See paras. 119, 224, 225, 249, 255, 283, 369-399

Case Name:

Husky Injection Molding Systems Ltd. v. Schad

Between
Husky Injection Molding Systems Ltd., Plaintiff, and
Robert Schad, Athena Automation Limited,
1297607 Alberta ULC, Stephen Mason
and Sipa SpA, Defendants
And between
Robert Schad, Athena Automation Limited,
1297607 Alberta ULC, Plaintiffs by
Counterclaim, and
Husky Injection Molding Systems Ltd., Defendant by Counterclaim

[2016] O.J. No. 2128

2016 ONSC 2297

Court File No.: CV-14-10482-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: November 23-27, 30, December
1-4, 7-11, 14-16 and 21-23, 2015.
Judgment: April 22, 2016.

(430 paras.)

Contracts -- Breach of contract -- Action by Husky Injection Molding Systems for damages for breach of contract and other claims dismissed -- Counterclaim by Athena Automation for damages for Husky's alleged tortious conduct in the prosecution of the action dismissed -- The defendant Schad started Husky in 1953, sold it in 2007, and formed Athena in 2008 -- Schad and Athena allegedly misused Husky's confidential information -- Husky's claims were statute-barred, with the exception of the claim for breach by Schad of non-competition and non-solicitation obligations -- However, Husky failed to prove those claims -- There was no proven claim permitting Athena to

collect damages.

Contracts -- Proceedings in contract -- Practice and procedure -- Limitation periods -- Action by Husky Injection Molding Systems for damages for breach of contract and other claims dismissed -- Counterclaim by Athena Automation for damages for Husky's alleged tortious conduct in the prosecution of the action dismissed -- The defendant Schad started Husky in 1953, sold it in 2007, and formed Athena in 2008 -- Schad and Athena allegedly misused Husky's confidential information -- Husky's claims were statute-barred, with the exception of the claim for breach by Schad of non-competition and non-solicitation obligations -- However, Husky failed to prove those claims -- There was no proven claim permitting Athena to collect damages.

Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- Injurious falsehood -- Action by Husky Injection Molding Systems for damages for breach of contract and other claims dismissed -- Counterclaim by Athena Automation for damages for Husky's alleged tortious conduct in the prosecution of the action dismissed -- The defendant Schad started Husky in 1953, sold it in 2007, and formed Athena in 2008 -- Schad and Athena allegedly misused Husky's confidential information -- Husky's claims were statute-barred, with the exception of the claim for breach by Schad of non-competition and non-solicitation obligations -- However, Husky failed to prove those claims -- There was no proven claim permitting Athena to collect damages.

Action by Husky Injection Molding Systems for damages for breach of fiduciary duties, breach of contract, breach of confidence, and unlawful interference with economic interests. Counterclaim by Athena Automation for damages for Husky's alleged tortious conduct in the prosecution of the action. Husky designed, manufactured, and sold injection molding machines, which were used to make a wide variety of plastic products. The defendant Schad started Husky in 1953 and built it into a worldwide manufacturer and distributor. Schad sold Husky in 2007 and formed the defendant Athena in 2008. In December 2012, Athena and SIPA announced that they had entered into a partnership to market injection molding machines developed by Athena. Husky alleged that Schad and Athena misused confidential information of Husky regarding its injection molding machines in the development of the Athena injection molding machines. Husky further alleged that SIPA and Mason were complicit in that misuse of confidential information. Schad and Athena took the position that the claims asserted in the action were statute-barred. In its counterclaim, Athena alleged that Husky had engaged in a campaign of disseminating false and misleading statements about Schad and Athena within the industry, with the predominant purpose to improperly undermine and eliminate competition from Athena.

HELD: Action and counterclaim dismissed. Husky knew or ought to have known of the alleged misuse of confidential information more than two years before the action was started. Husky's claims were dismissed as being statute-barred, with the exception of the claim for breach by Schad of his non-competition and non-solicitation obligations. However, Husky failed to establish that it was entitled to relief against Schad for those claims. Furthermore, Husky failed to establish that it

had a claim against SIPA for breach of confidence, and failed to establish any legal wrongdoing on Mason's part. As for the counterclaim, there was no evidence that any Husky employee spoke to anyone outside of Husky about the action or made any disparaging comment to anyone about Schad or the other defendants.

Statutes, Regulations and Rules Cited:

Limitations Act, 2002, s. 4, s. 5

Counsel:

Patrick Flaherty, Stuart Svonkin and Brendan Brammall, for the plaintiff and defendants by counterclaim.

Kent Thomson, James D. Bunting, Chantelle T. Spagnola, Anisah S. Hassan and James Raakman, for Robert Schad, Athena Automation and 1297607 Alberta ULC.

Gordon Capern and Michael Fenrick, for the defendant Stephen Mason.

Peter Cavanagh and Chloe Snider, for the defendant SIPA SpA.

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F.J.C. NEWBOULD J.:--

Nature of the action

1 The plaintiff, Husky Injection Molding Systems Ltd. ("Husky"), is in the injection molding machine business. It designs, manufactures and sells injection molding machines, molds and other equipment. Injection molding machines are used to make a wide variety of plastic products.

2 The defendant Robert Schad immigrated to Canada from Germany in 1951 at the age of 23. He started Husky in a garage in 1953. He built Husky into a world-wide manufacturer and distributor of injection molding machines, parts and services. Today Husky employs approximately 4,000 people in approximately 100 countries. Its main manufacturing facilities are located in Canada, the United States, Luxembourg, Austria, Switzerland, China, India, and the Czech Republic. Mr. Schad was Husky's sole shareholder from the time the company was founded and remained Husky's controlling shareholder after an earlier IPO until December 2007 when Husky was sold to Onex Corporation. Mr. Schad and his spouse received approximately $400 million at that time.

3 In June 2008 Mr. Schad formed the defendant, Athena Automation Limited ("Athena"). Athena

eventually developed certain types of injection molding machines. SIPA SpA ("SIPA") is an Italian injection molding machine manufacturer and a competitor of Husky. On December 18, 2012 Athena and SIPA announced that they had entered into a partnership to market injection molding machines developed by Athena. An agreement between Athena and SIPA was signed on September 19, 2013 after this action was commenced.

4 Niigon Technologies Limited ("Niigon") was established in 2000 at the urging of Mr. Schad. It was established by Mr. Schad and the Schad Foundation and by Husky, the federal and Ontario governments and the Moose Deer Point First Nation. It was located near Parry Sound in Ontario. It was established under Mr. Schad's leadership to address the difficult economic and social conditions on the reserve of the Moose Deer Point First Nation. The cornerstone of the project was a precision injection molding operation that Mr. Schad hoped would provide employment, skills training and a sense of achievement and responsibility for those involved. Mr. Schad became the chairman of the board of Niigon. Husky provided some injection molding machines on favourable terms, including two prototype machines under development referred to as the LEAP machines, as well as other injection molding machines that were operating and commercially available. The two LEAP machines were leased to Niigon and the commercially available machines were sold under equipment sale agreements.

5 Niigon and Husky signed agreements that contained confidentiality provisions in July and September 2000 and again on September 6, 2007. The extent of Niigon's confidentiality obligation to Husky is contested.

6 The defendant, Stephen Mason, was a Husky employee who in 2000 began working at Niigon on a secondment to Niigon as Niigon's operations manager. In 2007 he left Husky and became a Niigon employee. In 2013 after Niigon closed, he formed an injection molding company named Zephyr Plastics that operates from the former Niigon premises.

7 The basic claim of Husky is that after Mr. Schad formed Athena, he and Athena misused confidential information of Husky regarding its injection molding machines in the development of the Athena injection molding machines, including confidential information that Mr. Schad had acquired while at Husky and confidential information that Athena employees obtained from the Husky machines at Niigon. It is alleged that SIPA and Mr. Mason were complicit in this misuse of confidential information.

8 Various grounds for the claim are made, including breach of confidence, breach of fiduciary duties, breach of contract, inducing breach of contract, unlawful interference with economic interests and knowing assistance.

9 Damages against Mr. Schad, Athena and SIPA are claimed, or in the alternative, a disgorgement of profits. Injunctive relief against all defendants is sought restraining the defendants from making any further use of or disclosure of Husky confidential information.

10 Athena counterclaims for damages allegedly suffered as a result of what it says is tortious conduct of Husky in the prosecution of this action by Husky. Athena claims that Husky has engaged in a campaign of disseminating false and misleading statements about Mr. Schad and Athena within the industry with the predominant purpose to improperly undermine and eliminate competition from Athena. Athena relies on the actions of abuse of process, unjust enrichment and injurious falsehood.

11 For the reasons that follow, the claims against all defendants are dismissed and the counterclaim is dismissed.

The injection molding machine business

12 Injection molding is a manufacturing process that uses melted plastic resin (also referred to as "melt") to manufacture a wide variety of everyday plastic products for consumer use, including automotive parts, plastic bottles, food packaging and plastic housing for electronic devices.[1]

13 Central to the injection molding process is the injection molding machine, which melts plastic resin, injects it into a mold that shapes the melt into parts, and removes the parts once they have cooled and solidified. While injection molding machines can vary significantly in size and complexity, they all possess the same basic architecture: (i) an injection unit, which melts the plastic and injects it into a mold; (ii) a clamping unit, which holds the mold in place; (iii) a base, which supports the machine; (iv) a drive system, which powers the machine; (v) an ejection system to remove the part once solidified and cooled; and (vi) a controls system.

14 The injection molding industry is comprised of a number of different market segments, including "Automotive" (*e.g.*, bumper or dashboard); "Packaging" (*e.g.*, food containers); "PET" (*e.g.*, water bottles); "Medical" (*e.g.*, syringes); "Technical" (*e.g.*, cosmetics); "Electrical/Electronics" (*e.g.*, cell phone cases, computer components); and "General Consumer Products" (*e.g.*, toys, laundry baskets).

15 PET (polyethylene terephthalate) machines are highly customized to manufacture a single type of part made of PET. These machines manufacture "preforms", which are unfinished plastic containers. The plastic preforms are later blown or expanded by a process referred to as "blow molding", which transforms the preforms into a finished product (*i.e.*, a plastic beverage container). Husky is the dominant worldwide manufacturer in the PET segment of the market, with a market share in the past 10 years that has exceeded 75%. Husky's PET business is the key to its success and accounts for the majority of Husky's machine, mold and service revenues.

16 There are also general purpose machines that are produced and sold by manufacturers. The term general purpose machine is used to refer to an injection molding machine that can manufacture products of various materials and is used to manufacture a wide range of different products. Although general purpose machines are not configured to manufacture one type of part they are often designed to accommodate options that customize the general purpose machine for use in more specialized applications.

17 Injection molding machines have different tonnages, meaning not the weight of the machine but the tonnage of pressure applied by the clamping unit of the machine to the molds to hold them together during the injection molding process. A 300-ton machine is a reference to a machine with a clamping unit that is capable of generating 300 tons of force.

The LEAP project

18 In the latter part of 2005, Husky embarked upon a project that ultimately became known as project LEAP. The LEAP project was started by Husky in response to increasing competition. Husky's success over the years had been driven in large part by technological innovation and a focus on the PET market. By 2005, Husky's competitors had begun to introduce advanced electrically driven injection molding machines (either all-electric or hybrid machines) that were more energy efficient and quieter than the existing machines on the market, while still achieving key performance measures. At the time, Husky's PET machines were all driven hydraulically.

19 The LEAP project was intended to develop a machine line that would re-position Husky among its competitors and with the hope that Husky would develop technology that was better than existing technology in the market, or "leap" ahead of the existing technology. Initially, it was an advanced engineering project referred to as an electrification project, as Husky was looking at ways to incorporate more electric drives and greater energy efficiency into its machine offerings. By 2006, the project had changed to become an effort to develop a new machine. An October 2006 LEAP presentation indicated a desire to develop a new platform for Husky's entire machine line, to focus on mid to high end general purpose markets and current specialty markets and to have a similar or smaller footprint *versus* competitive machines. The primary objective was to establish a machine line that would be smaller and more efficient than Husky's existing machines and competitive with technology that either had been developed or was under development by Husky's competitors. Husky hoped that by designing a new machine line that could be sold into the general purpose market, but that could also be configured for PET, Husky could compete with some of its major competitors who had achieved success in the general purpose market.

20 A new LEAP machine as contemplated in the LEAP project was never developed and Husky decided not to take the LEAP system to market. One reason was that when Onex acquired Husky in October 2007, it decided that Husky should exit the general purpose machine market. Work on the LEAP project slowed down in the fall of 2007 when some resources were pulled off the project. In early 2008, new development activity ceased and Husky focused its efforts on the construction, support, testing and validation of the two HY140 LEAP prototypes that were placed at Niigon. During testing at Niigon there were more problems than anticipated and the two machines were removed in January and March 2010. A fully developed business case for the LEAP project was never presented to Mr. Galt, the President and CEO of Husky at the time, and no steps were taken to commercialize the LEAP machines. Four LEAP machines were built. The first two were destroyed. Of the two prototypes leased to Niigon, after their return one has been used for spare parts and the other was preserved for the purposes of this litigation.

21 Husky applied for 28 patents relating to the LEAP project. One received patent approval. The other 27 applications were abandoned.

Niigon facilities and use by Husky

22 As part of its involvement in the sustainable community project, Husky made a number of commitments to provide resources to that project. Mr. Schad was the president and CEO of Husky when these commitments were made, and was a passionate supporter of the Niigon initiative. Husky had representation on the board of Niigon, as did the Schad Foundation, members of the Moose Deer Point First Nation and others.

23 Husky's commitments to Niigon were contained in a Support and Consulting Agreement as of July 17, 2000. They included assisting Niigon in the construction of its plant and other operating facilities, setting up its equipment and systems required for an injection molding operation, assisting with the training of Niigon, assisting with the development of its business plans, amongst other things. Husky also committed to provide injection molding machines to Niigon on favourable terms.

24 During the period from September 2001 to September 2005, Husky supplied Niigon with five injection molding machines for use in its operations. Two were sold and three were loaned. These machines were commercially available machines on the market. Niigon used these machines to make and sell plastic parts to various customers. An Equipment Agreement covering the lease and purchase of these machines was made as of July 17, 2000 the same date as the Support and Consulting Agreement.

25 Throughout the first half of 2007, Husky and Niigon discussed and ultimately renegotiated the terms of the Equipment Agreement and the Support and Consulting Agreement. A new Equipment and Support Agreement was executed by Husky and Niigon on September 6, 2007. That agreement provided that Husky would, among other things, be given the opportunity to: (i) beta test machines at Niigon (*i.e.*, the LEAP machines), (ii) provide Niigon with support for various aspects of its business free of charge, and (iii) provide Niigon with an automation engineer to assist with a project known as the "Lights Out" project, which was a factory automation project designed to permit portions of the molding process to be done automatically, without the need for an operator to be present, particularly at night and on weekends. Niigon had experienced high levels of absenteeism, and factory automation was not only desirable but necessary.

26 The first LEAP machine, a HyPET 140 machine, was delivered to Niigon on December 3, 2008. Athena personnel who were stationed at Niigon at the time to work on the Lights Out project assisted Husky personnel in getting the machine started up, which took at least two to three weeks. The second LEAP machine, also a HyPET 140 machine, was delivered to Niigon on March 24, 2009. The first one was returned to Husky on March 15, 2010 and the second was returned on January 25, 2010. There were four other commercially available machines sold or leased that were obtained by Niigon from Husky between April 2009 and April 2010.

27 The September 6, 2007 Equipment and Support Agreement was in large part drafted by Mr. Peter Kendall, the executive director of the Schad Foundation and a director of Niigon at the time. He is not a lawyer, and neither party used external counsel in negotiating the agreement.

Benchmarking

28 Companies that develop and manufacture injection molding systems, including Husky, engage in a practice that is often referred to in the industry as "benchmarking". Benchmarking is a common industry practice by which a manufacturer will acquire information about commercially released competitive machines to compare against their own machine's performance. Sometimes a manufacturer will purchase a commercially available competitive machine for benchmarking purposes. Sometimes a manufacturer will gain access to a commercially available competitive machine at a customer of the manufacturer who permits access to the manufacturer.

29 Benchmarking is an issue in this case because of steps taken by Athena employees to obtain information from the two LEAP prototype machines and from the commercially available machines that were at Niigon. Athena says that what they were doing was simply benchmarking. Mr. Overbeeke, the vice-president of sales and engineering at Athena since January 2013 and a Husky employee from 1988 to 2008, conceded on cross-examination that it is not common in the industry to benchmark a prototype machine of a competitor that is not commercially available, but he insisted it had happened in the past, although rarely.

Schad exit from Husky, sale of Husky to Onex and effect on the business

30 In September 2005, after more than half a century with Husky, Mr. Schad stepped down as the company's CEO and president and ceased being an employee of Husky. He moved out of his office at Husky and worked from the offices of his charity Earth Rangers in Woodbridge, Ontario. In the period between September 2005 and December 2007, at which point Husky was acquired by Onex, Mr. Schad continued as a director and chairman of the board of directors of Husky. He also provided consulting services to Husky in connection with the development of the LEAP project, although he did not receive payment for that. Mr. Schad's former son-in-law, John Galt, was his hand-picked successor who took over as CEO and president.

31 Husky was a privately owned company from its inception until 1998, when it completed an initial public offering. Mr. Schad remained the controlling shareholder and at some point after stepping down as CEO and President, he formed an intention to sell Husky. In September 2007 it was decided that Onex would be the buyer and the sale closed in December 2007.

32 On January 16, 2008 several weeks after the sale to Onex, Mr. Galt met with Mr. Schad at the facilities of Earth Rangers. During this meeting, Mr. Galt gave a presentation to Mr. Schad outlining Husky's new strategic direction under Onex's ownership. This presentation emphasized financial results as Onex's "dominating priority" for Husky in the near term, and confirmed that Husky's new owners were "financially driven." Husky committed to a 6 percent annual compounded revenue

growth and a 16 percent annual compounded EBITDA growth, which was a significantly increased and more aggressive target than had been the case before. It marked a distinct shift from Husky's previous approach, which had been focused on innovation and long-term technology development. Mr. Galt told Mr. Schad that Husky would exit areas that did not have a validated track record of financial success including general purpose machines.

33 On May 14, 2008 Mr. Schad met with Mr. Galt to discuss his views of the result as he saw it of the Onex acquisition of Husky. During the meeting, Mr. Schad expressed his disappointment with Husky's new strategic direction, including its decision to exit the general purpose market. He also expressed his disappointment with Husky's declining support for Niigon in the period following the Onex acquisition. He discussed with Mr. Galt some ideas that he had for the future. On June 16, 2008 he formed Athena.

Assessment of the evidence

34 In this case, there is a difference in some instances as to what was said by persons at various times, which is not unusual when the trial takes place many years after the facts in issue. Memories fade and some have better memory than others. There are a number of instances in which it is asserted by witnesses as to what they took from what they were being told and how important or unimportant at the time the information was to them. This is particularly the situation with Messrs. Galt and MacDonald.

35 The evidence in chief for all fact witnesses was put in by way of affidavit. Some of it involved argument, no doubt the fault of the lawyers slipping into their normal habit, argument that would not have taken place had there been no affidavits and the witnesses had given their evidence in chief orally. Cross-examination was of importance in discerning the strength of the evidence of these witnesses. The credibility of witnesses and the reliability of the evidence must be assessed.

36 In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 CCC 29 (B.C.C.A.):

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

37 I also find it helpful, particularly in this case, the statement of Farley J. in *Bank of America Canada v. Mutual Trust Co.* (1998), 18 R.P.R. (3d) 213 at para. 23:

> Frequently in cases judges will be called upon to make findings concerning credibility of witnesses. This usually is a most difficult task absent the most blatant of lying which is tripped up by confession, by self-contradictory

> evidence, by directly opposite material developed at the relevant time period or by evidence of an extremely reliable nature from third parties. One is always cognizant that people's perceptions of the same event can sincerely differ, that memories fade with time, that witnesses may be innocently confused over minor (and even major) matters as well as the aspect of rationalization, a very human and understandable imperfection. A point that a witness may not be sure of initially becomes eventually a point that the witness is certain about because it fits the theory of his side. Rationalization will also affect some person's views so that a certainty that a fact was "A" evolves into a confirmation that that fact was "not A".

38 Farley J. used the word "rationalization". I take his comments to refer to what is often said to be "reconstruction" of evidence. Reconstruction can be either inadvertent or advertent. In either case, when it occurs, it is something that the trier of fact must consider in weighing evidence.

39 In this case, there are contemporaneous documents throughout the piece. These contemporaneous documents are of considerable importance in considering what took place and what the parties were taking from the information disclosed in the documents.

40 Mr. Schad by all accounts has been an extremely successful person in his life. He started Husky in a garage in 1953 and built it into a world leader in the injection molding machine business. From 1953 until September 2005, he was the president and CEO of Husky. He also served as the Chairman of Husky's board of directors from December 2006 until he resigned that position in December 2007. He was Husky's sole shareholder (directly and indirectly) at the time the company was founded and remained Husky's controlling shareholder after an earlier IPO until December 2007, when Husky was acquired by Onex. He has been interested in environmental matters for a very long time. He has had a deep and longstanding commitment to philanthropy with a focus on protecting the environment and on childhood education and has contributed approximately $175 million to various charitable organizations over the years, both directly and through his charitable foundation, including Earth Rangers, which is a charitable organization dedicated to educating children about biodiversity. He has taken a very keen interest in the development of business for First Nation youth and is an Honorary Chief of the Pottawatomi of Moose Deer Point First Nation for his work in connection with the Niigon sustainable community project, a project that is now central to the claim of Husky. Mr. Schad has had a lifelong reputation for hard work and uncompromising integrity and honesty.

41 Mr. Schad is now 87 years of age. Unfortunately, although he is a remarkable man in what he has done during his eighties, he is losing some of his faculties. For example, he finds it extremely difficult if not impossible to listen to a question orally and then answer it. As a result, and thanks to the fact that the trial was entirely electronically run on monitors with no paper exhibits, questions asked of him were transcribed by a reporter on a separate monitor which Mr. Schad read and then answered. There was some confusion for him between reading transcripts of his discovery put to

him on cross-examination and reading the trial proceedings. He was tired during much of his evidence and this affected him as well. I think it fair to say that his memory of events is now not very good. In the circumstances I hesitate to place a great deal of reliance on his affidavit or oral evidence at the trial on contested matters.

42 Mr. Galt is an engineer. He started at Husky as a young man and eventually married Mr. Schad's daughter. Although later divorced, he and Mr. Schad remained friends and close business associates. Mr. Galt described Mr. Schad as a professional mentor, personal friend and a confidante. He became the president and CEO of Husky in 2005 when Mr. Schad resigned from those positions.

43 Mr. Galt however has not spoken to Mr. Schad since this litigation commenced. Mr. Galt met with Mr. Schad many times after Mr. Schad formed Athena and discussed with him what Athena was doing. Mr. Galt in his affidavit stated that at the time he believed all of what Mr. Schad told him regarding what he was doing at Athena. He now believes that Mr. Schad was not fully open and transparent with him. He says this became apparent on May 26, 2011 when he and Mr. MacDonald met Mr. Schad at Athena and saw an indication of collaboration by Athena with a competitor of Husky named Mold Masters and was told by Mr. Schad that he felt Athena could sell its machines in competition with Husky. Mr. Galt now states a belief that Mr. Schad concealed his actions from him from 2008 to May 2011.

44 Mr. MacDonald has a science degree and also an MBA. He worked as a summer student for Mr. Schad personally and began working at Husky as a summer student in 1989 and 1990. He became a full-time Husky employee in 1992. In the latter 1990s he became a member of Husky's Executive Leadership Team. Although not an engineer, he was a member of the advisory group for the LEAP project. He left Husky on June 30, 2013. Mr. MacDonald stated in his affidavit that when he was at Husky, he had a longstanding professional and personal relationship with Mr. Schad, whom he trusted and viewed as a mentor. Until May 26, 2011 he had no reason to distrust Mr. Schad. He too has not spoken to Mr. Schad since the litigation began.

45 Mr. Galt and Mr. MacDonald accuse Mr. Schad of not being truthful with them about what Athena was doing. One must ask why Mr. Schad after a lifetime of honesty and integrity would suddenly become dishonest. Mr. Galt asserted that he thinks Mr. Schad wanted to show Onex and Husky that the LEAP general purpose machine that Onex caused Husky to stop working on would be the revolutionary system he had thought it would be and that he wanted Husky to then manufacture and market it. Even if that were the case, it would not be an explanation for Mr. Schad to begin being untruthful.

46 I think it fair from the evidence that after the acquisition of Husky by Onex in 2007 Mr. Schad formed a dislike of how Onex changed Husky's mandate, with short-term financial results being the dominant priority, and there was little love lost between him and Mr. Munk at Onex. It would not be outside the realm of human nature for Mr. Schad to start getting back at Onex through Husky by secretly working against Husky's interests and being less than candid with Mr. Galt or Mr.

MacDonald or others at Husky.

47 I have come to the conclusion, however, that Mr. Schad did not set out to do that. While he did not tell Husky what Athena employees were doing at Niigon, he took steps to disclose the nature of the machines being developed by Athena and Mr. Galt and Mr. MacDonald recognized them as being developed at least in part on Husky technology which they believed was confidential. Mr. Schad has never acknowledged that Athena used information that he thought was confidential and not in the public domain.

48 Mr. Galt and Mr. MacDonald have painted a picture of Mr. Schad giving them snippets of information about what he was doing at Athena and that their high regard for him changed as a result of what they learned at a meeting of May 26, 2011. They have downplayed information they knew before that meeting, sometimes long before that meeting, in an attempt, I believe, to explain their actions before then and to support a defence to a limitations argument of Athena that the action was not started within two years of their knowing of sufficient facts to enable the action to be started. I have had considerable difficulty with parts of their evidence as to what little store they put on information that they had before that meeting.

49 Mr. Schad began to consider aspects of a general purpose injection molding machine after being given the presentation by Mr. Galt in January 2008 about Onex's new strategy for Husky. That strategy included an Onex priority on near-term financial results, a requirement for higher revenue and EBITDA growth and exiting unprofitable areas, including general purpose machines. Mr. Schad told Mr. Galt of his thinking as early as May 2008 of his disappointment with Husky's new strategic direction, including its decision to exit the general purpose market, and of his deciding to develop ideas for a general purpose machine and possible ideas regarding the PET business. When he later decided with Mr. Strohmaier that Athena should begin developing a prototype machine, he advised Mr. Galt of that as well. He and Mr. Strohmaier showed several versions of the A150 Book prepared by Athena that disclosed the essential features of the prototype machine that Athena was working on.

50 There is no question but that Mr. Schad expressed to Mr. Galt and Mr. MacDonald a desire to work with Husky in manufacturing or selling the machine Athena was developing. This was both before and after his non-competition clause expired in September 2010. The response that he continuously got from Mr. Galt and Mr. MacDonald was that they would first have to see a prototype and a business case that made sense to Husky.

51 Mr. Galt asserted in his affidavit and in a letter shortly after the May 26, 2011 meeting that he thought that Mr. Schad was developing his machine for exclusive manufacture or sale by Husky. I have not accepted that evidence for reasons which I will later explain. This evidence was given I believe as an *ex post facto* explanation why Husky did not object to Mr. Schad developing an injection molding machine which Mr. Galt and Mr. MacDonald came to believe was based at least in part on Husky confidential information.

52 In February 2011 Mr. Schad told Mr. Galt that he had received expressions of interest from European and Asian sources regarding Athena's PET system, and Mr. Galt passed that on to Mr. MacDonald. On May 11, 2011 Mr. Galt and Mr. MacDonald learned that Mr. Schad had met with a competitor of Husky named Mr. Yu of Yudo, a Chinese competitor of Husky, at a trade show in Düsseldorf, Germany in October 2010, who had been asked by Mr. Schad if Yudo would join Mr. Schad's new business and that Mr. Yu had said that it would. They also learned that at Mr. Schad's request Mr. Yu was going to meet with him again in Shanghai at a China Plastics trade show. Both Mr. Galt and Mr. MacDonald professed in their evidence that they were not concerned at this news, but I have held otherwise.

53 Mr. Galt and Mr. MacDonald were concerned about this and further concerned when they visited Mr. Schad at Athena on May 26, 2011 and saw an indication that Athena was doing something with Mold Masters, a competitor of Husky.

54 What I take from the evidence is that both Mr. Galt and Mr. MacDonald thought that Mr. Schad's respect for Husky, the company he had built from nothing, would lead him to make a deal with Husky, and they did not like it when they learned that he might have other ideas. They knew this was a risk, and as Mr. MacDonald testified, while they knew it was a risk that Mr. Schad might market his machines with someone other than Husky if he could not make a deal with Husky, "it was a risk we had to manage". When they learned that they had not managed the risk as well as they had hoped, they reacted.

55 One reason they did not manage the risk well had to do with their dealings with Toyo Machinery & Metal Co. Ltd., a Japan-based company. Mr. MacDonald was told by Mr. Schad on February 4, 2010 that Athena was working on a machine that could be provided to Husky as the basis for a complete system, with tooling provided by Husky, for medical or PET applications. Unbeknownst to Mr. Schad, Husky had been working since September 2008 with Toyo for a similar machine. Mr. Galt first disclosed the relationship between Husky and Toyo to Mr. Schad in July 2010 and said that Husky was still interested in making a deal with Athena if it saw a prototype of a functioning Athena machine and a business case that made sense to Husky. Mr. Schad first saw the Husky/Toyo machines at a trade show in Düsseldorf, Germany in October 2010. He saw those machines as filling the same gap in Husky's machine line that Athena would be able to fill. He became more skeptical of Husky's intentions of making some deal with him. It upset him, as indicated by the evidence of Mr. Overbeeke.

56 It was perhaps a natural reaction on the part of both Mr. Galt and Mr. MacDonald to afterwards blame Mr. Schad for their belief that they had held for some time and yet had nothing about that the Athena machine being developed based in part on Husky technology that they believed was confidential. I believe this has coloured much of their evidence. I do not think they are purposely lying, just as I do not think that Mr. Schad lied to them, but I have come to the conclusion that much of their evidence is based on rationalization, or reconstruction, and that it must be considered very carefully in that light. In coming to that conclusion I have placed reliance on

contemporaneous documentation that is inconsistent with many of their evidentiary assertions.

57 Mr. Galt was not prepared to admit things one might have expected him to. For example, he and Mr. MacDonald met with Mr. Schad and Mr. Strohmaier on February 4, 2010 at which time the A150 Book was shown to them. A difference in the evidence is whether the entire A150 Book was shown to them or just selected parts of it without making full disclosure of what they were doing. It is Athena's position that it would have been in Mr. Schad's interest to show the entire book as he was trying to entice Husky to manufacture and sell the Athena machine being developed. In that connection, it was put to Mr. Galt on cross-examination that Mr. Schad and Mr. Strohmaier were attempting to persuade him that Husky should commit to Athena, as part of their objective was to entice him to commit to Athena and work with them to develop their machine. Mr. Galt's response was that was not the way he remembered the meeting. He also denied that he was shown slides that showed similarities with the LEAP machine that are now being complained of by Husky. Mr. Galt had no notes of that meeting. When he was shown Mr. MacDonald's email four days after the meeting that said, in reference to the meeting, that Athena was working on a machine "that looks a lot like the leap machine and hope to market this through a company (Husky) who could build and market them", his response was not to change his answer but to say "That's what he (*i.e.*, Mr. MacDonald) says" and to deny that it would be safer to rely on Mr. MacDonald's contemporaneous note than his recollection five years later.

58 An example of the unreliability of Mr. Galt's evidence is his evidence regarding his PowerPoint presentation in January 2008 to Mr. Schad shortly after the acquisition of Husky by Onex. In that presentation it was stated that Husky was exiting the general purpose machines business. It was that information that led Mr. Schad to form Athena and to begin considering development of a general purpose machine. In his affidavit, Mr. Galt stated that at the meeting, he told Mr. Schad that Husky would be proceeding with the beta testing of "Small LEAP". This evidence was given, I believe, to support an argument of Husky that it was not exiting the LEAP program and that Mr. Schad knew that. However, on cross-examination Mr. Galt acknowledged that he could not recall what if anything he said to Mr. Schad at the meeting about the future of the LEAP machine and his contemporaneous notes of the meeting say nothing about telling Mr. Schad that Husky would be proceeding with the beta testing of Small Leap. In his affidavit, Mr. Galt said that the PowerPoint presentation discussed with Mr. Schad referred to a decision to "place a small bet" on the "new machine line", which was a reference to the Small LEAP as it was then being pursued at Husky. This statement was more than a stretch. The PowerPoint presentation stated that Husky was exiting areas that did not have a validated track record of financial success, including general purpose machines, and then went on to state that Husky was going to "place multiple small bets on the future" including on "metal molding, new machine line, recycling initiatives". The adjective "small" referred to the size of the bets, or investments, to be made to a number of initiatives including a new machine line and not to the size of the new machine line or other initiatives. Also, in February 2007 the goal of the LEAP program was described in a PowerPoint presentation by Mr. Yankov, a project manager at Husky, "To develop and launch low tonnage (75-180 tonne) general purpose machine platform..." This size of machine was small. A bet on a

new machine line in the January 2008 PowerPoint presentation would not be a reference to LEAP as LEAP was by then not new. It was being discontinued. This entire paragraph in Mr. Galt's affidavit was at best a rationalization or reconstruction to support an argument and it did not represent any real recollection of Mr. Galt.

59 Another example of the unreliability of Mr. Galt's evidence is that in his affidavit, he said that contrary to what Mr. Schad had told him from 2008 to May 26, 2011, he now knew based on the documents produced by Athena in this litigation that Mr. Schad was contacting competitors of Husky regarding the machine he was developing, including Yudo. This statement is clearly not right in suggesting that it was only through the documentary production in this litigation that Mr. Galt learned of these things. Mr. Galt knew from what Mr. Schad told him in February 2011, as discussed, and from the email exchange regarding Mr. Yu of Yudo that was given to Mr. Galt on May 11, 2011, that Mr. Schad was having discussions with Asian competitors of Husky including Yudo. His statement that he learned of these things only after the litigation had started from documents produced in the litigation I believe was coloured by an attempt to answer the limitations defence of Athena.

60 Mr. MacDonald was also not prepared to admit things that cast considerable doubt on his evidence. One example was his evidence about a meeting of December 21, 2012 when he met with Stephen Mason and Mr. Kendall of Niigon. Three days earlier Athena had announced its strategic partnership with SIPA and that was a concern for Mr. MacDonald and Husky. On January 18, 2013 Mr. MacDonald wrote to Mr. Mason threatening to terminate the agreement between Husky and Niigon, which it subsequently did. In the letter Mr. MacDonald expressed concern about a mold made by Mold Masters on a Husky machine at Niigon. The machine was a commercially available machine owned by Niigon and was making parts for a Niigon customer named GK Packaging. GK Packaging decided to change the mold from a Husky-made mold owned by it to one made by Mold Masters. For that purpose Mold Masters had attended at Niigon to measure the mold mounting holes on the existing Husky mold owned by GK Packaging in order to ensure that the mold it was selling to GK Packaging would work on the Husky machine owned by Niigon. This was nearly three years after the LEAP machines had been returned to Husky from Niigon.

61 Although Mr. MacDonald acknowledged that he understood that Niigon had not agreed to maintain confidentiality on Husky information that was already public and that Husky had no right to expect that Niigon was obliged to keep that publicly available information confidential, which clearly was the case with the information that GK Packaging had on its own mold purchased from Husky some years earlier, he asserted that while GK Packaging was entitled to permit Mold Master access to its existing mold to take the measurements, this access could not take place at Niigon because of the September 2007 Agreement. He said that what other development activities may be going on around it could create a confidential situation around that commercial machine platform. This assertion ignored the fact that there were no development activities at the relevant time as the LEAP machines had been removed nearly three years before. This evidence amounted to a stubbornness to pursue the theory of the Husky case regardless of the evidence. I note that in its

closing submissions, Husky has not contended that this situation involving Mold Master and GK Packaging made Mr. Mason responsible for inducing a breach of the Niigon confidentiality obligations to Husky.

62 I will deal with individual witnesses and the reliability of their evidence as needs be. One person's evidence that I have concluded must be viewed with caution is the evidence of Matthew Simpson who was an employee of Athena for a little over two years and who was terminated by Athena. He was called as a witness by Husky.

Limitation defences

A. **Were the claims discovered more than two years before the claim was issued?**

63 The statement of claim was issued on May 24, 2013. The Schad defendants (Robert Schad, Athena Automation Limited and 1297607 Alberta ULC) take the position that the claims asserted in this action are statute-barred by reason of the provisions of the *Limitations Act, 2002* (the "Act") because, they assert, Husky knew, or ought to have known, that it had a claim against them before May 24, 2011 *i.e.*, more than two years before the action was commenced.[2] Husky takes the position that it was only at a meeting on May 26, 2011 that it learned of activity giving rise to the claims and therefore the statement of claim was commenced within the two year limitation period.

64 The *Limitations Act*, 2002 provides:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

65 A cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. Discoverability is a fact-based analysis. See *Lawless v. Anderson*, 2011 ONCA 102, a negligence case, in which Rouleau J.A. stated:

> 22**.** The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term 'cause of action' - the fact or facts which give a person a right to judicial redress or relief against another": *Aguonie v. Galion Solid Waste Material Inc*. (1998), 38 O.R. (3d) 161 (C.A.), at p. 170.
>
> 23. Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run: see *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.) and *McSween v. Louis* (2000), 132 O.A.C. 304 (C.A.).

66 In many cases, knowledge of when injury, loss or damage occurred is not an issue, as in *Lawless v. Anderson* involving negligent breast surgery. In other cases, such as oppression cases, it can be an issue, as in *D'Addario v. EnGlobe Corp.* 2012 ONSC 1918. It is an issue in this case.

67 In this case, the gravamen of the complaint of Husky is one of an alleged breach of a duty of confidence owed by Niigon and by Mr. Schad to Husky, which breach was participated in by Athena and Mr. Schad's numbered company as well as by Mr. Schad. Injunctions, both preventive and mandatory, are sought to prevent the misuse of confidential information belonging to Husky and to require the delivery to Husky of all machines that were based or derived from or manufactured through the unauthorized use of Husky's confidential information. Damages are sought for the misuse of confidential information and in the alternative a disgorgement of profits acquired by the misuse is sought.

68 The elements of an action for breach of confidence are: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. See *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at para. 129.

69 In this case, the first two tests as to whether the information conveyed to Mr. Schad and Athena was confidential or communicated in confidence is contested. For the purposes of considering the limitations period issue, I will assume these tests are met. The third issue is as to the misuse by Mr. Schad and Athena. If the confidential information in issue was misused by them before May 24, 2011 *i.e.*, more than two years before the action was commenced, and Husky knew or ought to have known of that misuse before that date, the action would be statute barred. What constitutes misuse in this case?

70 Husky relies on authority that puts the onus on a recipient of confidential information to establish that there was no prohibited use of the information. In *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at para. 139, La Forest J. stated that, in establishing a breach of duty of confidence:

> ... When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.

71 Husky pleads in its claim that Mr. Schad and Athena have improperly used Husky's confidential information to design, develop, manufacture and market technology and equipment in competition to Husky and that Athena's technology and equipment were not developed without misuse of Husky's confidential information. The misuse procured for Athena a head start on developing its technology and equipment.

72 While Husky includes in its pleading the marketing of equipment in competition to Husky, the claim is in no way dependent on marketing in asserting a cause of action. The nub of the complaint is that Mr. Schad and Athena misused Husky confidential information in developing the Athena injection molding machines. In its closing submissions, Husky contends that an inference of misuse may be established from similarity of characteristics between the respective products of a confider and a confidant, in which the "coincidences" of similarities between the products may be "too strong to permit of any other explanation" than the use of the confidential information by the

confidant. That is, the alleged misuse is the creation by Athena of a similar injection molding machine using Husky confidential information. For that alleged misuse Husky claims a mandatory injunction requiring the delivery to it of all injection molding machines derived from unauthorized use of Husky's confidential information.

73 In this case, assuming it can be proven, the cause of action was complete when confidential information was misused by Mr. Schad and Athena. Husky was damaged in that the misuse procured for Athena a head start on developing its technology and equipment. Husky was worse off as a result of the misuse of confidential information. See *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156 at paras. 32 and 42 per LaForme J.A. and the difference between damage sufficient to complete the cause of action and damages, which is the monetization of the damage.

74 Husky also relies on the principle enunciated by Doherty J.A. in *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (C.A.) that that loss of a potential economic opportunity, such as the loss of potential profits, would constitute detriment. That is, the potential to lose profits due to the misuse of confidential information is sufficient to establish the cause of action.

75 In an action for breach of confidence, the definition of detriment is broad. In *Cadbury Schweppes Inc. v. FBI Foods Ltd*. [1999] 1 S.C.R. 142, Binnie J. dealt with this issue directly as follows:

> **52** La Forest J. said in *Lac Minerals* that if the plaintiff is able to establish that the defendant made an unauthorized use of the information to the detriment of the party communicating it, the cause of action is complete...
>
> **53** The issue of detriment arises in this case because the trial judge made a specific finding that the respondents had not suffered financial loss, yet she proceeded to find liability and award damages "in the interest of fairness". While La Forest J. in *Lac Minerals* considered detriment to be an essential element of the breach of confidence action (Sopinka J. did not express a view on this point in his discussion of the applicable principles), it is clear that La Forest J. regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information (see, e.g., *Argyll (Duchess) v. Argyll (Duke)*, [1967] Ch. 302). In the *Spycatcher* case, supra, Lord Keith of Kinkel observed, at p. 256, that in some circumstances the disclosure itself might be sufficient without more to constitute detriment:
>
> So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it,

even though the disclosure would not be harmful to him in any positive way.

76 That is essentially what Husky argues in this case. They say they want returned what they contend is confidential information still in the hands of Athena and Mr. Mason (formerly of Niigon) because they have a right to decide who should have it.

77 The real issue is whether Mr. Schad and Athena have established that Husky knew or ought to have known of the alleged misuse of confidential information more than two years before this action was started. In my view of the evidence, they have.

78 After Husky decided to stop developing a general injection molding machine, a decision driven by Onex after it acquired Husky, Mr. Schad began exploring the development of a general purpose machine. He told Mr. Galt on March 4, 2008 that he was building an engineering support team that would work on ideas for a general purpose machine and that there could be ideas developed that have application in Husky's core markets of PET and metal and that he would be happy to find a way to work with Husky both before and after his non-competition agreement expired in September 2010.

79 In April 2008 Mr. Schad hired Franz Strohmaier, an engineer with over 30 years' experience in the injection molding machine business with Engel, a competitor of Husky that was undergoing restructuring. On June 16, 2008 Mr. Schad incorporated Athena. Athena then began hiring other experienced engineers who had previously worked at Engel and young graduate designers.

80 Athena initially investigated discrete ideas for certain assemblies and components of general purpose injection molding machines. At some point in 2008 Mr. Strohmaier concluded that Athena should consider forming a general purpose machine platform and Athena began to focus on developing a prototype machine. Mr. Strohmaier eventually prepared, and updated from time to time, an Athena "A150 Book" which was a PowerPoint presentation and a booklet that showed Athena's design ideas, development progress and how Athena's designs compared to those of others in the industry.

81 Current versions of the A150 Book were shown by Mr. Schad and Mr. Strohmaier to Mr. Galt and Mr. MacDonald at meetings on May 22, 2009 and February 4, 2010. Mr. Strohmaier's evidence was that he went through the book in its entirety on these occasions. His notes of the meeting record that Mr. Galt and Mr. MacDonald were impressed with the progress being made by Athena. His note of the February 4, 2010 meeting states that Mr. Schad asked whether there could be a fit between Athena and Husky and that both Mr. Galt and Mr. MacDonald stated that they would need to see a running prototype before they could comment.

82 Mr. Galt and Mr. MacDonald both said in their affidavits that Mr. Schad showed selected pages of his book very quickly. Neither can recall exactly what all was shown from the book but they recall certain pages. Their evidence, if accepted, is to the effect that Mr. Schad was very careful about what pages were shown to them, keeping certain parts of the A150 Book to himself.

Mr. Galt stated in his affidavit that the pages from the A150 Book shown to him by Mr. Schad suggested that the Athena machine borrowed Husky technology from systems then commercially available, which did not concern him. If the implication of the evidence of Mr. Galt and Mr. MacDonald is that Mr. Schad and Mr. Strohmaier were careful not to disclose that they were developing an injection molding machine that was based on the Husky LEAP prototype machine that had been placed at Niigon, I would not accept that. On February 8, 2010 four days after the February 4 meeting, Mr. MacDonald in an email to Husky personnel stated that Athena was working on a machine design "which looks a lot like the leap machine".

83 I realize that it is now five and six years since these meetings at which the A150 Book was shown by Mr. Schad and Mr. Strohmaier to Mr. Galt and Mr. MacDonald and that memories fade. It makes no sense, however, for Mr. Schad to have held back information on what Athena was developing if he was hoping at that stage to persuade Husky to build and market what Athena was developing. Both Mr. Galt and Mr. MacDonald agreed that Mr. Schad indicated an interest in working with Husky and that their response was that they needed to see a prototype machine and a business case that made sense to Husky. I think it much more likely that the entire A150 Book was shown to Mr. Galt and Mr. MacDonald as testified to by Mr. Strohmaier. If less than the entire book was shown to Mr. Galt and Mr. MacDonald, what was shown included pages that disclosed an Athena prototype machine that resembled the LEAP machine. I do not accept that Mr. Schad purposely withheld from view any pages so as to lead Mr. Galt or Mr. MacDonald to have no concerns.

84 At the meeting of February 4, 2010 Mr. Galt and Mr. MacDonald committed to giving to Mr. Schad some "high level" specs that he requested on what Husky would require for a small PET machine and a small medical machine. It is clear from this that they were told that Athena was now considering the development of a PET machine as well.

85 Mr. Galt had some concerns regarding the request for specs by Mr. Schad and he arranged a call with Mr. Munk of Onex on February 24, 2010 to discuss this issue. Mr. Galt said he could not recall the conversation but acknowledged that what is in Mr. Munk's notes of that call most likely came from him. Mr. Munk's notes refer to LEAP plus machines, which is an indication that Mr. Galt told him that the Athena machine he saw had similarities to the Husky LEAP prototype machine that was at Niigon. The note also refers to "noncompete", which must be a reference to Mr. Schad's non-competition agreement that still had some eight months to run.

86 Mr. Galt asserted on his cross-examination that the reference to "noncompete" was a reference to Mr. Schad not wanting to compete with Husky. I do not accept that assertion. On the same day of the call with Mr. Munk, Mr. Galt sent an email to Mr. Schad and stated that "given the existence of the non-compete clause in your management services agreement we are prevented from giving up information as disclosure that could adversely impact any claim or assertion of our rights to enforce the non-compete clause in the future". Mr. Galt said on his cross-examination that this position was not taken as a result of his call with Mr. Munk that day. I highly doubt that assertion because of the

timing of his call with Mr. Munk and his email to Mr. Schad backing off from the commitment Mr. Galt himself and Mr. MacDonald had made to Mr. Schad to provide him with the information. The only reason for the change of position by Mr. Galt to provide the information had to have been his call with Mr. Munk.

87 The evidence as I take it is that at least by February 10, 2010 when Mr. Galt and Mr. MacDonald visited Athena and saw the latest A150 Book, they realized that the machine Athena was working on had similarities to the Husky LEAP prototype machine. Shortly thereafter Mr. Galt and Onex, the owner of Husky, had concerns that Mr. Schad might breach his non-competition agreement with Husky. It is clear that Onex was unhappy with Mr. Schad and Mr. MacDonald told Mr. Schad that at a dinner on February 24, 2010. As a result, Mr. Schad caused Athena to put the PET concept on hold and there is no suggestion that Athena work on a PET concept resumed at any time prior to the expiry of Mr. Schad's non-compete covenant in September 2010.

88 On July 20, 2010 Mr. Schad and Mr. Galt travelled together in the back seat of Mr. Schad's limousine to Niigon, which is a drive of roughly two hours. During the trip up to Niigon, Mr. Schad took out an up-to-date version of the A150 Book and put it on the armrest between them to show it to Mr. Galt. Mr. Galt testified that Mr. Schad showed him select pages although he could not say what pages in particular he was shown. He acknowledged on cross-examination that there were no pages in the book that he asked to see that were not shown to him by Mr. Schad. Mr. Galt testified that Mr. Schad was enthusiastic with his ideas and wanted to share them with him. Mr. Schad's memory of events is now not very good, but I doubt that he would have taken out the A150 Book and put it on the armrest between them if he was trying to hide parts of it.

89 On December 15, 2010 Mr. MacDonald visited Athena and saw for the first time Athena's first general purpose prototype in operation. Mr. MacDonald testified that during this meeting, Mr. Schad gave him a full tour of Athena's facilities, as well as an update on Athena's progress. Mr. MacDonald was also shown an updated version of the A150 Book during this meeting although he testified on cross-examination that he could not identify what pages of the A150 Book he was shown. On January 4, 2011 Mr. MacDonald sent an email to Mr. Schad, following up on the meeting on December 15, 2010 in which he congratulated Mr. Schad on his first machine starting to come to fruition and wrote that it was great to spend a few hours to get updated on everything together.

90 On February 11, 2011 Mr. Schad met Mr. Galt at Husky's premises. He had the latest A150 Book with him, which he showed to Mr. Galt. On March 3, 2011 Mr. Galt sent an email to Mr. MacDonald in which he summarized his key notes from his discussion with Mr. Schad. Included in his email was the following:

> Robert is developing his PET system. He expects to have it ready for Sept. and begin marketing at that time. He is thinking of taking it to NPE [an industry trade show in Florida]. He has received interest from "European and Asian sources" in

> the product.
>
> His intention is to show me a version of the machine (most likely an earlier variety) when we meet. He may have some of the PET specific pieces in hand at that time. He would like me to come prepared to discuss the "kind of arrangement Husky would consider". This arrangement could be exclusive, but that would require a greater "commitment".
>
> Robert showed me his "book". His machine borrows on quite a bit of Husky technology. He had a cross section of a two stage extruder. It was virtually identical to our own with the exception of a direct drive motor and remote transfer cylinder.
>
> We discussed openly the fact that Robert working to market his product with others or on his own would represent a direct competitive position and our relationship with him would be as it is with a competitor.

91 It is clear that by March 3, 2011 Mr. Galt and Mr. MacDonald knew that Athena was once again (after Mr. Schad's non-competition agreement had expired) developing a PET system, that Mr. Schad was contemplating marketing his system to third parties as early as September 2011, that Mr. Schad had confirmed that he had already received interest in Athena's machines from industry participants in Europe and Asia, that Athena's machine borrowed quite a bit of Husky's technology, and contained a two stage extruder that was virtually identical to Husky's. They knew the risk that Mr. Schad might well work with somebody other than Husky to market his product and Mr. Galt had warned Mr. Schad what might happen if that were to occur.

92 A further meeting between Messrs. Schad and Galt was scheduled for May 26, 2011 at Athena. This was after Onex had sold Husky to Berkshire Partners LLC and OMERS Private Equity Inc. In preparation for this meeting, Husky undertook a detailed comparison between Athena's designs and Husky technology. In this regard, on May 6, 2011 Mr. MacDonald asked Derek Smith, a Husky internal patent agent, to help prepare for the upcoming meeting at Athena by providing "a summary of the IP that we've seen from Athena" and "a package of the key machine patents (LEAP and otherwise) so that we have a refresher on what to look for."

93 When Mr. Smith asked for more details about Athena's designs, Mr. MacDonald responded in an email dated May 10, 2011 that the machine Athena was building "is most like the Leap machine" and he noted that the Athena machine had a "Leap like injection unit." On the same day Mr. Galt described his key observations in an email as follows:

> The clamp is a hybrid of leap and quadloc

> The rs injection unit is virtually identical to our own.
>
> The new two stage unit is for all purposes a direct copy of our HPP 4.0 design...
>
> Many of the current detail design features borrow on Husky IP.
>
> The current robot for PET is very similar to an earlier design discussed during the LEAP Project. Rob D is best to consult on this.
>
> As Robert has selectively shown us these designs he may also be angling to suggest he had our "support or non-objection" to proceed. We should understand this also.

94 Mr. Galt testified that this information in his email came from the A150 Book shown to him by Mr. Schad and that he had held these views since his meeting with Mr. Schad on February 25, 2011. Mr. Galt's affidavit evidence is that it appeared to Husky that Mr. Schad's machine bore resemblance to confidential designs and ideas that Husky had developed as part of the LEAP project and to some Husky patented inventions unrelated to LEAP, and that by this date he had formed the view that Athena's machine borrowed from Husky intellectual property.

95 That would appear to be an understatement of Mr. Galt's view. It is Husky's position in this lawsuit that the LEAP prototype machines and the other Husky machines commercially available in the market place and delivered to Niigon were subject to a confidentiality clause with Niigon that was ignored by Mr. Schad and Athena and that by accessing these machines in developing the Athena prototype machine as indicated in the A150 Book, Mr. Schad and Athena participated in a misuse of confidential information. That Athena was misusing Husky confidential information was believed by Mr. Galt to be the case as evidenced in his email of March 4, 2011 to Mr. MacDonald and in earlier notes that I have discussed. Mr. MacDonald admitted on cross-examination that he and Mr. Galt had concluded before the meeting of May 26, 2011 that the Athena machine was based on LEAP technology that Mr. Schad had helped to develop while earlier at Husky.

96 One day later, on May 11, 2011 Messrs. Galt and MacDonald learned that Mr. Schad had been dealing with a competitor of Husky. On that day, an email exchange between Mr. Gerardo Chiaia, the President of Asia Pacific Sales for Husky and Francis Yu, the principal and founder of Yudo, an injection molding machine and mold manufacturer based in China that is a competitor to Husky, was forwarded to Mr. Galt by Mr. Chiaia who then forwarded it to Mr. MacDonald. In the emails between Mr. Yu and Mr. Chiaia, Mr. Yu informed Mr. Chiaia that at the K-Show in October 2010

(a plastics trade show in Germany), he had visited with Mr. Schad, and that during that visit, Mr. Schad asked Mr. Yu if he would like to join Mr. Schad's new business (*i.e.*, Athena), to which Mr. Yu responded that he was willing to do so. Mr. Yu also confirmed that at Mr. Schad's request he had arranged to meet with Mr. Schad on May 19, 2011 in Shanghai during the China Plastics trade show. Mr. MacDonald replied in an email to Mr. Galt after receiving the email exchange between Mr. Chiaia and Mr. Yu "Unbelievable (almost)."

97 Mr. MacDonald testified as to what he meant by the "Unbelievable (almost)"comment. I must say his explanation somewhat defies gravity and I put little credit in his explanation. In the email exchange between Mr. Yu and Mr. Chiaia, Mr. Yu said that he had told Mr. Schad that he had made a mistake to sell Husky to private equity (*i.e.*, Onex) and that Mr. Schad had agreed he had made a mistake when he had agreed to work as an honourary chairman of Husky when he sold the company to Onex. Mr. Schad also told him that he had no further chance of working with bankers (*i.e.*, Onex) because they had a totally different business philosophy. Mr. MacDonald in his affidavit stated that what he meant by the comment was that it was disappointing that Mr. Schad was saying negative things to others in the industry about Onex, Husky's owner that had paid him approximately $400 million for his shares in Husky. He said that the reason he added the word "almost" in parenthesis was that by that time he understood that Mr. Schad had negative feelings about Onex.

98 When it was put to Mr. MacDonald on cross-examination that he had known about Mr. Schad's disappointment with Onex for years, he did not deny that but said "Not entirely, no". It would not be unbelievable to Mr. MacDonald that Mr. Schad was "badmouthing" Onex, (to use a word of Mr. MacDonald in his cross-examination), as Mr. MacDonald and Mr. Galt had known for a very long time that there was no love lost between Onex and Mr. Schad. Mr. Schad expressed his displeasure with Onex to Mr. Galt as early as May, 2008 after being advised of Onex's plans for Husky with the first priority being near-term financial results. Onex displeasure with Mr. Schad was made clear in emails in July, 2009 by Mr. Munk of Onex to Mr. Galt who had passed on Onex's concerns to Mr. Schad. The concerns of Onex were discussed by Mr. MacDonald with Mr. Schad at a dinner at Mr. Schad's home on February 24, 2010. Later in 2010 Mr. MacDonald knew that Mr. Schad was offended by an offer regarding spare parts for Niigon. Moreover, to think it unbelievable that Mr. Schad was saying negative things to people about Onex because Onex had paid Mr. Schad $400 million ignores the fact that the $400 million was not a gift to Mr. Schad. Rather it was to pay him for something he had built up over the years. The reality was that Mr. MacDonald had to be concerned that Mr. Schad was prepared to work with Mr. Yu and he did not like that.

99 Mr. Galt had been told in February, 2011 by Mr. Schad that he had received interest from European and Asian sources regarding Athena's PET system, which Mr. Galt had passed on to Mr. MacDonald, and now Messrs. Galt and MacDonald had received direct information from Mr. Yu, a competitor of Husky, that Mr. Schad and the competitor had discussed doing business together. What is far more likely, although denied by Mr. MacDonald on cross-examination, was that he was concerned that Mr. Schad was taking steps to deal with a competitor of Husky who indicated it was willing to deal with Mr. Schad, and he did not like it. I do not accept the explanation given by Mr.

MacDonald that he was not surprised or concerned that Mr. Schad was speaking to Mr. Yu, as Mr. Schad had often had such "high-level discussions" with others in the industry while at Husky. Mr. Schad was not at Husky and had spent $100 million in his Athena endeavour. At that stage Mr. Schad had no indication from Husky that it would deal with him.

100 For the same reasons, I put little credit in Mr. Galt's testimony that the one thing that stood out in the email exchange between Mr. Yu and Mr. Chiaia that revealed the discussions between Mr. Schad and Mr. Yu was his surprise that Mr. Schad was telling at least one other person in the industry that Husky's "bankers" had a different philosophy on work and that this seemed inappropriate for someone who had founded Husky and sold his interest for approximately $400 million, and who was pursuing Husky to manufacture and market his machine. Why that would stand out instead of the fact that Mr. Schad was discussing doing business with Mr. Yu, a competitor of Husky, makes little sense. Mr. Galt was not naïve.

101 In his affidavit, Mr. Galt said that contrary to what Mr. Schad had told him from 2008 to May 26, 2011, he now knew based on the documents produced by Athena in this litigation that he was contacting competitors of Husky regarding the machine he was developing, including Yudo. I do not accept the suggestion that it was only through the documentary production in this litigation that Mr. Galt learned these things. Mr. Galt knew from what Mr. Schad told him in February, 2011, as discussed, and from the email exchange regarding Mr. Yu of Yudo that was given to Mr. Galt on May 11, 2011, that Mr. Schad was having discussions with Asian competitors of Husky including Yudo.

102 Mr. Galt in his affidavit stated that he arranged for the internal review by Mr. Derek Smith to determine of the summary of the IP that they had seen from Athena and the key machine patents Husky had for the purpose of any business discussion with Mr. Schad of the potential value of his machine to Husky. He stated that if Mr. Schad's machine made use of ideas subject to patents held by Husky, or otherwise made use of Husky's intellectual property such as confidential information or trade secrets, this would be a relevant consideration in terms of what business terms Husky would be prepared to offer and agree to in any arrangement with Mr. Schad regarding the manufacture and/or marketing of his machine. For example, Mr. Schad had been particularly proud of his robot design as noted above. If this design was in fact part of an early Husky design for LEAP, the value he was ascribing to it would be limited to Husky because Husky had already developed that design and there was nothing valuable to Husky in Mr. Schad's reimplementation of it. For reasons that will be later discussed, I have difficulty with the suggestion that what Mr. Galt said was the reason for the review was the sole reason. Mr. Galt had concerns with what Mr. Schad was doing at Athena. In his email of May 10, 2011 to Mr. MacDonald, Mr. Galt stated "As Robert has selectively shown us these designs he may also be angling to suggest he had our 'support or non objection' to proceed. We should understand this also." This is an indication of concern and a lack of trust by Mr. Galt in Mr. Schad.

103 Messrs. Galt and MacDonald visited Athena on May 26, 2011. While Mr. MacDonald had

seen the Athena prototype machine before, Mr. Galt had not, having only seen the A150 Book on several occasions. Both Mr. Galt and Mr. MacDonald testified that when they saw the A150 prototype, they were surprised to see that it had a hot runner controller with the insignia of Mold Masters on it. Mold Masters is a competitor of Husky and it indicated to them that Athena was now working with Mold Masters, a competitor of Husky. They say this fact, and the fact that they saw a former Husky employee named Rob Sicilia working at Athena, changed the nature of their discussions with Mr. Schad. There was then a discussion that led to further meetings and correspondence with a view to seeing whether the differences between Husky and Athena could be resolved.

104 Husky lays great store on this meeting and takes the position that the limitation period did not start to run until the meeting and what they learned at it. They give more than one reason for that.

105 One reason is that they say that they learned of the alleged misuse of confidential information at the meeting. In a letter of July 19, 2011 to Mr. Schad, Mr. Galt stated "We were surprised, however, to learn on May 26th that Athena has incorporated Husky confidential information (and possibly Husky's patented designs) into Athena's machine..." That statement, however, cannot be supported if it is suggested that it was only at the May 26 meeting that they learned of what they say was incorporation of Husky confidential information into Athena's machine. It is contradicted by Mr. Galt in his letter of June 16, 2011 to Mr. Schad, in which he said that concerns regarding the sensitivity and importance of Husky confidential information which had been incorporated into Athena designs came to Husky's attention during and leading up to the discussions on May 26, 2011.

106 Both Mr. Galt and Mr. MacDonald believed before the May 26, 2011 meeting, as discussed previously, that the Athena machine was based on LEAP technology that Mr. Schad had helped to develop at Husky. The statement of Mr. Galt in his letter of July 19, 2011 to Mr. Schad is also contrary to his statements in his affidavit at paragraphs 149 and 150, including his statement that he had personally formed the view that Mr. Schad's machine borrowed from Husky's intellectual property as described in his prior May 10, 2011 email to Mr. MacDonald and Mr. Derek Smith.

107 Another reason given by Messrs. Galt and MacDonald is that it was only at the May 26 meeting that they learned that Athena was likely to compete with Husky. In particular, Mr. Galt testified that at the meeting Mr. Schad told him for the first time that he had already had business meetings with competitors of Husky, and that he considered himself free to manufacture and market his machine in collaboration with competitors of Husky or alone if he chose to do so. However, Mr. Galt and Mr. MacDonald both knew before the meeting that Mr. Schad had met with and had discussions with Mr. Yu of Yudo, a competitor of Husky.

108 I do not take the evidence to be that Mr. Schad told Mr. Galt and Mr. MacDonald that he intended to sell the Athena machine through someone other than Husky. I think Mr. Galt has

overstated what was said. Mr. MacDonald's evidence is that Mr. Schad said that if Husky was not interested in entering into a commercial arrangement with respect to Athena's machine, he would feel free to work with others. Mr. Schad's evidence was that he expected at the meeting to be finally entering into discussions with Husky but that it soon became apparent that Husky did not want to do so. He testified that because he had met other people at the trade show in Germany in October 2010, he told Mr. Galt and Mr. MacDonald that Athena now had other interests and so if Husky did not want do work with Athena, then he could not sit down and discuss what he wanted to do. What I think can fairly be taken from Mr. Schad's evidence is that he did not say that Athena intended to work through others, but felt able to do so if a deal with Husky could not be negotiated. This is consistent with Mr. MacDonald's evidence. What Mr. Schad said at the meeting was nothing new to Mr. Galt or Mr. MacDonald.

109 Mr. Galt now says that before the meeting he thought that Mr. Schad was developing his technology for exclusive manufacture and/or sale by Husky and that therefore he had no concern with what Mr. Schad was doing. Implicit in this contention for the limitation argument of Husky is that Mr. Galt had no knowledge and no reason why he ought to have had knowledge of a basis for a lawsuit for misuse of confidential information. I do not accept this contention for a number of reasons.

(i) The misuse of confidential information as pleaded does not require actual sales of equipment by Athena that uses confidential information of Husky. In any event, the fact that they were told by Mr. Schad at the meeting of May 26, 2011 that he felt free to deal with someone other than Husky is not any *sine qua non* of a claim for misuse of confidential information. Nor was it the first time that Mr. Schad had discussed a non-exclusive arrangement with Husky.

(ii) At no time did Mr. Schad ever tell Mr. Galt or Mr. MacDonald that he would deal only with Husky. He told them that he would like to deal with Husky, both with respect to a general purpose machine and a LEAP machine, but he never said that if Husky would not do a deal with him he would not deal with someone else. Both Mr. Galt and Mr. MacDonald admitted that on cross-examination.

(iii) In his email of March 3, 2011 to Mr. MacDonald regarding his meeting with Mr. Schad on February 25, 2011, Mr. Galt said that Mr. Schad wanted Husky to come to the next meeting prepared to discuss the kind of arrangement Husky would consider and that "this arrangement could be exclusive but that would require a greater commitment". This statement of Mr. Schad to Mr. Galt made clear that Mr. Schad was not committing to an exclusive arrangement with Husky. In his letter of July 19, 2011 to Mr. Schad, Mr. Galt stated that they had an "understanding of your work which has been in the context of the

development of a machine with the potential for Husky's exclusive use, which obviously would not raise any concerns of infringement of Husky's patents." I take this to be an *ex post facto* rationalization for not doing anything earlier when Mr. Galt and Mr. MacDonald believed that Athena was misusing Husky confidential information.

(iv) On his cross-examination it was put to Mr. Schad that at no point before the May 26, 2011 meeting did he tell Husky that he was intending to and would compete with Husky. His response was that he did not think so. This question was put to Mr. Schad at the end of a long day for him and he was obviously tired with little memory at that stage. Just before then he could not recall whether he said things at meetings. Mr. Schad's memory, or lack of it, did not permit him in one short question to recall all of his discussions with Mr. Galt or Mr. MacDonald and, like most of his testimony at the trial, I hesitate to put much reliance on it. In any event, it is clear that Mr. Schad had discussed an exclusive possibility with Mr. Galt on February 25, 2011 but told him that it would require a bigger commitment from Husky.

(v) Mr. Galt said in his affidavit that he believed that what Mr. Schad was saying at their meeting of February 25, 2011 was a negotiating tactic and that Mr. Schad was overstating what he could do in order to get Mr. Galt to enter into negotiations. Mr. Schad acknowledges that the things he told Mr. Galt at the meeting were to get some momentum going in negotiations with Husky. However, when Mr. Galt later learned from Mr. Chiaia on May 11, 2011 that Mr. Schad had been having discussions with Mr. Yu, he had to understand that what Mr. Schad was telling him was no mere bluff.

(vi) In discussing the work requested by him in early May, 2011 from Mr. Smith, Husky's non-lawyer internal patent agent, Mr. Galt said in his affidavit that it did not occur to him that Mr. Schad would assert a right to market his machine without Husky, so he was not concerned with legal claims or positions and gave no thought to such matters. I find that difficult to accept. The possibility of a non-exclusive arrangement between Athena and Husky was openly discussed by Mr. Schad with Mr. Galt, as mentioned in Mr. Galt's email of March 3, 2011 to Mr. MacDonald. Moreover, between May 11, 2011, the date Mr. Galt learned of the discussions between Mr. Schad and Mr. Yu, and May 26, 2011, there are twelve documents listed on schedule B to the affidavit of documents of Husky that are claimed to be covered by solicitor/client privilege. One is a patent analysis by Mr. Smith. The others are internal emails within Husky including

Messrs. Galt and MacDonald, correspondence from outside counsel to Husky and a "Preparation Document for Athena Meeting on May 26, 2011" dated May 25, 2011. Clearly legal advice on relevant issues was dealt with by Mr. Galt and Mr. MacDonald before they went to the May 26, 2011 meeting, and I give no credit to Mr. Galt's testimony that he gave no thought to legal claims or positions before the meeting.

(vii) Mr. Galt never committed Husky to any arrangement with Athena. It was always stated by Mr. Galt that they would first have to see a working prototype of the Athena machine and a business case that made sense to Husky before making any decision. They knew that Mr. Schad had built a large facility, hired dozens of people to develop injection molding machines, including experienced engineers and had been working on the development of new Athena machines for three years. They would know that it would make no sense for Mr. Schad to simply shut down Athena if no deal could be made with Husky.

(viii) Mr. MacDonald conceded on cross-examination that he had no expectation that Athena would simply shut its doors and walk away if Athena and Husky failed to reach mutually satisfactory commercial arrangements. As early as July 17, 2009 when Mr. Galt advised Mr. Munk of Onex in an email that Mr. Schad was hiring design engineers with the purpose of developing a world-class general machine platform with the primary object of selling it to Husky, he said to Mr. Munk that if Husky was not interested, he suspected that Mr. Schad would approach other manufacturers or manufacture the product himself, which would bring into question Mr. Schad's non-compete agreement at that time.[3] This statement of Mr. Galt in July 2009 is contrary to his assertion in his affidavit that it did not occur to him that Mr. Schad would assert a right to market his machine without Husky. It is also contrary to his discussion with Mr. Schad on February 11, 2011 in which Mr. Galt discussed openly with Mr. Schad the fact that Mr. Schad working to market his product with others or on his own would represent a direct competitive position and that Husky's relationship with him would be as it would be with a competitor. I do not accept that Mr. Galt thought that Mr. Schad's statements that day to him were merely a negotiating tactic. Mr. Galt did not state that at all in his email shortly afterwards to Mr. MacDonald.

(ix) While it is quite unclear what exactly Messrs. Galt and MacDonald saw on May 26, 2011 with the name Mold Masters on it, and quite unclear whether it was hooked up in any way to the Athena machine they saw that day, I accept that they saw the name Mold Masters on a HMI that day. In spite of Mr. Galt's contrary

> assertions or belief expressed in his affidavit, I cannot accept that at that stage Mold Masters had been provided any information regarding the Athena machine. It appears that a Mold Masters machine had been lent to Athena at that stage and no order to purchase one had yet been given. In his letter of July 19, 2011 to Mr. Schad, Mr. Galt put it that Mr. Schad "may have also disclosed Husky's technology with at least one of our competitors given your recent work with and incorporation of Mold-Masters technology in the Athena machine". I do not see the fact that they saw Mold Masters insignia that day, indicating some potential or actual business between Athena and Mold Masters, as being something that would start the limitations clock running from that date. They already believed before the meeting that Husky technology had been incorporated into the Athena machine and they had been told of the dealings of Mr. Schad with Mr. Yu.

110 Both Mr. Galt and Mr. MacDonald testified that one of the things that gave them concern at the meeting of May 26, 2012 was seeing Mr. Sicilia, a former employee, working at Athena. Mr. Galt in his affidavit said that he was concerned that Rob Sicilia was now working for Mr. Schad on his machine development because after leaving Husky, Mr. Sicilia had developed a reputation as a person who could provide Husky-level expertise on Husky molds to Husky competitors. Mr. MacDonald in his affidavit expressed concern with seeing Mr. Sicilia there because during his time at Husky Mr. Sicilia had been a lead designer on some of Husky's most important mold and hot runner products and thus he knew that Mr. Sicilia knew a great deal of Husky confidential information in those areas.

111 I find this concern regarding Mr. Sicilia a little hard to credit. Mr. Sicilia had not worked at Husky for five years. Athena was not developing molds for injection molding machines and both Mr. Galt and Mr. MacDonald knew that. Mr. Sicilia had been working as a consultant for competitors of Husky in the industry for several years before he joined Athena, without any complaints or concerns from Husky. He had not retained any documents from his time at Husky and he had played no part in Husky's LEAP project. Both Mr. Galt and Mr. MacDonald already believed that Athena had used Husky confidential information in developing its own prototype machine. Even if they believed that Mr. Sicilia would have relevant Husky confidential information, that would have just meant in their eyes one more way that Husky confidential information might be accessed by Athena. It could not affect the running of the limitation period.

112 Husky has contended in its written submissions that Mr. Schad and Athena engaged in fraudulent concealment from Husky of the material facts that form the basis of the claims against them. Even on the broad view of what fraudulent concealment means for limitations purposes, I cannot, for the reasons already given, find that Mr. Schad or anyone else at Athena took steps to conceal what Athena was doing.

113 From what Husky had seen and been told, it was aware of the facts necessary for it to commence the action, as I have held. This is not a case in which Husky only learned after the

limitation period had expired of facts giving it a cause of action. It would be in such a situation that the doctrine of fraudulent concealment might apply. Here the wrong was known to Husky.

114 Moreover, even if the doctrine of fraudulent concealment were to apply, Mr. Schad stated on more than one occasion during the settlement discussion process that Athena had not used Husky confidential information or breached Husky patents. This however is what Mr. Schad believed then and still believes, and a difference with Husky as to whether he was or was not correct in his assertions does not mean he was concealing things. He did not tell Husky during the settlement discussion process that Athena personnel went to Niigon and looked at the injection molding machines that had been placed there by Husky, but he did not take any active steps to conceal that. His belief was, and still is, that nothing that was used by Athena in that process was confidential to Husky or in breach of its patents. I cannot find that his actions, for which Athena would be bound, were unconscionable.

115 It is contended that it is only during the process of this litigation and the actions of Athena personnel attending at Niigon to look at various Husky machines that Husky learned of these activities at Niigon. I do not see that as providing any answer to the limitations defence. Discovery of a new fact that might help a plaintiff's case does not restart the limitation period. See *Investment Administration Solution Inc. v. Silver Gold Glatt & Grosman LLP*, 2011 ONCA 658 at para. 15. A claimant only has to know enough material facts on which to base a legal allegation and need not know the details of the wrongdoer's conduct or how the wrongdoer caused the loss. The question of "how it happened" will be revealed through the legal proceeding. See *Beaton v. Scotia iTrade*, 2012 ONSC 7063 at para. 13. Certainty of a defendant's responsibility is not required for the limitation period to commence. See *Kowal v. Shyiak*, 2012 ONCA 512 at para. 18. See also *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 at paras. 59 and 60, aff'd 2013 ONCA 474.

116 On my view of the evidence, and I so find, the claims on which this action is based against Athena and Mr. Schad were discovered more than two years before the action was commenced and Husky is not protected by the doctrine of fraudulent concealment.

117 The one exception to this finding is the claim for breach by Mr. Schad of his non-competition and non-solicitation obligations. On the view I take of these claims, there is no evidence that Husky knew or ought to have known of a breach of them more than two years before the statement of claim was issued.

B. Was there a continuing breach?

118 This issue was not raised by either party in their pleadings or during the trial or in their extensive closing submissions filed some weeks after the close of evidence. The issue was raised from the bench during closing oral submissions. Relatively brief oral argument by both parties was made in response.

119 I have given consideration to whether I should deal with this issue of a continuing breach and have concluded that I should not. The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. See *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60 and 61and *Bulut v. Carter*, 2014 ONCA 424, at para. 12..

120 This is not a mere technicality in this case. Whether any particular breach was a continuing breach is not an easy matter. The claims in this case are not just for breach of confidentiality but also for other causes arising out of the alleged breaches, including breach of fiduciary duty, inducing breach of contract, unlawful interference with economic interests, knowing assistance and vicarious liability. Without pleadings on an assertion of a continuing breach, evidence directed to the issue and full argument, it is very difficult for a judge to properly and fully consider the issue.

C. Conclusion of the limitations defence

121 The claims against Athena, Mr. Schad and his numbered company other than the claims for breach of Mr. Schad's non-competition and non-solicitation obligations should be dismissed as being statute barred under the *Limitations Act, 2002.*

Settlement discussions

122 After the meeting of May 26, 2011 at which there was a discussion about the concerns expressed by Mr. Galt and Mr. MacDonald that Athena had used Husky confidential information, Husky and Athena representatives conducted a series of meetings to enable Husky to review the Athena A150 machine prototype machines and to attempt to resolve the concerns of Husky. Athena says that during the discussions all but two of the Husky complaints were resolved by agreement and that it is not open to Husky to raise these resolved concerns. Husky says that the discussions were without prejudice and that no concluded agreement was reached as agreement had to be reached on all issues before there was a concluded agreement and that the agreement had to be put to paper, which never occurred.

123 It is clear that at the meeting of May 26, 2011 Mr. Schad was upset at the allegations made to him that day and he asked for particulars of what it was that they were alleging. At the meeting, Mr. Galt promised to compile a list of specific examples of the confidential information owned by Husky that was alleged to have been used in the Athena machines and Mr. Schad wrote to Mr. Galt on June 2, 2011 about that.

124 On June 16, 2011 Mr. Galt replied with a formal letter that included provisions of the Management Services Agreement made by Mr. Schad with Husky in 2003. He included what he said was a partial list of Husky confidential information that might be at issue. He said he looked forward to Mr. Schad and Athena complying with Mr. Schad's obligations to Husky and that his

goal was to work together to avoid potential sources of conflict.

125 There was further correspondence. In a letter of July 19, 2011 Mr. Galt proposed that to avoid litigation, Husky engineers be given access to Athena's machines. He stated:

> Robert, please understand that we do not wish to become embroiled in litigation with Husky's founder. However, we do have an obligation to Husky's new owners and shareholders to fully protect our technology and intellectual property and will do so to the fullest extent necessary. As a suggestion to attempt to avoid the inevitable legal battle, perhaps a way forward is for Athena to provide full disclosure of the Athena concepts and execution to a small group of Husky's engineers so that we may fully identify areas of concern to us.

126 There followed further correspondence, including a letter from U.S. attorneys to Mr. Schad threatening litigation and responding replies from Athena's Canadian lawyers. On October 26, 2011 Mr. Galt wrote to Mr. Schad and suggested a meeting at which he would provide his recommendation as to how they might resolve the conflict. On November 11, 2011 Mr. Schad wrote to Mr. Galt saying he was open to the suggestion of a meeting and said that the discussions would of course be on a without prejudice basis.

127 On November 30, 2011 Mr. Schad and Mr. Galt met at Athena to discuss ways to resolve their escalating dispute in a non-litigious manner. Mr. Galt's discussion note for the meeting contained discussion regarding the pitfalls of litigation for both sides. Mr. Galt proposed going back to an original idea Mr. Schad had earlier suggested of a clearing process consisting of multi-disciplinary teams from Husky and Athena reviewing and discussing the use of any technology that might be a concern for Husky. Alternatively, or as part of the clearing process, Husky would consider providing a licence to Athena for the general purpose market for any concern that could not be resolved.

128 In a letter of December 9, 2011, Mr. Schad proposed a process to resolve the dispute between the parties. He stated as a pre-condition that the process would be comprehensive and that neither party would later raise concerns that could reasonably have been raised at the outset. He stated that to encourage full and open participation, nothing said by a party in the process would be later used against the party in any proceeding. He proposed a four-stage process in which: (i) two Husky engineers would visit Athena and be provided with full information including access to an Athena prototype machine; (ii) Husky would completely and comprehensively identify all concerns regarding Husky confidential information; (iii) Athena would respond to the Husky concerns; and (iv) they would meet together to resolve the issues.

129 Mr. Galt replied by letter of December 16, 2011 basically agreeing to Mr. Schad's proposal with some clarification. He stated that after the review process, he was hopeful that they could come to a mutual understanding on any issues of concern without the need for litigation.

130 There is no doubt that the discussions that then took place were an attempt to settle issues without the need for litigation and that they were privileged. The issue therefore is whether any settlement was reached, which if the case permits evidence of any agreement reached during the settlement discussions.

131 As agreed between the parties, Robert Domodossola and Roman Pirog, two senior engineers from Husky who were both heavily involved in the LEAP project, visited Athena on January 17, 2012 to inspect Athena's technology. During this meeting Athena disclosed a significant amount of its technical information to them and gave them access to Athena's three prototype machines (Machine 1000, Machine 1001 and Machine 1002). They were also given a detailed presentation respecting Athena's intellectual property, and were permitted to ask whatever questions they wanted of Mr. Schad and other Athena engineers and employees.

132 On February 12, 2012 Mr. Domodossola wrote to Mr. Schad with an initial list of concerns Husky had based on the visit he had had on January 17, 2012. In a telephone call with Mr. Schad, Mr. Domodossola requested that Athena provide further information in a second visit, which Mr. Schad agreed to in a letter of February 22, 2012 in which he asked for a complete list of concerns as had been agreed would be the procedure. Mr. Domodossola on cross-examination said that he and Mr. Pirog went back to Athena on February 27, 2012 not to obtain more information but to describe some areas of concern that they had. I do not accept that evidence. Mr. Schad's contemporaneous correspondence of February 22, 2012 is to the contrary. In any event, Mr. Domodossola and Mr. Pirog did go to Athena a second time and were given an opportunity to inspect Athena's machines and ask questions.

133 On March 12, 2012 Mr. Galt wrote to Mr. Schad and sent him two charts prepared by Husky lawyers listing Husky's areas of concern. One updated the chart that Mr. Domodossola has earlier sent to Mr. Schad that outlined areas of concern and the second dealt with patent infringement concerns[4]. Mr. Galt stated "Of course, while we have identified the confidential information and patents that are currently of concern, as the Athena design continues to develop and evolve, other Husky confidential information and/or patents may become relevant."

134 On April 13, 2012 Mr. Schad wrote to Mr. Galt. He stated that Mr. Galt's letter of March 12, 2012 completed the second step of the resolution procedure agreed to resolve issues as Husky had provided its comprehensive list of its concerns. The third step required Athena to provide its response to the Husky concerns, and Mr. Galt provided Athena's response in his letter and attachments to it.

135 Mr. Schad said in his letter that the next and final step in the resolution procedure was to meet to resolve any remaining issues and that the procedure contemplated that for such issues, agreements would be reached allowing each company, at the very least, to use the technology in dispute without fear of litigation.

136 Husky argues that this last sentence was an indication that Mr. Schad was requiring a written

agreement before there was any settlement of any issues at all. I do not read it that way. What Mr. Schad said was in conformity with Mr. Galt's discussion notes of November 30, 2011 in which he said that Husky would consider providing a licence to Athena for any concern that could not be resolved. Mr. Schad was saying that for issues that could not be agreed, *i.e.*, issues that remained in dispute as to whether Athena was misusing confidential information or breaching Husky patents, he was contemplating some agreement such as a licence that would permit Athena to use the technology without fear of litigation.

137 It was also consistent with Mr. Schad's letter of December 16, 2011 which outlined his proposed settlement process in which he stated that ideally some issues would be resolved just by the contents of the exchanged information. That appears to be what happened. Mr. Schad went on to say that with respect to disputed technology the cloud of litigation could be resolved by reaching agreements that would allow the technology to be used without fear of litigation. That was not a statement that all issues that were resolved needed to have a written formal agreement. He had stated just the opposite by stating that some issues will be resolved just by the contents of the exchanged information.

138 This distinction between resolved issues and unresolved issues makes sense. There would be no need for Athena to pay a licence fee or a royalty to Husky for technology used by Athena that was not Husky confidential technology. There would however be reason for such a licence fee or royalty to be paid by Athena to Husky if a dispute remained as to whether the technology was covered by a valid Husky patent or was confidential information of Husky, and in that case a written agreement would obviously be necessary.

139 Mr. Galt stated in his affidavit that at that stage (the fourth stage) he anticipated that they would meet and attempt to resolve all of the differences that had been discussed and that if they reached an agreement in principle, lawyers would draft the necessary documentation (such as licenses, releases, and the like) to effect the resolution they both sought as an alternative to litigation. While Mr. Galt may have anticipated that, there had been no agreement to that point that required a written signed agreement before anything was settled.

140 Mr. Galt met with Mr. Schad on May 3, 2012. In advance of the meeting, Mr. Galt had prepared a discussion note, a copy of which he gave to Mr. Schad at the meeting. The note included the following:

* We want to reiterate that we view this ongoing process as promoting an open dialog allowing us to work through the issues that have been raised so far as well as any future issues.

* We have dismissed many issues that were originally a concern:

* Ejector
    * combined feed throat and injection unit housing,
    * preloaded tiebar nut,
    * removable power pack cover,
        * overall two-platen machine architecture with lock and piston arrangement
        * hollow electric motor with internal piston,
        * platen actuator -- ball screw with in-line cylinder
    * mold stroke actuation with a ball screw

* You have agreed to avoid other areas:
    * use of turret block cooling,
        * V-type arrangement of rollers on tie-bar supports.

141 Shortly after the meeting Mr. Galt wrote to Mr. Schad on May 7, 2007 and reiterated that the areas set out in his memo of May 3, 2007 had been dismissed and were no longer a concern of Husky.

142 In his affidavit Mr. Galt stated that in referring to issues that had been dismissed, he meant that they required no further discussion at that point, and that Husky believed that they could be dealt with as part of an all-inclusive settlement, provided that the remaining issues could be resolved. I do not accept that evidence if it is suggested that there was an agreement that required a final "all-inclusive settlement". Mr. Galt's note does not state that at all. The word "dismissed," which is the word Mr. Galt used in his note, is a far cry from and more definite than what he asserted in his evidence as to what he believed.

143 Mr. Galt also asserted in his affidavit that he understood that he and Mr. Schad had agreed that it was essential that for the communications to end successfully, they would have to come to a complete and full resolution of all issues in dispute that would be documented in agreements between the parties. He also stated that he was not prepared to resolve issues on a piecemeal or "one off" basis but was focused on seeking a comprehensive resolution of all issues. I do not accept this evidence. There is no objective evidence apart from Mr. Galt's assertions that he and Mr. Schad had agreed to these things and the contemporaneous documentation is to the contrary.

144 Neither Mr. Schad's letter of December 9, 2011 in which he proposed the process to resolve the dispute nor Mr. Galt's responding letter of December 16, 2011 refer to a need for all issues to be resolved before anything is resolved or the need for a formal agreement to be in place for settled issues. To the contrary, as discussed, in his December 9, 2011 letter Mr. Schad stated that ideally some issues would be resolved just by the contents of the exchanged information.

145 Mr. Galt's note of May 3, 2012 and his letter of May 7, 2012 refer to issues being dismissed, with no qualification. In his letter of June 18, 2012 to Mr. Schad terminating the discussions, Mr. Galt stated:

> In our view the process was working well as evident from the large number of issues that were resolved and dismissed by Husky, a point that you favourably commented on at the outset of our last meeting.

146 This is an acknowledgment of Mr. Galt confirming that issues were resolved, as stated in his note that he gave to Mr. Schad at the outset of the meeting of May 3, 2012. It is contrary to the argument now made by Mr. Galt and Husky that nothing was settled or resolved because all issues were not settled or because there was no later formal agreement made after all of those issues were settled.

147 Mr. Galt did state in his note of May 3, 2012 that "We [I assume he meant he or Husky] have always viewed the process agreed to as an on-going and consultative in nature. Our process is a snapshot at a point in time and we suggest an ongoing dialogue as the Athena design continues to evolve." What he clearly meant by this note, as well as by his statement that he viewed this ongoing process as promoting an open dialog allowing the parties to work through the issues that have been raised so far as well as any future issues, was that known issues may have been resolved but, because of the ongoing development work of Athena, further issues might arise in the future.

148 To now argue that the agreed procedure was not to deal with all issues known at the time but to leave them open-ended and unresolved to some unstated time in the future is completely contrary to the procedure that was agreed. I can understand Mr. Galt saying that if Husky learned in the future of some other concern that it later had because of continuing ongoing development by Athena of its machines, Husky was not to be taken as precluding raising that later concern. But the agreed procedure was to deal with the known issues after the meetings with Athena in a timely manner.

149 Mr. Galt now says that at the meeting on May 3, 2012 he let Mr. Schad know that they needed to resolve all of the issues to Husky's satisfaction, including Athena providing Husky with additional information as requested and accounting for the fact that Athena would continue to design, before a successful closure to the process and settlement of the dispute could occur. He says that he does not recall Mr. Schad raising any objection to that. If said, and I have considerable doubt that it was said as that talk was not included in Mr. Galt's contemporaneous note, it does not mean that a settlement of some issues could not occur without any future possible issues arising from future Athena development, if any, being settled. It would mean at most that until all issues had been settled, there would be no closure to the settlement process.

150 There was no agreement that all known issues had to be resolved in order for an agreement to be reached regarding some of the issues. To be sure, both parties went into the process expressing a desire to resolve all issues. That is different from an agreement requiring all concerns of Husky to be agreed before any concern was agreed. Husky relies on a statement of Mr. Schad after Mr. Galt terminated the settlement discussion:

> We note that many of the issues raised by Husky have now been dismissed, and so the procedure and our discussions have been productive to some extent. But we did not enter into the resolution procedure (and disclose to Husky details of the Athena designs) with the goal of resolving only some of the issues. From the outset we indicated that the desired result was to be resolution of all issues. This makes sense, having agreed that it was in our mutual best interest to avoid litigation.
>
> Resolving some, but not all, of the issues fails to provide that assurance, as we have now seen. The last step of the procedure was to be the meeting we had on May 3rd, in which we were to settle any remaining unresolved concerns. That would not necessarily be easy, requiring flexibility and concessions on both sides, but would be necessary to successfully avoid litigation. Instead of going through this final, perhaps challenging exercise, Husky has resumed the seemingly endless exchange of letters. This was not the object of the process and quite frankly, is both disappointing and unacceptable to Athena.

151 This is no statement that without all issues being settled, none were. It would have made no sense for Mr. Schad or Athena to say that no issues raised by Husky could be settled without all issues being settled, and Mr. Schad did not say that. He was expressing his disappointment at Mr. Galt terminating discussions before the last issues that had been raised were discussed at another meeting that had been scheduled. Mr. Schad said that the procedure and discussions had been productive to some extent as many of the issues raised by Husky had now been dismissed, which is directly contrary to the notion that he was rejecting a settlement of those issues.

152 With respect to the two issues that Mr. Galt said in his note of May 3, 2012 were areas Athena had agreed to avoid, being issues surrounding Athena's turret block cooling and V-type arrangement of tie bar roller supports, the evidence of Mr. Schad which has not been contradicted is that Athena agreed to make design modifications to address Husky's concerns and Mr. Galt confirmed that if those changes were made, that would resolve those issues. Athena subsequently took steps to implement this agreement by modifying its machine designs.

153 In his affidavit of November 10, 2015 Mr. Galt asserts that the concerns that Husky raised during the settlement communications that were dismissed are not the same complaints that Husky makes in this action, which as noted above relate to collection and misuse of Husky business and technology information from Niigon.

154 To the extent that this argument is essentially that Husky did not know during the settlement discussions of the visits to Niigon by Athena personnel to look at the Husky machines placed at Niigon, but learned of the visits and related activity only during the discovery process in this action, I do not agree that the complaints now are different. The complaints are the same. *i.e.*, that the Athena machines contained features that were confidential to Husky. The two engineers from Husky visited Athena and reported on their findings after looking at the machines at Athena. The gravamen of the complaint of Husky is not that Athena personnel looked at the Husky machines that were at Niigon or did things such as reverse engineering or collecting data from the machines, but rather that such information was used in making the Athena machines that the Husky engineers saw. How that information was known to Athena, such as Mr. Schad taking it with him when he left Husky or Athena personnel learning it from the machines at Niigon does not change that.

155 I take Mr. Galt's note for the meeting of May 3, 2012 and his statement in his letter of June 18, 2012 as evidence of an agreement reached that the issues that Husky had dismissed and the two areas that Athena had agreed to avoid were no longer considered to be a misuse of Husky confidential information. I find that there was such an agreement and I do not think it open for Husky to now raise in this action a claim arising out of these settled issues. There was no agreement or mutual understanding that a resolution of any issue was to be deferred until all issues had been resolved or that a formal legal contract was a requirement for a binding agreement to avoid litigation over any issue. At most, there may have been an understanding or perhaps an expectation that if some concern was not resolved to Husky's satisfaction, there might be a licence agreement or some royalty arrangement regarding the unresolved issue that would permit Athena to use the disputed technology.

156 Moreover, apart from the agreement reached that issues were resolved and settled, Husky should be estopped from asserting a claim now on the settled issues.

157 Promissory estoppel is an equitable defence. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The representee must establish that in reliance on

the representation, he acted on it or some way changed his position. See *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13 per Sopinka J.

158 Mr. Galt's note of May 3, 2012 and his letter of June 18, 2012 stated that issues had been resolved, and Mr. Schad and Athena took it that way. Eight issues had been dismissed by Husky and two required Athena to change its design, which Athena did. These statements of Mr. Galt were representations made to Athena by Husky that the ten issues were over so far as Husky was concerned. The letter of June 18, 2012 terminating the discussions did not state in any way that those issues were outstanding or required some further formal agreement before they could be considered settled. Athena acted on the representations in commercializing its injection molding machines with these features and bringing them to market through SIPA.

159 Husky argues that during the settlement process, Athena, and in particular Mr. Schad, made statements that are now known to be false, and that if Mr. Galt had known then what he now knows, the settlement discussions would have ended sooner than they had. In particular it is said that it was never disclosed to Husky that Athena personnel attended Niigon and obtained information from machines at Niigon that had been placed there by Husky. I have considerable difficulty with this argument. I view it as *ex post facto* argument not based on any contemporaneous record.

160 There is a complete difference of opinion between Husky and Athena whether Athena used Husky confidential information in developing its injection molding machines. Athena certainly had personnel attend at Niigon and obtained information from the machines there. Athena has taken the position that most of the machines there, being commercially available, did not contain confidential information. Regarding the LEAP machines, Athena has taken the position that they did not make use of information obtained from these machines but were benchmarking to obtain data. There is no evidence that in taking these positions Athena does not believe them to be true.

161 Moreover, Mr. Galt in a subsequent affidavit dealing with the settlement discussions asserted that acceptance of answers to some concerns that had been raised by Husky were based on a belief that Mr. Schad was being truthful in the settlement process. Mr. Galt stated that during the process to attempt settlement, Husky was satisfied with some of the responses that Athena provided to the issues raised based on the information and representations Athena made that it did not use Husky confidential information and that its development efforts had been entirely independent, and that acceptance of those representations was predicated on the belief that Mr. Schad was being completely open with Husky regarding the details and nature of his work. I take this assertion with a grain of salt and as unsubstantiated.

162 Mr. Galt's evidence is that things changed dramatically for him and Husky at the meeting of May 26, 2011. In his words, the world changed from his perspective. He was alarmed that Mr. Schad was off-side his agreements with Husky and told him so. He was concerned that Mr. Schad had breached his obligations to Husky and would continue to do so if unchecked. In spite of Mr. Schad's statements that he was not acting contrary to the agreements, Mr. Galt was not prepared to

accept that. They discussed having engineers from Husky review the issue in more detail. The settlement process ultimately agreed involved two engineers from Husky going to Athena twice to review the Athena prototype machines and obtain information. It was their review of the situation that led to the decision of Husky to dismiss concerns that they had.

163 In short, there is no contemporaneous evidence that Mr. Galt was prepared to take Mr. Schad's word for much if anything on this issue. I have considerable difficulty with Mr. Galt's general assertion that statements of Mr. Schad during the review process in any way led to Husky dismissing the concerns that it did. It was Mr. Domodossola of Husky, the senior Husky engineer who was involved in the review process, who had discussions with Mr. Schad when he went to Athena twice during that review process. Mr. Domodossola gave very little evidence of the review process other than what he saw in the Athena prototype machines that he saw when he visited Athena. He and Mr. Pirog provided a technical report of what they learned to Husky's lawyers over which privilege has been asserted. He gave no evidence of statements made to him by Mr. Schad during that process.

164 In conclusion, so far as Husky confidential information is concerned, there were two unresolved issues that remained a concern for Husky, one being with respect to a servo-driven gear pump and the second being Athena's use of through holes in the base for a safety drop bar. It is clear that those issues were not settled and no licence or other agreement was made regarding them. The settlement process does not prevent Husky from pursuing a claim on these two issues. The other issues identified by Husky in that process were settled and Husky is not entitled to make any claim in this action regarding them.

Mr. Schad's contractual obligation of confidentiality

165 Mr. Schad's obligations to Husky were governed by two contracts: (i) a Management Services Agreement (the "MSA") dated August 1, 2003 between Husky and Mr. Schad's personal services corporation, the Defendant 1297607 Alberta ULC (formerly 824401 Alberta Inc.); and (ii) an Employment Agreement dated August 2003 between Mr. Schad and 1297607 Alberta ULC. Under the Employment Agreement, Mr. Schad agreed to perform his duties and responsibilities required by his personal services corporation to perform the MSA. Thus Mr. Schad was bound to comply with the MSA.

166 The MSA contained provisions protecting Husky's Confidential Information (Article 8) and imposing on Mr. Schad in his capacity as President and CEO non-competition obligations of five years in duration from the end of the term of the agreement (Article 9). With regard to the date when the non-competition obligation of Mr. Schad terminated, Husky's position is that Mr. Schad's contractual non-compete obligation did not expire until December 13, 2012. Mr. Schad's position is that it terminated on September 22, 2010. Husky has agreed for purposes of this action to treat Mr. Schad's obligations under that non-competition covenant as coming to an end on September 22, 2010.

167 In the MSA, it was agreed that during its term and thereafter Mr. Schad would not disclose or make use of confidential information of Husky. Article 8.1 provided:

> Accordingly, [Albertaco] hereby agrees that both during the Term and thereafter neither [Albertaco] nor the Executive will directly or indirectly, disclose (except as required by law) to any person or in any way make use of (other than for the benefit of the Corporation), in any manner, any of the Confidential Information.

168 Confidential Information was a defined term. It covered a wide variety of information acquired by Mr. Schad while he was the President and CEO of Husky including product design and development. It excluded information that was or became public information. In particular, Article 1.1(i) provided in part:

> (i) "**Confidential Information**" means all of the following materials and information (whether or not reduced to writing and whether or not patentable or protectable by copyright) which the Executive receives, received access to, conceived or developed, in whole or in part, directly or indirectly, in connection with the Executive's position with the Corporation or in the course of the Executive performing the Executive Services for the Corporation or through the use of any of the Corporation's facilities or resources:
>
> ...
>
> (ii) discoveries, concepts and ideas relating to the Business including, without limitation, the nature and results of product design and development activities, formulas, inventions, computer software, copyright, patents, patent applications, technology, techniques, know-how, designs, drawings and writings;
>
> (iii) all other materials or information related to the Business which are not generally known to others engaged in similar businesses; and
>
> (iv) all ideas which are derived from or related to the Executive's access to or knowledge of any of the above materials and information;
>
> except that the Confidential Information shall not include information which is or becomes publicly available without a breach of:

(v) this Agreement;

(vi) any other agreement or instrument to which the Corporation is a party or a beneficiary;

(vii) any duty owed to the Corporation by the Executive or any other person;

169 The confidentiality obligations of Mr. Schad under article 8.1 to protect confidential information acquired by him while he was President and CEO of Husky were continuing obligations after he left Husky and this was confirmed in the Termination Agreement signed when he left Husky.

170 Much of the complaint of Husky is that Athena had access to machines at Niigon that were not prototypes but were commercially available and sold to companies for use in making plastic parts. Any information that Mr. Schad first learned from Athena employees accessing these machines at Niigon would not be covered by the MSA as it would not be information received or developed by Mr. Schad as the President and CEO of Husky.

171 Assuming information used by Athena from those machines once they were at Niigon was confidential information acquired by Mr. Schad while he was the President and CEO of Husky, and that Mr. Schad could be said to have disclosed or made use of such confidential information at Athena, the issue as to whether that could a breach of the MSA would depend on whether that information was or became publicly available.

172 The evidence of all witnesses was that competitors of Husky could and did have access to such commercially available machines at companies that had bought them from Husky and were able to do all kinds of benchmarking for their own purposes. Husky did the same thing with machines manufactured by its competitors. Mr. Galt agreed on cross-examination that Husky's competitors had access to Husky's commercially available machines literally around the world and could measure, inspect, test and disassemble them.

173 I accept the evidence that information concerning commercialized machines such as those at Niigon was available from a wide variety of sources, including patent applications and issued patents, the internet trade shows and third party molding facilities and by purchasing, leasing or accessing the machines of other manufacturers. I accept the opinion of Drs. Urbanek and Osswald, the engineering experts called by Husky, that information from commercially available Husky machines is not confidential and is public in nature. That opinion was essentially confirmed by Dr. Wobbe, the engineering expert called by Athena, who stated in his report that it was hidden know-how regarding the LEAP machines taken from Husky that enabled Athena to design its A150 Machine. However he clarified the term hidden know-how by stating that anything that can be felt, measured and seen and that can be analyzed physically and chemically from publicly available

products is not hidden know-how. That would apply to the commercially available machines of Husky that were leased or sold to Niigon. Husky did not adduce any evidence to establish that there was anything special or different about the commercially available machines at Niigon compared to the same models of its commercialized machines sold elsewhere in Canada and throughout the world.

174 I find that the information and technology embodied in such commercially available machines at Niigon was information which was publicly available and not confidential information within the meaning of the MSA.

175 The two HyPet 140 LEAP prototype machines of Husky that were at the Niigon premises for beta testing were different. They were not publicly available. There is a considerable difference of evidence as to whether their design or components were derived from publicly available information. I will deal with this evidence when required. However, if the information regarding the various components or the design of the LEAP machines was not publicly available, and was acquired by Mr. Schad while he was the President and CEO of Husky, and if Mr. Schad could be said to have disclosed or made use of the information at Athena, that in my view would constitute a breach of his obligations under the MSA.

Niigon confidentiality obligations to Husky

176 On July 17, 2000 Husky and Niigon entered into an Equipment Agreement and a Support and Consulting Agreement. Mr. Schad signed the agreements for Husky as its President and CEO and for Niigon as a director.

177 The Equipment Agreement provided for the loan of four Husky injection molding machines for 10 years, an option to purchase up to six Husky injection molding machines from 2002 to 2007 at Husky's factory cost, and to purchase a further eight injection molding machines at market prices. There was no confidentiality provision in the Equipment Agreement.

178 The Support and Consulting Agreement provided for the provision of support and consulting services by Husky to Niigon free of charge including assistance in the construction of Niigon's plant, hiring employees, setting up its equipment and systems, preparation of business plans and other matters. It was agreed that Husky would assist Niigon to understand Husky's method of carrying on business so that Niigon might implement similar methods and that as Niigon's operations developed, Husky might permit Niigon to use certain of Husky's intellectual property on mutually agreeable terms. The term of the agreement was to March 31, 2011.

179 The Support and Consulting Agreement provided that if during its term either party provided the other with confidential information or materials, the recipient would enter into a confidentiality agreement. In fact, the confidentiality agreement was signed by both Husky and Niigon on the same day as the Support and Consulting Agreement on July 17, 2000. It covered all information to be provided under the Support and Consulting Agreement but excluded information that was publicly

available at the time it was given to the other party or became publicly available thereafter.

180 I do not construe the confidentiality agreement under the Support and Consulting Agreement as covering the Husky machines being supplied to Niigon under the Equipment Agreement signed on the same day. It covered "confidential information or materials", not equipment, and was to be signed if during its term such confidential information or materials were provided. The Husky machines that were to be loaned under the Equipment Agreement were not an "if", but a contemplated certainty. Moreover, the Husky machines being supplied under the Equipment Agreement were publicly available as they were sold by Husky into the open market and thus would be excluded from the confidentiality provision in the Support and Consulting Agreement. The confidentiality provision in that agreement would cover things like Husky intellectual property if it were provided to Niigon so long as that intellectual property had not been publicly disclosed.

181 On September 27, 2007 a new Equipment and Support Agreement (the "September 2007 Agreement") was made between Husky and Niigon. Husky says that it is the governing agreement that determines the rights and obligations of Husky and Niigon in this action.

182 The September 2007 Agreement to some extent reads like a social treatise rather than a legal agreement.[5] It was mainly drafted by Peter Kendall who is not a lawyer and who at the time was the chairman of the board of Niigon and the executive director of the Schad Foundation, one of Mr. Schad's charitable endeavours. No external lawyers were involved in its drafting, although Mr. Dirk Schimm, the head of corporate affairs for Husky and a lawyer, reviewed it. While it is not a typical legal agreement, it does contain commercial terms and I think it safe to use the principles of contractual interpretation of commercial agreements in construing the confidentiality provision contained in it.

183 Winkler C.J.O. articulated the test for construing a commercial contract in *Salah v. Timothy's Coffees of the World Inc.* (2010), 74 B.L.R. (4th) 161 as follows:

> **16** The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

184 In *Kentucky Fried Chicken v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.) Goudge J.A. stated the following regarding the interpretation of a commercial agreement at para. 27:

> Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. [*City of Toronto v. W.H. Hotel Ltd*. (1966), 56 D.L.R. (2d) 539 at 548 (S.C.C.)]. Rather, the document should be construed in accordance with sound commercial principles and good business sense; [*Scanlon v. Castlepoint Development Corporation et al.* (1992), 11 O.R. (3d) 744 at 770 (Ont.C.A.)]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

185 I take the principles in *Kentucky Fried Chicken* and in *Salah*, the latter adopted by Cronk J.A. in *Downey v. Ecore International Inc.*, 2012 ONCA 480 and by Juriansz J.A. in *Ariston Realty Corp. v. Elcarim Inc.*, 2014 ONCA 737, as the applicable principles governing this case. See also *Unique Broadband Systems Inc. (Re)*, 2014 ONCA 538 at para. 88.[6]

186 The factual matrix of the contract is to be considered. What may be considered was expressed in *Kentucky Fried Chicken* as follows:

> **25** ...While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In the famous passage in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 at 995-96 (H.L.) Lord Wilberforce said this:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> **26** The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the court "... to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry

> into the contract." *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.,* [1980] 1 S.C.R. 888 at 901.

187 More recently, Rothstein J. in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 referred to the use of surrounding circumstances and cautioned as to the extent they can be considered:

> **58** The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, [2011] M.J. No. 311 at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

188 It is clear that the factual matrix that can be considered may not include evidence of the subjective intent of a party or what a party believed a contract to mean. See *Sattva*, *supra*, at para. 59. It may also not include evidence of negotiations or create an ambiguity where none exists in an agreement. See also *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne* (2012), 115 O.R. (3d) 287 and Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis, 2012), at pp. 27 and 31.

189 Two things led to the September 2007 Agreement. One was that Mr. Schad for some time had been contemplating leaving Husky and selling it and he wanted to ensure that Husky would continue to support Niigon after he left Husky. The day after the agreement was signed Husky announced that Onex had agreed to purchase Husky.

190 The other was that Husky was developing its prototype LEAP machines and was contemplating using the Niigon facilities to beta test them. The September 2007 Agreement contained provisions dealing with the LEAP machines at Niigon.

191 The September 2007 Agreement contained a confidentiality provision that is relied on by Husky. The genesis of this provision was in a proposal for a new agreement between Husky and Niigon received by Husky from Mr. Schad in September 2006. The proposal contemplated LEAP machines of Husky being beta tested at Niigon. It stated that Niigon was an ideal beta site for a variety of reasons, including "guaranteed confidentiality". A number of terms of a new agreement were contained in the proposal, including:

> **Confidentiality.** Niigon will keep all of Husky's business and technical information confidential. Niigon will exclusively use Husky injection molding machines.

192 The September 2007 Agreement in its final form was presented to the board of Husky by Mr. Galt and approved. Mr. Galt stated to the board that he believed that Niigon was a great cause for Husky to support and that the beta test site arrangement would be very beneficial to successfully launch the new machine, *i.e.*, the LEAP machine. He said that the cost to Husky was modest especially in light of the benefit Husky was receiving and as a small part of its charity budget.

193 The confidentiality provision in the September 2007 Agreement was changed from the September 2006 proposal to make it a mutual obligation of both Niigon and Husky and to contain an exclusivity clause. It provided:

> ***g) Confidentiality and Exclusivity*.** Niigon and Husky will keep each others (sic) business and technology confidential. During the term of the agreement, Niigon will exclusively use Husky injection molding machines.

194 Husky takes the position that this provision required Niigon to maintain confidentiality of not only the LEAP machines but also the commercially available Husky machines at Niigon and that it was a breach of the September 2007 Agreement to permit Athena personnel to have access to those commercially available machines.

195 In the context of what was occurring at Husky and Niigon at the time of the September 2007 Agreement, what was intended to be included by referring to the "business and technology" of Husky that Niigon was to keep confidential? Those words are very broad, but some things could not have been intended. For example, the "business" of Husky was known world-wide. It was the design, manufacture and sale of injection molding machines and molds. That could not have been meant to be included in what was to be kept confidential. A great deal of Husky technology was known world-wide, such as patent information, commercially sold machines and manuals for such machines, many of which were available on line. It would make no commercial sense for things known publically to be covered by the provision.

196 The 2002 Equipment Agreement under which injection molding machines were lent or sold to Niigon contained no confidentiality provision. The 2000 Support and Confidentiality Agreement did have one provision that covered information provided by Husky to Niigon but it excluded information that was or later became public. The September 2007 Agreement was not entirely clear on what would happen to the earlier agreements. There is a reference to "cancelling the original equipment loan agreement" under the heading "Costs to Husky" which was a reference to the 2000 Equipment Agreement. At the end of the September 2007 Agreement is the following provision:

> **k)** ***Existing Agreements***. Husky will be released from all obligations under the existing agreements with Niigon. Niigon will continue to have use of the three

loaned machines currently at Niigon for the balance of the original term.

197 Thus Husky was no longer required to provide support to Niigon under the terms of the 2000 Support and Consulting Agreement but rather under the September 2007 Agreement. A question arises as to whether Niigon was released from the confidentiality agreement provided for in the 2000 Support and Consulting Agreement which excluded information that was or later became public. In light of the provision in that confidentiality agreement that it covered all information to be provided under the 2000 Support and Consulting Agreement, once Husky was released from its obligations under that agreement, it presumably would not be providing information under it. In that case the confidentiality obligations of Niigon under that agreement would no longer apply.

198 Assuming Niigon was released from its obligations under the 2000 Support and Consulting Agreement, which excluded information that was or later became public, there is nothing in the surrounding circumstances at the time of the September 2007 Agreement that indicates the parties intended that the confidentiality obligations of Niigon were to change to include information that was or later became public. The evidence of Mr. Kendell was that at no time before entering into the September 2007 Agreement did Husky express concerns about the confidentiality of its commercially available injection molding machines or equipment. There is no evidence from Husky to the contrary and I accept it.

199 It is clear that it was the intention of Husky to use the Niigon facilities for beta testing of its LEAP machines that gave rise to the new confidentiality provision in the September 2007 Agreement. That is apparent from the proposal from Mr. Schad to Husky in September 2006. It was not the intention to continue to provide commercially available machines to Niigon that gave rise to that provision.

200 Mr. Galt stated in his affidavit that the guarantee of confidentiality and exclusivity was an essential element to Husky if it was to make Niigon part of its in-house testing and validation department and stated in his evidence in chief that the confidentiality and exclusivity provision in the September 2007 Agreement was important given that Husky was supplying equipment that was in a preproduction and development state. This evidence of Mr. Galt related to Husky's LEAP development and not to commercially available machines. On his cross-examination, Mr. Galt acknowledged that Husky's concern was not to shield under a veil of confidentiality information of Husky that was widely and publicly available. He also acknowledged that Husky's competitors had access to Husky's commercially available machines literally around the world and could measure, inspect, test and disassemble them. This evidence was consistent with there being no confidentiality provision in the 2000 Equipment Agreement under which the Husky commercially available machines had been provided to Niigon. It was also consistent with the confidentiality provisions in the 2000 Support and Consulting Agreement that excluded information that was or later became public.

201 This evidence of Mr. Galt was consistent with the evidence given by Mr. MacDonald on

cross-examination that information in the public domain was not confidential information and that Husky had no right to expect that Niigon was obliged to keep publicly available Husky information confidential.

202 This evidence of Mr. Galt related to common knowledge of the parties at the time of execution of the September 2007 Agreement and is an important part of the factual matrix or surrounding circumstances to be considered in construing the agreement.

203 It would have made no sense to have required Niigon to "keep confidential" information that was available to the public. I have found in dealing with Mr. Schad's confidentiality obligations that the information and technology embodied in the commercially available machines at Niigon was information which was publicly available and not confidential information. I interpret the September 2007 Agreement and the obligation of Niigon in clause g) to keep the information and technology of Husky confidential as excluding from that obligation any information and technology concerning the commercially available Husky machines at Niigon.

204 Clause g) did require technology about the LEAP machines that was not publicly available to be kept confidential by Niigon. What exactly that information was that was not publicly available has been a matter of considerable difference of opinion in the evidence.

Alleged breaches of confidence by Athena regarding Husky confidential information

205 I have held that the action against Athena, Mr. Schad and his numbered company should be dismissed as being statute-barred. I have also held that all but two issues were settled in the settlement discussions. I will however deal with some of the claims that Athena and/or Mr. Schad breached duties of confidentiality owned to Husky, particularly with respect to the allegations relating to the LEAP machines. I will also deal with the claims of Mr. Schad's disclosure and use of Husky information.

206 The elements of an action for breach of confidence are: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at para. 129.

207 I have held that the information and technology embodied in the commercially available machines at Niigon was information which was publicly available and that it was not confidential information within the meaning of the MSA to which Mr. Schad was bound and was not subject to the confidentiality obligations of Niigon under its agreement with Husky. Thus the action for breach of confidentiality by Husky is limited to claims with respect to the LEAP prototype machines. Contractual terms regarding confidentiality will negate any broader duty of confidence that may be imposed by the common law. See *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 36 per Binnie J. See also *Canadian Power Developers Group Inc. v. Calpine Power L.P.*, [2007] O.J. No. 3689 at paras. 17-18 per Wilton-Siegel J.

208 Athena was not a party to any agreement with Husky. Mr. Schad however was bound under his Management Services Agreement with Husky which provided that neither he nor his numbered company would directly or indirectly disclose to any person or in any way make use of, other than for the benefit of Husky, any of the confidential information as defined that he obtained while CEO and president of Husky. As owner and a director of Athena, the knowledge of Mr. Schad is the knowledge of Athena, and under the principle enunciated by Justice Binnie in *Cadbury Schweppes Inc.*, *supra*, at para. 19, equity will pursue confidential information that comes into the hands of a third party who receives it with knowledge that it was communicated in breach of confidence. Thus any breach by Mr. Schad of his obligations of confidentiality to Husky would be the responsibility of Athena as well and would make Athena subject to whatever remedy would be appropriate for breach of that obligation of confidentiality.

209 It is certainly not clear exactly what aspects of the LEAP development that Husky claims were confidential and misused by Athena. The statement of claim defines Husky Confidential Information as information related to, among other things, Husky's customers, suppliers, finances, marketing and development plans, technology, equipment, trade secrets, inventions, discoveries, designs, drawings, development activities, patents, patent applications, copyrights, know-how, writings, photographs, and techniques. It alleges misuse as follows:

> 52. The Husky Confidential Information that Schad and Athena have accessed and misused includes, without limitation, the following: control module software, LEAP system technology, servo-motor control strategies, use of "through holes" in parts of the molding equipment, tooling know-how, roller configuration for tie-bar support, and mold technologies. Additional particulars of the misuse are known to the defendants but not to Husky. They will be provided after discovery.

210 In response to a demand for particulars, Husky stated that its then known concerns related to the LEAP development. It stated:

> At this preliminary stage, the Husky confidential information that Husky is aware has been misused by your clients relates to the design and development of Husky's LEAP injection molding system, including the specific types of information referenced in paragraph 52 of Husky's Statement of Claim and information relating to the following aspects of the LEAP system:
>
> * the servo-driven gear pump system;
>
> * the control systems, including algorithms, logic, electronic control modules and software;

* the clamp lock system, including the use of two platens and the design of the tie bars;

* the ejection system;

* the hydraulic system;

* the machine base, including specific elements of the base design such as the height of the base and the use of through holes in the base for the drop bars;

* the PET post-mold cooling and part handling system; and

* operating and diagnostic data regarding the LEAP system.

211 There are no further pleadings or particulars that allege specific confidential information from Husky commercially available machines placed at Niigon that was misused by Athena or Mr. Schad.

212 Husky appears to have somewhat changed the focus of its closing argument from its pleading and is now relying not so much on particular aspects of the LEAP system which it claims Athena used, but rather that all of these aspects together were unique and confidential. In particular, it states:

> 115. Husky is not claiming that the mere idea of using a two-platen clamp, a bayonet clamp locking mechanism or a servo-motor driving a hydraulic gear pump on the LEAP prototypes is confidential and proprietary information. As the parties' machine experts (Drs. Wobbe, Urbanek and Osswald) all agreed, those basic components and physical features, taken individually and at a general level, were known in the industry. What was unique, innovative and confidential about the LEAP prototypes that Husky developed and placed at Niigon was the detailed design and implementation of each of the machines' subsystems (*e.g.*, injection unit, clamp unit, hydraulics, ejectors and base) and -- most importantly -- the way that all of those subsystems worked together. Drs. Wobbe, Urbanek and Osswald agreed that "[t]he combination and resulting performance of the physical features within the HY140 Beta Machines at Niigon were unique".

213 The report of Dr. Wobbe, the expert engineer called by Husky, did not express an opinion

that supports this argument of Husky. Rather he opined that Athena did not have the personnel and did not spend the time required to develop an injection molding machine such as the Athena A150 prototype machine that he looked at and that Athena developed its machine by copying features of the LEAP prototype from Husky's LEAP book and by access to the LEAP prototype machines at Niigon. His opinion was that Husky developed know-how about the machines that was not publicly available but contained in the LEAP book and accessed by Athena on the Husky LEAP machines at Niigon.

214 Dr. Wobbe did not do a detailed review of Athena's commercially available machines and testified that what Athena is doing with its machines was not relevant to his analysis. In his report, he only considered the A150 prototype design. He testified that he looked particularly at the Athena documents that related to the Athena prototype.

215 Dr. Wobbe did look to some extent at the later Athena A150 machines as he noted that the prototype A150 machine used a bayonet-style locking mechanism whereas the commercially available machine of Athena had changed to a split-nut mechanism. One of the outstanding patent concerns raised by Husky during the settlement process pertained to Athena's use of a bayonet locking mechanism. After that process came to an end, Athena made the decision to and did implement a "split-nut" locking mechanism on its machines in place of the bayonet locking mechanism. Athena made this design change in light of Husky's concerns and in order to avoid a confrontation with Husky going forward. Dr. Wobbe noted that the change was a negative one for the Athena machine as it added to the cycle time and had a higher cost.

216 Athena called two engineers, Drs. Urbanek and Osswald who filed a joint report. Their opinion was that there was little, if any, information of Husky at Niigon that would be considered confidential within the industry and that no feature of the LEAP machines at Niigon could properly be regarded as confidential. They opined that Athena's injection molding technology did not resemble the technology embedded in the LEAP machines and that the Athena machines did not appear to be derived from the LEAP machines or Husky's commercially available machines. The one exception was the use of through holes in the base as part of a safety locking mechanism which they opined was a design publicly available and not confidential. They also opined that Athena developed its machines independently.

217 At my direction, these experts met prior to the trial to determine what they could or could not agree upon. Several questions were developed by counsel. The experts added some questions. There was some agreement and some disagreement on various issues, all set out in a "meet and confer chart". Various facets of the machines such as the servo motor and hydraulic pump or the tie bars were listed as issues.

218 One issue was a statement that the combination and resulting performance of the physical features within the LEAP machines at Niigon were unique. The experts agreed on that statement. The statement did not go on and state that the uniqueness meant that the combination and resulting

performance were confidential. They did agree that the development process and expertise gained during the design of the LEAP beta machines can be confidential, but as explained by Dr. Wobbe, what he was talking about was knowledge gained from things like testing new components with higher risk, *i.e.*, know-how gained by Husky relating to the operation of the various parts of the machines.

219 Drs. Urbanek and Osswald in their report stated that by selecting a list of specific features on an injection molding machine, one could arrive at a unique combination of features for almost any machine. They noted that Athena's machines have different combinations of features than the LEAP machines, and thus represent another unique combination of features. They expressed the opinion, however, that creating a list of unique features does not make a machine innovative. They were not aware of any manufacturer in the industry obtaining patent protection in respect of an allegedly unique combination of features and noted that the United States Patent and Trademark Office rejected a patent application by Athena and took the position that assembling various known components in a particular combination was not patentable even if the particular combination did not exist previously.

220 A combination of known parts assembled in a particular way does not, merely because the specific combination was not done before, become eligible for intellectual property protection. For example, under patent law an aggregation of known elements is not patentable unless the combination of those elements results in a novel and unobvious advantage that is more than the sum of the known elements. See R.H. Barrigar, *Canadian Patent Act Annotated*, 2nd ed. (Aurora: Canada Law Book, 2008) at PA-28.11-12; *Domtar Ltd. v. McMillan Bloedel Packaging Ltd.* (1977), 33 C.P.R. (2d) 182 at 189-91 (F.C.T.D.), affirmed (1978), 41 C.P.R. (2d) 182 (F.C.A.).

221 Mr. Domodossola in his affidavit did say that the LEAP machine included innovative elements and that while other machines in the industry had some of those features, no other injection molding machine had or has a design and implementation of those features that is the same or similar to the LEAP design. He also stated that Husky's specific design and implementation of those features was unique, innovative, and significantly different from anything offered by the competition. To say, however, that other machines in the industry had some of the features in the LEAP prototype machine is contrary to the notion of the features being confidential, which is what Husky concedes in paragraph 115 of its argument. Mr. Domodossola did not say, however, as contended by Husky, that the implementation of those various features was confidential. While Mr. Domodossola used the word "innovative" in his affidavit in referring to the implementation of the various features, he did not give any reason or explanation why the implementation was innovative.

222 There is no independent evidence in this case that the combination of the features making up the LEAP prototype machines at Niigon was unobvious. The opinion of Drs. Urbanek and Osswald is that the combination was not innovative. I accept that opinion. I am not satisfied that there is cogent independent evidence that the combination of features was in itself innovative or, more importantly, confidential.

223 In short, I do not accept the argument made by Husky in paragraph 115 of its submissions that what was confidential about the LEAP prototypes that Husky developed and placed at Niigon was the way that all of those subsystems worked together. There is no evidence to support that argument. What was considered important, and what the experts generally discussed, were the various components of the LEAP prototypes and whether they were confidential to Husky and used by Athena. Dr. Wobbe considered that the know-how developed by Husky with respect to those components was confidential and was accessed and used by Athena. Drs. Urbanek and Osswald thought otherwise.

224 Further, to say that the LEAP prototype machines at Niigon contained know-how that was accessed and used by Athena personnel without specifying what that know-how was, or to say that what was confidential and used was the way all of the subsystems worked together without any more specificity, puts Athena in a difficult position to defend against those arguments. Athena is entitled to know with some precision what the information is that is said to be confidential and to have been used. Each case involving trade secrets or confidential information will depend on the unique circumstances of the case, but I agree with the comments of Justice Wedge in *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd.*, 2007 BCSC 143, in which she held in a pleadings motion that the plaintiff would be required to identify with particularity what was alleged to be confidential. She stated:

> 80. Nevertheless at trial Blue Line ... will be required to identify the information it says is confidential and establish the proprietary nature of that information. ...Blue Line will also be required to establish facts which prove that the Acquilini Defendants used the information for purposes of concluding the Investment Agreement, or facts from which that inference can reasonably be drawn.
>
> 82. By way of example, Blue Line may identify individual pieces of information which it says were confidential. Or, Blue Line may say an individual piece of information was not itself confidential, but that in combination with another piece, or other pieces, of information, it was confidential. Whatever the case, Blue Line must particularize the piece or pieces of information it alleges were confidential, or the combination of those pieces of information that rendered them confidential.

225 It is evident that it is important not just to plead with particularity, but at trial to prove the case with particularity. Husky particularized its claim in its pleading and in its reply to demand for particulars. But its argument that overall the combination of subsystems was innovative, confidential and used by Athena or that Athena accessed and used know-how developed by Husky without particularizing the matter is not sufficient to prove any misuse of confidential information.

Alleged misuse of Husky's LEAP information

226 The closing argument of Husky specifies particular LEAP information which it claims was used by Athena to its detriment, being (i) tie bars, (ii) ejector speed, (iii) safety drop bar, (iv) information relating to the LEAP hydraulic system sent to B&R, and Matthew Simpson's evidence. I will deal with each of these.

Tie bars

227 Tie bars are used in injection molding machines to guide the platens (plates) as they move horizontally. The platens hold the mold halves that are closed together by force and held while melted plastic is injected into the mold. The platens then open after the particular plastic piece has been made and cooled and the plastic piece is then ejected.

228 Tie bars have to be able to withstand the clamping force put on the platens. The larger the clamping force the larger the tie bar diameter since the diameter is dictated by the stress exerted on the tie bar. The lead engineer for Athena in designing the clamping unit, which includes the tie bars, was Mr. Carsten Link, an engineer with many years' experience at Engel Canada before joining Athena in 2008. Once the clamping force was decided on (*i.e.*, 150 tons for the A150 machine), the tie bar diameter was calculated based on a formula. Mr. Link knew from his past experience the allowable stress on a tie bar.

229 Mr. Link also checked Athena's tie bar diameter against other machines with various tonnages, including five machines manufactured by Engel, two by Netstal, and two by Husky (a HY140 (LEAP) and a 160 ton machine). The information for the two Husky machines was obtained at Niigon. The two Husky machines had a tie bar diameter of 85 millimetres, as did one of the Engel and one of the Netstal machines. Husky argues that the tie bar information from the two Husky machines was thus used by Athena in designing the Athena tie bars.

230 Athena's initial tie bar diameter was set at 85 mm but was later increased to 90 mm due to seal availability. Thus, the diameter chosen by Athena and the tonnage that the tie bars had to support were different from the Husky LEAP machine. Dr. Wobbe did not examine the current design of the A150 machine and was not able to say if Athena's commercially marketed machines incorporate confidential Husky information about the tie bars.

231 Drs. Urbanek and Osswald in their report opined that that there was no confidential information in the LEAP machines that Husky placed at Niigon and given that these were beta machines, they paid specific attention to information Athena may have used (as opposed to had access to) from that machine in its development efforts. With respect to the tie bar diameter, they opined that there was nothing confidential or special about the 85 mm tie bar diameter used by Husky on the LEAP prototype machine as it was available on commercially available machines, such as those other machines looked at by Athena, and that Athena did not derive any particular value from the tie bar diameter on the Husky LEAP machine. They stated that due to tonnage differences, the final tie bar design parameters of the Athena A150 machine are, and must be, different from the LEAP prototype machine design due to engineering fundamentals. Dr. Urbanek

on cross-examination stressed that to design a tie bar diameter is a very elementary engineering task. I accept their opinions. Athena's looking at tie bar diameters on other machines, including the Husky LEAP machine, was not making use of the information in the sense of having any impact on the Athena A150 machine.

Ejector speed

232 Beginning in early 2009 Athena began to design its ejector system, which is the system that ejects the part from the machine once it has been formed and cooled. From his past experience Mr. Link knew that typical ejector speeds were around 250 to 350 mm/s and Athena selected 250 mm/s as its initial ejector speed target. Beginning in July 2010, Athena began looking at designing a high force ejector for cap molding. Other than the initial design referred to above, very little work was done in connection with a high force ejector until March 2011. At that time, Athena began looking at designing a hydraulic boost ejector for PET applications. Athena looked at different ejector forces for its hydraulic boost and considered 19 tons, 15 tons and 28 tons of force. Athena settled on 28 tons which is comparable to the hydraulic ejector force used by both Husky and Netstal as shown in a 2005 Husky brochure for HyPet Systems and a Netstal brochure. Athena also considered the ejector speed to be used on its high force ejector. In doing so, Athena looked at ejector speeds on Husky's Hy140 (LEAP) and HyPet300 on April 21, 2011[7]. The LEAP machine had speeds of 250 mm/s on ejector extend and 220 mm/s on ejector retract. The HyPet300 machine had speeds of 350 mm/s on ejector extend and 300 mm/s on ejector retract. Athena initially decided to use 250 mm/s, which was the same speed used on Athena's standard ejector and within the range of speeds used on other machines, including Husky's machines.

233 However, after testing the performance of its earlier designs in the beginning of March 2012, Athena decided that its ejector system was not fast enough. As a result, Athena looked at the ejector speeds on other machines for benchmarking purposes to decide how much it should increase its ejector speed. In particular, Mr. Link looked into the ejector speed of the Husky HyPet 300 and HyPet 120 at Niigon obtained on March 23, 2012 (*i.e.*, non-LEAP machines) and noted that the ejector systems on these machines could reach speeds of 500 mm/s and 700 mm/s, respectively. Mr. Link also gathered information at the NPE show in early April 2012 from a representative of Arburg who told Mr. Link that their ejector system could be configured as fast as 500 mm/s. Based on these benchmark comparisons, Athena increased the speed of its ejector to 500 mm/s by changing its motor size, pulley ratio and ball screw pitch.

234 Husky argues that by looking at ejector speeds from the LEAP machine, Athena used that information to Husky's detriment. Drs. Urbanek and Osswald opined that the ejection speed of the LEAP machine was one of a number of data points considered by Athena in selecting its ejector speed and is not something that would be considered confidential or innovative within the industry. Nor would Athena have derived any particular value from this information. I accept that opinion. In the end, Athena used a much higher ejection speed than the LEAP ejection speed obtained from publically available information, including from Husky commercially available machines. Athena

did not make use of the LEAP information in the sense of it having any impact on the Athena A150 machine.

Safety drop bar

235 Injection molding machines must have a safety bar function, which is a mechanical safety mechanism to lock the moving platen in place, preventing it from moving in an uncontrolled way in case of a power loss or a machine shut down. After observing the configuration of the safety mechanism on one of the LEAP machines at Niigon, Athena adopted a substantially similar configuration. What is contested is whether what Athena copied was confidential.

236 Drs. Urbanek and Osswald in their report stated that Husky has used mechanical stops executed as pins entering drilled holes either on the ram or the machine base in an unprotected manner for some years such as the Husky Moduline E-Series Machine or "Quadloc". The holes in the base of the LEAP machine was disclosed in a LEAP patent application published on April 23, 2009 that was subsequently abandoned. They opined that the use of horizontal through holes as part of a locking mechanism as used on the LEAP machine is a common mechanical engineering design, as for example, used to lock a seat in place in the Volkswagen Beetle. They opined that the use of through holes in the base of the LEAP machine as a safety mechanism was not confidential or proprietary to Husky.

237 When the experts met, they agreed that the idea of a safety bar mechanism designed with holes is not new and is publically available as a non-protected Husky design. Drs. Urbanek and Osswald stated in the meet and confer chart that the safety drop bar on the LEAP machines was not confidential, because a safety drop bar mechanism with holes is now an unprotected feature that is common in other industries such as car seat rails and that the design on the LEAP machines was publicly disclosed in a patent application.

238 In the meet and confer chart, while Dr. Wobbe agreed that the idea of a safety bar mechanism designed with holes is not new and is publically available as a non-protected Husky design, he stated that the drop bar on the LEAP machine included confidential information such as tolerances shown in detailed workshop drawings and that Athena used this confidential information in the design of the A150 machine. Dr. Wobbe's evidence was that patent applications typically do not include know-how for the patented part that was developed by the patent holder and that such information can be obtained from detailed workshop drawings that illustrate special engineering know-how.

239 However, the drawing referred to by Dr. Wobbe in his evidence was not a workshop drawing showing any know-how and it contained no tolerances or other information that would be needed to manufacture this component. It was a "drawing package", a document type that the experts agreed was not confidential. Dr. Wobbe could not point to any workshop drawings of Husky that Athena had access to, and there is no evidence that Athena ever had any Husky workshop drawings.

240 In the circumstances, while it is undoubted that Athena, after observing the configuration of the safety mechanism on one of the LEAP machines at Niigon, adopted a substantially similar configuration, Athena did not use any confidential information to do that. What Athena observed was disclosed by Husky in its patent application. I accept the opinion of Drs. Urbanek and Osswald that Athena did not use any confidential information in the design of its safety bar mechanism.

Information Relatin*g *to LEAP Hydraulic System Sent To B&R

241 In 2009 Athena sent information to Bernecker & Rainer ("B&R"), taken from a servo motor and pump installed on the LEAP machine at Niigon. Husky claims this was a use of LEAP confidential information that was detrimental to it.

242 This particular saga starts in May, 2008 when Mr. Strohmaier of Athena was in contact with Bosch Rexroth (no connection to B&R), a supplier of hydraulic systems, about acquiring a pump for variable speed drive applications. He received information from Bosch Rexroth and decided to acquire one of their pumps (a PGH-3X pump). This was months before the first LEAP machine was sent to Niigon. On December 4, 2008 he visited Bosch Rexroth and discussed the pump. This was one day after the first LEAP machine was delivered to Niigon. Mr. Strohmaier testified that by that day he had not seen the LEAP machine and did not know what pump was used on it, evidence which he was not challenged on, and which I accept.

243 By January 7, 2009 Mr. Strohmaier had heard that the LEAP machine at Niigon was using a pump the same as the pump Athena was intending to use. He asked Mr. Kehrls, an Athena employee, for information regarding the LEAP machine including the servo motor RPS during injection hold, the pump model, hold pressure, hold time and the servo pump motor model and type. He said he needed this information in order to go ahead with the hydraulic design. The pump was a Bosch Rexroth pump out of the same series as the one that Athena had decided to use. The servo pump was a Baumueller pump of a type Athena initially considered using but later changed to another supplier.

244 On July 14, 2009 Mr. Strohmaier sent the information he had received six months earlier from Mr. Kehrls to Mr. Kastinger at B&R who was involved in supplying Athena with a control system. The control system is to coordinate machine sequences in the injection molding machine. It is software that is tied to the machine. B&R supplied Athena with the control unit. Mr. Strohmaier gave the following evidence:

THE COURT: Why was the information being sent to B&R?

THE WITNESS: The information was sent to B&R somewhat later because we

> had problems with the Husky machine, the HY140 at Niigon, and I didn't want -- I didn't want to run into the same problems. For that particular reason I asked specifically what kind of pressures they are running, like hold pressure 650 PSI on the document and the hold time of 3.5 seconds.
>
> THE COURT: I still don't understand. If there is a problem with the Husky machine at Niigon, why is that your concern and not Husky's concern?
>
> THE WITNESS: Because at this particular point in time we wanted to use the same pump motor assembly and I was afraid that we were running into the same problems. It was just to be proactive in order to sort out those problems before we decide and build that machine.

245 Husky asserts that Mr. Strohmaier's response is direct evidence of misuse, that his July 14, 2009 email to B&R is a concrete example of Athena taking information from one of the LEAP prototypes running at Niigon and using that information to advance Athena's development process. The hold time, hold pressure, pump model and motor model information from the LEAP machine was Husky's confidential information.

246 Dr. Wobbe testified that the information was useful to Husky. He testified that without information of hold pressure and hold time, Athena would need to develop the information and that needs time. In other words, it was an example of Athena developing its A150 machine sooner than if they had not had access to the LEAP machines at Niigon. When asked how useful the information would be in creating the control software, he said that he could not give a figure, stating:

> I cannot give you a figure now. It is useful because you can start with these things and you need more information to -- to design the controller, but at the beginning the servo-motor datas and the pump datas are very important, and viewed from that side, it is useful. But I cannot say it's 50 percent useful or whatever. It is useful, yes.

247 Athena says that the information of hold pressure and hold time was not Husky information. The hold pressure and hold time was obtained by Mr. Kehrls from the HMI (human machine interface, *i.e.*, the computer screen of the control system) and these numbers were set or inputted by the Niigon operator. Thus, the servo-motor RPM during injection hold is a derivative which is a result of the hold pressure and time that the operator sets. Mr. Kehrls testified that the settings came from the operator's experience in setting up molds.

248 Drs. Urbanek and Osswald testified that the hold time and the hold pressure will vary according to whatever part is being molded and that at best, the data sent to B&R was an example but that it could not be used in designing a control system as a control system has to be able to act

for whatever part is being molded. The input of the hold pressure and hold time is done by the machine operator depending on the particular part being molded but does not give an indication how to program the software.

249 I think it obvious that the hold time and hold pressure was sent by Mr. Strohmaier to B&R because it was thought that it would be useful in some way to Athena. As Mr. Strohmaier testified, they had earlier decided on using the same pump motor assembly that they later learned was on the LEAP machine at Niigon and were concerned about whether the pump model would have problems running Athena's proposed applications. The information of hold time and hold pressure was information inputted into the control system by the Niigon operator. It is by no means clear that the hold time and hold pressure had anything to do with the LEAP machine although it was used in making some part on the LEAP machine. Dr. Wobbe's opinion was that this type of information can give a developer of a machine a head start. Assuming that to be true, the head start would not be significant, given that the information had to do with only one part being made on a mold and any control system would have to work for all kinds of parts and molds. I accept the opinion of Drs. Urbanek and Osswald that the information given to B&R would not assist in designing a control system. Thus if there was any use of LEAP confidential information, which is very unclear, it was not much of a use and it is quite unclear that it was in any way detrimental to Husky.

250 Mr. Strohmaier also sent information about cycle times to B&R, which broke down the time for the various movements on a Husky machine at Niigon on a 5 second cycle time and a 10 second cycle time. There is a difference in the evidence as to whether the information came from a LEAP machine at Niigon. The pump model referred to in the email from Mr. Strohmaier to B&R was a "Rexroth PGH5-100(100cm/rev)". Dr. Wobbe said that was the pump used on the LEAP machine. The pump information sent to B&R in January said that the pump on the LEAP machine was a Rexroth "PGH5-31/100RR11VU2." Mr. Strohmaier testified the 5 and 10 second cycle times had been given to B&R for their A150 machine but that B&R had requested a realistic, practical cycle breakdown for a 5 second and a 10 second molding cycle. He said that looking at the data on the 5 second cycle, it looked like the data came from a mold running at Niigon on the Husky 160 machine, which was not a LEAP machine but a commercially available machine.

251 I cannot accept the assertion of Mr. Strohmaier that the data came from a mold operating on a Husky 160 machine. The data chart did not refer to what machine the mold was operated on. More importantly, the chart contained a reference to a bayonet lock being the second step in the process being timed. The LEAP machine used a bayonet lock. The Husky 160 ton machine did not. Mr. Strohmaier's answer when this was put to him was that the A150 machine at the time used a bayonet lock, but this was no answer as the cycle times were taken from a mold being run at Niigon on a Husky machine. The cycle times provided to B&R were data obtained from running a LEAP machine at Niigon, and constituted confidential information of Husky.

252 The reply from B&R to Mr. Strohmaier was that a motor from Baumueller should have sufficient performance to drive the pump based on the cycle information sent to B&R and there

would be no problem to run the motor with B&R's inverter (the drive of a servo-motor).

253 Dr. Wobbe concluded from this reply from B&R that the information led to the use by Athena of a B&R drive and so the information was very important to design the system made by B&R for Athena. Drs. Urbanek and Osswald disagreed that the information would be helpful in designing a control system as it was again a data point, albeit more detailed, from producing one product on a mold and so related to that one part. More information was needed. In the meet and confer chart, Drs. Urbanek and Osswald stated that Athena could not use confidential information from the LEAP machine since the control systems (including software tied to the functions/drives/cycles and the control hardware, including operating system and software modules) are different for both machines.

254 What is of note is that B&R said that a motor from Baumueller should have sufficient performance to drive the pump based on the cycle information sent to B&R. At the time of that information in July 2009 Athena was planning on using a Baumueller motor, which is presumably why B&R said that such a motor would be sufficient to drive B&R's inverter. However Athena is not today using a Baumueller motor. The evidence of Mr. Ricke, the controls manager at Athena, which has not been contradicted, was that while Athena first used a Baumueller motor in its first prototype machine, in early 2011 it switched to using a motor manufactured by MOOG for the second prototype machine. MOOG is a competitor to Baumueller. Athena made this change because the MOOG motor was more efficient as it had a better current-torque factor. Athena continued to use MOOG servo-motors to power the hydraulic pump until early 2013, when it began using a combined servo-motor and pump package supplied by Bosch Rexroth.

255 Thus it is not at all clear that the use of confidential information taken from the LEAP machine ever assisted Athena in the end. I agree with Husky that it was a use of confidential information in 2009, but it is unlikely that it can be said to have been detrimental to Husky or useful to Athena. If Drs. Urbanek and Osswald are right, it was of no utility to Athena, and they were really not cross-examined on their opinion on this point.

Matthew Simpson evidence

256 Mr. Simpson filed an affidavit on behalf of Husky. He was hired by Athena in July 2009, having just completed the Mechanical Engineering Design Technology Co-op Program at Humber College in 2009. He had no knowledge or experience regarding injection molding machines or the injection molding industry. His job title was Mechanical Designer, and he worked in the engineering department for most of the time as a member of the Injection Team, which was led by Stephen Mracek. He worked on the design and development of the PET and non-PET versions of the A150 machine, as well as on the single stage and two-stage injection units.

257 A great deal of the evidence in Mr. Simpson's affidavit is hearsay and I have ignored it.

258 In his affidavit, Mr. Simpson stated that the injection team that worked on the A150 relied

extensively on information about Husky machines and technology that was obtained from Niigon. This information came from and related to injection molding machines and equipment of Husky that were located at Niigon. This included Husky 140T [LEAP], 120, 300 and 160 ton machines located there. Information was also obtained from a Husky 90 ton machine that was on the shop floor at Athena, and later a Sumitomo machine that Athena acquired.

259 Mr. Simpson stated in his affidavit that to his understanding, the goal of the A150 development project was to use principally the Husky machines at Niigon, especially the two platen Husky 140T machines there (the "140T LEAP machines"), as the base design of the A150 and to make modifications where necessary to improve on that design. He did not state how he had that understanding or who may have told him that. He stated that he made trips to Niigon at the direction of Mr. Mracek for the purpose of examining the Husky machines and collecting information for use in Athena's design and development work. He stated that he collected information from the two Husky 140T LEAP machines as well as from other Husky machines that were located at Niigon (Husky 120 and Husky 300 PET machines, and an H160 machine).

260 To some extent, it is necessary to consider the reliability of Mr. Simpson's evidence. He was fired without notice by Athena in March 2012. When it was put to him in chief that it was being suggested that he was a disgruntled former employee who had come to court to get back at Athena, he said that could not be further from the truth and had he not been terminated he wouldn't have found the job he now has, which he loves, and in which there is room for growth in a friendlier environment. What he said is an indication that he is happier in his new job than he was at Athena.

261 Much was said about his performance reviews in which there was some good and some bad, but I do not see that as too important. On cross-examination, Mr. Simpson acknowledged that at times he had experienced friction with his colleagues at Athena and was not regarded as being a satisfactory team player. He was criticized by Mr. Mracek for a lack of initiative and not taking ownership of his work, a criticism he did not agree with. A few months before he was terminated, he said that for whatever reason, Mr. Schad did not see any value in his position and concerns were expressed that he did not know enough about the design process to perform effectively at the level he was seeking to achieve. When he was terminated, he testified that Mr. Mracek told him that it was because he was not a good fit and that Mr. Mracek did not know what to do to help Mr. Schad see him in a better light. Mr. Simpson could not have been happy to hear all of this.

262 On his cross-examination, Mr. Simpson said it was not right that he was unhappy about being terminated by Athena. This was contrary to his affidavit in which he said that at the time he was terminated he was unhappy about it. In his affidavit he said that he was told that the reason for his termination was due to a departmental restructuring. This was contrary to the evidence he gave on cross-examination that when he was terminated Mr. Mracek told him it was because he was not a good fit and Mr. Mracek told him that he did not know what he could do to have Mr. Schad see Mr. Simpson in a better light.

263 Mr. Simpson complained at the time of his termination about the amount of severance pay he was being offered, but Athena refused to pay him more, which he thought was unfair. He was concerned that Athena's policy was not to provide a reference letter, but after that Athena did provide a reference letter that stated he was terminated due to departmental restructuring.

264 Mr. Simpson was contacted by Husky's lawyers. How they got on to him was not disclosed. He spent time with them and they prepared his affidavit. When Athena's lawyers were told of Mr. Simpson having Athena documents, which he was obliged on his termination to leave with Athena but did not, they told him to send them to them and they would determine if they should be produced to Husky's lawyers. That happened. But Athena's lawyers asked Mr. Simpson to meet with them, which he declined to do. This is some indication of whose side he thought he was on.

265 In the circumstances, I view with considerable caution the evidence of Mr. Simpson. There is no doubt that Athena personnel spent a good deal of time at Niigon looking at Husky machines there, including the LEAP machines, but what use was made of the information and how helpful it was to Athena is a contested matter.

266 Mr. Simpson's statement in his affidavit that it was his understanding that the goal of the A150 development project was to use principally the Husky machines at Niigon, especially the two LEAP machines, as the base design of the A150 and to make modifications where necessary to improve on that design is contested by Mr. Mracek for whom he worked. Mr. Simpson did not state what the basis of his understanding was and did not identify anyone who might have told him that. He has no note among his 490 pages of notes that states that. While in his words he literally worked side by side with Mr. Mracek for the time he worked at Athena, he never shared his understanding with Mr. Mracek.

267 Mr. Mracek's evidence is that it is patently untrue that the goal of the A150 project was to principally use the Husky machines at Niigon, especially the LEAP machines there, as the base design of the A150 machine, and that he has no idea where Mr. Simpson could have obtained such an understanding and who never shared that understanding with him. Mr. Mracek told him on a number of occasions that the machines at Niigon were a good learning resource and that he should observe the equipment at Niigon to gain a better understanding of injection molding machines, and injection units in particular. Mr. Mracek said that as Mr. Simpson's supervisor, he would have been aware if he was basing his designs off of the HY140. At no time did Mr. Simpson suggest to him that he had done so. Mr. Mracek was not cross-examined on this evidence and I accept it. It is also in accord with the detailed description of the work done that was attached to Mr. Mracek's affidavit. The same is true with respect to the evidence of Messrs. Strohmaier, Link, Ricke, Sicilia and Shuev, none of whom were cross-examined on their denial of Mr. Simpson's evidence on the point.

268 Thus I do not accept that the goal of the A150 development project was to use principally the Husky machines at Niigon, especially the two LEAP machines, as the base design of the A150 and to make modifications where necessary to improve on that design. There is no doubt, however, that

Athena personnel visited Niigon on many occasions and looked at Husky machines there, including doing some reverse engineering. But I cannot find any understanding existed as asserted by Mr. Simpson, that the Husky machines were to be used as the base design for the A150 machine of Athena.

269 Mr. Simpson first visited Niigon on July 22, 2009 shortly after joining Athena. He stated in his affidavit that he examined the injection units on the 140 ton LEAP machines. He stated they were single stage units and were useful in the design and development of Athena's A150 single stage (RS) injection unit.

270 How useful this trip was so far as his work on the injection unit is concerned is questionable as he testified that at the time of the trip had no prior knowledge of injection units and how they functioned and it was an observation trip for that portion of the machine. His memorandum to Mr. Strohmaier and Mr. Mracek made shortly after the trip stated that for the injection unit he saw, it was more a case of understanding how they worked. He agreed that he was just getting his feet wet and trying to learn what injection molding machines were. He had no knowledge or experience in the area of benchmarking other that what he had been told in school as to what it was. Mr. Mracek agreed that the trip was meant to be educational for Mr. Simpson and said that the trip was a way of evaluating employees in the group and that he would have had an interest in what Mr. Simpson noticed, what questions he had and what he found interesting. What was in Mr. Simpson's notes was not something that could have been used. I accept Mr. Mracek's evidence.

271 Mr. Simpson was asked in chief whether he could have done his design work as he described on the A150 without the information that he collected at Niigon on this trip. His response was that "We could have but it would have taken a lot more trial and error in order to get it right, as opposed to having it almost correct the first machine that we had." Who the "we" was that he was referring to was not said. I put little credit in this answer.

272 The issue of whether Athena shortened the time for developing its A150 machine was the subject of differing expert evidence. Dr. Wobbe was of the opinion that Athena could not have developed its prototype in the time that it did if it had not had access to the Husky machines at Niigon and made use of the information obtained. He viewed as a negative the fact that nearly half of the engineering team at Athena were directly recruited from college or university. Drs. Urbanek and Osswald were of the opposite view.

273 There is something to be said for both points of view, but I prefer the opinion of Drs. Urbanek and Osswald generally on this point. Regarding the use of new recruits, the view that new persons are not of a great utility is a matter of opinion of course, but I question Dr. Wobbe's view and agree with Drs. Urbanek and Osswald. Dr. Osswald is a professor of mechanical engineering with a great deal of expertise in injection molding machines. Drs. Urbanek and Osswald put it this way:

> 101. Finally, Dr. Wobbe discounts unfairly the value of a fresh perspective. Dr.

> Osswald has had the benefit of working with tens of thousands of engineering students over the course of 25 years. From his perspective, young engineers approach a project with an open and unbiased mind. This inevitably leads to innovation. Students who do not know how things have been done in the past are capable of arriving at innovative design ideas that are uninfluenced by past habits, conceptions or company politics. Students also bring with them the undeniable value of youth. They are motivated, energetic and quick to learn.

> 102. Athena's engineering team had an enviable mix of experienced industry veterans and new college graduates and students. Athena was able to combine the knowledge and experience of industry veterans with the innovation and energy of new students and college graduates. It was our impression that Athena's engineering team was very strong and was more than capable of achieving the company's development objectives in the time frame that they did.

274 If Dr. Wobbe's view prevailed, there would likely have been no Microsoft or Windows software as it was first produced by a group of very young college graduates (and someone like Bill Gates who did not graduate from college).

275 Drs. Urbanek and Osswald looked at the time taken to develop the Athena A150 machine. There was some question of the validity of the number of hours spent, but it was considerable on any view of it. One way in which the experience that Dr. Wobbe had at Engel differed from Athena is that Athena was a start-up company without the formality and need for approvals at every stage that a large organization like Engel utilized. Mr. Schad had stressed that he did not want that kind of formality. Drs. Urbanek and Osswald stated:

> 109. It is our respectful opinion that Dr. Wobbe is simply wrong. In our experience, there is a wide variability in the amount of time it takes to develop a new machine, or components of a new machine. There is no fixed minimum period that applies in all cases. Large organizations generally do not move as quickly, efficiently or effectively as small start-ups due to the existence of strict gating processes, including the need for formal documentation at every stage and sign off before advancing a project to the next stage. Smaller companies, on the other hand, are generally able to move faster and more effectively and efficiently.

> 110. Examples of fast moving development projects that illustrate there is no fixed development time include:

> (a) Billion (a small French company) brought a new all electric machine line to market in about one year.

(b) Engel's first 5500 tonne machine was developed, manufactured and delivered in under fifteen months;

(c) Cincinnati Milacron developed its P-270 machine in less than a year; and

(d) Infiltrator Systems Inc. designed and built a revolutionary 6000 tonne press in a total of fourteen months.

276 I cannot find that from the amount of hours spent by Athena in the development of its A150 machine and from the qualifications of the Athena personnel that Athena must have made use of information obtained from Husky machines at Niigon. Whether information was made use of by Athena to the detriment of Husky requires a consideration of the various types of information accessed, which I have done so far as the LEAP machines at Niigon were concerned. There is no doubt that Athena personnel spent a good amount of time at Niigon looking at the commercially available machines, and while this may have helped them in the design of aspects of the A150 machine, I have made no analysis regarding this aspect as these machines were not under any confidentiality obligations.

Alleged disclosure and use of Husky confidential information by Mr. Schad

277 As part of the LEAP project, the Husky LEAP team created a detailed PowerPoint presentation that described the concept, design, specifications, development process, performance characteristics, test and validation results, and market strategy (among other things) for the LEAP system. That document, which was generally called the "white book" or the "LEAP Book", was a working document that was regularly updated and revised over the course of the project as the team's ideas for the system evolved.

278 Mr. Schad kept a copy of the LEAP Book after he sold his shares in the company and left Husky's board in December 2007, as he remained involved in the LEAP project at Husky until early 2008. He kept his copy dated February 2008 with him, and produced it in this litigation. Mr. Schad asked Mr. Strohmaier to prepare an A150 Book and gave to Mr. Strohmaier his copy of the LEAP Book. Mr. Schad asked Mr. Strohmaier to create a document with a similar format for Athena's designs. Mr. Strohmaier used the LEAP Book as a formatting template for the first A150 Book. He took digital photographs of the pages of the LEAP Book and inserted them into a PowerPoint presentation as placeholders. He then replaced the photos of the HY140 presentation with information relating to Athena's design plans to create the first version of the A150 Book. Mr. Strohmaier did not use the technical or other information that was contained in the LEAP Book and did not use the document itself for any purpose other than as a template for purposes of formatting the A150 Book. Updates to the A150 Book were periodically made to reflect the current state of the

development of the A150 machine.

279 The LEAP Book was a document that fell within the confidentiality provisions of Mr. Schad's Management Services Agreement except insofar as it contained information that was publically available. Much of the information according to Drs. Urbanek and Osswald had been made publicly available in patent applications of Husky, and I accept that evidence. Mr. Schad often showed the LEAP Book to customers of Husky and he showed it in February 2008 to a customer of Husky. It is questionable therefore if it fell within the MSA terms. However, if it did it is unlikely that the LEAP Book was of much utility in designing an injection molding machine. Dr. Wobbe acknowledged on cross-examination that the LEAP Book that Mr. Schad had when he left Husky contained some information that was publicly available and it did not contain workshop drawings or specification tolerances or dimensions. It did not contain the type of information that would allow someone to manufacture a component and it did not contain any costing information.

280 Husky claims that Mr. Schad permitted and encouraged, or at a minimum acquiesced in, Athena's use of Husky's LEAP information in the development of Athena's machine. Four instances are referred to in the Husky closing submissions.

281 First, Mr. Strohmaier collected information about the size of the motor and other data regarding the LEAP prototype at Niigon and discussed it with Mr. Schnitzler of Baumueller in a meeting of April 9, 2009. He stated that they came to the conclusion that the LEAP requirements were less demanding than the Athena requirements. This was reported in a memorandum to Mr. Schad. On his discovery, when shown this memorandum, Mr. Schad said that the information was partially used, or not exclusively, to select the motor for the A150 machine. What he meant by that was not explored by counsel for Husky. While at the time, Athena was planning on using a Baumueller motor, which would be the reason for visiting Baumueller, and used a Baumueller motor in its first prototype machine, in early 2011 it switched to using a motor manufactured by MOOG for the second prototype machine. MOOG is a competitor to Baumueller. Athena made this change because the MOOG motor was more efficient as it had a better current-torque factor. Athena continued to use MOOG servo-motors to power the hydraulic pump until early 2013, when it began using a combined servo-motor and pump package supplied by Bosch Rexroth. It cannot be concluded therefore that by comparing information from the LEAP machine at Niigon with the proposed prototype A150 machine at that time that it was in any way materially detrimental to Husky.

282 I do not see this situation as being a breach by Mr. Schad of his Management Services Agreement. The information obtained by Mr. Strohmaier, even had it been instigated by Mr. Schad, was not information obtained by Mr. Schad while he was CEO and President of Husky.

283 Second, Mr. Strohmaier sent a memo to Mr. Schad dated May 30, 2009 which included a table regarding the gear design in which Mr. Strohmaier compared the screw diameter of the Athena machine that was under development with Husky machines, including the Husky LEAP machine at

Niigon. On his discovery, Mr. Schad acknowledged that the information was used to determine the screw diameter on the Athena machine that was under development at the time, although how it was used was not explored. At trial, Mr. Schad said on his cross-examination that Athena did not use the information other than for benchmarking because it got all of the injection information from SIPA, which was obviously long after the May 2009 information. I assume that the information was confidential, although I do not think anyone gave evidence on the point so far as this screw was concerned, but I cannot find that whatever use was made of it was materially detrimental to Husky.

284 The reference to SIPA by Mr. Schad was likely a mistake insofar as using information from the LEAP machine at Niigon was concerned. There were discussions between Athena and SIPA that led to an agreement between them in September 2013 under which SIPA has marketed its XFORM 150 and 300 machines[8]. Although the XFORM 150 and XFORM 300 were generally manufactured by Athena, there were four components that were sourced by SIPA, one of which was the injection screw. SIPA had to manufacture a screw that would interface properly with the Athena gearbox and also that would fit properly in the barrel. Mr. Mracek of Athena sent drawings to SIPA from which SIPA adapted the information to its existing screw.

285 Mr. Mracek later told SIPA in an email of July 30, 2013:

> From my point of view your 85mm 2-stage screw performs well and with the minor changes in length it would make sense to transfer the design to the RS screw (pending your review of the test data). In the past we have successfully (and relatively quickly) adopted a 2-stage competitor screw design into our RS machine.

286 Shortly thereafter on August 21, 2013 Mr. Mracek sent another email to SIPA that stated:

> We are satisfied with the screw we have in the RS machine. The issue is that we do not want to sell the screw since it is a competitors design. Although there is nothing proprietary in the design (as far we could identify) we would be much more comfortable with a SIPA screw (or possibly another supplier) given our current legal circumstance.
>
> I have attached the test results from the competitor's screw. I believe this should be our benchmark since we see better performance with this design than any others we have tested. Unfortunately I cannot provide any more details about the design -- I hope you understand.

287 The competitor Mr. Mracek named was Husky and the "current legal circumstance" that Mr. Mracek referred to was this action that had been commenced shortly before in May 2013. The only evidence in the case about a Husky screw being analyzed by Athena was an analysis of a Husky 85mm two-stage screw in a HyPet 120 machine located at Niigon at a time when Athena was using

a manufacture named Xaloy for the design and manufacture of its PET screw and barrel. There were issues regarding the first Xaloy screw. Athena had performed some comparisons between the performance of the Xaloy screw in the Athena machine and the performance of a Husky 85mm two-stage screw in a HyPet 120 machine located at Niigon, and noticed some significant differences in performance. Athena then removed the Husky 85mm two-stage screw from the commercially available HyPet 120 machine located at Niigon, had it cleaned and then sent it to Xaloy for inspection and measurement. This was referred to at the trial as "reverse engineering". Xaloy then manufactured a second screw and it was tested in Athena's prototype machine 1004, which was a single-stage machine.

288 When cross-examined on what he sent to SIPA, while Mr. Mracek readily agreed that information regarding the testing of the Husky screw was sent to SIPA, he was not asked whether it was a testing of a screw from a LEAP machine at Niigon or from a commercially available HyPet 120 machine at Niigon. However the reference to the RS machine in Mr. Mracek's email was a reference to the single-stage machine line at Athena which was the line that Xaloy had earlier been working on and for which the testing had been done. In its closing brief, Husky acknowledges that the testing was from a Husky two-stage injection unit into the Athena RS machine. I take from the evidence that what was sent to SIPA was information from the testing of the HyPet 120 machine at Niigon, which was a commercially available machine. That information was sent to SIPA for benchmarking purposes.

289 I do not see this situation as being a breach by Mr. Schad of his Management Services Agreement. The information obtained by Mr. Strohmaier, even had it been instigated by Mr. Schad, was not information obtained by Mr. Schad while he was CEO and President of Husky. Moreover, it related to a commercially available machine which I have held was not confidential information within the meaning of the MSA.

290 Third, Mr. Mracek sent a memo to Mr. Schad about a visit by Mr. Mracek to Niigon on November 25, 2009. Mr. Mracek was the team leader on the injection team at Athena and went to Niigon to obtain information about a HyPet 300 machine and a LEAP machine and his email to Mr. Schad contained an itemization of the things he observed from the two machines. Most of the information regarding the LEAP machine came from the HMI on that machine.

291 On his discovery, it was put to Mr. Schad that the information was taken to use in the development of the A150 machine. He answered by saying "from what I can read here". However the email from Mr. Mracek to Mr. Schad did not state what use, if any, would be made of the information. It could have been just taken for benchmarking purposes. At trial on cross-examination Mr. Schad said that he did not agree that the information was used to build the A150 machine because the A150 machine was to be far beyond what Husky had in their machine. In his affidavit, Mr. Mracek said that the information obtained on his visit to Niigon on November 25, 2009, like other information obtained at Niigon was either not used for any purpose, or was looked at for benchmarking purposes, as one data point amongst many, and represented a small amount of the

information that was reviewed by the injection team when benchmarking the performance of Athena's injection unit technology. While Mr. Mracek was asked on his cross-examination to confirm that the information in his e-mail was taken from the LEAP machines or the HMI for those machines, he was not cross-examined on the statement in his affidavit or more generally on what use he made of the information obtained on November 25, 2009.

292 One cannot be naïve about these things. The information was gathered for a reason. But what use was made of it in the end is an open question and not proven. Whether it was used in a material way is certainly not proven. In any event, I do not see this situation as being a breach by Mr. Schad of his Management Services Agreement. The information obtained by Mr. Mracek, even had it been instigated by Mr. Schad, was not information obtained by Mr. Schad while he was CEO and President of Husky.

293 Fourth, Mr. Mason of Niigon sent a memo to Mr. Schad on February 24, 2010 that contained a summary of the various failures on one of the LEAP machines at Niigon that had occurred from October 2009 to February 2010. Mr. Mason cannot recall why he sent the memo. On his cross-examination, Mr. Schad acknowledged that collecting failure data about a machine can be useful in developing one's own machine because failure data tells one whether there are any problems with the design and the implementation of the machine and what not to do in one's own design and development process. When he was then shown the memo from Mr. Mason, Mr. Schad testified that he did not recall the memo but that the failure data in it was not significant because it was from a very different machine and hardly applied to the A150 machine. What use was made of this failure data is unproven. In any event, I do not see this situation as being a breach by Mr. Schad of his Management Services Agreement. The information sent by Mr. Mason, even had it been requested by Mr. Schad, which was not established, was not information obtained by Mr. Schad while he was CEO and President of Husky.

294 On December 19, 2008 Mr. Schad sent a memo to seven Athena employees (Messrs. Strohmaier, Kehrls, Ricke, Link, Mracek, Kardos, and Chen) all of whom were engaged in the Athena injection molding machine development project. The memo was sent a few weeks after the first LEAP prototype machine arrived at Niigon and after some Athena employees had visited Niigon to examine the LEAP machine. The memo stated:

> I noticed that some photos of the NIIGON 140 ton Husky machine installation had been taken. Please refrain from photographing and/or copying any details which could be of [a] confidential nature and are not known as industry practices.
>
> Should you have done so already I request that you destroy any obtained photos/information and discontinue such practices.
>
> The 2-Platen 140 is a new product from Husky and is undergoing a beta-testing

> period at the NIIGON Technologies Ltd. Plant and therefore a high degree of confidentiality and integrity must be maintained. Any infringement of Husky's technology will not be tolerated.

295 Husky makes much of this memo as indicating the standard which Mr. Schad set for Athena. By sending the memo, Mr. Schad wanted to send a serious message to the Athena developers that there could be confidential information on the HY 140 and that he did not want them to use it. The memo speaks for itself and indicates a concern that the LEAP machines at Niigon could contain confidential information. Exactly what might be confidential was not stated.

296 Mr. Schad stated in his affidavit that although he had been involved as a consultant in the LEAP project in the period before he resigned from the board of Husky in 2007, he was not involved in the project for the final design or manufacture of the HY140 beta machine and he did not believe that he had seen a PET implementation of the machine before he sent his memo of December 19, 2008. He said he saw the HY140 machine installed at Niigon for the first time in February 2009. As to his memo, he said he wanted to make sure that if there was any information in the HY140 machine that was confidential in nature, Athena would not take advantage of it. He said by confidential he meant what confidential means within the industry, namely information that is not publicly available or known and which is innovative or unique.

297 Mr. Schad further stated that when he saw the HY140 machine for the first time in February 2009, he noted that Husky had not installed any screens or barriers preventing access to the machine, and that if there were a concern about confidential information in the machine it would be typical to erect a screen or barrier so the suppliers and customers of a third party molding facility where the beta testing is done would not see or inspect the machine. He said that when he saw the machine he was quite disappointed with Husky's execution and concluded there was nothing in the HY140 machine that was confidential.

298 Husky contests Mr. Schad's evidence that he thought there was nothing confidential about the LEAP machines that he saw at Niigon. In the end, I do not think that a great deal turns on this memo. The memo is no evidence of what in particular could be considered confidential, which is the critical issue in this action. In any event, if Husky is right, and Mr. Schad thought that there was something confidential about the LEAP machines he saw at Niigon, the question would arise as to why Mr. Schad would have sent his memo of December 19, 2008 in the first place and then soon after ignore it and permit Athena personnel to go to Niigon to look at the LEAP machines. There is no suggestion that the memo was not sent in good faith. It indicates a concern by Mr. Schad to look out for Husky's interests. Husky has not provided any good reason why Mr. Schad would have sent out the memo and then decided for ulterior reasons to shortly thereafter ignore it.

299 Mr. Schad also stated in his affidavit that he remained optimistic that the machine would perform, but there were repeated problems with it and his opinion was that the HY140 machines were a flop. Husky strongly contests that assertion by Mr. Schad. Again, I do not think it matters,

unless it is a matter that goes to the credibility or reliability of Mr. Schad's evidence. I have earlier discussed my concerns regarding the reliability of Mr. Schad's evidence given his age and condition. I have no concerns that he has knowingly given false evidence. Whether the LEAP machines were a flop is a matter of opinion and not one-sided. One cannot forget that there had been problems with the LEAP machines at Niigon and that they were abandoned by Husky before ever going to market.

Fiduciary and non-competition and non-solicitation obligations of Mr. Schad

300 Mr. Schad owed fiduciary duties to Husky when he was its president and CEO and a director. Those duties are generally well known and were described in *Peoples Department Stores v. Wise*, [2004] 3 S.C.R. 461 at para. 35.

301 In this case, the allegations against Mr. Schad of a breach of his fiduciary duties relates to the period after he left Husky. Fiduciary duties can continue to apply to a departed fiduciary. For example, a former fiduciary is not permitted to solicit the employer's customers for a reasonable period of time after his or her departure. See *Veolia ES Industrial Services Inc. v. Brule*, 2012 ONCA 173, per Hoy J.A. (as she then was) at para. 33 and *Boehmer Box L.P. v. Ellis Packaging Ltd.*, [2007] O.J. No. 1694 per Brown J. (as he then was) at paras. 42-43. However, the nature and scope of the fiduciary duty must be assessed in the legal framework governing the relationship out of which the fiduciary duty arises and the common law fiduciary duties may be modified by agreement. See *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271 at para. 186 and *Garcia v. Liuna Local 1059 Members Benefit Trust (Trustee of)* (2015), 125 O.R. (3d) 1 (C.A.) at para. 53.

302 In this case, the contractual obligation of Mr. Schad so far as confidential information is concerned was limited to information obtained by him while he was employed as CEO and president of Husky that was neither public nor later became public. So far as his obligations to Husky after he left Husky are concerned, there were two new limitations on what he could do. His Management Services Agreement contained a non-competition clause and a non-solicitation clause, both of which for the purposes of this action are agreed to have expired on September 22, 2010. In my view, the extent of Mr. Schad's fiduciary obligations to Husky were defined and limited by this agreement.

303 Mr. Schad's obligation to keep information gained by him while at Husky that was confidential continued after he left Husky. Mr. Schad had his February 2008 version of the LEAP Book when he left Husky and kept it. The LEAP Book was a document that fell within the confidentiality provisions of Mr. Schad's Management Services Agreement except insofar as it contained information that was publically available. I have accepted the evidence of Drs. Urbanek and Osswald that much of the information in the LEAP Book had been made publicly available in patent applications of Husky. Mr. Schad often showed the LEAP Book to customers of Husky and he showed it in February 2008 to a customer of Husky. I have held that it is questionable therefore

if the LEAP Book fell within the MSA terms but if it did, it is unlikely that it was of much utility in designing an injection molding machine. Dr. Wobbe acknowledged on cross-examination that the LEAP Book that Mr. Schad had when he left Husky contained some information that was publicly available and it did not contain workshop drawings or specification tolerances or dimensions. It did not contain the type of information that would allow someone to manufacture a component and it did not contain any costing information. Mr. Strohmaier used the LEAP Book for no purpose other than as a template for purposes of formatting the A150 Book.

304 In the circumstances, I find it unlikely that Mr. Schad breached his continuing obligations of confidentiality by asking Mr. Strohmaier to use it as a template for purposes of formatting the A150 Book and that even if he had, it caused no material damage to Husky.

305 The non-solicitation clause prevented Mr. Schad from attempt to solicit any suppliers, employees or customers away from Husky. There is no evidence that Mr. Schad breached this non-solicitation clause by trying to hire away any Husky employees, and no evidence that he tried to have Husky suppliers not continue to supply Husky. No attempt was made to sell machines until well after the expiry of the non-solicitation clause.

306 The non-competition clause prevented Mr. Schad until September 22, 2010 from carrying on, being concerned with or interested in any undertaking which in whole or in part was substantially competitive with the business carried on by Husky within the respective territories in which such business were then carried on. Mr. Schad contends that this non-competition clause is unenforceable as contrary to public policy, particularly with respect to its five year term, and that Husky called no evidence to justify its reasonableness in that regard. Mr. Galt's non-compete clause is for a term of one year. The principles relating to a non-competition provision being in restraint of trade unless justified as being reasonable between the parties are well known. See *Lyons v. Multari* (2000), 50 O.R. (3d) 526 (C.A.) paras. 19-23. I have some sympathy for this argument in so far as a five year term is concerned, as that term is quite long, but it must be recognized that Mr. Schad was the long-time CEO and the largest shareholder of Husky at the time he made the agreement. However, I do not think it necessary to deal with this issue as in my view there was no breach of the non-compete provision.

307 Covenants in restraint of trade are to be strictly construed. See *Russo v. Field*, [1973] S.C.R. 466 at pp. 486-7. In this case, the business that Mr. Schad was not to substantially compete against was defined as "the business of the designing, manufacturing and sale of injection molding equipment and systems for the plastics industry and the providing of related services thereto". At no time before the expiry of the non-competition clause on September 22, 2010 did Athena sell any injection molding machines or related services. As I read the clause, Athena could have designed or manufactured its A150 machine during the time of the covenant not to compete and would not have been acting contrary to the covenant so long as it was not selling machines during the term of the covenant. I do not accept the argument of Husky that merely designing and developing machines, or even owning shares in Athena, was a breach of the covenant not to substantially compete with

Husky.

308 Moreover, Athena had no ability to be substantially competitive with Husky during the term of the non-competition covenant. Athena's early work was in the development of a general purpose machine, a market that Husky had decided to exit. Athena began working on the design for a prototype RS inline single stage injection unit intended for PET applications in early November, 2010. Prior to that Athena had done some preliminary work and had begun looking at preliminary specifications for purposes of determining whether Athena's machine platform was capable of potentially accommodating PET applications compatible with Athena's general purpose injection molding machines. Work on the design and development of Athena's two-stage injection unit was not pursued in any meaningful way until early 2011. The manufacturing drawings for Athena's first one-stage PET injection machine (machine 1004) were released in September 2011 and this machine was not powered on until March 2012. The manufacturing drawings for Athena's first two-stage PET injection machine (machine 1009) were released on September 5, 2012 and this machine was not powered on until March 2013.

309 The agreement with SIPA under which SIPA agreed with Athena to market a line of hybrid PET machines was made on December 18, 2012. The first sale by SIPA of an XFORM 150 machine was made on September 6, 2013.

310 Husky has not established that it has a cause of action entitling it to relief against Mr. Schad for a breach of his confidentiality obligations or his non-solicitation or non-competition obligations.

Inducing breach of contract and unlawful interference with Husky's interests

311 The tort of inducing a breach of contract is well known. See *Drouillard v. Cogeco Cable Inc*. (2007), 86 O.R. (3d) 431 (C.A.) at para. 26. There are four elements:

(a) the plaintiff had a valid and enforceable contract with a third party;

(b) the defendant was aware of the existence of this contract;

(c) the defendant intended to and did procure the breach of the contract; and

(d) as a result of the breach, the plaintiff suffered damages.

312 Husky claims that Mr. Schad is liable for committing this tort. Although I have held that this action should be dismissed for other reasons, I will deal briefly with this alleged tort.

313 There is no doubt that Mr. Schad knew of the September 2007 Agreement between Husky and Niigon. He signed it on behalf of both parties. Mr. Schad knew that Athena employees were

visiting Niigon and looking at the LEAP machines there and he did nothing to stop it. I will assume that Mr. Schad intended his Athena employees to go to Niigon to look at the LEAP machines. The question remains however whether Mr. Schad intended that the agreement between Husky and Niigon be breached by Athena obtaining information regarding the LEAP machines that was to be kept confidential by Niigon.

314 Intention is proven by showing that the defendant acted with the desire to cause a breach of contract, or with the substantial certainty that a breach of contract would result from the defendant's conduct. However, a defendant turning a blind eye or being indifferent as to whether his actions will cause a breach will be treated as knowingly procuring the breach. See *Drouillard* at paras. 29 and 30.

315 Mr. Schad has said that he thought there was nothing confidential about the LEAP machines at Niigon and in this respect he is supported by Drs. Urbanek and Osswald who opined that there was no feature or design on the HY140 machines that could properly be regarded as confidential. Dr. Wobbe agreed that these machines at Niigon did not contain any components and physical features that were not generally known within the industry.

316 However, the evidence regarding tie bars, ejector speeds and information relating to the LEAP hydraulic system sent to B&R that I have reviewed makes clear that Athena personnel visited Niigon and obtained confidential technological information from the LEAP machines. The same pertains to the information obtained by Mr. Strohmaier about the size of the LEAP prototype motor discussed with Baumueller, the collection of data by Mr. Mracek from the HMI of a LEAP machine and the collection of failure data from a LEAP machine.

317 While I have held that in the end Athena did not make any material use of the information in the development of its A150 machine, the fact that Athena personnel were given access to the LEAP machines for this purpose was in my view a breach of the confidentiality provision in the September 2007 Agreement. Mr. Schad had to know this, or turned a blind eye to it. There is some evidence that Mr. Schad thought that so long as a patent of Husky was not being contravened, Athena was free to deal with the LEAP machines. This belief, which was likely wrong, would not be a defence for Mr. Schad to the tort of inducing breach of contract.

318 However, for reasons earlier discussed, I cannot conclude that Husky has suffered any material detriment enabling it to an award of damages. Had Athena made use of the technological information it obtained from the LEAP machines at Niigon, it would have been a different matter.

319 The tort of intentional interference with economic interests or the unlawful means tort is also well known. See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*, [2014] 1 S.C.R. 177. It will be available in three-party situations in which the defendant commits an intentional unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. The unlawful means must be directed at a third party who has an actionable claim based on the defendant's conduct or would have a claim if it had suffered a loss as a result of that conduct.

320 Husky argues that as a result of Mr. Schad's conduct, Niigon would have a claim against him for breach of his duties as a director and officer of Niigon, presumably for failure to ensure Niigon lived up to its confidentiality obligations to Husky under the September 2007 Agreement.

321 This claim suffers from the same problem as the claim for inducing breach of contract, and for the same reason does not give rise to an entitlement to an award of damages.

Claim against SIPA

322 SIPA is an Italian corporation. It manufactures products and provides solutions for the injection molding industry. It was founded in 1980 as an engineering company and, since 1986, has focused mainly on the PET plastics industry, which is used primarily for bottles and containers in the food and beverage industry. SIPA is a supplier of machines and systems for PET container production, including molds for PET preform production for all major brands of PET injection molding machines available in the market: Husky, Netstal, Sandretto, Krauss Maffei, BMB, BM Biraghi, Krupp, ASB Nissei, Arburg, Engel and Battenfeld. In the PET injection molding market, SIPA is a competitor of Husky.

323 Prior to its relationship with Athena, SIPA had information that permitted it to design its machines to be compatible with Husky molds, and to allow it to manufacture molds for its competitors' machines, including Husky's machines. It has produced molds for a competitive platform for more than ten years, which has required it to know the mold patterns which it obtains from public sources.

324 SIPA has historically partnered with companies that specialize in the design and manufacturing of injection molding machines to develop and market PET injection molding machines. Prior to entering into its business relationship with Athena, SIPA also sold several low tonnage PET machines.

325 In 2010, SIPA began considering entering into a business relationship to develop a new low-medium ton injection molding machine to replace its existing machines. In early 2011, SIPA came up with a list of machine specifications for a new low tonnage machine to specify (for itself and potential partners) what it was looking for in the machine. In mid-2011, SIPA began identifying potential partners for designing and developing this machine. In 2011, SIPA identified four potential partners: Engel (due to its previous partnership in developing the SIPA XFORM 500 machine), Toshiba, SACMI and Athena.

326 SIPA was introduced to Athena through a sales representative for SIPA's mold division in Atlanta in or around August 2011. Mr. Zoppas, SIPA's president, had known Mr. Schad during their long careers in the injection molding industry. Negotiations followed and culminated in a handshake agreement on December 18, 2012 that SIPA and Athena would together develop and market the XFORM 150 machine. SIPA selected Athena as its partner (in preference to SACMI) both for technical reasons and because of the personal relationship between Mr. Zoppas and Mr.

Schad. The agreement between SIPA and Athena was committed to writing on September 19, 2013. Under the agreement, SIPA marketed its XFORM 150 and XFORM 300 machines, which are PET machines, until December 31, 2015.

327 The XFORM 150 and XFORM 300 were generally manufactured by Athena, but there were four components that are sourced by SIPA: the shooting pot, the injection screw, the heater band, and the hot runner controller.

328 SIPA received drawings and other information for the shooting pot from Athena, and the supply chain people at SIPA arranged for it to be manufactured by a vendor, C.R.S.R.L. SIPA did not do any development work or design work on the shooting pot or do any work to integrate the shooting pot into the Athena design. SIPA had no information about where Athena obtained the information regarding the shooting pot that was provided to the vendor C.R.S.R.L. Regarding the injection screw, SIPA obtained drawings and other information from Athena and adapted it to its existing screw. SIPA did not know the source of the drawings or the information Athena provided. It then had the screw manufactured by a supplier, Viplas S.R.L. The heater band was supplied by Rica, an affiliate of SIPA and was a standard off the rack component. The external hot runner controller was first obtained from Mold Masters. It was a stand-alone unit. SIPA then changed that to a hot runner controller it produced. It too is a stand-alone unit.

329 SIPA had no knowledge that Athena had used confidential information belonging to Husky by obtaining information from the Husky machines, including the HY 140 beta prototype, at Niigon. SIPA was never told by anyone at Athena that Athena had reviewed Husky manuals from Niigon or that it was sending its employees to Niigon in order to gather information about the Husky machines. While SIPA was aware of Mr. Schad's relationship to Niigon and that he sometimes visited Niigon, and assumed some Athena employees may have gone there with Mr. Schad, SIPA was not aware what Athena employees may have been doing at Niigon. No one from SIPA has ever been to Niigon. No one from SIPA knew on what terms the Husky machines had been placed at Niigon.

330 There is no evidence that SIPA knew how Athena had developed the A150 machine. SIPA had no information about how Athena created the shooting pot component drawings that Athena provided to SIPA, no information about how Athena designed the shooting pot, no information about how Athena created the drawings and .stp files for the two stage barrel head, and no information about where Athena got the information in the documents relating to the cooling-pin technology. SIPA had no reason to ask whether the information or drawings were developed using Husky confidential information and there was no reason for SIPA to suspect that Athena was misusing Husky's confidential information in the development of its machines, particularly given Mr. Schad's lengthy experience in the injection molding industry and his sterling reputation.

331 Husky's claim against SIPA is based on breach of confidence. Husky relies on the fact that after the handshake agreement on December 18, 2012 between SIPA and Athena, SIPA was put on

notice of Husky's claim for misuse of Husky confidential information before it signed the agreement with Athena on September 19, 2013 by reason of the statement of claim in this action issued on May 24, 2013 and served on SIPA before it signed the agreement with Athena. In the statement of claim, Husky alleged that the Schad defendants and SIPA had misused Husky confidential information.

332 For a third party in receipt of confidential information to be held liable, the third party must have received the information with knowledge that it was communicated in breach of confidence, or the third party must afterwards acquire such knowledge. In *Cadbury Schweppes Inc. v FBI Foods Ltd*. [1999] 1 S.C.R. 142, the Supreme Court of Canada confirmed the principle by which third party recipients of confidential information may be held liable. In that case Justice Binnie stated:

> **19** Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

333 I take the words "notice of that fact" used by Justice Binnie to mean notice of knowledge that the information was communicated in breach of confidence, not notice of an allegation that the information was communicated in breach of confidence. An allegation in a statement of claim is not knowledge. Pleadings that make allegations that later cannot be proven are commonplace in litigation. I agree with SIPA's contention that Husky's argument, if accepted, would mean that an allegation in a statement of claim would result in a self-imposed injunction.

334 In its statement of claim, Husky pleaded that SIPA was fully aware that Mr. Schad and Athena had improperly obtained and were misusing Husky's confidential information or alternatively was willfully blind to Mr. Schad's and Athena's improper procurement and use of Husky's confidential information. Husky pleaded further that SIPA was aware of Mr. Schad's ongoing duties to Husky, including his duty not to disclose or use Husky's confidential information and his duty not to compete unfairly with Husky.

335 In this case, those allegations of what SIPA knew have not been proven and Husky has not argued wilful blindness, which is understandable given the lack of any evidence that could support such an argument. In the circumstances, for the law to now tell SIPA that it is liable for proceeding with its agreement with Athena in the face of allegations that SIPA denied from the start does not make sense and would work an injustice.

336 There is authority for such a view. In *Carl Zeiss Stiftung v. Herbert Smith & Co*. [1969] 2 Ch. 276 (C.A.), a case in which it was contended that the defendant solicitors unlawfully dealt with the plaintiffs' funds held in trust for them, it was alleged that the solicitors were aware of allegations in an action that the funds were held in trust for the plaintiffs. That contention was rejected.

Dankwerts L.J. had this to say at p. 290:

> In my view, knowledge of a claim being made against the solicitor's client by the other party is not sufficient to amount to notice of a trust or notice of misapplication of the moneys. In the present case, which involves unsolved questions of fact, and difficult questions of German and English law, I have no doubt that knowledge of the plaintiffs' claim is not notice of the trusts alleged by the plaintiffs.

> And at page 293:

> What the defendant solicitors knew was that the moneys came from the West German Foundation and they knew of the allegations contained in the proceedings brought against that foundation by the plaintiffs in which they were instructed to act as solicitors for the West German foundation. They knew that claims were being made against the West German foundation that all of their property and assets belonged to the plaintiffs or were held in trust for them. But claims are not the same thing as facts... What we have to deal with is the state of the defendant solicitors' knowledge (actual or imputed) at the date they received payments of their costs and disbursements.

337 See also *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd.* [2011] EWCA Civ. 347, [2012] Ch. 453 at para 100 per L.J. Neuberger. See also *Fraser v. Thames Television Ltd.* [1984] 1 Q.B. 44 in which Justice Hirst stated:

> ...in order to be fixed with an obligation of confidence, a third party must know that the information was confidential; knowledge of a mere assertion that a breach of confidence has been asserted is not sufficient.

338 In my view, Husky has not established that it has a claim against SIPA for breach of confidence and the action against SIPA is dismissed.

Claim against Stephen Mason

339 Mr. Mason was employed at various times by Husky, Niigon and Athena. He met Mr. Schad when he worked at the Schad cottage in the summer of 1992 while he was a student at the University of Western Ontario in computer science. Mr. Schad offered him a job at Husky and he left Western and started working at Husky in October 1992. He held a variety of jobs and developed an expertise in operating injection molding machines to make optimal parts for customers.

340 In October 2000, Husky seconded Mr. Mason to work at Niigon, first as its operations

manager and in 2004 as its General Manager. As a result of personal difficulties, Husky terminated Mr. Mason's employment in May 2007. Shortly thereafter, Mr. Schad decided to give Mr. Mason a second chance and Niigon hired Mr. Mason as its General Manager. Because of continuing personal issues, Mr. Mason decided to leave Niigon in November 2007 after talking with Mr. Schad. It took Niigon some time to find a new General Manager and Mr. Mason stayed on to help with the transition to October 2008.

341 From late October to December 2008 Mr. Mason worked under contract at Husky to operate a Hy 140 (LEAP) machine. His job was to run the machine at night, make parts for GK Packaging, start the machine if it was not running when he arrived at night, and, if the machine stopped, to re-start it. He also ensured the machine was making quality parts for GK Packaging and would make adjustments to the machine's set points if it was not.

342 Thereafter Mr. Mason was unemployed until July 2009, when Mr. Schad offered him a job as "Lights Out" Manager at Athena to work on the factory automation of the injection molding facility at Niigon. Over time, Mr. Mason began to assume more of the responsibilities he had previously performed as Niigon's General Manager. Effective September 1, 2010, Niigon hired Mr. Mason to resume his role as its General Manager full-time which continued until Niigon ceased operations on July 31, 2013.

343 Mr. Mason is now the owner of Zephyr Plastics Inc. which since September 2013 has operated an injection molding business in the old Niigon facilities. It manufactures products for two former customers of Niigon.

344 Husky has not made any claim against Mr. Mason for damages. It claims that it wants the return of documents that it says are confidential to Husky.

Contractual obligations

345 Husky asserts that Mr. Mason breached the confidentiality provisions of his employment agreement made with Husky when he was hired in 1992. I find that he did not. That agreement required him to keep confidential any information relating to Husky that he acquired in the course of his employment with Husky, and it excluded as confidential any information that was in the public domain. There is no evidence of any confidential information learned by Mr. Mason while employed by Husky until terminated in May 2007 that he later disclosed to anyone.

346 When he was terminated, Mr. Mason signed an acknowledgment which provided:

> I acknowledge and understand my obligations as set out in the attached Confidentiality/Invention Agreement ("Agreement") signed by me at the time of my hire. In particular, I understand my obligation to keep confidential and not to make unauthorized use or disclosure either during or after my employment with Husky of Confidential Information as described in the Agreement including any

information relating to Husky, its customers, its suppliers and other persons with whom Husky carries on business.

347 No Confidentiality/Invention Agreement was attached to the acknowledgment signed by Mr. Mason, who does not recall signing the acknowledgment or any confidentiality/invention agreement. Husky says on a fair reading of the acknowledgment it refers back to Mr. Mason's employment agreement signed in 1992. Assuming that to be the case, it would have been a meaningless acknowledgment because the employment agreement of 1992 itself required Mr. Mason to keep confidential after he left Husky any confidential information acquired by him when he was at Husky.

348 For the few months from late October to December 31, 2008 when Mr. Mason was hired under contract to operate the Hy 140 machine at Husky, Mr. Mason was not asked to sign an employment agreement, a confidentiality agreement or a non-disclosure agreement. During that short time he was at Husky, Mr. Mason did not communicate to anyone at Athena anything about the Hy 140 machine.

349 When he was hired by Athena in July, 2009 Mr. Mason signed an employment agreement that contained nothing about Husky information. Mr. Mason's duties at Athena focused initially on factory automation. After a few months, he spent most working days at Niigon, where the work on factory automation was actually taking place. Before that, he spent much of his time at Athena's offices. Much of the period he was at Athena's offices was coextensive with the brief period the Hy 140 machines were at Niigon while Mr. Mason was employed by Athena (*i.e.*, July 2009 to March 2010).

350 When Mr. Mason became General Manager of Niigon in September 2010 he signed a second Niigon employment agreement which again contained nothing about Husky information.

Inducing breach of contract and unlawful interference with Husky's interests

351 Husky argued at the conclusion of the case that Mr. Mason induced a breach of the Niigon confidentiality obligations that it had in its contract with Husky and that he unlawfully interfered with Husky's interests. These causes of action were not pleaded against Mr. Mason and on that ground cannot succeed. In any event, the evidence does not support any claim for either tort against Mr. Mason.

352 Much of this claim has to do with information dealing with the commercially available Husky machines at Niigon. Mr. Mason never thought those machines or the information relating to them were confidential. I do not intend to deal with this allegation in light of the finding that the confidentiality provision of the September 2007 Agreement did not cover the commercially available Husky machines at Niigon.

353 Husky claims that from the fall of 2009 until the LEAP machines were removed from Niigon

in January and March 2010 Mr. Mason spent a good part of his time at Niigon and did not stop any Athena employee from accessing the LEAP machines there. However, Mr. Mason was also an Athena employee at the time and he had no authority to be stopping Athena employees from doing anything with the LEAP machines at Niigon. He was working on the automation or Lights Out project and it was only in September 2010 that he was hired as General Manager of Niigon. This could not give rise to his inducing a breach of the confidentiality obligations of Niigon to Husky or constitute unlawful activity giving rise to an unlawful interference with Husky's economic interests.

354 There is one memo dated February 24, 2010, shortly before the last LEAP machine was removed from Niigon, in which Mr. Mason sent to Mr. Schad a summary of the LEAP machine failures. Mr. Mason believes that he prepared the memo for Mr. Schad, to whom it is addressed, and who, at the time, was also Niigon's Chairperson. He does not recall why Mr. Schad requested the information. Again, Mr. Mason was an employee of Athena working for Mr. Schad. He was reporting to his superior at Athena. I do not see this evidence regarding Mr. Mason while he was an Athena employee as constituting any inducement of a breach of the confidentiality obligations of Niigon to Husky or constituting unlawful activity giving rise to an unlawful interference with Husky's economic interests.

Relief claimed against Mr. Mason

355 Husky claims injunctive relief requiring Mr. Mason to return what it contends are confidential documents in his possession.

356 This claim must fail as Husky has not established any legal wrongdoing on Mr. Mason's part. A pre-condition to embarking on a consideration of whether an injunctive remedy should be granted is whether a cause of action has been established. See Sharpe, *Injunctions and Specific Performance*, loose-leaf edition (Toronto, Ont: Canada Law Book, 2015), Ch. 1 at s.1-45 and *NunatuKavut Community Council Inc. v Nalcor Energy*, 2014 NLCA 46 at para 51.

357 Moreover, Husky has not established that Mr. Mason has any documentation that could be considered confidential to Husky.

358 After the termination of the relationship by Husky with Niigon and the request by Husky for return of any Husky documentation at Niigon, Mr. Mason and another Niigon employee collected what they believed to be all of the Husky-authored documents at Niigon that Niigon was not using to operate the machines still at Niigon. Niigon stored these documents in a disorganized fashion, many in boxes in the basement. An inventory of what was returned to Husky refers to documents that appear to be associated with the Hy 140 machines. Mr. Mason was unaware that these documents remained at Niigon and he never looked at them or provided access to them to anyone from Athena. Husky had never asked for the return of documents related to the Hy 140 LEAP machines when it removed those machines from Niigon.

359 Zephyr operates from the old Niigon premises using commercially available Husky machines

that its customer GK Packaging has purchased save for one that Husky has abandoned. The molds at Zephyr are all owned by Zephyr's customers including GK Packaging. Zephyr retains possession of certain Husky-authored documents, mostly CD-ROMs for the commercially available machines and molds at Zephyr. These CD-ROMs are owned by the owners of the machines and molds. Zephyr requires these CD-ROMs for the operation of its business to make parts for its customers.

360 Mr. Galt on his cross-examination agreed that there is nothing wrong with Zephyr using the CD-ROMS if they contain the standard terms provided to Husky customers. Mr. Galt could not say whether the CD-ROMS being used by Zephyr contain anything but standard information provided to customers of the commercially available machines of the type used by Zephyr and there is no evidence that they do. Mr. Mason testified that he had no reason to believe that the CD-ROMs contain information other than what a normal Husky customer would receive with the purchase of a machine or mold and that if he misplaces a CD-ROM, which he once did, he simply calls Husky's helpline, provides Husky with the relevant serial number and Husky sends him a replacement copy for a fee.

361 The CD-ROMS do not belong to Zephyr but rather to GK Packaging or other third parties. Mr. Mason has offered twice to make inquiries of the owners of these documents to permit Husky to inspect them, once during discoveries and then in his affidavit sworn for this trial. While Husky says they want these back to see if there is anything on them that would be confidential to Husky, Husky has not taken up Mr. Mason on his offer.

362 In this litigation, Husky has also demanded the return of those CD-ROMs that are not associated with machines or molds at Zephyr, and which Zephyr retained through oversight. These CD-ROMs relate to commercially available machines that Husky delivered to Niigon in 2002 and 2004 and which left Niigon in 2008, more than seven years ago. One of these CD-ROMs relates to the same type of machine that Husky abandoned at Niigon and which Mr. Galt admitted had no valuable confidential information.

363 Husky also referred to four documents or categories of documents at para. 668 of its Detailed Summary of Evidence that it says contain confidential information relating to the Hy 140 LEAP machines. This reference was only disclosed on the eve of oral argument and these documents are not dealt with in Husky's closing submissions. There is no suggestion Mr. Mason misused any of these documents. There is no evidence that the documents contain any Husky confidential information and the explanation for them at tab D of Mr. Mason's written argument is considerable evidence that there is nothing in them that is confidential.

364 I view the purported need of Husky to have delivered to it the various documents or CD-ROMS as grasping at straws to justify the claim against Mr. Mason.

Conclusion

365 The claim against Mr. Mason is dismissed.

Damages

366 The action is being dismissed in its entirety. However, in case this matter goes further, I will deal with the damage claim by Husky.

367 The principles on which damages may be claimed in this case are set out in the submissions of Husky, which I accept. They are based on *Cadbury Schweppes Inc. v. FBI Foods Ltd*., [1999] 1 S.C.R. 142; *Canson Enterprises v. Broughton*, [1991] 3 S.C.R. 534; and Dimock, Ronald E. ed., *Intellectual Property Disputes: Resolutions and Remedies* (Toronto: Carswell, 2015). Husky's submissions are the following:

> 208. Damages can be awarded for breach of confidence and for breach of fiduciary duty pursuant to the court's general equitable jurisdiction. The objective of damages for breach of confidence is "to put the confider in as good a position as it would have been in but for the breach." For equitable compensation, the plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. "Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which on a common sense view of causation, were caused by the breach." The plaintiff is not required to mitigate, but losses resulting from clearly unreasonable behaviour on the plaintiff's part will be adjudged to flow from that behaviour and not from the breach.
>
> 209. The appropriate measure of damages for breach of confidence may include any one or a combination of the following considerations: (1) loss of profit; (2) the value of a consultant's fee; (3) the development costs incurred in acquiring the information; (4) capitalization of an appropriate royalty; (5) the market value on information as between a willing buyer and a willing seller; and/or (6) lost opportunity.
>
> 210. The following factors have been identified as helpful in establishing loss of profit: (1) identifying specific customers that were diverted to the defendant; (2) showing proof of a general decline in sales; (3) disruption of business growth following the commencement of use by the defendant; and (4) evidence that sales made by the defendant would instead have been made by the plaintiff, in which case the plaintiff may establish its lost profits by applying its own profit margin to the defendant's sales.
>
> 211. A compensable period must be determined. In *Cadbury Schweppes*, that period was fixed at 12 months...

368 Husky claims damages of $24,248,000 against all defendants other than Mr. Mason[9]. It relies on the evidence of Mr. Peter Steger, a highly qualified expert in damage calculations. The defendants rely on the evidence of Mr. Mark Berenblut, also a highly qualified expert in damage calculations.

369 Pursuant to the agreement between SIPA and Athena, SIPA marketed the XFORM 150 and XFORM 130 machines produced by Athena. SIPA also marketed an XFORM 500 machine produced for it by Engel, which Husky claims contains in its cooling system a cooling pin that is based on information that Athena improperly obtained from a cooling pin on a Husky HyPet 120 machine at Niigon.

370 Husky has identified nine sales by SIPA of XFORM 150 or XFORM 130 machines to customers of SIPA that Husky bid on and says it would have won had SIPA not been marketing those machines produced for it by Athena. Husky claims the lost profits it would have made on those nine sales plus lost ancillary revenue for after-market tooling, spare parts and servicing it would have earned over 20 years totalling $16,136,833.

371 Husky has identified two sales that it made to customers where SIPA had unsuccessfully bid and for which Husky claims it had to discount its price to compete with SIPA. It claims lost revenue caused by the discounting of $416,351.

372 Husky has also identified three XFORM 150 or XFORM 300 machines and one XFORM 500 machine sold by SIPA that Husky was not asked to bid on but which it claims would have been asked to bid on and would have won the bids if SIPA had not bid. It claims lost profits on the sales plus lost ancillary revenue for after-market tooling, spare parts and servicing it would have earned over 20 years totalling $6,589,000, $3,413,788 of which is for the sale of the XFORM 500 machine.

373 Finally, Husky has identified sales made by Athena to SIPA or sales/leases to others that Husky acknowledges that it would not have been able to make. Husky claims a disgorgement of profits of Athena of $853,000. Husky has identified two sales of Athena machines by SIPA that Husky acknowledges that it would not have been able to make but claims a disgorgement of profits from SIPA of $253,000.

374 The Husky claim in the main assumes that with complete certainty, Husky would have made the sales but for SIPA selling the Athena machines. No discount for the prospect that Husky would not have been successful on those sales has been made. In a case such as this, the claim of Husky is really for the lost chance of selling its machines because of the fault of Athena and SIPA being in the market place with confidential Husky information. It is not a matter of a balance of probabilities that Husky would have sold its machines and is therefore entitled to 100% of its lost profits.

375 The damage claim of Husky assumes that there were no non-infringing alternatives available to Athena or to SIPA in respect of the sales that they made. Mr. Steger was instructed by counsel for Husky to make this assumption. That is, the assumption is that neither Athena nor SIPA could have

used a part in the machines sold that was different from the part that was made from the use of confidential information of Husky. This means that in the absence of the alleged misuse, Athena and SIPA would not have been able to sell any injection molding machines. Husky does not particularize any aspect of the XFORM 150 and 130 machines sold by SIPA that it says was confidential to Husky or try to value such confidential aspects.

376 This assumption on the part of Husky and the failure to identify specific and identifiable confidential information in the machines sold by SIPA or Athena is a significant flaw in Husky's theory of damages. Mr. Berenblut's opinion, which I accept, is that critically absent from the Husky claim and the report of Mr. Steger is an assessment, from an economic perspective, of the commercial or technological importance of the particular confidential information allegedly misused by Athena or SIPA in their commercialized machines, or any assessment of how the Defendants' alleged use of any such confidential information might have impacted Husky's business or benefited the businesses of Athena or SIPA.

377 Mr. Berenblut also stated in his report that in order to support the central assumptions of Husky and the Steger Report (that but for their alleged misuse of the confidential information, the defendants would not have made any sales and Husky would have made all of the sales that were made by the defendants), it would be necessary to consider the commercial and technical importance of the confidential information to each of the injection molding machines actually commercialized and sold by SIPA and Athena. It would also be necessary to demonstrate (likely with input from experts in the engineering of these machines) that the most likely consequence of the defendants not having misused the particular information in question in the machines that they commercialized and sold, is that those machines could not and would not have been brought to market. The Steger Report contains no assessment to confirm the economic impact of the technological or commercial importance of the confidential information in question to the machines sold by Athena and SIPA.

378 Mr. Berenblut stated more particularly in his report that the analyses required to quantify any such damages would include:

a. A delineation of the particular confidential information in question, as well as identification of the technological and commercial significance of any such information in the injection molding machines that have actually been commercialized and sold by Athena and SIPA;

b. Having regard to the nature and commercial and technological importance of that particular information, an assessment of the economic impact that the alleged misuse of that particular information has actually had on the business of Husky, in the period since SIPA and Athena began selling their commercialized machines in 2013. At a minimum, the required assessment

would include:

i. Analysis of actual significance to the sales of Athena and SIPA of the particular confidential information they are alleged to have misused in the particular machines that they have commercialized and sold;

ii. An assessment of other machines of SIPA or Athena that could (and in some instances would) have been sold even if they did not contain the specific confidential information in question; and

iii. Whether Athena or SIPA could have "designed around" the specific confidential information they have allegedly misused in their commercialized machines, as well as the time and expense associated with doing so;

c. In the case of the lost profits measure of damages, quantification of the difference in Husky's profits based on an assessment of the actual impact on Husky's sales associated with the alleged misuse by Athena and SIPA of the particular confidential information allegedly contained in their commercialized machines; and

d. In the case of the disgorgement remedy, quantification of the incremental profits earned by the Defendants that are attributable to their alleged use of Husky's confidential information, if any. This might include assessing:

i. Whether the use of the confidential information was a prerequisite to the Defendants' allegedly infringing sales;

ii. The impact, if any, on the prices received by the Defendants for machines they have commercialized and sold as a result of their alleged use of the confidential information (if that confidential information was, in fact, embodied in machines that were commercialized and sold by Athena or SIPA); and

iii. The cost savings realized by Athena or SIPA, if any, associated with their use of the confidential information in the development or manufacturing of the Athena/SIPA machines.

379 This opinion of Mr. Berenblut is consistent with the way in which Husky in this case led evidence of the various aspects of confidential information improperly used by Athena in the development of its A150 machine. Husky referred throughout to specific information and parts of the LEAP machine that Athena improperly accessed. Yet it has not attempted to put a value on any particular aspect of the LEAP machine that it says was used by Athena.

380 An example of the effect of this failure of Husky to value any aspect of the machines that it says were improperly accessed by Athena relates to information relating to the cooling pin that it says was provided by Athena to SIPA and then eventually used by Engel in producing the XFORM 500 machines for SIPA. The information was taken from a commercially available HyPet 200 machine. Husky claims that because the XFORM 500 machine produced by Engel contained information regarding the cooling pin, all of the profits earned by SIPA should be disgorged. Yet SIPA began selling that machine prior to incorporating Athena's cooling pin technology. Mr. Berenblut opines, correctly in my view, that it would be illogical to assume (as the Steger Report does on the instructions he was given) that SIPA would not have been able to sell the XFORM 500, or even that it would not have been able to sell the post-mold cooling option for this machine, but for the defendants' alleged misuse of Husky's confidential information and that from an economic perspective, the evidence suggests that without the use of Athena's cooling pin technology, the XFORM 500 machines would still have been sold by SIPA. After this law suit was commenced, SIPA stopped using the Athena designed cooling pin and has continued to market its XFORM 500 machines. Husky's claim also ignores the evidence that the cooling pins are a single component of a larger cooling system and that the cost of cooling pins is a few thousand dollars in the context of an entire system that costs over a million dollars.

381 In its written submissions, Husky stated while SIPA contests Husky's entitlement to damages on the sale of a complete XFORM 500 system based on the inclusion of Athena's post-mold cooling technology in that system, it is open to the Court to perform an apportionment or allocation of profits if that is determined to be appropriate. That is an acknowledgment that damages can be calculated on the value of any particular aspect of the Athena or SIPA machines rather than simply looking at the overall profits on a machine earned by Athena or SIPA or lost by Husky.

382 The same point can be made with respect to the through holes in the base of an injection molding machine for a safety mechanism on Athena's machines. Dr. Urbanek explained that the through holes in the base used for a safety mechanism on Athena's machines is a trivial aspect of the design and could be replaced with a different safety locking system for a few hundred dollars.

383 A problem with the damage claim of Husky is that its expert Dr. Wobbe did not do any detailed review of the Athena machines being sold. He said that what Athena was doing today was

without relevance to his analysis. In his report, Dr. Wobbe only considered the A150 prototype design. There were certainly changes made to a number of aspects of the A150 machine from the prototype that Dr. Wobbe examined. Drs. Urbanek and Osswald analyzed and provided opinions about Athena's current machines as well as its earlier prototype designs. Their opinion was that Athena's commercialized machines are not a copy of Husky's LEAP machine, and do not appear to contain any proprietary Husky technology. Without evidence of what was contained in the Athena machines sold by SIPA that was derived from Husky confidential information, it cannot be assumed that they contained the results of confidential Husky information that had a significant value. Yet the whole basis of the Husky damage claim is that the machines being marketed by SIPA contain confidential Husky information entitling it to its lost profits from lost sales.

384 Mr. Berenblut's opinion is that an appropriate method of determining damages would depend in part on whether and to what extent the machines that were commercialized and sold by Athena and SIPA embodied confidential information of Husky. His opinion is that if it is the case that machines that have been commercialized and sold by Athena and SIPA do, in fact, include the confidential information of Husky, then an appropriate approach to measuring damages to Husky would be to determine a reasonable royalty having regard to the nature and significance of the information in question and apply that royalty to machines that have been sold by the defendants.

385 I accept that applying a royalty rate as discussed by Mr. Berenblut would be the most appropriate method of determining damages in this case, to be applied to the particular aspect or part containing confidential information of Husky. A royalty rate for a part such as a cooling pin or a tie bar, for example, would be far more appropriate and realistic than simply awarding Husky all of its lost profits on the sale of a machine containing this cooling pin. This is consistent with the discussions in the settlement process involving Husky and Athena in which one possibility that was discussed by Mr. Schad and Mr. Galt was a royalty or license agreement covering confidential information.

386 Another problem with the Husky damage claim is that it does not distinguish between information that came from the Husky LEAP machines at Niigon and from the commercially available machines that I have held were not confidential. With respect to the LEAP machines, I have held that what information Husky asserts was misused was either not misused or was of little if any material value to the development of the Athena A150 machine. Mr. Berenblut points out that if the opinion of Drs. Urbanek and Osswald is accepted that the confidential information actually at issue here is limited in scope, and has equally limited technical and commercial importance, then a reasonable royalty would likely be a small fraction of the gross profits actually earned by SIPA or Athena in selling the machines in question to third parties and would result in a substantially lower damage quantification than the damages claimed by Husky and quantified in Mr. Steger's report. I have accepted that opinion of Drs. Urbanek and Osswald and accept the conclusion of Mr. Berenblut as to the relative value of a reasonable royalty.

387 If I were to adopt the Husky theory of damages as articulated by Mr. Steger in his report, which I do not accept as the correct theory, I would make substantial changes to the quantification.

388 Included in the damage claim are claimed lost profits on four XFORM 500 machines sold by SIPA. In my view there is no basis for Husky making a claim on those machines. They were manufactured by Engel. Athena provided the cooling pin technology, which is part of the post-mold cooling technology, to SIPA which provided it to Engel. Husky alleges that Athena obtained the technology from Husky, which it claims was confidential, and used it in producing the cooling pin technology given to SIPA and then Engel. I do not accept that allegation.

389 In early 2012 Mr. Sicilia of Athena took high-speed video footage of the post-mold cooling system on a HyPET 120 machine at Niigon showing the operation of the part transfer into the cooling tubes and the use of cooling pins. Mr. Sicilia said in his examination in chief that he did not use Husky information in designing Athena's cooling pin. On cross-examination he said that he did not remember how he used the video regarding the post-mold cooling process but also acknowledged that "the videos were used in connection with post-mold cooling". I do not take this as evidence that the video was used by Athena in designing its cooling pin.

390 The evidence is that the Athena cooling pin was very different from the Husky cooling pin. Husky used two distinct pins to perform the function of cooling the preform and retaining the preform, whereas Athena developed a single pin that would perform both functions in one. As well, the unchallenged evidence of Mr. Schad and of Drs. Urbanek and Osswald was that Athena's cooling pins use vacuum to suck air through the preform to cool it, as well as to hold the pin in place while transferring it. By contrast, Husky's cooling pins blow air into the preforms and are very different from the Athena designed cooling pin. Dr. Wobbe, Husky's expert, did not examine the cooling pins on any Athena machine. There is no cogent evidence that the Athena cooling pin was designed from the video taken from the HyPet 120 machine at Niigon. In any event, the HyPet 120 machine was a commercially available machine and not confidential. As well, although there is no evidence that Athena used any information from the LEAP machines at Niigon in designing its cooling pin, Drs. Urbanek and Osswald testified that they looked at the remaining HyPet 140 machine (LEAP) and that the cooling system on it was different from the Athena cooling system and that the LEAP cooling system was similar or equal to commercially available systems.

391 If no other adjustments were made to the Husky damage claim contained in the report of Mr. Steger, removing the claim for the four XFORM 500 machines sold by SIPA would reduce the claim by $11,856,005 on my reading of that report.

392 A discount would have to be applied to the chance that Husky would not have been able to make the sales that it claims it would have made but for the SIPA machines sold. I would differentiate the different categories of claims.

393 For six of the sales (nine before three sales of XFORM 500 machines are taken out), Husky made an unsuccessful bid. Husky claims it would have made these sales had SIPA not successfully

bid to sell the Athena machines. Mr. Galt testified that the claim that Husky would have made the sales is based on the fact that for the past 10 years it had approximately 75% of the global PET market and that for customers with existing Husky equipment it is a real advantage to continue with Husky equipment. For the six machines, five were sold to four existing Husky customers, some far more significant than others. Nuovoplast, for which claims are made totalling $2,578,740, or one-third of the claims for the six machines, had no significant former relationship with Husky. One customer, for which a claim is made of $950,457, or 12% of the claims for the six machines, was not a former Husky customer. Most of these buyers had been a customer of SIPA. Moreover, for several of the sales made by SIPA, Husky quoted on a different system than the one it now claims it would have sold. Mr. Berenblut's opinion is that at a minimum, this suggests that Husky did not adequately understand and address the customer's needs and, therefore, may not have been successful in making those sales even if Husky had not faced competition from Athena and SIPA. The claim of Husky for these sales is based on what it says is its closest product to the one sold by SIPA. Also to be taken into account is that there were other competitors in the marketplace and Mr. Galt could not say how many other bidders there were. There is no evidence that SIPA was the only other bidder.

394 For the sales lost by Husky for which it was unsuccessful in its bid, I would discount the claims by 40%.

395 Mr. Steger said that if there was a discount applied for the risk of Husky not making the sale, then with respect to the ancillary revenue to be earned over 20 years, for consistency he would say it should increase the risk to the receipt of that ancillary revenue stream. The effect of this increased risk would be to cause an increase to the discount rate he applied to the future income stream obtained by Husky for this ancillary revenue. Mr. Steger in his report used a discount rate of 5%, as opposed to the WACC rate of 6.75% used by Husky, because of what he viewed as the risk of the ancillary income being achieved. How much he would have increased the discount rate because of the higher risk he did not say, as he did not know what the discount for risk would be, if at all.

396 Mr. Berenblut opined that the discount rate should be higher than 5%. He was critical of the low rate of 15% for the equity portion of the WACC. He gave an overall range for the discount rate of 10 and 15%. Considering the significant risk to the ancillary revenue not taken into account by Mr. Steger, I would apply a discount rate to be used in calculating lost ancillary revenue of 8%.

397 Husky claims lost profits on two sales that it made but for which it claims it had to provide the customer with a higher than normal discount because of the competing bid of SIPA. One customer was a very significant customer of Husky. One was not. Mr. Steger said that he had been informed by Husky staff that Niagara Bottling, a significant customer of Husky, had said that SIPA would be getting the sale and agreed to sell to Husky only after a larger discount than normal was given. Mr. Galt's evidence was that on the other sale there were indications from the customer that led to Husky to increase its discount. All of this is of course hearsay. Whether it was just a bluff and good bargaining by the customer is not known. However larger discounts were given and I would

not deduct anything from the modest claims made for these two sales.

398 Husky claims lost profits on sales that it was not invited to bid on. It claims that if SIPA was not a bidder, it would have been invited to bid and would have been successful. There are three XFORM 150 or 300 machines in question. Two of the customers were relatively significant customers of Husky. One was not. There are two risks here. One is that the buyer would not have asked Husky to quote on the product even if SIPA were not bidding. The second is that even if Husky bid it might not have obtained the job. The evidence of Mr. Gribaudo, the General Manager of SIPA, was that in his experience, a customer will contact an existing supplier if it is satisfied with its performance, but will not if it is not satisfied or is not interested in purchasing further technology from that supplier. There is logic in what he says. There is no specific evidence why these three buyers did not ask Husky to quote. This claim is based only on supposition given Husky's position in the market and its relationship with two of the buyers. I would discount this claim by 80%. I would increase the discount rate used by Mr. Steger to value the ancillary revenue claimed by Husky to have been lost over 20 years from 5% to 10%.

399 I find that Husky has not proven any material damages for misuse of confidential information. Husky has failed to establish that any specific confidential information was used by Athena that was material to the manufacture and development of its technology and has failed to establish the value of any such confidential information. In the circumstances if there had been a breach entitling Husky to damages, I would award nominal damages of one dollar.

Conclusion on the Husky claims

400 The claims against all defendants are dismissed.

Counterclaim

401 Athena counterclaims for damages allegedly suffered as a result of what it says is tortious conduct of Husky in the prosecution of this action by Husky. Athena claims that Husky has engaged in a campaign of disseminating false and misleading statements about Mr. Schad and Athena within the industry and more broadly with the intention to undermine and eliminate competition from Athena and to improperly preserve its dominant position in the PET injection molding market. Athena claims that Husky was not motivated to bring this action by a legitimate interest in protecting confidential information but rather its predominant purpose was to improperly undermine and eliminate competition from Athena. Athena relies on the actions of abuse of process, unjust enrichment and injurious falsehood.

402 Athena acknowledges that it lacks direct evidence supporting constituent elements of these causes of action. It relies on a letter sent by Mr. Galt after the action was commenced to all Husky employees and asks that an inference be drawn against Husky for refusing to produce documentation it says it was entitled to. It contends that in furtherance of its improper purpose in bringing this action, Husky has made extremely broad allegations in the action including claims

regarding its commercially available machines that have been widely and publicly available throughout the world for many years, and made claims regarding concerns that were settled during the settlement process.

403 Shortly after this action was commenced, Mr. Galt sent a memorandum to roughly 4,000 Husky employees notifying them of the action. The memorandum contained the following:

> As you may have read in the media recently, Athena Automation Ltd. has started machine production. Athena, a company owned by Husky's founder Robert Schad, is planning to manufacture injection molding systems for the PET market. The company has partnered with SIPA, a direct competitor of ours, to manage the sales, service and integration of their PET preform machines.
>
> Every day our team members invest their time, intellect and creativity to develop innovative ways of delivering value to our customers, and I want to assure you that we are taking steps to protect these investments. Based on Robert's past relationship with Husky and his agreements with the company he is legally obliged to not misuse or disclose any Husky confidential information. We have made efforts with him to protect our confidential information. As a last resort, we have now initiated legal proceedings against Robert Schad, Athena, SIPA and others to protect our confidential information and business. We want to ensure that any and all rewards and customer value that result from our inventions and knowledge stay within the Husky team, for the benefit of Husky.
>
> It is essential that Husky team members do not comment in any way on the lawsuit or discuss their thoughts and opinions on the overall situation, Athena or Robert Schad. This includes discussions with both those inside and outside of Husky, email and all other forms of communication. Any inquiries from customers, suppliers, the media and others should not be responded to and instead forwarded to Jessica Calleja on our Communications team for a response.

404 One may legitimately ask if the direction of Mr. Galt to Husky employees not to discuss the matter inside Husky, for example, was seriously made. The employees were being told of an action against the founder of Husky. To expect the employees to read the memorandum and then not discuss it with anyone with whom they worked at Husky would be naïve in the extreme, and I did not judge Mr. Galt to be a naïve person. Mr. Galt denied on cross-examination that he knew when he sent this memorandum to over 4,000 people throughout the world that the inevitable consequence would be that the dissemination in the injection molding industry of the very information that he said in this note should not be shared. I find this denial a little hard to credit.

405 However there is no evidence in the record that any Husky employee spoke to anyone

outside of Husky about the action or made any disparaging comment to anyone about Mr. Schad or the other defendants. It is not possible without some evidence to make a finding that they did and that it had a material effect on Athena's business.

406 In its defence and counterclaim Athena pleaded that Husky had made unfounded allegations of misconduct against Athena and Mr. Schad to numerous industry participants, including to potential customers of Athena, warning them against doing business with Athena or Mr. Schad. After a demand for particulars, Athena provided particulars of three occasions known to it in which such statements were made.

407 Athena says that an adverse inference should be drawn from the failure of Husky to produce documents demanded by Athena. On discovery of Mr. Galt, Athena requested all internal emails and other internal communications from May 2011 onwards containing information or allegations made concerning Mr. Schad or Athena and all documents in the possession, custody or control of Husky or its affiliates concerning communications with third parties, including customers of Husky, about Mr. Schad or about Athena or Niigon and about pursuing potential claims against Mr. Schad or Athena. Mr. Flaherty on behalf of Husky responded that to the extent that Athena's counterclaim has been particularized in the answer to the demand for particulars, Husky had reviewed and produced documents that related to those specific allegations, but beyond that, it was an improper fishing expedition.

408 Husky has some 4,000 employees worldwide. It would be no small matter to review the entire company's email system and records to search for communications with third parties regarding Mr. Schad or Athena. The requested documentation was certainly a wide request and whether or not it could be described as a fishing expedition, I am reluctant to draw an adverse inference that the documentation in Husky's possession would be unhelpful to its case. Athena could have brought a motion for the refusal of Husky to make a document search, but it did not. In any event, the making of an adverse inference against Husky would not turn a lack of evidence of third party communications into some evidence permitting a finding of third party communications. Generally, an adverse inference against a party bolsters the competing evidence of the party asking for the adverse inference, but in the absence of competing evidence I doubt there is any utility in an adverse inference being drawn.

Abuse of process

409 There are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted. See *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, per Moldaver J.A. (as he then was) at paras. 27-28, leave to appeal refused, [2011] S.C.C.A. No. 85.

410 Athena relies on what it says was an unreasonable termination of the settlement discussions

in support of this claim. I must say that after reading the correspondence from Mr. Galt terminating the discussions, I am somewhat skeptical of why they were terminated. Mr. Galt blamed the hostile tone of the most recent letter from Athena answering the unresolved claims of Husky and the use of lawyers in so doing. Husky, however, had used outside lawyers and provided that legal advice to Athena during the settlement discussions and the Athena letter was responding to that. While Mr. Schad expressed concerns with the process and the delays caused to Athena entering the market, and expressed concerns with rumours that Husky was planning on shutting Athena down through the legal process, he also said he hoped there would be no litigation. I am somewhat surprised by Mr. Galt professing to view the letter from Mr. Schad as hostile and making any further discussions not worthwhile. However, I cannot find from the termination of the settlement discussions that the lawsuit was started by Husky for the predominant purpose of furthering some indirect, collateral and improper objective.

411 Nor can I find such an improper objective from the fact that Husky made claims for matters that were settled or claims that did not succeed, such as the claim that commercially available machines were protected by confidentiality obligations. Many claims in many actions do not succeed but that does not in itself establish an improper purpose in bringing the action. This action cannot be said to have been completely spurious in the sense discussed by Justice Nordheimer in *Westjet Airlines Ltd. v. Air Canada*, [2005] O.J. No. 2310.

412 Moreover, there is no evidence to establish the third element of the tort that Husky took a definite act or threat in furtherance of the improper purpose.

Unjust enrichment

413 Canadian law permits recovery for unjust enrichment whenever a plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

414 I see no basis for this claim of Athena to succeed. It is based on the same allegations of improper purpose by Husky in bringing this action and the unproven allegation of a campaign of Husky to harm Athena in the marketplace by making detrimental statements to third parties to persuade them not to deal with Athena.

Injurious falsehood

415 The tort of injurious falsehood is similar to the tort of defamation but protects a different interest. Defamation protects a person's personal reputation while injurious falsehood protects an interest in one's property, products or business. In order to recover for injurious falsehood, there must be a false statement made with malice and malice must be proven. Injurious falsehood consists in the publication of false and malicious statements concerning the plaintiff or his property calculated and intended to induce others not to deal with him. See Fleming, *The Law of Torts*, 9th ed., at pp. 778-779.

416 For the same reasons as with the other claims of Athena, I see no basis for this claim to succeed, as it is based on the unproven campaign of Husky to harm Athena in the marketplace by making detrimental statements to third parties to persuade them not to deal with Athena.

Damages

417 Athena claims damages of $32 million to $50 million based on a report of Mr. Berenblut, as follows:

Damage Component	Damages to Athena	Report Section
Athena's Past Lost Profits, 2013-2015	**$5 million**	6.2
Athena's Lost Future Profits, 2016-2019	**$27 million**	6.3
Athena's Lost Future Profits, After 2019	**$nil to $18 million**	6.4
Total Damages to Athena	**$32 million to $50 million**	

418 The damage claim is based on a forecast of sales made by Mr. Overbeeke of Athena for the purpose of the law suit. It was not a forecast made by Athena in the ordinary course of its business. It compared what sales could have been achieved without the interference by Husky and what would likely be achieved but for the improper actions of Husky.

419 Mr. Berenblut made a number of assumptions on instructions from Athena's lawyers, including:

a. In commencing this proceeding Husky sought to preserve its dominant position in the PET injection molding industry, including by impairing the ability of Athena to commercialize its injection molding machines. Husky's communications to the industry and market go beyond the allegations it reasonably could or should have made in a legitimate effort to protect properly its legal and economic interests.

b. Representatives of Husky have made its allegations of misconduct known to other participants in the injection molding industry, including to potential customers of Athena. Athena's ability to penetrate the market for

injection molding machines has been impaired by these allegations of misconduct and will continue to be impaired until at least 2019.

c. Resolution of this lawsuit in favour of Athena will reduce the uncertainty and impact of Husky's conduct on the reputation of Athena thereby allowing the Company to eventually achieve, over time, the business performance that it expects it would have been able to achieve had it not been for Husky's conduct.

420 In order to determine the loss of past and expected future profits suffered by Athena, Mr. Berenblut compared the sales volumes and revenues expected by Athena but-for the alleged wrongful conduct of Husky to the actual sales volumes and revenues Athena has generated and now expects to generate in the future. He then made deductions for variable costs and any other saved costs in order to arrive at estimates of Athena's past loss of profits and its loss of expected future profits. He had discussions with Athena's management and considered the reasonableness of the but-for and actual expected forecast level of sales, average prices, and associated costs in the context of Athena's experience to date as well as industry benchmarks. He applied a discount rate of 15% to the expected future lost profits in order to express them in 2015 dollar terms, and to recognize the uncertainty associated with these forecasts.

421 I have held that there is no proven claim permitting Athena to collect damages. However, assuming there had been liability of Husky, I would have made changes to the damage assessment.

422 The number of sales to 2015 was known. The future sales were not. In a start-up business it is not so easy to forecast future sales as with a mature business. Mr. Berenblut accepted the Athena forecasts of lost sales due to Husky's actions as reasonable. He used an after-tax discount rate of 15% for future lost income based on a typical WACC analysis that included a risk free rate of 2%, an equity risk premium of 10.45%, an industry premium of 2.76% and a company-specific risk premium of 2% as Athena was in the early stages of marketing, is a small player in the industry, and has an exchange risk as it sells its products in U.S. dollars. That resulted in a nominal WACC of 17% and a real net of inflation rate of 15%.

423 The sales forecast of the sales that would have occurred but-for the actions of Husky assumes a new supplier or a renewed partnership with SIPA. I think that reasonable. It also assumes that Athena would have been able to sell increasing volumes of machines in a market that may be stagnant. I think it reasonable to assume increasing sales, given Mr. Schad's reputation in the marketplace, but there is a risk involved that future sales would not be as robust as forecasted, and obviously the longer out the forecast goes, the greater the risk. When one compares the discount rate of 15% used by Mr. Berenblut to the 10-15% discount rate that he would have applied to Husky's claim for future ancillary profits, it is apparent that the 15% discount rate for Athena's future losses is likely too low, given the fact that Husky is a mature company that is the market

leader with a surer future income stream than Athena.

424 Even if Husky's actions affected the sales of Athena to the time of the trial, how long that would continue is unknown. The sales forecasts of Athena used by Mr. Berenblut, which he accepted as reasonable, assume the effect of Husky's actions would continue from 2016-2019 and beyond that in perpetuity. Mr. Berenblut stated that it appears that Husky's conduct is expected to continue to have an adverse impact on Athena sales beyond 2019, although on what that is based was not stated, and he calculated losses for that after period by adding a terminal value of between $4 and $18 million.

425 I would discount the damage claim for the years beyond 2019 by a very high rate based on the risk that the forecasted but-for sales of Athena might not materialize and on the fact that the effect of any Husky actions in the marketplace complained of by Athena after 2019 would be very speculative taken the dismissal of the Husky action. I would think a discount of 65% would be reasonable for that period. For the period 2016 to 2019 the effect of Husky's actions would likely be more negative on Athena's sales performance and I would apply a discount of 30% to the lost profits for that period.

426 I accept that the Athena forecast appropriately takes into account issues that Athena has had to date with its machines and that comments of Mr. Schad about Husky in the marketplace would have had a mitigating effect on Athena's prospects rather than a negative effect.

427 I agree with Mr. Steger that the variable costs of Athena used in the damage calculation are likely high given that the production costs to date for Athena are much higher than those forecasted. Mr. Steger calculated an increased saved labour cost of $7.4 million for Athena's lost contribution margin for the years up to 2019 based on its actual costs to date. However, it is reasonable to assume that Athena's production costs will decline as the volume of machines sold picks up from the few sales to date and while I would make a deduction for the reasons Mr. Steger has given in his report, I would cut his increase to the saved labour costs by one-half.

Conclusion o*n *counterclaim

428 The counterclaim is dismissed.

Costs

429 My view is that the defendants are entitled to their costs of the Husky action and that Husky is entitled to its costs of the counterclaim. However, I am unaware of any offers that may have been made or something else that may affect costs. I suggest a 9:30 a.m. appointment to discuss how costs will be dealt with.

Professionalism

430 I cannot leave this case without expressing my thanks and admiration in which this case was presented. While there are obviously difficulties between each side in this dispute, the lawyers all acted with reasonableness and courtesy in dealing with each other and with the Court. This was in the highest traditions of the bar and they are to be congratulated.

F.J.C. NEWBOULD J.

1 Unless otherwise indicated, statements of fact in these reasons are findings of fact.

2 The defendant Stephen Mason pleaded the *Limitations Act, 2002* in his statement of claim. However this defence was not pursued at the trial.

3 The email from Mr. Galt was produced by Onex shortly before the trial after a motion was brought to require Onex to search for and produce any relevant documents. Why this email was not produced by Husky has not been satisfactorily explained.

4 No claim is made by Husky in this case for patent infringement.

5 Its opening paragraph reads "The sad reality is that Aboriginal Canadians have been the worst indicators of health of anyone in the country including: the highest rates of diabetes and infant mortality, the highest incidences of AIDS, teen pregnancy and suicide and the lowest life expectancy."

6 I prefer this test to that articulated in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.), in which it was said that interpreting a contract that accords with sound commercial principles is limited to situations in which there is some ambiguity. I do not think that is correct and it is not what other cases of appellate authority have stated. See my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc*. (2011), 83 C.B.R. (5th) 106 at para. 13 and *Oncap L.P. v. Computershare Trust Co. of Canada* (2011), 94 B.L.R. (4th) 314 at paras. 21 to 24. See also Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham Ont.: LexisNexis 2012) at p. 46 fn. 191.

7 It is not clear what the source of the LEAP information was as the LEAP machines had been removed from Niigon by March, 2010.

8 The agreement was terminated by Athena effective December 31, 2015.

9 Mr. Steger provided an alternative damage calculation, being a disgorgement of all of Athena's and SIPA'S profits totalling $3,069,000. However in its written submissions

following the conclusion of the evidence, Husky has not argued for this alternative head of damages.