

Western Larch. In addition, Western Larch will have to pay taxes on income allocated to it over the years by the Partnership for which there were no tax draws or where the expected tax draws were not received.¹²²

197 On his cross-examination Di Poce acknowledged that on the closing of the purchase transaction the 0.001% interest of Western Larch in the Partnership was eliminated.¹²³

198 In their factum the plaintiffs submitted that as a result of the Offeror Defendants ignoring on closing the entitlement of Western Larch under the Acknowledgement to a 0.001% interest in earnings, Western Larch suffered negative tax consequences associated with the loss of the deferred income benefits of the Partnership: "This resulted in a significant tax liability and lost value for the Plaintiffs for which the Defendants are liable, which KPMG LLP has valued at \$5.109 million as of December 15, 2009."¹²⁴ When one examines the KPMG Report, it does not contain a specific analysis of the damages caused by ignoring the retained interest on closing. KPMG did offer two opinions on the *en bloc* value of the Partnership as at December 15, 2009, one which did not take into account any tax deferral benefits and the other which considered "a 28-month income tax deferral formerly enjoyed by WLL and currently enjoyed by the existing Alpa Partners."¹²⁵ Its analysis involved discounting the DCF analysis it had performed to determine enterprise value to take into account the tax deferral benefits. The difference between the *en bloc* enterprise values was the \$5.109 million the plaintiffs mentioned in their factum.

199 The Acknowledgement did not purport to amend the Agreement; by its terms it was a separate, very narrowly-focused agreement amongst the partners. Although the Acknowledgement did not amend the Agreement, it must be given effect to in conjunction with the Agreement. As a result, although the Offer to purchase all of the "Interests" of Western Larch in the Partnership complied with the requirements of Section 6.1 dealing with shotgun buy-sell offers, if it was accepted, or deemed to be accepted, the resulting purchase transaction would have to give effect to the additional agreement amongst the partners embodied in the Acknowledgement.

200 That did not happen on the closing of the purchase transaction. From the draft closing documentation sent from the Offeror Defendants to Western Larch it was apparent that the narrowly defined earnings interest agreed upon in the Acknowledgement would not be recognized. Western Larch did not bring that omission to the attention of the Offeror Defendants. Nonetheless, by the same token Western Larch did not waive its entitlement to that narrowly defined interest. Although the KPMG Report did not perform an analysis specifically addressing this issue, its Report suggested a tax benefit deferral might have some value, albeit it approached the issue from the perspective of the impact on overall enterprise value, not the damages suffered by Western Larch. Also, on cross-examination Ms. Glass acknowledged that while amendments made to the *Income Tax Act* effective March, 2011 would not necessarily remove the tax deferral benefit, they "would certainly lessen" it.¹²⁶ Nonetheless, I find that the Offeror Defendants have not demonstrated that no genuine issue requiring trial exists in respect of the plaintiffs' claim that on closing Western Larch should have received the narrowly defined earnings interest described in the Acknowledgement and whether any damages resulted from that omission. I direct a trial of that issue.

C.13 Summary

201 By way of summary, for the reasons set out above I conclude that no genuine issue requiring a trial with respect to the plaintiffs' claims concerning the validity of the Offer. Consequently, I grant summary judgment in favour of the defendants dismissing the claims asserted in the following portions of the Amended Statement of Claim: paragraphs 1(a), (t), (u) and (v).

202 However, with respect to the plaintiffs' claim for damages caused by breach of contract against the defendants, other than Red Alder and the Guglietti Estate, as pleaded in paragraph 1(n) of the Amended Statement of Claim, I conclude that the moving party defendants have not demonstrated that no genuine issue requiring a trial exists with respect to the following three specific claims, for which I direct a trial:

a/ the claim that Western Larch suffered damage as a result of the closing taking place on the basis that Western Larch was not paid in full on closing the indebtedness owed to it by the Partnership;

b/ the claim by Western Larch for additional net earnings pursuant to section 6.9 of the Agreement; and,

c/ the claim by Western Larch that on closing it should have received the narrowly defined earnings interest described in the Acknowledgement and whether any damages resulted from that omission.

Later in these Reasons I will give specific directions regarding the trial pursuant to Rule 20.05(2).

203 By directing the trial of certain issues I am not concluding that conduct by the Offeror Defendants caused damage to the plaintiffs. I have identified where the conduct of the Offeror Defendants departed from the requirements of Article 6 or the Acknowledgement. In respect of these issues I am simply concluding that the Offeror Defendants have failed to demonstrate that no genuine issue requiring trial exists, and I have directed a trial of those issues.

C.14 The defendants' estoppel and affirmation arguments

204 Although as is clear from the evidence set out above in paragraphs 58 to 71 that upon receiving the Offer the plaintiffs initially worked hard to reverse it and took no objection to its validity, in light of my finding that that no genuine issue requiring a trial exists regarding the validity of the Offer, it is not necessary to deal formally with the defendants' arguments that by trying to reverse the Offer the plaintiffs had affirmed its validity and were estopped from challenging its validity.

VIII. Analysis: Breach of fiduciary duty claims

A. The Plaintiffs' allegations and the positions of the Defendants

A.1 The Plaintiffs' allegations

205 The plaintiffs have pleaded extensive allegations of breach of fiduciary duty, relying heavily of section 14.3 of the Agreement which provided:

Each partner shall be faithful to the others in all Partnership transactions and shall at all times furnish to the others correct statements and accounts of all such transactions without any concealment or suppression.

Based on this provision of the Agreement, and a pleaded relationship of trust amongst the partners, the plaintiffs asserted that the defendant partners owed them a fiduciary duty to subordinate their own interests to those of the partnership and not to act in their own self-interest to the detriment of their partners and, as well, to make full and fair disclosure of all things affecting the partnership.

206 From this general pleading the plaintiffs then alleged the following specific instances of the defendants' breaches of their fiduciary duty:

First Group of Allegations: The existence of a voting bloc

(i) In 2008 Di Poce established a "voting bloc to marginalize MacIver's and Western Larch's interest and ability to exercise their voting rights in Alpa";

(ii) To establish the voting bloc Di Poce had convinced MacIver in 1988 to dilute Western Larch's partnership interest to increase those of the other partners, thereby causing the plaintiffs the loss of "significant earnings in the tens of millions due to the dilution of their profit-sharing interest in Alpa";

Second Group of Allegations: Breach of a succession plan agreement

(iii) Di Poce reneged on a 2006 agreement to implement a MacIver-designed succession plan which would reduce gradually the partners' interests in Alpa and enable their children to assume continuing interests in the Partnership;

Third Group of Allegations: Misleading the plaintiffs about the future role of Red Alder in the Partnership

(iv) At a December 8, 2009 meeting, before making the Offer, the defendants misled the plaintiffs into believing that the mandatory termination of Red Alder's partnership interest would occur when they already had agreed that it would not;

(v) The defendants intended to enable Red Alder to continue as a Partner following the death of Giovanni Guglietti notwithstanding the clear requirements of the Agreement to remove Red Alder;

(vi) The defendants secretly agreed to suspend the Agreement to enable them to carry out their plan to permit Red Alder to continue in the Partnership;

(vii) The defendants misled the plaintiffs about the purported Payment on Death to Red Alder by reducing the Alpa Valuation in the Offer by the amount of the Payment when, in fact, no such amount had been paid to Red Alder, and they deliberately delayed completely the formal transactions associated with the termination of Red Alder's interest in Alpa;

Fourth Group of Allegations: Improper use of the Buy/Sell Offer mechanism

(viii) The defendants resorted to the buy/sell mechanism in Article 6 of the Agreement in a circumstance where a Partner had not become mentally unstable or erratic, contrary to an agreement reached amongst the Partners in 1988;

(ix) The defendants conspired to expel Western Larch from the Partnership by making the Offer;

(x) The defendants kept their plans to make an Offer hidden from the plaintiffs;

(xi) The defendants made the Offer knowing that the plaintiff, as a minority partner, could not finance any purchase under the Offer, thereby taking advantage of the plaintiffs' minority status, and they had taken steps to make it impossible for the plaintiffs to secure financing to pursue the offer to sell;

(xii) The defendants failed to provide in a timely manner information requested by MacIver to evaluate and respond to the Offer;

(xiii) The defendants wrongfully employed the services of Witten to draft the Offer;

(xiv) The defendants wrongfully and secretly employed the services of Matkowsky to develop the terms of the Offer;

(xv) The Alpa Valuation contained in the Offer was unfair because it was not based on a true valuation of Alpa;

(xvi) Notwithstanding the plaintiffs' objections, the defendants unilaterally closed the Offer by improperly using their power of attorney;

Fifth Group of Allegations: Other alleged breaches

(i) "Several" partners breached an agreement that partners and their children would receive a benefit of building one home each using materials and supplies taken from Alpa at no cost by building more than one home in such a way;

(ii) Throughout late 2009 and early 2010 the defendants excluded MacIver from the negotiations for a new credit agreement with the Royal Bank of Canada.

A.2 Defence of the Di Poce Defendants

207 As to the allegations relating to the 1988 adjustment in the respective partnership interests, the Di Poce Defendants pleaded that the plaintiffs had agreed to the reduction, received \$2 million as compensation for the reduction, approved all subsequent annual financial statements of the Partnership and were statute-barred from asserting their claim. They also denied the existence of any voting conspiracy and pleaded that the plaintiffs had agreed with the defendants on every partnership decision upon which a vote had been required.

208 The Di Poce Defendants denied that Giovanni Guglietti had misappropriated any amounts from the Partnership, and stated that the plaintiffs had agreed to the final resolution of that "misunderstanding". The Di Poce Defendants also denied any misappropriation of benefits related to the construction of homes for partners and their children. With respect to the alleged succession plan, the defendants pleaded that no agreement was ever reached on the issue.

209 In terms of the plaintiffs' allegations of breach of fiduciary duty relating to the Offer, the Di Poce Defendants pleaded that "no fiduciary duties are owed to the plaintiffs in the context of a contractual buy-sell offer which is the expression of all parties' reasonable expectations". They stated that Article 6.12 of the Agreement expressly contemplated the expulsion of a partner pursuant to Article 6, and the terms of Article 6 stipulated that any offer had to emanate from a majority of the partners to a minority of the partners. Repeating their position that the Offer had complied with the requirements of Article 6, the Di Poce Defendants pleaded that they were free to enter into an agreement with Red Alder to continue in the partnership contingent upon the purchase of Western Larch's interest and were under no obligation to inform the plaintiffs of their intention to form a new partnership agreement in such an event.

210 The Di Poce Defendants stated that any delay in providing information requested by the plaintiffs while the Offer was outstanding resulted from their reasonable request that the plaintiffs secure appropriate confidentiality assurances from any third party to whom it might disclose the information as part of their efforts to secure financing. Finally, they stated it was proper to require the plaintiffs to obtain opinions on Offer-related matters from their own counsel, rather than from Witten or Matkowsky.

A.3 Defence of the Red Alder Defendants

211 The Red Alder Defendants denied that (i) they had been party to any voting bloc, (ii) had misappropriated any Partnership money in 2008, (iii) had breached any obligations in regards to the building of homes, or (iv) had instructed Witten or Matkowsky regarding representations made to MacIver. They stated that they were free to enter into the December 14, 2009 agreement with the Di Poce Defendants to continue in the Partnership in the event Western Larch sold its interest under the Offer and that part of the consideration they gave to re-enter the Partnership was the relinquishment of future entitlements to the Adjusted Preferential Allocation on Death, an asset which they were free to deal with as they saw fit. The Red Alder Defendants pleaded that they were under no obligation to inform the plaintiffs about the December 14, 2009 agreement.

B. Governing legal principles

*B.1 The general principles of the law of fiduciary duty*¹²⁷

212 The fiduciary duty doctrine requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary, in managing the latter's affairs.¹²⁸ A fiduciary duty is one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others.¹²⁹ While the concept of vulnerability is not the hallmark of fiduciary relationship, it is an important *indicium* of its existence.¹³⁰ Its place in any legal analysis

concerning the existence of a fiduciary duty was clarified recently by the Supreme Court in *Elder Advocates of Alberta Society v. Alberta*:

It is now clear that vulnerability alone is insufficient to support a fiduciary claim. As Cromwell J. explained in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 67:

An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines.

Cromwell J. concluded, at para. 68, that:

... while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

[Emphasis added.]¹³¹

A critical aspect of a fiduciary relationship is an undertaking of loyalty.¹³²

213 Canadian law distinguishes between *per se* fiduciary relationships and *ad hoc* ones. *Per se* fiduciary relationships arise in certain categories of relationships, such as partnerships, because of the inherent purpose or presumed factual or legal incidents of those relationships.¹³³ It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty:

A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature...The point was also put nicely by Rupert M. Jackson and John L. Powell, *Jackson & Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.¹³⁴

214 By contrast, *ad hoc* fiduciary obligations may arise as a matter of fact out of the specific circumstances of a particular relationship.¹³⁵ In its recent decision in *Elder Advocates of Alberta Society v. Alberta* the Supreme Court summarized the current approach to identifying *ad hoc* fiduciary relationships in the following way:

First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

...

The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in *Galambos*, at para. 77:

The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[Emphasis added.]

Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them...

Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary...¹³⁶

215 The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances.¹³⁷ Whether an *ad hoc* fiduciary relationship exists therefore "demands a meticulous examination of the facts surrounding the legal and practical incidents of any particular relationship".¹³⁸

216 Commentators have described the requirement that a fiduciary give an undertaking of responsibility to act in the best interests of a beneficiary in various fashions: a person had "bound himself in some way to protect and/or to advance the interest of another"; or a person had relinquished self-interest; or a person had undertaken "to act in the interest of another person."¹³⁹ As Cromwell J. noted in *Galambos* :

This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.¹⁴⁰

217 As a general, but not invariable, rule courts are reluctant to recognize a fiduciary relationship as arising from a commercial contract or between arm's length independent parties in commercial transactions because such transactions usually derive their utility from the pursuit of self-interest.¹⁴¹ Sopinka J. in his judgment in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, adopted the following passage from an academic article explaining why fiduciary duties rarely arise in arm's length commercial transactions:

It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.¹⁴²

218 Against those observations must be balanced the comment of the Court of Appeal in the *Waxman v. Waxman* case concerning the existence of a fiduciary duty in a contractual relationship between shareholders:

The appellants' second argument is that the fiduciary duty does not arise on the sale of shares by one shareholder to another, particularly where there has been no express undertaking by the selling shareholder to act in the other's interest.

Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, *Tongue v. Vencap Equities Alberta Ltd.* (1994), 148 A.R. 321 (Q.B.), aff'd (1996), 184 A.R. 368 (C.A.); *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.). Although a fiduciary relationship between parties may not always extend to a share sale between

them, the evidence that it does so in this case is again overwhelming. We repeat the trial judge's findings that make this clear:

They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability (para. 1262).

Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship. He did not need to make any express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.¹⁴³

219 More recently the Supreme Court of Canada, in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, upheld the trial judge's finding of the existence of fiduciary duties where a commercial contract was in place between the parties. The Court went on to observe that the "fiduciary relationship in this case must therefore be circumscribed by the contractual bargain".¹⁴⁴

B.2 Fiduciary duties and shotgun buy-sell agreements

220 Turning more specifically to the question of fiduciary duties in the context of shotgun clauses, in *Aronowicz v. EMTWO Properties Inc.*,¹⁴⁵ the Court of Appeal considered the availability of an allegation of breach of fiduciary duty in the context of the exercise of a buy/sell shotgun provision in a unanimous shareholders' agreement. In that case, one brother, Harry, had triggered the provision. The other, Abraham, alleged that by failing to disclose that the financing he had arranged involved the transfer of certain properties owned by the corporation, Harry had breached fiduciary and other duties he owed to Abraham. The motions judge granted summary judgment dismissing Abraham's claim, a result affirmed by the Court of Appeal.¹⁴⁶

221 In the course of his decision Blair J.A. explained why the self-interested nature of a carefully drafted shotgun provision usually prompts courts to refrain from imposing fiduciary duties on the person who triggered the provision:

It is hard to conceive of a corporate/commercial mechanism less likely to attract the operation of fiduciary obligations than a shotgun buy/sell provision in a unanimous shareholder agreement. The same may be said for the operation of obligations to act reasonably, honestly and in good faith — other than the good faith obligation not to act in a fashion that eviscerates the very purpose of the agreement. A shotgun buy/sell provision is the quintessential corporate mechanism for the exercise of shareholder self-interest. Carefully drafted, it provides a delicate balance for the preservation of the parties' individual rights by ensuring that the pulling of the trigger generates the best and highest price in exchange for the involuntary termination of the shareholders' relationship.

...

There is nothing in the relationship between Harry and Abraham in the context of the Shotgun Provision that carries any indicia of such a relationship. No duty of loyalty or good faith. No discretionary power or trust. No undertaking by one party to submerge its own interests and to act for the benefit of the other. No dependency or vulnerability. As noted above, the relationship between parties to a shotgun buy/sell agreement is the very antithesis of these attributes. See *Hodgkinson v. Simms*; *Frame v. Smith*, [1987] 2 S.C.R. 99, at para. 136, Wilson J., dissenting;

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 599, Sopinka J., dissenting in part, and pp. 646-647, La Forest J.; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, at paras. 40-41.

Finally, courts are appropriately reluctant to impose fiduciary duties where the parties' relationship is governed by commercial contract. As La Forest J. noted in *Hodgkinson*, at p. 414:

Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest.¹⁴⁷

222 As re-iterated by the Court of Appeal in *Springer v. Aird & Berlis LLP*,¹⁴⁸ it is well established that:

not every statement or act made or done in the context of a fiduciary relationship gives rise to a fiduciary duty. Further, not every legal claim arising out of a fiduciary relationship will give rise to a claim for breach of fiduciary duty.

223 An illustration of how that principle operates in the arena of offers to buy or sell partnership interests can be found in *Simkeslak Investments Ltd. v. Kolter Yonge LP Ltd.*,¹⁴⁹ a limited partnership which owned a downtown Toronto property. Two equal groups of limited partners made up the partnership. The affairs of the partnership were governed by a limited partnership agreement. The Class A partners offered to sell their interest in the partnership to the Class B partners. Following receipt of this offer the Class B partners lined up a purchaser for 100% of the partnership at a price which would result in a profit to them. The Class B partners then accepted and closed the purchase of the partnership interests of the Class A partners. Later, when the Class A partners learned of the profit earned by the Class B partners on the "flip", they alleged a breach of fiduciary duties.

224 In granting summary judgment dismissing the claim of the Class A partners, Hainey J. observed that even though the case did not involve the exercise of a shotgun buy/sell provision or the making of a put which would result in a forced sale, the offer by the Class A partners was made at a time when both sets of partners "were acting entirely in their own interests to maximize the value of their interest in the partnership and to obtain the greatest value for it",¹⁵⁰ so at that time no fiduciary relationship existed between the parties with respect to that transaction. As Hainey J. noted:

The fact that fiduciary duties exist in a particular category of relationship, such as a partnership, does not mean that the fiduciary duties inherent in that relationship will necessarily continue unaffected throughout the course of the parties' relationship. It will be "the facts surrounding the relationship" and the expectation of the parties that will determine the existence and nature of any fiduciary duties.¹⁵¹

C. Consideration of the plaintiffs' claims

225 Let me deal briefly with each group of the plaintiffs' allegations, as set out above, that the defendants breached fiduciary duties owed to them the plaintiffs.

C.1 First Group of Allegations: The existence of a voting bloc

226 The plaintiffs' allegation that in 1988 Di Poce had convinced MacIver to dilute Western Larch's partnership interest to increase those of the other partners in order to establish some "voting bloc" against MacIver simply finds no support in the evidence. Quite apart from the claim being statute-barred, the evidence suggested that most decisions made by the Partners were done on a consensus basis and there was no evidence of a history of the other partners "ganging up" on MacIver.

C.2 Second Group of Allegations: Breach of a succession plan agreement

227 In his evidence MacIver acknowledged that in 2006 the partners did not reach agreement on a succession plan and no amendment was made to the Agreement to reflect any such plan. Simply put, the evidence showed that there was no agreed-upon succession plan for the defendants to breach. There is no doubt, however, that the partners' inability to agree upon a succession plan was one factor which led the Offeror Defendants to consider triggering the shotgun buy-sell mechanism against Western Larch.

C.3 Third Group of Allegations: Misleading the plaintiffs about the future role of Red Alder in the Partnership

228 Cumming J., in his endorsement dismissing the plaintiffs' request for an interlocutory injunction to restrain the closing, offered the following view on the plaintiffs' allegations that the Offeror Defendants improperly struck a secret deal with Red Alder following the death of Giovanni Guglietti to let Red Alder back into the Partnership:

Mr. MacIver complains that his partners were going behind his back to keep Red Alder in the Partnership, with the son of the deceased as the new principal of Red Alder. He alleges that a deal had been made between Red Alder and the three Offeror Defendants that, if the Buy-Sell Offer was successful in removing the Plaintiffs from the Partnership, then Red Alder and the three Offeror Defendants would form a new partnership. Under that arrangement, Red Alder would receive back its original 19% interest in the Alpa Partnership.

In my view, Red Alder and the three Offeror Defendants had the freedom of action to enter into this arrangement and were under no obligation to tell the Plaintiffs of their intent should they be successful in removing the Plaintiffs as partners via the Buy-Sell Offer. ¹⁵²

I see nothing in the more fulsome record placed before me that would change that assessment of the events.

229 The record revealed that before Giovanni Guglietti died the Offeror Defendants were considering a buy-out of Western Larch. Efforts to negotiate a succession plan had failed. Some partners decided they wanted to remove Western Larch. Section 6.12 expressly permitted a majority of the partners to expel another party. The agreement amongst all of the partners embodied in Article 6 meant that a majority group of partners would not breach the fiduciary duty of loyalty they owed to a minority partner in the event they invoked the contractual buy-sell provisions set out in that article.

230 Before steps were taken to trigger Article 6, Giovanni Guglietti died. The remaining partners, including Western Larch, began to implement the requirements of Article 8 governing the consequences of the death of a Partner Shareholder. When Di Poce broached with MacIver the prospect of bringing Red Alder back into the partnership, MacIver objected. The Offeror Defendants then made a business decision — they preferred to work to re-admit the partner with a valuable operating business, Red Alder, than to continuing to work with a partner which did not have an operating business, Western Larch. They were free to make and act upon that decision provided that they did so in accordance with the terms of the Agreement. I have found that their Offer was valid and complied with the Agreement, although on closing they failed to comply with certain closing arrangements and the side-letter Acknowledgement. While those failures may give rise to a claim for contractual damages, they do not support a claim for breach of fiduciary duty.

231 The plaintiffs made much of a section in the December 11 Minden Gross Memo entitled, "Suspension of Partnership Agreement". Indeed, they went so far as to argue that the re-admission deal between the Offeror Defendants and Red Alder amounted to a repudiation of the Agreement. With respect, the plaintiffs' argument ignored the fact that the agreement between the Offeror Defendants and Red Alder to re-admit the latter was conditional on a successful buy-out of Western Larch. Until that happened, Western Larch continued to receive that to which it was entitled under the Agreement, save for the two weeks of net earnings under Section 6.9 which are in dispute. Put another way, whatever other significance the "suspension" language may have had, vis-à-vis Western Larch the Agreement continued to be performed in the normal fashion, with regard having to be taken of the December 15 Offer.

232 As to the plaintiffs' allegations regarding the Red Alder Preferential Allocation on Death, I have already observed that the Offer was made on the basis of Western Larch's increased partnership interest, so Western Larch was required to pay for that increased interest in order to obtain the benefit of it under the Offer.

C.4 Fourth Group of Allegations: Improper use of the Buy/Sell Offer mechanism

233 This group of the plaintiffs' allegations regarding breach of fiduciary duty really is a variant of their arguments regarding the invalidity of the Offer. Let me repeat my two main findings: (i) Article 6 of the Agreement entitled the Offeror Defendants to make the Offer; and, (ii) the Offer complied with the requirements of that article. As was observed by Blair J.A. in the extract set out above from the *Aronowicz* decision, there is no room for allegations of breach of fiduciary duty in the exercise of a well-drafted buy-sell provision. Article 6 was a well-drafted buy-sell provision; I find that there is no basis on the evidence to support an allegation of breach of fiduciary duty by the Offeror Defendants in their exercise of their contractual right to deliver the Offer.

234 Before moving on, let me deal with three specific points raised by the plaintiffs. First, MacIver deposed that he believed the defendants had acted in bad faith by delivering the Offer:

I also believe the Buy-Sell Offer was delivered as part of Di Poce's stated threat to "deal with me" when I made known my opposition to Giovanni's children's participation in the Partnership as partners rather than on the basis of the previously agreed-to, and reneged upon, succession plan that involved all of the partners' children. The Buy-Sell Offer has nothing to do with acting in the best interests of Alpa Partnership. Instead, it represents an attempt by Di Poce to seize absolute control over the Partnership and to rid it of what he considers to be an independent voice (my own), who has always acted to protect the Partnership.

It is clear to me that my and Western Larch's interests have been disregarded entirely in the formulation and the delivery of Buy-Sell Offer.¹⁵³

Di Poce did not deny telling MacIver that he would "deal with" him. And Di Poce did. But the means which he, and the other Offeror Defendants, used to "deal with" MacIver were those which had been agreed upon by all the partners — the buy-sell mechanism contained in Article 6. One partner cannot complain, at law, that he had been "dealt with" by other partners if that dealing complied with the terms of the agreement amongst the partners.

235 Second, I see no merit in the plaintiffs' allegation that the Offeror Defendants failed to provide requested information in a timely manner. The initial delay by the Offeror Defendants resulted from their legitimate business desire to ensure that Western Larch had put in place some mechanism to preserve the confidentiality of sensitive financial information disclosed to third parties during any due diligence process. Those details were ironed out, documents began to flow, and by January 14, 2010 Traub, the plaintiffs' counsel, was writing to defendant's counsel acknowledging the spirit of co-operation which characterized the delivery of requested materials to the plaintiffs. Further, MacIver presented himself in his evidence as the "financial-side guy" in the partnership. It therefore is difficult to accept his suggestion that somehow he was operating at an information-disadvantage about the financial affairs of the Partnership. Finally, MacIver adduced no evidence that his inability to reverse the Offer was related in any way to some inability to provide interested third parties with necessary information. The evidence was to the contrary — the Offeror Defendants agreed to a mechanism for the conduct of due diligence, including site inspections.

236 Third, the plaintiffs alleged that the use by the Offeror Defendants of the services of Matkowsky and Witten constituted a breach of their fiduciary duty to Western Larch and MacIver. I have already found that the Offer was a valid one; I do not see how the use of certain advisors could invalidate an otherwise valid Offer. If the focus of this allegation is somewhat different and, in effect, a plea that by virtue of their access to the CFO and the Partnership's counsel the Offeror Defendants gained some unfair informational advantage over Western Larch which prejudiced its ability to respond to the Offer, the evidence does not support the allegation.¹⁵⁴ I saw no merit in the plaintiffs' allegation

that the Offeror Defendants had failed to provide the plaintiffs with requested information in a timely manner. MacIver was the Partnership's financial expert. The evidence disclosed no informational imbalance between the parties. As to MacIver's January 15 demand for opinions from Minden Gross and Matkowsky on the inclusion of indebtedness in Alternative 2, I regard that as posturing during a negotiation process, and the Offeror Defendants were reasonable in responding by stating that MacIver should obtain such opinions from his own counsel or financial advisor.

C.5 Fifth Group of Allegations: Other alleged breaches

Misuse of house building benefit

237 The plaintiffs alleged that several partners breached an agreement — partners and their children would receive a benefit of building one home each using materials and supplies taken from Alpa at no cost — by building more than one home in such a way. Frankfort gave the following evidence in response to that allegation:

[T]he plaintiffs accuse the defendants of misappropriation of benefits from Alpa Partnership and in particular the use of materials and supplies owned by Alpa Partnership for their personal use.

The usual routine followed by the individuals affiliated with the Corporate Partners in the event that they used building materials for personal use was either to pay for the materials directly or to inform Mr. MacIver who would keep track of the costs, which costs would be accounted for between the partners in the annual allocations of income to the partners approved by the partners.

This was the routine I followed and, to my knowledge, was the routine followed by the other individuals.

The only specific allegation made by the plaintiffs is an allegation that the late Mr. Giovanni Guglietti "confirmed that he had misappropriated \$82,000 worth of lumber and other materials". The amount of \$82,878 was adjusted for in relation to Red Alder Limited in the annual allocations of income among the partners for the year ending June 30, 2008, in accordance with the routine described above. The plaintiffs' allegation of misappropriation of benefits is wrong, the amount was adjusted for in the usual way by Mr. MacIver.¹⁵⁵

238 MacIver did not pursue the matter in his subsequent, third affidavit and the plaintiffs did not deal with the issue in their factum. I regard Frankfort's evidence, as well as that given by Riccardo Guglietti in his affidavit,¹⁵⁶ as complete answers to the allegation.

Exclusion from negotiations for new credit agreement

239 The plaintiffs alleged that throughout late 2009 and early 2010 the defendants excluded MacIver from the negotiations for a new credit agreement with the Royal Bank of Canada in breach of their fiduciary duties to him as a partner.

240 On March 15, 2010, after Western Larch had been deemed to accept the Offer but before the Offer transaction had closed, Witten sent plaintiffs' counsel a letter enclosing materials for the April, 2010 partnership meeting. Those materials included a current draft of an amended and restated credit agreement with Royal Bank. Witten wrote:

By way of background, the amended and restated credit agreement is not intended to change in any material way the terms of Alpa's current credit facilities with RBC.

241 MacIver wrote to Di Poce on March 17, 2010 stating that he was not prepared to consent or give his approval to the restated credit agreement. By way of explanation MacIver wrote:

The Notice of a Combined Meeting represented the first notice I was given that an amended and restated credit agreement was being contemplated. In addition to being surprised that I was not previously made aware that such an agreement was under consideration, I am concerned about the veracity of the Representations and Warranties

being made and the ability to comply with the Covenants being agreed to in the proposed agreement. I am also concerned about the underlying purpose for the new signing authority being proposed for Mr. Matkowsky as well his description in the proposed credit agreement as a "Partner Representative". I do not agree to this description.

MacIver suggested that "any consideration of the proposed draft agreement is pre-mature and that such consideration be deferred until the outstanding litigation involving the partnership is resolved".

242 In their factum the plaintiffs described the allegation they were making in respect of this matter as follows:

In addition, the evidence shows that the partners and Mr. Matkowsky were withholding material information regarding Alpa's financial affairs from Mr. MacIver while he was still a partner. Specifically, Mr. MacIver was given notice in March 2010, after the purported expiration date for the Buy-Sell Offer, that Alpa had negotiated an amended and restated credit agreement with its primary lender, the Royal Bank of Canada ("RBC"). This amended agreement related to the main operating lines of credit maintained by the various Alpa entities, including a \$65 million credit facility for ALI.

Despite the fact that Mr. Matkowsky, with Mr. Di Poce's involvement, had negotiated the amended credit agreement with RBC through 2009, Mr. MacIver was never informed of the negotiations or the amended agreement until just prior to the March 2010 partners' meeting to approve it. Previously, Mr. MacIver had always been involved or kept informed of any discussions with lenders regarding Alpa's credit facilities. This evidence seriously undermines Mr. Di Poce's contention that Mr. MacIver "should have known" the details of Alpa's financial affairs so as to be able to respond to the Buy-Sell Offer.¹⁵⁷

243 I do not accept the plaintiffs' assertions on this matter. First, MacIver did not depose that any information regarding the amended and restated agreement would have assisted him in responding to the Offer. Indeed, Witten had advised that the amendment and restatement was not intended to change the material terms of the credit agreement.

244 Second, as can be seen from the following evidence given by Matkowsky on his cross-examination, the timing of the disclosure of the amended and restated agreement was the result of senior management — Matkowsky — waiting until an administrative work product had been brought sufficiently along in the process before reporting to the partnership as a whole on the matter:

Q. In March of 2010, the partnership approved a new credit facilities agreement with Royal Bank?

A. Yes, we did.

Q. And when did the negotiations for that renewed facility begin?

A. Sandra Lockoff came on the account and she had Brad Clarkson, when she contacted me, much, much earlier in the year, and said, "This credit agreement is a disaster. There are too many volumes. We just don't know where we are. We just can't get our fingers on things. Nobody wants to be on the account." She says we need to consolidate it. I told her at that time, business was tough and I could not spend that kind of money at this time. So I would say she originally approached me April, May of the prior year.

Q. Of 2009?

A. 2009, yes.

Q. And when did those discussions pick up again?

A. I think in the fall.

Q. Of 2009?

A. 2009, yes.

Q. And did you acquaint Mr. MacIver with the fact that those discussions were being renewed?

A. No.

Q. And was there a reason for that?

A. I was handling the relationships with the banks, and the financing, and I felt very comfortable. It was not a whole new agreement. It was a consolidation of "x" number of books all into one with appendixes.

Q. And I assume that as CFO you would report from time to time, at least to the other partners, on the state of the progress of those negotiations?

A. I had kept John informed.

Q. And George Frankfort?

A. No.

Q. Had Mr. MacIver, in the past, been involved in discussions, or at least kept informed of discussions with lending institutions regarding credit agreements?

A. Previously. ¹⁵⁸

245 Given the administrative nature of the work Matkowsky performed in respect of the amended and restated credit agreement and the absence of any evidence from MacIver that Western Larch was prejudiced by that administrative work, I see no merit whatsoever in this allegation of breach of fiduciary duty.

C.6 Summary

246 For these reasons, I conclude that the defendants have demonstrated that no genuine issue requiring a trial exists in respect of the plaintiffs' breach of fiduciary duty claims, and I dismiss the claims asserted in the following portions of the Amended Statement of Claim: paragraph 1(m) and paragraph 1(n) to the extent it seeks damages for breach of fiduciary duty.

IX. Analysis: Oppression claims

A. The Plaintiffs' claims and the positions of the Defendants

A.1 Plaintiffs' allegations

247 The plaintiffs pleaded that Di Poce, Carmine and Giovanni Guglietti formed a voting conspiracy to control Alpa and to marginalize MacIver and Western Larch and, ultimately, sought to remove MacIver and Western Larch from Alpa against their will and for less than fair value thereby acting in an oppressive manner against the plaintiffs who were security holders, creditors and directors and officers of ALI and other Alpa corporate entities. The plaintiffs also asserted that Di Poce, Carmine and Frankfort, as officers and directors of ALI, engaged in oppressive conduct against the plaintiffs:

- (i) by using the services of Witten and Matkowsky to assist in preparing their Offer; and,
- (ii) making the Offer for an unfair price and on unreasonable terms

248 Next, the plaintiffs contended that debts owed by Termpark Inc., Roycourt Inc. and Sugar Maple Holdings (RHRW) Inc. to Western Larch were included improperly in the Offer's purchase price, thereby resulting in payment of the indebtedness to Western Larch over a four-year period instead of "being repaid immediately as required pursuant to the parties' reasonable expectations".

249 All this conduct, the plaintiffs alleged, contravened their reasonable expectations "to have an ongoing role and participation" in the Partnership or, "at the very least", to have their interest bought out "for fair value". The plaintiffs also pleaded a reasonable expectation that the defendant partners would not act against the plaintiffs' best interests.

A.2 Defence of the Di Poce Defendants

250 The Di Poce Defendants denied that the plaintiffs were "complainants" within the meaning of section 245 of the *Ontario Business Corporations Act*. Further, they stated that the reasonable expectations of the plaintiffs were framed by the Agreement. The Di Poce Defendants contended that the Agreement permitted them to make the Offer as they did and that delivery of the Offer in accordance with the terms of the Agreement could not constitute oppressive conduct. In addition, they pleaded that the Agreement did not preclude their agreement to re-admit Red Alder after the purchase of the Western Larch interests.

A.3 Defence of the Red Alder Defendants

251 The Red Alder Defendants denied that the plaintiffs enjoyed standing to assert an oppression complaint and, in any event, denied engaging in any oppressive conduct against the plaintiffs.

B. Governing legal principles: oppression claims

252 The oppression remedy contained in section 248 of the *OBCA* is an equitable remedy which seeks to ensure fairness and which gives courts a broad, equitable jurisdiction to enforce not just what is legal, but what is fair. In considering oppression claims courts must look at business realities, not merely narrow legalities. At the same time the remedy is very fact-specific — what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.¹⁵⁹

253 In *BCE Inc., Re* the Supreme Court identified the two inquiries which a court must make in considering an oppression claim: (i) Does the evidence support the reasonable expectation asserted by the claimant? and (ii) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?¹⁶⁰ The reasonable expectations of specified stakeholders is the cornerstone of the oppression remedy.¹⁶¹ Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".¹⁶²

254 The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive — the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.¹⁶³

255 The onus lies on the claimant to identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held.¹⁶⁴ Factors which a court may consider in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.¹⁶⁵

256 As the Supreme Court pointed out in *BCE*, not every unmet expectation gives rise to an oppression claim. Something more is required: "The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests...[I]t is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression." ¹⁶⁶

C. Consideration of the plaintiffs' claims

257 The plaintiffs' oppression allegations can be dealt with in brief fashion since they simply re-cast allegations made under other causes of action. For reasons already given, the plaintiffs' asserted expectation "to have an ongoing role and participation" in the Partnership or, "at the very least", to have their interest bought out "for fair value", were not reasonable on any objective basis. Article 6 permitted the expulsion of a partner through the buy-sell offer mechanism. The Offeror Defendants were entitled to trigger that mechanism, and I have found that their Offer was valid. By the same token there was no reasonable basis for an expectation by the plaintiffs that they would be bought out only at "fair value". They had agreed to a shotgun buy-sell mechanism which permitted the making of an offer to them at "a value", and entitled them to reverse the offer at that value. Those contractual provisions bench-marked the reasonable expectations of all partners with respect to the value which they reasonably could expect when delivered a buy-sell offer. ¹⁶⁷ The defendants did not engage in oppressive conduct as alleged by the plaintiffs.

258 I therefore conclude that no genuine issue requiring a trial exists in respect of the plaintiffs' oppression claim, and I dismiss the claims asserted in the following portions of the Amended Statement of Claim: paragraphs 1(o), (p), (q), (r) and (s).

X11. Summary, directions regarding trial and costs

259 By way of summary, I conclude that the moving party defendants have demonstrated that no genuine issue requiring a trial exists in respect of the plaintiffs' claims regarding the validity of the Offer, breach of fiduciary duty and oppression. Consequently, I grant summary judgment dismissing the claims alleged in the following paragraphs of the Amended Statement of Claim: paragraphs 1(a), (m), (n) to the extent it seeks damages for breach of fiduciary duty, (o), (p), (q), (r), (s), (t), (u) and (v).

260 As to the plaintiffs' claim for damages against as the defendants, other than Red Alder and the Guglietti Estate, caused by breach of contract as pleaded in paragraph 1(n) of the Amended Statement of Claim, I conclude that the moving party Offeror Defendants have not demonstrated that no genuine issue requiring a trial exists with respect to the following three specific claims, for which I direct a trial:

a/ the claim that Western Larch suffered damage as a result of the closing occurring on the basis that Western Larch was not paid in full on closing the indebtedness owed to it by the Partnership;

b/ the claim by Western Larch for additional net earnings pursuant to section 6.9 of the Agreement; and,

c/ the claim by Western Larch that on closing it should have received the narrowly defined earnings interest described in the Acknowledgement and whether any damages resulted from that omission.

It follows that the action against Red Alder Limited and The Estate of Giovanni Guglietti, deceased, is dismissed in its entirety.

261 In *Harris v. Leikin Group Inc.* I expressed the view where a judge refuses to grant a motion for summary judgment in a complex case, the motions judge should act as the trial judge so that the parties do not lose the benefit of the work product developed on the motion for summary judgment. ¹⁶⁸ I intend to follow that course in this case and will act as the trial judge.

262 I understand that an April, 2013 trial date has been scheduled. Counsel are to consult on what further steps remain to ready this action for trial and then schedule a 9:30 appointment before me for further directions. If possible, I would ask that the 9:30 be booked for a date before Christmas. If that is not possible, the appointment must be as early as possible in January, 2013.

263 I reserve the costs of these motions to the conclusion of the trial which I have directed.

X. Some final comments on the scheduling of this and other summary judgment motions

264 I wish to conclude with some comments about the procedural history of this summary judgment motion, as well as the phenomenon of large summary judgment motions.

A. The importance of keeping commitments to go trial

265 First, dealing with the procedural history of this case, Cumming J., in his May 27, 2010 reasons dismissing the injunction motion, stated:

Both parties have asked for an expedited trial and that should be arranged under the supervising direction of the Court. ¹⁶⁹

That no doubt stemmed, in part, from the statements made by Frankfort in his responding affidavit in which he deposed:

If necessary, Di Poce, Carmine Guglietti and I and our partner corporations are prepared for this Honourable Court to order a trial with respect to the claim of the plaintiffs that they are entitled to fair market value as a purchase price in the Buy-Sell Offer after the Buy-Sell Offer is closed. They can pursue the balance of the relief that they claim in the Statement of Claim at that time.

266 Notwithstanding that the moving party defendants had joined with the plaintiffs in asking Cumming J. for an expedited trial, they subsequently changed their minds and initiated these summary judgment motions. The plaintiffs moved to stay the motions. A judge of this Court, in reasons released January 20, 2011, dismissed the stay motion and allowed these summary judgment motions to proceed. Over one year then elapsed — January 20, 2011 until May 3, 2012 — before this "summary" judgment motion was argued before me. The matter could have been tried within that time. A further half year has elapsed while I had these motions under reserve, having secured a formal extension from my Regional Senior Justice since motions are regarded as "short" "simple" matters for which we are required to release our decisions within three months.

267 So, stepping back, in January, 2010 Cumming J. directed an expedited trial and now, in December, 2012, almost three years later, I am releasing my reasons on summary judgment motions and directing a trial of several issues next year. I do not see much which is "summary" in that process.

268 But for the order of this Court made on January 20, 2011 dismissing the plaintiffs' stay motion, I would not have heard these summary judgment motions. If parties agree to an expedited trial, they must honour their agreement, not renege from it. The fact that our litigation system is adversarial in nature does not justify the breach of promises or representations made to the court.

B. Behind the judicial door — the life of a reserve

269 These motions were argued on May 3 and 4, 2012. Counsel were most efficient; the argument took only 1.5 days. Over seven months have elapsed from the time of oral argument to the release of these Reasons. Section 124(5) of the *Courts of Justice Act* requires a judge to render a decision on a motion within three months of the date of the hearing, or otherwise secure an extension from the Regional Senior Justice, which is what I did.

270 As I have written elsewhere, I do not think that litigants appreciate the time it takes to prepare reasons on these complex summary judgment motions. As a practical matter a motion judge must undertake the same level of factual review on a summary judgment motion as the judge would if deciding a trial solely on a written record. Much of that factual review occurs after the motion hearing, not contemporaneously with the adducing of the evidence as occurs at a trial. That takes time.

271 For the first time since my appointment to the Bench I kept a docket of the time which I spent on writing a judgment. I spent 75 hours writing these Reasons. To put that number in context, the 1.5 day hearing (7.5 hours of sitting time) in this case resulted in the expenditure of 75 hours of judicial decision-making time. Under current Superior Court of Justice internal scheduling protocols each judge must sit 35 weeks a year, or a total of 175 sitting days, or 875 hours (1 sitting day = 5 sitting hours). The hearing of these motions therefore consumed 0.86% of my annual hearing time.

272 Each year a judge is allocated 9 weeks of non-sit or judgment writing time. Using an eight-hour writing day, that results in 360 hours of allocated judgment writing time. These Reasons took 75 hours to write, or 21% of my annual judgment writing time. (Of course most judges use part of their vacation to write reserve judgments, but I will put that issue to one side.)

273 In short, a complex summary judgment motion which took less than 1% of my annual sitting time to hear consumed 21% of my allocated annual judgment writing time.

274 Our Court now sees an increasing number of complex summary judgment motions. Yet, at the same time that judges are asked to hear complex summary judgment motions, they also are called upon to hear and decide quickly numerous intervening urgent motions and applications. Inevitably each judge subjects his or her reserve inventory to a form of triage, often resulting in delays to the adjudication of less urgent complex matters, such as summary judgment motions of the kind now before me.

275 Is over seven months an acceptable turn-around time for a 1.5 day summary judgment motion? I do not think that it is, but in the present case it was not possible to do otherwise; other demands on my judicial time prevented starting these Reasons until early October, 2012. If such a delay is not acceptable, then what questions do we, as judges, need to ask about our internal procedures in order to ensure that the public receives more timely decisions? The issue has several facets, one of which is our internal scheduling protocol which is predicated on three principles: (i) generally meeting the statutory requirement to release decisions on motions within three months of the hearing; (ii) annually assigning each judge the same number of judgment writing weeks regardless of the complexity of the matters under reserve; and, (iii) assuming that as a general rule the volume of work asked of our Court routinely can be met within normal business hours. On the last point a 2010 amendment to our internal scheduling protocol expressed the following principle:

While additional hours daily, over and above "sitting hours", are an inherent and reasonable aspect of duties in a judicial day, judicial scheduling should endeavour to avoid situations where workload results in routine or systemic night and weekend work.

The present-day reality of our court is that unless most judges routinely worked nights, many weekends and part of their vacations, our court system would collapse. Even then, it remains very difficult to release complex motion decisions within the time prescribed by the *Courts of Justice Act*.

276 So, if in the current civil litigation era complex summary judgment motions are to remain available to parties to bring (assuming the motions otherwise meet the *Consolidated Air* principles), how can those motions be accommodated within existing judicial resources without requiring the parties to wait a long time for a judgment? What role does the current uniform allocation of judgment writing weeks in this Court play in such delays? Must existing scheduling principles be re-thought? Is it time to re-jig the allocation of judgment writing so that a more direct relationship exists between the complexity of a matter heard and the time allocated to a judge to write the resulting decision in a timely manner?

277 If we are to restore the health of Ontario's ailing civil litigation system, as judges we must not only call on those who appear before us to change their litigation culture, we also must look at our own internal scheduling culture and change it to meet the realities of our times. No sacred cows, judicial or otherwise, should stand immune from scrutiny behind some firewall. Everything must be on the table for examination and reform. Restoring the health of our province's civil litigation system requires no less.

Order accordingly.

Footnotes

- 1 MacIver Affidavit sworn March 17, 2011 ("Third MacIver Affidavit"), para. 5.
- 2 MacIver April 26, 2010 Affidavit ("MacIver Second Affidavit"), para. 4.
- 3 MacIver Third Affidavit, para. 6.
- 4 Frankfort's evidence is supported by the terms of the 2006 plan found at Ex. C to MacIver's Second Affidavit.
- 5 MacIver Second Affidavit, para. 30(d).
- 6 MacIver First Cross-Examination Transcript, Q. 192 and 197.
- 7 MacIver First Transcript, QQ. 235-6.
- 8 Di Poce Cross-Examination Transcript, QQ. 69-79.
- 9 MacIver Amended Affidavit, April 9, 2010, paras. 35 and 36.
- 10 Di Poce, Transcript, Q. 220.
- 11 MacIver First Transcript, QQ. 226-7, 229.
- 12 Matkowsky Cross-Examination Transcript, QQ.105-109.
- 13 Matkowsky Transcript, QQ. 92-93.
- 14 See Frankfort Cross-examination Transcript, QQ. 477-479; 609-622.
- 15 MacIver deposed that until 2006 Minden Gross also had acted as counsel to Western Larch, but with the failure of the proposed 2006 succession plan, he then retained separate counsel for Western Larch.
- 16 Transcript of Frankfort cross-examination, Q. 144; Matkowsky testified that the discussions took place in the latter part of October: Matkowsky Transcript, QQ. 207-210..
- 17 Riccardo Guglietti transcript, QQ. 80-92.
- 18 Frankfort, April 19, 2010 affidavit, paras. 67 and 68
- 19 Frankfort transcript, Q. 109.
- 20 Davies Phillips Vineberg acted for the Di Poces; Oslers, for the Frankforts; and, Gowlings, for the Guglietti families.
- 21 MacIver Amended Affidavit, para. 38.
- 22 Matkowsky transcript, QQ. 254-260.

- 23 Frankfort Transcript, QQ.169-172.
- 24 Transcript of examination of Stephen Witten conducted October 3, 2011, Q. 124.
- 25 Witten Transcript, Q. 76.
- 26 Frankfort transcript, QQ. 272 and 606. See also Carmine Guglietti cross-examination, QQ. 80 - 83.
- 27 Transcript of the cross-examination of MacIver conducted on October 5, 2011 ("MacIver Second Transcript"), Q. 74.
- 28 MacIver Amended Affidavit, paras. 69-70.
- 29 MacIver Second Affidavit, para. 42.
- 30 MacIver First Transcript, QQ. 244, 246-248.
- 31 MacIver First Transcript, Q. 288.
- 32 MacIver First Transcript, Q. 508, 512.
- 33 MacIver December 28, 2009 email to M. Moore, RBC, contained in MacIver's answers to undertakings.
- 34 MacIver First Transcript, QQ. 290-320; 347.
- 35 MacIver First Transcript, Q. 522.
- 36 Witten Transcript, Q. 177.
- 37 MacIver Amended Affidavit, para. 76.
- 38 MacIver First Transcript, QQ. 671-2.
- 39 Frankfort transcript, QQ. 198-199.
- 40 MacIver Amended Affidavit, paras. 61 and 62.
- 41 Riccardo Guglietti Affidavit, para. 9; Matkowsky Transcript, QQ. 307-310.
- 42 Di Poce transcript, Q. 160. See also the transcript of the cross-examination of Riccardo Guglietti, Q. 76.
- 43 Di Poce transcript, Q. 183.
- 44 MacIver Second Transcript, QQ. 78-81.
- 45 MacIver Second Transcript, Q. 84.
- 46 MacIver Second Transcript, QQ. 89-92.
- 47 MacIver Second Transcript, Q. 99.
- 48 MacIver Second Transcript, QQ. 107-109.
- 49 MacIver Second Transcript, QQ. 112-114.
- 50 MacIver Second Transcript, QQ. 105-6.

- 51 Frankfort, Transcript, QQ. 588-9.
- 52 Matkowsky Transcript, QQ. 127-130.
- 53 MacIver Second Transcript, Q. 129.
- 54 [2011 ONCA 764](#) (Ont. C.A.), paras. 1 and 2.
- 55 *Ibid.*, para. 36.
- 56 *Ibid.*, para. 38.
- 57 *Ibid.*, para. 38.
- 58 *Ibid.*, para. 39.
- 59 *Ibid.*, paras. 40 to 45.
- 60 *Ibid.*, para. 50.
- 61 *Ibid.*, paras. 53-54.
- 62 *Ibid.*, para. 55.
- 63 *Ibid.*, paras. 51 and 52.
- 64 Responding Parties' Factum, para. 110.
- 65 See the cases considered by the Court of Appeal in *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, [2008 ONCA 396](#) (Ont. C.A.), paras. 31 to 33.
- 66 [\(2007\)](#), [85 O.R. \(3d\) 616](#) (Ont. C.A.), para. 56.
- 67 *Buttonwood Holdings Inc. v. Zeubear Investments Ltd.*, [2010 ONCA 825](#) (Ont. C.A.), para. 24.
- 68 *Trimac Ltd. v. C-I-L Inc.*, [\[1987\] 4 W.W.R. 719](#) (Alta. Q.B.), para. 29; affirmed [\[1987\] 6 W.W.R. 66](#) (Alta. C.A.).
- 69 [\[1993\] 3 W.W.R. 745](#) (Alta. Q.B.)
- 70 *Laschuk*, paras. 17, 20-23.
- 71 [\[1987\] 4 W.W.R. 719](#) (Alta. Q.B.)
- 72 *Trimac*, paras. 27, 28 and 30.
- 73 [2003 CarswellOnt 4082](#) (Ont. S.C.J.)
- 74 *Hargreaves*, para. 25.
- 75 [\(2008\)](#), [47 B.L.R. \(4th\) 1](#) (Alta. C.A.)
- 76 [\(2010\)](#), [103 O.R. \(3d\) 578](#) (Ont. C.A.)
- 77 *Buttonwood Holdings*, paras. 26 to 29.
- 78 Amendment No. 17. See First MacIver Transcript, QQ. 63-66.

- 79 MacIver Amended Affidavit, paras. 24 and 25.
- 80 MacIver Amended Affidavit, paras. 44 and 45.
- 81 MacIver First Transcript, QQ. 80-84.
- 82 MacIver First Transcript, QQ. 92-95.
- 83 Frankfort, April 19, 2010 Affidavit, para. 75.
- 84 MacIver Amended Affidavit, para. 49.
- 85 MacIver First Transcript, Q. 636.
- 86 MacIver Amended Affidavit, paras. 50 to 55.
- 87 Frankfort, April 19, 2010 affidavit, para. 90.
- 88 Frankfort, April 19, 2010 affidavit, para. 96.
- 89 MacIver Second Affidavit, para. 30(a).
- 90 Frankfort cross-examination, QQ. 297-303, emphasis added.
- 91 MacIver Amended Affidavit, para. 51.
- 92 Transcript of cross-examination of Susan Glass conducted October 18, 2011.
- 93 Reasons of Cumming J., [2010 ONSC 3046](#) (Ont. S.C.J. [Commercial List]), para. 29.
- 94 The periodic calculations of a Partnership Valuation required by Article 13 of the Agreement have no relevance to Article 6, as Article 13 makes clear by its terms.
- 95 MacIver Amended Affidavit, para. 49.
- 96 MacIver Amended Affidavit, para. 49.
- 97 Amended Statement of Claim, para. 49.
- 98 MacIver Initial Affidavit, para. 42.
- 99 MacIver April 26, 2010 Affidavit, paras. 17 to 19.
- 100 MacIver First Transcript, Q. 134.
- 101 MacIver First Transcript, QQ. 158-165.
- 102 MacIver April 10, 2010 affidavit, para. 62.
- 103 Frankfort Transcript, QQ. 243-244.
- 104 Amended Affidavit, para. 65.
- 105 Amended Statement of Claim, para. 55(d). See also para. 148 of the Plaintiffs' Responding Factum.
- 106 MacIver Amended Affidavit, para. 49.

- 107 Frankfort Transcript, QQ. 304-306. See also, QQ. 354-356.
- 108 Frankfort Transcript, QQ. 316-318.
- 109 MacIver April, 2010 affidavit, paras. 12 and 13.
- 110 I would note that by analogy to the reasoning of the Court of Appeal in the *Buttonwood Holdings* case, described in paragraphs 119 and 120 above, it was open to Western Larch, as offeree, to insist that the closing take place in accordance with Section 6.11(a). Although *Buttonwood Holdings* dealt with the terms of offers and their acceptance, not the terms of closing, the analogy is a useful one.
- 111 Responding Parties' Factum, para. 148.
- 112 MacIver Amended Affidavit, para. 49.
- 113 MacIver First Transcript, QQ. 602-607.
- 114 MacIver First Transcript, QQ. 691-692.
- 115 MacIver First Transcript, QQ. 554-555.
- 116 MacIver Amended Affidavit, para. 49.
- 117 MacIver Third Affidavit, para. 55.
- 118 Frankfort, April 19, 2010 Affidavit, para. 114.
- 119 Frankfort Transcript, Q. 324.
- 120 Frankfort Transcript, Q. 248.
- 121 Amended Statement of Claim, para. 55(b).
- 122 MacIver Third Affidavit, paras. 51 and 53.
- 123 Di Poce Transcript, Q. 206.
- 124 The plaintiffs referred to the KPMG Valuation of Alpa, dated June 6, 2011, page 45.
- 125 KPMG Report, p. 45.
- 126 Transcript of examination of Susan Glass, QQ. 121-137.
- 127 This summary of legal principles was taken from *Harris v. Leikin Group Inc.*, 2011 ONSC 3556 (Ont. S.C.J.), paras. 276 *et seq.*, Plaintiffs' Authorities, Tab 21.
- 128 *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (S.C.C.), para. 22.
- 129 *Perez v. Galambos*, 2009 SCC 48 (S.C.C.), paras. 83 and 84.
- 130 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), para. 25.
- 131 *Alberta v. Elder Advocates*, para. 28.
- 132 *Galambos*, paras. 68 and 69.

- 133 *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), para. 30.
- 134 *Galambos*, paras. 36 and 37.
- 135 *Ibid.*, para. 48.
- 136 *Ibid.*, paras. 29 to 36.
- 137 *Ibid.*, para. 48.
- 138 *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), para. 505.
- 139 *Galambos*, para. 78.
- 140 *Galambos*, para. 79.
- 141 *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), para. 1210; affirmed (2004), 44 B.L.R. (3d) 165 (Ont. C.A.).
- 142 [1989] 2 S.C.R. 574 (S.C.C.), para. 27.
- 143 *Waxman, OCA*, paras. 510 to 512.
- 144 2011 SCC 23 (S.C.C.), para. 143.
- 145 2010 ONCA 96 (Ont. C.A.).
- 146 Prior to initiating the court action, Abraham had alleged that the form of Harry's buy/sell offer had not complied with the terms of the shotgun provision contained in the shareholders' agreement. That issue was resolved by arbitration in Harry's favour. Accordingly, the judgments dealing with the summary judgment motion did not consider that issue any further.
- 147 *Aronowicz, supra*, paras. 50, 54 and 55.
- 148 2010 ONCA 287 (Ont. C.A.), para. 11.
- 149 2011 ONSC 7134 (Ont. S.C.J.).
- 150 *Ibid.*, para. 72.
- 151 *Ibid.*, para. 61.
- 152 *Western Larch Ltd. v. Di Poce Management Ltd.*, 2010 ONSC 3046 (Ont. S.C.J. [Commercial List]), paras. 33 and 34.
- 153 MacIver Amended Affidavit, paras. 71 and 72.
- 154 The contention made in paragraph 72 of the Responding Parties' Factum that Witten and Matkowsky misused information "confided" by MacIver to them simply is not supported by the evidence referenced. That evidence could not support a finding that MacIver provided Witten and Matkowsky with confidential information. See also the references in the Reply Factum of the Di Poce Defendants, para. 46.
- 155 Frankfort July 23, 2010 Affidavit, paras. 5 to 8.
- 156 Riccardo Guglietti Affidavit, paras. 16 to 18.
- 157 Responding Parties' Factum, paras. 84 and 85.
- 158 Matkowsky Transcript, QQ. 315-324.

- 159 *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), paras. 58 and 59.
- 160 *Ibid.*, para. 68.
- 161 *Ibid.* para. 61.
- 162 *Ibid.*, para. 64.
- 163 *Ibid.*, para. 62.
- 164 *Ibid.*, para. 70.
- 165 *Ibid.*, para. 72.
- 166 *Ibid.*, paras. 67 and 90.
- 167 *Ruggiero v. Swartz*, [2003] O.J. No. 6292 (Ont. S.C.J.), para. 40; appeal dismissed [2004] O.J. No. 2055 (Ont. C.A.).
- 168 2011 ONSC 3556 (Ont. S.C.J.), para. 401.
- 169 2010 ONSC 3046 (Ont. S.C.J. [Commercial List]), para. 49.

Tab 12

Most Negative Treatment: Distinguished

Most Recent Distinguished: Brentwood Pioneer Holdings Ltd. v. British Columbia (Agricultural Land Commission) | 1998 CarswellBC 2022, [1998] B.C.J. No. 2081, 82 A.C.W.S. (3d) 422 | (B.C. S.C., Aug 27, 1998)

1989 CarswellAlta 45
Alberta Court of Queen's Bench

First Calgary Financial Savings & Credit Union Ltd. v. Meadows

1989 CarswellAlta 45, [1989] A.W.L.D. 429, [1989] C.L.D. 529, 14 A.C.W.S. (3d) 90, 66 Alta. L.R. (2d) 7, 94 A.R.
286

FIRST CALGARY FINANCIAL SAVINGS AND CREDIT UNION LTD. v. MEADOWS and MEADOWS

Deyell J.

Judgment: February 14, 1989
Docket: Calgary No. 8601-19093

Counsel: *J. Lawson*, for plaintiff (defendant by counterclaim).
M.J. Dorchik and *S. Mabbott*, for defendants (plaintiffs by counterclaim).

Subject: Corporate and Commercial; Torts

Action seeking order nisi of foreclosure; Counterclaim by defendants.

Deyell J.:

1 The plaintiff credit union (Calgary Federal Credit Union Ltd., now known as First Calgary Financial Savings and Credit Union Ltd.) seeks judgment against the defendants, the Meadows, and an order nisi of foreclosure pursuant to the defendants' default in payment of their mortgage. Demand was made on the mortgage on 3rd September 1986. The balance outstanding on the mortgage as at 31st October 1988 was \$129,800.32 (exclusive of legal fees), and is accumulating at a rate of \$38.09 per diem.

2 The plaintiff also asks for solicitor-client costs as agreed to in the mortgage document.

3 The mortgaged property is an acreage used as a home by the Meadows. Mr. Meadows is a realtor. Mrs. Meadows is a housewife. Nei ther disclosed any income from farming operations although Mr. Meadows testified that "some hay" was grown on the property in the past. Without more, the plaintiff submits that the property is not farm land as defined by paras. (a) and (b) of s. 43.4(3) of the Law of Property Act, R.S.A. 1980, c. L-8, which read as follows:

43.4 ...

(3) ...

(a) "farm land" means land that is or *was used* for carrying on farming operations;

(b) "farming operations" means (i) the planting, growing and sale of trees, shrubs or sod,

- (ii) the raising or production of crops, livestock, fish, pheasants or poultry,
- (iii) fur production, or
- (iv) beekeeping [emphasis mine]

4 Via s. 42 the time to be fixed for redemption by the order nisi in an action for foreclosure of a mortgage is six months from the date of granting the order in the case of land other than farm land (s. 42(1)(b)), but is one year in the case of farm land (s. 42(1)(a)).

5 Although the Meadows may strictly fit within the words defining “farm land” as the land was used in the past for growing “some hay”, I agree that we are not dealing with farm land, either on an application of the principle *de minimis non curat lex* or based on the rules of statutory interpretation which require looking at legislative intent. The longer period has been established as an aid to farmers and to protect the agricultural sector. This is not the sort of “farming operations” intended to receive the benefit of a longer redemption period. The redemption period of six months set in s. 42(1)(b) is therefore applicable.

6 The defendants’ reply, by counterclaim, to the plaintiff’s claim is that the mortgage is unenforceable due to the credit union’s breach of fiduciary duty which caused the Meadows to make a bad investment. In the alternative, they claim damages for the breach of fiduciary duty. It is necessary to examine their claim for breach of fiduciary obligation before determining the remedies to be granted in either claim.

7 The facts are as follows. The Meadows, who are man and wife, are unsophisticated investors. They were first introduced to the company Kem Kinetic Energy Management Ltd. (“KEM”) by a Mr. Sellars who advised them that an investment was worth investigating. They talked to Mr. Murakami, who was responsible for the daily operations of KEM, and he advised them to invest. They obtained financial information, including payables, receivables and a balance sheet about KEM which they evaluated by themselves. They chose not to review this information with their accountant with whom they had an ongoing relationship for a number of years. Mr. Meadows had talked to suppliers of the company including Honeywell (who had cut off credit to KEM). KEM’s banker, Mr. Lawrence of the Bank of Montreal, told Mr. Meadows the investment was “a realistic proposal”. They were aware KEM was a speculative venture with a potential profit of 117.5 per cent over two years.

8 In the midst of their investigations of KEM, they applied to the credit union for a loan secured by a mortgage. They met Dan Denischuk, the general manager, whose duties included the taking and processing of loan applications. At their first meeting on 11th February 1986 he took down information to be used in the processing of the loan application. The Meadows were informed that Mr. Denischuk had a conflict of interest as he was involved in KEM so Morley Wright, the general manager of another branch, would deal with the approval of the loan. Mr. Denischuk proceeded to give advice about investing in KEM pursuant to the Meadows’ request and in fact acted as a promoter for the company. He at no time told the Meadows of the serious financial situation in which KEM was involved. Instead, he extolled the possibilities and the benefits that the Meadows and KEM would derive from the association. The Meadows took over four months to evaluate KEM. Mr. Denischuk’s enthusiasm at the first and subsequent meetings and his offering to put up a personal guarantee was a factor in their decision to invest \$80,000 in KEM. They have since recovered \$35,000 on the guarantee from Mr. Denischuk.

9 The Meadows also asked for advice on how to best protect their investment. Mr. Denischuk advised them that they would be protected if Mr. Meadows insisted that the bank signing authorities of KEM’s bank accounts were changed so that no cheques could clear without Mr. Meadows’ signature. He did not inform them that changes to signing authorities take effect from the date of the change, and that any cheques which were dated prior to 2nd May 1986 (the date of the investment contract) could clear the bank account with only one signature unless contrary instructions were given. There were outstanding cheques at the Bank of Montreal including two payable to Mr. Denischuk totalling approximately \$12,000.

10 The Meadows testified that they were not told that the corporation could not meet its obligations nor that in the month preceding the Meadows’ investment it had required interim financing. On previous occasions Mr. Denischuk had loaned the corporation funds or he had guaranteed loans that the corporation had difficulty paying back. Mr. Denischuk needed \$11,700

immediately so that his mother could be repaid the money she had loaned him.

11 The Meadows also spoke to Mr. Wright about their proposed investment and, after a review of the financial statements supplied by Mr. Meadows, Mr. Wright advised against investment in KEM as the company was “gone” and “virtually bankrupt”.

12 Mr. Wright subsequently approved a loan application for \$100,000. The credit union was aware that Mr. Denischuk had a conflict of interest although not the extent of it. The credit union allowed Mr. Denischuk to continue to act as a liaison between the Meadows and the credit union and most of their contact with the credit union was through Mr. Denischuk. This gave the impression he was acting within the scope of his employment in giving investment advice especially since they were aware that he could not act in approving the loan. The fact that Mr. Wright also advised on the investment adds to the appearance that credit union managers were authorized to do so. As Mr. Denischuk had apparent authority to give investment advice (and therefore was acting within the scope of his employment) the credit union is vicariously liable for Mr. Denischuk’s actions.

13 An independent credit committee also approved the loan but there is no evidence that it was advised of the conflict of interest.

14 The Meadows received the loan on 28th April 1986. They placed a mortgage on their acreage as security for the loan. At the time of signing the mortgage, the Meadows were referred to an independent solicitor, Bradley A. Milne. He reviewed the documents with them. They then completed a certificate of independent advice which acknowledged that Mr. Denischuk had a conflict of interest due to his being either “an investor and/or director and/or shareholder of Kinetic” and that the funds would be invested in KEM although the Meadows understood that they had the free choice to do what they chose with the proceeds. Mr. Milne offered to act on the Meadows’ behalf with respect to investing in KEM by advising what security should be taken, such as a debenture, and in drafting security documents to protect their investment. The Meadows declined this offer.

15 On 2nd May 1986, the Meadows entered an investment contract with KEM in which they invested \$80,000 of their loan proceeds. Mr. Denischuk was at this meeting with Leah Bailey, the solicitor for KEM. Prior to the execution of the investment contract and advancement of the \$80,000 cheque, Ms. Bailey advised the Meadows that she was acting as solicitor for KEM, not for them. She told them to seek independent legal representation to advise them of their position and to protect their interests with respect to the investment contract and the advancement of funds pursuant to it. Mr. Denischuk confirmed this. The Meadows declined to obtain such advice. KEM’s solicitor testified that she advised the Meadows to obtain independent legal advice several times and I accept this testimony. \$10,000 was paid to the Meadows by the Law Society of Alberta for the discontinuance of their action against KEM’s solicitor. The reasons for settlement are not known.

16 The Meadows claim that there were two facts which Mr. Denischuk should have disclosed. First, he did not disclose the nature and extent of his conflict of interest. Secondly, he did not disclose that there were a number of cheques being held at the Bank of Montreal which could not be processed due to insufficient funds including two cheques payable to Mr. Denischuk. Mr. Denischuk was a forthright and credible witness and I accept his evidence where it conflicts with that of the Meadows. His conflict of interest was completely disclosed.

17 The first claim conflicts with the fact that Mr. Meadows made a note on a balance sheet dated 31st January 1986 stating “Dan 20,000” at the end of an arrow pointing to the item “Investor Loans”. Mr. Denischuk’s testimony indicates an approximate outstanding loan in January 1986 of \$20,000.

18 As to the second claim dealing with the outstanding cheques, Mr. Denischuk testified that he relied on Mr. Murakami to advise the Meadows of these. Mr. Meadows was involved in a significant number of negotiations with Mr. Murakami and Mr. Meadows’ evidence at the examination for discovery was to the effect that Mr. Murakami wanted to put “a bunch” of cheques through at the Bank of Montreal. The solicitor for KEM made notes shortly after the meeting where the investment contract was completed to the effect that there was reference made to a list of cheques and that Mr. Denischuk’s name was mentioned. Mr. Meadows stated that Mr. Murakami merely shrugged his shoulders and walked away when Mr. Meadows told him he did not want the cheques to go through.

19 The investment loan was immediately paid out for the most part for debts owed by KEM and for the cheques being held at the Bank of Montreal. About 31st August 1986, KEM shut down its business operations.

20 The Meadows are counterclaiming on the basis that their dealings with Mr. Denischuk gave rise to a fiduciary obligation which was breached and caused the plaintiffs by counterclaim's loss.

21 The general rule is that the relationship between a lending institution and its customer is that of creditor-debtor. The finding of a fiduciary duty on behalf of the lending institution or its employees is the exception to this rule; the onus of proof is on the customer alleging a fiduciary duty.

22 The leading case in this area is *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, [1974] 3 W.L.R. 501, [1974] 3 All E.R. 757 (C.A.). In that case, the defendant was an elderly, unsophisticated farmer who agreed to put up his farm, his only asset, as additional security for a loan already advanced to his son's business, and who also signed a personal guarantee. The business was known to the bank to be in financial trouble. Mr. Bundy had been a customer of the bank for many years. He was not advised to consult his solicitor and received no independent and informed advice. He relied on the bank manager to advise him about the transaction and the bank manager was well aware of this. The bank manager did not appreciate that there was a conflict of interest.

23 The Court of Appeal set aside the guarantee and the mortgage by finding that a fiduciary duty had arisen due to undue influence and had been breached. Sir Eric Sachs (Cairns L.J. agreeing) noted that it was not feasible to attempt to closely define when a fiduciary duty results from a relationship but, nonetheless, some guidelines are set out at p. 767:

On the other hand, whilst disclaiming any intention of seeking to catalogue the elements of such a special relationship, it is perhaps of a little assistance to note some of those which have in the past frequently been found to exist where the court had been led to decide that this relationship existed as between adults of sound mind. Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.

Confidentially [sic], a relatively little used word, is being here adopted, albeit with some hesitation, to avoid the possible confusion that can arise through referring to 'confidence'. Reliance on advice can in many circumstances be said to import that type of confidence which only results in a common law duty to take care — a duty which may co-exist with but is not coterminous with that of fiduciary care. 'Confidentiality' is intended to convey that extra quality in the relevant confidence that is implicit in the phrase 'confidential relationship' (cf per Lord Chelmsford LC in *Tate v Williamson*, Lindley LJ in *Allcard v Skinner* and Wright J in *Morley v Loughnan*) and may perhaps have something in common with 'confiding' and also 'confidant', when, for instance, referring to someone's 'man of affairs'. It imports some quality beyond that inherent in the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arm's length. It is one of the features of this element that once it exists, influence naturally grows out of it (cf Evershed MR in *Tufton v Sporni*, following Lord Chelmsford LC in *Tate v Williamson*).

24 He then goes on to describe the nature of the fiduciary duty that arises (at p. 768):

It is also to be noted that what constitutes fulfilment of that duty (the second issue in the case now under consideration) depends again on the facts before the court. It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment. The duty has been well stated as being one to ensure that the person liable to be influenced has formed 'an independent and informed judgment', or to use the phraseology of Lord Evershed MR in *Zamet v Hyman*, 'after full, free and informed thought'. [the emphases in each case are Sir Eric's]

25 The House of Lords approved of Sir Eric's majority decision in *Nat. Westminster Bank v. Morgan*, [1985] A.C. 686, [1985] 2 W.L.R. 588, [1985] 1 All E.R. 821, noting that the transaction sought to be set aside must be to the manifest disadvantage of the person over whom a dominating influence has been exercised. Lord Scarman (the other Lords agreeing) emphasized the importance of the facts of each individual case and stated at p. 831:

The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

26 The reasons of Sir Eric Sachs in *Lloyds Bank* have also been adopted in Canada in various cases including the recent Ontario Court of Appeal decisions in *Hayward v. Bank of N.S.* (1985), 51 O.R. (2d) 193, 32 C.C.L.T. 286, 6 C.P.R. (3d) 33, 19 D.L.R. (4th) 758, 10 O.A.C. 391 (C.A.), and *Standard Inv. Ltd. v. C.I.B.C.* (1985), 52 O.R. (2d) 473, 30 B.L.R. 193, 22 D.L.R. (4th) 410, 11 O.A.C. 318 (C.A.). In *Standard Inv. Ltd.*, the duties which are imposed on such a relationship once it is found to exist are described at p. 436:

At the very minimum there was a duty on the defendant to advise the plaintiffs with reasonable care and skill. More important, having regard to the circumstances of this case, if the defendant chose to advise and assist the plaintiff, as it did, there was a duty on the defendant to disclose to the plaintiffs the conflict of interest between the defendant and the plaintiffs and the conflict of interest between the plaintiffs and McDougald and Crown Trust. It may be that the defendant was under a legal obligation not to disclose the intention or actions of McDougald and Crown Trust. That, however, does not excuse the defendant for its behaviour towards the plaintiffs. If for any valid reason the defendant could not disclose the nature of the conflicts of interest or for any reason was unwilling to do so, it should have told the plaintiffs that it was unable to advise and assist them by reason of existing conflicts of interest. If the defendant did not wish to disclose the fact that conflicts of interest existed, it should have simply refused to give advice and assistance to the plaintiffs to effect their purpose.

27 In Alberta, the law relating to the establishment of a fiduciary relationship in a banker/customer situation has been most recently applied in *Royal Bank v. Aleman*, 57 Alta. L.R. (2d) 341, [1988] 3 W.W.R. 461, 43 C.C.L.T. 245, 86 A.R. 64 (Alta. Q.B. — appeal pending: No. 10426). In this case the borrowers approached the bank to discuss the potential purchase of a business which had debts owing to the bank. The bank advised that the investment was viable and did not disclose that the company was experiencing financial difficulties.

28 Medhurst J. offered a summary of the existing state of the law at p. 70:

In summary, if a plaintiff wishes to allege a fiduciary duty is owed to him by a defendant he must show:

- (a) that he relied upon the advice;
- (b) that the defendant was aware of this reliance;
- (c) that the defendant derived a benefit from the transaction; and
- (d) that the relationship was of a "confidential" nature.

Once these elements are proven the court may impose a variety of obligations upon the fiduciary (such as the duty to disclose a conflict of interest) for which that party will be liable regardless of actual knowledge or intention.

29 Keeping in mind Sir Eric Sachs' warning against any set definition, I find that on the facts of the present case Mr. Denischuk did not have a dominating influence over the Meadows which would establish a fiduciary relationship. Although

Mr. Denischuk encouraged the investment and was a factor in the Meadows' decision to invest, the reliance on Mr. Denischuk was reliance in the sense that ordinary businessmen in arm's length transactions rely on one another. The reason for the Meadows' bad investment was their failure to take reasonable care in investigating and investing in KEM (e.g., their failure to consult their accountant, their refusal to seek the additional advice that was offered, and their willingness to make a risky but potentially very profitable investment). Their loss is the result of their own folly. Mr. Denischuk was a factor but did not exercise undue influence on the Meadows. The elements of reliance and "confidentiality" are not present.

30 If the line had been crossed and a fiduciary relationship found to have been created, I have serious concerns as to Mr. Denischuk's involvement and the sufficiency of the independent advice received, but I need not discuss these matters. Further, the applicable remedy in this kind of situation need not be dealt with.

31 I see no merit in the Meadows' claim based on the credit union's failure to comply with generally accepted lending institution procedures in approving the loan to the Meadows. There was no verification of Mr. Meadows' income (although his employment as a commission salesman was verified) and a misunderstanding that he had earned \$3,500 per month in the past year when the amount of \$3,500 represented his income for the year. Their collateral position was excellent, their character assessed as good, and their credit rating was very good but for some problems of late.

32 In the main claim by the credit union, the order nisi of foreclosure with a six-month redemption period plus solicitor-client cost are granted. The counterclaim fails and no costs are ordered given the conduct of the credit union.

Order nisi of foreclosure granted; counterclaim dismissed.

Tab 13

Alberta *Fraudulent Preferences Act*, RSA 2000, c F-24

Section 1

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

Intent to prefer

2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

RSA 1980 cF-18 s2

Preferential effect

3 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Tab 14

2001 MBQB 136
Manitoba Court of Queen's Bench

Abalon Holdings Ltd. v. Bank of Nova Scotia

2001 CarswellMan 236, 2001 MBQB 136, [2001] M.J. No. 231, 105
A.C.W.S. (3d) 675, 155 Man. R. (2d) 289, 2 P.P.S.A.C. (3d) 236

**Abalon Holdings Ltd. (Plaintiff) and The Bank of Nova Scotia
(Defendant); The Bank of Nova Scotia (Plaintiff by Counterclaim)
and 0544699 Manitoba Ltd., Abalon Holdings Ltd., J. Leo
Mulligan and Darlene McKenzie (Defendants by Counterclaim)**

Wright J.

Judgment: May 10, 2001
Docket: Winnipeg Centre CI 99-01-13702

Proceedings: affirmed (2002), 2002 CarswellMan 268 (Man. C.A..)

Counsel: *Gene G. Zazelenchuk*, for Plaintiff / Defendants by Counterclaim
Ingrid Lincoln, for Defendant / Plaintiff by Counterclaim

Subject: Contracts; Corporate and Commercial; Torts; Property; Insolvency

Headnote

Fraud and misrepresentation --- Fraudulent conveyances --- What constituting

Defendant bank obtained judgment against numbered corporation and owner --- Equipment belonging to numbered corporation was seized --- Plaintiff company alleged that it had proprietary interest in equipment at time of seizure, because of promissory note given to company by numbered corporation --- Promissory note was registered under Personal Property Security Act --- Promissory note was allegedly given as security on unpaid licensing fees --- Company brought action against bank for damages for wrongful retention of equipment --- Bank brought counterclaim for declaration that promissory note and security registration were invalid --- Action dismissed; counterclaim allowed --- Transfer of equipment to company was fraudulent conveyance --- Company's contention that promissory note was aimed at securing legitimate debt was rejected --- Promissory note had been created after original action was already undertaken --- Owner was likely directing mind of numbered corporation and company --- Transaction was not bona fide under s. 4 of Fraudulent Conveyances Act, as each company involved in transaction was aware of intent to put equipment beyond reach of bank --- Contention that numbered corporation had no economic interest in equipment at time that promissory note was created, due to existence of chattel mortgage and debenture in favour of owner, was rejected --- At minimum, numbered corporation held beneficial interest in equipment --- Fraudulent Conveyances Act, R.S.M. 1987, c. F160, s. 4 --- Personal Property Security Act, R.S.M. 1987, c. P35.

Personal property security --- Fraudulent conveyances --- What constituting

Defendant bank obtained judgment against numbered corporation and owner --- Equipment belonging to numbered corporation was seized --- Plaintiff company alleged that it had proprietary interest in equipment at time of seizure, because of promissory note given to company by numbered corporation --- Promissory note was registered under Personal Property Security Act --- Promissory note was allegedly given as security on unpaid licensing fees --- Company brought action against bank for damages for wrongful retention of equipment --- Bank brought counterclaim for declaration that promissory note and security registration were invalid --- Action dismissed; counterclaim allowed --- Transfer of equipment to company was fraudulent conveyance --- Company's contention that promissory note was aimed at securing legitimate debt was rejected --- Promissory note had been created after original action was already undertaken --- Owner was likely directing mind of numbered corporation and company --- Transaction was not bona fide under s. 4

of Fraudulent Conveyances Act, as each company involved in transaction was aware of intent to put equipment beyond reach of bank — Contention that numbered corporation had no economic interest in equipment at time that promissory note was created, due to existence of chattel mortgage and debenture in favour of owner, was rejected — At minimum, numbered corporation held beneficial interest in equipment — Fraudulent Conveyances Act, R.S.M. 1987, c. F160, s. 4 — Personal Property Security Act, R.S.M. 1987, c. P35.

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Cases considered by Wright J.:

Blakely v. Gould (1897), 24 O.A.R. 153 (Ont. C.A.) — distinguished

Blakely v. Gould (1897), 27 S.C.R. 682 (S.C.C.) — referred to

Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd. (1996), 38 C.B.R. (3d) 284, 11 P.P.S.A.C. (2d) 57 (Ont. Gen. Div.) — followed

Hogg v. Hogg (1915), 30 W.L.R. 802, 1915 CarswellMan 20, 8 W.W.R. 111, 21 D.L.R. 862, 25 Man. R. 226 (Man. C.A.) — distinguished

Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp. (1995), 34 C.B.R. (3d) 241 (B.C. S.C. [In Chambers]) — followed

Reutcke v. Reutcke (1958), 66 Man. R. 134, 24 W.W.R. 417 (Man. Q.B.) — distinguished

Sovereign Bank v. McIntosh (1916), 10 O.W.N. 410 — considered

Statutes considered:

Fraudulent Conveyances Act, R.S.M. 1987, c. F160

s. 2 — considered

s. 4 — considered

Personal Property Security Act, R.S.M. 1987, c. P35

Generally — considered

Tariffs considered:

Queen's Bench Rules, Man. Reg. 553/88

Tariff A, Class II — referred to

ACTION by company for damages for wrongful retention of equipment; COUNTERCLAIM by bank for declaration that registration of security regarding equipment was invalid.

Wright J.:

1 This action arises as a result of a sheriff's seizure on or about December 16, 1998 of a piece of equipment owned at all material times by a corporation identified as 0544699 Manitoba Ltd. ("the numbered company"). The equipment is described as a Mustang 960 loader ("the loader").

2 The seizure was made pursuant to execution on a judgment obtained by the Bank of Nova Scotia ("the Bank") against both the numbered company and J. Leo Mulligan ("Mulligan"), the owner of the numbered company's shares.

3 The judgment issued on November 24, 1998 following a two-day trial on November 9 and 10, 1998. It was entered on January 28, 1999 and covered an award of \$22,276.42, plus costs. The statement of claim giving rise to the judgment was filed December 2, 1997.

4 Following the seizure, an employee of the numbered company was appointed sub-bailee of the loader. Later, on or about March 25, 1999, the sheriff took physical possession of the loader and placed it in private storage where it has remained pending the outcome of the present litigation.

5 Abalon Holdings Ltd. ("Abalon Holdings"), a company also owned and controlled by Mulligan, now sues the Bank for wrongful detention of the loader. It claims it had a proprietary or security interest in the loader at the time of seizure, as a result of a promissory note dated March 20, 1998 given to it by the numbered company in the amount of \$40,000.

It says the \$40,000 reflected an accrued debt owing Abalon Holdings and represented good and valuable consideration. The note was registered under the registry of *The Personal Property Security Act*, R.S.M. 1987, c. P35.

6 Abalon Holdings seeks the return of the loader or, alternatively, \$18,000, being the value placed on the loader by Abalon Holdings when the present claim was filed in July 1999. Damages of \$1,000 a month, plus goods and services tax (GST) from April 1, 1999 are also claimed.

7 The Bank denies any wrongful seizure and detention and challenges the validity of the promissory note and the registration of the note as a security on grounds which include the allegation the plaintiff and the numbered company have the same operating mind in Mulligan (and presumably, therefore, no legitimate transaction was concluded between the plaintiff and the numbered company). The Bank counterclaims for a declaration that the promissory note and security registration are invalid.

8 The counterclaim also alleges a fraudulent conveyance by virtue of the giving of the promissory note and its registration as the basis of the security claimed. This allegation arises pursuant to s. 2 of *The Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, which says:

When conveyances declared void as against creditors.

2 Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns.

9 Although other arguments were advanced, I believe plaintiff's counsel was right when he commenced his oral argument with the opinion that this case stands or falls on whether the security founded on the promissory note can be sustained.

10 I have directed my analysis of the position of the parties on the basis of that approach.

11 For the reasons that follow, I have concluded a fraudulent conveyance did occur, as alleged by the Bank, and that it should be set aside.

12 Although there are some relevant considerations that I have taken into account, I do not find it necessary to make a definitive finding on the Bank's alternative submission relative to piercing the corporate veil.

13 A good guideline for the approach to the assessment of fraudulent intent is expressed by Baker, J. in *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.* (1995), 34 C.B.R. (3d) 241 (B.C. S.C. [In Chambers]) at 247:

Fraudulent intent is essentially a matter of fact to be proved in the circumstance of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. . . .

14 The evidence at trial confirms that Mulligan, in conjunction with advice from his lawyer and accountant, established Abalon Holdings as a vehicle through which a personal retirement plan could operate. Previously he had operated construction companies under the name Abalon Construction Ltd. in at least two provinces (Manitoba and Alberta). The plan provided that Abalon Holdings would retain the name "Abalon" and for a fee would license that name to others who might purchase the construction company's assets but wished to carry on the businesses under the name "Abalon". Abalon Holdings was established in 1996 and successful arrangements were made to license the Alberta construction company to third parties. However, no licensee could be found for the Manitoba company, which now existed as the numbered company. Accordingly, as a temporary measure, the numbered company, still owned by Mulligan, entered into an agreement with Abalon Holdings to license the name while it continued to operate. Mulligan testified that over

the next two years the numbered company did not do as well as in earlier times and did not pay its license fees. Mulligan stated the promissory note for \$40,000 was given on account of outstanding license fee arrears, which later, in the year 1998, he said were as high as \$100,000.

15 This is the background to the promissory note. The plaintiff provided no details relative to the calculation or accounting records for the claimed licensing arrears. Mulligan did not testify as to what arrangements, if any, were made with the numbered company for payment of the licensing fees at all or in part. Although information was provided as to the formula utilized for arriving at the amount charged for these fees, no evidence was presented to demonstrate the reasonableness of the figures claimed to be owing, *vis-à-vis* the gross earnings of a construction company said not to be doing very well.

16 In the absence of considerably more information to strengthen the argument that the creation of the promissory note was truly and fundamentally aimed at providing security for a legitimate and honest debt of the numbered company, I find that all the surrounding circumstances lead inexorably to the conclusion the note was part and parcel of an undertaking, the real intent of which was to defeat, hinder or delay creditors . . . of their just and lawful actions, suits, debts or damages, . . . and, in particular, the Bank's rights pursuant to its suit. The surrounding circumstances include the existence of the suit, that it was being actively prosecuted when the promissory note and security were created, the ultimate realization of a judgment in less than one year's time from commencement of the suit, and the absence of third party decision-making in the operation of the numbered company and the plaintiff. In reality, Mulligan was at the very least an influential controlling factor for both companies and probably was the guiding mind of each.

17 This last mentioned fact means Mulligan's knowledge and intent then, fairly can be deemed as existing for each of his companies. This, in turn, means the plaintiff cannot gain any benefit from s. 4 of *The Fraudulent Conveyances Act*, which saves a transaction from s. 4 if the conveyance was "bona fide to any person not having, at the time of the conveyance to him, notice or knowledge of that intent" [underlining supplied].

18 A decision of Sedgwick, J. of the Ontario Court of Justice (General Division) in *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.* (1996), 38 C.B.R. (3d) 284 (Ont. Gen. Div.), is directly supportive of my finding of a fraudulent conveyance. I have reviewed the cases cited by counsel for the plaintiff, including *Reutcke v. Reutcke* (1958), 24 W.W.R. 417 (Man. Q.B.), *Hogg v. Hogg* (1915), 25 Man. R. 226 (Man. C.A.), and *Blakely v. Gould* (1897), 24 O.A.R. 153 (Ont. C.A.), but all can be distinguished on the facts.

19 Mr. Zazelenchuk argued that at the time the alleged fraudulent conveyance took place - i.e. when the March 1998 promissory note was created and registered - the numbered company had no effective interest in the loader and, therefore, there was nothing to be taken from the Bank and the Bank was not deprived of any benefit. Mr. Zazelenchuk relied on a passage in *Sovereign Bank v. McIntosh* (1916), 10 O.W.N. 410, where the court found there was no real value in a mortgagor's equity of redemption and held, therefore, that even though the mortgage was given with preferential intent, the court should not interfere.

20 As indicated, this argument depends on a finding the numbered company had no interest remaining in the loader in March 1998, because of the Bank's chattel mortgage and a longstanding debenture in favour of Mulligan. However, that finding cannot be made (there is a dispute whether the debenture actually covered the loader at all, but for purposes of this argument only, I am assuming that it did). At the very least, the numbered company retained a beneficial interest in the loader. The numbered company still had the right to pay out the obligations, whatever they might be, and assume full control and ownership of the loader. The evidence does not identify the degree of the indebtedness that then existed. It may be some portion of the value of the loader could be found to remain after disposition of the charges, which would mean the numbered company had even more than beneficial rights. This is the more likely probability given that Abalon Holdings went to the trouble of obtaining the loader as a registered security. Nevertheless, whatever the case, it cannot be said the numbered company had no economic interest whatsoever in the loader at the critical time.

21 The existence of the encumbrances did not preclude the Bank from seizing the loader, as suggested by plaintiff's counsel, provided it did so with due regard for the rights of the chattel and the debenture holders. Where, as here, the chattel mortgage holder was the Bank itself and the debenture holder was Mulligan, the co-judgment debtor of the Bank, no problem arose. Unlike the situation in *Blakely v. Gould* (*supra*), affirmed (1897), 27 S.C.R. 682 (S.C.C.) , when the promissory note was given the loader was exigible in execution at the instance of the Bank.

22 In the end result then, the declaration sought in the counterclaim that the chattel mortgage encumbrance on the loader, and the security registration of same, are void and of no effect, is granted, and the plaintiff's claim is dismissed, with costs in favour of the Bank in accordance with the tariff (Class II).

23 Although the Bank's counterclaim seeks damages and interest, this was not pursued at trial. Consequently, there is no award under those headings.

Action dismissed; counterclaim allowed.

Tab 15

1982 CarswellBC 514
British Columbia Supreme Court

Crestwood Kitchens Ltd. v. Camco Inc.

1982 CarswellBC 514, [1982] B.C.J. No. 1399, [1983] B.C.W.L.D. 132, 17 A.C.W.S. (2d) 457, 47 C.B.R. (N.S.) 103

CRESTWOOD KITCHENS LTD. v. CAMCO INC. et al.

Cowan L.J.S.C. [in Chambers]

Judgment: December 14, 1982
Docket: Vancouver No. H822740

Counsel: *K.A. Jones*, for petitioner.
J.T. Threlfall, for respondent Camco Inc.
No one for respondent Huber.

Subject: Corporate and Commercial; Insolvency; Contracts; Torts

Headnote

Fraud and Misrepresentation --- Fraudulent preferences --- Attacking preference within 60 days --- Necessity to prove insolvency

Fraudulent conveyances --- Preferences under modern statutes --- Preferences attacked within 60 days --- Granting of mortgage challenged under Fraudulent Preference Act of British Columbia --- Petitioner not proving debtor in insolvent circumstances, unable to pay his debts or on eve of insolvency at date of mortgage --- Action dismissed.

The respondent debtor commenced an action against the petitioner, claiming damages for the tort of economic interference. The petitioner counterclaimed for its outstanding account and obtained summary judgment; however, a stay of execution was granted pending the outcome of the debtor's claim for damages. Shortly thereafter, the debtor granted a mortgage to the respondent creditor. The debtor's claim against the petitioner was subsequently dismissed. In an application commenced within 60 days of the registration of the mortgage, the petitioner applied to set aside the mortgage pursuant to the Fraudulent Preference Act of British Columbia.

Held:

Application dismissed.

The petitioner had not established that, at the relevant date, the respondent debtor was insolvent, unable to pay his debts in full or on the eve of insolvency. The facts were as consistent with an unwillingness to pay the debt of the petitioner as with an inability to pay.

Table of Authorities

Cases considered:

C.I.B.C. v. Ash (1964), 7 C.B.R. (N.S.) 154, 47 D.L.R. (2d) 620 (B.C.S.C.) — *applied*
Clarke v. Sutherland, [1917] 3 W.W.R. 624, 13 Alta. L.R. 132, 37 D.L.R. 368 (C.A.) — *considered*

Statutes considered:

Fraudulent Preference Act, R.S.B.C. 1979, c. 143, ss. 3, 7.

Words and phrases considered:

INSOLVENT CIRCUMSTANCES

A number of authorities were cited relative to the meaning to be attached to the words "insolvent circumstances" or "unable to pay his debts in full" [both in the *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143]. These authorities hold that there is no real distinction between "being in insolvent circumstances" and in being "unable to pay his debts in full".

It comes down to being unable to pay debts in the ordinary course of business assuming liquidation of property or assets at forced sale, or at a sale when the seller cannot await his opportunities but must sell.

UNABLE TO PAY HIS DEBTS IN FULL

A number of authorities were cited relative to the meaning to be attached to the words "insolvent circumstances" or "unable to pay his debts in full" [both in the *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143]. These authorities hold that there is no real distinction between "being in insolvent circumstances" and in being "unable to pay his debts in full".

It comes down to being unable to pay debts in the ordinary course of business assuming liquidation of property or assets at forced sale, or at a sale when the seller cannot await his opportunities but must sell.

Application to set aside mortgage as fraudulent preference under Fraudulent Preference Act of British Columbia.

Cowan L.J.S.C.:

1 The petitioner applies pursuant to the provisions of s. 7 of the Fraudulent Preference Act, R.S.B.C. 1979, c. 143, for an order setting aside a certain mortgage granted by the respondent Huber to the respondent Camco. The following are the facts.

2 At all relevant times the respondent Rudolf Huber carried on business as Langley Kitchen Centre, a retailer of kitchen cabinets and appliances.

3 As at 10th November 1980 Huber was indebted to Crestwood for kitchen cabinets sold and supplied. By letter dated 2nd December 1980 demand for payment of the indebtedness was made of Huber by Crestwood's solicitor. On 9th December 1980 Huber commenced an action against Crestwood claiming damages for the tort of economic interference. Crestwood counterclaimed for its then outstanding account in the sum of some \$10,000.

4 On 28th May 1982, in the Huber action, Crestwood was awarded summary judgment for the sum of \$8,987.55 of its counterclaim, but the order stipulated that execution was to be stayed pending the outcome of Huber's claim for damages.

5 On 16th July 1982, the Hubers granted the mortgage now sought to be set aside to Camco to secure the sum of \$15,186.16, an amount then owing by Huber to Camco for goods supplied. The mortgage was stated to be granted in consideration of an extension of time for payment. The extension was for a period of one month. This mortgage was registered on 21st July 1982. On 23rd July 1982 Crestwood registered its judgment for the \$8,987.55. On 17th September 1982, within 60 days of the registration of the Camco mortgage, Crestwood started these proceedings. On 1st November 1982, Huber's action against Crestwood was dismissed and Crestwood was awarded judgment for the balance of its counterclaim plus interest and costs.

6 Section 3 of the Fraudulent Preference Act provides as follows:

3. Subject to section 6, a disposition of property by a person at a time when he is in insolvent circumstances, is unable to pay his debts in full, or knows that he is on the eve of insolvency, is void as against an injured creditor, if made

(a) with intent to defeat, hinder, delay or prejudice creditors or some of them; and

(b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

The petitioner alleges that the mortgage granted to Camco is void under that section.

7 The issue raised before me was whether the petitioner had shown that Huber was at the relevant date in the terms of the section "in insolvent circumstances, is unable to pay his debts in full, or ... on the eve of insolvency".