was self-regulating and did not require "fair value". The mechanism for a shotgun offer within the Agreement permitted the offeror to craft an offer at a purchase price at which it is willing to be bought out; and,

(ii) no fiduciary duties are owed in the context of the delivery of a buy-sell offer and, in any event, any such duties or the reasonable expectations of the plaintiffs, must be measured against the contractual framework in which the parties placed themselves, namely the Agreement.

B. The Red Alder Defendants

99 On their part the Red Alder defendants contended that claim raised no genuine issue requiring a trial against them for several reasons:

(i) the majority of allegations asserted and complaints made by the plaintiffs related to the validity of the Offer, to which neither Red Alder nor Guglietti was a party;

(ii) although plaintiffs complained that all of the defendants failed to provide them with information prior to the close of the Offer, the plaintiffs did not request any information from Red Alder or Guglietti;

(iii) there was no evidentiary or legal basis for the plaintiffs' claim of breach of fiduciary duty, breach of the duty of good faith and oppression claims as against Red Alder and Guglietti in respect of the December 14, 2009 Agreement because Red Alder and the corporate co-defendants had every right to enter into the December 14, 2009 Agreement and had no obligation to disclose it to the plaintiffs; and,

(iv) there was no evidentiary or legal basis for the plaintiffs' allegations with respect to the alleged misappropriation of lumber and other materials by Red Alder and Guglietti.

C. The Western Larch Plaintiffs

100 The plaintiffs submitted that this case was not appropriate to be decided by way of summary judgment motions because it involved complex and disputed facts, a voluminous record, multiple material witnesses, numerous issues which turn on findings of credibility, various theories of liability, and examinations for discovery had yet to occur. It was the plaintiffs' position that a full appreciation of the evidence could only come through *viva voce* evidence and the full narrative of a trial. In sum, the plaintiffs' claims, arising from the defendants' breaches of the duty of good faith, breached fiduciary duties and oppressive conduct, could only be properly resolved through the exercise of the discretion which resides in a trial judge.

VI. Principles governing summary judgment motions

101 In *Combined Air Mechanical Services Inc. v. Flesch*,⁵⁴ the Court of Appeal provided extensive guidance about the purpose of summary judgment motions and the circumstances in which summary judgment motions are appropriate. The Court of Appeal observed that while the amendments to Rule 20 were meant to introduce significant changes in the manner in which summary judgment motions are to be decided,⁵⁵ the purpose of the new rule was to eliminate

unnecessary trials, not to eliminate all trials.⁵⁶ In each case the guiding consideration must be whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.⁵⁷ The appropriateness of a summary judgment motion for the final determination of a claim on its merits, instead of proceeding to trial, depends on the nature of the issues posed and the evidence led by the parties.⁵⁸

102 As the Court of Appeal noted, generally speaking there are three types of cases that are amenable to summary judgment: (i) cases where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment; (ii) cases where the claims or defences are shown to be without merit in the sense that they have no chance of success; and, (iii) cases where the trial process is not required in the "interest of justice".⁵⁹ In deciding if the powers under Rule 20.04(2.1) should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?⁶⁰

103 The full appreciation test requires a motion judge to do more than simply assess if he is capable of reading and interpreting all of the evidence that has been put before him; a motion judge is required to assess whether the attributes of the trial process are necessary to enable him to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.⁶¹ Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record — as may be supplemented by the presentation of oral evidence under Rule 20.04(2.2) — the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.⁶²

104 Finally, the Court of Appeal provided guidance — although they stressed it was not exhaustive guidance — on the types of cases which would and would not be appropriate for a summary judgment motion. Summary judgment usually is not appropriate in cases calling for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record. By contrast, summary judgment might be appropriate in (i) document-driven cases with limited testimonial evidence, (ii) cases with limited contentious factual issues, and (iii) cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.⁶³

105 As will become apparent from the analysis I conduct in the balance of these Reasons, I have concluded that, in light of the issues in dispute in this action and the nature of the evidence filed on these motions, the attributes of the trial process are not necessary to enable me to fully appreciate the evidence and the issues posed by this case. In short, I conclude that most of the issues in this case are capable of fair adjudication by way of summary judgment motions. That said, I take strong exception to the moving parties resiling from the representations they made to Cumming J. to proceed to an expedited trial. However, I will deal with that matter after addressing the issues on their merits.

VII. Analysis: Validity of the Offer and breach of contract claims

A. The Plaintiffs' claims

106 In their Amended Statement of Claim the plaintiffs advanced several reasons why the Offer failed to comply with the provisions of the Agreement and therefore was of no force and effect:

- (i) The Offer failed to contain an "Alpa Valuation" based on a fair valuation of Alpa's value and failed to comply with the "specified formula" for the Alpa Valuation under section 6.2;

(ii) The Offer failed to distinguish properly between the "Purchase Offer" and the "Sale Offer", "thereby creating uncertainty";

(iii) The inclusion of two alternatives in the Offer offended the Agreement in several ways:

- a. The Agreement did not permit the making of alternative offers;
- b. One alternative under the Offer included all indebtedness owed to the vendor, thereby breaching section 6.11 of the Agreement which required the payment of any such indebtedness on closing;
- c. The element of Alternative 2 stating that the purchase price was subject to dollar-for-dollar adjustments to reflect the actual indebtedness of Alpa relative to the estimate amount was not permitted by the Agreement;
- d. The Alpa Valuation under the two alternatives is different after adjustments are applied; and,

(iv) The Offer did not comply with the net earnings allocation requirements of section 6.9.

107 In their factum the plaintiffs summarized their breach of contract claims against the defendants as follows:

In the Buy-Sell Offer, the Offeror Defendants have committed the following breaches of contract:

- (a) the Buy-Sell Offer failed to strictly comply with the terms of the Partnership Agreement;
- (b) the Buy-Sell Offer failed to account for the Plaintiffs' Retained Interest, and, instead, the Plaintiffs' entire interest in the Alpa Partnership was eliminated upon closing;
- (c) the operation of the Partnership Agreement was unilaterally suspended in relation to RAL; and
- (d) the manner of closing failed to comply with the Partnership Agreement.⁶⁴

108 Before considering each of these allegations, let me first turn to the law governing the interpretation of provisions in commercial contracts, including shotgun buy-sell provisions.

B. Governing legal principles

B.1 General principles of contract interpretation

109 In a series of cases decided over the past few years the Court of Appeal has summarized the main principles which apply to the interpretation of commercial contracts.⁶⁵ Specifically:

- (i) a commercial contract is to be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (ii) a court must determine the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they intended what they said;
- (iii) a contract should be interpreted in a fashion which accords with sound commercial principles and good business sense, and that avoids a commercial absurdity;
- (iv) where the language of a written contract is unambiguous, extrinsic evidence is not admissible to alter, vary, interpret, or contradict the words used in the contract;
- (v) where a group of agreements essentially form components of one larger transaction, in the sense that each agreement is entered into on the faith of the others being executed and where it is intended that each agreement

form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements; and,

(vi) a court should interpret a commercial contract with regard to objective evidence of the circumstances underlying the negotiation of the contract, but without reference to the subjective intention of the parties.

110 On this last point, a consideration of the context in which the written agreement was made is an integral part of the interpretative process, irrespective of whether any ambiguity exists in the text of the document. Courts must always have regard to the context, or what commonly is called the "factual matrix", and to the objective evidence of the surrounding circumstances underlying the negotiations. That is because while the dictionary, grammatical or plain meaning of the words used by the parties will be important, and often decisive, in determining the meaning of the document, often the meaning of a document is derived not just from the words used, but also from the context or the circumstances in which the words were used. Understanding the meaning of words usually requires knowing the context in which the words were used. As a result, a court needs to read the text of a written agreement in the context of the circumstances as they existed when the agreement was created, including the facts which were known to or reasonably capable of being known by the parties when they entered into the written agreement, the genesis of the agreement, its purpose, and the commercial context in which the agreement was made.

111 To sort out which facts fall within the rubric of the objective, factual matrix, and which stray over the line into the forbidden realm of the parties' subjective intention, Doherty J.A., in *Dumbrell v. Regional Group of Cos.*, adopted the following description provided by an English court:

In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce.⁶⁶

B.2 Specific interpretative principles applicable to shot-gun provisions

112 Recently, the Court of Appeal considered the interpretation of a buy-sell shotgun provision in a commercial contract. After re-iterating the general principles of contractual interpretation, the Court of Appeal stated:

In this case, the court is confronted with the interpretation of a buy-sell provision in a commercial contract. I agree with the observation of the Alberta Court of Appeal in *942925 Alberta Ltd. v. Thompson*, (2008), 47 B.L.R. (4th) 1, at para. 21 that "a shareholder must strictly comply with the terms of a shotgun clause [buy-sell] in order to obtain its benefit".⁶⁷

Or, as put by a judge in another case: "A shotgun buy-sell is strong medicine. One takes it strictly in accordance with the prescription or not at all."⁶⁸

113 Of course, as with all general common law principles, their meaning only becomes clear when the particular facts which gave rise to them are known. Accordingly, in order to gain a practical understanding of what "strict compliance" means in the context of shot-gun provisions, I think it necessary to canvass the specific facts of the cases counsel placed before me.

*Laschuk v. Poon*⁶⁹

114 In the case of *Laschuk v. Poon* a disagreement had arisen amongst the partners in a dental practice. The partnership agreement contained a shot-gun buy-sell provision. Following a meeting, most of the partners wrote to the applicant offering to buy his partnership interest on specified terms. The applicant treated this offer as one made under the contractual shotgun provision, and he attempted to reverse the offer and buy-out the respondents. When the respondents

resisted, the applicant sought a declaration that a binding agreement existed between the parties. The Alberta Court of Queen's Bench found that no such agreement existed because the respondents' written offer had not engaged the shotgun provisions. The court found that by only including some of the mandatory provisions contained in the shotgun provision the respondents' written offer did not engage the shot-gun buy-sell clause:

The extent to which the terms differ from those contemplated in the buy sell vary from insignificant to material.

...

Nor I am satisfied, did the Respondents have any intention of engaging the buy sell provision thereby risking the imposition of a five mile radius/five year non competition provision prescribed by that provision since it would have put at risk a number of other dental operations in which some of the Respondents hold an interest and which operate within those geographical constraints.

The October 27, 1992 letter purports to incorporate by reference certain of the provisions of the buy sell.

If the Respondents intended their offer to be an offer as contemplated by s. 30 then all the terms mandated by that provision would without more be part of the binding agreement.⁷⁰

*Trimac Ltd. v. C-I-L Inc.*⁷¹

115 Clause 16, a shot-gun provision in a shareholders' agreement between Trimac Ltd. and C-I-L Inc., obliged the offeree "to either (i) unconditionally accept the offer, or (ii) purchase all the shareholdings of the Offeror *at the price contained in the offer without conditions* except as herein set out." Trimac made an offer pursuant to the shot-gun provision to buy C-I-L's shares in Tricil for \$91 million. In response, C-I-L purported to reverse the offer by electing to purchase Trimac's shares for "\$91 million...or such other sum as, by that time, has been determined by the Supreme Court of Ontario to be the amount payable for such shares". The Alberta Court of Queen's Bench held that C-I-L's reply did not constitute an offer to purchase Trimac's shares that complied with the terms of the shotgun clause:

I am satisfied that C-I-L did not within the time limited by clause 16, purchase the shareholdings of Trimac at the price contained in the offer without conditions, and that Trimac is entitled to the shares upon payment of the purchase price in accordance with the terms of the buy-sell agreement.

In its letter of 25 March 1987, C-I-L did not say C-I-L elects to purchase at \$91,000,000.00, the price contained in the offer. It said, in effect, C-I-L will purchase at \$91,000,000.00 or such other sum as may be determined by the court.

...

In my view C-I-L equivocated. It tried to take the benefit of clause 16 but still preserve its hope to obtain Trimac's shares for a much lesser price than that specified in the offer. That, in my opinion, is not the type of response that entitles it to take the benefit of the operation of clause 16.⁷²

*Hargreaves v. Charbonneau*⁷³

116 In this case the shareholders' agreement contained a shot-gun buy-sell clause which mandated that the offered price per share "shall not be less than the fair market value determined by a member of the Canadian Institute of Chartered Business Valuators, a copy of which valuation shall accompany the offer". The offerors had secured an opinion from a certified valuator which expressed the per share fair market value in terms of an upper range, a lower range and a mid-point valuation. Their offer used the mid-point valuation. The Court held that the offer did not comply with the pricing terms of the shotgun buy-sell provision because it did not use the upper range valuation:

It follows therefore that since the actual fair market value of the shares could be as high as \$59,000 more than what was actually offered...the offer does not comply with Section 12 of the original Shareholders agreement.⁷⁴

*942925 Alberta Ltd. v. Thompson*⁷⁵

117 The shotgun clause in a shareholders' agreement provided that "a shareholder" might give notice of an offer to purchase/offer to sell all "Issued Shares". Two shareholders delivered a joint notice to the other shareholder offering to purchase/sell all their Class A shares and, as well, offering to sell the Class E shares owned by one of the two offerors. The Alberta Court of Appeal held that the notice was invalid for two reasons: (i) the shotgun clause only authorized the giving of notice by one shareholder; joint offers were not permitted; and, (ii) the shotgun clause only applied to Class A shares; Class E shares did not fall within the provision.

*Buttonwood Holdings Inc. v. Zeubear Investments Ltd.*⁷⁶

118 In this case the issue concerned not the compliance of the offer with the shotgun provision, but the compliance of the purported acceptance of the offer. The shotgun clause in the shareholders' agreement required the notice of offer to contain "the terms and conditions, including the price to be paid for each Share, which shall apply to both the Sell Option and the Purchase Option..." The clause continued by providing:

Section 4.12(2) Minimum Terms.

Notwithstanding any other provision hereof ... the Terms shall be deemed to provide, *inter alia*, that:

...

(c) payment of the Purchase Price for all of the Shares to be purchased pursuant to this section shall be made by delivering on completion:

(i) at least 50.0% of the Purchase Price in cash or by certified cheque or bank draft; and

(ii) a promissory note for the balance of the Purchase Price, which promissory note shall...

119 The Offerors' notice required that the price payable for the shares "be paid in full on closing". The Offeree, relying on the Minimum Terms provisions, accepted the offer, but stipulated that "the purchase price would be payable in full on [closing] by delivering (in accordance with the USA Section 4.12(2)(c)) at least 50% of the purchase price in cash and the balance by way of promissory note." The Offerors took the position that the acceptance was not in accordance with the offers and therefore not valid.

120 The Ontario Court of Appeal disagreed, interpreting the "Minimum Terms" section, s. 4.12(2), as a term of the offer. Although the offer did not include the minimum terms, the Court of Appeal held that by virtue of the language of section 4.12(2), those terms were deemed to be included in the offer. It was therefore open to the Offeree to accept the offer on the basis of those deemed terms.⁷⁷

Summary

121 To summarize the cases placed before me, courts have held that shotgun buy-sell offers have not complied with the contractual provisions where they did not include all the terms the contracts mandated be included in an offer, did not use the price mechanism stipulated by the contract or were made by a group of offerors when the contract only permitted an offer by a single shareholder. As well, courts have held acceptances valid which complied with the express terms of the contractual provision, even though the offer had varied those minimum terms.

C. Consideration of the plaintiffs' claims

C.1 The structure of Article 6

122 Before considering each of the specific claims advanced by the plaintiffs concerning the failure by the Offeror Defendants to comply with Article 6, let me first describe, in general terms, the structure of Article 6. As I interpret the article, its sections can be grouped into the following categories:

<i>Category 1</i>	When a buy-sell offer could be made: Sections 6.1, "Right to Give a Buy-Sell Offer", and 6.8, "Disability or Death"
<i>Category 2</i>	The terms of a buy-sell offer: Sections 6.2, "Terms of Buy-Sell Offer", and 6.3, "Equal Purchases"
<i>Category 3</i>	The mandatory terms of payment for an accepted offer: Section 6.5, "Acceptance of Purchase Offer"
<i>Category 4</i>	Available offeree responses: Acceptance or conversion to disability election: Sections 6.4, "Response", and 6.10, "Conversion to Disability Buy-Out"
<i>Category 5</i>	How to deal with acceptances in special circumstances: Sections 6.6, "Acceptance of Sale Offer", and 6.7, "Contrary Acceptances"
<i>Category 6</i>	How net earnings were to be treated following delivery of an offer: Section 6.9, "Profit Allocations"
<i>Category 7</i>	Closing arrangements: Section 6.11, "Closing Arrangements"
<i>Category 8</i>	Buy-sell offers as a permitted means to expel a partner: Section 6.12, "No Expulsion Right"

123 As can be seen, only some of the categories of contractual provisions deal with the issue of the formation of a binding agreement of purchase or sale — Categories 1, 2 and 3 address the making of an offer and its terms, while Category 4 concerns the acceptance of an offer. Categories 5, 6 and 7 deal not with the making of a binding agreement, but its performance — Categories 5 and 7 set out various closing arrangements, and Category 6 addresses the on-going allocation and draw upon net earnings between the delivery of an offer and its closing.

124 As will become clear from my analysis below, it is important to keep in mind the function of each category of contractual term when considering the plaintiffs' allegations. The plaintiffs contend, in effect, that the breach of any Article 6 term invalidates an offer. I do not agree. The breach of those categories of contractual terms dealing with the making of an offer would invalidate an offer, but the breach of terms falling in the performance categories would give rise to a claim for breach of a binding agreement of purchase or sale, not a claim that the binding agreement was invalid. With that overview, I turn now to the specific allegations advanced by the plaintiffs.

C.2 The availability of Article 6 in the circumstances

125 The plaintiffs took the position that it was not open to the Offeror Defendants in the circumstances to make an Article 6 buy-sell offer and that Article 6 was only available where a partner became mentally unstable and erratic.

126 Article 6 of the Agreement contained the "Buy-Sell Provisions" agreed to by the partners through a May, 1987 amendment to the Agreement.⁷⁸ Section 6.1 specified when a Buy-Sell Offer could be made:

6.1 Right to Give a Buy-Sell Offer

Partners holding 60% or more of the profit-sharing interests in the Partnership (and after the rules set forth in subsection 2.4 (b) are to apply, the number of Partners provided for in clause (ii) of Section 2.4(b) irrespective of their profit-sharing interests in the Partnership) (in either case, the (Offerors)), *may at any time deliver to all the remaining Partners* (the "Offeree") a notice in writing (the "Buy-Sell Offer") including both (a) an offer to the Offerees (made by the Offerors in equal shares as provided in Section 6.3) to purchase all of the respective Interests (as hereinafter defined) of the Offerees and (b) an offer to sell to the Offerees (who shall purchase in equal shares as

provided in Section 6.3) all of the Offerors' respective Interests. Upon delivery of the Buy-Sell Offer, no further Buy-Sell Offers may be given pursuant to this Section 6.1 until the purchase(s) or sale(s) to be made as a result thereof is/are completed as hereinafter provided.

For purposes of this Article 6, "Interests" as used in relation to any Person (including any Offeror or Offeree) shall mean all of the interests of such Person in the Partnership and the Designated Entities whether directly or indirectly held and whether held through intermediary corporations or entities and whether held by other members of the Partner Group of such Person or otherwise.

(emphasis added)

127 Section 6.12 of the Agreement addressed the circumstances in which a partner could be expelled:

There will be no right to expel the Partners referred to in Section 2.1 nor to change their profit-sharing interests in the Partnership or in Designated Entities except as provided in Articles 6, 8, 9, 10 and 12.

Accordingly, by its terms the Agreement permitted the expulsion of a Partner in the circumstances of the making of a proper buy-sell offer.

128 MacIver gave evidence that notwithstanding the clear language of Section 6.1 that a 60% majority of the partners could deliver a buy-sell offer "at any time", resort to Article 6 was much more limited. MacIver deposed that at the inception of the Partnership, as well as during the restructuring that took place from 1986 to 1988, there existed a "shared understanding...that we would be together as partners until death." He also deposed:

It was always the understanding as reflected in both the spirit and the culture of Alpa Partnership that all decision-making would be unanimous and that decisions would always be taken in the best interests of the partnership. Throughout my involvement with Alpa Partnership, I endeavoured to conduct myself in accordance with these principles.⁷⁹

He further deposed:

While the Buy-Sell Offer purports to have been delivered pursuant to Article 6 of the Partnership Agreement, Article 6 was included in the Partnership Agreement in 1988, at my specific request, only to address the scenario where a partner became mentally unstable and erratic, thereby threatening the Partnership's ability to operate. By the clear understanding amongst the partners in 1988, the provision was never intended to be used as a means to expel a partner under any other circumstance nor has it been.

Article 9 of the Partnership Agreement, which addresses the disability of a partner, addresses only medical or physical infirmity that is either diagnosed by a physician or surgeon or that prevents the disabled partner from devoting his full time and attention to Alpa Partnership over an extended period of time. Article 6 was intended by the partners to address situations that fell short of the Article 9 criteria.⁸⁰

129 MacIvor was cross-examined on this evidence:

Q. And you would agree with me that nowhere in either the 1987 document or the 1988 document does there appear any language about mentally erratic or unstable in respect of the buy/sell offer?

A. That is correct.

Q. Right. And help me with this, sir. Who was going to define what mentally erratic or unstable meant? Was it you?

A. I believe it would have been each of the partners other than the partner under discussion as being or thought to be or who might have been unstable and erratic.

Q. Well, what is mentally erratic? You tell me.

A. In respect of Alpa, I would suggest that a division manager who acts and takes actions which will lose money would be considered erratic behaviour, it might also be considered unstable behaviour. Anything that any partner or other person, for that matter, might do to — which resulted in or might result in damage to the business or was not otherwise considered to be in the best interests of the partnership.

Q. I see. You'd agree with me that in 1987 you already had a disability provision in Amendment No. 17, right? Do you want to look at it?

A. I would, yeah.

Q. Look at tab 3 of Exhibit 1 which is the other book, sir. Page 6, you'd agree with me there was a disability buy-out provision in there? Page 6 of the document, sir.

A. Yes, disability and retirement is in there.⁸¹

As well:

Q. Fair enough. So the more recent events in 1997, which is a mere 13 years ago as opposed to 23 years ago, there was no conversation about the mentally erratic or unstable partner point when you entered into and signed the 1997 Partnership Agreement, correct?

A. That was because there was no change from agreement to agreement in the terms.

Q. Now answer my question, sir. There was no conversation of the type you attribute in paragraph 34 in 1997, correct?

A. Not at that time. Not at that time.

Q. Right. And would you also agree with me that the first time this is raised at any time between December 15 and the present is when it showed up in your very first affidavit in your first motion record, correct? Where you attempt to raise that argument?

A. I would have raised it, yes, at the start.

Q. At the start of this litigation?

A. Yes, that's correct.⁸²

130 Frankfort deposed that MacIver's understanding that all would remain partners until death was at odds with that of the individual shareholders and also contradicted the express terms of the Agreement. Further, while often decisions were made on a unanimous basis, specific terms in the Agreement contemplated that such a consensus would not be required. Frankfort denied that any agreement existed under which expulsion from the Partnership was available only if a partner became mentally unstable and erratic:

Before reading the Statement of Claim in this action, I had never heard such a proposition suggested by [MacIver] or anyone else associated with the partners of Alpa Partnership.⁸³

In Frankfort's view Article 6.12 of the Agreement reflected the partners' agreement and permitted expulsion via the buy-sell offer mechanism.

131 I do not accept the plaintiffs' assertion that a Partner could only resort to the buy-sell mechanism contained in Article 6 in the event another Partner became mentally unstable and erratic. First, the plaintiffs' assertion contradicts the plain and unambiguous language of Article 6 — section 6.1 permitted the delivery of notice "at any time" — and section 6.12 clearly spelled out that the expulsion of a partner could occur under Article 6.

132 Second, the Agreement contained a provision which specifically addressed the possibility of a Partner becoming disabled. Article 9 dealt with "Disability", and section 9.1 stated: "A Partner Shareholder shall be considered disabled if he is unable to devote his full time and attention to the Partnership's business for more than 6 consecutive months or more than 9 months in any 12-month period." Why would Article 6 only be available in the event of disability, as contended by MacIver, if Article 9 already made provision for such an eventuality? MacIver's evidence on this point made no sense.

133 Third, that Article 9, and not Article 6, was the disability provision was clearly agreed to by all Partners because section 6.10 of the Agreement allowed an offeree, instead of responding to a buy-sell offer, to elect to be deemed disabled:

In lieu of responding to a Buy-Sell Offer as provided in Section 6.4, an Offeree may elect, by notice in writing to the Offerors, delivered within 60 days of its receipt of the Buy-Sell Offer, to have its Partner Shareholder deemed disabled as of the last day of the month in which such election is made. In such event the Offeree shall not be deemed to have accepted the Purchase Offer and the provisions of Article 9 shall apply *mutatis mutandis*.

134 Finally, even if during the 1986 to 1988 period MacIver thought, for whatever reason, that some limitation existed on the right of a partner to invoke the buy-sell provision, he agreed to supersede that understanding with the express terms of Article 6 by signing the Agreement on May 27, 1997.

135 I have no hesitation in weighing and rejecting MacIver's evidence on this point without the benefit of a trial narrative. His bald assertion flies in the face of the clear terms of a detailed Agreement which he signed. There is no doubt that MacIver was, and remains, an experienced, sophisticated businessman. The evidence leaves no doubt that he knew what he was signing back in 1997 when he signed the Agreement. He is bound by its terms. Accordingly, I find that it was open to the Offeror Defendants under Article 6 to make their Offer.

C.3 The Offer and its terms

136 Article 6 of the Agreement contained three provisions which specified the terms of any buy-sell offer: section 6.2, dealing with "Terms of Buy-Sell Offer", section 6.3, "Equal Purchases", and section 6.5, "Acceptance of Purchase Offer", which identified "Designated Terms". The material portions of Sections 6.2 and 6.5 read as follows:

6.2 Terms of Buy-Sell Offer

The Buy-sell Offer deliver to each of the Offerees shall be signed by the Offerors and shall contain or be accompanied by the following:

- (a) specification of a value for the Partnership and the Designated Entities (hereinafter the "Alpa Valuation");
- (b) an offer by the Offerors (the "Purchase Offer") to purchase in equal shares the Interests of each Offeree for purchase prices to be paid to that Offeree which are in equal amounts and which in the aggregate total an amount equal to the Alpa Valuation multiplied by a percentage equal to the profit-sharing interest in the Partnership of that Offeree;
- (c) an offer by the Offerors (the "Sale Offer") to sell to each of the Offerees in equal shares the interests of each Offeror for a sale price which in the case of each Offeree shall be an equal amount and which in the aggregate

shall total an amount equal to the Alpa Valuation multiplied by a percentage equal to the profit-sharing interest in the Partnership of that Offeror; and,

(d) certified cheques payable to each respective Offeree in an amount equal to 15% of the respective purchase prices offered to it in the Purchase Offer, as deposits on account of such purchase prices.

...

6.5 Acceptance of Purchase Offer

In the event that all Offerees accept the Purchase Offer, the transactions of purchase and sale shall be completed in accordance with the provisions of Section 6.11 one hundred and twenty days following the date the Buy-Sell Offer was accepted and the purchase prices shall be satisfied as follows:

(a) a further 35% of each purchase price shall be paid by each purchaser to each vendor on closing by certified cheque...

(b) the remaining 50% balance of each respective purchase price shall be satisfied by the purchaser delivering its promissory note payable to the order of such vendor in a principal amount equal to that balance, which promissory note shall have the following attributes:

...

(All of the foregoing terms of payment and the terms of the promissory notes as referred to in this Section 6.5 are hereinafter collectively referred to as the "Designated Terms").

137 The Offer made by Di Poce Management, Eastern Hemlock and Large Tooth Aspen to Western Larch contained the following key financial terms:

Pursuant to Article 6 of the Partnership Agreement and subject to the terms and conditions set forth below, the undersigned hereby offer as follows:

The Offer

Alternative 1:

For purposes of this Alternative 1 of this Buy-Sell Offer, the Alpa Valuation is \$258,871,780, adjusted in relation to each Offeror and Offeree by that portion of the RAL Preferential Allocation on Death by which such Offeror's or Offeree's allocations of income would otherwise be reduced if such Offeror or Offeree continued as a partner of Alpa throughout the period that such Preferential Allocation is to be allocated and paid pursuant to the Partnership Agreement, such that:

a/ the undersigned hereby offer to purchase from you (the "Purchase Offer") in equal shares your Interests for a purchase price of \$33,643,078 in the aggregate and \$11,214,360 in relation to each of the undersigned, calculated as follows:

...

and

b/ the undersigned hereby offer to sell to you (the "Sale Offer") the Interests of each of the undersigned for a sale price of \$186,356,922 in the aggregate, which in relation to the Di Poce Management Limited ("DPML") is \$82,828,716, in relation to Eastern Hemlock Limited ("EHL") is \$51,764,103 and in relation to Large Tooth Aspen Limited ("LTAL") is \$51,764,103, all calculated as follows:

...

in either case, adjusted on closing for the vendor(s) portion of any payments made to RAL prior to closing on account of the RAL Preferential Allocation on Death (i.e. 25% per vendor of each such payment made to RAL), which adjustment will be added dollar for dollar to the portion of the purchase price otherwise payable on closing and which purchase price for the Interests is inclusive of all indebtedness owing to the vendor(s) by the Partnership or any Designated Entity including by Termcourt Inc., Termpark Inc., Roycourt Inc. and Sugar Maple Holdings (RHRW) Inc., so that no consideration over and above the purchase price set in this Alternative 1 Buy-Sell Offer shall be payable in respect of the assignment and transfer of such indebtedness.

And:

Alternative 2:

For purposes of this Alternative 2 of this Buy-Sell Offer, the Alpa Valuation is \$258,871,780, adjusted in relation to each Offeror and Offeree by subtracting that portion of the RAL Preferential Allocation on Death by which such Offeror's or Offeree's allocations of income would otherwise be reduced if such Offeror or Offeree continued as a partner of Alpa throughout the period that such Preferential Allocation is to be allocated and paid pursuant to the Partnership Agreement and further adjusted in relation to each Offeror and Offeree by subtracting any indebtedness owing to the vendor(s) by the Partnership or any Designated Entity other than by Termcourt Inc., but for greater certainty, including indebtedness owing by Termpark Inc., Roycourt Inc. and Sugar Maple Holdings (RHRW) Inc. (which indebtedness owing to all of the Partners excluding the Termcourt Debt is assumed to be \$31,693,927 in the aggregate on closing for purposes of the calculations set out below and the vendor(s)' share of the actual amount owing to be paid in full on closing in accordance with subsection 6.11(a) of the Partnership Agreement), such that:

a/ the undersigned hereby offer to purchase from you (the "Purchase Offer") in equal shares the Interests for a purchase price of \$28,334,346 in the aggregate and \$9,444,782 in relation to each of the undersigned, calculated as follows:

...

b/ the undersigned hereby offer to sell to you (the "Sale Offer") the Interests of each of the undersigned for a sale price of \$159,971,727 in the aggregate, which in relation to DPML is \$71,498,137 and in relation to EHL and LTAL is \$44,236,795, all calculated as follows:

...

in either case, adjusted on closing for the vendor(s) portion of any payments made to RAL prior to closing on account of the RAL Preferential Allocation on Death (i.e. 25% per vendor of each such payment made to RAL), which adjustment will be added dollar for dollar to the portion of the purchase price otherwise payable on closing and further adjusted on closing for the difference, if any, between the actual indebtedness owing to the vendor(s) on closing and the amounts set in the calculations above (such actual amount owing to be paid to the vendor(s) in full on closing in accordance with subsection 6.11(a) of the Partnership Agreement), which adjustment if such indebtedness is higher than the amount set out in the calculations above, will reduce the purchase price dollar for dollar and which adjustment if such indebtedness is lower than the amount set out in the calculations above, will increase the purchase price dollar for dollar and which purchase price for the Interests is inclusive of any Termcourt Debt owing to the the vendor(s) so that no consideration over and above the purchase price set out in this Buy-Sell Offer shall be payable in respect of the assignment and transfer such Termcourt Debt.

You shall have the option of electing to proceed under either Alternative 1 or Alternative 2 above, provided such election is so indicated in writing in the notice to be delivered by you pursuant to section 6.4 of the Partnership Agreement. *If no such election is indicated as aforesaid then you shall be deemed conclusively to have elected to proceed under Alternative 1 and if you fail to accept either the Purchase Offer or the Sale Offer, then subject to section 6.10 of the Partnership Agreement, you shall be deemed conclusively to have elected to proceed under Alternative 1 of the Purchase Offer.* (emphasis added)

C.4 Lack of fair value

138 The plaintiffs alleged that the Offer failed to comply with the Agreement because the Alpa Valuation used by the Offerors — \$258,871,780 — was not the fair market value of the Partnership. As put by MacIver in his Amended Affidavit:

Section 6.2 of the Partnership Agreement requires the Buy-Sell Offer to provide "a value for the Partnership and the Designated Entities (hereinafter the 'Alpa Valuation')". Accordingly, the Alpa Valuation in a buy-sell offer must represent a fair valuation of Alpa's value by the offering partners. Nevertheless, as I discuss in further detail below, the "Alpa Valuation" in the Buy-Sell Offer is not based on an independent or fair valuation of Alpa and is significantly less than the fair value for the Partnership as recently confirmed by the partners.⁸⁴

139 MacIver further deposed that the Alpa Valuation of \$258,871,780 (i) was approximately \$65 million less than the value for the Alpa Partnership confirmed by the partners at the December 8, 2009 meeting for the purpose of calculating Red Alder's Preferential Allocation, (ii) was not supported by any calculation or back-up, and (iii) represented a "steep discount" of Western Larch's partnership interest. MacIver estimated the fair market value of Alpa Partnership, including fixed assets, at in excess of \$350 million. He deposed that during the previous five years Western Larch had received approximately \$6.5 million a year in pre-tax earnings from Alpa Partnership, based on its 12% interest. Because on the death of Giovanni Guglietti Western Larch's interest increased to 16.75%, MacIver deposed that an offer of approximately \$28 million could not represent fair value for Western Larch's entire partnership interest. On cross-examination MacIver testified:

Q. And I'm suggesting to you that what you're really saying is that you've got to view it as a fair valuation before you would act on it. Isn't that what you're saying?

A. Yes.⁸⁵

140 MacIver also stated that in 2005 the partners had agreed to offer to sell Alpa Partnership to an interested third party for \$700 million. Although that transaction did not proceed, MacIver thought it "inconceivable" that the value of the partnership was more than 2.5 times greater a mere four to five years ago.⁸⁶ Frankfort confirmed that some discussions took place in 2005 regarding an offer to sell Alpa, but he deposed that the matter never had proceeded beyond very preliminary discussions, nor did the interested third party ever agree to pay \$700 million.⁸⁷ Employing the formula used in Article 13 of the Agreement, in April, 2010 Frankfort ventured that the value of the partnership interests likely was about \$158 million,⁸⁸ a value well below the Alpa Valuation used for the Offer. MacIver disputed that estimate.⁸⁹

141 Frankfort explained how the Offeror Partners arrived at the Alpa Valuation number:

Q. Mr. Frankfort, I'd like to take you to the buy/sell offer which is found at tab M of the motion record, and in that you have Alpa valuation of, if I take you to page 2, \$258,871,780, correct?

A. Yes.

Q. Can you tell me how you and Mr. Matkowsky arrived at this number?

A. It wasn't Mr. Matkowsky.

Q. Who was it?

A. It was I. It was me.

Q. How did you arrive at the number?

A. It wasn't a sophisticated calculation that you might think. It's a number that —

Q. I might not think.

A. *It's the number that I felt was the right number, it's the number that I felt that I would be happy with if it was returned, reversed, that's it.*

Q. And how did you come to — it's a very — it's not exactly a round number.

A. Yes, it is.

Q. \$258,871,780?

A. Sorry, the \$220 million is an absolute round number, and then when you work it backwards with the 38 million, that's how I come to 258.⁹⁰

142 While maintaining that the Offer price represented a steep discount from fair value, at the same time MacIver deposed that when the other partners made the Offer they were well aware "that I had no realistic possibility of securing financing to enable me to seriously pursue the offer to purchase their interests given the size of the contemplated transaction, the limited time available and the lack of cooperation in facilitating due diligence. Alpa Partnership has grown to such an extent over the past two decades that it is no longer feasible for a single minority partner to buy-out the collective interests of the remaining partners, even for a discounted price."⁹¹

143 The plaintiffs filed an "opinion of value" prepared by KPMG LLP which opined that, as at December 15, 2009, the *en bloc* value of Alpa was "in the order of \$371.068 million, of which \$348.868 million accrued to the Partners", and that the fair value of Western Larch's 16.75% interest in Alpa was "in the order of \$58.435 million." The author of the opinion, Susan Glass, was cross-examined.⁹² Matkowsky filed an affidavit contending that the Glass opinion contained several material factual errors.

144 In his reasons dismissing the plaintiffs' motion for an interlocutory injunction Cumming J. stated:

Article 6.2 does not set forth a fixed, objective formula for the valuation of Alpa Partnership as a prerequisite for the determination of the price to be offered. Rather, it only requires the "specification of a value" given by the Offeror Defendants of the Alpa Partnership and this is purposeful given the offer will necessarily be described in terms of fractional percentages reflecting the differing profit sharing interests of the partners. There is no reference to "fair" value in Article 6. Fair value is what the market will pay and the price is determined simply by the market created by the operation of the Buy-Sell Offer.⁹³

I agree. Article 6 was a carefully drafted shotgun buy-sell clause which detailed the mechanism by which a majority of the partners could attempt to expel all the remaining partners. Section 6.2 simply required the specification of "*a value*" for "the Partnership and the Designated Entities" — not fair value, but "*a*" value.⁹⁴ The Offer did so. That the value offered in fact would be reasonable in the circumstances, Article 6 left to the internal discipline of the shotgun buy-sell mechanism — the value selected by the offeror could be turned back on the offeror by the offeree, so the offeror would

act to ensure the value made some financial sense to both parties in the circumstances. Frankfort confirmed this point when he described how he arrived at the Alpa Valuation in the Offer:

It's the number that I felt was the right number, it's the number that I felt that I would be happy with if it was returned, reversed, that's it.

Such is the essence of the internal discipline of a shotgun buy-sell provision.

145 Accordingly, I find that the Agreement did not require an offer under Article 6 to contain an Alpa Valuation which reflected fair market value. I further find that the Offer complied with the specification of value requirements contained in section 6.2(a) of the Agreement.

C.5 Failure to comply with pricing requirements

146 In his Amended Affidavit MacIver contended that the Offer failed to comply "with the specified formula" in Section 6.2 of the Agreement for calculating the Purchase Offer and the Sale Offer based on the Alpa Valuation.⁹⁵ I see no basis for that assertion.

147 Section 6.2(b) of the Agreement required the "purchase prices" to be paid to total "an amount equal to the Alpa Valuation multiplied by a percentage equal to the profit-sharing interest in the Partnership of that Offeree". The Offer did so, attributing to Western Larch a 16.75% profit-sharing interest in the Partnership, which reflected the increase in Western Larch's partnership interest resulting from the death of Giovanni Guglietti.

148 Section 6.2(c) of the Agreement required the "sale price" to total "an amount equal to the Alpa Valuation multiplied by a percentage equal to the profit-sharing interest in the Partnership of that Offeror". Again, the Offer did so, using 83.25% as the Offerors' interest in the Partnership.

C.6 The inclusion of Alternatives 1 and 2 in the Offer

149 In his Amended Affidavit MacIver stated that Article 6 did not permit an offeror to make alternative offers, as the Offeror Defendants had done in their Offer, and therefore the Offer was invalid. He deposed:

Section 6.2 also provides that a buy-sell offer shall provide a single Purchase Offer and a single Sale Offer. The Buy-Sell Offer defines "Purchase Offer" and "Sale Offer" differently twice but, in several material instances, fails to distinguish between the two;

The Partnership Agreement does not permit alternative offers. The Buy-Sell Offer delivered presents two alternative offers.⁹⁶

150 The plaintiffs' position was that the term "an offer" found in Sections 6.2(b) and (c) of the Agreement — the Purchase Offer and Sale Offer provisions — possessed only a singular sense and therefore permitted only a single offer. That position stands at odds with the internal interpretative guidelines agreed to by the parties in section 1.14 of the Agreement, the "Interpretation" section, which provided, in part, as follows:

In construing this Agreement, words in the singular shall include the plural and vice-versa...

Accordingly, the term "an offer" used in Sections 6.2(b) and (c) included the plural, "offers". That is sufficient to deal with this objection by the plaintiffs.

151 I would observe, however, that the Offerors had left it open to Western Larch to select the alternative it preferred. The Offer stated:

You shall have the option of electing to proceed under either Alternative 1 or Alternative 2 above, provided such election is so indicated in writing in the notice to be delivered by you pursuant to Section 6.4 of the Partnership Agreement.

Under the terms of the Offer Western Larch was free to choose the alternative which best suited its own financial and tax considerations. There was no unfairness in the alternatives presented by the Offerors.

C.7 The inclusion of Red Alder Preferential Allocation amount

152 In its Amended Statement of Claim the plaintiffs pleaded that the Agreement did not permit the Offeror Defendants, when calculating the purchase or sale prices, to subtract from the Alpa Valuation an amount on account of the Preferential Allocation on Death due to Red Alder:

Both alternative offers subtract an amount of \$38,871,780 from the Alpa Valuation on account of the alleged liability owed by Alpa to the late Giovanni and Red Alder. These subtractions are not provided for under the terms of the Partnership Agreement nor did the Defendants have any intention of paying the alleged Payment on Death, as secretly agreed by them on December 14, 2009.⁹⁷

The Offer had provided that "the Alpa Valuation is \$258,871,780, adjusted in relation to each Offeror and Offeree by that portion of the RAL Preferential Allocation on Death by which such Offeror's or Offeree's allocations of income would otherwise be reduced if such Offeror or Offeree continued as a partner of Alpa throughout the period that such Preferential Allocation is to be allocated and paid pursuant to the Partnership Agreement..." In the ensuing calculations of the purchase and sale prices, the relevant proportionate share (25% for a purchase or 75% for a sale) of the RAL \$38,871,780 Preferential Allocation on Death was deducted.

153 Over the course of this proceeding MacIver's evidence about the appropriateness of including the Preferential Allocation in the purchase or sale offer prices evolved. MacIver swore an initial affidavit on March 30, 2010 in which he characterized the RAL Preferential Allocation on Death as a "fabricated" debt:

I believe Di Poce and the other partners have deliberately misled me with respect to amounts to be paid on account of Giovanni's death as described in greater detail below. Specifically, I believe they have fabricated a "debt" owed by the Partnership to Red Alder in an effort to pass 25% of that "debt" to Western Larch for the purpose of reducing the amount offered under the buy-sell offer as described below.⁹⁸

154 In his Amended Affidavit sworn April 9, 2010, MacIver changed his initial evidence in the following respect:

I believe Di Poce and the other partners have deliberately misled me with respect to amounts to be paid on account of Giovanni's death as described in greater detail below. Specifically, I believe they have improperly sought to reduce the amount offered under the buy-sell offer, as described below, on account of a "debt" now owed by the Partnership to Red Alder.

In his April 26, 2010 affidavit MacIver explained why he had made that change to paragraph 42 of his initial affidavit:

At several points in his affidavit, Mr. Frankfort refers to my "original" affidavit in which I challenged the contractual basis for paying any preferential allocation on death to Red Alder since it had already been paid the full amount of the proceeds from a life insurance policy taken out on the life of Giovanni Guglietti. *My affidavit was based on my understanding and interpretation of section 8.3 of the Partnership Agreement as found at Exhibit "A" of my Amended Affidavit at the time I swore the affidavit.*

However, after swearing my affidavit, my son, David, brought to my attention the 2000 amendments to the Partnership Agreement in which section 8.3 of the Partnership Agreement was amended. I recalled that certain

amendments had been made to facilitate the transfer of insurance policies to the partners but not the substance of those amendments. Upon reviewing the 2000 amendments, however, I realized that my understanding at the time I swore my affidavit was incorrect. I immediately informed my lawyers of the 2000 amendments and swore my Amended Affidavit which set forth my corrected understanding of the contractual basis for Red Alder's preferential allocation on death.

The 2000 amendments, however, have no impact on the fact that there is no basis under Article 6 of the Partnership Agreement for the Offering Defendants' attempt to deduct the Red Alder preferential allocation on death from the Alpa Valuation in the Buy-Sell Offer.

(emphasis added)⁹⁹

As noted earlier in these Reasons, the 2000 amendment had altered section 8.3 of the Agreement, and a subsequent 2001 amendment stated that a U.S. \$16.5 million insurance policy had been arranged on the life of Giovanni Guglietti and that "any proceeds of such Substituted Policy shall be treated as the Partner Share of the Insurance in relation to Giovanni Guglietti".

155 I think a fair reading of MacIver's affidavit evidence is that when he swore his initial affidavit he had not been aware of the 2000 amendments but, when his son drew them to his attention, he realized his error and corrected his affidavit. That explanation proffered in his affidavit is difficult to reconcile with MacIver's admission on cross-examination that he had known about the 2000 amendments when he swore his initial affidavit.¹⁰⁰ He was pressed on this point on cross-examination:

Q. And section 8.3 of the Partnership Agreement was the provision that was amended by the 2000 insurance amendment, correct?

A. That's correct.

Q. And then you go on to say: "However, after swearing my affidavit, my son David," who is right here with us, "brought to my attention the 2000 amendments to the Partnership Agreement in which section 8.3 of the Partnership Agreement was amended." That's what you said, right?

A. Correct.

Q. And the implication of that you wanted the reader to take was oops, I didn't swear my first affidavit based on the 2000 amendments. Isn't that the fair reading of that sentence?

A. That's a conclusion. That's not a reading.

Q. I see. Well, I'm suggesting to you, sir, that a fair reading of this paragraph 18 is to convey to the reader of the affidavit that what you're saying is I forgot about the 2000 amendments, they were brought to my attention after I swore my first affidavit, and therefore I swore an amended affidavit. That's the message in paragraph 18, isn't it?

A. Could you state that again, please?

Q. Yes. The message in paragraph 18 is I swore my first affidavit without having the benefit of the 2000 insurance amendment, once David brought it to my attention I amended and swore a new affidavit. Isn't that what I'm to take from that?

A. Correct.

Q. Right. Well, you told me 10 minutes ago, sir, that you were aware of the 2000 amendments when you swore your first affidavit?

A. That's correct.

Q. So I suggest to you that paragraph 18, sir, is untrue?

A. That's incorrect and unwarranted.

Q. Well, somebody else is going to make that decision, sir.

A. Thank you.

Q. But am I to take it from what you're saying that you don't really withdraw the allegation in your affidavit in paragraph 42, that is the first affidavit at Exhibit 2, that your partners fabricated a debt?

A. I believe that to be the case today.

Q. Right. So —

A. It makes no difference.

Q. Right. So as far as you're concerned, they misled you?

A. Correct.

Q. You don't trust them?

A. That is not correct. In most respects in all respects I have great respect for each of my partners.¹⁰¹

156 Given the clear obligations imposed by Article 8 of the Agreement upon remaining partners, MacIver's characterization of the RAL Preferential Allocation as a fabricated debt is quite difficult to understand, greatly weakens MacIver's overall credibility, and his explanation about how his error came about is not credible. MacIver's credibility was also weakened by his testimony in his April 9, 2010 affidavit that had he known about the prospect of a buy-sell offer and an effort to re-admit RAL into the Partnership "I would not have agreed to pay any amount on account of a preferential allocation on death at the December 8, 2009 meeting."¹⁰² Article 13 provided a formula for calculating the Preferential Allocation on Death in the event the Partners were unable to agree on a value, but MacIver's disclosure that he would not have agreed simply indicates that he thought Western Larch was above the workings of the Article 6 buy-sell provision. In that he was wrong.

157 Frankfort, in his cross-examination evidence, explained why the Offeror Defendants deducted the RAL Preferential Allocation from the Alpha Valuation in calculating the prices:

Q. Could I just have a moment. Article 6 of the buy/sell provision, Mr. Frankfort, deals with the terms of the buy/sell agreement or offer. Can you tell me what paragraph you rely on in article 6 to say that it's proper to include Mr. MacIver's alleged obligation to Red Alder as a deduction?

A. The buy/sell, as far as I understand it, works both ways. I made the — I made the offer; It clearly states that it's based on a certain calculation. For clarity it spells out how it was done, how we arrived at those numbers so there should be no misunderstanding. If Mr. MacIver wanted to reverse and own the company, he would have had the exact same right as what we offered him and we have the exact same rights. Therefore, I would have paid for it or he would have paid for it but it's identical based on the buy/sell offer. The number is 220

million, accounting for what's owed to Red Alder is 258, and it's for both parties identical. That's how I relied on it. Why is that any different?

Q. That's helpful, thank you. Just so I understand your answer, the valuation is 258 and then the obligation of the partners, if I can put it that way, under the preferential allocation to Red Alder is used to reduce that number to 220; is that correct?

A. Correct.¹⁰³

158 I see no merit in the plaintiffs' proffered interpretation of Section 6.2 of the Agreement that it precluded any deduction for the RAL Preferential Allocation on Death. By operation of Article 8, upon the death of Giovanni Guglietti Western Larch's partnership interest increased to 16.75%. Article 8 required Western Larch to pay for that increased share; it was not a gift. The Offer was made before the obligations of the remaining partners to Red Alder under Article 8 had been satisfied. The Offer calculated purchase and sale prices based on Western Larch enjoying a 16.75% interest in the Partnership. Since its incremental portion of the partnership was not a gift, Western Larch had to pay for it. Therefore, it was entirely reasonable for the Offeror Defendants to deduct what Western Larch had to pay to RAL for its increased partnership interest resulting from Mr. Guglietti's death.

159 True, Article 6 did not expressly deal with what would happen when a buy-sell offer was made immediately following the death of a Partner Shareholder. Article 6 did not create a mechanism by which to reconcile the treatment of liabilities imposed on a vendor-partner by Article 8 and the payments due to the vendor-partner under Article 6. But, Article 6 did permit the making of an offer "at any time", and that would include immediately following the death of a Partner Shareholder. In the circumstances, the approach taken by the Offeror Defendants — calculating a purchase price which took into account outstanding obligations owed by the vendor in respect of a Preferential Allocation on Death — was a reasonable way to deal with a coincidence of events not specifically addressed in the Agreement and was consistent with the overall obligations of the Partners under the Agreement.

160 In his Amended Affidavit MacIver pointed to a timing difference concerning payments due under Article 8 and Article 6:

Moreover, while the Offeror Defendants have attempted to charge Western Larch, and by extension me, immediately for the full amount they claim represents Western Larch's portion of the preferential allocation on death for Red Alder (\$9,717,945 according to the Buy-Sell Offer), notwithstanding the fact the amount is payable over a period of 10 years, there is no consideration in the Buy-Sell Offer for the amounts Red Alder has to repay the Partnership. This debt, which is in excess of \$3,500,000 (and is described more fully in the partners' agreement attached as Exhibit "N" to my affidavit) was to be repaid immediately upon closing of the redemption of Red Alder's interest. As I have described, that closing has been delayed by Di Poce.¹⁰⁴

161 As I said, Article 6 did not create a specific mechanism to deal with events as they in fact unfolded in the circumstances of this case — a Partner Shareholder died and a buy-sell offer was made shortly thereafter. Although timing differences did exist between the stream of payments under Articles 6 and 8, the deduction of the entire obligation of the vendor in calculating the purchase price was commercially reasonable given that the purchase price offered to the vendor was based on its enhanced partnership interest. To accede to the plaintiffs' interpretation that no such deduction could be made would result either in treating their increased partnership interest as a gift or in interpreting Article 6 as precluding the making of a buy-sell offer immediately following the death of a Partner Shareholder. Neither interpretation would be a commercially reasonable one, and the latter interpretation would stand in opposition to the express language of Section 6.1.

C.8 Promissory note: non-assignability clause

162 In their Amended Statement of Claim the plaintiffs pleaded that the Offeror Defendants "delivered promissory notes to Western Larch for the purchase price that did not comply with the Partnership Agreement".¹⁰⁵ Section 6.5(b) of the Agreement identified the "attributes" which the promissory note was to have, including the following:

6.5(b)(vii) the note shall otherwise be in such form as the solicitors for the vendor may reasonably require...

163 In his letter delivered about one hour before the closing on June 14, 2010, vendor's counsel wrote:

[T]he promissory note your clients intend to deliver pursuant to the closing contains a restriction on negotiability and assignment that is not authorized by the Partnership Agreement. This term, as well as the reference to subsection 6.5(b)(iv) of the Partnership Agreement, are improper and would be unacceptable to our clients in any event.

164 The draft note delivered by counsel for the Offeror Defendants on June 4, 2010 contained the following language:

This Promissory Note is further subject to the terms contained in subsection 6.5(b)(iv) of the [Agreement]...

There was nothing wrong with the inclusion of that language. In fact, Section 6.5(b) required its inclusion.

165 The draft note also provided: "This Promissory Note shall not be negotiable or assignable by the holder without the prior written consent of the undersigned." I do not regard the inclusion of this language as vitiating the Offer for several reasons.

166 First, Section 6.5(b) of the Agreement did not preclude the inclusion of additional terms. Section 6.5(b)(vii) contemplated the inclusion of additional terms, albeit at the request of vendor's counsel.

167 Second, following the release of a decision of this Court on May 27, 2010 holding that the plaintiffs' claim did not disclose a serious issue to be tried, on June 4, 2010 counsel for the Offeror delivered a draft closing agenda and closing documents, including the promissory note, to vendor's counsel. Subsequent drafts were delivered. The response of the vendor was to ignore the whole process until one hour before the June 14 closing. In paragraph 91 above I reproduced MacIver's evidence on that point. For Western Larch to turn its back on the normal pre-closing document comment and negotiation process in the face of the conclusions reached by Cumming J. on its injunction motion was a high risk strategy. The Partnership was a complex legal organization. The closing of the transaction involved significant complexity. In the ordinary course the parties to such a closing must work together to identify any closing document issues at an early stage and then work reasonably to negotiate the final closing documentation. For the vendor to sit back, to rebuff invitations to comment on the draft closing documentation, and then to spring comments on the purchasers an hour before closing was unreasonable commercial conduct and provided Western Larch with no legitimate basis upon which to complain about the contents of the proffered promissory note.

C.9 Inclusion of the payment of debt due to Western Larch in one option — the "deemed acceptance" issue

168 In his Amended Affidavit MacIver alleged that the inclusion of the payment of debt due to Western Larch in Alternative 1 rendered the Offer invalid. He deposed:

Section 6.4 of the Partnership Agreement prescribes the contents of the offeree's response to a buy-sell offer; specifically, the offeree is to advise whether it accepts the Purchase Offer or it accepts the Sale Offer. The Buy-Sell Offer received imposes an additional requirement on the offeree (i.e., me), not found in the Partnership Agreement, in that it requires the offeree to indicate an election between Alternative 1 and Alternative 2.¹⁰⁶

169 While both Alternatives 1 and 2 used the same Alpha Valuation to calculate the purchase price, the Alternatives differed in their treatment of when indebtedness owing by the Partnership to the vendor would be paid. Under Alternative 1, such indebtedness was included in the purchase/sale price, which meant that part of it would be paid out over the 48 months following the closing in accordance with the terms of the promissory note given to the vendor on closing.

Under Alternative 2, the indebtedness was treated separately from the purchase/sale price and would be paid "in full on closing". Frankfort explained the difference between the two Alternatives during the course of his cross-examination:

Q. Paragraph 99 of your affidavit, you state that the economic effect of the two alternatives is virtually identical. Let me see if I can tease that apart a little bit and understand it better.

A. Sure.

Q. Under the first alternative, the payments would be made over how many years?

A. Fifty percent upfront, fifty percent over four years.

Q. All right. And number two?

A. In number two, the total dollar value is identical, it's approximately \$2.6 million additional cash upfront and \$2.6 million less over four years.¹⁰⁷

Frankfort further testified:

Q. Based on your own experience as a business person and in Alpa, are you aware of the tax treatment, any tax treatment being different for a loan than the payment on account of a sale of business? The loan is a return of capital, isn't it?

A. I can't comment on that. I am not a tax lawyer. But it would have been — well, it would have been identical for either one of us.

Q. Well, I understand that. But why those differentials if it wasn't driven by the tax treatment? Why were they done differently then?

A. We ran across this when we had the calculations for the Gugliettis and I didn't want to have the same problem with the buy/sell, therefore we gave the two alternatives to make sure that there is no misunderstanding on how it's to be applied and Mr. MacIver could choose either one he preferred. If he liked the first one, he could choose that, if he liked the second one, he can choose that. If he chose nothing —

Q. If he I'm sorry, go ahead, I didn't mean to cut you off.

A. That's all.¹⁰⁸

170 The treatment of the Partnership's indebtedness to the vendor was dealt with as a closing issue under Section 6.11 of the Agreement. More specifically, Section 6.11(a) provided, in part, as follows:

6.11 Closing Arrangements

The following provisions shall apply to a purchase and sale made pursuant to the Buy-Sell provisions or any other purchase and sale made pursuant to the provisions of this Agreement:

(a) Partnership Indebted to Vendor

If at the time of closing, the Partnership or a Designated Entity is indebted to the vendor(s) the indebtedness (other than Termcourt Debt) shall be paid in full on closing...

171 Under Section 6.4 of the Agreement the failure of an offeree to respond would mean "it shall be deemed conclusively to have accepted the Purchase Offer on the last day of such 60-day period". The language of the Offer went further, stating that a failure by Western Larch to respond would mean "you shall be deemed conclusively to have elected to

proceed under Alternative 1 of the Purchase Offer". So, whereas a buy-sell offer accepted by a vendor in accordance with the Agreement would see the vendor receive "in full on closing" any indebtedness owed to it by the Partnership pursuant to Section 6.11(a) of the Agreement, the "deemed acceptance of Alternative 1 of the Purchase Offer" language contained in the Offer would see Western Larch paid such indebtedness over the 48 months following closing.

172 Now, the Offerors had left it open to Western Larch to select the alternative it preferred. The Offer stated:

You shall have the option of electing to proceed under either Alternative 1 or Alternative 2 above, provided such election is so indicated in writing in the notice to be delivered by you pursuant to Section 6.4 of the Partnership Agreement.

Under the terms of the Offer Western Larch was free to choose the alternative which best suited its own financial and tax considerations. However, in the result Western Larch ignored the Offer, thereby triggering the "deemed acceptance" provisions of the Agreement and the Offer. Although under Alternative 1 some (or perhaps all) of the indebtedness of the Partnership to the vendor would be paid out over 48 months, whereas it would be paid in full on closing under Alternative 2, Section 6.5(b)(iii) of the Agreement did require that the promissory note delivered to the vendor on closing for the "remaining 50% balance" of the purchase price bear interest at the Royal Bank Prime plus 1/2% per annum, payable monthly in arrears and compounded monthly. So, although Alternative 1 would see indebtedness to the vendor paid out over a longer period of time, interest was payable on the amounts outstanding and due. As a result, was there a real economic difference between the two Alternatives in terms of the benefit or cost of the timing of the re-payment of the indebtedness from the Partnership to the vendor?

173 I could not find any evidence from the plaintiffs which squarely addressed this question. MacIver, in his April 26, 2010 affidavit, deposed:

Despite [section 6.11(a)], the Alternative 1 "Purchase Offer" in the Buy-Sell Offer rolled Alpa Partnership's indebtedness to Western Larch into the purchase price. As a result, that indebtedness would be repaid over the course of 48 months not in full upon closing.

I disagree with Mr. Frankfort's statements that this result does not prejudice the vendor... ¹⁰⁹

Unfortunately, MacIver did not proceed to describe what prejudice the vendor would suffer given that the outstanding 50% balance attracted interest until paid in full.

174 Upon my review of the record, I am left with no evidence which describes the financial impact on Western Larch, if any, of the Offeror Defendants closing on the basis of a deemed acceptance of the Purchase Offer under Alternative 1. No doubt if Western Larch was paid in full on closing the indebtedness owed to it by the Partnership, it could have put that money to use. Whether the return it would have received from closing through to today would have been more or less than the interest it has been receiving as part of the payments under the promissory note is not addressed in the evidence. Based on their submissions at the hearing, I expect the plaintiffs would say that in any even such an approach would miss the real point — they were entitled to full payment of the indebtedness on closing, and they want the balance of the outstanding indebtedness paid in full now, not later.

175 Even if Western Larch suffered no financial prejudice as a result of the Offeror Defendants proceeding to close on the basis of a "deemed acceptance" of the Alternative 1 Purchase Offer, does that matter to the plaintiffs' allegation that the Offer did not comply with the Agreement and therefore was invalid? In other words, in the absence of any evidence of damages suffered, can Western Larch still try to obtain an order declaring the Offer invalid? To my mind the answer lies in the structure of Article 6. Sections 6.2 and 6.5 dealt with the terms of an offer. Section 6.2 specified the "Terms of Buy-Sell Offer"; it was silent on the issue of indebtedness to a vendor. Section 6.5 identified "Designated Terms" dealing with terms of payment and the promissory note; it was silent on the issue of indebtedness. The treatment of indebtedness only arose under Section 6.11 which concerned "Closing Arrangements". What is the significance of dealing with the

indebtedness as a matter of the closing arrangements? Well, one does not get to the closing of a transaction unless there exists a binding contract to be closed. A binding contract arises as a result of the acceptance of an offer. If a binding contract exists, one party may default on closing obligations, but that does not mean there never was a binding contract. Such a default would give rise to a claim for damages for breach of some closing obligation.

176 When Article 6 is interpreted as a whole, I conclude that for an offer to comply with the Article it had to contain the terms mandated by Sections 6.2 and 6.5. The Offer did. It was a valid Offer. Western Larch did not respond to the Offer, and by operation of Section 6.4 it was deemed to have accepted the Purchase Offer. A binding contract for the sale and purchase of Western Larch's Interests therefore arose. Section 6.11 specified the "Closing Arrangements", which included the payment in full on closing of indebtedness owed by the Partnership to the vendor. It was not open to the Offeror Defendants to close the transaction on a different basis, as they purported to do by deeming Western Larch to have accepted Alternative 1. By so doing the Offeror Defendants departed from the terms of closing set out in the Agreement. That departure, however, did not affect the validity of their Offer. I therefore give no effect to that part of the plaintiffs' allegations.¹¹⁰

177 As noted, the plaintiffs did not adduce evidence regarding the specific damage they suffered as a result of the *timing difference* caused by the postponement in receiving full payment of the indebtedness until the completion of the payments of the purchase price over 48 months. However, they did submit that they were entitled to full payment of the outstanding balance now. The plaintiffs pleaded a claim for damages caused by breach of contract and developed this point in their Factum which treated this issue as a breach of contract claim.¹¹¹ Under those circumstances, I am not prepared to conclude that the moving parties have demonstrated that no genuine issue requiring trial exists on the damages for breach of contract aspect of the claim. I therefore will direct a trial on that issue.

C.10 The inclusion of incorrect debt adjustment figures

178 The next allegation of the plaintiffs regarding the invalidity of the Offer was described by MacIver in the following way in his Amended Affidavit:

The Partnership Agreement does not allow for adjustments to the purchase price upon closing. Nevertheless, under Alternative 2, the Buy-Sell Offer states that the purchase price is subject to dollar for dollar adjustments to reflect the actual indebtedness of Alpa relative to the estimated amount. Therefore, the true amount of the purchase price under Alternative 2 was to remain uncertain until the date of closing.¹¹²

179 As set out in paragraph 137 above, Alternative 2 of the Offer, in calculating the offered purchase price, subtracted "any indebtedness owing to the vendor(s) by the Partnership or any Designated Entity other than by Termcourt Inc." Alternative 2 estimated the debt owing to Partners and provided that on closing there would be an adjustment "for the difference, if any, between the actual indebtedness owing to the vendor(s) on closing and the amount set out in the calculations above (such actual amount owing to be paid to the vendor(s) in full on closing in accordance with subsection 6.11(a) of the Partnership Agreement)..."

180 MacIver testified that the estimated amount of indebtedness specified in the December Offer was incorrect. In mid-January, 2010 Matkowsky sent MacIver a letter correcting the estimated indebtedness:

I did have a look again at the debt numbers I provided to you and found one error in the calculations with respect to the indebtedness owing by Termpark. Specifically, \$3,489,745.05 is owed to Talpx Inc. and not to the partner companies and therefore the indebtedness shown as owing to the partners was not accurate. I attach an updated spreadsheet showing the Alpa partner loans payable. *The dollar amounts of the indebtedness referred to in Alternative 2 of the Buy-Sell Offer were assumed for calculation purposes but under the offer are to be adjusted on closing to the actual indebtedness owing.* This results in a corresponding adjustment to the purchase price, so there would be no change in the aggregate payments to the seller, only the timing of payments.

(emphasis added)

181 As explained by MacIver on his cross-examination, he did not regard Matkowsky's correction of the estimating error as having any legal significance:

Q. And when did you figure out that the debt adjustment was incorrect?

A. Upon receipt from Mr. Matkowsky of a correction to his formerly communicated spreadsheet that I had requested.

Q. So that was in what, the mid-part of January of this year?

A. That's correct. Mid-part of January.

Q. And before this action was commenced, did you write to the offering partners or to Alpa Partnership and say listen, we need to correct that number in the buy/sell offer?

A. No.

Q. Did you just put that away for later use?

R/F MR. LAUBMAN: Don't answer that.

MR. GRIFFIN: What's wrong with that question?

Q. Answer the question, please.

A. Since I have no interest in either offer, nor accept the fact that I need to make a choice, it isn't particularly relevant.

Q. So you did nothing?

A. I just noted the fact that it was incorrect.

Q. And the difference as you describe it then would be in the difference identified in the one correction that Mr. Matkowsky brought to your attention; is that correct?

A. Insofar as I am aware, yes.¹¹³

MacIver further testified:

Q. And you see what he said in the balance of that paragraph, that after giving you an updated spreadsheet, he said the dollar amounts of the indebtedness referred to in alternative two were assumed for calculation purposes but under the offer are to be adjusted on closing to the actual indebtedness owing. You understood that that was intended by the offering partners?

A. No adjustments are permitted in the buy/sell.

Q. So even though they were prepared to adjust to recognize that difference, that wasn't good enough for you?

A. No.¹¹⁴

182 Nevertheless, during his cross-examination MacIver acknowledged that nothing in the Agreement prohibited the making of adjustments on the closing of a buy-sell offer.¹¹⁵

183 As already discussed, the payment to the vendor of any Partnership indebtedness was a matter of the closing arrangements. Section 6.11(a) required "the indebtedness" to be paid in full on closing. That term obviously meant the *actual* indebtedness at the time of closing. Alternative 2 simply gave Western Larch notice of the Offerors' estimate of the indebtedness which would be payable on closing and went on to state that the estimate would be adjusted on closing to reflect the amount to which the vendor was contractually entitled — i.e. the actual indebtedness. Consequently, there is no air of commercial reality to this objection by Western Larch.

C.11 Allocation of earnings

184 Section 6.9 of the Agreement stated:

6.9 Profit Allocations

Net earnings shall be allocated and drawn upon in the normal fashion *until the one hundred and twentieth day next following the date of delivery of the Buy-Sell Offer*; thereafter no net earnings shall be allocated to or drawn upon by the vendors.

(emphasis added)

185 The Offer contained a section entitled, "Other Terms", which provided, in part, as follows:

In addition to the provisions of the Partnership Agreement applicable herein, this Buy-Sell Offer is subject to the following further terms and conditions:

2. The net earnings of the Partnership for the fiscal year of the Partnership ending June 30, 2010 and the net earnings of the Special Partner for the fiscal year of the Special Partner ending June 26, 2010 shall be separately calculated, in each case:

(i) For the period commencing July 1, 2009 and *ending on the last day of the calendar month immediately preceding the 120th day following the date of delivery of this Buy-Sell Offer* and allocated among the Offerors and the Offeree (and RAL, where applicable)(the "Buy-Sell Stub Period") in a manner consistent with normal practices of the Partnership and of the Special Partner...(emphasis added)

186 Section 6.9 of the Agreement required net earnings to be allocated and drawn until April 14, 2010; Section 2 of the Offer provided that "in addition to the terms of the Partnership Agreement", net earnings were to be calculated until March 31, 2010. This difference in treatment of net earnings led MacIver to make the following allegation in his Amended Affidavit:

Section 6.9 provides that net earnings shall be allocated and drawn upon in the normal fashion until the 120th day next following the date of delivery of a buy-sell offer. Nevertheless, the Buy-Sell Offer states that net earnings shall be calculated in the normal fashion only until the last day of the calendar month immediately preceding the 120th day following the date of delivery of the Buy-Sell Offer.¹¹⁶

The Amended Statement of Claim alleged that this difference constituted a failure to comply with the terms of Article 6 which rendered the Offer invalid.

187 Initially, MacIver alleged that the Offeror Defendants had failed to pay Western Larch draws calculated at a 16.75% partnership interest level:

Finally, on the Closing, the Defendants failed to account for draw amounts that were not paid to MacIver and Western Larch in 2009 and 2010. Specifically, MacIver's salary and expense draws remained at the 12% level and

not 16.75% as they should have been from September 2009 until March 2010 when they were unilaterally cut off by the Defendants. Western Larch's October 2009 tax draw was also calculated at 12% instead of 16.75%. ¹¹⁷

However, in a May 17, 2010 answer to an undertaking, MacIver stated that based on the information then available, there was no dispute that Western Larch's October, 2009 tax draw was based on a 16.75% partnership share. The defendants, in a May 14, 2010 undertaking response, advised that Western Larch had received regular draws on January 5 and April 5, 2010 at a 16.75% interest, as well as fixed monthly draws on the 18th of each month up to and including March, 2010.

188 In response to MacIver's allegation that Section 2 of the Offer did not respect the requirements of Section 6.9 of the Agreement, Frankfort deposed:

The methodology included in the Buy-Sell Offer to allocate earnings until the last day of the calendar month immediately preceding the 120th day following December 15, 2009, is sensible, provides commercial certainty as to the effect of the Buy-Sell Offer and was applicable whether Western Larch Limited was the seller or whether the Offering Partners became sellers. It is the methodology that Mr. Orest Matkowsky tells me Mr. MacIver himself advocated for the purpose of calculating what earnings would be allocated to Red Alder Limited up to the date of the late Mr. Guglietti's death. He cannot now complain that this method is improper. ¹¹⁸

On cross-examination Frankfort testified:

Allocation of profit stopped at the end of March. The April 14th date, we had this discussion with the Guglietti family and Mr. MacIver on his own said that good practice would have to end on the previous month, at the month end, and that's the exact same way that we have done it as he suggested that we should do it with the Guglietti family. It stopped as of March 31st instead of April the 14th, exactly the same way as it did with the Guglietti family. ¹¹⁹

189 Frankfort confirmed on cross-examination that after December 15, 2009, profit was allocated to Western Larch on the basis that it enjoyed a 16.75% interest in the Partnership. ¹²⁰

190 In light of that evidence, the remaining dispute then appears to be a simple one: Western Larch contends that it was entitled to an allocation and draw of net earnings for the period April 1 to April 14, 2010, yet it only received an allocation and drawing of net earnings until March 31, 2010. The Offeror Defendants do not dispute Western Larch's allegation, but argued that because MacIver had been amenable to such an approach upon the death of Giovanni Guglietti, he should be taken to have agreed to such an approach when they exercised their buy-sell rights under Article 6.

191 I do not accept the submission of the Offeror Defendants. Whatever MacIver may have agreed to for the purposes of proceeding under Article 8 when Giovanni Guglietti died, he did not agree to depart from the requirements of Section 6.9 when he was delivered the Offer. Section 6.9 governed, and Western Larch was entitled to its benefit.

192 Did the departure by the Offeror Defendants from the requirements of Section 6.9 vitiate their Offer? In my view it did not. As I set out above, as I interpret Article 6, Section 6.9 did not operate to mandate the content of an offer; instead it addressed a Partnership performance issue — i.e. how net earnings would be allocated and drawn during the period following the delivery of an offer until its closing. Non-compliance with that performance requirement would not invalidate an offer, but non-compliance could give rise to a claim for any shortfall in net earnings for the period between the delivery of an offer and closing.

193 Although in their Amended Statement of Claim the plaintiffs characterized a breach of Section 6.9 as one invalidating the Offer, and I have found that it did not, the plaintiffs did claim damages for breach of contract "in addition to sums already owing". Consequently, I am not persuaded that the Offeror Defendants have demonstrated that no genuine issue requiring trial exists in respect of the plaintiffs' claim for additional net earnings, and I direct a trial of that issue.

C.12 Elimination of the residual partnership interest

194 In their Amended Statement of Claim the plaintiffs alleged that pursuant to the closing of the purchase transaction, the Offeror Defendants "removed the Plaintiffs from Alpa ignoring altogether the obligation that Western Larch continue to maintain a retained interest of 0.001% in Alpa's earnings regardless of whether or not the Buy-Sell Offer was valid, which it was not".¹²¹ As can be seen from this pleading, this allegation does not concern the validity of the Offer, but the alleged breach of another obligation.

195 The basis for this allegation lies not in the Agreement, but in a separate Acknowledgement letter signed by the partners contemporaneously with the execution of the Agreement. In the letter, after acknowledging the making of reductions in capital for Di Poce Management (\$1 million) and Western Larch (\$2 million), the partners then acknowledged and agreed as follows:

(i) *if either Di Poce Management Limited or Western Larch Limited dispose of their interest in the Partnership for any reason, it will be allowed to retain a .001% interest in the earnings of the Partnership (to a maximum of \$1,000 per annum) for the next 30 years.* During such 30-year period, the disposing Partner and its respective Partner Shareholder shall not by virtue of such retained interest have any voice or voting rights with respect to the Partnership or its business or affairs, shall as regards such retained interest be disregarded for the purpose of constituting a quorum and for all other purposes and by virtue of such retained interest shall simply be entitled to receive its said share of the Partnership earnings. Further, such Partner and its respective Partner Shareholder as regards such retained interest (but for no other purpose) hereby irrevocably appoints the President from time to time of the Partnership (or if there is no President then in office any two Partner Shareholders) its attorney in fact and in law for the purpose of executing all documents, matters and things that may be necessary or desirable in connection with the Partnership or the Designated Entities for their business or affairs, and such power of attorney, being coupled with an interest, shall survive the death or incapacity of the disposing partner and its respective Partner Shareholder; and,

(ii) notwithstanding the provisions of Subsection 2.6(a) of the Partnership Agreement or any other provisions of the Partnership Agreement or of this letter, the foregoing provisions of this letter may not be changed without the consent of Di Poce Management Limited and Western Larch Limited or their successors or assigns. (emphasis added)

196 In one of his affidavits MacIver explained the plaintiffs' allegation on this issue:

Furthermore, by altogether eliminating Western Larch's interest in Alpa Partnership, the Defendants appear to have entirely ignored the agreement reached in 1988 whereby the partners all agreed that Western Larch would retain a 0.001% interest in the Partnership regardless of whether its remaining partnership interest was disposed of for any reason, including a valid buy-sell offer delivered pursuant to Article 6...The Acknowledgement was entered into as part of the arrangement...that saw Di Poce and me agree to reduce our respective profit-sharing interests in the Partnership to the benefit and credit of Frankfort, Carmine and Guglietti. In my case, Western Larch's relinquished 4.66% of its profit-sharing interest.

...

Following the Closing, Western Larch and I will suffer detrimental tax treatment as a result of the Defendants disposing of 100% of our interest in Alpa Partnership. The Acknowledgement was intended to avoid such an occurrence and to manage the tax consequences to a partner removed from the Partnership for any reason. Due to the manner in which Western Larch and I have been expelled by my former partners, Western Larch will be subject to negative tax treatment for amounts that are above and beyond the purchase price paid pursuant to the Buy-Sell Offer. For example, as a result of the Closing, the \$2 million one-time differential draw will now be taxable to