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 in-

creased 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 base-

ment 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 Ches-

ter 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 prob-

lems 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 "conces-

sions" 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 ap-

pellate 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.

> [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 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 evi-

> dence. 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