See para. 306

Case Name:

Waxman v. Waxman

Between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Chester Waxman, Chester Waxman in trust, Chesterton Investments Limited, Robert Waxman, Gary Waxman, Warren Waxman, I. Waxman & Sons Limited, The Greycliffe Holdings Limited, Robix Financial Corporation Limited, Circuital Canada Inc., RKW Standardbred Associates Inc., RKW Standardbred Management Inc., and Glow Metal Trading Inc., defendants (appellants)
And between
I. Waxman & Sons Limited and Chester Waxman, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Shirley Waxman, Douglas Waxman, The Waxman Holding Corporation Inc., Morriston Investments Limited, Solid Waste Reclamation Limited, Solid Waste Reclamation Inc. and General Environmental Technologies Corporation, defendants to counterclaim
And between
Morris Waxman, plaintiff (respondent), and
I. Waxman & Sons Limited, defendants (appellants)
And between
Morris Waxman, Michael Waxman and Solid Waste Reclamation Limited, plaintiffs (respondents), and
Chester Waxman, Robert Waxman, Gary Waxman and I. Waxman & Sons Limited, defendants (appellants)
And between
Chester Waxman, Warren Waxman, Robert Waxman, Gary Waxman, Brenda Halberstadt and I. Waxman & Sons Limited, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Douglas Waxman, Solid Waste Reclamation Limited and The Waxman Holding Corporation Inc., defendants by counterclaim
And between

Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (appellants)
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and Paul Ennis, Q.C. and Ennis & Associates, defendants (appellants)
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (appellants), and Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (respondents)

[**2004**] **O.J. No. 1765**

186 O.A.C. 201

44 B.L.R. (3d) 165

2004 CanLII 39040

132 A.C.W.S. (3d) 1046

Docket Nos. C38611, C38616 and C38624

Ontario Court of Appeal
Toronto, Ontario

Doherty, Laskin and Goudge JJ.A.

Heard: April 22-25, 28-30 and May 1-2, 5-8, 2003.
Judgment: April 30, 2004.

(752 paras.)

Civil procedure -- Appeals -- Grounds for review -- Misapprehension of or failure to consider evidence -- Standard of review -- Pleadings -- Amendment of -- Statement of claim -- Contracts -- Breach of contract -- Remedies -- Damages -- Consensus, lack of -- Undue influence -- Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Damages for breach -- Actions -- Against corporations and directors -- Shareholders -- Rights -- Sale of shares -- Liability -- To other shareholders -- Shares -- Transfer -- Damages -- For torts --

Breach of fiduciary duty -- Civil evidence -- Witnesses -- Credibility -- Legal profession -- Liability -- Standard of care and negligence -- Professional responsibility -- Professions -- Other -- Auditors -- Professional duties -- Fiduciary duties -- Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- Contracts -- Breach of -- Inducing breach.

Appeal by the defendant brother Chester Waxman from a judgment substantially allowing the plaintiff brother Morris Waxman's claims against Chester and others. Morris had alleged that Chester had breached his fiduciary duty by cheating Morris out of his half of IWS, the family scrap metal business. Morris claimed that Chester had engineered a surreptitious sale to himself of Morris' interest in the company, had wrongfully dismissed Morris as president of IWS, and had runn IWS to Chester and his sons' personal advantage between 1979 and 1998. At trial, it was determined that Morris was entitled to half of the profits and equity realized by IWS over the 19-year period in question, as well as punitive damages and two years' salary for wrongful dismissal. Morris also recovered damages from the family lawyer for the latter's role in the sale and transfer to Chester of Morris' shares in IWS. Morris also recovered $2.6 million in damages for Chester's interference in the economic relations of SWRI. Morris also succeeded in his claim against the IWS' comptroller, but was unsuccessful in his claim against the family's accountants. Chester appealed, arguing that the judge's factual errors were so numerous as to undermine the entire judgment. Morris appealed the holding that the family accountants did not breach their duty to him.

HELD: Appeal allowed in part. While there was no basis upon which to interfere with the significant findings of fact or of liability, the quantum of damages was slightly reduced. The case turned on credibility. The trial judge's credibility assessments flowed from a detailed consideration of the entirety of the evidence. Her conclusion that Chester had fabricated a case against Morris while attempting to prevent Morris from pursuing his action was not unreasonable. There was no evidence that the trial judge reasoned from a predetermined conclusion. There was no clear of palpable error in the trial judge's reasoning. Morris' appeal was dismissed. The family accountants did not owe Morris personally a duty of care in tort, as auditors, as fiduciaries, or based on its historical relationship with the brothers. Indeed, it would have been inappropriate for the accountants to report Chester's activities to Morris, absent a specific request from Morris that they do so, as they would then have been placed in a conflict of interest. The accountants owed a duty of care to IWS and the shareholders collectively.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1), 134(4).

Ontario Business Corporations Act, R.S.O. 1990, c. B.16 , s. 129(1), 248(1), 248(2), 248(3).

Appeal From:

On appeal from the judgments of Justice Mary Anne Sanderson of the Superior Court of Justice

dated June 27, 2002, reported at (2002) 25 B.L.R. (3d) 1.

Counsel:

Alan Lenczner, Q.C. and Lorne Silver, for Chester Waxman et al. and Wayne Linton. Barbara Murchie, for Paul Ennis and Ennis & Associates (C38611) and Paul Ennis. Frank Bowman, Chris Hluchan and Sandy M. DiMartino, for Taylor Leibow. (C38616, C38611 and C38624) Robert S. Harrison and Richard B. Swan, for Morris Waxman et al. (C38611 and C38616)

Table of Contents

I. INTRODUCTION		para. 1
II. OVERVIEW OF THE PROCEEDINGS		para. 7
III. THE EVIDENCE: AN OVERVIEW		para. 27
IV. THE NARRATIVE OF THE IWS CLAIMS		para. 30
A.	The IWS Operation up to 1979	para. 32
B.	The Estate Freeze	para. 45
C.	1979 Bonuses to Chester's Sons	para. 53
D.	The Sale of the Ferrous and Refuse Divisions	para. 60
E.	The 1981-82 Bonuses	para. 76
F.	The Greycliffe Trucking Operation	para. 95
G.	The Share Sale and Related Lease in December 1983	para. 122
H.	The Descent into Litigation	para. 181
V. NARRATIVE OF THE SWRI CLAIMS		para. 225
A.	The Incorporation and Reorganization of SWRI	para. 227
B.	The Operation of SWRI Between 1982-1988	para. 242

C. The Termination of the SWRI-Philip Relationship in 1989 para. 254

VI. THE GROUNDS OF APPEAL para. 270

A. The Findings of Fact: The Broad Attacks

i. Introduction para. 270
ii. The Allegation that the Trial Judge Reasoned from a Predetermined Result para. 278
iii. Overview of the Fact-Based Arguments para. 285
iv. The Standard of Review: Palpable and Overriding Error para. 289
v. The Appellants' "Unreasonableness" Argument para. 310
vi. The Processing Error Argument para. 334
vii. Alleged Errors in Credibility Assessments para. 359

B. The Grounds of Appeal in the Main Action

i. Factual Issues in the Main Action para. 382

(a) Morris' Financial Abilities para. 392
(b) The 1979 Bonuses para. 394
(c) The 1981 and 1982 Bonuses para. 398
(d) The Share Sale and Lease para. 407
(e) The Greycliffe Profit Diversions para. 453
(f) The Ancaster Property para. 460
(g) The Valuation Findings para. 463

ii. Contested Rulings in the Main Action para. 472

(a) The Pleadings Amendment Ruling para. 473
(b) The Celia Butner Ruling para. 483

iii. The Liability Issues in the Main Action para. 488

(a) The Fiduciary Duty Issue para. 489
(b) The Undue Influence and Unconscionability Issues para. 516
(c) The Oppression Issue para. 517
(d) The Knowing Receipt/Knowing Assistance Issue para. 540
(e) Remedy for the Greycliffe Profit Diversions Issue para. 557
(f) The Ancaster Property Claim para. 568
(g) The Constructive Trust and Tracing Issues para. 571

C. The Grounds of Appeal Relating to SWRI para. 590

i. The Inducing the Breach of Contract Claim para. 593
ii. The Share Transfer Issue para. 607
iii. The IWS Claim for Theft of Business and Corporate Opportunities para. 627

D. The Wrongful Dismissal Action para. 636
E. Ennis's Appeal para. 640

i. Ennis's Appeal on Liability para. 644
ii. Ennis's Appeal on Damages para. 651
iii. Conclusion para. 670

F. Morris' Appeal Against Taylor Leibow para. 671

i. Background para. 675
ii. The Trial Judge's Negligence Findings para. 677

(a) Findings on the Related-Party Transactions para. 678
(b) Findings on the Bonuses para. 682
(c) Findings on Causation and Remedy para. 683

iii. Analysis

(a) Did the Trial Judge Err in Relying on Hercules to limit the scope of Taylor Leibow's liability? para. 686
(b) Did the Trial Judge Err in Failing to Hold that Taylor Leibow Owed a Duty to Morris Beyond its Role as Auditor of IWS? para. 706
(c) Did the Trial Judge Err in Failing to Find that Taylor Leibow Owed a Fiduciary Duty to Morris? para. 714
(d) Did the Trial Judge Err in Finding that Taylor Leibow Could Rely on the Agreement

and Undertaking in Defence of Morris' Claim on the Related-Party Transactions? para. 723

iv. Conclusion on Morris' Appeal para. 734
v. Taylor Leibow's Cross Appeal para. 735

G. Linton's Appeal para. 736

VII. CONCLUSION para. 748

The following judgment was delivered by

THE COURT:--

I
INTRODUCTION

1 Isaac Waxman arrived in Canada from Poland in 1911. Within a few years, he was providing for his growing family by selling scrap metal and other junk he collected using a horse and wagon. By the time Isaac died in 1972, his modest enterprise had become a multi-million dollar family business operating as I. Waxman and Sons Ltd. ("IWS").

2 Isaac's sons, Morris and Chester, began to work in the business in the 1940s. Blessed with strong work ethics, different and complementary skills, and a complete trust in each other, the brothers played a large role in the growth and prosperity of the business throughout the 1950s and 1960s. In the years immediately following Isaac's death in 1972, Morris and Chester continued to run the business together. Each owned fifty per cent of the shares of IWS and for all intents and purposes, treated the business as a partnership. It continued to grow and prosper. There was every reason to believe that this remarkable family success story would continue into a third generation of Waxmans, Morris' two sons and Chester's three sons.

3 By 1988, everything had changed. The love and mutual respect between Chester and Morris were gone, replaced by the powerful animosity that only a bitter lawsuit among family members can generate. The brothers and their sons have spent much of the last fifteen years and many, many

millions of dollars trying to prove that each was cheated by the other. The accusations and recriminations run the full gamut from the dishonourable through the dishonest to the downright criminal. Whatever the eventual legal outcome, Isaac's dream that his two sons should "share and share alike" in the business he started has been shattered.

4 These appeals are the latest round in this protracted and bitter fight. Chester and those aligned with him were largely unsuccessful at trial. They challenge almost every aspect of the trial judgments. Morris and his supporters resist Chester's appeals and appeal against the one part of the trial judgment that went against Morris and his supporters.

5 Because of the length of the trial and the complexity of the issues, these reasons are lengthy and, on occasion, repetitive. In essence, we have concluded that:

* there is no basis upon which to interfere with any of the significant findings of fact;
* there is no basis upon which to interfere with the findings of liability;
* the quantification of damages flowing from those findings should be varied downward to a relatively minor degree; and
* Morris' appeal should fail.

II

OVERVIEW OF THE PROCEEDINGS

6 In December 1998, some ten years after Morris Waxman first commenced legal proceedings, five actions proceeded to trial before Sanderson J. The trial lasted over two hundred court days. In June 2002, Sanderson J. delivered lengthy reasons in which she found in Morris' favour on most claims.

7 Three of the actions involved claims by Morris against Chester, his sons Robert, Warren and Gary, and IWS. In two of those actions Chester counterclaimed against Morris and his family, including his son Michael. In addition to these three actions, Morris commenced a fourth action against Paul Ennis, his lawyer, and a fifth action against IWS' accountants, Taylor Leibow, and IWS' comptroller, Wayne Linton.

8 The claims and counterclaims in the five actions revolve around the operations of two corporate entities, IWS and Solid Waste Reclamation Inc. ("SWRI"). The claims concerning IWS ("the IWS claims" or "the main action"), relate to the ownership of the shares in that company after December 1983, and the operation of IWS between 1979 and 1988. In essence, Morris alleged that Chester breached his fiduciary duty to Morris by cheating Morris out of his fifty per cent interest in IWS and further breached that duty by operating IWS between 1979 and 1988 to the personal advantage of Chester and his sons, and to the exclusion of the legitimate interests of Morris and his sons. Morris claimed that Chester and/or his sons:

* caused Morris unwittingly to sign documents transferring Morris' fifty per cent interest in IWS to Chester in December 1983; at the same time caused Morris, again unwittingly, to sign lease documentation purporting to lease properties jointly owned by Morris and Chester to IWS on terms that were grossly unfair to Morris' interests; (For convenience we will refer to these purported transactions as the "share sale" and the "lease".)
* after 1983, excluded Morris from his fifty per cent participation in the equity and profits of IWS;
* improperly distributed the equity of IWS to themselves by way of bonuses in 1979, 1981 and 1982;
* under the guise of providing trucking services to IWS, improperly diverted assets belonging to IWS to corporate entities owned by Chester's sons, Robert and Gary, and controlled by Robert; and
* improperly fired Morris as president of IWS in October 1988.

9 Morris also advanced his IWS claims relying on the oppression provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA").

10 Morris' suit against Ennis arose out of the share sale in December 1983. He contended that Ennis, who was his long-time lawyer, acted negligently and in breach of the duty that he owed to Morris in connection with the share sale and lease in December 1983.

11 Morris claimed against Taylor Leibow and Linton in relation to both the share sale and the alleged improper diversion of the assets and equity of IWS to Chester and his sons. Morris alleged that Taylor Leibow and Linton breached the duty of care they owed to Morris in connection with those transactions.

12 Chester denied the IWS claims. He contended that far from misappropriating IWS assets or diverting profits from the company after 1979, he and his sons led IWS to an era of unparalleled prosperity. Chester claimed that during a difficult recession in 1982, Morris decided that he wanted to sell his interest in IWS. After lengthy negotiations, Chester agreed to buy Morris' shares. Morris did not want to tell his family about the sale, so he and his brother agreed that he would keep the office of president and many of the benefits connected with that position to preserve appearances. Chester contended that Morris came to regret the sale of his shares when IWS flourished under the leadership of Chester and his sons. Instead of taking responsibility for the decision he made to sell his shares, Morris, urged on by his son Michael, falsely accused Chester, Ennis, Linton and Taylor Leibow of misleading him and taking advantage of him. Lastly, Chester argued that IWS had ample cause to fire Morris in October 1988 as by that time he was actively working against the business interests of IWS.

13 Morris' SWRI claims arise out of events which occurred in 1988 and 1989, after the business and personal relationship between Morris and Chester had broken down. Morris and Michael ran

SWRI from 1982 onward. SWRI was in the refuse business and had extensive dealings with Philip Environmental Inc. ("Philip"). Morris alleged that in 1988 Chester set out to destroy the business of SWRI as part of a strategy to impoverish Morris so that he could not pursue his IWS claims against Chester. Morris alleged that Chester and Robert, using various means, including applying economic pressure on Philip and forging documents, caused Philip to stop doing business with SWRI, thereby leading to the breach of Philip's agreement with SWRI and ruining the business of SWRI.

14 Chester denied the SWRI claims, and in counterclaims advanced his own SWRI claims. Chester contended that he and Robert learned of the business affairs of SWRI in 1988 and became concerned that Morris was operating his own business to the detriment of IWS. Chester testified that he became aware of the SWRI operation before Morris sued him. Chester contended that Morris issued the IWS claims as a pre-emptive strike only after Morris learned that Chester and Robert had discovered that Morris and Michael were using SWRI to steal business from IWS. In the counterclaim Chester alleged that Morris and Michael used SWRI to divert business opportunities and profits from IWS to themselves between 1982 and 1989. He also advanced several relatively minor miscellaneous claims against Morris and Michael. In a second counterclaim brought by Chester in the inducing breach of contract action, Chester alleged that his children owned fifty per cent of the SWRI shares and that Morris had attempted to falsify the books and records of SWRI to make it appear as though his two sons owned all of the shares of the company.

15 Morris was largely successful at trial. On the IWS claims, the trial judge held that Morris had not sold his shares to Chester in December 1983 and that Chester held those shares in trust for Morris from December 1983 onward. She ordered the shares returned to Morris. In addition, she held that:

* Morris was entitled to fifty per cent of the profits generated by IWS and fifty per cent of any equity distributed by IWS to Chester and his sons between December 1983 and the release of her reasons in June 2002. She directed a reference to determine the amount of those profits and provided formulae for that determination;
* Morris was entitled to punitive damages of $350,000 from Chester and IWS;
* Morris was entitled to recover fifty per cent (minus certain payments that had been made to him) of bonuses paid to Chester and his sons by IWS in the years 1979, 1981 and 1982;
* Morris was entitled to recover certain profits ($1,180,073) improperly diverted from IWS to corporate entities that provided trucking services to IWS and were controlled by Robert;
* Morris was improperly dismissed as president of IWS in October 1988 and was entitled to damages from IWS equal to two years salary; and
* Morris was entitled to recover $98,000 for Chester's breach of contract in relation to the transfer by Morris in 1986 of his property in Ancaster,

Ontario to Warren, Chester's oldest son.

16 Morris' claims against IWS under the oppression provisions of the OBCA also succeeded. The trial judge held that Morris could recover from IWS his share sale damages, the damages arising from the improper bonus payments, and the damages related to the improper diversion of IWS profits to trucking companies controlled by Robert.

17 The trial judge made tracing orders with respect to the distributions of profit from IWS between December 22, 1983 and June 27, 2000, the improper payment of bonuses, and the wrongful diversion of IWS profits to companies owed by Chester's sons. She declared that for the purposes of the tracing orders, Chester's sons were not bona fide purchasers for value without notice.

18 Morris also succeeded on his IWS claim against his lawyer, Ennis. The trial judge concluded that Ennis was liable for breach of fiduciary duty, breach of contract and negligence in connection with the share sale transaction and that Morris was entitled to damages from Ennis measured in the same way as the damage assessment made against Chester in connection with the share sale.

19 The trial judge concluded that Morris had made out his IWS claims against Linton and that Morris was entitled to recover from Linton the amounts awarded in connection with the share sale, the improper bonus payments and the improper diversion of IWS profits to corporate entities controlled by Chester's sons.

20 Morris' claims against Taylor Leibow were dismissed.

21 Morris also succeeded on the SWRI claims. The trial judge held that Chester, Robert and IWS had induced Philip to breach its contracts with SWRI. She awarded damages in the amount of $2.5 million plus punitive damages of $100,000. Chester's counterclaims were dismissed save for some limited success on the miscellaneous components of his counterclaim. He was awarded damages totalling about $76,000.

22 Chester appeals. He challenges most, if not all, of the critical findings of fact made by the trial judge. Chester also raises many legal issues relating to liability, the appropriateness of the non-pecuniary remedies awarded by the trial judge, and her damage assessments.

23 Ennis appeals. He attacks the trial judge's findings of fact and further argues that even if those findings stand, the trial judge erred in awarding a "trust" level of damages against him.

24 Linton appeals. He also challenges the trial judge's findings of fact and specifically contends that the finding that he was liable for knowing assistance or collusion with Chester and his sons in the structuring of the share sale, the improper payment of bonuses, and the diversion of profits from IWS was unfounded in fact and unavailable in law.

25 Morris appeals the dismissal of the action against Taylor Leibow. He argues that the trial

judge erred in law in holding that Taylor Leibow did not owe him a duty of care in connection with the improper diversion of IWS profits and the improper payment of bonuses by IWS. Morris also contends that the trial judge erred in law in finding that Taylor Leibow did not owe him a fiduciary duty. Lastly, Morris submits that the trial judge erred in holding that an undertaking given by Morris after the litigation started foreclosed his claim against Taylor Leibow. Taylor Leibow supports the holding of the trial judge and, in what it refers to as a cross-appeal, advances arguments rejected by the trial judge, which if successful would also lead to the dismissal of the action against Taylor Leibow.

26 The appeals were heard over thirteen days in April and May 2003. The number and complexity of the grounds of appeal necessitated lengthy facta, multi-volume compendia, and many volumes of legal authorities. The material filled the courtroom. In the course of oral argument, which extended over some sixty hours, counsel made extensive reference to this material and filed substantial additional written material. The industry, forensic skills and civility of counsel throughout the appellate process were greatly appreciated by the court. Like the trial judge, we commend counsel for reflecting the finest tradition of the bar, in what for their clients is a very bitter dispute.

III

THE EVIDENCE: AN OVERVIEW

27 The evidence at trial was extensive, detailed and contentious. Counsel left no evidentiary stone unturned and no forensic blow unstruck. The evidence ranged over the entire lives of Morris and Chester, but concentrated on the events between the mid-1970s and the late 1980s. It included not only detailed evidence from those involved in the events, but also copious and complex expert evidence. Some of the specific events, standing alone, would have led to a relatively complex commercial trial.

28 The trial judge had a daunting task. She had to resolve a myriad of difficult factual and legal questions. In the main, the evidence presented dramatically opposed versions of the key events. The trial judge had to make critical credibility assessments, which often left her with no realistic choice but to choose one of the two versions of events placed before her. Whatever may be said about the correctness of the trial judge's conclusions, her reasons, which extend over 2,618 paragraphs, are a model of organization, thoroughness, and clarity. They provide a detailed examination of virtually every issue raised at trial, fully inform the parties about why she decided the issues the way she did, and afford the dissatisfied parties with a full and complete opportunity to challenge the result on appeal. The trial judge's reasons also provided valuable assistance to this court in gaining an understanding of this factually and legally complex litigation.

29 Many of the grounds of appeal challenged findings of fact, thereby requiring a close review of the evidence. Others, which raise legal issues, also require a clear understanding of the factual substrata underlying those issues. To facilitate our review of the evidence, we begin with a brief

description of the principal individuals, corporate entities, and properties referred to repeatedly in the evidence.

The Waxmans

Morris Waxman: Born in 1925, son of Isaac and older brother of Chester. Married Shirley in 1954. Father of Michael, Douglas and Shirley.

Michael Waxman: The older son of Morris, born in 1956. After obtaining an MBA in 1981, he wanted to become involved in the business of IWS. Morris also wanted Michael to be involved. Michael operated SWRI with his father after 1982. He is the prime mover on Morris' side of the litigation and is despised by Chester and Robert, who blame him for many of the problems that developed between the families.

Douglas Waxman: Morris' second son, born in 1963. A shareholder of SWRI. Only peripherally involved in the relevant events.

Chester Waxman: Son of Isaac Waxman born in 1926, a little more than a year after his brother, Morris. Married Bailey in 1951. Father of Warren, Robert, Gary and Brenda.

Warren Waxman: Born in 1953. Oldest son of Chester. Began to work full-time at IWS in 1974 as a salesman/buyer. He was principally involved in the ferrous division (iron scrap) of the business.

Robert Waxman: Chester's middle son, born in 1955. He began to work full-time at IWS in 1975 or 1976. Soon he was running the non-ferrous division of IWS. In Morris' eyes, Robert took over many of the functions that he had previously performed. Robert also controlled various corporate entities that supplied trucking services to IWS between 1978 and 1984. Chester and Robert are the prime movers on Chester's side of the litigation.

Gary Waxman: Born in 1956. The youngest son of Chester. He began to work full-time at IWS in 1977. Worked primarily as a salesman in the ferrous division of the IWS operation.

The Lawyers and Accountants

Paul Ennis: A partner at Ennis & Associates. Lawyer for IWS, Morris and Chester from early 1970s until 1988.

Kevin Hope: An associate in the Ennis law firm. Assisted Morris in the preparation of a will in late December 1983.

Ramsay Evans and Ralph Hayman: Partners at the law firm of Evans Husband, who were involved in the incorporation of SWRI.

Taylor Leibow: Accounting firm that acted for Morris, Chester, IWS and related companies from

the 1940s until at least 1989.

Sam Taylor: The accountant at Taylor Leibow responsible for IWS-related accounts until 1977. He was also a close friend of both Chester and Morris.

Steven Wiseman: Accountant at Taylor Leibow responsible for the IWS-related accounts from 1977 to 1988.

Wayne Linton: Comptroller at IWS from August 1979 to 1988.

Others

Ian Campbell: A business valuator. Prepared valuation of IWS as of December 31, 1978 and December 31, 1979.

Sheldon Kumer: Brother-in-law of Chester and Morris. Long-time employee of IWS and/or related entities.

Allen Fracassi: Principal of Philip, which had extensive business dealing with SWRI in the 1980s. In 1993, Philip purchased the IWS operation from Chester in exchange for cash and shares in Philip.

Corporate Entities

I. Waxman and Sons Ltd. ("IWS"): Initially an unincorporated proprietorship. Incorporated in 1956. As of December 1983, Chester and Morris each held half of the shares of IWS. Before 1981, IWS had three divisions: the ferrous division, which reclaimed and sold iron scrap; the non-ferrous division, which reclaimed and sold metal scrap other than iron, especially copper; and the refuse division, which collected and disposed of garbage. The ferrous and refuse divisions were sold in 1981.

Solid Waste Reclamation Inc. ("SWRI"): Originally incorporated when IWS attempted unsuccessfully to obtain the Hamilton-Wentworth garbage contract. It remained inoperative until 1982. Operated in the refuse business by Michael and Morris between 1982 and 1989.

Lasco: Owned a steel mill that smelted scrap steel. In September 1981, it purchased the assets of the IWS ferrous division and thereafter operated the division as a joint venture with IWS.

IW & S Ferrous Ltd. ("IWS Ferrous"): The joint venture company co-owned by Lasco and IWS after September 1981.

Laidlaw, Superior Sanitation Ltd. ("Laidlaw/Superior"): Purchased the assets, goodwill and customers list of the IWS refuse division in June 1981.

Morriston Investments Ltd. ("Morriston"), Chesterton Investments Ltd. ("Chesterton"): Holding companies of Morris and Chester respectively.

Windermere Investments ("Windermere"): A partnership of Morriston and Chesterton.

Greycliffe Holdings Ltd. ("Greycliffe"): A company incorporated in 1978, owned by Robert and Gary, and controlled by Robert. It provided trucking services for IWS. Continued to do so until February 1984. Morris alleged that Greycliffe grossly overcharged IWS for its services.

Icarus Leasing Inc., Robix Financial Corp., Big Rig Trucking Services Ltd., Servetross: Related companies under the control of Robert and also involved in providing trucking and other services to IWS.

Waxman Resources Inc. ("Waxman Resources"): In September 1993, about five years after this litigation began, Chester caused IWS to transfer substantially all of its assets to Waxman Resources in exchange for shares in that company.

Philip Environmental Inc. ("Philip"): Controlled by Allen Fracassi and his brother operated as a joint venture/subcontractor with SWRI in the refuse business from 1982 until 1989. In September 1993, Philip purchased the shares of Waxman Resources for $12 million plus shares in Philip. By 1997, Waxman Resources had sold the Philip shares for $18.4 million.

Properties

Windermere Road: A property located near Stelco and Dofasco purchased in two separate transactions in the 1950s and put in the names of Morris and Chester. Property was transferred to Morriston and Chesterton in 1963. IWS conducted its business from this property and Morris had an office there until he was fired in 1988. In 1981 when IWS sold its ferrous division, it leased part of Windermere Road to IWS Ferrous. A building referred to as the "Blue Building" and surrounding lands, which were used for the non-ferrous operations, were not included in the lease to IWS Ferrous.

80 Glow Avenue: A property bought by Chester and Morris personally in 1972. The IWS maintenance department was located on this property and it was the operational base for the refuse division of IWS. After September 1981, IWS Ferrous leased this property.

500 Centennial Parkway: This property consisted of 13 acres purchased in 1980, referred to as the "Front 13 Acres", and 7.7 acres purchased in 1981, referred to as the "Back 7.7 Acres". Title in the Front 13 Acres was initially held by IWS. The IWS non-ferrous division operated out of the Front 13 Acres as did SWRI after 1982. Robert and Michael had offices at this location. Title to the Back 7.7 Acres was held in trust for Morriston and Chesterton.

Ancaster property: Property located in Ancaster, Ontario and purchased in 1956. Morris transferred

the property to Warren Waxman for $1 in 1986. According to Morris, Chester promised to "straighten out" the share transfer if Morris gave the Ancaster property to Warren so that he could build a home on it.

IV

THE NARRATIVE OF THE IWS CLAIMS

30 For our purposes, we divide the story underlying the IWS claims into eight chapters:

A. the IWS operation up to 1979;
B. the proposed estate freeze;
C. the 1979 bonuses;
D. the sale of the IWS ferrous and refuse divisions in 1981;
E. the 1981-82 bonuses;
F. the Greycliffe trucking operation (1978-84);
G. the share sale and related lease in December 1983; and
H. the descent into litigation (1984-93).

31 Parts of all of these chapters will be revisited when we address various grounds of appeal arising out of separate episodes. At this stage of our reasons, we provide an outline of the relevant evidence, a description of the competing positions of the parties, and a summary of the trial judge's findings of fact.

A. The IWS Operation up to 1979

32 Morris and Chester went to work for their father in the mid-1940s. By the mid-1960s, IWS had a thriving scrap metal and refuse business servicing major clients such as Stelco. Several family members were employed in the business.

33 Chester looked after the financial and legal affairs of IWS and also excelled at getting and keeping scrap metal accounts. Morris was in charge of the operations in the yard and was responsible for the purchase, repair and maintenance of equipment, trucking arrangements, and supervising employees working in the yard. Chester got the contracts and Morris made sure that IWS could fill them.

34 According to Sam Taylor and others, Chester and Morris had absolute trust in each other. One never second-guessed a decision made by the other in his area of expertise. The two brothers never argued publicly. If Chester told Morris that a certain transaction was necessary for the financial well-being of IWS, Morris accepted that representation without question. Similarly, if Morris told Chester that IWS needed a particular piece of equipment, Chester accepted that representation without question. Morris' wife Shirley described their relationship as like "two coats of paint on a wall".

35 Chester and Morris received relatively small salaries, but also drew funds from IWS on an as needed basis. If one of the brothers needed money to cover an extraordinary expense, such as the purchase of a home, he drew it from IWS. Neither brother attempted to control or monitor the drawings of the other. At the end of the year, the drawings were calculated and the accountants attempted to describe these drawings in a manner which would minimize taxes for the brothers, while still passing muster with Revenue Canada.

36 Morris and Chester did not separate their personal business affairs from the business affairs of IWS. Taylor Leibow and IWS accounting personnel looked after the personal investments and bank accounts of Morris and Chester. They took instructions from Chester for both brothers' investments. The brothers' income tax was calculated and paid by IWS personnel. The amount of tax paid was added to each brother's drawings from the company.

37 In 1968, on Chester's instructions, both brothers, Morris and Chester, prepared identical wills. The wills provided that IWS would continue as a family business with each side of the family owning half of the shares for at least twenty years after the brothers died.

38 By 1969, Isaac was no longer physically able to act as president. Morris became president of IWS and Chester became vice-president. Their relationship did not change. As president of IWS, Morris was required to sign many corporate minutes and other documents. According to him, if documents were presented to him by Chester or by the IWS lawyers or accountants for his signature, Morris would not read the documents, but would simply sign them. Morris trusted that Chester would never ask him to sign something that was to his detriment.

39 Warren began to work full-time in 1974 and by the end of 1977 all three of Chester's sons were working full-time as salesmen. The mid-1970s were not prosperous years for IWS because of a recession in the steel industry, but by 1978, IWS began to rebound financially. Chester attributed this rebound to his and his sons' efforts and abilities. The trial judge concluded that the revival of the steel industry played a significant role in IWS' financial recovery.

40 At the same time that Chester's sons were becoming active in the affairs of IWS, Morris was heavily involved in an ultimately unsuccessful attempt to obtain a very large garbage contract with Hamilton-Wentworth. SWRI was incorporated in anticipation of obtaining the contract. Between 1975 and 1977, Morris spent a great deal of time attempting to secure this contract and consequently spent less time working in the yard at IWS.

41 Within about a year of Robert going to work full-time for IWS, he decided that he wanted to develop the non-ferrous division. Chester supported this initiative, which included installation of a very expensive copper chopping line in the Blue Building on Windermere Road. Although Morris had traditionally made decisions about the purchase of new equipment, he was not consulted by Chester before IWS proceeded to install the copper chopping equipment. The decision was made by Chester and Robert.

42 With the benefit of hindsight, it is clear that the relationship between Morris and Chester began to change in the mid-1970s when Chester's sons came into the business on a full-time basis.

43 Linton came to work for IWS in August 1979. He took his instructions on financial matters from Chester and seldom, if ever, consulted Morris. This was consistent with the division of authority that had developed over the years at IWS.

44 By 1979, IWS had emerged from the financial slump of the mid-1970s. Revenues had returned to the levels of the early seventies. All three of Chester's sons were hard at work for IWS. Neither of Morris' sons worked for the company. Morris had removed himself somewhat from the day-to-day activities of IWS while he pursued the garbage contract with Hamilton-Wentworth. At the same time, Chester's sons, and particularly Robert, were assuming supervisory roles that had previously fallen to Morris. The long-running tandem of Chester and Morris was being replaced by one consisting of Chester and his sons.

B. The Estate Freeze

45 In the mid-1970s, Morris and Chester were advised by their financial advisers that they should structure an estate freeze as a means of deferring tax on the increase in the value of IWS shares. There were many discussions concerning the estate freeze in the late 1970s and further discussions in early 1982. The estate freeze never came to pass and is not the subject of a discrete claim by Morris. Morris, however, relies on the evidence concerning the estate freeze to demonstrate Chester's ascendancy in financial matters, the changing nature of their relationship in the late 1970s and early 1980s, and their very different views about how the ownership of IWS should be divided among their five sons.

46 In the late 1970s, there were several discussions concerning the proposed estate freeze among Morris, Chester, Taylor, Ennis and Arthur Scace, a tax expert. Scace recommended that a formal valuation of IWS be prepared with a view to obtaining an advance tax ruling on the proposed estate freeze. Ian Campbell prepared two valuations of IWS. He valued the company at between $7 and $8.5 million as of December 31, 1978 and between $8.5 and $10 million as of December 31, 1979.

47 Chester wanted to structure the estate freeze so that sixty per cent of the common shares would go to his three sons and forty per cent would go to Morris' two sons. Morris was opposed to this division and said that he made it clear to Chester in their private discussions that any division of the shares should be on a 50-50 basis between the two families. In keeping with their practice they did not argue publicly about their differences.

48 An advance ruling from Revenue Canada was obtained, as suggested by Scace. The material filed with Revenue Canada indicated that Chester's sons would hold sixty per cent of the common shares and Morris' sons would hold forty per cent. The trial judge found that Morris was not aware of the details of the proposal sent to Revenue Canada on Chester's instructions. The trial judge also found at para. 134 that under the voting trust arrangements described in the material sent to

Revenue Canada, "Chester would have had effective control of IWS". Counsel for Chester took issue with that finding, arguing that on the proposal Chester and Morris would have had joint control over eighty per cent of the voting shares during their lives. Counsel argued that even if Chester had exclusive control over the other twenty per cent of the common shares, he would not have control over IWS. Apart entirely from the question of immediate control, the proposal sent to Revenue Canada would certainly have put Chester's sons in control of IWS after Chester and Morris died.

49 Chester testified that in order to secure his brother's agreement to a 60-40 split in the estate freeze, Chester had agreed to transfer a single share held in the name of Isaac back to Morris in 1979. According to Chester, the share had been held by Isaac so that Chester would have one more share than Morris and would have the ability to control the affairs of IWS. Chester testified that his father had wanted him to have control of IWS in the future.

50 The trial judge rejected Chester's evidence concerning the single share. The corporate records showed that the share had been transferred back to Isaac by Morris so that Isaac could qualify to be a director of the corporation, and that Isaac held the share in trust for Morris. The share was transferred back to Morris after Isaac died. According to Taylor, the share had always been beneficially owned by Morris. The trial judge also rejected Chester's evidence that Isaac had wanted Chester to control the company. Chester's evidence was contradicted by the terms of Isaac's will.

51 The trial judge also found that Morris had told Chester in their private conversation that any division of IWS shares as part of an estate freeze must be on a 50-50 basis. The trial judge further found that Chester ignored Morris' wishes when he directed that a proposal based on a 60-40 split of the shares should be sent to Revenue Canada for advance approval. The trial judge concluded that Chester's conduct in relation to the estate freeze reflected his changed attitude towards Morris and ownership of IWS. In his will, written in 1968, Chester had anticipated that IWS would be owned 50-50 by each side of the family for at least twenty years. By 1978, Chester saw his family as entitled to a sixty per cent interest in IWS. Lastly, the trial judge held, relying on Chester's own evidence, that Chester was using the estate freeze to gain control of IWS. According to Chester's evidence, there was no longer a need for an estate freeze when Morris decided to sell his shares to Chester.

52 In February 1982, there were further discussions among Chester, Ennis and Scace concerning the estate freeze. These discussions tie into the declaration of the 1982 bonuses to be discussed below. The estate freeze contemplated in February 1982 also involved a 60-40 split of the common voting shares. Morris was unaware of these discussions.

C. 1979 Bonuses to Chester's Sons

53 Morris alleged that bonuses totalling $250,000 allocated to Chester's sons for the year 1979, represented payment of shareholders' equity to non-shareholders. He contended that he was unaware of and did not agree to those payments and that as a fifty per cent shareholder was entitled to the

return of $125,000 representing fifty per cent of the bonus payment.

54 In 1979, IWS revenues increased to $34.9 million from $25.2 million. Chester's three sons were actively involved in the company and, according to Chester, largely responsible for the increased revenues. As noted above, a strong financial recovery by the steel industry contributed significantly to IWS' increased revenues.

55 In late 1979 or early 1980, Linton advised Chester that IWS would show substantial profits in 1979 and that the taxable income of IWS could be reduced by the payment of bonuses. Linton dealt only with Chester in relation to the bonuses and took his instructions from Chester. Linton in turn instructed Ennis to prepare certain corporate minutes to reflect the allocation and payment of the bonuses ordered by Chester.

56 Linton testified that initially he discussed a bonus of $100,000 with Chester, but later the amount was increased to $250,000. Initially, Chester told Linton to allocate $75,000 of the bonus to Chester, $75,000 to Morris, and the remaining $100,000 to his sons. Chester said that he would discuss the allocation with Morris. Linton testified that shortly afterwards Chester told him that Morris and he had decided that the entire $250,000 should go to the sons. Linton then told Ennis to prepare a minute declaring bonus payments totalling $250,000 to Chester's sons. That minute, dated December 17, 1979 and signed by Morris, indicates that the bonuses were approved in April 1980.

57 Chester testified that in late 1979 or early 1980, he and Morris discussed the payment of bonuses to Chester's sons in recognition of their contributions to IWS. Chester said that he and Morris agreed that bonuses totalling $250,000 would be paid to Chester's sons.

58 Morris testified that he had no discussions with anybody about the 1979 bonuses and was unaware of them until about 1998 when he learned of their existence in the course of this litigation. He acknowledged his signature on the minute, but testified that he signed IWS corporate documents when told to do so by Chester, Linton or Ennis. He had no knowledge of the minute allocating the $250,000 to the sons and would not have knowingly agreed to the payment since, in his view, this amount was part of the equity of the company, half of which belonged to him and, eventually, to his sons.

59 The trial judge did not accept Chester's testimony about the 1979 bonuses. She reached that determination based on documents from the files of Linton and Ennis that were contemporaneous with the events in issue. Based on those documents, she concluded that Chester had initially planned to allocate $75,000 to himself, $75,000 to Morris and $100,000 to his sons. In April 1981, when the bonuses were actually paid, Chester unilaterally decided to give the entire bonus to his sons. He instructed Linton to redo the corporate records to reflect the allocation of the entire $250,000 to his sons. Linton then wrote to Ennis indicating:

> I enclose necessary adjustments to minutes of December 17, 1979 changing allocation of bonuses. I will obtain Taylor Leibow's copy of minutes and destroy.

> Could you forward to me revised copy so that I may deliver same to Taylor Leibow for their audit files.

D. The Sale of the Ferrous and Refuse Divisions

60 In June 1981, IWS sold its refuse division to Laidlaw/Superior for a total of $1.6 million. Three months later, in September 1981, IWS sold its ferrous division and related equipment to Lasco for approximately $8.7 million. Neither transaction is challenged in this litigation. Both transactions are, however, closely connected to the 1981-82 bonuses and the share sale in December 1983.

61 Morris was primarily responsible for the operation of the refuse division. He had no interest in selling that division, but was told by Chester that IWS needed an infusion of cash and that the sale of the refuse division could provide the needed cash. Morris accepted Chester's assessment because this was the kind of financial decision that fell within Chester's area of expertise.

62 Chester told a different story. He said that he did not want to sell the refuse division, but did so only because Morris expressed little interest in keeping it and Chester knew that Michael would not do the hard work necessary to make the refuse division prosperous.

63 Chester began to negotiate with Laidlaw/Superior for the sale of the refuse division in the summer of 1980. These negotiations were interrupted temporarily while Chester negotiated with another company, but came to fruition in June 1981. Ennis testified that Chester had wanted to sell the refuse division throughout the year-long negotiations.

64 The sale to Laidlaw/Superior included IWS goodwill and customers list. The sale excluded certain hazardous waste accounts and other specialty refuse accounts, and allowed IWS to continue to service the refuse needs of its scrap metal customers. Morris, Chester, his sons and IWS also entered into non-competition clauses with Laidlaw. The remnants of the refuse division eventually fell under the auspices of SWRI, which was run by Morris and Michael until 1989.

65 The trial judge did not believe Chester's evidence concerning the sale of the refuse division to Laidlaw/Superior. Chester's explanation changed in the course of his evidence when certain documents were produced to him for the first time. The trial judge found that Chester initiated the sale of the refuse division, which was of little interest to him. He was much more interested in developing the scrap metal business in which his three sons were heavily involved by 1980. The trial judge further concluded that in deciding to sell the refuse division, Chester showed little concern for Morris' interests and saw no future role for Michael in the IWS operation.

66 In late 1980, Chester began to negotiate the possible sale of the ferrous division to Lasco. Lasco operated a steel mill and was a competitor of IWS in the ferrous scrap business. The transaction, which eventually closed in September 1981, included the following terms:

* IWS sold its ferrous division assets to IWS Ferrous, a joint venture company owned equally by IWS and Lasco, for $6,410,000;
* IWS sold a guillotine shearing machine to Lasco for $2,321,984.15;
* IWS Ferrous entered into employment contracts with Chester, his three sons and Sheldon Kumer, but not with Morris;
* IWS Ferrous leased the Glow Avenue property and the Windermere Road property (excluding the Blue Building and surrounding lands). The lease was a twenty year lease with rent at $19,000 per month, with increases in rent every five years tied to the consumer price index. Rents were payable to Morriston and Chesterton;
* IWS Ferrous was to pay IWS a tonnage fee of $4.00 for every ton of ferrous material processed.

67 The shareholder agreement between Lasco and IWS Ferrous provided that either could buy out the other's shares for a minimum of $4.5 million.

68 The trial judge found that Morris was involved in the negotiations leading to the transaction with Lasco. He was responsible for equipment valuations and other operational matters. He played no role in any of the financial details. She also held that no evidence was led explaining the reason for excluding Morris from the employment contracts entered into with IWS Ferrous. He had considerable expertise in operational matters relating to the ferrous division. She also concluded at para. 216 that the rents payable by IWS Ferrous to Morriston and Chesterton were "on the high side", but were within the range of what would be considered commercially acceptable.

69 After the Laidlaw/Superior and Lasco transactions, the business of IWS changed. By the fall of 1981, IWS had three sources of income. It continued to operate a non-ferrous division, received tonnage fees from IWS Ferrous (anticipated to be about $2 million a year), and operated a small refuse division.

70 After the sale to Lasco, IWS moved from the Windermere Road property to offices at the Centennial Parkway property, which had been purchased in 1980. IWS Ferrous continued to operate out of Windermere Road. Although Morris was still the president of IWS, he stayed at the Windermere Road property. Morris had very little to do with the day-to-day operation of the non-ferrous division, which quickly fell under Robert's control. Linton, who did move to the Centennial Parkway property, said that he had little day-to-day contact with Morris after the move and reported to Robert on matters involving the business of the non-ferrous division. An organizational chart prepared by Taylor Leibow in 1982 was consistent with Linton's testimony. Morris was shown as having little day-to-day responsibility for the IWS operations.

71 As Morris' role in IWS diminished in late 1981 and the roles of Chester's sons, especially Robert, increased at the same time, Michael, who was completing his MBA, was hoping to become involved in IWS. Michael's abilities and interests lay in financial matters, an area that had always

been under the exclusive control of Chester. As far as Morris was concerned, Michael was not given an opportunity to become involved in the day-to-day operations of IWS. From Chester's point of view, Michael was given the same opportunity as Chester's sons, but was not prepared to work hard enough to take advantage of that opportunity.

72 Chester made it clear in his evidence that he had no use for Michael. He said:

> Michael was the problem. Not me, not my sons. Michael. If he wanted to come in, he would have been welcomed in but if he expected to be pampered like he probably was at home, he wasn't going to get it from me or my three sons. It's a place to work and make money.

73 Later in his evidence after describing Michael as "arrogant", Chester said:

> [H]e personifies baleful or malignant passion. I don't know why but that's what he's made of. I don't believe my brother made a pact with him. I think Michael dominates him.

74 Robert and Michael disliked each other intensely.

75 IWS was financially strong as of late 1981. However, on the trial judge's findings, it had ceased to operate as an informal 50-50 partnership between Morris and Chester.

E. The 1981-82 Bonuses

76 In the fall of 1981, IWS had some $6.6 million in income as a result of the Laidlaw/Superior and Lasco transactions. By February 1982, IWS had declared bonuses totalling $6.6 million for 1981 and 1982. Of that amount, $4.7 million was payable to Chester and his sons, $1.4 million was payable to Morris, $500,000 was payable to Sheldon Kumer and Harry Liebovitz, another in-law employed by IWS. Nothing was payable to Morris' sons.

77 Chester testified that Lasco demanded non-competition agreements from Chester and his three sons as a condition to entering into the transaction with IWS. Chester's sons insisted that they should be compensated for agreeing not to compete with Lasco. Chester thought that his boys should be compensated since their efforts were largely responsible for IWS' prosperity and Lasco's interest in purchasing its ferrous division. As far as Chester was concerned, by the fall of 1981, he and his sons were the driving force behind IWS.

78 Chester testified that before the closing of the Lasco transaction in September 1981, he and Morris had agreed that bonuses should be paid to Chester's sons and to Sheldon Kumer and to Harry Liebovitz. Kumer and Liebovitz were married to sisters of Morris and Chester and were long-time employees of IWS. Chester further testified that he and Morris agreed on the specific amount that each of Chester's sons would receive. They agreed that Robert would receive a total bonus of $1.2

million, Warren $1.1 million, and Gary $1 million.

79 The evidence of Chester's sons was consistent with that given by Chester. Kumer, who was employed by Chester at the time of the trial, also testified that he was told before the Lasco deal closed that he would be receiving a bonus of $400,000.

80 Morris testified that in October or November 1981, he attended a meeting at the offices on Centennial Parkway with Chester, Linton, and two of Chester's sons. Chester told Linton that the bonuses would be declared in favour of Morris, Chester, Chester's sons and two of the brothers-in-law who worked at IWS. The bonuses totalled about $500,000. Although Morris disagreed strongly with what Chester was saying, he followed his usual practice and did not challenge Chester in front of others. After the meeting was over, Morris told Chester that as far as he was concerned, he and Chester were 50-50 partners and that if Chester wanted to give bonuses to his sons, the bonuses would have to come out of his fifty per cent. After his private conversation with Chester, Morris understood that any bonuses that would be declared would be declared in equal amounts to Chester and Morris. They could do whatever they wished with their money.

81 Linton's evidence concerning the genesis of the decision to pay the 1981-82 bonuses differed from Chester's. He testified that the idea of bonuses originated with him as a means of reducing or deferring the taxes that IWS would owe on the substantial profits it made in the Laidlaw/Superior and Lasco transactions. Linton testified that bonuses were first discussed in October or November 1981, well after the Lasco transaction had closed. Up until this time Chester had made no reference to payments to his sons as compensation for the non-competition agreements. As of the middle of November 1981, the bonuses were still under discussion. In these discussions, the bonuses were viewed as part of IWS' financial strategy and not as compensation for Chester's sons agreeing to sign non-competition agreements.

82 Linton's working papers show that in November or December 1981, Chester instructed Linton to have Ennis prepare corporate minutes declaring bonuses for 1981. Ennis' notes set out the bonuses in the following amounts:

- Chester $500,000;
- Morris $500,000;
- Robert $250,000;
- Gary $250,000;
- Warren $250,000;
- Sheldon Kumer $200,00; and
- Harry Liebovitz $50,000.

83 By early January, Chester had changed his instructions to Linton, who then told Ennis to prepare minutes reflecting the following bonus payments for 1981:

- Chester $700,000;

- Morris $700,000;
- Warren $550,000;
- Robert $600,000;
- Gary $500,000;
- Sheldon Kumer $200,000; and
- Harry Liebovitz $50,000.

84 Ennis prepared a corporate minute dated December 23, 1981 reflecting the revised amounts. The minute was signed by Morris and his wife Shirley. Morris testified that he had no recollection of when or how he came to sign the minute and that he would not have agreed to the bonuses referred to in the minute had he been aware of them. There was no evidence as to how this minute came to be signed.

85 In early 1982, Chester and Linton had further discussions concerning the bonuses. Chester told Linton that if Revenue Canada questioned the bonuses to his sons, they could be justified as compensation for the non-competition agreements. This was the first time that Chester connected the bonuses to the non-competition agreements in discussions with Linton. Linton could see nothing to justify the amounts of the bonuses declared in favour of Chester's sons. He indicated in a memo to Chester that they would be "hard pressed" to justify those bonuses either in the context of a valuation of IWS or a review by Revenue Canada. Linton indicated that, had the bonuses been paid directly to Morris and Chester, there would have been no problems with Revenue Canada, although bonuses of that size may still have raised a problem for anyone trying to prepare an accurate valuation of IWS.

86 Despite a recession in the steel industry in 1982, the 1981 bonuses to Chester's sons were paid in full during 1982. In fact, Warren received $40,000 more than had been allocated to him in the bonus minute of December 23, 1981.

87 Morris had been allocated a bonus of $700,000 for 1981. That bonus was "paid" by reducing Morris' drawings account to zero when the amount outstanding in that account combined with tax payable on that amount equalled $700,000. Morris never received a bonus cheque or any other documentation that referred to the 1981 bonus allocated to him. The treatment of Morris' drawings account and the payment of his income tax was the same in 1981 as it was in previous years.

88 Neither Linton nor Ennis gave any evidence about discussing bonus payments with Morris at any time before the execution of the December 23, 1981 minute. Linton testified that he reviewed the 1981 financial statements with Morris and that those statements revealed the 1981 bonuses. However, the only 1981 IWS financial statement with Morris' name on it referred to payments to directors and senior officers of some $530,000. It did not refer, as did the final IWS financial statement for 1981, to the payment of bonuses in the amount $3.3 million.

89 An IWS minute signed by Morris authorizing bonuses for 1982 in the same amounts as the 1981 bonuses is dated February 22, 1982, only one month into the 1982 corporate year. It is unusual

for a bonus to be declared before the end of the fiscal year.

90 Morris acknowledged that he signed the 1982 bonus minute. He did not know how or when he came to sign it and testified that he was unaware of the bonuses until much later. He further testified that he would not have approved the bonuses had he been aware of them. No other witness gave any evidence about how or when the February 22, 1982 minute came to be signed.

91 Chester's sons did not get most of their 1982 bonuses. They were reallocated to Chester in 1985. Part of Morris' $700,000 1982 bonus was also reallocated to Chester. Morris' drawings and the tax owing on those drawings totalled $288,000 at the end of 1983. That part of his $700,000 bonus was used to reduce the drawings to zero and pay the tax owing. The remainder, $412,000, was reallocated to Chester. According to IWS records and Linton, this happened at the end of 1983 and the $412,000 became part of the purchase price paid by Chester to Morris for Morris' shares. Chester testified that Morris had agreed to give up part of his 1982 bonus in February 1982 and that when Morris ceased to be a shareholder at the end of 1983, he was no longer entitled to the remainder of the bonus. Bonuses assigned to Kumer and other employees in 1982 were also reassigned to Chester.

92 The trial judge found that Chester lied about the reasons for the 1981-82 bonuses. Relying on the evidence of Morris and Linton, Linton's working papers, and Ennis' notes (produced for the first time after Chester had testified), she concluded that the bonus payments had nothing to do with the non-competition agreements and the Lasco transaction. Rather, Chester's attempt to connect the two was an after-the-fact justification for the payment of huge bonuses to his sons, all of whom were young and quite new to the business world. The trial judge held that Chester decided to pay these bonuses well after the Lasco transaction closed and that the actual amounts of the bonuses were in a state of flux until early in 1982. The trial judge also found that Morris was not aware of the payment of these bonuses to Chester's sons and would not have agreed to them had he been made aware of them.

93 The trial judge decided that the 1981 and 1982 bonuses were in fact a distribution of IWS shareholders' equity, realized from the Laidlaw/Superior and Lasco transactions and accumulated over the previous thirty years, to individuals who were not shareholders. She further held that there was no valid business reason for allocating millions of dollars in shareholders' equity to Chester's sons. The trial judge held that Chester's unilateral decision to pay these bonuses to his sons reflected Chester's view that by the end of 1981, neither Morris nor his sons were of any significant value to IWS. She also determined that the eventual reallocation of almost all of the 1982 bonuses to Chester demonstrated his control over the financial affairs of IWS and further put the lie to his evidence that the bonuses were compensation for the boys agreeing not to compete with Lasco.

94 The trial judge concluded that the decision to declare the 1982 bonuses in February 1982 was connected to the estate freeze discussions, which Chester was then having with his tax advisers. By declaring the bonuses in February 1982, Chester hoped to lower the value of IWS for the purposes

of the estate freeze, while at the same time putting the company's equity into the hands of the people he thought deserved it: himself and his sons.

F. The Greycliffe Trucking Operation

95 Morris claimed that between 1978 and early 1984, Greycliffe and related companies controlled by Robert diverted funds from IWS, thereby diminishing his equity in the company. Morris alleged that Robert caused IWS to pay exorbitant trucking rates to Greycliffe and related companies and caused IWS to pay trucking-related expenses that should properly have been paid by Greycliffe. The Greycliffe allegations came down to three factual issues:

* Did Morris know of and approve of the trucking arrangements made with Greycliffe on behalf of IWS?
* Were the rates charged to IWS by Greycliffe exorbitant?
* Did IWS pay expenses relating to the trucking operation that should have been paid by Greycliffe?

96 The first factual issue turned largely on the trial judge's assessment of the credibility of the various witnesses. The second required a consideration of competing expert evidence. The third turned to a large extent on Robert's credibility and the relevant documentary evidence.

97 Up until the mid-1970s, IWS owned its own trucks and hired drivers. Morris was responsible for this aspect of the IWS operation. In 1977, after experiencing labour problems with its unionized drivers, IWS attempted to use brokers to truck its product. These attempts were not successful. According to Robert and Chester, Robert approached Chester and Morris and offered to provide reliable trucking services for IWS at competitive rates using Greycliffe, a company he owned with his brother Gary. Robert said that he saw this as a chance to solve the IWS trucking problems, while at the same time earning extra income for himself. Robert agreed that the trucking problems could equally have been solved by setting up a subsidiary of IWS to perform trucking services.

98 The Greycliffe operation started slowly. By 1981, Greycliffe was trucking scrap iron to IWS customers in the United States. After the Laidlaw/Superior and Lasco transactions closed in 1981, Greycliffe began trucking the IWS non-ferrous product to its customers. By the fall of 1981, Robert was in charge of the day-to-day operation of Greycliffe and the day-to-day operation of the non-ferrous division of IWS. Robert effectively decided the rates that Greycliffe would demand and whether those rates were agreeable to IWS. Between 1980 and 1983, Greycliffe's business with IWS increased substantially. Its rates also increased by almost fifty per cent.

99 Chester, Robert, and Kumer all testified that Morris was aware that Robert owned Greycliffe and that Greycliffe was hauling product for IWS. According to them, Morris, who was in the Windermere Road yard every day as Greycliffe trucks came and went, was heavily involved in trucking-related matters and regularly attended at the informal late afternoon meetings where trucking matters were often discussed. They also testified that Morris reviewed the rates charged by

Greycliffe, saw Greycliffe invoices, and signed cheques payable to Greycliffe from IWS.

100 Morris' evidence was very different. He said that he learned in late 1981 or 1982 that Greycliffe was doing some trucking for IWS. He had no knowledge of the rates charged by Greycliffe and had nothing to do with approving those rates. He did not see Greycliffe invoices and did not sign cheques payable to Greycliffe.

101 Chester and his sons had control of IWS and Greycliffe documents after the litigation started. Chester did not produce any cheques to Greycliffe signed by Morris or any invoices bearing Morris' writing. According to Gary, most of the Greycliffe documents had been lost in a flood in the basement of the Centennial Parkway property in 1989. In Gary's cross-examination, it became clear that many documents that had been damaged in the flood were produced by Chester in the course of the trial. The documents that had apparently survived the flood, for example, certain SWRI documents, tended to help Chester's case. According to Gary, the Greycliffe documents were damaged beyond repair. Chester did not produce any of those documents to support his defence to the Greycliffe allegations. The trial judge ultimately concluded at para. 1072 that Chester's failure to produce various critical documents, including those said to have been lost in the "selective" flood, "was not accidental, but deliberate."

102 Robert testified that, by agreement, Greycliffe charged IWS common carrier rates. He produced one rate sheet, which post-dated the Lasco transaction. That rate sheet showed common carrier rates for haulage by dump-style vehicles. Greycliffe was not a common carrier and was hauling in vans, not dump-style vehicles. According to the expert evidence, industry practice dictated that haulage by van and by non-common carrier should be at much lower rates than those charged by common carriers using dump-style vehicles.

103 Although Robert insisted that there were many other rate sheets used by Greycliffe, he was unable to produce any of them. He suggested that Revenue Canada had been provided with the sheets in connection with a 1985 audit. Robert acknowledged in cross-examination that he had made no attempts to recover any of the documents from Revenue Canada.

104 According to the expert evidence tendered by Morris, Greycliffe was charging almost fifty cents per mile more than it should have for the service that it was providing. According to that same evidence, Greycliffe was enjoying profit margins of between forty-four and fifty-four per cent when normal profit margins in the industry were less than five per cent. Morris' experts opined that the profit margins enjoyed by Greycliffe could be achieved only through gross overcharging and/or the payment of Greycliffe expenses by IWS.

105 Chester attempted to counter the expert evidence called by Morris with evidence from a trucker named Stockwell, who operated a trucking business similar to Greycliffe's during the relevant time. In his evidence, Stockwell suggested that his own levels of profitability were consistent with those enjoyed by Greycliffe. Subsequent evidence showed that Stockwell grossly overstated the revenues generated by his trucking operation. His own financial records indicated

that far from making the profits he suggested he had made, his operation had lost money in 1983.

106 There was evidence from a Greycliffe truck driver that Greycliffe drivers regularly fuelled up at the Windermere Road and Glow Avenue properties. Robert testified that IWS charged the cost of that fuel to Greycliffe. IWS records show some fuel set off charges up until September 1981. No set-off charges appear after that date.

107 In the course of the 1983 audit, the IWS auditors referred to an expense of $25,000-$30,000 for "truck repairs", and indicated that those repairs should be charged to Greycliffe. Robert testified that these repairs represented the cost of replacing tires, and were properly charged to IWS because the damage had occurred when the Greycliffe trucks went through the yard at the Windermere Road property.

108 It was common ground that Greycliffe did not have any insurance expenses. It was insured under the IWS policy. According to Robert, this was the same arrangement that had been made with the brokers who provided trucking services prior to Greycliffe.

109 Greycliffe had no employees other than Robert, his wife, and the truck drivers. IWS employees regularly did administrative work for Greycliffe for which IWS was not compensated.

110 The IWS financial records showed that from time to time, petty cash advances were made by IWS to Greycliffe. There was no evidence of any reimbursement.

111 By February 1984, after Morris had purportedly sold his IWS shares and IWS was owned entirely by Chester, Greycliffe stopped providing trucking services for IWS. By then, Greycliffe had a racehorse inventory valued at $1.2 million. This inventory was funded by the profits Greycliffe had made hauling product for IWS.

112 For its year ending May 31, 1981, Greycliffe had revenues of $459,000, almost all of which came from providing services to IWS. Greycliffe and IWS were reported as related parties in Greycliffe's financial statement. No such notation appeared in the IWS financial statement for 1981. Steven Wiseman, who prepared the financial statement, indicated that he did not regard the relationship between Greycliffe and IWS as relevant to the users of the IWS financial statement. He repudiated an earlier position in which he had said that it was a mistake not to report Greycliffe as a related-party, and his evidence given on discovery in which he had indicated that he was not aware of any related-party transactions for the 1981 fiscal year.

113 Wiseman testified at trial that he was not concerned about the competitiveness of Greycliffe's rates, even though he knew Robert controlled Greycliffe and also made trucking decisions on behalf of IWS. There was evidence, however, that in early 1982, Wiseman discussed the rates being charged with Taylor who in turn spoke to Chester. There was a concern that if Revenue Canada found the Greycliffe expenses to be unreasonable, it would not allow IWS to deduct them for tax purposes.

114 Wiseman directed all his questions and concerns about Greycliffe and IWS to Chester and/or Robert, not Morris.

115 Greycliffe had revenues of $693,000 in 1982, most of which came from IWS. In the course of preparing the 1982 financial statement, Linton told Wiseman that Robert did not want payments to Greycliffe disclosed as related-party transactions in the IWS financial statement, if disclosure could be avoided. Wiseman's working papers reveal that he was made aware of Linton's request and that he was aware of the very large payments made to Greycliffe. Wiseman's notes also indicate that, by this time, Robert was signing all cheques.

116 Wiseman met with Linton and Chester to discuss the request that Greycliffe's transactions not appear as related-party transactions. According to Wiseman, Linton said that he did not want to disclose those transactions as he did not want to "wave a red flag" for the tax department. After the meeting, Wiseman instructed his subordinates to remove the related-party note that had appeared in the 1982 draft financial statement. A related-party note did appear in the final version of the financial statement, but it made no reference to Greycliffe. The 1982 financial statement was given to Robert.

117 The trial judge found that Wiseman knew that Robert and Linton did not want the Greycliffe related-party transactions disclosed on the IWS financial statements. She further held that this had nothing to do with concerns about attracting the attention of Revenue Canada since the transactions were revealed as related transactions in Greycliffe's financial statement.

118 The Greycliffe transactions were revealed as related-party transactions in the IWS 1983 financial statement. This was prepared in 1984 after the purported transfer of Morris' shares to Chester.

119 The trial judge accepted Morris' evidence that he was not aware of any of the details involving the arrangements between Greycliffe and IWS. Robert made the arrangements. Morris was aware in late 1981 or early 1982 that Robert and Gary owned Greycliffe and that Greycliffe was doing some trucking for IWS. He did not know what rates were being charged and he was not involved in the payment of Greycliffe's account. In reaching this conclusion, the trial judge relied in part on the evidence of Warren, to the effect that he had no familiarity with the operations of Greycliffe or the terms on which it carried IWS' product even though he was in the Windermere Road yard on a regular basis. On the trial judge's findings, at para. 425, Morris "received only snippets of information about Robert's Companies". She found that Morris would not have agreed to the arrangement between Greycliffe and IWS if he were aware of the details.

120 The trial judge also determined that Greycliffe charged IWS rates well above market rates, particularly after September 1981. She found that Greycliffe was charging common carrier dump truck rates, although it was not a common carrier and it was using van-style haulage. In her view, this two-fold overcharging resulted in rates that were exorbitant, about fifty cents per mile higher than they should have been.

121 The trial judge found that IWS was absorbing fuel expenses that should have been borne by Greycliffe. In addition, IWS was paying for truck repairs that were properly chargeable to Greycliffe, and absorbing insurance and administrative costs that should have been charged back to Greycliffe. The trial judge summed up her findings at para. 438:

> I find that IWS could have provided its own trucking services. Greycliffe was incorporated only because Robert wanted to make additional income for himself. All Greycliffe profits could have been earned within IWS. Each of Robert's Companies performed services that could have been performed by IWS or its subsidiaries, and the profits therefrom could have been retained in IWS. Those profits came right off IWS' bottom line, and deprived its shareholders of equity, which should have remained in IWS.

G. The Share Sale and Related Lease in December 1983

122 Before 1982, Morris and Chester had two very brief discussions about Morris selling his shares to Chester. The first occurred in September 1981. Morris was angry about a confrontation between Michael and Robert, and said to Chester that their sons could never work together. He suggested that Chester buy his shares. The next day Morris told Chester to forget what he had said in anger the day before. The second brief conversation occurred in late 1981 when Chester brought up the possibility of Morris selling his shares to Chester. Morris said he had no interest in selling his shares and asked Chester not to raise the topic again.

123 In 1982, a recession hit the steel industry and IWS fell into a business slump along with the rest of the scrap metal business. According to Chester and Linton, there were concerns about Lasco's survival. If Lasco did not survive, IWS Ferrous would fail and IWS would lose a major source of income. Chester testified that at a dinner in the summer of 1982 at the Trocadero Restaurant in Hamilton, Morris said that he was no longer interested in an estate freeze, but wanted Chester to buy his shares. Chester testified that he was upset at this request and thought that Morris was trying to get out of the business when times were difficult. Chester suggested to Morris that Morris should buy Chester's shares. Morris declined, indicating that it would make sense for Chester and his sons to continue in the business. Morris denied that this conversation took place. He said that although business was not good in the summer of 1982, he knew that IWS was financially sound and would rebound. He had no interest in selling his shares.

124 Chester testified that he was not immediately interested in buying Morris' shares because of the difficult business conditions. He spoke to his sons who told him that he should consider buying the shares if the price was right. Chester testified that he had two or three discussions with Morris in the late summer and early fall of 1982. Morris insisted on secrecy and, according to Chester, did not want Taylor or Wiseman or anyone else to know about the possible share sale. Morris' insistence on secrecy precluded going to any outside source, such as Campbell, for a valuation of IWS. Chester

indicated that Morris insisted that only Linton be told of the possible sale. Chester saw no need for outside consultation since in his view, "[w]e both had an identical interest in the Share Sale."

125 In November 1982, at Chester's request, Linton prepared a valuation of IWS. He had never prepared a business valuation before. Linton had been told that the estate freeze would not proceed and that Chester was considering buying Morris out. Linton did not discuss the valuation with Morris and sent the valuation only to Chester. Linton valued IWS on a break-up basis, even though he acknowledged in his evidence that there was no possibility that IWS was going to be liquidated. He valued fixed assets at cost, placed no value on the IWS interest in IWS Ferrous, and concluded that because Morris did not contribute to the success of the non-ferrous division, the value of that division should not be reflected in the value of Morris' shares. Linton eventually concluded that as of October 31, 1982, IWS had a value of between $3 and $3.5 million. In arriving at that amount, Linton took into consideration the anticipated dividends in 1982 in the amount of $2,288,000, half of which would go to Morris. According to these figures, Morris' fifty per cent interest in IWS was worth between $2.6 and $2.85 million.

126 Chester testified that he thought that Linton's valuation was low. However, Chester gave a copy of Linton's valuation to Ennis in 1983 when Ennis was working on the share sale. No other valuation was prepared in connection with the share sale. Morris testified that he was never shown Linton's valuation. In his view, the valuation was ludicrously low.

127 The trial judge accepted Morris' evidence that the discussion at the Trocadero did not occur. She also found that by 1982, Chester and his family were not prepared to split IWS on a 50-50 basis with Morris and his family. Instead, they were systematically "stripping IWS of much of its equity and diverting it to [Chester's] side of the family" (para. 494). Next, the trial judge found that despite the 1982 recession, IWS was financially sound. She relied on the evidence of Wiseman in coming to this conclusion. The trial judge also concluded that by the fall of 1982, an estate freeze was no longer under discussion. Chester's focus had shifted to purchasing Morris' shares.

128 The trial judge considered Linton's valuation in some detail. She concluded that it was written for Chester and to serve Chester's purpose, which was to drive down the value of Morris' shares. In support of this conclusion, the trial judge observed that although Linton approached his valuation on a break-up basis, IWS was purchasing expensive new equipment and expanding its non-ferrous operation.

129 Ennis' diary indicates that he met with Chester and Robert to discuss the sale of shares in February 1983. This was about one month after Chester and Michael had a serious discussion about Michael's future in the company and Michael's concern that Chester and his sons were not treating Morris properly. Michael did not think that Chester wanted him working for IWS in 1983.

130 Ennis denied that the meeting in February 1983 related to a potential purchase of Morris' shares by Chester. He also denied having any discussion about the sale with Chester in November 1982. Ennis testified that he was first consulted about a possible share sale in April or May 1983

when he spoke to Morris at their synagogue. Morris told him that he was going to sell his shares to Chester and that he wanted Ennis to act for him. Ennis testified that he told Morris that he could not act for Morris or Chester and could not give tax or business advice. Morris assured him that he and Chester would work out all of the details and the purchase price. They needed someone they could trust to draw up a contract that would reflect their mutual wishes. Ennis said that Morris told him that he and Chester had agreed that Chester would pay $3 million for Morris' shares.

131 Chester testified that he received a call from Ennis in May 1983, indicating that Morris had asked Ennis to call Chester about the share sale. Chester said that he and Morris then met with Ennis. Contrary to Ennis' evidence, Chester testified that the purchase price was not agreed on until months later. Morris denied discussing the share sale with Ennis at this time.

132 Ennis testified that in the summer of 1983 he had discussions and meetings concerning the share sale with both Morris and Chester. He eventually drafted a share sale agreement in July 1983 showing a purchase price of $2.65 million to be paid over several years. In addition, Morris would receive the $700,000 1982 bonus allocated in February 1982. The draft sale agreement was accompanied by a draft lease whereby the Blue Building and the Back 7.7 Acres of Centennial Parkway were to be leased to IWS by Chesterton and Morriston for $5,000 per month. According to Chester, this was the rent that Morriston and Chesterton had been receiving since February 1982 and took into account IWS' assumption of all environmental risks as well as Chester's agreement to take responsibility for the less fortunate members of the extended Waxman family. Ennis did not discuss the draft agreement or lease with Morris.

133 Ennis also prepared a document referred to as the "Lasco Covenant Agreement", whereby Morris and Chester undertook to abide by the IWS Ferrous shareholders' agreement and the Lasco management agreement. The agreement was specifically said to be binding on Morris, Chester, and their heirs. Morris was experiencing heart problems in the summer of 1983. Michael loomed as his heir.

134 The trial judge concluded that Chester and Ennis first discussed the share sale in late 1982 and were actively discussing the potential share purchase in the summer of 1983. Morris had no involvement in these discussions and was not aware of them. The Lasco Covenant Agreement was drawn on Chester's instructions exclusively for Chester's benefit in the event that something happened to Morris before Chester could complete the purchase of Morris' shares. Morris signed the Lasco Covenant Agreement at Chester's request, believing it had something to do with the Lasco transaction. He did not read it.

135 The trial judge rejected Ennis' evidence that his first discussion about the sale of shares was with Morris at the synagogue. Relying on Ennis' own records, the trial judge found that he had had at least two previous discussions with Chester. The trial judge also accepted Morris' evidence that there was no discussion about the sale of shares at the synagogue.

136 The trial judge found that by early 1983, after Chester had his discussion with Michael,

Chester was even more concerned about Michael's potential involvement in IWS. He knew that he would not be able to dominate Michael in financial matters in the same way he had dominated Morris.

137 As summer turned to fall in 1983, IWS' financial situation improved along with the rest of the economy. According to Chester, he and Morris continued to negotiate the share sale. Morris wanted to retain control of the refuse division, to remain as president of IWS, and he wanted Michael, himself and Shirley to remain on the IWS payroll. Chester said that he agreed to all of these stipulations. Ennis continued to meet with Chester, but not with Morris. He said that he spoke with Morris from time to time and inquired about the course of the negotiations between Morris and Chester.

138 Linton met with Chester four or five times in the fall of 1983 to discuss the share sale. Morris was not there. Linton never spoke to Morris about the share sale, although he saw him on a regular basis.

139 Morris had a longstanding heart problem. In September 1983, his heart specialist scheduled him for an angiogram. Morris fainted in October and was hospitalized. His specialist advanced the scheduled angiogram and told Morris that he might have to undergo open heart surgery. Morris met with his doctor to discuss the risks inherent in the angiogram and open heart surgery. Michael, Shirley, and a business associate all testified that Morris was not himself in the last three months of 1983. Shirley described Morris as withdrawn, preoccupied, frightened, and nervous. According to Morris' doctor, this was not unusual for a person facing open heart surgery. Chester testified that Morris seemed to be his same old self.

140 Between late November and December 22, 1983 Chester had many meetings with Ennis and Linton concerning the share sale. Ennis' notes indicate that initially Chester wanted an option to purchase Morris' shares, but that on about December 19, 1983 Chester decided to purchase the shares outright. Chester had discussed various ways of financing the purchase with Ennis and Linton. These included: reallocating part of Morris' 1982 bonus to Chester; IWS paying a dividend to Chester and Morris; and Morris gifting part of the dividend back to Chester.

141 In these meetings, Chester and Ennis also discussed the IWS lease with Morriston and Chesterton, which had first been discussed in the summer of 1983. Chester instructed Ennis that the rent to be paid to Morriston and Chesterton was to be $2,000 per month rather than the previously mentioned $5,000 per month. Chester offered no explanation for this change. Morriston's proposed share of the rent, $1,000 per month, was less than Morriston's carrying costs on the mortgage on the property. Chester also instructed Ennis that various terms were to be included in the lease. These terms effectively prevented Morriston from doing anything with the property without Chesterton's approval.

142 In his testimony, Morris said that he was completely unaware of Chester's discussions with Ennis and Linton and played no role in any of them. He testified that Chester mentioned the

possible purchase of Morris' shares to him twice in November 1983. Morris told Chester that he was not interested and later went to see Chester and specifically asked him not to bring the topic up again. Morris, who was not feeling well, felt that Chester was "trying to wear him down".

143 Chester and Ennis testified that in anticipation of Chester buying Morris out, Shirley's shares were transferred to Morris on December 8, 1983. Shirley resigned as a director on the same day. Share certificates and a resignation dated December 8, 1983 were in the IWS corporate records. Shirley had no recollection of signing the documents and Morris had no recollection of signing a related corporate minute. Ennis' notes indicate that these documents may actually have been signed in May 1984.

144 Chester testified that by about December 12, 1983, he and Morris had agreed on a purchase price of $3 million. According to Chester, this was more than Morris' shares were actually worth. But Morris was adamant that $3 million should be the face value of the purchase price, even if he actually received something less than $3 million and his tax liability significantly increased because of the mode of payment. Chester testified that Morris never explained his insistence on a stated purchase price of $3 million.

145 Linton testified that by the middle of December, it was understood that part of the purchase price would come from the reallocation of part of Morris' 1982 bonus to Chester. Ennis' notes also reflect this reallocation. Wiseman testified that $412,000 of Morris' 1982 bonus was reallocated to Chester for the purposes of the share sale.

146 Linton testified that on Chester's instructions, he determined the amount of Morris' drawings account at the end of 1983 and doubled it to take into account taxation, yielding $288,000. Linton then drew the account down to zero by attributing $288,000 to Morris. This amount was deducted from the $700,000 bonus attributed to Morris for 1982, leaving $412,000. The $412,000 was reallocated to Chester and used to purchase Morris' shares. Linton said that the purchase price of Morris' shares was increased from $2.65 million to $3 million to reflect the use of these reallocated funds.

147 Chester denied giving Linton any of these detailed instructions. He acknowledged that $412,000 of Morris' 1982 bonus was reallocated to him, but insisted that the reallocation was unconnected to the purchase of Morris' shares. Chester said that it would be "immoral" to use the reallocated funds to purchase Morris' shares. It was Chester's evidence that because Morris was no longer a shareholder at the end of 1983, he was no longer entitled to the bonus. The bonus was, therefore, properly reallocated to Chester.

148 Although Ennis said that he had asked Morris from time to time about the discussions with Chester, all of his lengthy meetings were with Chester, not Morris. Ennis took all of his instructions from Chester and provided Chester with all of the documents that he produced. In cross-examination Ennis said that he saw no need to speak directly to Morris about the terms of any agreement until Chester had decided exactly what he wanted to do and how he wanted to do it.

Ennis assumed that Chester was discussing matters with Morris and providing Morris with copies of the various draft documents that Ennis prepared. Ennis summarized his role in the following words:

> I am not negotiating this deal. I was only a scribe. I was to take instructions and draw a document when they worked out their agreement. I never interfered. I never insisted how they conduct themselves. They are experienced intelligent people who have made millions of dollars and know exactly how to handle themselves. They don't need me giving advice. They would not accept advice from me ... they are people who give advice.

149 The trial judge held that by December 19, 1983, Chester's discussions with Ennis and Linton had crystallized to the point that he had decided to buy Morris' shares. The details of the transaction were in a state of flux. The trial judge rejected the evidence of Ennis and Chester and found that Morris was not involved in or aware of any of the discussions pertaining to the share sale. In coming to that conclusion, the trial judge referred to the absence of any reference to Morris' involvement in notes prepared by Ennis or Linton. The trial judge summarized her findings concerning the situation as of December 19th as follows:

* Chester wanted Morris' side of the family out of the business and had decided to purchase Morris' shares.
* Chester wanted the transaction consummated quickly because of concerns about Morris' health and Chester's desire to avoid having to deal with Michael.
* Chester did not want the IWS accountants, Taylor Leibow, or any outside valuators, lawyers, or accountants to examine the specifics of the proposed share sale. The only valuation that was prepared was done in November 1982 by Linton.
* Ennis was dealing only with Chester and Linton. He took his instructions exclusively from Chester and did not discuss the share sale with Morris.
* Morris was oblivious to the ongoing share sale discussions and consequently never sought any professional advice.

150 Chester and Ennis testified that they met with Morris at Ennis' office on December 20th and 22nd to complete the share sale documentation. According to Chester and Ennis, both meetings were long and several documents relating to the share sale and the related lease were discussed and signed at both meetings. They testified that all of the pertinent documents were read out loud line by line by Ennis' assistant, Ms. Butner. Ennis and Chester also testified that Morris raised certain objections and questions in the course of the reading of the documentation and that changes were made in response to some of his comments. They testified that Morris raised questions about the amount of the initial payment to him and the timing of that payment. As a result of these questions Linton was told to revise the agreement. Chester also gave evidence that the documentation could not be completed on December 20th because Morris insisted that notice of the share sale be given to

Lasco to avoid any possible problems with the IWS Ferrous shareholders agreement. Consequently, the final version of the share transfer agreement was not signed on December 20th, but was signed at the second long meeting on December 22nd. Chester and Ennis testified that the same oral line by line review of the documents occurred at the second meeting.

151 Morris denied that he ever attended a meeting where the share sale documentation and the lease were explained or discussed, much less read out loud line by line. He could recall attending one meeting, although he did not know the date, when Chester told him to sign certain documentation that Chester referred to as "the sale". According to Morris, Chester told him to look over the papers. Morris assumed that the documents related to the day-to-day business of IWS and were the kind of corporate documents he had routinely signed without reading when asked to do so by Chester. Morris also recalled that when he was about to sign one document, Chester said to Ennis, "this is to save your ass". Morris did not know what Chester was referring to when he made the comment. One of the documents signed by Morris was a waiver of independent legal advice.

152 Morris testified that when he signed the documents he had complete trust in Chester. He was also very concerned about his own health, particularly his upcoming angiogram, which was scheduled for December 29th, 1983.

153 The trial judge accepted Morris' evidence. She found at para. 726 that the relevant documents were signed at one meeting and that they not were read aloud, discussed, or explained in any way to Morris:

> Morris did not understand at the time that the documents he was being asked to sign were out of the ordinary. He thought he was signing IWS documents as its President in the usual course. He signed the documents because Chester asked him to do so and because he trusted Chester and Ennis. He did not want or intend to sell his shares. He had no idea that he was selling his shares or signing a lease. ... I do not accept that Morris was involved in *any* negotiations that produced this deal [emphasis in original].

154 In rejecting the version of events offered by Chester and Ennis, the trial judge relied on several factors. She noted that although Chester testified that it was Morris who wanted Lasco advised of the transaction, it was in fact Chester and Ennis who drove to Whitby, Ontario from Hamilton to personally speak to the president of Lasco on December 21, 1983. At this meeting, Chester and Ennis gave the president of Lasco a notification letter describing the pending share sale. The trial judge found that this trip was made at Chester's insistence and was consistent with Morris' testimony that he had no knowledge of the pending sale. The letter Chester and Ennis provided to Lasco was also inconsistent with the transaction having been completed by December 20th.

155 The trial judge found, on the basis of the documentation, that the share sale was not in its final form on December 20th and that many of the relevant documents had not yet been prepared. The trial judge further concluded that the evidence of Chester and Ennis that they along with Morris

sat in a boardroom for hours while Ms. Butner read the documents line by line did not have the ring of truth. She observed that the documentation contained many errors, which would have been spotted and corrected had the parties gone through the line by line reading of the documents as described by Chester and Ennis. Finally, the trial judge noted that in Chester's detailed statement of defence, he referred to only one meeting, which he said occurred on December 22nd.

156 Under the terms of the share sale, Morris sold his shares to Chester for $3 million. One million dollars was payable on January 4, 1984, and the rest was payable in instalments over five years. IWS was to declare a 1983 dividend of $1 million, $500,000 payable to each of Chester and Morris. Morris was then to immediately gift his $500,000 dividend to Chester. Morris was to lend IWS $500,000 repayable on October 8, 1984.

157 Morris' shares were to be transferred to Chester in stages beginning with a transfer of eighty-four shares in January 1984. There was a dispute over whether the share sale was structured to provide for the transfer of title of all of the shares to Chester upon the first payment or whether title was to be transferred in stages over the payment term.

158 In addition to the share sale, Morriston and Chesterton were to enter into a fifty year lease with IWS, initially covering the front of Windermere Road (including the Blue Building) and the Back 7.7 Acres of Centennial Parkway, but eventually covering all of the Windermere Road and Centennial Parkway properties.

159 It was Chester's evidence that in addition to the elements set out above, the share sale required him to assume full responsibility for members of the extended Waxman family who could not look after themselves and required IWS to take full responsibility for any environmental problems that might develop on the properties. IWS was also to continue to pay salaries and benefits to Morris and Michael, who would operate the refuse division.

160 After a detailed review of the evidence, including expert evidence, the trial judge decided that virtually all aspects of the transactions described above were grossly unfair to Morris. Based on the expert evidence that she accepted, the trial judge concluded that as of December 31, 1983, IWS was conservatively worth between $8.73 and $8.96 million. These figures did not include the $1 million dividend declared in 1983 or the $6.6 million in bonuses declared in 1981 and 1982. According to the expert evidence accepted by the trial judge, a purchase price of $3 million was "not in the ballpark of reasonableness or fairness".

161 The trial judge further held that Morris did not actually receive $3 million. She found that almost $1 million of the purchase price was Morris' own money (the reassigned 1982 bonus of $412,000 and the gifted dividend of $500,000). The trial judge also adjusted the real purchase price downward to reflect the fact that Morris was to be paid over time and without interest. She concluded that in actual 1983 dollars, Morris received the cash equivalent of $1,594,721.

162 The trial judge found that the loan of $500,000 to IWS was grossly unfair to Morris. The

loan was without interest and for no stated purpose. Interest rates in late 1983 were about twelve per cent.

163 The trial judge next turned to the gifting agreement, whereby Morris received a $500,000 dividend and immediately gave it to Chester. She found that this transaction resulted in double taxation for Morris in that he paid tax on the dividend and also paid tax when that same money came back to him as part of the purchase price. She also found that Morris was deprived of certain tax benefits that would flow to IWS from the declaration of the dividend. Finally, she found that through the gifting arrangement, Chester effectively used $500,000 of Morris' money to buy Morris' shares from him.

164 The trial judge also determined that the lease was entirely one-sided in Chester's favour. She concluded that the lease was so one-sided that Morris would never have signed it had he been aware of the terms. The one-sided terms highlighted by the trial judge included the following:

* The lease was for fifty years with no increase in the rent during the fifty year term.
* The rent, $2,000 per month ($1,000 payable to Morriston), was about $9,000 per month below fair market value according to the expert evidence accepted by the trial judge.
* The rent did not increase after 2001, when the IWS Ferrous lease expired and all of the Windermere Road and Centennial Parkway properties came under the IWS lease.
* Should IWS default on the lease, Morriston could not take any action without Chesterton's permission. Chester controlled both Chesterton and IWS.
* Morriston could not sell or mortgage its interest in the property without the permission of Chesterton. Consequently, although the rent being paid to Morriston would be less than Morriston's carrying costs, Morriston could not sell or assign its interest in the property without Chesterton's permission.

165 Having concluded that the transactions as documented were grossly unfair to Morris, the trial judge then rejected Chester's evidence that his obligations included the unstated obligations for potential environmental liabilities and family responsibilities. The trial judge found that there were no discussions about environmental liabilities and no estimates of potential clean-up costs as of the end of December 1983.

166 Morris recalled that on the evening he signed the documentation Ennis phoned him at Chester's request. Ennis was upset and may have been drunk. He told Morris not to blame Chester, that it was all Robert's fault. Morris was distracted by his own health problems and pending angiogram and did not ask Ennis for any explanation.

167 Morris also testified that he wanted to prepare a will before his scheduled angiogram on December 29, 1983. He arranged to meet with Wiseman and Ennis' associate, Kevin Hope, at his home on December 26th. In the course of their discussions, Hope told Morris that he did not own the Centennial Parkway property. Morris was shocked when Hope told him that he did not own Centennial Parkway. He could not understand how the property did not belong to him. Morris said that he felt as though he was "finished". Despite this, Morris did not ask Hope for any explanation because he was preoccupied with his will, concerns about his own mortality, and looking after his affairs for his family. Hope did not testify.

168 In his testimony, Wiseman recalled that Morris was upset when he learned that Centennial Parkway belonged to IWS. Wiseman said that Morris told him that he had sold his shares in IWS. Wiseman said that he had several discussions with Morris in the next few days and reviewed the share sale documents with him and Taylor on December 28, 1983. Wiseman said that it was obvious that Morris did not understand any aspect of the agreement and was very upset with what had happened.

169 The trial judge rejected Wiseman's evidence that Morris told him about the share sale on December 26, 1983, and reviewed the documentation with him on December 28th. In rejecting that evidence, the trial judge referred to prior inconsistent statements Wiseman had made in an earlier affidavit, and the contrary evidence of Taylor. Taylor's evidence, which was consistent with Morris' evidence, was that Morris first learned of the share sale in early January 1984. The trial judge also accepted the evidence of Shirley that Morris went into the hospital on December 28th and remained with her either in the hospital or at home until the end of the year. He did not meet with Wiseman or anyone else on these dates.

170 Linton testified that he did not discuss the share sale transaction with Morris until January 1984. Linton further explained that pursuant to that transaction, IWS declared a 1983 dividend of $1 million and had two $500,000 cheques prepared, one payable to Morris and one payable to Chester. Linton said that Morris endorsed his cheque to Chester to complete the $500,000 gift required under the share sale transaction. Linton also testified that Chester paid Morris $1 million by a cheque dated January 4, 1984, representing the first payment on the shares. Morris signed a $500,000 cheque payable to IWS on the same day. That cheque represented the loan from Morris to IWS. Chester's bank records confirm that $1 million was deposited into his account on December 30, 1983. That amount is described as a dividend. There is no documentation referring to the $500,000 cheque said to have been given by Morris to IWS. Many of the relevant banking records, which were in the possession of IWS or Chester up to and during the litigation, were not available.

171 The existence of the alleged $1 million cheque dated January 4, 1984 from Chester to Morris was supported by a duplicate carbon copy of a deposit slip produced by Chester. No other bank documents, such as Morris' bank statements, were available, although according to Linton, copies of these documents had been kept in three different places under the control of Chester and IWS. Taylor testified that on January 4th, Morris received a $500,000 cheque from IWS and that on

Taylor's advice, Morris deposited that at the Continental Bank.

172 The trial judge concluded that there never was a $1 million cheque payable by Chester to Morris dated January 4, 1984. In coming to that conclusion, she relied on the evidence of Morris, Taylor, and the absence of relevant banking documents. She held that the carbon copy of the deposit slip was not authentic. The trial judge further held that Morris did not endorse a $500,000 cheque over to Chester, but that $1 million representing the total dividend had simply been deposited into Chester's account. Lastly, the trial judge held that Morris received $500,000 on January 4th and that this money came to him by an IWS cheque.

173 Morris testified that he first learned of the share sale on January 5, 1984 after he and Taylor deposited the $500,000 cheque from IWS into Morris' account at the Continental Bank. Morris said that he had trouble understanding the documents and the explanations given to him by Wiseman and Taylor. He was very upset. Taylor confirmed that Morris was unhappy with the deal.

174 Morris said that he spoke to Chester several times in January and that Chester repeatedly told him to "calm down, just take it easy". Chester assured Morris that they would talk later and that things would remain the same.

175 Morris met with Wiseman on several occasions in January 1984. Although Wiseman and Morris disagreed on when the conversations took place - Wiseman said late December 1983 and Morris said early 1984 - they agreed that Morris was very upset about the transaction.

176 Morris testified that Taylor arranged a meeting with Chester and Wiseman at which Morris understood that the share sale would be discussed. Immediately before the meeting Chester told Morris not to say anything in the meeting. To Morris' surprise neither Taylor nor Wiseman raised the topic of the share sale at the meeting.

177 In early January, Linton and Chester discussed clarifying the nature of the share transaction. In Linton's view, it was unclear whether the share sale agreement called for a completed or a staged sale. The nature of the sale had tax ramifications for Morris and a potentially significant impact on Chester's ability to direct dividends from the company exclusively to himself as the sole shareholder. Linton prepared documents instructing Ennis to revise the share sale agreement so that it more clearly reflected a sale completed in January 1984. Chester subsequently signed those amending documents. Morris refused to do so and never did sign the amended share sale documents. Chester testified that he did not know until a couple of years later that Morris had refused to sign the documents. Chester further testified that he had no reason to believe that Morris was dissatisfied with the share transaction in January 1984. He saw no change in his relationship with Morris. The trial judge rejected this evidence and found that Chester knew in January 1984 that Morris was unhappy.

178 It was Morris' evidence that during his discussions with Chester in January, Chester assured him that nothing would change. He said that Morris would remain as president, would draw a

salary, as would Michael, and would keep the same benefits. The trial judge held that these "concessions" by Chester in January gave Morris some reason to believe that Chester would in fact undo the share transaction.

179 Morris was scheduled for open heart surgery on February 1, 1984. He testified that immediately before going into the hospital, he was afraid, concerned for his family's future, and upset at what had happened between Chester and him. He felt that everything he had worked for all his life had been taken away from him. On January 29, 1984, Morris wrote a stream of consciousness description of events addressed to Taylor and Wiseman that was to be provided to his son Michael, if Morris died in the hospital. He left a copy with Wiseman. These notes, referred to as the "notes from the grave", figured prominently in the argument of both counsel for Chester and Morris. The trial judge spent many pages analyzing the notes and considering the competing submissions. She concluded that, read in their entirety, the notes supported Morris' position that he did not know what he had signed and that he believed Chester had tricked him into signing the documents. The trial judge described the notes as being

> indicative of a very troubled man trying to grapple with a growing recognition that his brother, whom he had loved and trusted implicitly since childhood, had betrayed him (para. 844).

180 Morris gave evidence that the night before his open heart surgery, Chester promised to tear up the share sale. Wiseman also testified that Morris told him of this conversation shortly after the operation.

H. The Descent into Litigation

181 Although to the outside world Morris still appeared to be involved in IWS, the company came under Chester's control after January 1, 1984. On Chester's instructions, Morriston and Chesterton were billed by IWS for legal costs relating to the drafting of the 1981 IWS Ferrous lease and for bookkeeping and management services. Chester instructed that any amounts owing for these services should be deducted from the rent owed by IWS to Morriston and Chesterton under the December 1983 lease agreement. This set-off meant that apart from January 1984, Morriston did not receive even the $1,000 per month rental amount called for by the lease.

182 Linton testified that Morriston's loss of the rent was more than made up for by the gaining of a tax deductible expense equal to the amount of the administrative and legal fees charged to Morriston by IWS. Morris testified that he did not learn that Morriston did not get any rents from IWS after January 1984 until after the litigation had started. No one ever asked Morris whether the legal and administrative fees could be set off against the rent.

183 The trial judge found that in the absence of any documentation to support the charges to Morriston, she could not accept that the administrative and legal charges imposed by IWS were real. She found that they were invented to permit IWS to avoid paying even the modest $1,000 per

month in rent that the December 1983 lease required IWS to pay to Morriston. She also found that Linton did not seek Morris' approval of this scheme or even advise him about it. The beneficiary of the scheme was IWS or Chester.

184 Within two months of Chester's assuming full ownership of IWS, it severed its trucking relationship with Greycliffe. Greycliffe purchased the trucks it had been leasing and immediately sold several of them to IWS. IWS resold them at a loss the following month. Robert explained that Greycliffe had stopped trucking for IWS because IWS lost many of its American contracts and high insurance costs made the trucking business less attractive. The trial judge rejected this evidence noting that although Greycliffe's insurance rates spiked briefly, they then returned to previous levels. The trial judge concluded that Greycliffe ceased its trucking operation because once Chester and his sons had total ownership and control of IWS it made no sense to continue to siphon off IWS profits to Robert's company by paying exorbitant trucking rates.

185 During their discussions in early 1984, Morris said that Chester had assured him things at IWS would not change. Morris understood this to mean that he would continue to receive drawings from IWS on an informal, as-needed basis. In fact, on Chester's instructions, Linton charged Morris' drawings against the $500,000 loan purported to have been made by Morris to IWS as part of the share sale transaction. Morris knew nothing about the supposed loan and was unaware that drawings taken from him by IWS in 1984 were being charged against that loan.

186 Morris testified that he learned in April 1984 that Chester had not ripped up the share sale as he had promised the night before Morris had open heart surgery. Chester continued to assure him that he would do so. Morris testified that in June 1984, Chester finally showed him the actual share sale documents. When Morris questioned the effect of the documents, Chester said they would talk later. Chester denied that this discussion ever took place.

187 Ennis, Taylor and Wiseman all became concerned that the growing difficulties between Morris and Chester could lead to problems in the day-to-day operation of IWS and in the financial affairs of the company. Ennis and Chester were very concerned that Morris had not signed the amended share sale documents. Although Morris did not sign these documents, the dividend declared by IWS in 1984 went entirely to Chester. Under the terms of the share sale that had been signed by Morris, he still held shares as of the end of 1984.

188 In the spring of 1985, Linton assembled the information needed to complete Morris' 1984 tax return, drafted it and sent it to Wiseman. Wiseman had concerns about whether the share sale as documented was a staged sale or a sale that was completed in January 1984. Linton told Wiseman that it was a completed sale. He prepared Morris' tax returns on the basis that Morris had sold all of his 250 shares in January 1984.

189 In the spring of 1985, Wiseman met with Morris to discuss his 1984 tax return. Wiseman told Morris that the share sale transaction had to be finalized for tax purposes. Wiseman described a meeting with Morris, Chester, and Taylor where the restructuring of payments and the share transfer

was discussed. According to Wiseman, Morris did not raise any concerns about the share sale. Also in the spring of 1985, Linton and Ennis met with Scace. Morris was not at that meeting. He said that Chester told him that this meeting was to find out how to undo the deal.

190 Morris said that he did not want to acknowledge the sale of any shares to Chester in his 1984 tax return. Wiseman told him that he should fill out the tax form on the basis that he had sold his shares, pay the taxes to avoid any penalty, but not mail the return. As had been the case for many years, Morris' personal taxes were paid by Linton through IWS. Linton delivered an IWS cheque in the amount of $156,638 payable to Revenue Canada. Linton then deducted that amount from the outstanding amount of the loan owing to Morris by IWS. All of this was done without consulting Morris. On the trial judge's findings, Morris was still unaware of the $500,000 loan that had supposedly been made by him to IWS as part of the share sale transaction.

191 Morris also testified that he met with Chester and his sons in the spring of 1985 to discuss the concerns he had about filing a tax return reflecting a share sale that Morris said had never happened. Morris prepared rather detailed notes in anticipation of the meeting. Those notes included eleven points that Morris wanted to discuss with Chester and his sons. Morris discussed those notes in some detail in his evidence and the trial judge made extensive reference to them in her reasons. Chester and his sons denied that the meeting ever occurred.

192 In the summer of 1985, Chester told Linton to pay the taxes on his sons' as yet unadvanced 1982 bonuses and to transfer the remaining balances to him. Linton did so and transferred about $594,000 in after-tax dollars to Chester. He had earlier transferred $412,000 of Morris' 1982 bonus to Chester along with about $650,000 in 1982 bonuses initially assigned to Kumer and other employees. In addition to these amounts, in 1985, Chester received a non-taxable $250,000 dividend, a $42,000 taxable dividend and a $625,000 bonus. He also advised Morris by letter in November 1985 that he would be postponing the $500,000 share sale payment due in 1985 under the terms of the share sale agreement.

193 Morris testified that he learned about the 1981 and 1982 bonuses for the first time in the spring of 1985 when Wiseman told him. This was in the context of discussions about Morris' tax returns and a possible restructuring of the share sale. Although Wiseman said that this discussion occurred in 1984 and not 1985, he agreed with Morris' evidence that Morris was very angry when he found out about the size of these bonuses and that they were assigned to Chester and his sons. Morris spoke to Chester about the bonuses and was told they were not real, but were for tax purposes.

194 The trial judge found that Morris first learned of the bonuses in the spring of 1985. She also found that in the spring of 1985 the restructuring of the share sale was discussed, but that Morris was not a party to these discussions. Documents prepared for those discussions grossly overstated the amount of money Morris had actually received on the share sale. She also found that Morris was not told how his 1984 taxes were paid or of the existence of the loan account from which the taxes

were paid. The trial judge found that Wiseman ignored the terms of the share sale agreement in preparing Morris' taxes and in treating the share sale as completed as of January 4, 1984. She held that on a plain reading of the agreement, the sale was a staged one and Morris still held shares in IWS after January 1984. Consequently, even if the share sale was real, Chester was not entitled to take for himself all of the dividends declared that year.

195 The trial judge rejected Chester's evidence that the reallocation of his sons' bonuses to him was not intended to be permanent, but rather was done for banking reasons. She rejected his evidence that he was holding the money on behalf of his sons. On the trial judge's calculation, Chester ended up with over $2.5 million of the $3.3 million in bonuses declared for 1982. Morris received slightly less than $300,000.

196 The trial judge also concluded that as of the end of 1985, Morris had received some $1,125,000 on account of the share sale. He had received $500,000 on January 4, 1984, a $500,000 credit with IWS represented as a loan to IWS, and a $250,000 cheque from Chester in December 1984. The $500,000 credit was drawn down as IWS paid various expenses (e.g. taxes) for Morris.

197 On Morris' evidence, Chester continued to promise he would undo the share sale in 1985 and 1986. In one of those discussions, Chester promised that he would "straighten out" the share sale if Morris would transfer his Ancaster property to Chester's son Warren. Morris transferred the property to Warren for $1 on January 1, 1986. After the transfer, Morris said he asked Chester to make good on his promise, but Chester stalled him and never did keep his promise.

198 Chester denied any such conversation. He said that the Ancaster property was partially paid for with partnership money in the 1950s and that Morris willingly transferred the property to Warren. Warren testified that Morris was not impressed with Warren's idea of building a house on the property, but willingly gave it to Warren.

199 By the middle of 1986, Ennis could see that Chester and Morris were not getting along. There were numerous corporate documents that Morris, as president of IWS, had not signed. Ennis assumed that the disagreement between the brothers had something to do with the 1983 share sale. In a memo to Chester dated February 10, 1986, Ennis showed Morris as the owner of 145 of the 500 IWS shares. This description was consistent, although not exactly the same, as the terms of the share sale as documented at the December 22, 1983 meeting. According to the amended share sale documents drawn in early 1984, Morris did not own any shares after January 1984. Morris had never signed the amended documents.

200 In April 1986, following his long established practice, Morris requested that Linton look after his 1985 income taxes. Morris owed just under $49,000 in taxes. On Chester's instructions, Linton deposited a personal cheque for $60,000 from Chester into Morris' account and typed the reference "payment for 5 Shares" on the back of the cheque. Under the terms of the share sale $60,000 was due to Morris in December 1986. Linton then prepared a cheque from Morris payable to the Receiver General for Morris' taxes. Morris was never told of the source of the funds for the

payment of his taxes. The trial judge found that Chester knew that Morris was unhappy with the share sale and was attempting to build a "paper" record to support Chester's version of events.

201 By late December 1986, Morris had become sufficiently concerned about the way things were being done at IWS to send the following letter to Linton:

> [N]o cheques or moneys for Morris Waxman from any source can be deposited by you or withdrawn for me without my written approval. This applies to any and all documents for whatever reason.

202 On the same day, on Chester's instructions and without Morris' authorization, Linton deposited $440,000 into Morris' account. This represented the $500,000 payment due to Morris under the share sale minus the $60,000 that Chester had put in Morris' account earlier in 1986. Linton later denied making this deposit. Morris learned that the money had been deposited into his account in early 1987, but he gave instructions that it should be returned to Chester. Chester testified that he called Morris to ask him what was going on and Morris told him that he was having considerable difficulty with the situation. Morris said that he had not told his family about the share sale and that he now wanted to re-purchase forty per cent of the IWS shares. Chester told him "that's not going to happen" and deposited the $440,000 into a trust account. All IWS dividends and bonuses for 1986 totalling $612,000 were paid to Chester.

203 While vacationing in early 1987, Morris came to understand that the public perceived that he had retired from IWS. This upset Morris and upon his return from vacation, he arranged a meeting with Chester and his sons. In preparation for that meeting, he wrote out in point form the topics that he wished to discuss. These included Morris' claim that Chester had "concocted a scheme to take from me what we worked for" and Chester's promise to "tear up everything". After the meeting, Morris continued to talk to Chester. Chester and his sons said there was no meeting. The trial judge accepted Morris' evidence.

204 In April 1987, Chester instructed Linton to draw a cheque for $90,000 to pay Morris' income tax for 1986. The cheque was to be drawn on the trust account Chester had established earlier that year when Morris returned the $440,000 to him. Chester wrote a covering letter enclosing the payment to Revenue Canada. Morris was unaware of the cheque or the source of the funds.

205 The trial judge found that as late as October 1987, Chester was describing IWS as a partnership between himself and Morris. He used this description in an interview given to a well-known business journal. Chester's public posture gave Morris cause to believe that Chester would keep his word and return the affairs of IWS to the way they had been in the 1970s.

206 By April 1988, Morris was becoming frustrated in his attempts to get Chester to undo the share transaction. He told Chester that he would be prepared to go ahead with an estate freeze based on sixty per cent to Chester's family and forty per cent to his family. Chester testified that Morris made an offer in early 1988, but that he told Morris IWS was a totally different company than it had

been in December 1983 when Morris sold his shares. Chester suggested that Morris was trying to get back into the company at a time when the economy was good and prices were up.

207 Morris' 1987 taxes were paid in 1988 with a cheque drawn on the trust account that Chester had established for the share purchase funds Morris had been refusing to accept since late 1986. Linton prepared the documentation and initially testified that he discussed it with Morris. On cross-examination, he said that his instructions came from Chester. Morris continued to refuse to have anything to do with the money Chester had ordered placed in the trust account.

208 Morris testified that by the summer of 1988, he felt alienated at IWS. It seemed to him that Robert was taking more control of the operation. Morris went to see a lawyer who wrote to Chester in July 1988 indicating that it was Morris' position that there had been "serious breaches of fiduciary duty and other matters which are fatal to the agreements." Morris' lawyer suggested an exploratory meeting. The concerns expressed in the letter were not addressed by Chester before September 1988.

209 Morris testified that on September 7th, he finally told Michael about the share sale. Michael was very upset. He confronted and threatened Chester at his Windermere Road office and then went to the Centennial Parkway office and did the same to Robert.

210 On October 26, 1988, Linton handed Morris a letter firing him as president of IWS and removing Michael, Morris and Shirley from the IWS payroll and benefit plans effective immediately. Morris was surprised that Linton was firing the president of IWS and shocked that his health benefits were being terminated when everyone in the family knew his wife Shirley had just been diagnosed with bladder cancer and required surgery. On the same day, Ennis gave Morris an account for legal services to Morriston stretching back over many years. The next day, Chester instructed Taylor Leibow not to release any documents or information of any kind relating to any partnership or activity in which Chester had an interest. Linton refused to give Morris his personal documents or documentation belonging to Morriston.

211 Robert acknowledged that in October and November 1988, he surreptitiously removed some documents and copied many others he found in the SWRI offices located at Centennial Parkway.

212 Chester testified that Michael was seen burning documents at Centennial Parkway in November 1988. Michael denied this and the trial judge accepted Michael's evidence.

213 Although Morris was fired from IWS on October 26, 1988, Michael continued to operate SWRI at the Centennial Parkway property until he received a lawyer's letter dated December 21, 1988 demanding that he leave the premises. The next day security guards prevented Michael from removing SWRI's possessions from the property. A confrontation occurred and the police were called. Michael eventually left the property but not before he wrecked the SWRI offices. By this time, Morris had started his lawsuit.

214 On the same day that IWS fired Morris, Linton wrote him a letter demanding that he repay IWS $51,058.02 said to be owed to the company. This was the first written notice Morris had of the loan account, which had been established to reflect the supposed $500,000 loan made by Morris to IWS as part of the share sale agreement. All of Morris' drawings since that time had been debited against that loan account. By October 1988 the account had a negative balance of just over $51,000. Linton acknowledged that he had never provided Morris with any statement of accounts showing the status of this loan account before October 1988. Linton took all of his instructions in relation to this account from Chester.

215 Morris' evidence, which the trial judge accepted, was that he knew nothing about the loan account. He understood, as Chester had promised in early 1984, that his drawing privileges had stayed the same. He did not know that his drawings were being debited against the supposed loan. The trial judge rejected Linton's evidence that he reviewed the account with Morris on a regular basis.

216 1988 was a very good year financially for IWS. Shortly after Morris commenced the litigation, IWS, on Chester's instructions, declared bonuses of $8,750,000 for 1988. Of those bonuses, $3 million were allocated to Chester, $2.5 million to Robert, $1.7 million to Warren and $1,550,000 to Gary.

217 At the end of 1988, Chester put $1 million into the trust account he had established when Morris refused to take money in payment for the purchase of his shares. Chester described this payment as "Full and final payment" of the amount owing under the share sale.

218 The trial judge found that when Chester learned in the summer of 1988 that Morris had gone to a lawyer, Chester decided to develop a legal complaint of his own in connection with Michael's and Morris' operation of SWRI. As noted above, Chester and Robert interfered with Morris' attempts to get SWRI documents in December 1988 and in the previous weeks had surreptitiously obtained and copied SWRI documents.

219 By January 1989, it was all-out war between Chester and Morris. Chester had launched a counterclaim and IWS was refusing to pay the medical bills arising out of Shirley's cancer treatment. Both sides were continuing to struggle over access to and control of SWRI files and documents. The trial judge ultimately held that Chester and those acting for him had no entitlement to those documents.

220 IWS declared bonuses of $6,450,000 in favour of Chester and his sons for 1989 and dividends in Chester's favour of $300,000.

221 Between 1990 and 1992, Chester and his sons received bonuses totalling about $4.7 million. A dividend of $2,250,000 was declared in favour of Chester in 1993.

222 The trial judge summarized her findings on the dividends and bonuses IWS paid to Chester

and his sons between 1984 and 1993 as follows. IWS declared:

* dividends of about $3.2 million in Chester's favour;
* bonuses of about $11.5 million in Chester's favour;
* bonuses of about $6.4 million in Robert's favour;
* bonuses of about $3.3 million in Warren's favour; and
* bonuses of about $3 million in Gary's favour.

223 In September 1993, IWS transferred substantially all of its operating assets to Waxman Resources in exchange for shares in Waxman Resources. Philip purchased shares in Waxman Resources for $12 million plus Philip shares. By 1997, Waxman Resources had sold the Philip shares for some $18.4 million, thereby receiving a total of about $30.4 million from the Philip sale. IWS retained the Front 13 Acres at Centennial Parkway, a small piece of the property at Windermere Road, the grease pit at Glow Avenue, the December 1983 lease, and the name "I. Waxman & Sons".

224 The trial judge put her ultimate conclusion on the funds received by Chester and his sons from IWS in these words:

> Therefore, between 1984 and 1993, Chester/his sons/IWS received a total of $57,875,031 comprised of $24,258,000 in bonuses to Chester and his sons, $3,197,000 in dividends to Chester and $30,420,031.24 to IWS from Philip (para. 1101).

V

NARRATIVE OF THE SWRI CLAIMS

225 As described above, three claims relate to SWRI:

* Morris claimed that Chester induced Philip to breach its contracts with SWRI [the inducing breach of contract claim];
* Chester counterclaimed in the main action brought by Morris alleging that SWRI misappropriated business and corporate opportunities belonging to IWS; and
* Chester counterclaimed in the inducing breach of contract action alleging that fifty per cent of the common shares of SWRI were improperly transferred from Chester's children to Morris' children in 1982.

226 For the purposes of this narrative, the SWRI claims will be divided into three parts, which correspond roughly to the three claims:

(a) the incorporation and reorganization of SWRI;

(b) the operation of SWRI from 1982 to 1988; and
(c) the termination of the SWRI-Philip relationship in 1989.

A. The Incorporation and Reorganization of SWRI

227 SWRI was incorporated in 1977 by Evans Husband. Chester and Morris intended to use the company to bid for the Hamilton-Wentworth Region garbage contract. Morris was the prime mover behind this attempt to get what was a potentially very lucrative contract. He failed.

228 As incorporated, SWRI had both preference and common shares. IWS held the two thousand preference shares. Fifty common shares were held in trust for Chester's children and fifty common shares were held in trust for Morris' children. Morris and Chester were directors of SWRI.

229 Up to 1977 SWRI did not conduct any business or have any assets. It remained dormant until 1980 when it was used in connection with an attempt to secure a refuse contract known as the "Sheppard's Quarry" contract. It was anticipated that IWS would be entering into a non-competition agreement with Laidlaw/Superior as part of Laidlaw's purchase of the IWS refuse division. To circumvent that agreement SWRI was used as the potential party to the Sheppard's Quarry contract.

230 A receipt signed by Ennis' assistant indicated that Ennis & Associates received SWRI's books and records from Evans Husband on October 21, 1980. Ennis drafted a letter of intent in connection with the Sheppard's Quarry contract showing SWRI as a party to that agreement. Ennis testified that the books and records of SWRI did not arrive at his law firm until July 1982. The trial judge, relying on his office records, found that his firm received the records in October 1980. She also found that Morris pursued the Sheppard's Quarry contract with Chester's support and that Chester knew that SWRI was being used as the potential party to the contract to circumvent any possible limitations arising from the non-competition agreements required by Laidlaw/Superior in connection with the purchase of the IWS refuse division. The trial judge accepted Morris' evidence that Chester said he did not want Michael and Douglas to be required to sign any non-competition agreements with Laidlaw/Superior.

231 Morris did not obtain the Sheppard's Quarry contract. SWRI did not carry on any business until the middle of 1982. In 1982, Allen Fracassi, a principal of Philip, came to IWS with a proposal that Philip and IWS share a contract for the transport and disposal of 100,000 containers of cement kiln dust. IWS could not pursue this opportunity as it would be in breach of its non-competition agreements with Laidlaw/Superior. Chester also had little interest in the waste aspect of IWS' business. To him it was a very small part of the IWS operation and was not "deserving of my focus."

232 Morris and Michael testified that Chester encouraged SWRI to pursue the business opportunity presented by Fracassi. The trial judge found that the books and records of SWRI, which were now at Ennis & Associates, were then altered to remove any connection between SWRI and

IWS and any connection between SWRI and Morris and Chester. This was done to avoid any potential conflict with the non-competition agreements. The two thousand preference shares initially owned by IWS were deleted from the books and records as were any references to Morris and Chester as directors. Michael and Douglas, who unlike Chester's sons were not bound by any non-competition agreement, became the owners and directors of SWRI.

233 Chester denied any knowledge of the restructuring of SWRI. He maintained that Morris had secretly instructed Ennis to transfer the SWRI shares from Chester's children to Michael and Douglas. The trial judge rejected this evidence. She found that given the close relationship between Ennis and Chester and Chester's dominant role in that relationship, it was inconceivable that Ennis would restructure SWRI to exclude Chester's children without first consulting with and receiving instructions from Chester.

234 Ennis testified that he knew nothing about the original share structure of SWRI. Morris told him that the common shares were to be transferred to Morris' sons. Ennis denied removing any material from the SWRI corporate records or altering those records. According to Ennis, he acted on Morris' instructions alone, without any supporting documentation, because SWRI was a worthless shell company. He said that when the materials arrived at his law firm from Evans Husband there were virtually no corporate records.

235 The trial judge rejected Ennis' evidence for several reasons. A handwriting expert testified that a word on an altered share certificate stub referable to the preference shares was in all likelihood written by Irene Cook, an employee of Ennis & Associates. The Ennis & Associates accounts indicated that the restructuring of SWRI and the preparation and backdating of corporate records from 1982 to 1979 was done by the firm. Finally the trial judge observed that there were several serious inconsistencies between Ennis' trial evidence and his evidence on discovery.

236 The trial judge concluded that in September 1982, Ms. Cook, on Ennis' instructions, prepared minutes of an SWRI directors' meeting backdated to August 1, 1979. The minutes documented the transfer of common shares to Michael and to Ms. Cook as trustee for Douglas (who was under eighteen as of August 1979). Corporate records were also prepared to show Michael and Ms. Cook as directors. Further documentation was subsequently prepared transferring the shares from Ms. Cook, in trust, to Douglas as of May 4, 1981, the date he reached the age of majority. Corresponding documentation described Ms. Cook's resignation as a director and the appointment of Douglas as a director. On the reconstructed corporate records there was no apparent connection between IWS and SWRI or between Chester and Morris and SWRI. The preference shares were gone and the common shares were transferred to Michael and Douglas, in trust, as of August 1, 1979.

237 There was no direct evidence that Chester gave any instructions to Ennis in connection with the restructuring. The trial judge concluded, however, that the restructuring was done on Chester's instructions. She relied on Ennis' evidence that on all "major matters" he would contact Chester

before acting and seek his instructions. The trial judge concluded that the restructuring of SWRI to permit it to pursue the business venture presented by Fracassi was a "major matter".

238 The trial judge found that initially Chester was motivated to restructure SWRI as a way of getting around the Laidlaw/Superior non-competition agreement. By 1982, however, Chester also saw SWRI as a vehicle to be used by Michael to pursue the waste business apart from IWS and to keep Michael occupied elsewhere. Chester believed that if Michael busied himself with SWRI and the remnants of the IWS refuse business he would not be likely to try and interfere in the scrap metal business. On the trial judge's finding, after the restructuring of SWRI, Chester and Morris both understood that it could be used by Michael to build an active business.

239 The trial judge also found that documentation signed by Chester's children agreeing to the transfer of the common shares of SWRI was signed in 1982 and backdated to 1979. She found that the lawyer Hayman had arranged for the necessary consents. In coming to this conclusion, the trial judge relied on Hayman's evidence that although he had no specific recollection of obtaining these documents, it was his normal practice to obtain the beneficiary's written consent to transfers of shares. Hayman knew of no reason why he would not follow his usual practice on this occasion.

240 The original Evans Husband SWRI file went missing during the litigation. There was evidence that after the litigation started, Robert had reviewed the file in the Evans Husband office. Robert was asked if he removed any documents from the file during that review. The trial judge interpreted Robert's answer as indicating that he could not be sure whether or not he had removed any documents. The trial judge used the evidence of Robert's opportunity to remove the documents and his ambiguous answer to find that he removed SWRI documentation from the Evans Husband file after this litigation started.

241 The trial judge ultimately concluded that Morris, Michael and Douglas did not steal the shares of SWRI. Rather, Chester agreed that Michael could use SWRI to pursue the waste disposal business for himself and Douglas. When SWRI was "restructured" in 1982, it had no value and little attention was paid to the details of the corporate restructuring or the dates of the documents. Hayman had obtained the appropriate consents to transfer the common shares from Chester's children, but after this litigation had started Robert had removed them from the file. The preference shares held by IWS were cancelled as of 1982. The trial judge further held that to the extent that rectification of the SWRI records was necessary to reflect the changes made in the 1982, that rectification should be ordered.

B. The Operation of SWRI Between 1982-1988

242 SWRI started slowly. Its gross revenues for 1982 were $39,025. Gross revenues fell to $31,121 in 1983. Most of the revenue came from contracts with Philip for the removal of kiln dust and with Stelco for the disposal of wood. SWRI used IWS' administrative services and IWS provided haulage on some of the contracts. According to Morris, Chester approved of SWRI's involvement in these contracts. IWS could not have taken this business without violating its

non-competition agreements with Laidlaw/Superior.

243 In 1984, SWRI's gross revenues increased substantially to $835,541. It continued to do most of its work with Philip and Stelco. Morris testified that Chester knew that SWRI's business was expanding. IWS continued to provide haulage services for SWRI in connection with some of its contracts. Many of the contracts were taken up by SWRI because either the non-competition agreements with Laidlaw/Superior or the terms of the IWS Ferrous agreement prevented IWS from being involved.

244 In 1985, SWRI's gross revenues dropped to $405,895. In the course of that year, several waste accounts with IWS scrap metal clients were transferred from IWS to Philip. IWS had been allowed to keep these accounts under its contract with Laidlaw/Superior. Morris explained that the accounts were moved with the full support of Chester because new environmental regulations put a heavy onus on those involved in the disposal of this kind of waste. Some of the accounts were handled by SWRI directly and others by Philip with SWRI receiving a commission. According to Morris, Chester was fully aware of and content with these transactions. When it was suggested to Morris that he had stolen these accounts from IWS for SWRI, Morris responded:

> The accounts were turned over by Chester Waxman. They couldn't have been stolen. If he wanted them back, he had the power of an elephant compared to a flea, which Solid Waste was. All he had [to] do was walk to Stelco or any customer and tell them the accounts were his. He didn't need me to do that. He didn't need Michael to do [that].

245 SWRI's gross revenues for 1986 exceeded $1.3 million. The company continued to haul refuse of various kinds that had previously been handled by IWS. It also expanded a new business that involved hauling electronic air furnace flue dust ("EAF dust") from plants and processing for use in the manufacture of cement. Lasco became a prime source of the EAF dust for SWRI. Morris testified that Chester knew about this new aspect of the business and was instrumental in obtaining the contract with Lasco. IWS could not take the Lasco business because of its partnership with Lasco in IWS Ferrous. IWS was also not in the business of processing EAF dust for use in the manufacture of cement. Chester denied knowing anything about this new aspect of SWRI's business or assisting Michael in obtaining the contract with Lasco.

246 Laidlaw/Superior's non-competition agreements with IWS expired in 1986. Chester showed no interest in taking IWS back into the waste disposal business.

247 1987 was a very good year for SWRI. Gross revenues exceeded $3.1 million. The EAF dust business thrived, particularly with Lasco. Michael testified that Chester continued to assist him in developing new business for SWRI. Michael used his uncle's name to gain an introduction to potential customers.

248 1988 was also a good year for SWRI. Gross revenues were just under $3 million. Most of the

revenue again came from the EAF dust business, about half of which was with Lasco. Philip continued to provide the haulage on several of the contracts and also had the necessary licences for the disposal of some of the environmentally sensitive waste products.

249 The trial judge concluded that between 1982 and 1988, SWRI operated in an open and public way out of the offices of Centennial Parkway. She rejected outright Chester's evidence that he was unaware of the nature of SWRI's business activities until 1988. She referred to the evidence of Linton and Chester's sons who said they were aware of the nature of the SWRI business. She also referred to Ennis' evidence that he knew as early as 1983 that SWRI was an active company carrying on business. When Ennis was asked if Chester was aware of the activities of SWRI he said

> of course Chester knew that. Of course he knew they were carrying on business. Why would he not? They had offices at Centennial.

250 Linton also testified that "there was no secret" to the fact that SWRI was carrying on business in the 1980s. It participated in at least one project that attracted considerable public attention.

251 The trial judge further concluded that SWRI was distinct from and operated separately from IWS and that Chester knew this. Linton treated SWRI as a company separate from IWS, Ennis billed SWRI separately for services and when IWS needed an arm's length purchaser for a transaction involving a company called Intercelco, SWRI served as purchaser.

252 After an exhaustive consideration of the various accounts that SWRI serviced between 1983 and 1988, the trial judge concluded:

* Some of the SWRI accounts were with IWS customers. The accounts were initially held by IWS. Chester had agreed SWRI could take over these refuse contracts.
* Some of the business operated by SWRI, particularly the EAF dust business, was developed by SWRI and Philip. This business had nothing to do with IWS although Chester did help Michael get some of the contracts.
* Some of the SWRI contracts were contracts that IWS could not take either because of the Laidlaw/Superior non-competition agreements or because of IWS' involvement in the IWS Ferrous partnership.

253 Based on these findings of fact the trial judge rejected Chester's claim that SWRI had misappropriated IWS business and business opportunities. She dismissed this part of the counterclaim although she did allow relatively minor miscellaneous claims, which need not be detailed here.

C. The Termination of the SWRI-Philip Relationship in 1989

254 The relationship between SWRI and Philip grew and prospered until the early part of 1989. The legal relationship between Philip and SWRI varied from contract to contract. Sometimes Philip and SWRI were joint venturers and sometimes Philip was a sub-contractor of SWRI. Generally speaking, Philip did the physical work including transportation of the product as well as providing the necessary licences from the Ministry of the Environment.

255 Philip continued to do business with SWRI in January and February of 1989 following the commencement of Morris' lawsuit against Chester and Chester's counterclaim against Morris. Chester also counterclaimed against Philip. Fracassi and Robert discussed the potential settlement of Chester's counterclaim against Philip. Robert wanted Fracassi to sign a statutory declaration, but he was not prepared to sign the draft provided to him by Robert. At one stage of the negotiations between Fracassi and Robert, Fracassi threatened to sue IWS for intentional interference with its economic relationship with SWRI.

256 IWS discontinued its counterclaim against Philip on March 7, 1989. On the same day, Philip terminated its relationship with SWRI. Morris claimed that Philip was induced to terminate the relationship with SWRI in part by a promise from Chester to discontinue his counterclaim against Philip. Chester and Fracassi insisted that there was no connection between the discontinuation of the lawsuit and the termination on the very same day of the six-year business relationship between SWRI and Philip.

257 According to Fracassi, Philip terminated its business relationship with SWRI because Fracassi learned through Robert that SWRI had been cheating Philip on the Lasco contract involving the removal and treatment of EAF dust since 1986. The 1986 contract was for three years and in late 1988, Michael had negotiated a renewal of the contract.

258 Fracassi testified that in the course of discussions with the IWS lawyers about the counterclaim against Philip, he was presented with copies of three documents relating to the Lasco contract. The first was a copy of the Lasco contract with SWRI dated October 24, 1986, the second was a settlement letter between SWRI and Lasco dated February 24, 1987 altering the rates charged by SWRI as of October 1988, and the third was a proposal from SWRI to Lasco dated November 7, 1988 setting out the terms on which Michael proposed that the contract should be renewed.

259 According to Fracassi, he had received similar but not identical documents from Michael on or near the dates reflected in the three documents. Fracassi testified that the documents provided to him by Michael set out disposal and transportation rates that were lower than the rates set out in the copies given to him by the IWS lawyers in 1989. Philip had billed SWRI at these lower rates. Fracassi said that when he compared the documents Michael had given him with the documents the IWS lawyers had given to him in 1989 he realized that SWRI had been cheating Philip by paying it at the altered lower rates for transportation and disposal of the Lasco material. Fracassi said that as soon as he realized that his "partner" had been cheating him he immediately decided to terminate the business relationship. It was a coincidence that the termination happened on the same day that

IWS discontinued its lawsuit against Philip.

260 It was common ground at trial that there were two sets of the three Lasco documents, one real and one altered. The transportation and disposal rates had been lowered on the altered set. It was also common ground that the altered set of the documents came into existence some time in or before March 1989. The dispute centred around the identity of the forger and the purpose of the forgery.

261 Chester maintained that Fracassi should be believed. Michael had given him the altered version of the documents in the course of their business dealings to mislead Fracassi about the amount being paid by Lasco for disposal and transportation thereby allowing SWRI to increase its profit on the contract at the expense of Philip. Morris and Michael maintained that SWRI did not give Fracassi any of the Lasco documents. Philip was not a party to the contract and there was no need to give Philip the documents. Morris contended that Robert must have found copies of the actual Lasco documents during his surreptitious search through the SWRI documents in October and November of 1988. He must have then altered copies of the three documents and presented them to Fracassi to give Fracassi an excuse for ending the relationship with SWRI. Morris argued that the forged altered documents provided a pretext for the termination of the SWRI/Philip relationship, which in turn destroyed SWRI.

262 Fracassi and Robert told different stories about how they discovered the altered documents. According to Robert, he and Fracassi were reviewing the documents Robert had stolen from the SWRI offices and comparing them with the documents Fracassi had in his possession. They made a mutual discovery of the altered documents in the course of this comparison. Fracassi denied reviewing the documents with Robert. He said that the altered documents came, unrequested, from IWS' lawyers, with a letter which described the documents as "important and necessary in regard to this litigation". Fracassi did not know how Robert or IWS' lawyers acquired the documents but he did know that Robert had wanted him to see the documents so that he would know "what the transactions were".

263 The trial judge found that Philip did not receive copies of the Lasco documents from Michael. She accepted the evidence that Philip was not a party to the October 1986 agreement between Lasco and SWRI and that Philip was a sub-contractor of SWRI. In its capacity as a sub-contractor there was no reason to give Philip copies of the contract between Lasco and SWRI or copies of correspondence between Lasco and SWRI.

264 In rejecting Fracassi's evidence that Philip had been provided with the altered contracts by Michael and had relied on those documents when billing SWRI, the trial judge relied heavily on the evidence of the amounts actually charged by Philip as reflected in their invoices. Philip's charges did not coincide with the rates set out in the altered documents but rather coincided with the amounts set out in a letter from SWRI to Lasco dated November 17, 1986. That letter increased the rates that had been agreed on in October of 1986 as reflected in the October contract. There was no

altered counterpart to the November 17, 1986 letter.

265 The trial judge found that whoever had prepared the altered version of the October 1986 contract was unaware of the November letter clarifying and adjusting the terms of the October agreement. In the trial judge's view, if SWRI were cheating Philip it would not have paid Philip at the rate described in the unaltered November 17, 1986 letter. In brief, Philip's own invoices reflected payment in accordance with the actual terms agreed upon between Lasco and SWRI as of November 1986.

266 The trial judge's conclusion concerning the altered documents is set out at para. 1760:

> I find that Robert tampered with the documents, then presented them to Fracassi through his lawyer in both real and altered form in order to induce [Philip] to terminate its contract with SWRI. On March 3, or shortly thereafter, Robert, on Chester's instructions, also made Fracassi understand that if Philip stopped doing business with SWRI, it would be able to dramatically increase its revenues because it would be able to keep 100% of the profits it had been sharing with SWRI.

267 SWRI was virtually ruined by the termination of its business relationship with Philip. Within a year, SWRI revenues had dropped by ninety per cent. Philip acquired much of the business that it had previously shared with SWRI.

268 The trial judge found that Chester induced Philip to breach its contract with SWRI through the combined use of economic pressure (the dropping of the lawsuit if Philip stopped doing business with SWRI), promises of future business (the assuming of the SWRI contracts), and forged documents (the altered Lasco documents). She held that had Chester not interfered with the relationship between Philip and SWRI that relationship would have continued and prospered.

269 Morris tendered expert evidence that set out four ways in which the losses suffered by SWRI could be calculated. The trial judge chose the one most favourable to Morris. That approach assumed that the existing contracts between SWRI and Philip would be completed and renewed for an additional term. It also assumed growth in revenues from those contracts anticipated by SWRI management immediately before the breach. Using this methodology SWRI losses were about $2.8 million. After certain adjustments the trial judge fixed the damages at $2.5 million. She added $100,000 in punitive damages against Chester and Robert.

VI

THE GROUNDS OF APPEAL

A. The Findings of Fact: The Broad Attacks

i. Introduction

270 Chester's factum begins with the assertion that the trial judge made "at least" fifty findings of fact that were "demonstrably and palpably wrong". In oral argument, Mr. Lenczner, counsel for Chester, alleged "hundreds" of factual errors. The appellants contend that virtually every facet of the fact-finding process was fatally flawed. They argue that the trial judge disbelieved the witnesses that she should have believed, believed the witnesses that she should have disbelieved, made erroneous assessments of the reliability of evidence, especially documentary evidence, ignored other relevant evidence, failed to properly weigh competing pieces of evidence, drew unwarranted inferences from primary findings of fact, failed to draw inferences that were obvious from other proven facts and gave unwarranted weight to certain expert evidence.

271 The appellants maintain that the factual errors made by the trial judge are so numerous, so obvious, and so crucial to the central issues at trial that they necessitate not only a rejection of the trial judge's factual findings, but also compel contrary findings of fact by this court. They submit that on a proper assessment of the evidence, Morris' claims should be dismissed in their entirety and Chester's counterclaims should succeed in their entirety.

272 Although the trial judge had to grapple with many difficult legal issues, this was first and foremost a factual dispute. The resolution of the factual disputes to a large extent determined the outcome of the trial. Not only were the facts hotly contested, the competing versions of the relevant events were diametrically opposed on most important factual issues. For example, Morris testified that apart from a few brief references, there was never any mention of him selling his IWS shares to Chester before December 1983, much less any negotiation for the sale of those shares. Chester, however, described lengthy negotiations between himself and Morris that went on for well over a year and culminated in two lengthy meetings in late December where he, Morris, and Ennis went over all of the relevant documents line by line at least twice.

273 Although there was evidence (e.g. parts of Wiseman's testimony and the "notes from the grave") that could have supported findings of fact about the share sale that were not consistent with either the evidence of Morris or Chester, no one suggested to the trial judge, or to this court, that those findings of fact should be made. The parties chose to stand or fall on the testimony of their chief spokesmen, Morris and Chester. Practically speaking, the trial judge was left with no middle ground on most important factual questions. Her findings of fact on the many crucial factual issues reflect the stark conflict in the versions of events presented in the evidence of Morris and Chester and in the arguments made at trial.

274 The either/or tenor of the evidence and arguments placed a premium on the trial judge's assessment of the credibility of the key witnesses, especially Morris and Chester. It is no overstatement to say that, despite the complexity of this litigation and the mass of evidence adduced by the parties, the outcome turned in large measure on the trial judge's assessment of the credibility of Morris and Chester. She made that assessment crystal clear in her reasons: Morris was credible;

Chester was not.

275 As the trial judge's reasons demonstrate, her credibility assessments flowed from a detailed consideration of the entirety of the evidence. Her findings reflect both an overall assessment of the credibility of Morris and Chester and specific assessments of their credibility as it applied to the numerous events described by them in very different ways in their evidence. The overall credibility assessments are obviously the product of the many specific assessments. The specific credibility assessments cannot, however, be viewed in isolation from each other. For example, the trial judge rejected Chester's evidence that Morris was aware of and agreed to the payment of bonuses to Chester's sons in 1979, 1981 and 1982. Her conclusion that Chester's evidence concerning the bonuses was not credible was a product not just of a close analysis of the evidence concerning the bonuses, but also of the trial judge's negative assessment of the credibility of Chester on other matters as diverse as his father's intentions with concerning the control of IWS after his death and Chester's knowledge of the operation of SWRI between 1982 and 1988.

276 The credibility findings made against Chester, and his sons, especially Robert, go beyond a simple rejection of their evidence as unreliable. The trial judge found that from 1988 onward, Chester and Robert engaged in a litigation strategy aimed at fabricating a case against Morris, while at the same time preventing Morris from pursuing his case against them. The trial judge held that Chester and/or Robert stole documents (e.g. the SWRI documents removed from the SWRI offices in the fall of 1988), fabricated documents (e.g. SWRI documents and the January 4, 1984 deposit slip), did not produce documents (e.g. the documents supposedly lost in the "selective" flood), and failed to produce other documents in a timely fashion.

277 The detailed and uncompromising credibility assessments made by the trial judge raise a very high hurdle for the appellants on these appeals. At every turn in their arguments, counsel for the appellants are met with credibility findings squarely against them. They cannot escape these pervasive credibility assessments by attacking these findings where they relate to specific issues in isolation from other credibility findings. The trial judge's finding that from the outset Chester's case was spun from dishonesty and greed hangs like a shroud over the appellants' submissions in this court.

ii. The Allegation that the Trial Judge Reasoned from a Predetermined Result

278 The appellants' attack on the trial judge's findings of fact is ambitious if not bold. Before turning directly to their arguments aimed at the findings of fact, it is necessary to dispose of an argument lurking just under the surface of the appellants' attack on the findings of fact.

279 In his facta, and to some extent in his oral submissions, Mr. Lenczner used language suggesting something other than factual errors by the trial judge. He referred to the trial judge "deliberately ignoring" and "manipulating" evidence in the course of her fact-finding. Counsel also submitted that the trial judge did not "treat the evidence objectively", was determined "to excuse every piece of evidence" that hurt Morris' claims, "pretended" that the evidence was other than it

actually was in order to further Morris' claims, and "quite cunningly" drew inferences that favoured Morris.

280 Counsel's language strongly suggests an allegation of bias. When Mr. Lenczner was asked in oral argument whether he was alleging bias or some other form of improper judicial conduct, he disavowed any such contention and explained:

> I am saying that the trial judge started from a conclusion that she wanted to start from and worked backward and made facts to fit her conclusion which is not the correct process.

281 Despite counsel's statement, it remained unclear to the court at the end of argument whether the appellants were alleging bias or some other improper conduct by the trial judge. Nothing during the course of the trial provides a basis for such a claim, and the appellants did not suggest otherwise. Despite the length and complexity of this bitterly contested trial, the trial judge exemplified throughout the highest standards of judicial conduct.

282 The submission that the trial judge improperly began with the conclusions "that she wanted" and worked backward in her reasons to justify those conclusions has no merit. The trial judge's observations early in her reasons provide a candid description of her thought processes as the evidence and arguments unfolded. These observations refute any suggestion that she began with a preconceived notion of the desirable result. She concluded her description of her intellectual journey in these terms at para. 24:

> After a detailed analysis of all of the evidence, I eventually preferred the evidence of two witnesses over the evidence of many: specifically, that of Morris and Michael over that of Chester, his sons, Sheldon Kumer ("Kumer") and others. I concluded, given the nature of the allegations and my acceptance of the evidence of few over many, that it was necessary to set out in some detail the basis for my factual findings.

283 The submission that the trial judge's reasons reveal that she began with the desired conclusion and analyzed the evidence with a view to justifying that conclusion, misunderstands the nature and purpose of reasons for judgment. Reasons for judgment are written after the trial judge has analyzed the evidence, made the necessary credibility assessments and findings of fact, and reached her conclusions. Reasons for judgment are offered as an explanation for the result arrived at by the trial judge. They explain the result of the reasoning process. They are not exhaustive contemporaneous notes of the process itself: R. v. Sheppard (2002), 162 C.C.C. (3d) 298 at 308 (S.C.C.). They cannot be read as a travelogue of the trial judge's voyage of discovery through the evidence: R. v. Morrissey (1995), 97 C.C.C. (3d) 193 at 204 (Ont. C.A.).

284 The trial judge decided that Chester and others who testified in support of his version of events had lied, fabricated documents, destroyed other relevant documents, and failed to produce

still other relevant documents. It is hardly surprising that her reasons paint those individuals in a poor light. Reasons for judgment that reflect and support conclusions and evidentiary assessments already made by the trial judge are not indicative of an improper analysis of the evidence or a preconceived notion of the appropriate result of the case. To the contrary, reasons for judgment that did not accurately reflect those conclusions and assessments would be seriously flawed.

iii. Overview of the Fact-Based Arguments

285 The appellants' attack on the fact-finding of the trial judge moves on three broad fronts. First, they contend that the findings were unreasonable. In support of this contention, the appellants ask this court to make an independent assessment of the evidence and test the trial judge's findings of fact against a reasonableness standard. For example, the appellants argue that when all of the evidence is examined, particularly the extensive documentation relating to the share sale, it is simply unreasonable to conclude that Morris did not know that he was selling his shares in IWS when he executed the various documents.

286 The second prong of the appellants' argument is based on alleged errors in the processing of the evidence by the trial judge. The appellants argue that the trial judge misapprehended evidence, failed to consider relevant evidence, and reached factual conclusions in the absence of any evidence to support those conclusions. For example, the trial judge found that Robert removed certain SWRI documentation from Hayman's file. This finding, say the appellants, was based on her understanding that Robert had testified that he may have removed such documentation. The appellants claim that Robert gave no such evidence.

287 The third challenge advanced by the appellants takes aim at the trial judge's credibility assessments. The appellants contend that even allowing for the high deference that this court must accord the trial judge's credibility assessments, many of those assessments are arbitrary, contrary to the overwhelming weight of the evidence, or are flawed by the various processing errors referred to above. For example, the appellants submit that the trial judge rejected Kumer's evidence concerning the 1981-82 bonuses for a reason which, even allowing for the widest deference, could not justify the rejection of that evidence.

288 In this part of our reasons, we address the appellants' challenges to the fact-finding of the trial judge on a general level with reference to some specific submissions to clarify our approach to these submissions and our response to them. Other specific submissions challenging findings of fact will be addressed in subsequent parts of these reasons. We do not pretend to address each and every factual argument made by the appellants. We are, however, satisfied that none of the arguments can prevail. To the very limited extent that any of these submissions demonstrate factual errors in the trial judge's reasons, those errors, considered separately or cumulatively, do not justify appellate intervention.

iv. The Standard of Review: Palpable and Overriding Error

289 As Cameron J.A. observed in H.L. v. Canada (Attorney General), [2002] S.J. No. 702 (C.A.) at para. 11:

> [T]he business of appeal - the right of appeal and the jurisdiction and powers of an appellate court - is very much that of statute and hence legislative policy choice. ...

290 Section 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA") provides for an appeal from a final order of a judge of the Superior Court of Justice. Unlike other rights of appeal (e.g. s. 6(1)(a)), s. 6(1)(b) puts no limitation on the grounds that may be advanced on appeal from a decision by a judge of the Superior Court. Questions of fact may be raised on appeal. Section 134(1) of the CJA gives the appellate court wide remedial powers. Section 134(4) of the CJA recognizes that an appeal court can set aside findings of fact and, to a limited extent, make its own factual findings.

291 The Legislature has chosen not to address standards of review in the CJA. In the absence of any legislative pronouncement, the courts must fix the appropriate scope of appellate review. In doing so, the court must balance the goal of achieving justice in the individual case with the need to preserve the overall effective administration of justice. Jurisprudence from this court, and more importantly, from the Supreme Court of Canada, has determined that in appeals on factual findings, strong deference to the findings made at trial best strikes that balance. Absent statutory direction to the contrary, appellate courts must defer to all findings of fact made at trial unless the court is satisfied that the finding was the product of a "palpable and overriding" error. As the majority in Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 256 said:

> We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge - that of palpable and overriding error.

292 The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.

293 Whatever may be the arguments in favour of more aggressive appellate review of fact-finding, the policy reasons justifying strong appellate deference are powerful and have been repeatedly accepted by our highest court: see Housen at 248-51. The wisdom of the policy

favouring appellate deference on questions of fact is evident in a case like this one. The evidence at trial occupied over two hundred days. The documents fill thousands of pages. The trial judge saw the witnesses and heard the evidence unfold in a narrative with a beginning, a middle, and an end. Our system of litigation is predicated on the belief that it is through the unfolding of the narrative in the testimony of witnesses that the truth will emerge. This court is not presented with a narrative, but instead with a description or summary of that narrative from the trial judge in her reasons, and from counsel in their written and oral arguments. The descriptions provided by counsel are not designed to tell a story, but rather to support an argument. Of necessity, and in keeping with their forensic role, counsel's description of the narrative at trial is selective and focuses on parts of the narrative or on a particular interpretation of a part of the narrative.

294 In a case as lengthy and factually complex as this case, appellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the "palpable and overriding" standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding.

295 Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make.

296 The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: Housen at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

297 An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: Schwartz v. Canada, [1996] 1 S.C.R. 254 at 281.

298 For example, the trial judge found that by the late 1970s, Chester was trying to take control of IWS and push Morris out of the company. In connection with that finding, she analyzed evidence of a proposed trust drawn on Chester's instructions in connection with a potential estate freeze. The trial judge found that under the terms of the proposed trust, Chester would gain voting control of

IWS and that Chester kept this fact from Morris. The appellants contend that the proposed trust did not give Chester voting control over IWS while Morris was alive. They submit that the trial judge misapprehended the effect of the document.

299 We think the appellants are correct in their interpretation of the trust document. However, the trial judge's conclusion that the relationship between Chester and Morris was changing and that Chester was forcing Morris out of the IWS operation in the late 1970s was based on many findings of fact. Her erroneous interpretation of the terms of the proposed trust cannot override all of the other relevant factual findings she made. This error may be "palpable", but is clearly not "overriding".

300 Housen provides a detailed analysis of the "palpable and overriding" standard of review. Several specific points made in that analysis have direct application to the arguments advanced by the appellants. First and foremost, as indicated above, the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. This court cannot retry any aspect of this case.

301 The same deference must be shown to primary findings of fact flowing directly from credibility determinations (e.g. the trial judge's finding that Chester and Morris did not meet at the Trocadero restaurant to discuss the share sale in 1982), the interpretation of documents (e.g. the trial judge's interpretation of Morris' "notes from the grave"), or the weighing of expert evidence (e.g. the expert evidence concerning the valuation of IWS as of December 1983). This court must also show equal deference to findings of fact flowing from the drawing of inferences from primary findings of fact (e.g. the trial judge's inference from the unfavourable terms of the share sale and accompanying lease that Morris did not know he entered into those agreements): Housen at 248-56; Hodgkinson v. Simms, [1994] 3 S.C.R. 377 at 426; Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 at 388-89.

302 Housen is particularly important for its treatment of the standard of review as applied to the inference-drawing process at trial. The majority and dissent were divided on this issue. The dissent asserted at 296:

> [T]he appeal court will verify whether it [the inference] can reasonably be supported by the findings of fact that the trial judge reached. ...

303 The majority at 253 would not draw any distinction for the purposes of appellate review between "primary" findings of fact flowing directly from assessments of the credibility and reliability of evidence and secondary findings of fact based on inferences drawn from the primary facts.

> <u>[T]he standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge</u>

> made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard. [emphasis added].

304 The majority in Housen explained its opposition to a standard of review based on an assessment of the reasonableness of factual inferences drawn at trial at 253:

> [W]e find that by drawing an analytical distinction between factual findings and factual inferences, the above passage [from the dissent] may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence [emphasis added].

305 After Housen, appellate courts will not review findings of fact, either primary or those drawn by inference, by asking whether on the totality of the record, those findings are reasonable. Cases from this court such as Keljanovic Estate v. Sanseverino (2000), 186 D.L.R. (4th) 481 at 488-489 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 300 and Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.) must be taken as overruled to the extent that they contemplate appellate review of findings of fact based on an independent albeit limited appellate reassessment of the reasonableness of the findings of fact made at trial.[1]

306 That is not to say that the approach favoured by the majority in Housen will change the result of many fact-based appeals. A process which yields findings of fact that cannot pass the reasonableness standard of review will almost always be tainted by at least palpable error. For example, in Equity Waste Management of Canada v. Halton Hills (Town), the court concluded that a finding of bad faith was unreasonable on the totality of the evidence. The court also found that the finding was the product of at least two palpable errors. Similarly, a finding of fact based on speculation and not logical inference will be subject to appellate correction not because the finding is unreasonable, although it clearly is, but because a process of fact-finding based on speculation is clearly wrong and, therefore, constitutes a palpable error: Rodaro v. Royal Bank of Canada (2002), 59 O.R. (3d) 74 at 94 (C.A.).

307 The emphasis in Housen on the application of the "palpable and overriding" standard to the process by which findings of fact are made moves reasons for judgment to the centre of the

appellate review stage. Reasons for judgment can be so cryptic or incomplete as to provide little or no insight into the fact-finding process. Where reasons for judgment are so deficient that they effectively deny meaningful appellate review on a "palpable and overriding" standard, the inadequacy of the reasons may in and of itself justify appellate intervention: Sheppard, supra; R. v. Braich (2002), 162 C.C.C. (3d) 324 (S.C.C.).

308 While inadequate reasons may short-circuit effective appellate review of fact-finding and thereby justify appellate intervention, detailed reasons for judgment, which fully explain findings of fact, make the case for a rigorous application of the "palpable and overriding" standard of review. Reasons for judgment which lay bare the fact-finding process at trial offer ample room for meaningful appellate review without resort to an evaluation of the reasonableness of the findings of fact made at trial.

309 The reasons for judgment in this case are extensive, to say the least. They offer a full review of the evidence, detailed findings of fact, extensive explanations for those findings, and an insight into the evolution of the trial judge's thought processes as this trial proceeded. The "palpable and overriding" standard of review as explained in Housen is made for reasons like those delivered by this trial judge. The reasons afford the appellants a meaningful right of appeal from findings of fact made at trial while at the same time demonstrating the wisdom of appellate deference to those findings of fact.

v. The Appellants' "Unreasonableness" Argument

310 The appellants rely heavily on the contention that this court could conduct a reasonableness review of the findings of fact made at trial. In particular, Mr. Lenczner argues that this court must consider whether specific findings were "reasonably supported by the evidence. Not unreasonably, but reasonably." He invites the court to weigh the evidence on contested issues, submitting that in most cases the evidence of Morris stood alone against the evidence of many other witnesses and the contemporaneous documentation. For the reasons outlined above, we do not agree that it is our function to conduct an independent review of the evidence to determine whether the trial judge's findings are reasonable. Rather, we must examine the reasons for "clear and palpable" error.

311 In the course of his submissions, Mr. Lenczner also advocated a much broader basis for factual review. In written submissions filed in reply, he described the standard of review in these terms:

> If a court has doubt whether a reasonable trier of fact, acting judicially could come to the conclusion the trial judge did, it must interfere. It cannot allow to stand a judgment it suspects as being unsafe.

312 This "lurking doubt" standard of review has never been accepted in civil appeals. It is close to the polar opposite of the "palpable and overriding" standard of review. Indeed, the "lurking doubt" standard has even been rejected in criminal appeals from conviction where s. 686(1)(a)(i) of

the Criminal Code mandates a reasonableness review of criminal convictions: R. v. Biniaris, [2000] 1 S.C.R. 381. We cannot review the findings of fact against this standard.

313 Apart entirely from the various formulations of the standard of review articulated by counsel for the appellants, most of their fact-based arguments came down to an invitation to reweigh the evidence. As seductive as some of those arguments were, this court cannot do so.

314 Mr. Lenczner's submissions on the share sale are perhaps the best example of an argument that invites reweighing of the evidence. In his factum, Mr. Lenczner spent pages reviewing the evidence relevant to the alleged share sale. He went over much of the same ground in his oral argument. His review of the evidence was done without regard to the findings of fact made by the trial judge. Indeed, much of his review assumed findings of fact that were directly contrary to those made by the trial judge. For example, he referred to Morris as having admitted that he knew he signed a waiver of independent legal advice at the time of the alleged share sale. Morris testified that he knew no such thing and the trial judge believed him. Similarly, in counsel's review of the evidence, he asserts that a meeting with a representative of Lasco on December 21, 1983 to advise him of the share sale was "suggested by Morris at the meeting on December 20". The trial judge found, based on Morris' evidence, that there was no meeting on December 20th and that Morris had no knowledge of the meeting with the Lasco representative.

315 This court cannot ignore findings of fact made at trial. It must accept each and every finding of fact unless it is tainted by a palpable and overriding error. Much of the appellants' argument on the facts ignores the requirement that appellate review take the facts as found by the trial judge unless on limited review of the facts there is cause to reject those findings.

316 The appellants present this as a case where the evidence of Morris stood virtually alone against all of the other evidence. Although it is true, as the trial judge observed, that there was more evidence supporting Chester's position on many of the contentious issues, we do not think that the trial judge's crucial findings of fact rest solely on the evidence of Morris. That is not to say that if they did, they would be subject to reversal on appeal. A trial judge conducts a qualitative and not a quantitative analysis of the evidence.

317 The trial judge's ultimate preference for Morris' version of events was based not on unquestioning acceptance of his evidence, but rather on a full assessment of the competing versions of events and a careful consideration as to the appropriate inferences to be drawn from her primary findings of fact.

318 Once again, the evidence concerning the share sale provides the best example of the complex nature of the fact-finding involved in this case. Morris testified that he had no idea that he signed documents purporting to sell his shares in IWS to Chester. Chester and Ennis testified that the sale was the product of long negotiations and that Morris knew exactly what he was signing. Clearly, the trial judge had to assess the credibility of these witnesses. In doing so, she had to look at the other evidence relating to the sale. Some of that evidence, for example Morris' signature on many

documents relating to the transaction, offered potentially strong support for Chester's position. Other parts of the evidence, for example the evidence that the transaction and related lease as structured were grossly unfair to Morris, supported Morris' claim that he did not know about the sale or the lease. Still other evidence, for example Morris' conduct in the days and months following the sale, was equivocal and the inferences to be drawn from it depended very much on the trial judge's credibility assessments.

319 As the trial judge's reasons demonstrate, she was alive to the competing versions of events and to the evidence of prior and subsequent events that could shed light on Morris' state of knowledge. She considered all of the evidence, made her credibility assessments and assigned the weight to the evidence she accepted that she deemed appropriate. In the end, she accepted Morris' version of events. Clearly, the mass of evidence did not all point that way. It was open to the trial judge on this evidence to find that Morris did know that he was signing documents referable to the share sale. Other triers of fact might, as the appellants urge this court to do, have placed reliance on the contemporaneous documents and found in Chester's favour. The acknowledgement that a finding for Chester would have been reasonable is, however, no basis upon which this court can interfere with the contrary conclusion reached by the trial judge.

320 In the course of urging this court to redo the complex fact-finding exercise undertaken by the trial judge and to place more significance on certain parts of the evidence than did the trial judge, the appellants contend that the trial judge was obliged to make findings of credibility "in harmony with the objective contemporaneous documentation". We are unaware of any evidentiary hierarchy that requires a trier of fact to treat contemporaneous documents as the most probative form of evidence. Clearly, that kind of documentation was very important in this case. The trial judge's reasons reflect their significance. She referred at length to the mass of documentation placed before her. Sometimes she relied on contemporaneous documents to make findings of fact; sometimes she chose to make findings of fact that were not consistent with the contemporaneous documentation. For example, the trial judge relied on Linton's contemporaneous notes to reject the argument that the 1981-82 bonuses to Chester's sons were agreed to before the Lasco transaction and were compensation for the sons giving non-competition agreements to Lasco.

321 Where the trial judge did not give effect to contemporaneous documents, she provided detailed reasons for doing so. For example, in rejecting the argument that Morris' signature on the share sale documents demonstrated his knowledge of the sale, the trial judge referred to and accepted Morris' evidence that he habitually did not read or even look at documents presented to him for signature by Chester. The trial judge further found that Chester knew that Morris would not examine documents Chester gave him to sign and that Chester relied on Morris' usual practice when he placed the share sale documentation before him in December 1983. In view of these findings, the contents of the documents signed by Morris shed little, if any, light on what Morris knew about the share sale.

322 The trial judge's acceptance of Morris' evidence that he did not read the share sale documents

before he signed them was crucial to the outcome of the entire litigation. It is fair to say that other judges may have rejected this part of Morris' evidence and concluded that he did know, at least on some level, that he was selling his shares. A holding that a reasonable trier of fact could have relied on the documentation is, however, far from saying that the trier of fact was obliged to make findings that were consistent with the documentation. The documentation was part of the evidence and had to be considered along with the rest of the evidence.

323 The appellants' submissions concerning the trial judge's interpretation of Morris' "notes from the grave" provide another example where this court was invited to consider the evidence afresh and draw its own conclusions rather than limit itself to a review of the trial judgment for "palpable and overriding" error.

324 The notes were prepared by Morris in late January 1984 just before he went into the hospital for heart surgery. The notes were left with Wiseman and Taylor and were to be given to Morris' sons if he died. Morris testified that when he prepared the notes in late January, he knew that he had signed documents purporting to sell his shares in IWS. He was upset with the way Chester had treated him and was worried about his pending surgery. According to Morris, the notes reflected his confusion and distress. The appellants argued at trial that the notes clearly demonstrated that Morris knew he was selling his shares when he signed the documents and that he had come to regret doing so.

325 Some of the notes are cryptic and ambiguous. Morris was examined and cross-examined at length on the meaning of the various items referred to in the notes. He testified that in the notes he was not distinguishing between what he knew by the end of January 1984 and what he knew when he signed the documents. He offered explanations for all of the items, none of which supported the appellants' contentions that he knew he was selling his shares. The trial judge analyzed this evidence over some sixteen pages in her reasons. She acknowledged that parts of the notes could be read to support the contention that Morris knew he was selling his shares in December 1983. She found, however, that "read as a whole and in context" they supported Morris' contention that he did not know what he signed and that he had been tricked by his brother and Ennis. In coming to that conclusion, the trial judge took into consideration Morris' explanation of the notes, the vague and inarticulate nature of parts of the notes and Morris' description of his state of mind when he prepared the notes.

326 The appellants do not point to any error in the trial judge's lengthy review of the evidence. Instead, they renew the positions advanced at trial. For example, Item 12 in the "notes from the grave" reads:

> Paul [Ennis] did not explain the documents to me except to make sure I signed one that exonerated him.

327 The appellants argued at trial, and again on appeal, that this note should be read as indicating that when Morris signed the document waiving independent legal advice, he knew what he was

doing. The trial judge read this as indicating that by the time Morris wrote the "notes from the grave", he appreciated that he had signed a document purporting to exonerate Ennis from any liability in connection with Morris' signing of the documents. We see no palpable error in accepting Morris' explanation of what he meant when he wrote the note. It is not for this court to second-guess the trial judge's interpretation of the note.

328 The appellants make similar submissions on the trial judge's interpretation of Item 22 in the "notes from the grave". It reads:

> If I had known that the Centennial property was not included, I would not have signed even under my condition.

329 The appellants argue that this was an admission by Morris that he knew he was signing documents referable to the share sale. All parties agreed that this item, if read literally, made no sense. Centennial Parkway was included in the purported share sale in the sense that it was owned by IWS. Morris explained that in writing the note, he meant to say that he would not have signed the documents had he been given any information about their contents. Some might find this a strained interpretation of the words in Item 22. It was, however, the trial judge's job to interpret the words. She was entitled to consider Morris' explanation in coming to that interpretation. In assessing that explanation, she had the benefit of seeing and hearing Morris testify for many days. She could assess his facility with the English language and factor that assessment into her interpretation.

330 The appellants have failed to demonstrate that the trial judge's treatment of the "notes from the grave" reveals any "palpable and overriding error".

331 In summary, this section of our reasons makes two points: first, the trial judge's findings of fact and credibility must be examined not against the reasonableness standard of review, but against the standard of palpable and overriding error; and second, our examination of the record reveals no such error.

332 However, we do not want to leave the impression that the appellants' attack on the trial judge's findings would have succeeded had we used a reasonableness standard of review. It would not. In our view, all of the trial judge's fundamental findings are reasonably supported - indeed, usually amply supported - by the trial record. To show this we take but one example, one we have used earlier: the trial judge's finding that Morris did not know he was signing away his interest in IWS or signing the accompanying lease. As we have said, other trial judges might have taken a different view of the evidence, but unquestionably Morris' evidence combined with the unfair terms of the sale transaction and the even more unfair terms of the lease, reasonably, even amply, supported the trial judge's finding.

333 We end this section with this observation: although "reasonableness" and "palpable and overriding error" are different standards of review they are not entirely distinct. The application of

the one may inform the application of the other. So in this case, our conclusion that the trial judge's fundamental findings are reasonably supported by the evidence confirms, to a large degree, our principal conclusion that none of these findings is tainted by a palpable and overriding error.

vi. The Processing Error Argument

334 In addition to the all-out attack on the reasonableness of virtually all of the trial judge's crucial findings on the central factual issues, the appellants also contend that the trial judge made innumerable processing errors in the course of her reasons. The phrase "processing errors" is borrowed from Keljanovic Estate v. Sanseverino, supra, at 489-90 where O'Connor J.A., for the majority, said:

> The second kind of error that may warrant appellate interference is what might be called a "processing error", that is an error in processing the evidence that leads to a finding of fact. This type of error arises when a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending that evidence. When the appellate court finds such an error it must first determine the effect of that error on the trial judge's reasoning. It may interfere with the trial judge's finding if it concludes that the part of the trial judge's reasoning process that was tainted by the error was essential to the challenged finding of fact.

335 The appellants argue that there was no evidence to support various findings of fact made by the trial judge. Clearly, a finding of fact in the absence of any evidence is a processing error of a most serious kind and constitutes a palpable error. It may or may not be an overriding error: Schwartz, supra, at 281.

336 Many of the "no evidence" submissions made by the appellants are, on closer examination, arguments that there was not enough evidence to support findings of fact made by the trial judge. The sufficiency of evidence is not open to review. Two examples from the many submissions made by counsel will suffice to make this point. The appellants maintain that there was no evidence that Morris' health in any way affected his cognitive functions in December 1983 when he signed the share sale documents. In the course of their submissions, the appellants, however, had to acknowledge that evidence from Shirley, Morris' wife, did support the contention that Morris was distracted and unable to concentrate in December 1983 because of his health concerns. Michael and Morris gave evidence to the same effect. The trial judge was entitled to accept the evidence of Shirley, Michael, and Morris. A finding based on that evidence cannot be characterized as a finding without evidentiary support.

337 Similarly, the appellants argue that there was no evidence to support the trial judge's conclusion that Chester's sons signed the necessary consents to the transfer of the SWRI shares when it was reorganized. Hayman gave evidence that it was his usual practice to obtain such consents, although he had no recollection of what had happened in this case. Evidence that Hayman

acted in a certain way in performing routine legal duties is evidence that he acted in accordance with that habit on a particular occasion. That evidence of practice may not be particularly strong evidence does not mean that it amounts to no evidence.

338 Other "no evidence" submissions made by the appellants mischaracterize the nature of the challenged finding of fact made by the trial judge. For example, the appellants argue that there was no evidence to support the trial judge's finding that Morris was not financially astute and was virtually incapable of understanding complex legal and financial matters. The appellants refer to evidence of many instances where Morris was very involved in complex business dealings.

339 As Mr. Harrison, counsel for Morris, demonstrated, however, the trial judge did not make the broad finding that Morris was generally incapable of understanding complex business negotiations and transactions. Rather, she found that insofar as the affairs of IWS were concerned, the natural abilities of Chester and Morris led to a clear division of responsibility between the two of them. This division of authority extended to Morris' personal finances, which in his mind were not distinct from those of IWS. Chester assumed responsibility for financial and legal matters. Morris was not sophisticated in such matters and trusted Chester totally, leaving decisions in those realms entirely to Chester. Morris assumed responsibility for overseeing the physical operation of the business. The trial judge found that it was this division in authority, combined with Morris' total trust in his brother that rendered Morris vulnerable to Chester's deception. There was ample evidence from sources as diverse as Linton, Taylor and Michael to support these findings of fact.

340 Some of the appellants' submissions that the trial judge ignored relevant evidence fail on a more basic level. Evidence that the appellants claim was ignored by the trial judge was in fact referred to, often more than once, by the trial judge in her reasons. These references demonstrate that the trial judge did not ignore the evidence. To the contrary, she considered it and rejected it as she was entitled to do.

341 For example, Chester argued at trial that the terms of the 1983 lease included IWS' assumption of potentially very significant environmental liabilities. On appeal, the appellants argued that the trial judge ignored this evidence when considering whether the terms of the lease made good business sense for both Morris and Chester. In fact, the trial judge referred to this evidence on more than one occasion and gave reasons for rejecting Chester's evidence that IWS' assumption of potential environmental liabilities was part of the lease arrangements.

342 On a first reading, the trial judge's reasons are impressive in both their thoroughness and lucidity. Repeated rereading of those reasons, with the benefit of thirteen days of oral argument and hundreds of pages of written argument, strengthens the initial impression. There is no basis for finding that the trial judge made important factual findings without any evidentiary support.

343 A second "processing error" alleged by the appellants is the failure of the trial judge to consider relevant evidence. The failure to consider relevant evidence can amount to a palpable error if the evidence was potentially significant to a material finding of fact. The appellants bear the onus

of demonstrating a failure to consider such evidence. The mere absence of any reference to evidence in reasons for judgment does not establish that the trial judge failed to consider that evidence. The appellants must point to something in the trial record, usually in the reasons, which justifies the conclusion that the trial judge failed to consider certain evidence.

344 When assessing an argument that a trial judge failed to consider relevant evidence, it is helpful to begin with an overview of the reasons provided by the trial judge. If that overview demonstrates a strong command of the trial record and a careful analysis of evidence leading to detailed findings of fact, it will be difficult for an appellant to suggest that the mere failure to refer to a specific piece of evidence demonstrates a failure to consider that evidence. The failure to refer to evidence in the course of careful and detailed reasons for judgment suggests, not that the trial judge ignored that evidence, but rather that she did not regard that evidence as significant. The reasons for judgment in this case leave no doubt that the trial judge knew this record, appreciated the contentious factual issues, and understood the positions of the parties and the evidence they relied on.

345 The trial judge, as she acknowledged in her reasons, did not refer to all of the evidence. No one would expect her to do so. For example, in considering the fairness of the lease allegedly entered into at the same time as the share sale, the trial judge made no reference to a lease for the same property entered into between IWS and Philip some ten years later. The appellants argue that the absence of any reference to this evidence demonstrates that the trial judge ignored it. We take the absence of any reference to this evidence as an indication that it had no significance to the trial judge in her consideration of the business efficacy of 1983 lease. This sorting of the evidentiary wheat from the chaff is the essence of the trial judge's job.

346 The appellants allege a third kind of processing error, which they describe as a failure to make consistent findings of fact. For example, they argue that the trial judge rejected outright the evidence of Linton wherever it assisted the appellants, but accepted those parts of his evidence that offered some support for Morris. As we understand this submission, the appellants argue that these inconsistent conclusions demonstrate that the trial judge treated the evidence differently depending on whether it helped or hurt the appellants.

347 We reject the premise of this argument. Consistency is not necessarily a hallmark of sound judicial fact-finding. Triers of fact must consider the entirety of the evidence of a witness in the context of the rest of the evidence that impacts on various parts of that witness' testimony. It is quite common for triers of fact to accept some, but not all, of a witness' testimony. For example, the trial judge accepted the part of Linton's testimony concerning the 1981-82 bonuses because that testimony was supported by credible documentation produced during the trial. She rejected other parts of Linton's testimony, for example his evidence concerning Greycliffe, because it was inconsistent with other evidence that she accepted and was not supported by the documentation. The trial judge's conclusion that Linton's evidence should be accepted in some areas and rejected in others not only does not reveal any processing error, but also offers strong support for Mr.

Harrison's contention that the trial judge engaged in a careful and critical analysis of the entirety of the evidence.

348 A fourth processing error alleged by the appellants is the failure of the trial judge to make what the appellants described as "essential" findings of fact. In support of this submission, the appellants referred to the trial judge's failure to make any finding on whether the amounts of the 1982 bonuses were filled in on the minute referable to those bonuses when it was signed by Morris. The appellants contend that the trial judge had to make a finding on this factual issue before she could properly determine whether Morris knew about the bonuses.

349 We agree with the contention that a failure to make findings of fact that are essential to the ultimate determination of the issues in dispute amounts to a palpable and overriding error. We disagree, however, that the finding referred to above was an essential finding of fact. There was no evidence before the trial judge concerning the circumstances in which the minute was signed or the contents of the minute when it was signed. Morris, while acknowledging his signature, had no idea when and how he came to sign it. Neither Chester nor any of his witnesses gave any evidence about the circumstances surrounding the signing of the minute or its condition when it was signed. On the state of the evidence, and of course depending on her credibility assessments, it was open to the trial judge to conclude that whether or not the amounts were on the document when it was signed, Morris did not know about the bonuses. Indeed, on the evidence that she found credible, there was no basis upon which she could come to any conclusion on whether the amounts had been filled in on the minute before it was signed by Morris.

350 A fifth processing error relied on by the appellants arises out of the trial judge's alleged misuse of her rejection of evidence given by Chester and others in support of Chester. The appellants contend that the trial judge used the rejection of that evidence as evidence of the contrary facts. For example, Ennis and Chester testified that they were unaware of any medical problems that Morris was having in the fall of 1983. The trial judge rejected this evidence, but according to the appellants went on to use the rejection of this evidence as evidence that they in fact knew that he had serious medical problems in the fall of 1983.

351 Evidence that is rejected by the trier of fact has no evidentiary value and cannot be used as a basis for findings of fact: R. v. Hibbert (2002), 163 C.C.C. (3d) 129 at 148-52 (S.C.C.); R. v. O'Connor (2002), 170 C.C.C. (3d) 365 at 374-77 (Ont. C.A.). It would have been palpable error had the trial judge used the rejection of evidence given by Chester and Ennis as a basis for a finding that they knew Morris' health was precarious in the fall of 1983. There was, however, ample evidence from other sources to support that finding. Members of Morris' family and at least one other business associate gave evidence of Morris' obvious ill health in the fall of 1983. Morris fainted and had to be taken to the hospital in October 1983. Chester was aware of this incident. It was open to the trial judge, in the face of the evidence that Morris met and dealt with Chester and Ennis on a daily basis, to conclude that what was obvious to others concerning Morris' health would also be obvious to Ennis and Chester. This evidence provided ample support for the trial judge's finding at

para. 641 that:

> Morris' health problems were becoming more evident in the fall of 1983. Chester knew Morris was feeling the strain both physically and mentally.

352 The rejection of the contrary evidence offered by Chester and Ennis, of course, made it easier for the trial judge to draw the inferences she did from the evidence she accepted.

353 Mr. Lenczner also argues that the trial judge used her rejection of Chester's explanation for not obtaining an independent valuation of the IWS shares before the share sale as positive evidence that Chester did not obtain that valuation because it would have brought the previous bonuses and profit diversions to Morris' attention. Mr. Lenczner argues that this is another instance in which the trial judge used the rejection of evidence as the basis for a finding of fact.

354 We do not agree with this submission. It was common ground that no independent valuation of IWS was obtained in connection with the share sale, although one had been obtained earlier in connection with the possible estate freeze. The question for the trial judge was what inference, if any, should be drawn from the absence of an independent valuation? Chester's evidence that there was no need for an independent valuation because he and Morris knew the value of IWS was rejected by the trial judge as an explanation for not obtaining an independent valuation. She was left to decide what inference should be drawn from the absence of any valuation without regard to Chester's rejected explanation. There was evidence that Linton had warned Chester as early as February 1982 that the bonuses might not survive outside scrutiny. In assessing what inference to draw from the absence of any independent valuation, the trial judge was also entitled to consider the evidence, which she accepted, that the amount paid to Morris for his shares was well below fair market value. This evidence supported the inference that an independent valuation might well bring to light matters that Chester preferred left in the dark. The inference which the trial judge drew from the absence of an independent valuation of the IWS shares flowed from the evidence she accepted, not from her rejection of Chester's evidence.

355 Although evidence rejected as unworthy of belief has no evidentiary value, a finding that a party has fabricated evidence can be used as evidence against that party. The trier of fact cannot infer fabrication simply because evidence is rejected as untrue. There must be evidence of fabrication: R. v. O'Connor, supra.

356 The trial judge found that Chester and Robert fabricated evidence. For example, Chester alleged that he gave a cheque for $1 million to Morris in connection with the share sale on January 4, 1984. To support that evidence, he produced a carbon copy of a bank deposit slip showing a deposit of $1 million into Morris' account. The trial judge concluded that the deposit slip was a forgery. She gave reasons for that conclusion, which included (1) the absence of any other supporting banking documentation, although Chester, through IWS, had possession of Morris' banking records until well after the litigation began, and (2) Taylor's evidence that Morris deposited a $500,000 cheque from IWS and not a $1 million cheque from Chester into his account on January

4, 1984.

357 The evidence accepted by the trial judge permitted the inference that the bank deposit slip was forged. That finding, considered in conjunction with the other relevant findings, permitted both a rejection of Chester's evidence as untrue and a finding that he did not make a $1 million payment to Morris on January 4, 1984.

358 No trial of this length and complexity will ever be error-free. Cloistered appellate counsel with months to pour over the trial record will find mistakes in the trial judge's processing of the evidence. We are satisfied, however, that none of those uncovered on this appeal rises to the level of "palpable and overriding" error.

vii. Alleged Errors in Credibility Assessments

359 Although the "palpable and overriding" standard of review applies to all factual findings, Housen, at 254-55 recognizes that findings of fact grounded in credibility assessments will be particularly difficult to disturb on appeal. Credibility assessments are inherently partly subjective and reflect the life experience of individual judges and their own perception of how the world works. Credibility assessments are also grounded in numerous, often unstated considerations which only the trial judge can appreciate and calibrate.

360 Deference to the findings of credibility includes giving full force and effect to those findings. An allegation that a trial judge has made a palpable and overriding error in assessing a witness' credibility can only be evaluated by examining the entirety of the record touching on that credibility assessment. Where a trial judge advances several reasons for rejecting a witness' testimony in its entirety as incredible, a demonstrated error in relation to just one of those reasons will not necessarily warrant reversal of the credibility assessment.

361 The trial judge's assessment of Robert's credibility makes this point. The trial judge disbelieved Robert's evidence on virtually every contentious issue. On her findings, Robert's conduct from the middle of 1988 forward was thoroughly dishonest. Her rejection of his evidence reflects the cumulative assessment of his credibility.

362 The appellants fasten on the trial judge's disbelief of Robert's evidence that he did not remove documents from Hayman's file on SWRI. In making this specific credibility finding, the trial judge relied on a single, ambiguous answer given by Robert in cross-examination as evidence that he admitted he may have removed the documents. We think she misapprehended this evidence. We are, however, satisfied that this mistake had no effect on her overall assessment of Robert's credibility or her findings of fact. Even if she was wrong in finding that Robert removed the documents, this did not affect her findings that the documents existed and at some point had been removed from the file.

363 In disbelieving Robert on virtually every significant fact, the trial judge relied on her finding

that Robert had stolen documents, forged documents to induce Philip to breach its contract with SWRI, and had failed to produce and perhaps destroyed relevant Greycliffe documentation. We have no doubt that she would have arrived at exactly the same position on Robert's credibility had she not misunderstood his answer concerning the removal of documentation from Hayman's file. A single isolated misapprehension of one bit of the evidence does not justify interfering with the trial judge's rejection of Robert's evidence as incredible on issues as diverse as the payment of the bonuses, the operation of Greycliffe, and the operation of SWRI.

364 Although credibility assessments, especially powerful ones such as those made in this case, are difficult to reverse on appeal, they are not immune from appellate review. For example, a credibility finding that is arbitrary in that it is based on an irrelevant consideration or tainted by a processing error can be set aside on appeal.

365 The appellants contend that several of the trial judge's findings of credibility reflect these kinds of errors. We reject those submissions. For the most part, these arguments reflect a misapprehension of what the trial judge said or refer only to part of the basis upon which the trial judge made the challenged finding of credibility.

366 For example, the appellants contend that Kumer's evidence was found to be unreliable based entirely on the fact that Chester had provided financial assistance to Kumer in 1979-80 when he was having trouble with the tax department. The appellants submit that the trial judge found that because Kumer received this assistance in 1979, he was prepared to lie in his testimony for Chester many years later. Counsel refer to this finding of credibility as "irresponsible" and arbitrary.

367 Assuming that a disbelief of Kumer based entirely on the financial assistance provided some years earlier by Chester would constitute an arbitrary finding of credibility, that is not what the trial judge did. Kumer, like Chester and his sons, gave evidence that the 1981-82 bonuses to Chester's sons had their genesis before the completion of the Lasco transaction in 1980 and provided compensation for the boys in exchange for their non-competition agreements. The trial judge concluded, primarily on the basis of the evidence of Linton and certain documents produced for the first time during the trial, that the decision to pay these bonuses post-dated the Lasco transaction and had nothing to do with the non-competition clauses. This finding was open to the trial judge and was buttressed by the evidence of Morris and the common sense observation that Chester's young sons hardly seemed entitled to half of the profits realized from the sale of two divisions of a company built by the combined lifetime efforts of Chester and Morris.

368 Having found that Kumer lent his voice to a fabricated explanation for the 1981-82 bonuses, the trial judge rejected his evidence as unreliable. She rejected his evidence not only as it related to the 1981-82 bonuses, but also as it related to other material matters in dispute such as Morris' knowledge of the relationship between Greycliffe and IWS. Rejection of the entirety of the contentious parts of a witness' evidence based on a finding of a single material, deliberate falsehood is not arbitrary. Juries are routinely told that they may reject a witness' evidence in its entirety if

they are satisfied that that witness has deliberately lied to them on a material matter.

369 The appellants allege various other processing errors, which they say undermine all of the crucial credibility findings. Various combinations of processing errors are put forward in relation to various credibility findings. We do not propose to address each and every one of these arguments. Mr. Lenczner's detailed submissions directed at the trial judge's rejection of Wiseman's evidence concerning his alleged discussions with Morris between December 26, 1983 and the end of 1983 are typical of this category of the appellants' arguments. We will address those submissions in some detail.

370 Wiseman testified that Morris told him on December 26th that he had sold his shares to Chester. Morris was upset. According to Wiseman, he and Morris discussed the sale on several occasions between December 26th and the end of the year. Wiseman further testified that Morris produced the share sale documents on December 28th and that he, Morris, and Taylor went over the documents.

371 Morris denied that he had any discussions with Wiseman concerning the share sale before the end of 1983. On his evidence, he only became aware of the share sale in early 1984. He testified that he did not see the share sale documents until much later.

372 The trial judge rejected this part of Wiseman's evidence. In doing so, she referred to:

* the inconsistencies between his trial testimony and his discovery;
* an inconsistency between his trial testimony and an affidavit he swore in October 1988; and
* the inconsistency between his trial testimony and a notation on the October 1988 affidavit.

373 Mr. Lenczner contends that the trial judge's rejection of Wiseman's evidence has no proper foundation in the record. He argues that the inconsistencies are so trivial as to be non-existent, that the finding ignores Wiseman's status as a "professional" and finally, that the notation referred to by the trial judge on the October 1988 affidavit was not made by Wiseman and, therefore, could have no relevance to his credibility.

374 Mr. Harrison responds that the trial judge's rejection of this part of Wiseman's evidence is not only free from any palpable and overriding error, but is also firmly rooted in the evidence. He begins with the sound proposition that one's status as a "professional" does not permit any presumption about the credibility of that person's evidence. He then submits that Wiseman testified at trial that Morris gave him the share sale on December 28, 1983. His trial testimony was very specific. At discovery, Wiseman was much less certain as to when he received these documents. In his October 1988 affidavit, he said that he had received them "in about January 1984".

375 Mr. Harrison argues that these answers reveal inconsistencies that were potentially

significant. In any event, he submits that the significance of the inconsistencies was for the trial judge and not this court.

376 Mr. Harrison does not suggest that the notation on the October 1988 affidavit could assist in assessing Wiseman's credibility. Wiseman was not the author of the notation. To this very limited extent, the trial judge's reasons are in error, although it must be said that it is not at all clear that the trial judge relied on the notation in assessing Wiseman's credibility.

377 Mr. Harrison further contends that in considering whether the trial judge's rejection of Wiseman's evidence reveals "palpable and overriding" error, this court must look beyond the factors specifically referred to by the trial judge in rejecting that part of Wiseman's evidence. Mr. Harrison says that the court must look to the evidence accepted by the trial judge. He refers to Taylor's evidence denying any meeting on December 28th and to the unchallenged evidence that Morris went into the hospital for an angiogram on December 28th and was indisposed for several days. Mr. Harrison submits that this evidence was accepted by the trial judge and that Wiseman's evidence concerning the events between December 26th and the end of the year simply cannot stand with that evidence.

378 Lastly, Mr. Harrison urges the court to have regard to the trial judge's overall assessment of Wiseman's credibility in considering whether her credibility finding on one part of his evidence reveals "palpable and overriding" error. For example, based on the evidence of Ray Harris, an expert called by Taylor Leibow, the trial judge found that Wiseman was not being truthful when he attempted to explain why he had not included a related party note for Greycliffe in the 1982 IWS financial statement. Mr. Harrison submits that having found that Wiseman engaged in a deliberate falsehood on a material issue, it was entirely appropriate for the trial judge to take a negative view of his credibility on other material issues, especially where that evidence was contradicted by witnesses, like Taylor, whose overall credibility was accepted by the trial judge.

379 The competing arguments with respect to the trial judge's finding that Wiseman's evidence was not credible as it related to the events between December 26 and December 31, 1983 demonstrate the following:

* The trial judge had a difficult credibility assessment to make. There were reasons to believe Wiseman's testimony and there were reasons to question his credibility.
* Counsel diligently and effectively presented the competing positions before the trial judge.
* The trial judge had a firm grasp of the trial record and the positions of the parties. Any deficiencies in her recollection or understanding of the evidence were insignificant.

380 In the end, we see no reason to interfere with her assessment of Wiseman's credibility, or her many other similar assessments. There was nothing arbitrary about her assessment, it did not reflect

any significant misapprehension of the evidence, and it was not the product of an unfair balancing of the relevant credibility considerations. This trial judge may have attached more or less significance to certain factors going to the witnesses' credibility than other trial judges. It was her responsibility to decide how much weight should be given to the various factors. We are being asked to recalibrate her assessment of those factors. We cannot do so.

381 The appellants have not demonstrated any basis on which this court can interfere with the powerful credibility assessments made by the trial judge.

B. The Grounds of Appeal in the Main Action

i. Factual Issues in the Main Action

382 We turn now from the appellants' broad attacks to their specific challenges to the core findings of fact in the main action. These arise in the five most important episodes in the relationship between Morris and Chester, which were so carefully scrutinized in the main action. We have already dealt with a number of these challenged findings in addressing the appellants' broad arguments. We do so again in order to address the specific challenges raised by the appellants.

383 The first episode concerned the 1979 bonuses. The trial judge found Chester liable to Morris both for breach of fiduciary duty and, together with IWS, under s. 248 of the OBCA in connection with the 1979 bonuses. Judgment was granted against Chester and IWS for $125,000. Morris was also granted a tracing order to determine whether any of the $125,000 in bonuses declared in 1979 remains in the hands of persons other than a bona fide purchaser for value. In this connection (as with the other tracing orders made), the trial judge declared that Chester's sons, Robert, Warren, and Gary, are not bona fide purchasers for value.

384 The second episode concerned the 1981 and 1982 bonuses. The trial judge found Chester liable to Morris for breach of fiduciary duty in connection with those bonuses. She found Chester and IWS liable to Morris under s. 248 of the OBCA. She also found Chester's sons liable to Morris under s. 248 and for knowing receipt of the bonus monies they each received for these two years.

385 She quantified the relief against Chester and IWS at $2,312,000, which represents Morris' fifty per cent of the bonuses declared for those two years less the amount Morris actually received as bonus monies for these years. She also ordered that Morris could trace the bonus payments and recover them by a constructive trust or personally against Chester and IWS. She ordered Chester's sons to pay to Morris the sums of $622,000, $936,000 and $500,000 respectively, provided that ultimately Morris recovered no more than $2,312,000 in connection with the bonuses for these two years.

386 The third episode, and by far the most important, was the agreement that Chester said he

made with Morris in December 1983 to buy Morris' shares in IWS. The trial judge found that Chester's actions in this connection made him liable to Morris for breach of fiduciary duty, undue influence, unconscionability and pursuant to s. 248 of the OBCA. She also found IWS liable to Morris pursuant to s. 248.

387 By way of remedy, the trial judge ordered that Chester held these shares on constructive trust for Morris from December 22, 1983 onward, and she ordered that they be transferred to Morris as of June 27, 2002, the date of the trial judgment. She also ordered that Morris' lost profits during the period of constructive trust be quantified and that Morris is entitled to judgment against Chester and IWS for this amount or to trace these profits into the hands of persons other than a bona fide purchase for value without notice.

388 In this episode, the trial judge also dealt with the lease to IWS signed in December 1983 as part of the share sale. She found Chester liable to Morris and Morriston for breach of fiduciary duty, undue influence, and unconscionability in connection with that lease. She also found both Chester and IWS liable to Morris and Morriston under s. 248 of the OBCA. However, given that the loss to Morris and Morriston from this lease constituted a gain to IWS and that she had restored Morris to his ownership position in IWS, the trial judge did not order a separate remedy based on the lease.

389 The fourth episode addressed the profit diversions. The trial judge found Chester liable to Morris for breach of fiduciary duty, knowing assistance, and under s. 248 of the OBCA in connection with the profits diverted from IWS to Greycliffe and four other companies through which Robert provided trucking services to IWS. She also found IWS, Robert, and Robert's companies liable to Morris under s. 248. She quantified Morris' fifty per cent of these profit diversions at $1,180,073 and ordered personal judgment in this amount against Chester, IWS, and Robert. She also ordered judgment against Robert's companies in the amounts of the profits diverted to them. She granted Morris a tracing order in connection with these diversions.

390 The final episode involves the Ancaster property. The trial judge found Chester liable to Morris for breach of contract in connection with the Ancaster property and awarded Morris damages of $98,000.

391 Our evaluation of the appellants' specific attack on the fact-finding by the trial judge must be made in the context of the proper role of appellate review of facts as found at trial, which we have already described. The appellants argue that the trial judge was palpably wrong in her assessment of Morris, and in determining the fundamental facts that underpinned her conclusions in each of the episodes we have just outlined. We will deal with each of these episodes in turn.

(a) Morris' Financial Abilities

392 The appellants' attack is the finding, made in a number of different ways, that Morris had a relative lack of sophistication in financial matters. The appellants contend that the evidence compelled the opposite conclusion and that, given his financial astuteness, Morris surely knew he

was agreeing to the bonus allocations, the share sale including the lease, and the profit diversions to Robert's companies.

393 Although there was evidence from which the trial judge might have drawn the conclusion urged by the appellants, there was clearly ample evidence to sustain the conclusion that she reached. There is no doubt that Chester, not Morris, ran the financial affairs of IWS. Taylor, the company's accountant, dealt with Chester, not Morris, regarding such matters. Linton, the company comptroller, did the same and knew that Morris had no interest in or understanding of corporate tax matters. Others carried on aspects of Morris' personal banking for him. Michael testified about his father's limitations in this area. Indeed, Morris did so himself. Most importantly, the trial judge heard evidence over fifteen months that painted a picture of Morris' business abilities. She heard Morris testify over almost twenty-five days about many subjects that necessarily revealed his limited financial abilities. She was uniquely placed to draw the conclusion she did. It is not palpable error; indeed it is well-founded.

(b) The 1979 Bonuses

394 The appellants attack the basic findings of the trial judge concerning the 1979 bonuses, namely that Chester had never discussed them with Morris, and that Morris never agreed to them and indeed was unaware of them. The appellants point to Chester's evidence (that he discussed the 1979 bonuses with Morris and they agreed by early 1980 at the latest that all $250,000 would go to Chester's sons) and Morris' signature in three places on the 1979 bonus minute as necessitating the opposite finding.

395 However, Chester's version of events was contradicted by contemporaneous documentation produced by Linton and Ennis, which made clear that the 1979 bonuses were the result of a reallocation of a prior allocation of those bonuses and that this reallocation was not made until April 1981.

396 Moreover, Morris said he did not know about the 1979 bonuses until after the litigation began. His view that he and his brother should be building the company for the equal benefit of his sons and Chester's sons was entirely inconsistent with his agreeing to the 1979 bonuses going entirely to Chester's sons as Chester alleged. As to his signature on the bonus minute, there was ample evidence of Morris' practice of signing corporate documents brought to him by Chester without reading them, which is exactly what he said happened in this instance.

397 In all the circumstances, the conclusion of the trial judge that Morris neither knew about nor agreed to the 1979 bonuses is not palpably wrong. It is eminently supportable.

(c) The 1981 and 1982 Bonuses

398 One of the main issues in this action involves the bonuses allocated and paid by IWS for 1981 and 1982. These bonuses totalled $6.6 million: $3.3 million for each of the two years. For

each of these two years, Morris and Chester were each to receive $700,000 and Chester's sons, Warren, Robert and Gary were to receive $550,000, $600,000 and $500,000 respectively.

399 The appellants do not contest the trial judge's finding that this $6.6 million represented the proceeds of two sales by IWS in which it sold its refuse division and its ferrous division. However, their fundamental challenge is to the findings that Morris did not know about these allocations, had no discussions with Chester about them and did not agree to them. The appellants argue that these findings fly in the face of the evidence of Chester, his sons, and his brother-in-law, Kumer, and most importantly the two corporate minutes recording the allocations for these years. Morris signed each minute in three places. The appellants contend that the findings are palpably wrong and must be reversed, thus sustaining the validity of the bonuses.

400 We disagree with the appellants. There was ample evidence supporting the trial judge's findings and contradicting the story told by Chester, his sons and Kumer. That story was that the bonus allocations were all discussed with Morris and settled before the closing of the sale of the ferrous division in September 1981. However, Linton's evidence, supported by contemporaneous documentation from both himself and Ennis, made clear that the idea for the final allocation of these bonuses originated with Linton, not Chester, and was not raised until October or early November 1981. Although he discussed the idea with Chester, he never did so with Morris.

401 Although Morris acknowledged his signatures on the corporate minutes, he could not recall signing them. His evidence was that he did not read the minutes, no one told him about the bonus allocations, and he did not agree to them. The trial judge accepted this. In our view, it was clearly open to her to do so.

402 In addition to Morris' own evidence, there was evidence of his pattern of signing corporate documents in the appropriate place when asked to do so, but without reading their contents. There was evidence from Wiseman that when he told Morris about the 1981 and 1982 bonuses in early 1985, he believed that Morris was learning of this for the first time. Moreover, there was the fact that Morris raised no complaint about the allocations until 1985, which was completely inconsistent with his knowing about them at the time. It is inconceivable that Morris would have accepted, without protest, a distribution of the proceeds of the sale of two divisions created in large part through his own efforts where the allocation was so skewed towards Chester and his sons.

403 The appellants rely heavily on Morris' signatures on the two corporate minutes to demonstrate that Morris must have known of these bonus allocations. However, there was no evidence from anyone about the circumstances under which Morris signed. The trial judge could not know whether he was hurried and distracted and simply followed his previous pattern of signing corporate documents or whether he had time to calmly review the corporate minutes. The corporate signatures themselves, even where the allocations are on the same page an inch or two above those signatures as in the 1981 minutes, do not compel the conclusion that Morris knew of them, let alone agreed to them.

404 In summary, there was a clear evidentiary foundation for the trial judge's findings about Morris' lack of knowledge of these bonus allocations. She made no palpable error in making them.

405 The appellants also quarrel with the trial judge's finding that these bonuses were a distribution of shareholder equity arising from the sale of the two divisions of the company and the further finding that there was no valid business reason for allocating millions of dollars to Chester's sons. However, here again there was significant evidence in support of these findings. Linton said exactly this in his testimony: he could see nothing to justify these bonuses to Chester's sons. The divisions that were sold had been built over forty years. Chester's sons were young men in their mid-twenties who had been with IWS for relatively short periods of time and for whom these bonuses represented exorbitant payments. The trial judge was perfectly justified in concluding that neither their services nor the non-competition agreements they signed as part of the two sales warranted these payments. She was equally justified in finding that these bonuses represented a distribution of shareholder equity.

406 In short, we conclude that the fact-finding of the trial judge in connection with the 1981 and 1982 bonuses is well-founded and does not constitute palpable and overriding error.

(d) The Share Sale and Lease

407 The share sale and the trial judge's findings of fact in connection with it are at the heart of this appeal.

408 The trial judge's core conclusion is that Morris did not participate in any negotiations to sell his shares and had no idea, when he was asked to sign the documents on December 22, 1983, that he was selling his shares or signing a lease. The appellants attack these findings and argue that they must be set aside and indeed reversed.

409 The trial judge came to these conclusions in the context of a very careful and detailed review of the evidence about the share sale and its aftermath. That evidence covered the seven years from 1982 to 1989. Her review, complete with numerous footnoted references to the evidence, encompasses some 740 paragraphs and 190 pages of her reasons for judgment as reported. In evaluating the appellants' attack on the trial judge's findings, three considerations, which we have already discussed in detail, must be kept in mind.

410 First, as with every other major episode in this very long trial, the trial judge was presented with two starkly different versions of events.

411 Chester, supported by Ennis, said that he and Morris negotiated the terms of the share sale over a series of meetings running from the summer of 1982 through to December of 1983. Morris then executed the agreements at two meetings on December 20 and 22, 1983 at which the documents were reviewed in detail. Thereafter, for a number of years, Morris conducted himself in a way that revealed that he was fully cognizant of the deal when he signed and that this conduct also

constituted his ratification of it.

412 On the other hand, Morris said that he had no negotiations with his brother concerning the sale of his shares. When he was asked to go to Ennis' office on December 22, 1983 he was distracted by his own health problems and his imminent angiogram. He assumed that he was simply being requested to sign routine corporate documents. Receiving no contrary explanation, he signed as he was asked, without reading the documents, just as he had done many times before. Only on January 5, 1984 did he learn what the documents contained and thereafter he consistently and vehemently told his brother that he had to straighten out what had happened and restore Morris' fifty per cent ownership of the company.

413 The fact-finding required of the trial judge was thus necessarily shaped by the parties, presenting as they did these fundamentally contradictory scenarios. In determining the facts surrounding the share sale, any choice of a third scenario lying between these stark alternatives would have faced the practical difficulty that neither side was saying that it happened that way. Indeed, Mr. Lenczner argued that this court (and therefore presumably the trial judge) could not determine that the truth lay somewhere between the two alternatives - for example that although there had been no negotiations, at some level Morris knew on December 22nd that he was signing away his shares. He submitted that to find these to be the facts and attach legal consequences to them would deprive Chester of due process since Morris had not pleaded his case on this basis. Thus, while the trial judge was certainly not bound to choose one story or the other, the way the evidence about the share sale was presented is a relevant factor in considering whether her finding that it happened as Morris described was palpably wrong.

414 Second, in making her fundamental findings, the trial judge was also guided by her overall credibility assessments of the major witnesses. These assessments were reached over the fifteen months of the trial and, with Morris and Chester, after seeing each of them in the witness box for a number of days. Particularly in connection with the share sale, much of her task required her to weigh Morris' word against Chester's. The trial judge was left with no doubt in her general assessment of their credibility: overall, she found that Morris was credible and Chester was not. Indeed, by the end of the trial she had concluded that Chester had fabricated much of his story.

415 Third, it must be remembered that this trial addressed a number of episodes in the relationship between these two brothers. While the share sale was by far the most significant, other episodes preceded it, such as the 1981-82 bonuses, and episodes that followed it, such as the story of SWRI. The facts as found by the trial judge reflect a significant degree of consistency in the behaviour of the principal actors throughout all of these episodes. The overall picture that emerges is one into which each episode fits coherently. The holistic nature of fact-finding in a complex trial such as this, with its many interrelated episodes, makes more difficult the finding of a palpable error at the core of any one episode taken in isolation. The appellants implicitly recognize this in asking that we find palpable error and reverse the fundamental findings of fact not just in the share sale episode, but in all the other episodes as well.

416 These general considerations must be kept in mind in considering the appellants' position that the trial judge's fundamental finding concerning the share sale constituted palpable and overriding error.

417 The trial judge accepted Morris' evidence that there were no negotiations and that on December 22, 1983 he thought he was signing corporate documents in the ordinary course, not selling his shares to his brother.

418 The appellants argue that this finding cannot stand in the face of Chester's evidence, supported by Ennis, of substantial negotiations initiated by Morris leading to the execution of the agreement at two meetings on December 20th and December 22nd, and in the face of Morris' repeated signatures on the sale documents and Morris' own statements. The appellants contend that this evidence, taken together with Morris' conduct over the ensuing five years, require the setting aside of this finding and compel the conclusion that Morris knew he was selling his shares and is bound by his signature.

419 We do not agree. For a number of reasons, in addition to the general considerations we have just outlined, it was open to the trial judge to accept Morris' version of what happened.

420 The trial judge's conclusion reflects her general assessment of Morris' credibility. As we have already discussed, that assessment must be respected in this court. Over the course of this very lengthy trial and with ample opportunity to form her view, she found him a truthful witness. She acknowledged that she began with an initial scepticism about Morris' professed lack of knowledge of events, but as the trial unfolded and as she listened to the appellants' version of events, this scepticism dissipated. She gave a number of examples of instances where little and seemingly unlikely details of Morris' evidence were borne out in ways he could not have predicted. In the end, her conclusion about Morris' credibility was careful and considered, and based on reasoning that withstands scrutiny. This is just the kind of finding that attracts very significant deference in this court.

421 Beyond the general assessment of Morris' credibility, his version of events was also consistent with his clear and lifelong aspiration to pass the business on to the next generation. For his part, that meant his sons, Michael and Douglas. For Morris to negotiate and conclude the sale of his shares to his brother would have been entirely inconsistent with his fundamental objective. This reality strengthens the soundness of the trial judge's finding.

422 Equally, the trial judge's analysis of the manifest unfairness of the share sale provides important support for her findings about what happened. The trial judge found that in December 1983 the shares of the company were conservatively worth $8.735 to $8.963 million, apart from the $1 million dividend declared in 1983 to fund the share sale. The fair market value of Morris' fifty per cent interest would therefore have been about $5 million. Yet the share sale nominally called for Morris to receive only $3 million.

423 However, the trial judge found that Morris only received the equivalent of $1,594,721 for his interest, far less than its fair market value of $5 million, and even far less than the nominal sale price of $3 million. The trial judge gave three reasons for her finding:

* Some of the payments were in reality dividends to which Morris was entitled to in any event;
* The payments were sourced in part from the reallocation of Morris' bonus to Chester and a notional loan from Morris to Chester; and
* Other payments were made over several years and without interest.

424 Finally, the lease signed as a part of the share sale required Morris, through his holding company, to lease to IWS the land he owned together with Chester for a term of fifty years at a rate well below market, with no inflation protection or rent adjustment. Over the life of the lease the trial judge accepted that this represented a rent that was $2,529,607 below market.

425 Overall, as revealed by the trial judge's analysis of the share sale, it was patently unfair, unconscionable, and manifestly disadvantageous to Morris. Had Morris understood its terms, neither he nor any reasonable person in his position would have agreed to it. This alone constitutes a powerful validation of the trial judge's conclusion that there were no negotiations and that Morris did not agree to sell his shares.

426 Put together with the other considerations we have discussed, the trial judge had good reason to accept Morris' version of events. On the other hand, the trial judge had ample reason to reject Chester's story. She made no palpable error in doing so.

427 Here too, her assessments of general credibility are important, since so much of the debate about whether there were any negotiations is simply Chester's word against that of his brother. And as we have said, those assessments display no reversible error. Beyond that, however, there was much to support her rejection of Chester's story.

428 One example is the alleged meeting at the Trocadero restaurant. Chester testified that it was Morris who broached the share sale in the summer of 1982 when the brothers met over dinner at the restaurant. Chester made clear that the tone of his response to Morris' proposal was markedly negative. Morris denied that any such meeting took place. Chester's version was undermined by the fact that this allegedly seminal event is not even mentioned in his very detailed pleading. Moreover, his supposedly negative response is inconsistent with other steps he had taken to diminish Morris' voice in the company and with his desire to exclude Morris' sons from the company over the longer term.

429 A second example is Chester's testimony that he knew by the end of July 1983 that Morris was only interested in having Chester buy all of his shares. Yet despite this knowledge, supposedly derived from the negotiations that Chester said were going on, Ennis' notes reflect that as late as November 23, 1983 he and Chester were discussing an option to purchase the shares, not an

outright purchase of shares.

430 A third example is Chester's testimony about extensive negotiations and discussions between himself and Morris over a number of months. However, there are no notes reflecting any such negotiations or discussions with Morris, or demonstrating that any of the many draft documents prepared by Ennis made their way to Morris. As the trial judge said, there are only notes of discussions among Chester, Ennis, and Linton.

431 A fourth example concerns Ennis' evidence. He attempted to support many aspects of Chester's story that there were ongoing negotiations, but his evidence was seriously undermined by his own documentation. Ennis said that he was first consulted about the share sale in May 1983 when Morris approached him about it at the synagogue, a conversation Morris denied. Ennis' own notes reveal that well before that, as early as September 22, 1982, he was meeting with Chester in Morris' absence to discuss share purchase alternatives. Similarly, Ennis' evidence that he met with Chester on February 7, 1983 about another subject was contradicted by his own notes, which recorded a general discussion about the sale of shares. Ennis' records showed many meetings with Chester through the fall of 1983 and many drafts of the sale documents. In cross-examination, Ennis admitted that he never discussed share sale drafts or specific terms of the deal with Morris before December 20, 1983. In the end, the trial judge had an ample basis to find that Ennis' evidence provided no support for Chester's story of negotiations with Morris, and instead supported her conclusion that Chester conceived the sale entirely without Morris' knowledge and had Ennis prepare documents for Morris to sign, without his having seen them before.

432 A final example concerns Chester's testimony, again supported by Ennis, that the share sale documents were signed at two meetings at Ennis' office on December 20 and December 22, 1983. This testimony proved to be fraught with difficulties. Chester said that at these meetings, the documents were reviewed in detail, read aloud, and had changes made to them. This evidence was a vital part of Chester's story that Morris knew all about the share sale and agreed to it.

433 Morris, on the other hand, said there was only one meeting, on December 22, 1983, and that without explanation he was asked to sign documents in his various capacities as owner, officer, and director. He did as he was asked as he had done many times before. He trusted his brother and his lawyer and signed without reading the documents.

434 The trial judge rejected Chester's evidence that there were two meetings and found that the meeting of December 22nd took place as Morris described.

435 There was good reason for her doing so. Chester's original pleading, which he reviewed and approved before it was issued, referred to only one meeting, namely, December 22nd. Chester and Ennis gave accounts of the alleged December 20th meeting with Morris that were inconsistent in a number of respects. If the chronology had unfolded as Chester described, several of the documents would not have read as they did. These include a letter prepared by Ennis and used by Chester on December 21st in a meeting to explain what was happening to Lasco. The letter referred to the share

sale as having an initial closing date of December 31, 1983, whereas Chester's and Ennis' evidence was that at the December 20th meeting, a decision was made to amend the agreement to provide for a January 1984 closing date.

436 Thus in the end, the trial judge rejected Chester's story about the negotiating and signing of the share sale and accepted Morris' story. Her fundamental finding at paras. 725-6 is as follows:

> On one occasion only, on December 22, 1983, Morris was called into Ennis' office to sign Share Sale documents. I accept Morris' evidence that the meeting was brief. None of the documents were read aloud, reviewed, discussed or explained.
>
> Morris did not understand at the time that the documents he was being asked to sign were out of the ordinary. He thought he was signing IWS documents as its President in the usual course. He signed the documents because Chester asked him to do so and because he trusted Chester and Ennis. He did not want or intend to sell his shares. He had no idea that he was selling his shares or signing a lease.

437 In our view, this finding does not constitute palpable and overriding error.

438 The appellants also launch a number of very specific attacks on the trial judge's fundamental finding.

439 The appellants' most vigorous assault on her core finding is founded on the fact that Morris signed and initialled the share sale documents, some of which were highly distinctive, in more than fifty places. The appellants claim that no one doing this could have been mistaken about what these documents so clearly indicated. The appellants argue that Morris must have known that what he was signing were documents effecting the sale of his shares.

440 We do not agree. The context in which Morris signed all these documents must be kept squarely in mind. The trial judge determined that over the months before the signing, Morris had not been involved in any negotiations with Chester to sell his shares and had no idea of the meetings between Chester and Ennis to set up this sale. Morris came to Ennis' office on December 22nd, completely trusting Chester, who was his brother and Ennis who was his lawyer. He simply followed his usual pattern in such a business circumstance, signing where he was asked to sign by two people he trusted implicitly. He was only a few days away from an angiogram, which was to be followed by open-heart surgery shortly after. He was understandably preoccupied with his own health. Moreover, given the unfairness of the deal, the trial judge was not palpably wrong in finding that Morris did not know what he was signing.

441 The appellants also mount an attack on the trial judge's core finding based on parts of Morris' own evidence. The appellants contend that taken individually, and certainly taken collectively, these

references compel the conclusion that Morris knew he was selling his shares. The appellants cite a number of examples of both what Morris said at the time and what he acknowledged had been said to him.

442 Morris testified that on December 14, 1983, when meeting with Ennis about his will, he responded to a suggestion by Ennis that he sell his shares in the company to Chester by saying "I don't want to, but if I ever did, Chester wouldn't screw me and all the properties would have to remain 50/50." Morris also testified that on December 22nd Chester said "this is the sale" but that since he was out of sorts that day because of his health problems, he did not know what Chester meant. Morris agreed that after he signed one of the documents that day, Chester said to Ennis, "oh, this is to save your ass". Morris also said that as he was driving back to the office he stopped his car and vomited. When asked why, he said, "probably because I wasn't feeling good. I could have been anxious, I could have been nervous about what was happening to me. The possibility of subconsciously maybe knowing what happened to me, I don't know. I don't know. I can't answer it. I just don't know. And I don't remember today." That night he said that Ennis called him and seemed drunk or crying. Ennis said not to blame Chester, that it was Robert's fault. Morris did not know what he was talking about. Finally, on December 26, 1983 when Morris met with Ennis' associate, Hope, together with Wiseman to prepare his will prior to entering the hospital, Hope told him that he did not own the Centennial Parkway property. Morris acknowledged that he was very taken aback and felt that he was "finished" and "a goner". However, while he was upset at this news, he was so confused and concerned about his looming angiogram that he did not understand what Hope told him. The appellants claim that if Morris still thought he owned his shares he would not have reacted so violently because as co-owner of IWS he would still have "owned" the Centennial Parkway property.

443 The trial judge was undoubtedly alive to all of this evidence. Indeed she referred to virtually all of it in her reasons for judgment. None of Morris' own statements is incompatible with the conclusion that Morris did not participate in any negotiations and did not understand that he was selling his shares, and simply did not comprehend the implication of the statements made to him. Moreover, contrary to the appellants' submission, this evidence does not compel the contrary conclusion to that reached by the trial judge, namely that Morris had negotiated the deal and fully understood what he was signing. Even if taken in isolation, this evidence does not provide significant support for such an inference.

444 Although it would probably have been open to the trial judge to infer from this evidence that while Morris had not negotiated a deal with his brother, he did vaguely understand at some level what was happening on December 22nd, it was certainly not necessary that she do so. And, as we have said, the way the case was presented to her made this a less likely conclusion.

445 In summary we cannot find that these statements by Morris render her findings about the share sale palpably wrong.

446 The appellants also rely on Wiseman's evidence regarding events on December 26 and December 28, 1983 to attack the core finding about the share sale. As we have said at paras. 369-380 of our reasons, it was entirely open to the trial judge to reject this evidence and conclude that Morris did not discuss the share sale with Wiseman in this time period and that he first learned of the sale on January 5, 1984.

447 The appellants also submit that Morris' conduct after January 1984 demonstrated that he knew about and affirmed the share sale. The appellants refer particularly to Morris' acceptance of share sale payments, his investment and reinvestment of some of these payments, his signing of annual tax returns, which included capital gains from the sale of his shares, and his "notes from grave" made in late January 1984.

448 The appellants argue that in reaching her core finding on the share sale in the face of these successive acts of ratification, the trial judge committed reversible error. They urge this court to conclude that these events demonstrate Morris' complete knowledge, awareness, and acceptance of the transaction of December 1983.

449 The trial judge considered all the post-sale evidence with care, including this evidence, and rejected the conclusion advanced by the appellants. She found that Morris did not accept the share sale but rather complained about it from the time he first learned of it. This finding was well founded in the evidence. Morris testified to this effect. Taylor, Wiseman, and Ennis each knew of Morris' dissatisfaction with the sale from very early on. The trial judge accepted that Morris' treatment of his tax returns simply reflected his view that it was business as usual and his hope that Chester would respond to his complaint by putting it right and in the meantime he did nothing to make the dispute public, which was consistent with the strong family tradition of settling things internally. As for the "notes from the grave", she accepted Morris' explanation and read them as indicative of a very troubled man trying to grapple with a growing recognition that his brother, whom he had loved and trusted implicitly since childhood, had betrayed him. She did not interpret them as an admission that Morris had known of the share sale all along and agreed to it. We see no error in her interpretation.

450 In addition to complaining about the trial judge's failure to draw the inference from Morris' post-sale conduct that he had agreed to the deal, the appellants argue that several of her particular findings are palpably wrong. The appellants point first to her finding that Morris did not receive a cheque from Chester for $1 million on January 4, 1984. However, the trial judge gave clear reasons for this finding, weighed the evidence before her, and considered what banking documents would have been available had there been such a cheque. It is not the role of this court to second-guess such a finding.

451 Second, the appellants claim that in rejecting Wiseman's evidence about a meeting he had with Morris in April 1985, the trial judge misinterpreted an exhibit, which Wiseman said he reviewed with Morris at that meeting. The respondents concede this point, but claims that in a trial

of this length and complexity absolute perfection in interpreting every piece of evidence cannot be expected and that this mistake is innocuous. We agree. The trial judge has a sound basis to accept Morris' version of his conversation with Wiseman apart from this exhibit, particularly given her findings of general credibility. Although the trial judge's interpretation of the exhibit is an error, it is not a palpable and overriding one.

452 To summarize, we conclude that the trial judge committed no palpable and overriding error in her fact-finding about the share sale. She was entitled to apply the law to the factual basis that Morris had not negotiated the sale and did not understand or agree to it.

(e) The Greycliffe Profit Diversions

453 The appellants make two major complaints about the trial judge's fact-finding in connection with the profits diverted from IWS to Greycliffe and four other companies through which Robert provided trucking services to IWS. These services began in the late 1970s and continued until Chester ended them in February 1984, shortly after the share sale.

454 First, the appellants argue that the trial judge was palpably wrong to find that while Morris knew Greycliffe was doing some trucking for IWS, he did not know the rates being paid by IWS and had never agreed to them. The appellants claim that this conclusion flies in the face of significant contrary evidence. Chester and Robert testified that they discussed the entire arrangement with Morris and that he consented to it. Linton gave evidence that Morris signed cheques payable to Greycliffe. Morris was clearly interested in the trucking being done by IWS and, on a daily basis, was in the yard, which the Greycliffe trucks were constantly using. Indeed, Morris acknowledged that he was aware that Greycliffe was providing some trucking services to IWS.

455 In our view, the trial judge's conclusion does not represent palpable and overriding error. She accepted Morris' evidence that he never discussed these trucking services with Chester or Robert and was completely unaware of the rates being charged to IWS. He said that he simply assumed that while Chester's sons were providing some trucking services, he had no idea to what extent, and he also assumed that when his own sons came into the business they would be able to take equivalent amounts out of the company. Morris said that he had no idea of the size of the actual profit diversions until after the lawsuit started and that he viewed them as "sinful." It was entirely open to the trial judge to prefer Morris' evidence over that of Chester and Robert. This preference is consistent with and reflects her general credibility assessments, which we have found to be unassailable on appellate review. Moreover, the appellants produced no documentation to support his version of events, for example, IWS cheques to Greycliffe that had been signed by Morris.

456 Finally, the extent of the profit diversions provides solid support for Morris' evidence. The trial judge found that Greycliffe's profit ratios for these years were in the range of approaching fifty per cent of gross revenues, some twelve times the broad industry average. Given Morris' concern that Chester's side of the family not be preferred to his own, Morris would never have accepted such exorbitant profits going to companies owned by Robert. He certainly would never have agreed to

this arrangement.

457 Second, the appellants take issue with the trial judge's use of expert evidence to assist her in determining how much Greycliffe overcharged, saying that this was a matter of fact, not opinion. The appellants also argue that the trial judge ought not to have accepted the particular expert evidence called by the respondents.

458 In our view, neither of these points has merit. The determination of what are reasonable rates charged by various sectors of the trucking industry and what reasonable profits result not information within the knowledge or experience of a trier of fact and is properly the subject of expert evidence. See R. v. Mohan (1994), 89 C.C.C. (3d) 402 (S.C.C.) at 413. Further, the appellants do not offer any cogent reason to undermine the trial judge's decision to prefer the respondents' experts over those of the appellants. Their opinions were reasonable and well-founded. Although one of those experts had not served a pre-trial report, he was called with leave in response to the appellants' unsuccessful challenge of bias in relation to the respondents' first expert.

459 In all, we see no palpable error in the trial judge's fact-finding in connection with the profit diversions.

(f) The Ancaster Property

460 The last episode dealt with by the trial judge in the main action concerned the Ancaster property. Morris acquired it in 1956 and on January 1, 1986 he conveyed it to Warren for $1. The trial judge found that he did so in return for Chester promising him that Chester would "straighten out", meaning he would undo the share sale. Chester denied any such conversation.

461 The trial judge accepted Morris' version, concluded that there was a contract on these terms, and found that Chester had breached it, since he had not undone the share sale. She awarded Morris damages equivalent to the market value of the property on January 2, 1986 which she found to be $98,000.

462 Once again the appellants submit that Chester's evidence should have been preferred to Morris'. Once again, we disagree. It was entirely open to the trial judge to accept Morris' evidence over Chester's. She found him to be a significantly more credible witness.

(g) The Valuation Findings

463 The final focus of the appellants' attack on the trial judge's fact-finding in the main action concerned certain of her conclusions about valuation.

464 First, the appellants challenge her determination of the value of the Centennial Parkway property owned by IWS, which was an important component of the value of its shares as of December 1983. The appellants contend that the trial judge was palpably wrong to base her

conclusion on the evidence of Steven Pocrnic, an expert witness called by the respondents, because his methodology was flawed.

465 We do not agree. The trial judge carefully reviewed and understood the two different valuation methods used by Pocrnic in reaching his conclusion. His report was prepared in accordance with the Uniform Standards of Professional Appraisal Practice. His ultimate valuation was consistent with the price paid by IWS for the property in 1980 multiplied by the average increase in sale prices in the Hamilton region between 1980 and 1983. There was no palpable error in the trial judge's acceptance of Pocrnic's expert opinion of the value of the Centennial Parkway property.

466 Second, the appellants challenge the trial judge's acceptance of the evidence of the respondents' expert witness Frank Vettese about the value of IWS itself as of December 1983. The appellants contend that it was palpably wrong for the trial judge to accept this valuation since it was based on the inclusion of the profits of Greycliffe in calculating the maintainable earnings of IWS.

467 In our view, the trial judge did not err in this respect. There was no need for IWS to use a separate trucking company. It could have gone forward doing its own trucking. Indeed, Chester terminated the Greycliffe services soon after the share sale. It was therefore entirely appropriate to value IWS by including the Greycliffe enterprise.

468 Third, the appellants argue that the trial judge erred in admitting and relying on the opinion evidence of the witness Stephen Cole, who was called by the respondents to assist in establishing the value of the IWS shares. The appellants baldly assert that his evidence was argument, not opinion and, in any event, he had not prepared a formal valuation report.

469 We find nothing in this argument. No objection was taken to Cole's qualifications to express the opinion that he did. Although he did not prepare a formal valuation report, his evidence and his report provided an analysis of the financial aspects of the transaction reflected in the share sale documents and the fairness of it from a financial point of view. He was qualified to give this opinion and the trial judge was entitled to accept and rely on it.

470 Finally, the appellants argue that the trial judge committed palpable and overriding errors in quantifying the unfairness of the lease that Morris signed as part of the share sale. The errors alleged are that the trial judge did not compare the rent under the lease to the rental amounts which Morris had accepted for the land before the sale and that the expert opinion of Les Robertson about fair market rent for the land, which the trial judge accepted, was based on a flawed methodology.

471 We do not agree. The trial judge was entitled to calculate the fairness of the lease by comparing the rents it provided to fair market rents rather than to what Morris had previously received. The lease was to have effect in the context of Morris selling his interest in the company. As for the expert witness Robertson, he explained that his methodology added value for the unused lands surrounding the building covered by the lease. He did so because of the extent of these surplus

lands and because scrap yard properties derive considerable economic value from open land area. The trial judge did not err in accepting Robertson's opinion of the fair market rent based on this methodology.

ii. Contested Rulings in the Main Action

472 In addition to the appellants' attacks on the findings of fact made by the trial judge, they also challenge two rulings and all of the various legal bases on which the trial judge found liability in the main action. We will deal with each of these in turn.

(a) The Pleadings Amendment Ruling

473 At the end of January 1999, almost two months into the trial, counsel for Morris sought leave of the court to amend three paragraphs of the statement of claim in the main action. In essence, the proposed amendment withdrew the assertion that at the December 22, 1983 meeting, Chester and Ennis presented the share sale agreement to him with no forewarning and represented that it was at fair market value, but that the Centennial Parkway property was excluded. The proposed amendment substituted the assertion that at the December meeting Morris was presented with papers to sign which he neither read nor understood. It said nothing about any representations by Chester or Ennis.

474 In support of the motion, counsel filed an affidavit of Michael who said that he acted on his father's behalf in dealing with the lawyers in the preparation of the statement of claim and that he thought that the original paragraphs were an appropriate method of pleading representation by omission.

475 Counsel for Chester brought a cross-motion seeking, among other things, to cross-examine Michael on his communications with his lawyers.

476 The trial judge dismissed the cross-motion and allowed the amendments. In our view, she was correct to do so.

477 The trial judge first dealt with a motion to amend under Rule 26, which requires that at any stage of an action leave to amend be granted absent non-compensible prejudice. Since Morris had clearly and consistently taken the position reflected in the proposed new paragraphs of the claim from the time he was first examined for discovery in 1991, the trial judge could find no prejudice to the appellants. This conclusion is unassailable, the more so because, although the motion to amend followed Morris' cross-examination, counsel offered to produce him for further cross-examination on the amendment. Once the amendment was granted, this offer was not taken up.

478 The trial judge also dealt with this motion under Rule 51.05, which requires leave of the court to withdraw an admission. She correctly looked to Antipas v. Coroneos (1988), 26 C.P.C. (2d)

63 (Ont. H.C.J.) for the three-part test required by the rule: that the proposed amendment raise a triable issue; that the party provide a reasonable explanation for the change of position; and that there be no non-compensable prejudice. She found that test met here.

479 In our view, the paragraphs Morris sought to withdraw do not constitute an admission for the purpose of the rule. They are not statements of fact relevant to the case that Chester was seeking to make. Indeed, he expressly denied the allegations in these paragraphs in his own statement of defence. Chester did not rely on the misrepresentation alleged in those paragraphs; he did not seek to prove that he made representations to Morris that Morris was receiving fair market value.

480 However, even if these paragraphs are treated as admissions, the trial judge was correct in finding that the test in Antipas was met. The proposed amendment raised a triable issue and caused no prejudice. The finding of the trial judge that the explanation for the change in position offered by Michael was reasonable was one clearly open to her and one with which we would not interfere.

481 Moreover, that explanation - that Michael believed that the original pleading represented a proper way to plead what happened - would not have been affected by disclosure of the communications between Michael and Morris' solicitors. The relevant fact was Michael's belief, not where it came from. In any event, the trial judge properly ruled these communications to be privileged. She did not err in refusing to permit cross-examination on these communications.

482 We agree with the ruling of the trial judge.

(b) The Celia Butner Ruling

483 Counsel for Chester sought to have a signed statement of Ms. Celia Butner dated July 29, 1991 admitted into evidence for the truth of its contents.

484 Ms. Butner had been a long-time employee of Ennis. She was present with Ennis, Morris and Chester during all or part of the meeting in December 1983 at which the share sale documents were signed. As a legal assistant to Ennis, she had known the Waxman brothers for several decades. At the time of trial she was incapable of giving evidence due to her severe cognitive deficit.

485 The trial judge dismissed the request, finding that while necessity had been demonstrated, counsel had not shown sufficient indicia of reliability to warrant admitting the written statement for its truth. The appellants challenge that ruling in this court.

486 We agree with the trial judge's ruling. She properly applied the criteria of necessity and reliability required by the hearsay nature of the statement.

487 Ms. Butner's medical condition undoubtedly served to meet the necessity criterion. However, there was ample basis for the trial judge to conclude that the written statement lacked the threshold reliability to be admitted for its truth. Ms. Butner was a long-time employee of Ennis and the

statement was elicited by Ennis' lawyer in the context of litigation against him at a time when Ms. Butner was aware of key elements of her employer's defence and had helped to gather documents to support it. The statement was made some seven years after the events in question. The statement was reduced to writing by Ennis' counsel after counsel's interview with her. Neither her statements at the interview nor those as reduced to writing were made under oath or cross-examined upon. The interview was not recorded verbatim in any form. The written statement could possibly have been influenced by Ennis, as indicated by his letter to his counsel in which he sought to discuss a draft of the statement. And finally there were three drafts of the written statement. The last of these was signed by Ms. Butner, but it differed from counsel's notes of the interview giving rise to the statement. It was proper for the trial judge to conclude that the statement was not sufficiently reliable to be admissible.

iii. The Liability Issues in the Main Action

488 The trial judge began her discussion of liability in the main action by setting out the basic positions of the parties - positions which were reiterated in this court. We can do no better than to reproduce her summary at paras. 1202-04:

> Counsel for the Defendants strongly urge me to take a very technical, common-law/contractual approach to the issue of liability, and without saying so directly, advocate that I should ignore equitable considerations. They submit that all or most of the evidence to which I have already referred is irrelevant to an appropriate resolution. They ask me to treat the Share Sale as if it were a commercial transaction between two equally sophisticated and knowledgeable arm's length businessmen, who should have been expected to protect their own interests. They submit that one who signs a contract, without taking the trouble to read it, is liable and cannot plead ignorance of its terms.
>
> Submitting that this rule is a complete answer to Morris' claims, they say Chester should be allowed to enforce documents signed by Morris, as if Chester were an innocent arm's length commercial purchaser. They would have it that, having established Morris signed the Share Sale documents, he has no case. Having established that Morris signed the bonus minutes, he has no claim to a larger share of the bonuses. On their view of the law, Morris slipped up. He should have protected himself better, obtained more information, sought more advice. Morris and only Morris must bear responsibility for his own carelessness. "On all of the evidence, the only person responsible for this over-lengthy trial is the very person who participated actively and willingly in every event - Morris Waxman."
>
> The Plaintiffs submit that Morris' signing of Share Sale documents in December

> 1983 must be considered in context. Chester is not an innocent outsider seeking commercial certainty. He is not trying to enforce documents signed in circumstances about which he has no personal knowledge or involvement. Chester's actions, as well as Morris', must be carefully scrutinised. These events took place in a close family context. For Morris and Chester, business and family were inseparable. Chester knew of Morris' pride of place in IWS, his perception of self-importance arising out of responsibility for defined aspects of the IWS business and his exceptional trust in Chester. Chester knew Morris could not conceive that Chester would ever attempt to cheat him or IWS. Chester abused Morris' trust. He took advantage of Morris' vulnerability resulting from his dependence in financial matters exacerbated by poor health. Relief from contractual obligations is widely and frequently given on equitable grounds including breach of fiduciary duty, undue influence, unconscionability and under s. 248 of the Business Corporations Act [footnotes omitted].

(a) The Fiduciary Duty Issue

489 The trial judge primarily based her conclusion that Chester was liable to Morris on her findings that Chester had a fiduciary duty to his brother in connection with the share sale, the bonuses, and the Greycliffe profit diversions and that he breached that duty.

490 She came to the fiduciary duty finding by two routes. First, given the history of their lives and the way IWS had always been run, the brothers were partners in the business. The incorporation of the business in 1956 did not change that reality. She found that, as partners, Morris and Chester owed each other fiduciary duties. Indeed Chester conceded as much in his evidence.

491 Second, the trial judge applied the criteria developed in the jurisprudence to determine the existence of a fiduciary duty absent a traditionally recognized fiduciary relationship such as a partnership. She found that whether one uses the approach of the majority or that of the minority in the seminal case of Hodgkinson, supra, the conclusion is the same: the brothers owed each other fiduciary duties. She summarized her finding as follows at para. 1262:

> I find that, in all of the circumstances here, there was a fiduciary expectation that arose from the conduct and the relationship of the parties. Chester owed Morris fiduciary obligations in the exercise of his power and discretion over financial and legal matters, even as they affected Morris personally. They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied

> absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability.

492 The trial judge then went on to determine the scope of the fiduciary duty owed by Chester to Morris and found that in the context of their relationship, it encompassed a duty of good faith, a duty to avoid conflict and, most importantly, a duty of disclosure.

493 She set out her conclusion that Chester breached this duty to Morris in connection with the share sale in these words at para. 1283:

> Chester breached his fiduciary duty to Morris with respect to the Share Sale, the lease and other documents signed on December 22, 1983, when he failed to adequately disclose to Morris the fact of the sale and the nature of the documents. It was not enough to simply say "this is the sale and look over the documents." Chester asked Morris to sign documents he knew Morris had not read and would not read, to transfer shares he did not want to transfer. Chester knew Morris was ill. He did not disclose the other information set out above. I have found that Chester did indeed "trick"/"hoodwink" Morris into signing documents that day. Chester stood to benefit enormously. In all of the circumstances here, Chester clearly breached his fiduciary duty to Morris.

494 Her conclusion in respect of the bonuses was equally clear at paras. 1284-5:

> Morris relied upon Chester and reasonably expected he would act in IWS' and his own personal best interest. Given his 50% ownership, Morris was entitled to assume he would receive 50% of IWS profits and equity.
>
> Given the division of responsibility within the partnership, Chester's willing assumption of responsibility for financial matters, his cultivation of Morris' trust, and Morris' resulting total dependence and reliance on Chester in financial matters, his knowledge that Morris did not read corporate documents before he signed because corporate documents were Chester's responsibility, Chester owed Morris a duty to properly disclose the declaration of the 1979, 1981 and 1982 bonuses to Morris and obtain his consent. Chester did not do so.

495 Turning to the Greycliffe profit diversions, the trial judge found that Chester allowed Robert to use Greycliffe and related companies to extract exorbitant amounts from IWS that should have remained with the company, and that he kept Morris in the dark about this. She concluded as follows at paras. 1292-93:

> Chester knew that profit diversions to related companies were affecting IWS'

> profitability. He had the power to stop the improper profit diversions. He waited until shortly after the Share Sale to do so.
>
> Chester breached his fiduciary duties to Morris in respect of the profit diversions to Greycliffe and the other related companies. He failed in his duty of good faith, his duty of disclosure, his duty to avoid a conflict.

496 The appellants main challenge to these conclusions is to the findings of fact which underpin them. Apart from this, however, the appellants mount three legal attacks on these findings, all of which assume the facts as found by the trial judge.

497 First, the appellants contend that fundamental to the application of the fiduciary principle is the intention to contract and that the principle can be properly resorted to only if Morris intended to sell his shares to Chester. The appellants argue that the fiduciary principle cannot be used to find liability where a person signed documents but claimed he did not know the nature and character of the documents he was signing. The appellants contend that unless Morris can demonstrate the applicability of the concepts in cases like Marvco Color Research Ltd. v. Harris, [1982] 2 S.C.R. 774 (concepts like fraud, misrepresentation, and non est factum), the principle of personal responsibility requires that he be bound by his signature. That signature cannot be touched by the principle of fiduciary breach. This argument addresses the conclusions of the trial judge both in relation to the share sale and the bonuses.

498 Second, the appellants argue that no fiduciary duty can arise on the facts as found because they involve no more than the sale of shares by one shareholder to another and because Chester gave no express undertaking to act in Morris' best interest in connection with that transaction. This argument addresses the share sale but not the bonuses or the profit diversions.

499 Finally, the appellants argue that, in connection with the share sale, Chester did not breach his fiduciary duty should one be found to exist. The appellants contend that he did not withhold any material facts about the condition of the company or its value from Morris.

500 We will deal with each of these arguments in turn, but first it is important to be clear on the role of an appellate court in reviewing findings of fiduciary duty made at trial.

501 In Hodgkinson, at 425-26, LaForest J. made clear that significant deference must be granted on appeal to findings at trial on whether or not there was a fiduciary duty and whether or not there was a breach of such a duty. He said that absent manifest error, such as a material and identifiable error of law or a clear and identifiable error of fact in appreciating the evidence, an appellate court should not interfere.

502 We turn then to the appellants' first argument, namely that the fiduciary principle cannot be used to relieve Morris from the consequences of his own signature.

503 We disagree with this proposition. As LaForest J. said in Hodgkinson, at 405, the fiduciary principle is an equitable doctrine designed to protect vulnerable parties in transactions with others. It focuses on the relationship between the participants to the transaction and the presence of factors such as loyalty, trust and confidence that characterize the relationship as fiduciary. In LaForest J.'s words at 406 of Hodgkinson, "the fiduciary principle monitors the abuse of a loyalty reposed".

504 There is no suggestion in the jurisprudence that this principle can apply only where the fiduciary relationship and the abuse of loyalty exist in a transaction where a contract has been concluded by parties who mutually intend to do so. Quite the opposite. In Guerin v. Canada, [1984] 2 S.C.R. 335 at 384, Dickson J. said: "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."

505 The existence of a fiduciary duty depends on the precise circumstances of the particular relationship, not on the presence of any legal precondition such as the existence of a contract. Apt here is the phrase of Lord Scarman, repeated by LaForest J. in Hodgkinson, at 413-14: "[t]here is no substitute in this branch of the law for a meticulous examination of the facts".

506 Moreover, a scan of the jurisprudence on fiduciary duty quickly demonstrates its application in many circumstances that do not require a contractual relationship: see for example the relationships of parent/child (M.(K.) v. M.(H)., [1992] 3 S.C.R. 6); government/foster children (K.L.B. v. British Columbia, [2003] 2 S.C.R. 403); custodial/non-custodial parents (Frame v. Smith, [1987] 2 S.C.R. 99); and doctor/patient (McInerney v. MacDonald, [1992] 2 S.C.R. 138).

507 To do as the appellants argue would dramatically limit the utility of the fiduciary principle with untenable results. Where a dishonest fiduciary has persuaded his beneficiary to sign contractual documents, the fiduciary ought not to be better off because he has ensured that the beneficiary has no understanding of the documents whatsoever. In the context of this case, the fiduciary principle does not make Chester better off for ensuring that Morris did not understand what he was signing than he would have been had he explained to Morris the contents of those documents.

508 Nor can it be said that this application of the fiduciary principle undercuts the principle of personal responsibility reflected in cases like Marvco, supra. Unlike that case, this was not a commercial transaction done at arm's length between two business people. Morris and Chester had a relationship that developed over a lifetime. It was one of complete loyalty and trust in connection with the business of IWS and their interests in it. The evidence of the fiduciary nature of this relationship was overwhelming.

509 In these circumstances it was entirely appropriate for the trial judge to apply the fiduciary principle despite Morris' signatures, given that Chester had Morris sign knowing that he had no understanding of what was really going on, either with the share sale or the bonuses. While the result might have been different if Chester had persuaded the trial judge that Morris' signatures were

indeed fully informed, Chester's evidence to this effect was simply disbelieved. Thus we would not give effect to the appellants' first argument.

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

511 Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, Tongue v. Vencap Equities Alberta Ltd. (1994), 148 A.R. 321 (Q.B.), aff'd (1996), 184 A.R. 368 (C.A.); Dusik v. Newton (1985), 62 B.C.L.R. 1 (C.A.). Although a fiduciary relationship between parties may not always extend to a share sale between them, the evidence that it does so in this case is again overwhelming. We repeat the trial judge's findings that make this clear:

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

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

513 The appellants' third argument is that Chester did not breach his fiduciary duty to Morris in connection with the share sale because he did not possess any information material to the value of the share sale, which Morris did not also have. In our view, this argument entirely misses the mark. Not only did the trial judge find as a fact on the basis of ample evidence that Morris was unaware of much material information relevant to the value of IWS prior to December 23, 1983, she also provided a number of other examples: see paras. 1271-72 of her reasons.

514 Even more importantly, she found that Chester did not explain to Morris that he was being asked to sign share sale documents turning over his interest in IWS to Chester. Chester had Morris sign knowing that Morris trusted him implicitly and that Morris had no idea what was really going on. How could this be anything other than a breach of the fiduciary duty Chester owed to his

brother?

515 In short, we find that the appellants' legal arguments relating to fiduciary duty must all fail.

(b) The Undue Influence and Unconscionability Issues

516 The trial judge used both concepts as alternative bases for the remedies she ordered against Chester in connection with the share sale. The appellants argue that she erred in doing so in the absence of a finding that the share sale was a concluded contract to which Morris, at some level, consented. We find it unnecessary to address this issue. Given our other findings, the answer to the question posed by the appellants could have no effect on the outcome of this appeal.

(c) The Oppression Issue

517 The trial judge found that Morris was entitled to relief under s. 248 of the OBCA in connection with the share sale, the December 1983 lease, the 1979, 1981 and 1982 bonuses, the wrongful termination of his employment, and the profit diversions to Greycliffe and related companies. In each case she found that there was oppression warranting a remedy, although not always against the same defendants.

518 For the share sale, the December 1983 lease, the 1979 bonuses, and Morris' wrongful termination, Chester and IWS were found liable to Morris under s. 248. For the 1981 and 1982 bonuses, Chester, IWS, and Chester's three sons were found liable to Morris under s. 248. And for the profit diversions, Chester, IWS, Robert, and Robert's companies were found liable to Morris under s. 248.

519 Section 248 reads in part as follows:

> 248.(1) A complainant ... may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation of any of its affiliates effects or threatens to effect a result;
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests

> of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing ...
>
> (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
> (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
> (j) an order compensating an aggrieved person;
> (k) an order directing rectification of the registers or other records of a corporation under section 250 ...

520 The appellants raise a number of legal arguments to challenge the trial judge's findings under this section.

521 First, the appellants argue that Morris cannot resort to the oppression remedy where the acts he complains of, particularly the share sale (including the December 1983 lease) and the bonuses, were effected by his own signatures on various corporate documents. The appellant looks for assistance to s. 129(1) of the OBCA, which provides:

> 129.(1) A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or a committee of directors, is as valid as if it had been passed at a meeting of directors or a committee of directors.

522 We cannot agree with this submission. Morris' signatures were procured through Chester's breach of his fiduciary duty. We do not think that the deemed validity provided by s. 129(1) extends to signatures obtained in this way, at least as against the signatories who were owed that duty. If the Legislature had intended to eradicate such fiduciary obligations it would have done so explicitly. Moreover, nothing in s. 248 suggests that Morris' signatures on the corporate documents bar him from being a complainant under s. 248(1) or deprives the court of its broad discretion to conclude that the various actions were oppressive towards him.

523 Finally, s. 248(3) gives the court a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or

amending unanimous shareholder agreements, corporate articles or by-laws. This statutory language is to be given a broad interpretation consistent with its remedial purpose: see Ferguson v. IMAX Systems Corp. (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

524 On the facts as found by the trial judge, Chester conducted the business and affairs of IWS - the share sale, the lease, the bonuses, and the profit diversions - in a manner that was clearly oppressive of Morris' interests. The appellants do not contest that in this appeal. It was open to the trial judge to use her remedial jurisdiction under s. 248 to rectify the acts of oppression as she did even if there were otherwise valid corporate resolutions authorizing those acts.

525 The appellants' second argument is that only IWS can make a claim under s. 248 in respect of the bonuses since the monies paid out were from the corporation. The appellants claim that Morris cannot use s. 248 since his is a derivative claim only.

526 The simple answer to this argument is that Morris clearly qualifies as a complainant for the purposes of s. 248 as it was he who was personally aggrieved by the distribution of bonus monies for 1979, 1981 and 1982. This distribution was done at the expense of his interest in the company. That these claims could have been the subject of a derivative action does not prevent them from also constituting a proper case of oppression: see Jabalee v. Abalmark Inc., [1996] O.J. No. 2609 (C.A.).

527 Third, the appellants contend that using s. 248 to find liability against Warren, Robert, and Gary for receipt of the 1981 and 1982 bonuses is wrong in law. None of the sons was a shareholder or director of IWS.

528 Again there is a simple answer to this assertion. On the facts as found, there is no doubt that the payment of these bonuses was oppressive of Morris' interests. The recipients were not innocent strangers to this. As the trial judge found, the sons could not reasonably have ever thought that they deserved the bonuses or that Morris had agreed to them. Providing a remedy against them for accepting those monies properly rectifies the oppressive actions. The trial judge did not err in exercising her broad remedial authority under the statute to do so.

529 Fourth, the appellant argues that the oppression remedy ought not to be applied to capture conduct that occurred before the remedy came into force and that the trial judge erred in doing so. The oppression provisions of the OBCA came into force on July 29, 1983.

530 We do not agree. There is no doubt that the trial judge ordered relief under s. 248 for events that occurred, or at least commenced, before July 29, 1983. The 1979 bonuses preceded that date. Payments of the 1981 and 1982 bonuses began before that date but continued after it. So did the Greycliffe profit diversions.

531 The trial judge based this application of s. 248 on the finding that the oppression provisions, although not procedural, were intended to be retrospective in application: see Re Mason and

Intercity Properties Ltd. (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

532 We agree that the oppression provisions of the OBCA are not merely procedural. They provide significant substantive rights and remedies. However, because of the facts of this case, we need not decide whether there is a sufficiently clear expression of legislative intent to require that these provisions be given full retrospective application to conduct that was completely concluded before their enactment. Rather, we think that the essence of the trial judgment is that starting at least in 1979 and continuing well beyond July 1983, the appellants conducted the business of IWS in a way that was oppressive of Morris. This pattern of conduct, although it commenced before July 1983, was ongoing well after that date. This is equally true of the subcomponents of that pattern, such as the improper payment of bonuses and the Greycliffe profit diversions. They too were going on well after July 1983. This ongoing pattern of oppression is what Professor Sullivan describes as a continuing fact situation: see R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Markham: Butterworths, 1994) at 514-15.

533 In providing remedies under s. 248 for conduct that took place in part before July 1983, but that continued after this date, the trial judge was simply doing what the legislation expressly contemplates, namely making orders to rectify the pattern of oppressive conduct complained of. We do not need to decide if the legislation may be applied to a pattern of conduct that was fully concluded before the provisions became effective.

534 Fifth, the appellants contend that the trial judge erred in applying the oppression remedy to events that occurred five or more years before the claim was made.

535 Again, we disagree. The appellants seek assistance from Jaska v. Jaska (1996), 141 D.L.R. (4th) 385 (Man. C.A.). In that case the court determined that the counterpart Manitoba legislation could not reach back in time to the extent sought by the respondents. In Jaska, however, the result depended on a general limitation period imposed by the Manitoba Limitations of Actions Act, R.S.M. 1987, c. L150, which has no counterpart in Ontario, and in part on an exercise of the court's discretion in the circumstances of that case.

536 The trial judge understandably found the Jaska case of little assistance to her, because in this case there is no similar legislative provision and the oppression of Morris continued right up until the commencement of the action. The trial judge exercised her discretion to apply her broad remedial authority to the pattern of oppressive conduct that started in 1979. In doing so she neither abused her discretion nor ran afoul of any legislative limitation period.

537 Sixth, the appellant argues that the trial judge erred in applying s. 248 to order a remedy against IWS in connection with the share sale, since IWS was not a party to the sale. In our view, the trial judge was correct to do so. A dispute over a transaction that determined shareholder control of a corporation is one "in respect of" that corporation as that phrase is used in the opening paragraph of s. 248(2). As such, it clearly engages the court's jurisdiction under this section: see

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)), per Blair J.

538 Having found such a transaction here and having concluded that it was oppressive to Morris, the trial judge found that part of the appropriate rectification of that oppression was a remedial order against IWS itself because of its deep involvement in the process. This order represents no error in the exercise of her broad remedial authority, given the very significant participation of IWS in the oppression, as the trial judge spelled out graphically at para. 1387 of her reasons:

> The way in which the Share Sale was implemented deeply implicated IWS. Chester, acting as if he were already the 100% owner of IWS, put the resources of IWS at his own disposal to make his share purchase so that he would have 100% ownership of IWS. By causing the corporation to act, he engaged s. 248(2)(a). He arranged for IWS to declare a million-dollar dividend that he would use to pay for part of Morris' shares; for IWS to reallocate $412,000 of Morris' 1982 bonus to himself to pay for Morris' shares; for IWS to borrow $500,000 from Morris, interest-free; for Linton, the IWS comptroller, to issue an IWS cheque in the amount of $500,000 payable to Morris, even though the Share Sale Agreement provided that payments were to be made by Chester personally. By his actions and IWS' actions, Chester secured control of IWS. Chester made IWS a party to the December 1983 lease.

539 In short, the appellants' oppression arguments all must fail.

(d) The Knowing Receipt/Knowing Assistance issue

540 The trial judge employed the doctrines of knowing receipt and knowing assistance in dealing with two aspects of the main action, namely Morris' claim in connection with the 1981 and 1982 bonuses, and his claim in relation to the profit diversions from IWS to Robert's companies, primarily Greycliffe.

541 She found Robert, Gary and, Warren liable to Morris for knowing receipt of their 1981 and 1982 bonuses. She found that they had at least constructive knowledge that these bonuses were paid to them in breach of Chester's fiduciary duty to Morris. She ordered that they pay to Morris amounts equivalent to the full payments they received. This relief duplicates the relief granted under s. 248 of the OBCA to Morris against his three nephews in connection with those bonuses.

542 As to the profit diversions, the trial judge found Chester liable to Morris for knowingly assisting Robert to dishonestly divert the profits to Robert's companies in breach of his fiduciary duty to IWS (and therefore presumably to Morris as well). In the same way, she found Robert's companies liable to Morris for knowingly receiving these profits.

543 The trial judge ordered Chester to pay Morris an amount equal to fifty per cent of the profits

diverted and ordered Robert's companies to pay to Morris fifty per cent of the profits they each received. The relief ordered on this basis against Chester duplicated the relief based on s. 248 of the OBCA and the relief based on Chester's breach of fiduciary duty to Morris. The relief against Robert's companies duplicates that ordered against them pursuant to s. 248.

544 The appellants argue that the trial judge made two errors of law in applying the doctrines of knowing receipt and knowing assistance.

545 First, the appellants argue that these doctrines cannot apply where there is only a breach of fiduciary duty. Rather, they can only apply where the monies wrongly paid out are trust monies and here, the 1981 and the 1982 bonuses are simply corporate funds paid out pursuant to signed corporate resolutions.

546 We do not agree that these two doctrines have such a narrow compass. We agree with the trial judge that both are available in the context of a breach of fiduciary duty and not simply where trust monies are involved. Thus she did not err in applying these doctrines without concluding that either the 1981 and 1982 bonuses or the profit diversions constituted trust monies.

547 Laskin J.A. made clear that a breach of fiduciary duty may trigger the imposition of liability on third parties in Gold v. Rosenberg (1995), 129 D.L.R. (4th) 152, aff'd on other grounds [1997] 3 S.C.R. 767. Speaking for this court, he said at 154:

> Beginning with the judgment of Lord Selborne in Barnes v. Addy (1874), L.R. 9 Ch. App. 244, courts have imposed the obligations of a trustee on third parties who participate in another's breach of trust or breach of fiduciary duty. Third parties may be liable as "constructive trustees" if they knowingly receive trust property obtained in breach of trust (the "knowing receipt" cases) or if, without receiving trust property, they knowingly assist in its misapplication (the "knowing assistance" cases).

548 Paul Perell, in his article "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Advocates' Q. 94, makes the same point, namely that these equitable doctrines apply to both breaches of trust and breaches of fiduciary duty. An example of the latter application is found in MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255 (B.C.S.C.), cited with approval in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 at 239.

549 Moreover, in this context there is no reason in principle to differentiate between the beneficiary of a trust obligation and the beneficiary of a fiduciary obligation. Both are equally deserving of the protection of equity as against a third party who knowingly assists in the dishonest breach of that obligation or knowingly receives funds paid in breach of it.

550 The appellants' second argument is that Robert, Warren, and Gary can be found liable in knowing receipt for no more than one-half of the bonuses they received for 1981 and 1982.

551 We agree with this submission. The trial judge based her conclusion on the finding that Chester's sons knew that the source of the money used to pay those bonuses was the proceeds of the sale of the two divisions of IWS of which Morris owned fifty per cent. She further found that reasonable young men in their position would have known that the bonuses were a distribution of IWS equity and not the payment of reasonable compensation.

552 Although she did not say so expressly, the trial judge clearly concluded from these findings that Chester's sons had constructive knowledge that half their bonus monies represented Morris' equity in IWS and were paid to them in breach of Chester's fiduciary duty to Morris. The trial judge did not conclude that Chester's sons had constructive knowledge that Morris had a beneficial interest in one hundred per cent of the bonus monies they received for these two years. Nor could she have done so on these facts. As a distribution of equity, Morris had a beneficial interest in only half of it.

553 The elements of the doctrine of knowing receipt are set out in the Perell article, supra, at 110: a trust or fiduciary relationship; the third party receiving property from the trust or fiduciary relationship in his or her own personal capacity; and the third party having actual or constructive knowledge that the property was transferred in breach of trust or fiduciary duty. Thus liability for knowing receipt does not extend beyond the property which the third party knows (or is deemed to know) has been received in breach of trust or fiduciary duty.

554 In this case Chester's sons knew that their bonus monies for 1981 and 1982 represented a distribution of IWS equity, half of which was Morris'. Their knowledge (either actual or constructive) that Chester was in breach of his fiduciary duty to Morris by paying these bonuses could therefore extend only to the fifty per cent in which Morris had a beneficial interest; they could be liable in knowing receipt for no more than this amount.

555 Although the appellants do not expressly argue the point, the same logic applies to the remedy under s. 248 of the OBCA against Chester's sons in respect of the 1981 and 1982 bonuses. The payment of those bonuses constitutes an act of oppression against Morris in so far as the payment was made with Morris' fifty per cent share of the proceeds from the sale of the two divisions of IWS. And under s. 248(2), the order to rectify that matter must be limited to the fifty per cent of the bonuses received by Chester's sons for 1981 and 1982.

556 In the body of her reasons, the trial judge found that an order may be made against Chester's sons in respect of the receipt of the 1981 and 1982 bonuses both under s. 248 of the OBCA and in knowing receipt. In her summary of liability findings, the trial judge found Chester's sons liable to Morris for these bonuses only in knowing receipt. The formal judgment orders that they pay Morris the sum equivalent to the full amount of the bonuses. Whether that order is based on only the doctrine of knowing receipt or also on s. 248 of the OBCA, we amend it to provide for liability in an amount equal to fifty per cent of the bonuses received by Chester's sons for 1981 and 1982.

(e) Remedy for the Greycliffe Profit Diversions Issue

557 As we have described, the trial judge found liability on a number of different bases against Chester, IWS, Robert, Robert's companies, and Gary in relation to the profits diverted from IWS to Greycliffe and the related companies owned by Robert.

558 Chester was found liable for breaching his fiduciary duty to Morris by knowingly allowing the improper profit diversions. He was also found liable to Morris under s. 248 of the OBCA and for knowingly assisting Robert in breaching his fiduciary duty to IWS (and therefore presumably to Morris as a fifty per cent owner) by charging IWS rates that far exceeded competitive rates.

559 IWS was found liable to Morris under s. 248 of the OBCA as were Robert and Robert's companies. Robert's companies were also found liable to Morris in knowing receipt.

560 The trial judge then went on to find that because all the services provided by Greycliffe and related companies could have been done by IWS itself, all the diverted profits could have been retained within IWS. She therefore ordered Chester and IWS to pay to Morris an amount equivalent to fifty per cent of all profits received from IWS by Greycliffe and related companies after allowing for a modest additional management fee of $50,000 that IWS would have had to incur to perform these services itself. The various companies were all ordered to pay Morris fifty per cent of their individual profits from IWS.

561 Against this backdrop, the appellants make two legal arguments. First, the claim for profit diversions is a claim for the diversion of IWS corporate revenue and can only be made by IWS or by way of a derivative claim, neither of which was made here. The simple answer to this is that the trial judge found liability against these various parties on a number of legal bases that are quite independent of whether IWS could also have made a claim itself. The fact that IWS might have done so does not in any way undermine the validity of claims based on fiduciary breach, knowing receipt, knowing assistance, or s. 248 of the OBCA.

562 Second, the appellants argue that in ordering payment equivalent to fifty per cent of all the profits made by Greycliffe and Robert's other companies, the trial judge went too far. We agree with this. Morris was undoubtedly aware that Robert was providing some trucking and related services to IWS through companies like Greycliffe. His concern was that after the fact, he discovered that the level of profits received by those companies was so excessive as to be (in his own words) "a sin" rather than the reasonable rate of profit he would have anticipated. He was also candid in admitting that "reasonable" was to be assessed generously, since the profits were being earned by a member of the family, and that he would expect the same treatment to be accorded to his sons if and when they joined the business.

563 This reality was recognized by the trial judge when she identified just what it was that constituted Chester's breach of fiduciary duty to Morris, the oppression under s. 248 and Robert's breach of fiduciary duty: it was that Robert arranged for his companies to receive excessive profits for their services to IWS and that Chester knowingly permitted this to happen. The gravamen of the conduct was not that Robert's companies made any profit at all on these services, but that these

profits were more, indeed much more, than was reasonable.

564 Having found that excessive profits were what attracted liability, the trial judge's remedial order in Morris' favour could not properly extend beyond his share of that portion of the profits received by Robert's companies that was excessive. In basing her order on all profits received by these companies, the trial judge reached beyond the fiduciary breaches and the oppression that she had found. Her remedy also compensated for the payment of reasonable profits, which were the product of neither. She erred in so doing.

565 If the correct remedial order for the profit diversions should reflect only those profits that were excessive or unreasonable, the question is whether this court can make that order. While all parties made it clear that a new trial was to be avoided at all costs, the state of the record before us makes the challenge of fixing a proper remedial order a less precise exercise than is desirable. Nonetheless, in the interest of finality we must attempt it.

566 The evidence accepted by the trial judge showed that Greycliffe, the main provider of trucking services to IWS, was operating at a profit ratio of approximately fifty per cent or thereabouts, while the industry average hovered around five per cent. For this purpose we will take Greycliffe to be typical of Robert's other companies. Using this as a rough and ready tool of analysis we conclude that a profit ratio of half that or twenty-five per cent would constitute a reasonable level of profit for these companies in the circumstances. While still significantly above the industry norm, this profit ratio reflects that the profits were going to a family member and that the context here was the Waxman family.

567 On this basis, in operating at a fifty per cent profit ratio, half of all the profits received by Robert's companies were beyond the reasonable level of twenty-five per cent, and thus excessive. The order should therefore provide Morris with his half of that half. We amend the part of the order relating to profit diversions so that the amounts to be paid by Chester, IWS, Robert, and his companies are half of those ordered by the trial judge in each case.

(f) The Ancaster Property Claim

568 The trial judge found that Morris transferred this property to Warren because Chester promised that if he did so, Chester would "straighten out" the share sale. She found that both brothers understood that this meant returning the parties to their shareholdings prior to December 22, 1983. She concluded that since Chester breached his promise, Morris was entitled to receive damages for breach of contract equal to the value of the property at the time it was transferred to Warren.

569 The appellants argue that the trial judge erred in failing to conclude that this contract was fatally vague. We do not agree. The trial judge had ample evidence to conclude that the brothers fully understood what Chester was obligated to do in return for Morris transferring the property to Warren.

570 The appellants also argue that Morris is not entitled to this relief if he also succeeds in having the court return him to his shareholding position as it existed prior to December 22, 1983. We agree with this and indeed counsel for the respondents candidly conceded as much in argument. In effect, Morris will have received Chester's performance of his promise through court order and should not receive damages as well. Thus we order that the trial judgment be amended in this respect.

(g) The Constructive Trust and Tracing Issues

571 The trial judge's findings of liability in the main action were based fundamentally on breach of fiduciary duty, undue influence, unconscionability, and oppression under s. 248 of the OBCA. While we have not found it necessary to deal with undue influence and unconscionability, the breach of fiduciary duty entitled the court to turn to equitable principles in devising appropriate remedies. So too did s. 248. The task under s. 248 is very much the same since s. 248(3) empowers the court upon a finding of oppression to make any order "it thinks fit". It is important to keep in mind that the various remedies the trial judge ordered were made in this context.

572 In connection with the share sale, the trial judge imposed a constructive trust. She ordered that Chester held fifty per cent of the shares of IWS on constructive trust for Morris from December 22, 1983 (the date of the share sale) to June 27, 2002 (the date of her judgment), when she ordered Chester to transfer the shares from his name to Morris' name. She provided a remedy for the profits and the equity taken out of the company during the existence of the constructive trust by ordering that Morris could elect one of two ways, which she described in detail, for calculating his fifty per cent of those amounts. She then ordered that to recover his share of these post-sale payouts, Morris could elect between a proprietary remedy, namely a constructive trust on his portion of those amounts, or a personal remedy against both Chester and IWS for damages equivalent to his portion of those amounts.

573 In connection with the 1979 bonuses, the trial judge ordered that both Chester and IWS were liable to pay Morris $125,000, which was equivalent to fifty per cent of those bonuses. She ordered that Morris could elect a proprietary remedy as an alternative which would yield an order that Chester had held Morris' $125,000 on constructive trust for Morris since December 17, 1979.

574 For the 1981 and 1982 bonuses her remedies were much the same. Morris was entitled to a personal judgment against Chester for his fifty per cent (less what Morris in fact received) or to elect an order that these sums were subject to a constructive trust. She also held that Robert, Warren, and Gary were personally liable for the bonus amounts they received for 1981 and 1982 (which, as we explained earlier, we have reduced by one-half).

575 The trial judge used the same approach for the profit diversions to Greycliffe and Robert's other companies. Personal remedies were ordered against Chester, IWS, and Robert for Morris' fifty per cent share of those profit diversions and against each of the companies for fifty per cent of the profits they received. She again permitted Morris to instead elect a proprietary remedy and to choose that any portion of his fifty per cent be subject to a constructive trust.

576 The trial judge also ordered Chester to pay punitive damages of $350,000 in connection with the share sale, the bonuses, and the profit diversions.

577 Finally, to support the constructive trust remedy, the trial judge ordered a tracing process to permit Morris to attempt to trace the amount subject to constructive trusts into the hands of persons other than bona fide purchasers for value without notice. She also found that none of Robert, Warren, or Gary qualified as such persons. This process would permit Morris to make an informed election between the personal and the proprietary remedies provided for as alternatives by her judgment.

578 The appellants argue that the trial judge erred in several respects in this exercise of her remedial jurisdiction. Before turning to the specific arguments, it is worth reiterating that the remedies ordered all flowed from the trial judge's use of (1) the equitable tools of fiduciary breach, undue influence, and unconscionability and (2) the broad remedial powers given by s. 248 of the OBCA. All her remedies are therefore entitled to significant deference in this court: see McBride Metal Fabricating Corp. v. H & W Sales Co. (2002), 59 O.R. (3d) 97 (C.A.); Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563 (C.A.).

579 The appellants first argue that the trial judge erred in the exercise of her discretion in reinstating Morris as a fifty per cent shareholder with the accompanying share of post-sale profits, since this is a business to which he has not contributed and in whose management he has not participated for twenty years. Rather, Morris should simply be entitled to damages for lost opportunity, measured by the difference between the fair market value of IWS on December 23, 1983 and the price set in the share sale agreement.

580 The answer to this is twofold and straightforward. First, it would effectively ignore the trial judge's finding that Morris never intended to sell his shares. Second, as LaForest J. said in Hodgkinson, at 440, equity's objective in a circumstance like this is restitutionary, namely to put Morris in as good a position as he would have been in had the fiduciary breaches not occurred. Moreover, particularly where the breach is found to be dishonest, equity does not permit the failed fiduciary to profit from his wrongdoing. The remedies ordered by the trial judge in relation to the share sale and the post-sale profits accomplish just that. They restore Morris to his ownership position as it was before December 23, 1983. They also recognize his entitlement as owner since that time. They permit Chester and his sons reasonable bonuses beyond their generous salaries for their contributions to IWS during the period of the constructive trust. In our view, these remedies are appropriate. They represent no error in the exercise of the trial judge's remedial discretion.

581 The appellants also argue that the trial judge erred in making her tracing orders, saying that she used them as an additional remedy. They contend that a tracing order cannot be used as a remedy, but is merely a process. The appellants also argue that the tracing orders are too invasive of the lives of Chester and his sons to be a proper exercise of judicial discretion.

582 We do not agree. The tracing orders here do not constitute additional remedies. They simply

provide the process by which Morris can attempt to trace the property in which he has a beneficial interest through the remedy of constructive trust. If the process is successful, it is the constructive trust that will provide Morris with his remedy should he elect it. As that process unfolds, those into whose hands the property can be traced will be able to advance any defences available to them.

583 While the trial judge has precluded Chester's sons from advancing the defence of being bona fide purchasers for value without notice, her finding in this regard is overwhelmingly supported by the evidence. Her order that the 1979 bonuses can be traced into their hands for the purpose of the constructive trust remedy is quite consistent with her finding that they are not personally liable in knowing receipt for these amounts. The former is simply a proprietary remedy based on Chester's breach of fiduciary duty to Morris in paying the 1979 bonuses.

584 Nor can it be said that these tracing orders, as invasive as they may be, are so invasive of the lives of Chester and his sons as to be an erroneous exercise of the trial judge's remedial discretion. These orders are the natural corollary of the constructive trust orders made by the trial judge, which in turn are the consequence of the egregious breaches by Chester and his sons of their equitable obligations.

585 The appellants' third submission is that the trial judge erred in ordering punitive damages both because the circumstances lacked the necessary blameworthy conduct and because there was no finding of an actionable wrong independent of the breaches of fiduciary duty found by the trial judge. This argument also fails. The trial judge concluded that Chester's conduct met or surpassed the requirement that it be sufficiently malicious, oppressive, and high-handed as to deserve public censure by the court. On the facts as found, that conclusion is unassailable.

586 Moreover, where liability is founded on breach of fiduciary duty, an independently actionable wrong is not a precondition of punitive damages. Although that is necessary in an action based on breach of contract, where this "private law" agreed to by the parties defines the extent of their obligations to each other, the situation is different where the common law imposes an obligation on one to act as a fiduciary for another. In Norberg v. Wynrib, [1992] 2 S.C.R. 226 for example, McLachlin J., writing for herself and L'Heureux-Dubé J., found an award of punitive damages for breach of fiduciary duty to be appropriate without finding an independently actionable wrong. In doing so, she cited with approval the following passage from M.V. Ellis, Fiduciary Duties in Canada (Don Mills: Richard DeBoo, 1988) at 20-24:

> Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest.

587 Finally, in her supplementary reasons, the trial judge makes clear that Robert, Warren, and Gary are personally liable in knowing receipt for the post-sale profits they received. Although the appellants have not raised it, we amend this part of her judgment by ordering that their liability is

limited to one-half of the sums so received. We do so on the same basis as we did for the 1981 and 1982 bonuses, namely that they could not have had constructive knowledge that any more than one-half of these sums belonged beneficially to Morris.

588 In summary, with the modest exceptions we have set out, we find no error in the trial judge's legal analysis in the main action.

589 We therefore vary the judgment in the main action but only in the following respects:

a) Robert, Warren and Gary are liable for only one half of the 1981 and 1982 bonuses that they received: see para. 556.
b) Chester, IWS and Robert and his companies are liable for only one half of the amounts ordered by the trial judge in relation to the Greycliffe profit diversions: see para. 567.
c) The order for damages in relation to the Ancaster property is set aside: see para. 570.
d) Robert, Warren and Gary are liable for only one half of the post sale profits that they received: see para. 587.

C. The Grounds of Appeal Relating to SWRI

590 Three separate claims in the litigation involved SWRI. In one action, Morris, Michael, and SWRI claimed that Chester, Robert, Gary, and IWS had induced Philip to breach its contract with SWRI. Chester and his children counterclaimed in that action, alleging that their shares in SWRI had been transferred to Michael and Douglas improperly and without their consent. The trial judge found Chester, Robert, and IWS liable to SWRI for inducing the breach of the contract with Philip and assessed damages at large at $2.5 million and punitive damages at $100,000. She dismissed the counterclaim, finding that Chester's children had consented to transfer their shares in SWRI to Morris' sons.

591 In the main action, IWS counterclaimed against SWRI, Morris, Michael, Shirley, and Douglas for theft of its business and corporate opportunities. The trial judge dismissed the counterclaim, except on three minor matters, which are not in question in this appeal. In dismissing the counterclaim she found that Chester and IWS were aware of and consented to SWRI's handling of all of the business that IWS had handled.

592 Chester, Robert, and IWS appeal all three adverse findings. Their three general submissions are:

1. The trial judge erred in finding Chester, Robert, and IWS liable to SWRI for inducing the breach of its contract with Philip; in the alternative she erred in her assessment of damages.

2. The trial judge erred in finding that Chester's children consented to the transfer of their shares in SWRI to Michael and Douglas.
3. The trial judge erred in dismissing IWS' counterclaim for theft of its business and corporate opportunities.

The factual background to these three submissions is set out at paragraphs 225 to 269 of these reasons.

i. The Inducing the Breach of Contract Claim

593 Beginning in 1982, Morris and then Michael developed a close and valuable business relationship with Alan Fracassi, the principal of Philip. SWRI provided the customers and invoiced them and Philip supplied the trucking services to haul their waste. Morris issued his claim in the main action in 1988 and in January 1989 IWS counterclaimed not only against SWRI, Morris and Michael, but also against Philip for misappropriation of waste accounts allegedly belonging to it. On March 7, 1989, Philip wrote to SWRI terminating their six-year business relationship. That same day, IWS dropped its counterclaim against Philip. The termination of Philip's relationship with SWRI had dramatic financial consequences: SWRI was effectively put out of business, as its profits decreased by ninety per cent, while Philip's profits skyrocketed, nearly doubling in less than a year.

594 It was in this context that the trial judge held IWS, Chester, and Robert liable to SWRI for inducing the breach of its contract with Philip. In so holding she applied the elements of the tort of inducing breach of contract to her factual findings. The appellants do not challenge her legal analysis. Instead, they attack her findings of fact and credibility. For the brief reasons that follow, we conclude that her findings are well supported by the record, disclose no palpable and overriding error and, therefore, are unassailable on appeal.

595 To succeed in its tort action for inducing breach of contract SWRI had to prove these five elements:

1. It had a valid and enforceable contract with Philip;
2. The defendants, IWS, Chester, and Robert, were aware of the existence of this contract;
3. The defendants procured the breach of the contract;
4. The breach was effected by wrongful interference on the part of the defendants; and
5. As a result of the breach it suffered damages.

See Posluns v. Toronto Stock Exchange and Gardiner, [1964] 2 O.R. 547 (H.C.), aff'd [1966] 1 O.R. 285 (C.A.), aff'd [1968] S.C.R. 330. The trial judge concluded that SWRI had made out these five elements. We agree with her conclusion.

596 Although Philip and SWRI had exchanged draft agreements, they never formalized their

arrangement in a written contract. Nonetheless, the trial judge found that the parties had a valid and enforceable contract arising out of their negotiated agreements to transport and process waste for every major SWRI customer. There is no basis to interfere with that finding. It satisfies the first element of the tort.

597 The appellants acknowledged that they were aware of the contractual relationship between SWRI and Philip. Their awareness satisfies the second element of the tort.

598 Both at trial and on appeal the main issue was whether SWRI had made out the third element of its cause of action: did the appellants procure the breach of the contract? Each side told a different story of why Philip terminated the contract in March 1989. The appellants, bolstered by the testimony of Fracassi, claimed that Philip ended its relationship with SWRI because it discovered that SWRI had "cheated" it on the Lasco contract. According to Fracassi, Michael gave him altered copies of the three agreements between SWRI and Lasco that we referred to earlier - the letter agreement of October 24, 1986, the settlement agreement of February 24, 1987, and the proposed letter of November 1988 - to hide the amount of profit SWRI was earning on the Lasco contract. The altered copies showed reduced transportation charges to Lasco for hauling its waste. Fracassi claimed that he first saw authentic copies of these agreements between SWRI and Lasco in reviewing documents given to his lawyer by lawyers for Robert, Chester, and IWS in March 1989. On discovering the discrepancies he severed Philip's relationship with SWRI.

599 Morris and Michael denied the appellants' version of what occurred. They contended that the appellants pressured Philip to sever the relationship in order to drive SWRI out of business. According to Morris and Michael, the appellants offered two inducements: IWS would drop its counterclaim against Philip and IWS would not compete for any of the business that SWRI and Philip had developed, not even business that had originated with IWS. Morris and Michael claimed that Robert altered the Lasco documents in early 1989 and gave them to Fracassi to provide him with a pretext for ending Philip's business relationship with SWRI.

600 The trial judge accepted Morris and Michael's evidence and their account of what occurred. She therefore found that the appellants had procured or caused the breach of the contractual relationship between SWRI and Philip. She wrote:

> After February 20, 1989, IWS did not release Philip from its counterclaim until Philip agreed to stop doing business with SWRI. I find that Robert insisted that Philip cease doing business with SWRI as a condition of the dismissal of IWS' counterclaim against it. Philip at first refused to do so, eventually relenting only after Robert provided them with forged documents, which suggested SWRI had defrauded Philip and when Chester/IWS offered other financial incentives (para. 1762).

She concluded that the appellants had induced the breach intentionally. At para. 1780, she wrote: "The termination of Philip's contractual relationship with SWRI was precisely what Chester and

Robert intended. They knew SWRI would be severely damaged as a result."

601 The evidence amply supports the trial judge's conclusion that SWRI had proved the third element of its cause of action. This evidence includes the following:

a) The timing of Philip's termination of its relationship with SWRI Philip ended the relationship with SWRI the very day IWS dropped its counterclaim against Philip. The trial judge properly rejected Fracassi's evidence that the timing was a coincidence.

b) The altering of the Lasco documents

The appellants alleged that Michael altered the documents and used them to conceal SWRI's profits. Michael denied this allegation and the trial judge accepted his denial, as she was entitled to do. Instead, she found that Robert altered the documents in early 1989 and gave them to Fracassi, who, knowing they were false, used them as a pretext to terminate his relationship with SWRI. Her finding is supported by the invoices SWRI sent to Lasco, which show transportation charges consistent with the authentic agreements; and by the different stories Fracassi and Robert told about how each "discovered" that the Lasco agreements had been altered. According to Robert, he met Fracassi at the Centennial Parkway offices, and in the course of going through files Fracassi had brought with him, discovered that some of the Lasco documents in those files differed from those in SWRI's files. According to Fracassi, however, no such meeting took place. Fracassi said he stopped doing business with SWRI after Robert's lawyers sent the authentic documents to his lawyer and he compared them with the altered documents. Not surprisingly, the trial judge rejected these "confusing, inconsistent and unpersuasive" stories.

c) Fracassi's first exposure to the altered Lasco documents

This point is closely related to the last point. Fracassi's story hinged on his claim that he received copies of the altered documents at the time each was written, that is, in October 1986, February 1987, and November 1988. He said that because he was a joint venture partner with SWRI he received copies of all contracts between SWRI and its customers.

Two pieces of evidence undermine Fracassi's claim: Michael's evidence, which the trial judge accepted; and the nature of the arrangement between

> Philip and SWRI on the Lasco account. Although SWRI and Philip were joint venture partners for other customers, on the Lasco account they were contractor and subcontractor. As a subcontractor Philip was not entitled to receive and did not receive copies of the agreements between SWRI and Lasco.

d) Philip's motive

> Philip obviously had a strong motive to end its contract with SWRI. Because of the appellants' promise not to compete, Philip stood to maintain all the SWRI business and to reap all the profits instead of having to share them.

e) Philip's termination letter

> This letter made no reference to the altered Lasco documents or to Philip having been cheated as a basis for terminating its relationship with SWRI.

602 SWRI easily established the last two elements of its cause of action. The appellants had no lawful grounds for interfering with the contract between SWRI and Philip, let alone by proffering tampered documents to justify Philip's termination of its relationship with SWRI. And SWRI sustained substantial damages because of the breach of contract: its profits fell by approximately $2.7 million in the first year after the breach. For these reasons we uphold the trial judge's finding of liability.

603 The appellants argue in the alternative that if they are liable for inducing breach of contract, the damages "at large" awarded by the trial judge, $2.5 million, are excessive and should be substantially reduced. We see no merit in this submission.

604 The trial judge largely accepted the evidence of the respondents' expert, Vettese, and relied on one of his four alternative loss calculations. She set out her key finding at para. 1800 of her reasons:

> Based on Michael's evidence, I find that of the four sets of assumptions used by Vettese, the assumptions in Alternative D and damages of $2,770,000-$2,840,000 are the most appropriate. However I find that those assumptions are conservative given the evidence of Michael, which I accept about expectations of growth in the business. Vettese's calculations do not include all of SWRI's customers.

After making various adjustments she arrived at a figure of $2.5 million.

605 The appellants challenge the assessment by challenging Vettese's assumptions. In his loss calculation, which was relied on by the trial judge, Vettese assumed that SWRI's customers at the date of breach would continue to do business with SWRI for the expiry of their contract term and an additional renewal term. The appellants submit that this assumption was not reasonable because Lasco, SWRI's most important customer, and perhaps other customers, too were dissatisfied with SWRI's rates and were looking for another waste handler. We do not accept this submission for the simple reason that after the breach Philip maintained the Lasco account and most other SWRI accounts.

606 The appeal against the finding of inducing breach of contract and the award of damages therefore fails.

ii. The Share Transfer Issue

607 As we have said, SWRI was incorporated in 1977 with two thousand preference shares and one hundred common shares. IWS held the preference shares. Ramsay Evans and Hayman, lawyers at the firm of Evans Husband, held the common shares in trust: fifty for Morris' three children and fifty for Chester's four children. By the time of trial, the IWS corporate records showed that the preference shares had been eliminated and that Michael and Douglas owned all of the common shares.

608 The appellants alleged that they discovered this change in SWRI's shareholdings in the summer of 1988. They counterclaimed for misappropriation of their shares in SWRI. They pointed out that there was no board of directors resolution cancelling the preference shares; there were no consents to the transfer of the common shares; and there was no compliance with Article 9 of SWRI's letters patent, which required written evidence of a share transfer.

609 The trial judge dismissed the counterclaim. Although troubled by the absence of corporate records documenting the restructuring, she found that the appellants had knowingly consented to the elimination of the preference shares and the transfer of the common shares. She found that the share restructuring took place in Ennis' law office in 1982 and was backdated to 1979. She also found that Chester actively directed the restructuring, largely to be able to claim that he, his sons and Morris never had anything to do with SWRI, thus permitting them to escape the scrutiny of anyone seeking to enforce the Laidlaw/Superior non-competition covenants. The trial judge ordered that, if necessary, SWRI's minute book and share registry be rectified to reflect what she found was everyone's intention: that Michael and Douglas own and run SWRI, and that IWS, Chester and his children have no further interest in it.

610 The appellants make two arguments on appeal: first, that the trial judge's finding of consent was unsupported by the evidence and contrary to the sworn testimony of Chester's sons; and second, that the transfer of the common shares was ineffective because of non-compliance with Article 9 of

SWRI's letters patent. We do not accept either argument.

611 Ennis' account to Morris dated September 29, 1982, and his handwritten notes show that his office effected the restructuring of SWRI in 1982. The corporate records of SWRI showed that the restructuring was backdated to August 1, 1979. A minute of that date shows that Hayman,[2] as trustee, transferred fifty common shares to Michael Waxman and fifty common shares in trust to Cook, a legal assistant in Ennis' office. A later minute dated May 4, 1981 shows that Cook transferred the fifty shares she held in trust to Douglas Waxman.

612 The principal question the trial judge had to resolve was whether Chester's sons consented to the transfer of their common shares to Morris' sons. The secondary question was who bore responsibility for eliminating IWS' ownership of the preference shares.

613 In support of their claim that Morris orchestrated the restructuring of SWRI without their consent, the appellants pointed to the following evidence: the sworn testimony of Chester's sons that they did not consent to the transfer of their shares; Ennis' evidence that he took instructions on the restructuring from Morris and Ennis' September 29, 1982 account, which was sent only to Morris; the absence of any written consent; and the absence of any corporate records reflecting the elimination of the preference shares.

614 The trial judge, nevertheless, found that Chester directed the restructuring of SWRI, including eliminating the preference shares, and that Chester's children consented to transfer their common shares to their cousins. In our view, her findings are not tainted by any palpable and overriding error. Instead, they are supported by several important pieces of evidence.

a) The Evidence of Hayman

615 Hayman, whose evidence the trial judge accepted, testified that though he could not recall obtaining the consent of Chester's children or signing backdated documents, his normal practice was to seek consents from the beneficiaries before signing off on their behalf or agreeing to a backdating and he could think of no reason why he would depart from his practice in this case. As we have said at para. 337 of these reasons, Hayman's evidence of his normal practice may not be especially strong evidence but it is some evidence of what occurred.

b) The Timing of the Restructuring

616 The restructuring took place in 1982. At that time SWRI was a near dormant company with revenues of less that $40,000. It had no value to Chester or Robert.

c) The Reasons for the Restructuring

617 The trial judge accepted Morris' evidence that the restructuring of both the common and preference shares was done for two main reasons: to ensure that IWS, Chester, Robert, and Morris

had no connection to the company and, therefore, could not be found in breach of the non-competition covenants with Laidlaw/Superior; and to give Michael a business to pursue, which would keep him away from IWS. These reasons for the restructuring provided cogent support for the trial judge's key finding of consent.

d) Chester's Role in Business Decisions Affecting IWS

618 The trial judge rejected Ennis' evidence that Chester played no role in the restructuring and instead found that he actively directed it. This finding was open to her on the evidence. Indeed, it was consistent with Ennis' acknowledgement that Chester was actively involved in all important business decisions affecting IWS.

e) The Active Operations of SWRI

619 SWRI carried on an active business from offices at the Centennial Parkway building, as did IWS and Robert. It defies credulity that Chester did not know until the litigation started who owned and ran SWRI.

f) The Disappearance of the Written Consents and Other Records of SWRI Reflecting the Restructuring

620 In 1988 or 1989, after the litigation started, Robert Waxman went to the Evans Husband law office and went through the original SWRI file. The trial judge found that when he did so, he removed the consents. This finding was based on the evidence of opportunity and Robert's answers on his cross-examination, referred to at para. 1902 of the trial judge's reasons:

A. There may have been a file there one day I was there with Ross Husband.

Q. Right. And I suggest to you you were allowed to look through it?

A. I don't know if I looked through it or not.

Q. Is it reasonably possible that you did?

A. Not necessarily.

Q. Do you deny looking through it?

A. No, I don't.

Q. And in fact, did you take documents out of that file?

A. No.

Q. Are you sure?

A. No. [emphasis in original]

621 The appellants urged that the trial judge misunderstood the significance of Robert's second "No". As we have said at para. 362 she may well have misapprehended this piece of evidence. But in the light of the evidence of opportunity and the trial judge's overall assessment of Robert's credibility, she committed no palpable and overriding error in inferring that Robert used his review of the SWRI files to purloin the consents.

622 For all these reasons, the appellants' attack on the trial judge's finding of fact that they consented to the restructuring of SWRI must fail.

623 Nor can the appellants succeed in their alternative argument that the restructuring did not comply with Article 9 of SWRI's letters patent. Article 9 provides that no share should be transferred "without the sanction of the directors of the Corporation expressed either by resolution passed by the board or by an instrument or instruments in writing signed by a majority of the directors". The records of SWRI produced at trial did not contain any documents transferring the common shares that would satisfy Article 9. Similarly, the records of SWRI did not contain a board resolution or other document cancelling IWS' preference share certificate.

624 Still, the validity of the restructuring depended not on formal documentation, but on the consent of the shareholders. Consent is a question of fact. And as we have already said, the trial judge's finding of consent is supported by the evidence, and reflects no palpable error.

625 Moreover, we agree with the trial judge that s. 250 of the OBCA gave her the discretion to rectify SWRI's corporate records to give effect to the restructuring she found had occurred. Sections 250(1) and (2)(a) provide:

> 250.(1) Where the name of a person is alleged to be or have been wrongly entered or retained in, or wrongly deleted or wrongly omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the court for an order that the

registers or records be rectified.

(2) In connection with an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a) an order requiring the registers or other records of the corporation to be rectified;

...

The discretion vested in the court under this section is broad: see Re Teddy Bear Valley Mines Ltd., [1993] O.J. No. 1588 (Ont. Ct. (Gen. Div.)). This discretion supports the trial judge's rectification order.

626 Accordingly, we do not give effect to the appellants' appeal from the dismissal of their counterclaim for misappropriation of the shares of SWRI.

iii. The IWS Claim for Theft of Business and Corporate Opportunities.

627 The appellants did not press this submission in oral argument. In their factum, however, they contended that Morris breached his fiduciary duty to IWS by misappropriating waste accounts and other corporate opportunities belonging to it for the benefit of SWRI. They submit that the trial judge erred in failing to find a breach of fiduciary duty. They focus on four particular waste accounts: Stelco, Proctor and Gamble, Domtar, and Munroe.

628 In advancing this submission the appellants rely on the principle exemplified in Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592: a person owing a fiduciary duty to a company is precluded from appropriating for himself property, a business advantage, or corporate opportunities belonging to the company. A fiduciary who does so must disgorge the misappropriated profits. This principle seeks to avoid conflicts between a fiduciary's personal interest and duty to the company.

629 Morris Waxman was a director and then the president of IWS. He therefore owed a fiduciary duty to IWS during the period he transferred waste accounts belonging to IWS to SWRI, the company run by his sons.

630 However, Morris has a defence to his transfer of IWS' accounts to SWRI: the informed consent of the shareholders of IWS. The only two shareholders of IWS were Morris and Chester. The trial judge found as a fact that Chester and IWS actively consented to the business activities of SWRI and the transfer of the accounts from IWS to SWRI. She specifically found that Chester and IWS consented to the transfer of the four waste accounts singled out by the appellants. The absence of a directors' or shareholders' resolution formalizing IWS' and Chester's consent was immaterial

because consent is a question of fact, and in a closely-held company such as IWS, where the brothers had ongoing discussions about the company's business, a formal resolution would not be expected.

631 Thus the appellants' submission that the trial judge erred in finding Morris did not breach his fiduciary duty to IWS is nothing more than an attack on the trial judge's finding of consent. Yet that finding is amply supported by the evidence. As the trial judge pointed out, Chester had several good reasons for consenting to the transfer of IWS' waste accounts to SWRI. Chester wanted to mollify his brother about the share sale; he considered the waste business unimportant and had no interest in it; he wanted a corporate vehicle to keep Michael away from IWS; and the non-competition covenants with Laidlaw/Superior precluded IWS from handling many of these waste accounts, one of which was Stelco.

632 The appellants did not demonstrate that the trial judge made any reviewable error in her finding of consent. They submit, however, that to avoid liability for breach of fiduciary duty, Morris needed more than the informed consent of the shareholders. He also had to show that IWS was not in the waste business or had wholly withdrawn from it. The appellants say Morris could not do this because IWS remained in the waste business.

633 As the trial judge accurately pointed out, the case law does not support this second requirement. Informed consent alone provides a defence even if the fiduciary is pursuing a business opportunity that conflicts with the business of the company: see Canadian Aero Services v. O'Malley, supra at p. 606.

634 Moreover, even if Morris had to satisfy this second requirement, the trial judge found as a fact that he did so. IWS did not carry on and did not intend to carry on a broad-ranging waste management business. It engaged in a very limited waste business for a few of its scrap metal customers. The trial judge found that the specialized industrial waste business pursued by SWRI did not overlap with the limited waste business undertaken by IWS. We have no basis to set aside this finding.

635 For these reasons the appeal of the dismissal of the counterclaim for misappropriation of IWS' waste accounts fails.

D. The Wrongful Dismissal Appeal

636 In Morris' action for wrongful dismissal, the trial judge found that he was dismissed by IWS without cause on October 26, 1988. She awarded Morris $64,672 in damages based on two years' notice. She calculated this using only his basic annual salary of $33,185 exclusive of any draws or other special payments from IWS, which he typically received prior to his discharge. She did so on the basis that the latter would be encompassed in the determination of post-sale profits described previously.

637 We see no basis to quarrel with either the notice period or the damage calculation and indeed the appellant IWS raises neither in argument.

638 The appellant company contests only the findings of fact that sustain the trial judge's conclusion, particularly those in relation to SWRI, which it says constitute cause. Second, it argues that Morris' conduct after his discharge should be found to constitute just cause.

639 We have already found that there is no basis to interfere with the findings of fact by the trial judge. And there is simply no basis in law to find that his conduct after termination can constitute just cause for his earlier dismissal.

E. Ennis' Appeal

640 As we have already noted, Ennis had been the Waxman family's lawyer for many years. On the share sale he acted for both Morris and Chester. In 1989, Morris and Morriston sued Ennis in a separate action for failing to meet his legal obligations in connection with the share sale and lease.

641 The trial judge found Ennis liable for breach of fiduciary duty, breach of contract, and negligence. She largely rejected his explanation for his actions. She concluded that he should not have acted for either brother on the sale because of the inevitable conflict in acting for both. She found that, having decided to act, he failed to meet even his most minimal obligations to Morris, including failing to explain to him the share sale and lease documents.

642 The trial judge concluded that had Ennis met his legal obligations, Morris would not have sold his shares and Morriston would not have signed the lease. Because of Ennis' breach of his fiduciary duty, Morris lost the profits from his one-half interest in IWS and Morriston incurred losses on the December 1983 lease. The trial judge found Ennis jointly and severally liable for those losses in the same amount that she had found Chester liable in the main action.

643 Ennis appeals both the finding of liability against him and the damages award. His appeal on liability depends on overturning the trial judge's finding that Morris did not know that he was selling his shares. His appeal on damages seeks to limit the equitable damages ordered by the trial judge or to substitute common law damages.

i. Ennis' Appeal on Liability

644 Ennis challenges several adverse findings of fact made by the trial judge. But his counsel fairly concedes that, if this court upholds the trial judge's finding that Morris did not know he was selling his shares, Ennis cannot succeed on his appeal against liability.

645 We have upheld the trial judge's finding that Morris did not know that he was selling his shares. Combined with Ennis' admission that he acted for Morris and Chester on the share sale, that finding is fatal to his appeal on liability.

646 Ennis acknowledges that he had a fiduciary duty to Morris in connection with the share sale. At the heart of the fiduciary duty lies the duty of loyalty, which includes the duty to avoid conflicting interests: see R. v. Neil, [2002] 3 S.C.R. 631 and Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599 (C.A.), leave to appeal to S.C.C. refused (1982), 37 O.R. (2d) 499n. Ordinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them. In a transaction of this magnitude Ennis simply could not act for Chester and Morris. By doing so he put himself into a hopeless conflict of interest, and, as the trial judge found, he severely compromised his representation of Morris. The trial judge was unquestionably correct in concluding that merely by acting on the sale, Ennis breached his fiduciary duty to Morris.

647 Moreover, having decided to act, Ennis breached even the most basic obligations of a lawyer to his client. Three obligations in particular come to mind. First, Ennis did not raise with Morris the problem in acting for both him and his brother. He did not explain the potential conflict, nor did he obtain Morris' consent to act for both sides. Rather than recommend that Morris obtain independent legal advice, Ennis arranged for Morris to sign a waiver of such advice. This waiver was ineffective because it was uninformed, and, in any event, was obtained only after the share sale documents had been signed.

648 Second, Ennis showed no commitment to Morris' cause and, correspondingly, Morris did not receive from Ennis the zealous representation to which he was entitled. Ennis did not explain to Morris the pitfalls and dangers of the share sale: see Clarence Construction Ltd. v. Lavallee (1980), 111 D.L.R. (3d) 582 (B.C.S.C.), aff'd (1981), 132 D.L.R. (3d) 153 (B.C.C.A.). He did not discuss the terms of the sale with Morris, much less review the share sale documents with him. He did not even discuss the clearly one-sided nature of virtually every term of the lease (see para. 164 of our reasons). Instead he sat silently at the meeting on December 22, 1983 when the documents were signed, thereby lending a false aura of normalcy to the closing, as the trial judge found.

649 Third, Ennis showed no regard for his obligation of candour to Morris. As the trial judge accurately observed, quoting LaForest J. in Hodgkinson, at 452, the duty to disclose "lies at the core of the fiduciary principle." Ennis could not keep from Morris any relevant information that he received from Chester. Yet the trial judge detailed nine pieces of relevant information that Ennis did not disclose to Morris (para. 2295). These included the fact that Morris was being asked to sign documents selling his shares, the fact that the $3 million sale price did not reflect the 1979 and 1981-2 bonus allocations, details about the terms of the lease with Morriston, and Linton's valuation memo of November 1982. The trial judge's findings on Ennis' non-disclosure are amply supported by the record.

650 For all these reasons we decline to give effect to Ennis' appeal on liability.

ii. Ennis' Appeal on Damages

651 The basic rule of equitable compensation is that the injured party will be reimbursed for all losses flowing directly from the breach. The trial judge applied this principle in assessing damages against Ennis for breach of his fiduciary duty. She held that from the time of the share sale onwards Morris was deprived of all the benefits of his fifty per cent ownership in IWS. The loss of these benefits flowed directly from Ennis' breach. Thus, together with Chester, Ennis was jointly and severally liable for these losses. He was also jointly and severally liable to Morris and Morriston for any losses flowing from the December 1983 lease.

652 Ennis contends that the trial judge's award of damages should be reduced for any one of three reasons. First, he submits that the proper measure of damages is the difference (if any) between the price at which Morris sold his shares in IWS and the fair market value of those shares in December 1983. Second, he submits that the trial judge erred in failing to consider that he neither controlled nor profited from the business of IWS. Third, he submits that the trial judge erred in failing to apply the common law principles that limit damages. We do not accept the first two submissions, but we do give effect to the third.

653 Ennis' first submission ignores the findings of the trial judge and the principles of equitable compensation. The trial judge found that had Ennis fulfilled his fiduciary duty Morris would not have sold his shares to his brother. Fixing damages at the difference between the sale price and the fair market value of the shares assumes a contrary finding: that Morris wanted to sell his shares and, but for Ennis' breach of duty, would have obtained a better price.

654 Moreover, the trial judge found that Ennis breached his fiduciary duty, which is a duty that lies in equity. Therefore, at least as a starting point, Ennis' damages must be assessed as the trial judge assessed them: damages flowing from Morris' loss of his fifty per cent interest in IWS. Morris is entitled to be put in as good a position as he would have been in if the breach had not occurred and he had remained a half-owner of the family business. Accordingly, we see no merit in Ennis' first submission.

655 Ennis' second submission seeks to reduce the award of damages because he had no control over IWS and did not profit from the business as Chester did. In our view, neither of these factors affords a basis in equity to reduce the award.

656 That Ennis had no control over or interest in IWS leads to but a single difference between the award against him and the award against Chester. Chester was required to convey fifty per cent of his shares of IWS to Morris. Ennis, obviously, had no such shares to transfer, nor was he required to pay Morris the value of his fifty per cent interest. Otherwise, in our opinion, the damages Ennis is required to pay should not be reduced because he did not exert any control over IWS.

657 Admittedly, in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, LaForest J. observed at 578 that "[t]here is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed

honestly and in accordance with the undertaking the fiduciary has taken on". But he made this observation simply to reject the argument that the remedy for breach of fiduciary duty should automatically be the same as the remedy for breach of trust. In breach of trust cases the object of the trust must be restored to the beneficiary, or, if that is not possible, the beneficiary must be compensated for the value of the object. In breach of fiduciary duty cases the court assesses the losses flowing from the breach.

658 Likewise, a damages award lower than that made against Chester should not be made against Ennis simply because he did not profit from the business of IWS. Lack of profit does not automatically reduce equitable compensation for breach of fiduciary duty. Canson itself makes this clear. In that case the defendant, a solicitor, failed to tell his clients of the secret profit earned by a third party when the solicitor acted for them in buying a piece of land. The clients were entitled to recover the secret profit. That was not disputed. What was disputed was whether they could recover more because of the solicitor's admitted breach of fiduciary duty. The court did not bar further recovery for breach of fiduciary duty simply because the solicitor had not benefited from the breach of fiduciary duty, though on the facts further recovery was denied. For these reasons, we decline to give effect to Ennis' second submission.

659 That brings us to Ennis' third submission: that the amount of equitable compensation awarded by the trial judge should be reduced because of limiting common law principles such as remoteness, causation and intervening act. Based on the Supreme Court's decisions in Canson and Hodgkinson, we accept this submission.

660 Traditionally, these common law limiting principles had no place in equity. The rationale for keeping these concerns out of equity has been the desire to enforce fiduciaries' strict standards of good faith. But as Canadian law has changed to permit plaintiffs to sue "in whatever manner they find most advantageous", correspondingly courts have recognized - as LaForest J. said in Hodgkinson at 444 - that "equity is flexible enough to borrow from the common law." Increasingly, courts seek to achieve similar compensation for "similar wrongs", whether the action is framed in contract or tort or as breach of fiduciary duty. Indeed, as LaForest J. commented in Canson at 587: "[I]t would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization."

661 Our former colleague, Finlayson J.A., made the same point in Martin v. Goldfarb (1998), 41 O.R. (3d) 161 (C.A.) when he approved the following passage from the reasons of the trial judge in that case at 173:

> Regardless of the doctrinal underpinning, plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract or tort. The objective of the expansion of the concept of fiduciary relationship was not to provide plaintiffs with the means to exact higher damages than were already available to them

under contract or tort law.

662 Thus, both the Supreme Court of Canada and this court have applied common law principles to limit equitable compensation. Their application is subject to two overriding considerations. First, the court can consider the principles of "remoteness, causation, and intervening act where necessary to reach a just and fair result": see Hodgkinson at 443. Second, these principles should be applied only if doing so does not raise any policy concerns: see Canson at 581 and Hunt v. TD Securities Inc. (2003), 66 O.R. (3d) 481 (C.A.) at 506.

663 We apply these principles to the award against Ennis. We do so giving a measure of deference to the trial judge's assessment. In our view, the principle of intervening act warrants reducing the damages award. Specifically, we consider Chester's repeated assurances to Morris that the share sale would be rectified to be an intervening act that should limit the award of damages against Ennis.

664 Morris learned the truth about what he had signed from Taylor and Wiseman in January 1984. He immediately objected to the sale and wanted it set aside. He knew then the facts grounding a cause of action against Ennis and Chester. But he did not sue them because Chester assured him that they would resolve the matter privately, consistent with the Waxman family culture. Importantly, the trial judge found at para. 1518 that "Morris was unduly influenced by Chester and was not free of that influence until approximately the time he filed suit. He did not seek legal advice because Chester led him on and because he mistakenly believed that Chester would voluntarily straighten out.'" The trial judge made no finding that Ennis led Morris on or that Ennis gave Morris any false assurances. Instead, Chester's conduct - and Chester's conduct alone - caused Morris to put off seeking legal advice or issuing a statement of claim. For this reason, Chester's defence based on Morris' post-sale conduct failed.

665 Chester's assurances to Morris, his leading him on, amount to an intervening act for which Ennis should not be held responsible. Ennis had no control over Chester's conduct and he is entitled to point to that conduct to limit the award of damages against him: see McKittericket al. v. Duco, Geist and Chodos et al. (1994), 76 O.A.C. 310. The trial judge did not consider this intervening act and her failure to do so justifies our intervening in the award.

666 Finally, we must fix a cut-off point for the damages award against Ennis. Any point necessarily entails a measure of arbitrariness, but we think it is fair to assess Morris' damages against Ennis in the amount of his losses from being deprived of a fifty per cent interest in IWS and from the December 1983 lease, to the end of January 1985. We choose that date for three reasons: First, less than a month after having signed the share sale and lease documents Morris knew that his brother had cheated him. From then on Morris' focus became not so much Chester's trickery but whether Chester would make good on his assurance that he would undo the sale. Ennis played no role in this.

667 Second, even if Chester had acted on his assurance, undoing the sale would have perhaps

taken up to a year. Ennis must bear responsibility for this time period.

668 Third, after finding out that his brother would not undo the share sale, Morris was entitled to a reasonable time to consider what to do. In the light of these considerations, fixing a January 31, 1985 cut-off date for the damages award against Ennis seems to be reasonable.

669 We see no policy concerns standing in the way of this award. Morris still recovers the full amount of his losses from Chester. Ennis must still pay a substantial amount, but is responsible only for the earlier portion of Morris' losses, not the later portion attributable to Chester's assurances. And Ennis is not penalized for his breach. Instead, the award against him is closely tied to the duty that he violated.

iii. Conclusion

670 In the light of the findings of the trial judge and Ennis' admission that he acted for both brothers on the share sale, we dismiss Ennis' appeal against liability. We allow his appeal against damages in part. Because we consider Chester's assurances to Morris that the share sale would be undone to be an intervening act for which Ennis cannot be held accountable, we reduce the damages payable by him to all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, to the end of January 1985. Ennis is jointly and severally liable for those losses. If the parties cannot agree on the amount we direct a reference to quantify these damages.

F. Morris' Appeal Against Taylor Leibow

671 In a separate action Morris and Morriston, sued IWS' long-time auditor, Taylor Leibow, for negligence and breach of fiduciary duty. Morris advanced two principal claims: first, Taylor Leibow failed to ensure that IWS' financial statements properly reflected related-party transactions, especially transactions with Greycliffe, or to bring the extent of these related-party transactions to his attention; and second, Taylor Leibow failed to discuss the bonuses with Morris.

672 The trial judge dismissed both claims. She found that if Taylor Leibow owed a duty of care to Morris, it breached that duty by failing to advise him that the related-party transactions between Greycliffe and IWS were not at fair market value, and by failing to advise him that IWS had paid out excessive bonuses, to his detriment. However, applying the Supreme Court of Canada's decision in Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, she held that though Taylor Leibow owed Morris a prima facie duty of care, that prima facie duty was ousted by policy concerns about indeterminate liability. She also held that Taylor Leibow did not owe a fiduciary duty to Morris. Additionally, she held that Morris' claim on the related-party transactions with Greycliffe was barred by an agreement and undertaking that he had signed in 1998 in order to obtain copies of Taylor Leibow's working papers.

673 Morris appeals and Taylor Leibow cross-appeals. The overriding issue on the appeal is whether the trial judge erred in holding that Taylor Leibow did not have a duty to warn Morris

about the related-party transactions with Greycliffe or about the bonuses. In contending that she erred, Morris makes four submissions:

1. The trial judge erred in relying on Hercules to limit the scope of Taylor Leibow's liability.
2. The trial judge erred in failing to hold that Taylor Leibow owed a duty to Morris separate and apart from its role as auditor of IWS, based on its historical relationship with Morris and Chester.
3. The trial judge erred in failing to find that Taylor Leibow owed a fiduciary duty to Morris.
4. The trial judge erred in finding that Taylor Leibow could rely on the agreement and undertaking in defence to Morris' claim on the related-party transactions.

674 Taylor Leibow seeks to uphold the trial judge's finding that it owed no duty to Morris and her finding on the agreement and undertaking. Moreover, on its cross-appeal it seeks to set aside her findings of negligence on the ground that they are not supported by the evidence.

i. Background

675 Taylor Leibow audited IWS' financial statements annually for over thirty years. It also audited the statements of the companies related to IWS, including Greycliffe. From the 1940s to the late 1970s, Taylor was the partner in charge of the audits. From the late 1970s on, Wiseman took over as the partner in charge, though Taylor was consulted and gave advice from time to time.

676 Beyond auditing IWS and the related companies, Taylor Leibow was retained to give advice on special projects, for example the Lasco and Laidlaw transactions. It gave advice about the estate freeze that Chester and Morris considered in the 1970s. And it annually reviewed the individual tax returns of Morris and Chester.

ii. The Trial Judge's Negligence Findings

677 To put Morris' submissions in context, we will briefly review the trial judge's findings of negligence. These findings assume, of course, that Taylor Leibow had a duty of care to warn him about the related-party transactions with Greycliffe and the bonuses.

(a) Findings on the Related-Party Transactions

678 The 1981 financial statement of Greycliffe prepared by Wiseman included a related-party note, which read as follows: "The rates charged by the company are at market value for services rendered."

679 The 1980, 1981, and 1982 financial statements of IWS, prepared by Linton and audited by Taylor Leibow, contained no related-party notes about the transactions between IWS and

Greycliffe. In these transactions, according to the trial judge's findings, Robert had diverted IWS profits of over $2.3 million to Greycliffe and his other companies by the end of 1983.

680 In light of the note on the 1981 Greycliffe financial statement and the absence of any related-party notes on the IWS statements, the trial judge concluded that Taylor Leibow fell below the standard of a reasonably competent auditor. If Taylor Leibow owed a duty of care to Morris personally then it was liable in negligence, either for failing to include a related-party note on the IWS statements or for failing to alert Morris to its suspicions about the fairness of Greycliffe's rates. In so concluding, the trial judge rejected Wiseman's evidence that he saw no reason to discuss the fairness of Greycliffe's rates with Morris because Morris knew what was going on in both companies.

681 The trial judge's conclusion was amply supported by the evidence. This evidence included:

* Morris' expert, Al Rosen, whose opinion evidence the trial judge accepted, testified that the 1981 Greycliffe note was a "very strong note". Under generally accepted standards of auditing, the note required Taylor Leibow to gather enough external corroborative evidence to verify its accuracy. Taylor Leibow had to verify that Greycliffe was charging and IWS was paying fair market rates. This it did not do.
* Because haulage costs amounted to over seven per cent of IWS revenues, Rosen also testified that, in his view, IWS' related-party transactions with Greycliffe were material and should have been disclosed in the 1981/1982 financial statements.
* Linton told Wiseman that Robert preferred not to include a related party note on the IWS financial statements. In Rosen's opinion, this preference for non-disclosure would have raised the suspicions of any reasonable auditor.
* In 1982 an employee of Taylor Leibow, Demers, concluded that IWS' financial statements should have reflected the company's related-party transactions with Greycliffe.
* Taylor Leibow's 1982 working papers included an organization chart for IWS, which showed Morris' diminished role in the company.
* Wiseman was concerned enough about Greycliffe's charges to IWS that he spoke to Taylor about them. Taylor then apparently spoke to Chester, but neither Taylor nor Wiseman spoke to Morris.

(b) Findings on the Bonuses

682 Taylor Leibow was not consulted about the 1981/1982 bonuses before they were declared or about the 1983 reallocation of Morris' bonus. However, it became aware of the bonuses and the reallocation during its audits. The trial judge found that by early 1982, Wiseman knew from his

audit of IWS that much of the company's equity (attributable to the proceeds of the Lasco and Laidlaw sales) had been distributed, apparently without justification, to Chester's sons. She therefore concluded that if Taylor Leibow owed a duty of care to Morris, it was negligent in failing to discuss with him both the 1981/1982 bonuses and the 1983 reallocation of Morris' own bonus.

(c) Findings on Causation and Remedy

683 The trial judge concluded that if Taylor Leibow had voiced its concerns about the related-party transactions and the bonuses to Morris, then his trust and confidence in his brother would have been eroded. The trial judge inferred that had this happened, Morris would have obtained independent legal and financial advice or would have talked to Michael. In the trial judge's view, had Morris done either, the share sale would not have occurred.

684 The trial judge did not assess damages against Taylor Leibow in connection with the related-party transactions and bonuses. However, in the light of her findings on causation, and assuming Taylor Leibow owed Morris a duty of care, presumably the trial judge would have awarded damages against the auditor in amounts similar to those she awarded against Chester.

685 In this court, Mr. Harrison fairly acknowledges that the trial judge's conclusion on causation may not be supportable because of concerns about remoteness. Therefore, on appeal, Mr. Harrison limits the remedy he seeks for his client to discrete sums for the failure to warn about IWS' transactions with Greycliffe and about the bonuses. For the profits Greycliffe diverted from IWS, Morris asks for damages of $1,180,073 and for the excessive bonus payments he seeks damages of $2,312,000. These amounts track the amounts awarded against Chester and IWS.

iii. Analysis

(a) Did the Trial Judge Err in Relying on Hercules to Limit the Scope of Taylor Leibow's Liability?

686 Morris' principal submission is that the trial judge erred in relying on the Supreme Court of Canada's decision in Hercules to conclude that Taylor Leibow did not have a duty of care to warn Morris about the bonuses and related-party transactions. This submission has two branches. First, Hercules was a negligent misrepresentation case and should not automatically be applied to a duty to warn case. Second, even if Hercules applies, it recognizes exceptional cases in which an auditor's prima facie duty of care is not ousted by policy considerations. Morris argues that his relationship with Taylor Leibow establishes one of these exceptional cases. We do not agree with either branch of Morris' submission.

687 Hercules was a negligent misrepresentation case. It concerned the extent of an auditor's duty to shareholders of a company for negligently prepared financial statements. Morris' claim against Taylor Leibow is not for negligently prepared audited statements of IWS, but for failure to warn

him about information Taylor Leibow uncovered or should have uncovered during the course of its audits. Morris frames his claim as a failure to warn rather than in negligent misrepresentation because the latter cause of action requires proof of actual reliance. As Morris maintains that he did not read the audited financial statements of IWS, he can hardly claim that he relied on them. But, however framed, the claim against Taylor Leibow - like the claim against the auditors in Hercules - arises out of its audit retainer with the company.

688 More important, Hercules did no more than apply the two-stage test from Anns v. Merton London Borough Council, [1978] A.C. 728, which has consistently been applied by the Supreme Court of Canada to determine the scope of liability for a wide array of negligence claims, especially, as this one is, claims for the recovery of pure economic loss. Under the Anns test the court asks first whether the parties have a sufficient relationship of proximity to establish a prima facie duty of care, and second, whether policy considerations negate that prima facie duty.

689 Although negligent misrepresentation imports considerations of reasonable reliance not relevant to a negligent failure to warn, for either claim the general framework in Anns will determine whether a duty of care exists. The Supreme Court itself applied the general framework that LaForest J. set out in Hercules in subsequent duty to warn decisions, such as Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210. Therefore, the trial judge cannot be criticized for drawing on the analysis in Hercules to decide whether Taylor Leibow owed the duty of care contended for by Morris.

690 The more important question is whether the trial judge was correct in concluding that Taylor Leibow had no duty of care to warn Morris that the bonus allocations and related-party transactions were detrimental to his interests. We think that she was.

691 The two-stage Anns test recognizes that policy considerations play a significant role in determining whether a duty of care exists. In its latest formulation of the test - in Cooper v. Hobart, [2001] 3 S.C.R. 537, decided after the trial judgment in the present case - the Supreme Court concluded that policy infuses both stages of Anns. McLachlin C.J.C. wrote at 550-51:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are

> residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

692 At the first stage of Anns the trial judge found, at para. 2441 of her reasons, a sufficient relationship of proximity to establish a prima facie duty of care:

> In all of the circumstances, I find that the auditors owed a prima facie duty of care to Morris. The test in Anns v. Merton London Borough Council, adopted by the Supreme Court of Canada in Hercules has been met here. A sufficient relationship of proximity or neighbourhood exists between the auditors and Morris such that carelessness on the part of the auditors would be likely to cause damage to Morris. The auditors were clearly aware that Morris was a 50% shareholder of IWS and a client. It was foreseeable that Morris would reasonably rely on the IWS financial statements [citations omitted].

693 Nonetheless, at the second stage of Anns, though "troubled" by the result, she concluded at paras. 2447 and 2449 that this prima facie duty was ousted by policy concerns about indeterminate liability:

> I agree with the submissions of counsel for Taylor Leibow that, absent a specific request by Morris for protection by the Auditors or by Taylor or by Wiseman, any duty of care arising from the audit engagement was owed to IWS.
>
> There was no evidence here to the effect that in respect of the audit Taylor Leibow was specifically retained to provide information to Morris. While I am troubled by this aspect of the case, I find that Taylor Leibow owed no duty of care in respect of the audit to Morris personally, that policy considerations about indeterminate liability override the prima facie duty of care. The facts here do not fall within the exceptions discussed by the Supreme Court in Hercules [citations omitted].

694 In our opinion, policy concerns at both stages of Anns negate any prima facie duty of care. We accept the trial judge's findings on the "proximity" between the parties. Proximity here means that Morris and Taylor Leibow had a sufficiently close relationship that in doing its audit work Taylor Leibow had an obligation to be mindful of Morris' legitimate interests: see Hercules, at 187-88. The evidentiary record supports this finding of proximity. For example, although IWS was Taylor Leibow's client, Wiseman acknowledged that the "real clients" were Morris and Chester.

695 We turn from this finding of proximity to policy considerations. In Hercules, LaForest J. concluded that in doing audit work for a company, in preparing reports and in reviewing a company's financial statements, auditors normally owe no duty of care to individual shareholders. Auditors perform these functions to permit shareholders as a group to collectively oversee the

administration and management of a company. Ordinarily they do not do their work to enable individual shareholders to make personal business decisions.

696 Imposing a duty on auditors to look out for the interests of individual shareholders raises the concern first articulated by Cardozo C.J. in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.C.A. 1931) at 444, and often repeated since: that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". The Supreme Court of Canada has fastened on this concern as a policy consideration limiting the circumstances in which a duty of care is established. In most cases this policy concern will - at the second stage of Anns - negate any prima facie duty of care owed by auditors to individual shareholders of a company. The trial judge relied on this "residual" policy concern to negate the prima facie duty that Taylor Leibow owed to Morris. We agree with her reasoning on this point.

697 Admittedly, in Hercules LaForest J. recognized that there might be exceptional cases in which the policy concern about indeterminate liability did not arise and, thus, the prima facie duty of care owed by an auditor to an individual shareholder would not be negated. The exceptional case requires the shareholder to show two things: the auditor knows the shareholder's identity; and the shareholder uses the auditor's work for the specific purpose for which it was undertaken. In his reasons in Hercules, LaForest J. discussed these two requirements several times. For example, he wrote at 198:

> In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the Anns/Kamloops test and a duty of care may quite properly be found to exist.

698 Like the plaintiffs in Hercules, Morris has established the first requirement but not the second. And as in Hercules, Morris' failure to establish the second requirement negates the prima facie duty of care.

699 Taylor and Wiseman had known Morris for a very long time. This relationship alleviates any concerns about liability to an indeterminate class. However, Morris did not seek to use Taylor Leibow's work for the purpose for which it was undertaken. Taylor Leibow undertook its audit work for the typical purpose of an audit engagement, to permit the controlling directors and shareholders, Morris and Chester, to better administer and manage the business of IWS. It did not perform its audit work to allow one shareholder, Morris, to make sure he was not being cheated by the other shareholder, Chester. In other words, by accepting an audit engagement for IWS, Taylor Leibow did not undertake to conduct its work with an eye to the personal interests of either of the two shareholders. To hold otherwise would expose Taylor Leibow, unknowingly, to liability in an

indeterminate amount for an indeterminate time, here potentially over $50 million over the course of more than a decade.

700 Taylor Leibow would only have had a duty of care to look out for Morris' personal interests, and to warn him of any actions taken by his brother that were detrimental to those interests, if it had agreed to such an expansion of its mandate. Yet the evidence shows that Taylor Leibow never undertook or agreed to do work that it was not specifically asked to do. And the evidence shows that Morris never asked Taylor Leibow to expand its mandate to protect his interests or warn him about actions that might detrimentally affect his position in IWS: to the contrary, Morris' total reliance on Chester was central to his position in the litigation.

701 Indeed, the evidence is to the contrary. Morris never brought any of his business concerns to the auditors even after the estate freeze discussions in the 1970s aroused his suspicions about the future operations and control of IWS. In other words, he never retained Taylor Leibow to give him personal advice about his interests in IWS. Thus, in doing its audit work for IWS, Taylor Leibow had no obligation to bring the information it discovered to Morris' attention.

702 During its audits, Taylor Leibow did become concerned about whether the seemingly excessive bonuses to Chester's sons could be justified. It also learned about Robert's request not to include a related-party note for Greycliffe in IWS' financial statements. Wiseman spoke to Taylor about both matters, and Taylor then spoke to Linton and Chester, but not to Morris. In both instances Taylor Leibow's concerns were tax concerns. Therefore, Taylor went to the two people responsible for tax matters: Linton and Chester. Taylor Leibow had reason to be concerned about Revenue Canada; it had no reason to be concerned about one brother cheating the other.

703 Morris' submission that Taylor Leibow owed him a duty of care raises a second problem, a problem that arises out of the relationship between the parties and, thus, at the first stage of the Anns test. The problem is one of potential conflict of interest. Suppose Morris had gone to Taylor Leibow and said: "I am concerned about the way my brother is running IWS. When you do the audit, let me know if you find anything suggesting that my fifty per cent interest in the company is being diluted." Most likely, Taylor Leibow would have replied: "To comply with your request would put us into a conflict of interest with your brother and our client IWS. We cannot act."

704 During oral argument, counsel for Morris contended that the analysis in Hercules did not apply to a closely-held company such as IWS, which was more akin to a partnership between the two brothers. He argued that Taylor Leibow had a "whistle blower" obligation, which included telling one brother that the other was trampling on his interests. We take a different view. Especially in a closely-held company such as IWS, unless both "partners" agreed that the auditor would take on this whistle blower role, doing so would potentially put it in an untenable conflict of interest.

705 Therefore, concerns about Morris not using Taylor Leibow's work for the purpose for which it was undertaken and about a potential conflict of interest negate the prima facie duty of care that Taylor Leibow may have owed to Morris Waxman. Accordingly, we decline to give effect to this

ground of appeal.

(b) Did the Trial Judge Err in Failing to Hold that Taylor Leibow Owed a Duty to Morris Beyond its Role as Auditor of IWS?

706 Morris contends that in assessing Taylor Leibow's obligation to him, the trial judge focused too narrowly on an auditor's duty to end users of audited financial statements. Morris submits that Taylor Leibow owed him a duty of care not just as the auditor of IWS, but as his long-time and trusted financial advisor and personal accountant. Morris says that this duty included the obligation to tell him of information contrary to his personal interests. Thus, if Taylor or Wiseman knew that his fifty per cent interest in IWS was being eroded, either had an obligation to tell him.

707 In support of this submission Morris points to these considerations: his long-standing relationship with Taylor and Taylor Leibow, stretching back nearly forty years; his "notes from the grave" in which he claimed that in business matters Taylor, Wiseman, and Chester were the people he most trusted; and Taylor's own acknowledgment that Morris and Chester were as close to him as any non-family members could be. Perhaps most important, Morris relies on Wiseman's evidence that during the discussions about an estate freeze, he felt an obligation and responsibility to make sure Morris understood that Chester was contemplating a 60/40 split in the ongoing ownership interests of IWS.

708 To us, this evidence falls short of establishing that Taylor Leibow had a general duty to warn Morris any time it discovered information suggesting his half-interest in IWS was being diminished. By themselves, neither the length of Taylor Leibow's relationship with Morris nor the closeness of that relationship can create the duty of care contended for by Morris. And Morris' "notes from the grave" - handwritten comments that were never communicated to Taylor or Wiseman - cannot create a duty of care either.

709 Whether a duty of care existed must depend on what Taylor Leibow was retained to do, and on the reasonable expectations of the parties arising from that retainer. Here, Morris' submission contradicts the undisputed evidence. Taylor Leibow was retained from time to time for very specific tasks: to review the tax returns of the Waxman family, including Morris, and to advise Chester and Morris during the estate freeze discussions, which explains why Wiseman brought the potential 60/40 split in IWS to Morris' attention.

710 Tellingly, Morris never retained Taylor Leibow to look out generally for his business or personal interests. He never looked on Taylor Leibow as his trusted personal or financial advisor. Indeed he never asked Taylor Leibow to provide him with financial or investment advice. And the trial judge found that, historically, Taylor Leibow never did anything for Morris that it was not asked to do.

711 Morris and Chester made business decisions about IWS and personal investment decisions within the Waxman family. They made them separately, or together, but typically without the

advice of their outside auditor. Taylor Leibow was not consulted about the bonus payments. It was not consulted about the share sale or any of the discussions leading to it.

712 Absent a specific request to do so, Morris could not reasonably expect that Taylor Leibow would advise him of the possible erosion of his fifty per cent interest in IWS. Had Taylor Leibow been asked to accept such a retainer it may well have refused. For by accepting it, as we said earlier, the firm risked being in the middle of a conflict between two brothers and long-standing friends, who were the directors of an important corporate client.

713 Therefore, we conclude that Taylor Leibow owed no duty of care in tort to Morris personally. It owed no duty as auditor and it owed no duty based on its historical relationship with Morris and Chester. Taylor Leibow was the auditor for IWS and it was to the company and to the shareholders collectively that it owed a duty of care.

(c) Did the Trial Judge Err in Failing to Find that Taylor Leibow Owed a Fiduciary Duty to Morris?

714 Morris submits that the trial judge erred by failing to find that Taylor Leibow owed him a fiduciary duty, a duty that again would include advising him of information contrary to his interests. We decline to give effect to this submission for two reasons: the trial judge's express finding to the contrary; and the absence of the traditional hallmarks of a fiduciary relationship between Morris and Taylor Leibow.

715 The trial judge found at para. 2448 of her reasons that, "[o]n the facts of this case, given the authorities cited above, I find no specific circumstances sufficient to give rise to a fiduciary duty owed to Morris personally in respect of the audit."

716 A finding on the existence of a fiduciary duty is typically a question of mixed fact and law: the application of the well-recognized legal characteristics of a fiduciary relationship to the specific facts of any given relationship. Here, Morris does not suggest that the trial judge misapplied the law. Therefore, her finding that Taylor Leibow owed no fiduciary duty to Morris personally is largely factual and is entitled to deference on appeal: see Hodgkinson, supra at p. 425-6.

717 Morris seeks to escape the consequences of this finding by two alternative arguments. He argues that although the trial judge found that Taylor Leibow owed no fiduciary duty as auditor, she did not decide whether it owed an "independent" fiduciary duty. Alternatively, he argues that the trial judge's conclusion on fiduciary duty really just meant that Taylor Leibow owed no duty to Morris in tort. We do not agree with either argument.

718 We acknowledge that the trial judge's finding, uncharacteristically, is not as clear as it might be. It comes in a section of her reasons dealing with a duty of care in tort, and is in the middle of a series of three paragraphs under the heading "Taylor Leibow Owed No Duty of Care to Morris in the IWS Audit" (paras. 2447-49). Moreover, the scope of the phrase "in respect of the audit" is

perhaps somewhat confusing. Nonetheless, we have no reason not to take the trial judge's words at face value.

719 Unquestionably, the trial judge knew the difference between a duty of care in tort and a fiduciary duty. No one could seriously suggest otherwise. To say that the words "in respect of the audit" limited the scope of the finding to Taylor Leibow's duty as auditor would mean that the trial judge failed to address Morris' claim of an independent fiduciary duty, a failure that would be inconsistent with the thoroughness of her reasons. Thus, we take her finding to mean that Taylor Leibow owed no independent fiduciary duty as well as no fiduciary duty as auditor to advise Morris of information contrary to his interests learned during its audits. Morris accepts that if this is our view of the scope of the trial judge's finding then, because of appellate deference to that finding, his submission must fail.

720 However, even if we were to accept the limited scope of the finding contended for by Morris, we see no basis for an independent fiduciary duty. Simply because Taylor Leibow is a firm of professional accountants and gave advice to Morris personally from time to time does not automatically give rise to a fiduciary relationship between them: see Brant Investments Ltd. v. Keep Rite Inc., (1991) 80 D.L.R. (4th) 161 at 172 (Ont. C.A.); Roman Corp. v. Peat Marwick Thorne, (1994) 12 B.L.R. (2d) 10 at 28 (Ont. G.D.). Nor do Morris' assertions, largely self-serving, that he "trusted" and "relied on" Taylor Leibow create a fiduciary duty. We must consider whether their relationship is characterized by the accepted badges of a fiduciary relationship: whether Taylor Leibow had scope to exercise some discretion or power; if so, whether it could exercise that discretion or power unilaterally to affect Morris' legal or practical interests; and whether Morris was vulnerable to the exercise of that discretion or power.

721 None of these badges was present. When Morris consulted others about his own business and financial affairs, invariably he went to Chester, occasionally to Linton. He gave Taylor Leibow neither discretion nor power over his business affairs. Taylor Leibow learned about decisions taken by IWS, for example the bonuses, after they had been made. It had no power over the business interests of Morris, or indeed of IWS. Equally, Morris had no particular vulnerability to Taylor Leibow. He was the president of IWS, a director of the company and active in its significant operations. Taylor Leibow provided very few services to Morris personally. Save for preparing his tax returns, he did not rely on Taylor Leibow.

722 Either because of the trial judge's express finding or because the hallmarks of a fiduciary relationship are not present, we decline to give effect to Morris' submission that Taylor Leibow owed him a fiduciary duty.

(d) Did the Trial Judge Err in Finding that Taylor Leibow Could Rely on the Agreement and Undertaking in Defence of Morris' Claim on the Related-Party Transactions?

723 Although it is unnecessary to consider this issue because of our conclusion that Taylor

Leibow owed no duty to Morris personally, for the sake of completeness we will address it.

724 In July 1998, after Morris had sued Taylor Leibow on the bonuses but before he had sued on the related-party transactions, Taylor Leibow gave him copies of its working papers. In exchange for doing so Morris signed - with legal advice - an "agreement and undertaking" in which he undertook not to sue Taylor Leibow for "any alleged negligence or other deficiency with respect to their accounting and auditing work". The full text of Morris' undertaking provided as follows:

> IN CONSIDERATION of the making available by Taylor Leibow of its working paper files for I. Waxman & Sons Limited for 1979 through 1984, Greycliffe companies for 1979, 1980, 1981 and 1983 and Icarus Leasing Inc. for 1982 and 1983, the undersigned hereby agree and undertake that they shall not commence any civil proceeding against Taylor Leibow claiming damages on the basis of any alleged negligence or other deficiency with respect to their accounting and auditing work with respect to the aforesaid companies for the fiscal years indicated above.

725 The trial judge concluded that the undertaking was akin to a release and she held that it barred Morris' claim against Taylor Leibow for negligently failing to include a note about the related-party transactions in IWS' financial statements.

726 Morris submits that Taylor Leibow cannot rely on the agreement and undertaking to bar his claim for three reasons: first, the undertaking releases only claims for a negligent audit, not for a failure to warn; second, the undertaking does not release Morris' claim in tort or breach of fiduciary duty against Taylor Leibow based on their long-standing relationship; and third, Taylor Leibow is precluded from relying on the undertaking because, before Morris signed it, Wiseman gave materially false evidence on discovery.

727 The first two reasons advanced by Morris depend on limiting the scope of the undertaking to release only claims for negligently performed audits. We do not agree that the undertaking is so limited. Its scope turns on how broadly the phrase "with respect to their accounting and auditing work" is defined.

728 In our view, the phrase is broad enough to bar Morris' claim of a failure to warn. If Taylor Leibow had a duty to warn Morris about IWS' related-party transactions with Greycliffe, that duty arose from its audit work. It was during its audit work that Taylor Leibow learned of, or should have learned of, the diversion of profits from IWS to Greycliffe. Thus, we think that the undertaking Morris signed released Taylor Leibow from all future claims arising from its audit work, whether the claim was for negligent misrepresentation or for a failure to warn, and whether it was based on Taylor Leibow's duty as auditor or on an independent duty derived from its long-standing association with Morris.

729 Morris' final attack on the undertaking rests on his assertion that Wiseman lied on discovery.

Had Wiseman told the truth, Morris says he would have sued Taylor Leibow for failing to warn him about the related-party transactions before releasing any claims. We find Morris' position unpersuasive.

730 Wiseman was examined for discovery in 1997. During his examination he testified that when he conducted the 1981 and 1982 audits of IWS he was unaware of any material related-party transactions. Later, at trial, Wiseman testified that at the time of the 1981 and 1982 audits he was aware of the substantial related-party transactions with Greycliffe. The trial judge accepted Wiseman's evidence at trial.

731 When Wiseman gave his discovery evidence about the related-party transactions he qualified his answers by saying that he had not reviewed Taylor Leibow's working papers before being discovered. Indeed, almost twenty years had passed since he had last seen them. Wiseman later clarified his discovery evidence in a letter from his counsel dated November 16, 1998. Morris did not complain about this clarification. If Wiseman's original discovery evidence was inaccurate, it was not deliberately so. Indeed the trial judge did not find that Wiseman lied on his discovery.

732 Moreover, Wiseman's answers did not preclude Morris from suing Taylor Leibow on the related-party transactions. Before signing the undertaking Morris knew the following: he knew IWS' transactions with Greycliffe were not noted on IWS' financial statements; he knew Taylor Leibow had audited the statements; he had, and therefore must be taken to have known, the contents of Linton's working papers. And he had sued in the main action for alleged profit diversions. He could have expanded that allegation to include a claim against Taylor Leibow but chose not to do so.

733 For all these reasons we are satisfied that the trial judge was correct in her conclusion that Morris' undertaking barred his tort claim against Taylor Leibow for failing to warn him of IWS' related-party transactions with Greycliffe.

iv. Conclusion on Morris' Appeal

734 We conclude that the trial judge was correct in holding that Taylor Leibow owed neither a duty of care in tort nor a fiduciary duty to Morris. We also conclude that she was correct in holding that the agreement and undertaking that Morris signed barred his claim against Taylor Leibow on the related-party transactions with Greycliffe. For these reasons, we dismiss Morris' appeal against Taylor Leibow.

v. Taylor Leibow's Cross Appeal

735 Taylor Leibow cross-appealed against the trial judge's findings of negligence. However, counsel for Taylor Leibow did not press us to consider the cross-appeal if we dismissed Morris' appeal. As we have done so, apart from what we have already said, we think it unnecessary to further consider the cross-appeal.

G. Linton's Appeal

736 Wayne Linton has appealed the judgment against him in the Taylor Leibow action. The trial judge found him liable for knowingly assisting Chester in his dishonest breaches of fiduciary duty toward Morris. In some parts of her reasons she also appears to have found Linton liable on the basis of oppression. We need not consider whether in law Linton could be liable under s. 248 of the OBCA, because we have determined that she properly found him liable for knowing assistance, and liability under s. 248 would add nothing to her remedy.

737 In concluding that he was liable for knowing assistance, the trial judge underlined a number of the findings of fact involving Linton that she made in the main action. She found that he was aware of all the reasons that made Morris vulnerable to Chester's breaches of trust, including Morris' poor health in late 1983, and his complete trust in Chester in the conduct of the financial affairs of IWS.

738 The trial judge then went on to highlight various actions of Linton throughout the 1980s that demonstrate how faithfully he followed Chester's directions in complete disregard of Morris' best interests. She provided a lengthy list of these actions at para. 2565 of her reasons.

739 The trial judge concluded that Linton was actively involved in helping Chester to effect the 1979, 1981, and 1982 bonuses and to structure and implement the share sale. She found that he did so knowing that these transactions were dishonest breaches of fiduciary duty by Chester.

740 Turning to the profit diversions to Robert's companies, the trial judge found that Linton was aware of the nature and extent of those related-party transactions, but did not reflect them in his drafts of the IWS financial statements between 1980 and 1982. Indeed, he relayed to the auditors Robert's desire that there be no such disclosure. In general, she found that Linton did Chester's bidding in allowing Robert to improperly divert unreasonable profits to his companies. The trial judge concluded that by doing these things, Linton participated in Chester's dishonest breach of fiduciary duty to Morris.

741 She ordered that Linton pay damages to Morris in the same amounts as ordered against Chester for the consequences of the share sale during the period of constructive trust; for the 1979, 1981 and 1982 bonuses; and for the profit diversions before the share sale. She found IWS vicariously responsible for Linton's conduct and therefore held it liable in like measure. However, because in most instances Linton acted at Chester's behest and did not personally benefit, she did not assess punitive damages against him.

742 In this court, counsel argued that Linton cannot be liable in knowing assistance in relation to the bonuses or the consequences of the share sale because no trust monies were involved. However, as we have explained earlier, this doctrine applies equally where the knowing assistance is of a dishonest breach of fiduciary duty. The findings of the trial judge make graphically clear that this was such a case, both concerning the bonuses for 1979, 1981 and 1982 and concerning the share

sale.

743 Counsel also argues that the trial judge found Linton liable for the bonuses based on "collusion and knowing assistance of oppression", neither of which are pleaded nor viable in law. Although both phrases appear in her reasons, we think a fair reading is that neither served as a basis for liability. Rather, liability is squarely and expressly founded on Linton's knowing assistance of Chester's breaches of fiduciary duty. The trial judge's findings of fact amply sustain this conclusion.

744 Counsel's final argument in relation to Linton's liability for the bonuses and the share sale challenges the trial judge's findings of fact. In dealing with the appeal in the main action we have addressed the broad and detailed factual picture painted by the trial judge of the sorry history of IWS from 1979 to the time of trial and her detailed description of the roles of the various players in it. We have found no reason to interfere with her factual findings.

745 Counsel also says that the trial judge erred in finding Linton liable for the profit diversions based only on Linton's conveyance to the auditors of Robert's wish that the 1982 IWS financial statement not disclose related-party transactions. He argues that the real fault is that of the auditors, who made the final decision not to disclose, and since Morris did not read the statements, Linton's acts had no adverse effect in argument.

746 We do not read the reasons of the trial judge that way. We see her conclusion concerning Linton's role in the profit diversions to be based on her finding that he was actively involved in this particular dishonest breach of fiduciary duty by Chester. Although not expressly stated in her reasons, the trial judge's findings throughout concerning Chester, Morris and Linton make this conclusion inevitable.

747 We therefore dismiss Linton's appeal from the finding of liability against him. However, just as we did in the main action (and for the same reasons) we vary the judgment against Linton to provide for half the amount of profit diversions ordered by the trial judge. Otherwise Linton's appeal is dismissed.

VII

CONCLUSION

748 As indicated at the outset, we agree with the trial judge's disposition except in minor ways. For convenience we repeat these minor variations here.

* Robert, Warren and Gary are liable for only one half of the 1981 and 1982 bonuses that they received: see para. 556.
* Chester, IWS and Robert and his companies are liable for only one half of the amounts ordered by the trial judge in relation to the Greycliffe profit diversions: see para. 567.

* The order for damages in relation to the Ancaster property is set aside: see para. 570.
* Robert, Warren and Gary are liable for only one half of the post sale profits that they received: see para. 587.
* Ennis is liable for all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, only to the end of January 1985: see para. 670.
* Linton is liable for only one half of the amounts ordered in relation to the Greycliffe profit diversions: see para. 747.

749 Despite these minor variations, overall we have found the trial judge's reasons thorough, lucid and fully reasoned. Our repeating reading of them in the course of preparing our own reasons have amply enhanced this view. The trial reasons represent a significant achievement at the end of a long and complex proceeding.

750 The parties have not yet addressed the issue of costs. We invite counsel to do so by written submissions. Before filing those submissions, counsel are to meet with Goudge J.A., who will determine the appropriate procedure.

751 The appeals are dismissed save in the limited respects we have indicated.

752 As we leave this case two impressions linger: the tragedy of a family shattered and the service accorded to the administration of justice by counsel and a trial judge who, in difficult circumstances, performed their roles in exemplary fashion.

DOHERTY J.A.
LASKIN J.A.
GOUDGE J.A.

1 These reasons do not address appellate review of jury verdicts. Those verdicts, which of course are not supported by reasons, are tested against a reasonableness standard: McKinley v. B.C. Tel, [2001] 2 S.C.R. 161 at 191; Marshall v. Watson Wyatt & Co. (2002), 57 O.R. (3d) 813 at 819 (C.A.).

2 Mr. Evans had passed away.