was having in the fall of 1983. The trial judge rejected this evidence, but according to the appellants went on to use the rejection of this evidence as evidence that they in fact knew that he had serious medical problems in the fall of 1983.

351 Evidence that is rejected by the trier of fact has no evidentiary value and cannot be used as a basis for findings of fact: R. v. Hibbert (2002), 163 C.C.C. (3d) 129 at 148-52 (S.C.C.); R. v. O'Connor (2002), 170 C.C.C. (3d) 365 at 374-77 (Ont. C.A.). It would have been palpable error had the trial judge used the rejection of evidence given by Chester and Ennis as a basis for a finding that they knew Morris' health was precarious in the fall of 1983. There was, however, ample evidence from other sources to support that finding. Members of Morris' family and at least one other business associate gave evidence of Morris' obvious ill health in the fall of 1983. Morris fainted and had to be taken to the hospital in October 1983. Chester was aware of this incident. It was open to the trial judge, in the face of the evidence that Morris met and dealt with Chester and Ennis on a daily basis, to conclude that what was obvious to others concerning Morris' health would also be obvious to Ennis and Chester. This evidence provided ample support for the trial judge's finding at para. 641 that:

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

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

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

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

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

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

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

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

vii. Alleged Errors in Credibility Assessments

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

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

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

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

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

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

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

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

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

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

369 The appellants allege various other processing errors, which they say undermine all of the crucial credibility findings. Various combinations of processing errors are put forward in relation to various credibility findings. We do not propose to address each and every one of these arguments. Mr. Lenczner's detailed submissions directed at the trial judge's rejection of Wiseman's evidence

concerning his alleged discussions with Morris between December 26, 1983 and the end of 1983 are typical of this category of the appellants' arguments. We will address those submissions in some detail.

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

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

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

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

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

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

375 Mr. Harrison argues that these answers reveal inconsistencies that were potentially significant. In any event, he submits that the significance of the inconsistencies was for the trial judge and not this court.

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

377 Mr. Harrison further contends that in considering whether the trial judge's rejection of Wiseman's evidence reveals "palpable and overriding" error, this court must look beyond the factors specifically referred to by the trial judge in rejecting that part of Wiseman's evidence. Mr. Harrison says that the court must look to the evidence accepted by the trial judge. He refers to Taylor's evidence denying any meeting on December 28th and to the unchallenged evidence that Morris went

into the hospital for an angiogram on December 28th and was indisposed for several days. Mr. Harrison submits that this evidence was accepted by the trial judge and that Wiseman's evidence concerning the events between December 26th and the end of the year simply cannot stand with that evidence.

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

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

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

380 In the end, we see no reason to interfere with her assessment of Wiseman's credibility, or her many other similar assessments. There was nothing arbitrary about her assessment, it did not reflect any significant misapprehension of the evidence, and it was not the product of an unfair balancing of the relevant credibility considerations. This trial judge may have attached more or less significance to certain factors going to the witnesses' credibility than other trial judges. It was her responsibility to decide how much weight should be given to the various factors. We are being asked to recalibrate her assessment of those factors. We cannot do so.

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

B. The Grounds of Appeal in the Main Action

i. Factual Issues in the Main Action

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

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

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

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

386 The third episode, and by far the most important, was the agreement that Chester said he made with Morris in December 1983 to buy Morris' shares in IWS. The trial judge found that Chester's actions in this connection made him liable to Morris for breach of fiduciary duty, undue influence, unconscionability and pursuant to s. 248 of the OBCA. She also found IWS liable to Morris pursuant to s. 248.

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

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

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

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

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

(a) Morris' Financial Abilities

392 The appellants' attack is the finding, made in a number of different ways, that Morris had a relative lack of sophistication in financial matters. The appellants contend that the evidence compelled the opposite conclusion and that, given his financial astuteness, Morris surely knew he was agreeing to the bonus allocations, the share sale including the lease, and the profit diversions to Robert's companies.

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

(b) The 1979 Bonuses

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

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

396 Moreover, Morris said he did not know about the 1979 bonuses until after the litigation began. His view that he and his brother should be building the company for the equal benefit of his sons and Chester's sons was entirely inconsistent with his agreeing to the 1979 bonuses going entirely to Chester's sons as Chester alleged. As to his signature on the bonus minute, there was ample

evidence of Morris' practice of signing corporate documents brought to him by Chester without reading them, which is exactly what he said happened in this instance.

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

(c) The 1981 and 1982 Bonuses

398 One of the main issues in this action involves the bonuses allocated and paid by IWS for 1981 and 1982. These bonuses totalled $6.6 million: $3.3 million for each of the two years. For each of these two years, Morris and Chester were each to receive $700,000 and Chester's sons, Warren, Robert and Gary were to receive $550,000, $600,000 and $500,000 respectively.

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

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

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

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

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

as in the 1981 minutes, do not compel the conclusion that Morris knew of them, let alone agreed to them.

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

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

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

(d) The Share Sale and Lease

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

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

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

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

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

412 On the other hand, Morris said that he had no negotiations with his brother concerning the sale of his shares. When he was asked to go to Ennis' office on December 22, 1983 he was distracted by his own health problems and his imminent angiogram. He assumed that he was simply

being requested to sign routine corporate documents. Receiving no contrary explanation, he signed as he was asked, without reading the documents, just as he had done many times before. Only on January 5, 1984 did he learn what the documents contained and thereafter he consistently and vehemently told his brother that he had to straighten out what had happened and restore Morris' fifty per cent ownership of the company.

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

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

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

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

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

418 The appellants argue that this finding cannot stand in the face of Chester's evidence, supported by Ennis, of substantial negotiations initiated by Morris leading to the execution of the agreement at two meetings on December 20th and December 22nd, and in the face of Morris' re-

peated signatures on the sale documents and Morris' own statements. The appellants contend that this evidence, taken together with Morris' conduct over the ensuing five years, require the setting aside of this finding and compel the conclusion that Morris knew he was selling his shares and is bound by his signature.

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

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

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

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

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

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

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

425 Overall, as revealed by the trial judge's analysis of the share sale, it was patently unfair, unconscionable, and manifestly disadvantageous to Morris. Had Morris understood its terms, neither he nor any reasonable person in his position would have agreed to it. This alone constitutes a pow-

erful validation of the trial judge's conclusion that there were no negotiations and that Morris did not agree to sell his shares.

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

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

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

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

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

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

432 A final example concerns Chester's testimony, again supported by Ennis, that the share sale documents were signed at two meetings at Ennis' office on December 20 and December 22, 1983. This testimony proved to be fraught with difficulties. Chester said that at these meetings, the docu-

ments were reviewed in detail, read aloud, and had changes made to them. This evidence was a vital part of Chester's story that Morris knew all about the share sale and agreed to it.

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

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

435 There was good reason for her doing so. Chester's original pleading, which he reviewed and approved before it was issued, referred to only one meeting, namely, December 22nd. Chester and Ennis gave accounts of the alleged December 20th meeting with Morris that were inconsistent in a number of respects. If the chronology had unfolded as Chester described, several of the documents would not have read as they did. These include a letter prepared by Ennis and used by Chester on December 21st in a meeting to explain what was happening to Lasco. The letter referred to the share sale as having an initial closing date of December 31, 1983, whereas Chester's and Ennis' evidence was that at the December 20th meeting, a decision was made to amend the agreement to provide for a January 1984 closing date.

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

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

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

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

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

440 We do not agree. The context in which Morris signed all these documents must be kept squarely in mind. The trial judge determined that over the months before the signing, Morris had not been involved in any negotiations with Chester to sell his shares and had no idea of the meetings between Chester and Ennis to set up this sale. Morris came to Ennis' office on December 22nd, completely trusting Chester, who was his brother and Ennis who was his lawyer. He simply fol-

lowed his usual pattern in such a business circumstance, signing where he was asked to sign by two people he trusted implicitly. He was only a few days away from an angiogram, which was to be followed by open-heart surgery shortly after. He was understandably preoccupied with his own health. Moreover, given the unfairness of the deal, the trial judge was not palpably wrong in finding that Morris did not know what he was signing.

441 The appellants also mount an attack on the trial judge's core finding based on parts of Morris' own evidence. The appellants contend that taken individually, and certainly taken collectively, these references compel the conclusion that Morris knew he was selling his shares. The appellants cite a number of examples of both what Morris said at the time and what he acknowledged had been said to him.

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

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

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

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

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

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

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

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

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

451 Second, the appellants claim that in rejecting Wiseman's evidence about a meeting he had with Morris in April 1985, the trial judge misinterpreted an exhibit, which Wiseman said he reviewed with Morris at that meeting. The respondents concede this point, but claims that in a trial of this length and complexity absolute perfection in interpreting every piece of evidence cannot be expected and that this mistake is innocuous. We agree. The trial judge has a sound basis to accept Morris' version of his conversation with Wiseman apart from this exhibit, particularly given her findings of general credibility. Although the trial judge's interpretation of the exhibit is an error, it is not a palpable and overriding one.

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

(e) The Greycliffe Profit Diversions

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

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

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

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

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

458 In our view, neither of these points has merit. The determination of what are reasonable rates charged by various sectors of the trucking industry and what reasonable profits result not information within the knowledge or experience of a trier of fact and is properly the subject of expert evidence. See R. v. Mohan (1994), 89 C.C.C. (3d) 402 (S.C.C.) at 413. Further, the appellants do not offer any cogent reason to undermine the trial judge's decision to prefer the respondents' experts

over those of the appellants. Their opinions were reasonable and well-founded. Although one of those experts had not served a pre-trial report, he was called with leave in response to the appellants' unsuccessful challenge of bias in relation to the respondents' first expert.

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

(f) The Ancaster Property

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

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

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

(g) The Valuation Findings

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

464 First, the appellants challenge her determination of the value of the Centennial Parkway property owned by IWS, which was an important component of the value of its shares as of December 1983. The appellants contend that the trial judge was palpably wrong to base her conclusion on the evidence of Steven Pocrnic, an expert witness called by the respondents, because his methodology was flawed.

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

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

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

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

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

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

471 We do not agree. The trial judge was entitled to calculate the fairness of the lease by comparing the rents it provided to fair market rents rather than to what Morris had previously received. The lease was to have effect in the context of Morris selling his interest in the company. As for the expert witness Robertson, he explained that his methodology added value for the unused lands surrounding the building covered by the lease. He did so because of the extent of these surplus lands and because scrap yard properties derive considerable economic value from open land area. The trial judge did not err in accepting Robertson's opinion of the fair market rent based on this methodology.

ii. Contested Rulings in the Main Action

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

(a) The Pleadings Amendment Ruling

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

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

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

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

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

478 The trial judge also dealt with this motion under Rule 51.05, which requires leave of the court to withdraw an admission. She correctly looked to Antipas v. Coroneos (1988), 26 C.P.C. (2d) 63 (Ont. H.C.J.) for the three-part test required by the rule: that the proposed amendment raise a triable issue; that the party provide a reasonable explanation for the change of position; and that there be no non-compensable prejudice. She found that test met here.

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

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

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

482 We agree with the ruling of the trial judge.

(b) The Celia Butner Ruling

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

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

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

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

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

iii. The Liability Issues in the Main Action

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

> Counsel for the Defendants strongly urge me to take a very technical, common-law/contractual approach to the issue of liability, and without saying so directly, advocate that I should ignore equitable considerations. They submit that all or most of the evidence to which I have already referred is irrelevant to an appropriate resolution. They ask me to treat the Share Sale as if it were a commercial transaction between two equally sophisticated and knowledgeable arm's length businessmen, who should have been expected to protect their own interests. They submit that one who signs a contract, without taking the trouble to read it, is liable and cannot plead ignorance of its terms.
>
> Submitting that this rule is a complete answer to Morris' claims, they say Chester should be allowed to enforce documents signed by Morris, as if Chester were an innocent arm's length commercial purchaser. They would have it that, having established Morris signed the Share Sale documents, he has no case. Having established that Morris signed the bonus minutes, he has no claim to a larger share of the bonuses. On their view of the law, Morris slipped up. He should have protected himself better, obtained more information, sought more advice. Morris and only Morris must bear responsibility for his own carelessness. "On all of the evidence, the only person responsible for this over-lengthy trial is the very person who participated actively and willingly in every event - Morris Waxman."
>
> The Plaintiffs submit that Morris' signing of Share Sale documents in December 1983 must be considered in context. Chester is not an innocent outsider seeking

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

(a) The Fiduciary Duty Issue

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

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

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

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

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

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

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

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

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

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

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

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

497 First, the appellants contend that fundamental to the application of the fiduciary principle is the intention to contract and that the principle can be properly resorted to only if Morris intended to sell his shares to Chester. The appellants argue that the fiduciary principle cannot be used to find

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

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

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

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

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

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

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

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

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

506 Moreover, a scan of the jurisprudence on fiduciary duty quickly demonstrates its application in many circumstances that do not require a contractual relationship: see for example the relationships of parent/child (M.(K.) v. M.(H)., [1992] 3 S.C.R. 6); government/foster children (K.L.B. v.

British Columbia, [2003] 2 S.C.R. 403); custodial/non-custodial parents (Frame v. Smith, [1987] 2 S.C.R. 99); and doctor/patient (McInerney v. MacDonald, [1992] 2 S.C.R. 138).

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

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

509 In these circumstances it was entirely appropriate for the trial judge to apply the fiduciary principle despite Morris' signatures, given that Chester had Morris sign knowing that he had no understanding of what was really going on, either with the share sale or the bonuses. While the result might have been different if Chester had persuaded the trial judge that Morris' signatures were indeed fully informed, Chester's evidence to this effect was simply disbelieved. Thus we would not give effect to the appellants' first argument.

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

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

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

512 Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship.

He did not need to make any express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.

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

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

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

(b) The Undue Influence and Unconscionability Issues

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

(c) The Oppression Issue

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

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

519 Section 248 reads in part as follows:

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

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing ...

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 250 ...

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

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

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

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

523 Finally, s. 248(3) gives the court a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or amending unanimous shareholder agreements, corporate articles or by-laws. This statutory language is to be given a broad interpretation consistent with its remedial purpose: see Ferguson v. IMAX Systems

Corp. (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

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

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

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

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

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

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

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

531 The trial judge based this application of s. 248 on the finding that the oppression provisions, although not procedural, were intended to be retrospective in application: see Re Mason and Intercity Properties Ltd. (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

532 We agree that the oppression provisions of the OBCA are not merely procedural. They provide significant substantive rights and remedies. However, because of the facts of this case, we need not decide whether there is a sufficiently clear expression of legislative intent to require that these provisions be given full retrospective application to conduct that was completely concluded before their enactment. Rather, we think that the essence of the trial judgment is that starting at least in 1979 and continuing well beyond July 1983, the appellants conducted the business of IWS in a way that was oppressive of Morris. This pattern of conduct, although it commenced before July 1983,

was ongoing well after that date. This is equally true of the subcomponents of that pattern, such as the improper payment of bonuses and the Greycliffe profit diversions. They too were going on well after July 1983. This ongoing pattern of oppression is what Professor Sullivan describes as a continuing fact situation: see R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Markham: Butterworths, 1994) at 514-15.

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

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

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

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

537 Sixth, the appellant argues that the trial judge erred in applying s. 248 to order a remedy against IWS in connection with the share sale, since IWS was not a party to the sale. In our view, the trial judge was correct to do so. A dispute over a transaction that determined shareholder control of a corporation is one "in respect of" that corporation as that phrase is used in the opening paragraph of s. 248(2). As such, it clearly engages the court's jurisdiction under this section: see GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)), per Blair J.

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

> The way in which the Share Sale was implemented deeply implicated IWS. Chester, acting as if he were already the 100% owner of IWS, put the resources of IWS at his own disposal to make his share purchase so that he would have 100% ownership of IWS. By causing the corporation to act, he engaged s. 248(2)(a). He arranged for IWS to declare a million-dollar dividend that he would use to pay for part of Morris' shares; for IWS to reallocate $412,000 of Morris' 1982 bonus to himself to pay for Morris' shares; for IWS to borrow

> $500,000 from Morris, interest-free; for Linton, the IWS comptroller, to issue an IWS cheque in the amount of $500,000 payable to Morris, even though the Share Sale Agreement provided that payments were to be made by Chester personally. By his actions and IWS' actions, Chester secured control of IWS. Chester made IWS a party to the December 1983 lease.

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

(d) The Knowing Receipt/Knowing Assistance issue

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

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

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

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

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

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

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

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

> Beginning with the judgment of Lord Selborne in Barnes v. Addy (1874), L.R. 9 Ch. App. 244, courts have imposed the obligations of a trustee on third parties

> who participate in another's breach of trust or breach of fiduciary duty. Third parties may be liable as "constructive trustees" if they knowingly receive trust property obtained in breach of trust (the "knowing receipt" cases) or if, without receiving trust property, they knowingly assist in its misapplication (the "knowing assistance" cases).

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

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

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

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

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

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

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

555 Although the appellants do not expressly argue the point, the same logic applies to the remedy under s. 248 of the OBCA against Chester's sons in respect of the 1981 and 1982 bonuses. The payment of those bonuses constitutes an act of oppression against Morris in so far as the payment

was made with Morris' fifty per cent share of the proceeds from the sale of the two divisions of IWS. And under s. 248(2), the order to rectify that matter must be limited to the fifty per cent of the bonuses received by Chester's sons for 1981 and 1982.

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

(e) Remedy for the Greycliffe Profit Diversions Issue

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

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

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

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

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

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

the family, and that he would expect the same treatment to be accorded to his sons if and when they joined the business.

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

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

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

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

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

(f) The Ancaster Property Claim

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

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

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

(g) The Constructive Trust and Tracing Issues

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

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

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

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

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

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

577 Finally, to support the constructive trust remedy, the trial judge ordered a tracing process to permit Morris to attempt to trace the amount subject to constructive trusts into the hands of persons other than bona fide purchasers for value without notice. She also found that none of Robert, War-

ren, or Gary qualified as such persons. This process would permit Morris to make an informed election between the personal and the proprietary remedies provided for as alternatives by her judgment.

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

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

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

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

582 We do not agree. The tracing orders here do not constitute additional remedies. They simply provide the process by which Morris can attempt to trace the property in which he has a beneficial interest through the remedy of constructive trust. If the process is successful, it is the constructive trust that will provide Morris with his remedy should he elect it. As that process unfolds, those into whose hands the property can be traced will be able to advance any defences available to them.

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

584 Nor can it be said that these tracing orders, as invasive as they may be, are so invasive of the lives of Chester and his sons as to be an erroneous exercise of the trial judge's remedial discretion.

These orders are the natural corollary of the constructive trust orders made by the trial judge, which in turn are the consequence of the egregious breaches by Chester and his sons of their equitable obligations.

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

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

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

587 Finally, in her supplementary reasons, the trial judge makes clear that Robert, Warren, and Gary are personally liable in knowing receipt for the post-sale profits they received. Although the appellants have not raised it, we amend this part of her judgment by ordering that their liability is limited to one-half of the sums so received. We do so on the same basis as we did for the 1981 and 1982 bonuses, namely that they could not have had constructive knowledge that any more than one-half of these sums belonged beneficially to Morris.

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

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

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

C. The Grounds of Appeal Relating to SWRI

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

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

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

1. The trial judge erred in finding Chester, Robert, and IWS liable to SWRI for inducing the breach of its contract with Philip; in the alternative she erred in her assessment of damages.
2. The trial judge erred in finding that Chester's children consented to the transfer of their shares in SWRI to Michael and Douglas.
3. The trial judge erred in dismissing IWS' counterclaim for theft of its business and corporate opportunities.

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

i. The Inducing the Breach of Contract Claim

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

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

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

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

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

596 Although Philip and SWRI had exchanged draft agreements, they never formalized their arrangement in a written contract. Nonetheless, the trial judge found that the parties had a valid and enforceable contract arising out of their negotiated agreements to transport and process waste for every major SWRI customer. There is no basis to interfere with that finding. It satisfies the first element of the tort.

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

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

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

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

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

She concluded that the appellants had induced the breach intentionally. At para. 1780, she wrote: "The termination of Philip's contractual relationship with SWRI was precisely what Chester and Robert intended. They knew SWRI would be severely damaged as a result."

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

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

b) The altering of the Lasco documents

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

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

This point is closely related to the last point. Fracassi's story hinged on his claim that he received copies of the altered documents at the time each was written, that is, in October 1986, February 1987, and November 1988. He said that because he was a joint venture partner with SWRI he received copies of all contracts between SWRI and its customers.

> Two pieces of evidence undermine Fracassi's claim: Michael's evidence, which the trial judge accepted; and the nature of the arrangement between Philip and SWRI on the Lasco account. Although SWRI and Philip were joint venture partners for other customers, on the Lasco account they were contractor and subcontractor. As a subcontractor Philip was not entitled to receive and did not receive copies of the agreements between SWRI and Lasco.

d) Philip's motive

> Philip obviously had a strong motive to end its contract with SWRI. Because of the appellants' promise not to compete, Philip stood to maintain all the SWRI business and to reap all the profits instead of having to share them.

e) Philip's termination letter

> This letter made no reference to the altered Lasco documents or to Philip having been cheated as a basis for terminating its relationship with SWRI.

602 SWRI easily established the last two elements of its cause of action. The appellants had no lawful grounds for interfering with the contract between SWRI and Philip, let alone by proffering tampered documents to justify Philip's termination of its relationship with SWRI. And SWRI sustained substantial damages because of the breach of contract: its profits fell by approximately $2.7 million in the first year after the breach. For these reasons we uphold the trial judge's finding of liability.

603 The appellants argue in the alternative that if they are liable for inducing breach of contract, the damages "at large" awarded by the trial judge, $2.5 million, are excessive and should be substantially reduced. We see no merit in this submission.

604 The trial judge largely accepted the evidence of the respondents' expert, Vettese, and relied on one of his four alternative loss calculations. She set out her key finding at para. 1800 of her reasons:

> Based on Michael's evidence, I find that of the four sets of assumptions used by Vettese, the assumptions in Alternative D and damages of $2,770,000-$2,840,000 are the most appropriate. However I find that those assumptions are conservative given the evidence of Michael, which I accept about expectations of growth in the business. Vettese's calculations do not include all of SWRI's customers.

After making various adjustments she arrived at a figure of $2.5 million.

605 The appellants challenge the assessment by challenging Vettese's assumptions. In his loss calculation, which was relied on by the trial judge, Vettese assumed that SWRI's customers at the date of breach would continue to do business with SWRI for the expiry of their contract term and an additional renewal term. The appellants submit that this assumption was not reasonable because Lasco, SWRI's most important customer, and perhaps other customers, too were dissatisfied with

SWRI's rates and were looking for another waste handler. We do not accept this submission for the simple reason that after the breach Philip maintained the Lasco account and most other SWRI accounts.

606 The appeal against the finding of inducing breach of contract and the award of damages therefore fails.

ii. The Share Transfer Issue

607 As we have said, SWRI was incorporated in 1977 with two thousand preference shares and one hundred common shares. IWS held the preference shares. Ramsay Evans and Hayman, lawyers at the firm of Evans Husband, held the common shares in trust: fifty for Morris' three children and fifty for Chester's four children. By the time of trial, the IWS corporate records showed that the preference shares had been eliminated and that Michael and Douglas owned all of the common shares.

608 The appellants alleged that they discovered this change in SWRI's shareholdings in the summer of 1988. They counterclaimed for misappropriation of their shares in SWRI. They pointed out that there was no board of directors resolution cancelling the preference shares; there were no consents to the transfer of the common shares; and there was no compliance with Article 9 of SWRI's letters patent, which required written evidence of a share transfer.

609 The trial judge dismissed the counterclaim. Although troubled by the absence of corporate records documenting the restructuring, she found that the appellants had knowingly consented to the elimination of the preference shares and the transfer of the common shares. She found that the share restructuring took place in Ennis' law office in 1982 and was backdated to 1979. She also found that Chester actively directed the restructuring, largely to be able to claim that he, his sons and Morris never had anything to do with SWRI, thus permitting them to escape the scrutiny of anyone seeking to enforce the Laidlaw/Superior non-competition covenants. The trial judge ordered that, if necessary, SWRI's minute book and share registry be rectified to reflect what she found was everyone's intention: that Michael and Douglas own and run SWRI, and that IWS, Chester and his children have no further interest in it.

610 The appellants make two arguments on appeal: first, that the trial judge's finding of consent was unsupported by the evidence and contrary to the sworn testimony of Chester's sons; and second, that the transfer of the common shares was ineffective because of non-compliance with Article 9 of SWRI's letters patent. We do not accept either argument.

611 Ennis' account to Morris dated September 29, 1982, and his handwritten notes show that his office effected the restructuring of SWRI in 1982. The corporate records of SWRI showed that the restructuring was backdated to August 1, 1979. A minute of that date shows that Hayman,[2] as trustee, transferred fifty common shares to Michael Waxman and fifty common shares in trust to Cook, a legal assistant in Ennis' office. A later minute dated May 4, 1981 shows that Cook transferred the fifty shares she held in trust to Douglas Waxman.

612 The principal question the trial judge had to resolve was whether Chester's sons consented to the transfer of their common shares to Morris' sons. The secondary question was who bore responsibility for eliminating IWS' ownership of the preference shares.

613 In support of their claim that Morris orchestrated the restructuring of SWRI without their consent, the appellants pointed to the following evidence: the sworn testimony of Chester's sons that they did not consent to the transfer of their shares; Ennis' evidence that he took instructions on the restructuring from Morris and Ennis' September 29, 1982 account, which was sent only to Morris; the absence of any written consent; and the absence of any corporate records reflecting the elimination of the preference shares.

614 The trial judge, nevertheless, found that Chester directed the restructuring of SWRI, including eliminating the preference shares, and that Chester's children consented to transfer their common shares to their cousins. In our view, her findings are not tainted by any palpable and overriding error. Instead, they are supported by several important pieces of evidence.

a) The Evidence of Hayman

615 Hayman, whose evidence the trial judge accepted, testified that though he could not recall obtaining the consent of Chester's children or signing backdated documents, his normal practice was to seek consents from the beneficiaries before signing off on their behalf or agreeing to a backdating and he could think of no reason why he would depart from his practice in this case. As we have said at para. 337 of these reasons, Hayman's evidence of his normal practice may not be especially strong evidence but it is some evidence of what occurred.

b) The Timing of the Restructuring

616 The restructuring took place in 1982. At that time SWRI was a near dormant company with revenues of less that $40,000. It had no value to Chester or Robert.

c) The Reasons for the Restructuring

617 The trial judge accepted Morris' evidence that the restructuring of both the common and preference shares was done for two main reasons: to ensure that IWS, Chester, Robert, and Morris had no connection to the company and, therefore, could not be found in breach of the non-competition covenants with Laidlaw/Superior; and to give Michael a business to pursue, which would keep him away from IWS. These reasons for the restructuring provided cogent support for the trial judge's key finding of consent.

d) Chester's Role in Business Decisions Affecting IWS

618 The trial judge rejected Ennis' evidence that Chester played no role in the restructuring and instead found that he actively directed it. This finding was open to her on the evidence. Indeed, it was consistent with Ennis' acknowledgement that Chester was actively involved in all important business decisions affecting IWS.

e) The Active Operations of SWRI

619 SWRI carried on an active business from offices at the Centennial Parkway building, as did IWS and Robert. It defies credulity that Chester did not know until the litigation started who owned and ran SWRI.

f) The Disappearance of the Written Consents and Other Records of SWRI Reflecting the Restructuring

620 In 1988 or 1989, after the litigation started, Robert Waxman went to the Evans Husband law office and went through the original SWRI file. The trial judge found that when he did so, he removed the consents. This finding was based on the evidence of opportunity and Robert's answers on his cross-examination, referred to at para. 1902 of the trial judge's reasons:

A. There may have been a file there one day I was there with Ross Husband.

Q. Right. And I suggest to you you were allowed to look through it?

A. I don't know if I looked through it or not.

Q. Is it reasonably possible that you did?

A. Not necessarily.

Q. Do you deny looking through it?

A. No, I don't.

Q. <u>And in fact, did you take documents out of that file?</u>

A. <u>No.</u>

Q. <u>Are you sure?</u>

A. <u>No.</u> [emphasis in original]

621 The appellants urged that the trial judge misunderstood the significance of Robert's second "No". As we have said at para. 362 she may well have misapprehended this piece of evidence. But in the light of the evidence of opportunity and the trial judge's overall assessment of Robert's credibility, she committed no palpable and overriding error in inferring that Robert used his review of the SWRI files to purloin the consents.

622 For all these reasons, the appellants' attack on the trial judge's finding of fact that they consented to the restructuring of SWRI must fail.

623 Nor can the appellants succeed in their alternative argument that the restructuring did not comply with Article 9 of SWRI's letters patent. Article 9 provides that no share should be transferred "without the sanction of the directors of the Corporation expressed either by resolution passed by the board or by an instrument or instruments in writing signed by a majority of the directors". The records of SWRI produced at trial did not contain any documents transferring the common shares that would satisfy Article 9. Similarly, the records of SWRI did not contain a board resolution or other document cancelling IWS' preference share certificate.

624 Still, the validity of the restructuring depended not on formal documentation, but on the consent of the shareholders. Consent is a question of fact. And as we have already said, the trial judge's finding of consent is supported by the evidence, and reflects no palpable error.

625 Moreover, we agree with the trial judge that s. 250 of the OBCA gave her the discretion to rectify SWRI's corporate records to give effect to the restructuring she found had occurred. Sections 250(1) and (2)(a) provide:

> 250.(1) Where the name of a person is alleged to be or have been wrongly entered or retained in, or wrongly deleted or wrongly omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the court for an order that the registers or records be rectified.
>
> (2) In connection with an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order requiring the registers or other records of the corporation to be rectified;
>
> ...

The discretion vested in the court under this section is broad: see Re Teddy Bear Valley Mines Ltd., [1993] O.J. No. 1588 (Ont. Ct. (Gen. Div.)). This discretion supports the trial judge's rectification order.

626 Accordingly, we do not give effect to the appellants' appeal from the dismissal of their counterclaim for misappropriation of the shares of SWRI.

iii. The IWS Claim for Theft of Business and Corporate Opportunities.

627 The appellants did not press this submission in oral argument. In their factum, however, they contended that Morris breached his fiduciary duty to IWS by misappropriating waste accounts and other corporate opportunities belonging to it for the benefit of SWRI. They submit that the trial judge erred in failing to find a breach of fiduciary duty. They focus on four particular waste accounts: Stelco, Proctor and Gamble, Domtar, and Munroe.

628 In advancing this submission the appellants rely on the principle exemplified in Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592: a person owing a fiduciary duty to a company is precluded from appropriating for himself property, a business advantage, or corporate opportunities belonging to the company. A fiduciary who does so must disgorge the misappropriated profits. This principle seeks to avoid conflicts between a fiduciary's personal interest and duty to the company.

629 Morris Waxman was a director and then the president of IWS. He therefore owed a fiduciary duty to IWS during the period he transferred waste accounts belonging to IWS to SWRI, the company run by his sons.

630 However, Morris has a defence to his transfer of IWS' accounts to SWRI: the informed consent of the shareholders of IWS. The only two shareholders of IWS were Morris and Chester. The trial judge found as a fact that Chester and IWS actively consented to the business activities of SWRI and the transfer of the accounts from IWS to SWRI. She specifically found that Chester and IWS consented to the transfer of the four waste accounts singled out by the appellants. The absence of a directors' or shareholders' resolution formalizing IWS' and Chester's consent was immaterial because consent is a question of fact, and in a closely-held company such as IWS, where the brothers had ongoing discussions about the company's business, a formal resolution would not be expected.

631 Thus the appellants' submission that the trial judge erred in finding Morris did not breach his fiduciary duty to IWS is nothing more than an attack on the trial judge's finding of consent. Yet that finding is amply supported by the evidence. As the trial judge pointed out, Chester had several good reasons for consenting to the transfer of IWS' waste accounts to SWRI. Chester wanted to mollify his brother about the share sale; he considered the waste business unimportant and had no interest in it; he wanted a corporate vehicle to keep Michael away from IWS; and the non-competition covenants with Laidlaw/Superior precluded IWS from handling many of these waste accounts, one of which was Stelco.

632 The appellants did not demonstrate that the trial judge made any reviewable error in her finding of consent. They submit, however, that to avoid liability for breach of fiduciary duty, Morris needed more than the informed consent of the shareholders. He also had to show that IWS was not in the waste business or had wholly withdrawn from it. The appellants say Morris could not do this because IWS remained in the waste business.

633 As the trial judge accurately pointed out, the case law does not support this second requirement. Informed consent alone provides a defence even if the fiduciary is pursuing a business opportunity that conflicts with the business of the company: see Canadian Aero Services v. O'Malley, supra at p. 606.

634 Moreover, even if Morris had to satisfy this second requirement, the trial judge found as a fact that he did so. IWS did not carry on and did not intend to carry on a broad-ranging waste management business. It engaged in a very limited waste business for a few of its scrap metal customers. The trial judge found that the specialized industrial waste business pursued by SWRI did not overlap with the limited waste business undertaken by IWS. We have no basis to set aside this finding.

635 For these reasons the appeal of the dismissal of the counterclaim for misappropriation of IWS' waste accounts fails.

D. The Wrongful Dismissal Appeal

636 In Morris' action for wrongful dismissal, the trial judge found that he was dismissed by IWS without cause on October 26, 1988. She awarded Morris $64,672 in damages based on two years' notice. She calculated this using only his basic annual salary of $33,185 exclusive of any draws or other special payments from IWS, which he typically received prior to his discharge. She did so on the basis that the latter would be encompassed in the determination of post-sale profits described previously.

637 We see no basis to quarrel with either the notice period or the damage calculation and indeed the appellant IWS raises neither in argument.

638 The appellant company contests only the findings of fact that sustain the trial judge's conclusion, particularly those in relation to SWRI, which it says constitute cause. Second, it argues that Morris' conduct after his discharge should be found to constitute just cause.

639 We have already found that there is no basis to interfere with the findings of fact by the trial judge. And there is simply no basis in law to find that his conduct after termination can constitute just cause for his earlier dismissal.

E. Ennis' Appeal

640 As we have already noted, Ennis had been the Waxman family's lawyer for many years. On the share sale he acted for both Morris and Chester. In 1989, Morris and Morriston sued Ennis in a separate action for failing to meet his legal obligations in connection with the share sale and lease.

641 The trial judge found Ennis liable for breach of fiduciary duty, breach of contract, and negligence. She largely rejected his explanation for his actions. She concluded that he should not have acted for either brother on the sale because of the inevitable conflict in acting for both. She found that, having decided to act, he failed to meet even his most minimal obligations to Morris, including failing to explain to him the share sale and lease documents.

642 The trial judge concluded that had Ennis met his legal obligations, Morris would not have sold his shares and Morriston would not have signed the lease. Because of Ennis' breach of his fiduciary duty, Morris lost the profits from his one-half interest in IWS and Morriston incurred losses on the December 1983 lease. The trial judge found Ennis jointly and severally liable for those losses in the same amount that she had found Chester liable in the main action.

643 Ennis appeals both the finding of liability against him and the damages award. His appeal on liability depends on overturning the trial judge's finding that Morris did not know that he was selling his shares. His appeal on damages seeks to limit the equitable damages ordered by the trial judge or to substitute common law damages.

i. Ennis' Appeal on Liability

644 Ennis challenges several adverse findings of fact made by the trial judge. But his counsel fairly concedes that, if this court upholds the trial judge's finding that Morris did not know he was selling his shares, Ennis cannot succeed on his appeal against liability.

645 We have upheld the trial judge's finding that Morris did not know that he was selling his shares. Combined with Ennis' admission that he acted for Morris and Chester on the share sale, that finding is fatal to his appeal on liability.

646 Ennis acknowledges that he had a fiduciary duty to Morris in connection with the share sale. At the heart of the fiduciary duty lies the duty of loyalty, which includes the duty to avoid conflicting interests: see R. v. Neil, [2002] 3 S.C.R. 631 and Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599 (C.A.), leave to appeal to S.C.C. refused (1982), 37 O.R. (2d) 499n. Ordinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them. In a transaction of this magnitude Ennis simply could not act for Chester and Morris. By doing so he put himself into a hopeless conflict of interest, and, as the trial judge found, he severely compromised his representation of Morris. The trial judge was unquestionably correct in concluding that merely by acting on the sale, Ennis breached his fiduciary duty to Morris.

647 Moreover, having decided to act, Ennis breached even the most basic obligations of a lawyer to his client. Three obligations in particular come to mind. First, Ennis did not raise with Morris the problem in acting for both him and his brother. He did not explain the potential conflict, nor did he obtain Morris' consent to act for both sides. Rather than recommend that Morris obtain independent legal advice, Ennis arranged for Morris to sign a waiver of such advice. This waiver was ineffective because it was uninformed, and, in any event, was obtained only after the share sale documents had been signed.

648 Second, Ennis showed no commitment to Morris' cause and, correspondingly, Morris did not receive from Ennis the zealous representation to which he was entitled. Ennis did not explain to Morris the pitfalls and dangers of the share sale: see Clarence Construction Ltd. v. Lavallee (1980), 111 D.L.R. (3d) 582 (B.C.S.C.), aff'd (1981), 132 D.L.R. (3d) 153 (B.C.C.A.). He did not discuss the terms of the sale with Morris, much less review the share sale documents with him. He did not even discuss the clearly one-sided nature of virtually every term of the lease (see para. 164 of our reasons). Instead he sat silently at the meeting on December 22, 1983 when the documents were signed, thereby lending a false aura of normalcy to the closing, as the trial judge found.

649 Third, Ennis showed no regard for his obligation of candour to Morris. As the trial judge accurately observed, quoting LaForest J. in Hodgkinson, at 452, the duty to disclose "lies at the core of the fiduciary principle." Ennis could not keep from Morris any relevant information that he received from Chester. Yet the trial judge detailed nine pieces of relevant information that Ennis did not disclose to Morris (para. 2295). These included the fact that Morris was being asked to sign documents selling his shares, the fact that the $3 million sale price did not reflect the 1979 and 1981-2 bonus allocations, details about the terms of the lease with Morriston, and Linton's valuation memo of November 1982. The trial judge's findings on Ennis' non-disclosure are amply supported by the record.

650 For all these reasons we decline to give effect to Ennis' appeal on liability.

ii. Ennis' Appeal on Damages

651 The basic rule of equitable compensation is that the injured party will be reimbursed for all losses flowing directly from the breach. The trial judge applied this principle in assessing damages against Ennis for breach of his fiduciary duty. She held that from the time of the share sale onwards Morris was deprived of all the benefits of his fifty per cent ownership in IWS. The loss of these benefits flowed directly from Ennis' breach. Thus, together with Chester, Ennis was jointly and severally liable for these losses. He was also jointly and severally liable to Morris and Morriston for any losses flowing from the December 1983 lease.

652 Ennis contends that the trial judge's award of damages should be reduced for any one of three reasons. First, he submits that the proper measure of damages is the difference (if any) between the price at which Morris sold his shares in IWS and the fair market value of those shares in December 1983. Second, he submits that the trial judge erred in failing to consider that he neither controlled nor profited from the business of IWS. Third, he submits that the trial judge erred in failing to apply the common law principles that limit damages. We do not accept the first two submissions, but we do give effect to the third.

653 Ennis' first submission ignores the findings of the trial judge and the principles of equitable compensation. The trial judge found that had Ennis fulfilled his fiduciary duty Morris would not have sold his shares to his brother. Fixing damages at the difference between the sale price and the fair market value of the shares assumes a contrary finding: that Morris wanted to sell his shares and, but for Ennis' breach of duty, would have obtained a better price.

654 Moreover, the trial judge found that Ennis breached his fiduciary duty, which is a duty that lies in equity. Therefore, at least as a starting point, Ennis' damages must be assessed as the trial judge assessed them: damages flowing from Morris' loss of his fifty per cent interest in IWS. Morris is entitled to be put in as good a position as he would have been in if the breach had not occurred

and he had remained a half-owner of the family business. Accordingly, we see no merit in Ennis' first submission.

655 Ennis' second submission seeks to reduce the award of damages because he had no control over IWS and did not profit from the business as Chester did. In our view, neither of these factors affords a basis in equity to reduce the award.

656 That Ennis had no control over or interest in IWS leads to but a single difference between the award against him and the award against Chester. Chester was required to convey fifty per cent of his shares of IWS to Morris. Ennis, obviously, had no such shares to transfer, nor was he required to pay Morris the value of his fifty per cent interest. Otherwise, in our opinion, the damages Ennis is required to pay should not be reduced because he did not exert any control over IWS.

657 Admittedly, in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, LaForest J. observed at 578 that "[t]here is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on". But he made this observation simply to reject the argument that the remedy for breach of fiduciary duty should automatically be the same as the remedy for breach of trust. In breach of trust cases the object of the trust must be restored to the beneficiary, or, if that is not possible, the beneficiary must be compensated for the value of the object. In breach of fiduciary duty cases the court assesses the losses flowing from the breach.

658 Likewise, a damages award lower than that made against Chester should not be made against Ennis simply because he did not profit from the business of IWS. Lack of profit does not automatically reduce equitable compensation for breach of fiduciary duty. Canson itself makes this clear. In that case the defendant, a solicitor, failed to tell his clients of the secret profit earned by a third party when the solicitor acted for them in buying a piece of land. The clients were entitled to recover the secret profit. That was not disputed. What was disputed was whether they could recover more because of the solicitor's admitted breach of fiduciary duty. The court did not bar further recovery for breach of fiduciary duty simply because the solicitor had not benefited from the breach of fiduciary duty, though on the facts further recovery was denied. For these reasons, we decline to give effect to Ennis' second submission.

659 That brings us to Ennis' third submission: that the amount of equitable compensation awarded by the trial judge should be reduced because of limiting common law principles such as remoteness, causation and intervening act. Based on the Supreme Court's decisions in Canson and Hodgkinson, we accept this submission.

660 Traditionally, these common law limiting principles had no place in equity. The rationale for keeping these concerns out of equity has been the desire to enforce fiduciaries' strict standards of good faith. But as Canadian law has changed to permit plaintiffs to sue "in whatever manner they find most advantageous", correspondingly courts have recognized - as LaForest J. said in Hodgkinson at 444 - that "equity is flexible enough to borrow from the common law." Increasingly, courts seek to achieve similar compensation for "similar wrongs", whether the action is framed in contract or tort or as breach of fiduciary duty. Indeed, as LaForest J. commented in Canson at 587: "[I]t would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization."

661 Our former colleague, Finlayson J.A., made the same point in Martin v. Goldfarb (1998), 41 O.R. (3d) 161 (C.A.) when he approved the following passage from the reasons of the trial judge in that case at 173:

> Regardless of the doctrinal underpinning, plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract or tort. The objective of the expansion of the concept of fiduciary relationship was not to provide plaintiffs with the means to exact higher damages than were already available to them under contract or tort law.

662 Thus, both the Supreme Court of Canada and this court have applied common law principles to limit equitable compensation. Their application is subject to two overriding considerations. First, the court can consider the principles of "remoteness, causation, and intervening act where necessary to reach a just and fair result": see Hodgkinson at 443. Second, these principles should be applied only if doing so does not raise any policy concerns: see Canson at 581 and Hunt v. TD Securities Inc. (2003), 66 O.R. (3d) 481 (C.A.) at 506.

663 We apply these principles to the award against Ennis. We do so giving a measure of deference to the trial judge's assessment. In our view, the principle of intervening act warrants reducing the damages award. Specifically, we consider Chester's repeated assurances to Morris that the share sale would be rectified to be an intervening act that should limit the award of damages against Ennis.

664 Morris learned the truth about what he had signed from Taylor and Wiseman in January 1984. He immediately objected to the sale and wanted it set aside. He knew then the facts grounding a cause of action against Ennis and Chester. But he did not sue them because Chester assured him that they would resolve the matter privately, consistent with the Waxman family culture. Importantly, the trial judge found at para. 1518 that "Morris was unduly influenced by Chester and was not free of that influence until approximately the time he filed suit. He did not seek legal advice because Chester led him on and because he mistakenly believed that Chester would voluntarily straighten out.'" The trial judge made no finding that Ennis led Morris on or that Ennis gave Morris any false assurances. Instead, Chester's conduct - and Chester's conduct alone - caused Morris to put off seeking legal advice or issuing a statement of claim. For this reason, Chester's defence based on Morris' post-sale conduct failed.

665 Chester's assurances to Morris, his leading him on, amount to an intervening act for which Ennis should not be held responsible. Ennis had no control over Chester's conduct and he is entitled to point to that conduct to limit the award of damages against him: see McKittericket al. v. Duco, Geist and Chodos et al. (1994), 76 O.A.C. 310. The trial judge did not consider this intervening act and her failure to do so justifies our intervening in the award.

666 Finally, we must fix a cut-off point for the damages award against Ennis. Any point necessarily entails a measure of arbitrariness, but we think it is fair to assess Morris' damages against Ennis in the amount of his losses from being deprived of a fifty per cent interest in IWS and from the December 1983 lease, to the end of January 1985. We choose that date for three reasons: First, less than a month after having signed the share sale and lease documents Morris knew that his brother had cheated him. From then on Morris' focus became not so much Chester's trickery but whether

Chester would make good on his assurance that he would undo the sale. Ennis played no role in this.

667 Second, even if Chester had acted on his assurance, undoing the sale would have perhaps taken up to a year. Ennis must bear responsibility for this time period.

668 Third, after finding out that his brother would not undo the share sale, Morris was entitled to a reasonable time to consider what to do. In the light of these considerations, fixing a January 31, 1985 cut-off date for the damages award against Ennis seems to be reasonable.

669 We see no policy concerns standing in the way of this award. Morris still recovers the full amount of his losses from Chester. Ennis must still pay a substantial amount, but is responsible only for the earlier portion of Morris' losses, not the later portion attributable to Chester's assurances. And Ennis is not penalized for his breach. Instead, the award against him is closely tied to the duty that he violated.

iii. Conclusion

670 In the light of the findings of the trial judge and Ennis' admission that he acted for both brothers on the share sale, we dismiss Ennis' appeal against liability. We allow his appeal against damages in part. Because we consider Chester's assurances to Morris that the share sale would be undone to be an intervening act for which Ennis cannot be held accountable, we reduce the damages payable by him to all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, to the end of January 1985. Ennis is jointly and severally liable for those losses. If the parties cannot agree on the amount we direct a reference to quantify these damages.

F. Morris' Appeal Against Taylor Leibow

671 In a separate action Morris and Morriston, sued IWS' long-time auditor, Taylor Leibow, for negligence and breach of fiduciary duty. Morris advanced two principal claims: first, Taylor Leibow failed to ensure that IWS' financial statements properly reflected related-party transactions, especially transactions with Greycliffe, or to bring the extent of these related-party transactions to his attention; and second, Taylor Leibow failed to discuss the bonuses with Morris.

672 The trial judge dismissed both claims. She found that if Taylor Leibow owed a duty of care to Morris, it breached that duty by failing to advise him that the related-party transactions between Greycliffe and IWS were not at fair market value, and by failing to advise him that IWS had paid out excessive bonuses, to his detriment. However, applying the Supreme Court of Canada's decision in Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, she held that though Taylor Leibow owed Morris a prima facie duty of care, that prima facie duty was ousted by policy concerns about indeterminate liability. She also held that Taylor Leibow did not owe a fiduciary duty to Morris. Additionally, she held that Morris' claim on the related-party transactions with Greycliffe was barred by an agreement and undertaking that he had signed in 1998 in order to obtain copies of Taylor Leibow's working papers.

673 Morris appeals and Taylor Leibow cross-appeals. The overriding issue on the appeal is whether the trial judge erred in holding that Taylor Leibow did not have a duty to warn Morris about the related-party transactions with Greycliffe or about the bonuses. In contending that she erred, Morris makes four submissions:

1. The trial judge erred in relying on Hercules to limit the scope of Taylor Leibow's liability.
2. The trial judge erred in failing to hold that Taylor Leibow owed a duty to Morris separate and apart from its role as auditor of IWS, based on its historical relationship with Morris and Chester.
3. The trial judge erred in failing to find that Taylor Leibow owed a fiduciary duty to Morris.
4. The trial judge erred in finding that Taylor Leibow could rely on the agreement and undertaking in defence to Morris' claim on the related-party transactions.

674 Taylor Leibow seeks to uphold the trial judge's finding that it owed no duty to Morris and her finding on the agreement and undertaking. Moreover, on its cross-appeal it seeks to set aside her findings of negligence on the ground that they are not supported by the evidence.

i. Background

675 Taylor Leibow audited IWS' financial statements annually for over thirty years. It also audited the statements of the companies related to IWS, including Greycliffe. From the 1940s to the late 1970s, Taylor was the partner in charge of the audits. From the late 1970s on, Wiseman took over as the partner in charge, though Taylor was consulted and gave advice from time to time.

676 Beyond auditing IWS and the related companies, Taylor Leibow was retained to give advice on special projects, for example the Lasco and Laidlaw transactions. It gave advice about the estate freeze that Chester and Morris considered in the 1970s. And it annually reviewed the individual tax returns of Morris and Chester.

ii. The Trial Judge's Negligence Findings

677 To put Morris' submissions in context, we will briefly review the trial judge's findings of negligence. These findings assume, of course, that Taylor Leibow had a duty of care to warn him about the related-party transactions with Greycliffe and the bonuses.

(a) Findings on the Related-Party Transactions

678 The 1981 financial statement of Greycliffe prepared by Wiseman included a related-party note, which read as follows: "The rates charged by the company are at market value for services rendered."

679 The 1980, 1981, and 1982 financial statements of IWS, prepared by Linton and audited by Taylor Leibow, contained no related-party notes about the transactions between IWS and Greycliffe. In these transactions, according to the trial judge's findings, Robert had diverted IWS profits of over $2.3 million to Greycliffe and his other companies by the end of 1983.

680 In light of the note on the 1981 Greycliffe financial statement and the absence of any related-party notes on the IWS statements, the trial judge concluded that Taylor Leibow fell below the standard of a reasonably competent auditor. If Taylor Leibow owed a duty of care to Morris personally then it was liable in negligence, either for failing to include a related-party note on the IWS statements or for failing to alert Morris to its suspicions about the fairness of Greycliffe's rates. In so concluding, the trial judge rejected Wiseman's evidence that he saw no reason to discuss the fairness of Greycliffe's rates with Morris because Morris knew what was going on in both companies.

681 The trial judge's conclusion was amply supported by the evidence. This evidence included:

- * Morris' expert, Al Rosen, whose opinion evidence the trial judge accepted, testified that the 1981 Greycliffe note was a "very strong note". Under generally accepted standards of auditing, the note required Taylor Leibow to gather enough external corroborative evidence to verify its accuracy. Taylor Leibow had to verify that Greycliffe was charging and IWS was paying fair market rates. This it did not do.
- * Because haulage costs amounted to over seven per cent of IWS revenues, Rosen also testified that, in his view, IWS' related-party transactions with Greycliffe were material and should have been disclosed in the 1981/1982 financial statements.
- * Linton told Wiseman that Robert preferred not to include a related party note on the IWS financial statements. In Rosen's opinion, this preference for non-disclosure would have raised the suspicions of any reasonable auditor.
- * In 1982 an employee of Taylor Leibow, Demers, concluded that IWS' financial statements should have reflected the company's related-party transactions with Greycliffe.
- * Taylor Leibow's 1982 working papers included an organization chart for IWS, which showed Morris' diminished role in the company.
- * Wiseman was concerned enough about Greycliffe's charges to IWS that he spoke to Taylor about them. Taylor then apparently spoke to Chester, but neither Taylor nor Wiseman spoke to Morris.

(b) Findings on the Bonuses

682 Taylor Leibow was not consulted about the 1981/1982 bonuses before they were declared or about the 1983 reallocation of Morris' bonus. However, it became aware of the bonuses and the reallocation during its audits. The trial judge found that by early 1982, Wiseman knew from his audit of IWS that much of the company's equity (attributable to the proceeds of the Lasco and Laidlaw sales) had been distributed, apparently without justification, to Chester's sons. She therefore concluded that if Taylor Leibow owed a duty of care to Morris, it was negligent in failing to discuss with him both the 1981/1982 bonuses and the 1983 reallocation of Morris' own bonus.

(c) Findings on Causation and Remedy

683 The trial judge concluded that if Taylor Leibow had voiced its concerns about the related-party transactions and the bonuses to Morris, then his trust and confidence in his brother would have been eroded. The trial judge inferred that had this happened, Morris would have obtained independent legal and financial advice or would have talked to Michael. In the trial judge's view, had Morris done either, the share sale would not have occurred.

684 The trial judge did not assess damages against Taylor Leibow in connection with the related-party transactions and bonuses. However, in the light of her findings on causation, and assuming Taylor Leibow owed Morris a duty of care, presumably the trial judge would have awarded damages against the auditor in amounts similar to those she awarded against Chester.

685 In this court, Mr. Harrison fairly acknowledges that the trial judge's conclusion on causation may not be supportable because of concerns about remoteness. Therefore, on appeal, Mr. Harrison

limits the remedy he seeks for his client to discrete sums for the failure to warn about IWS' transactions with Greycliffe and about the bonuses. For the profits Greycliffe diverted from IWS, Morris asks for damages of $1,180,073 and for the excessive bonus payments he seeks damages of $2,312,000. These amounts track the amounts awarded against Chester and IWS.

iii. Analysis

(a) Did the Trial Judge Err in Relying on Hercules to Limit the Scope of Taylor Leibow's Liability?

686 Morris' principal submission is that the trial judge erred in relying on the Supreme Court of Canada's decision in Hercules to conclude that Taylor Leibow did not have a duty of care to warn Morris about the bonuses and related-party transactions. This submission has two branches. First, Hercules was a negligent misrepresentation case and should not automatically be applied to a duty to warn case. Second, even if Hercules applies, it recognizes exceptional cases in which an auditor's prima facie duty of care is not ousted by policy considerations. Morris argues that his relationship with Taylor Leibow establishes one of these exceptional cases. We do not agree with either branch of Morris' submission.

687 Hercules was a negligent misrepresentation case. It concerned the extent of an auditor's duty to shareholders of a company for negligently prepared financial statements. Morris' claim against Taylor Leibow is not for negligently prepared audited statements of IWS, but for failure to warn him about information Taylor Leibow uncovered or should have uncovered during the course of its audits. Morris frames his claim as a failure to warn rather than in negligent misrepresentation because the latter cause of action requires proof of actual reliance. As Morris maintains that he did not read the audited financial statements of IWS, he can hardly claim that he relied on them. But, however framed, the claim against Taylor Leibow - like the claim against the auditors in Hercules - arises out of its audit retainer with the company.

688 More important, Hercules did no more than apply the two-stage test from Anns v. Merton London Borough Council, [1978] A.C. 728, which has consistently been applied by the Supreme Court of Canada to determine the scope of liability for a wide array of negligence claims, especially, as this one is, claims for the recovery of pure economic loss. Under the Anns test the court asks first whether the parties have a sufficient relationship of proximity to establish a prima facie duty of care, and second, whether policy considerations negate that prima facie duty.

689 Although negligent misrepresentation imports considerations of reasonable reliance not relevant to a negligent failure to warn, for either claim the general framework in Anns will determine whether a duty of care exists. The Supreme Court itself applied the general framework that LaForest J. set out in Hercules in subsequent duty to warn decisions, such as Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210. Therefore, the trial judge cannot be criticized for drawing on the analysis in Hercules to decide whether Taylor Leibow owed the duty of care contended for by Morris.

690 The more important question is whether the trial judge was correct in concluding that Taylor Leibow had no duty of care to warn Morris that the bonus allocations and related-party transactions were detrimental to his interests. We think that she was.

691 The two-stage Anns test recognizes that policy considerations play a significant role in determining whether a duty of care exists. In its latest formulation of the test - in Cooper v. Hobart, [2001] 3 S.C.R. 537, decided after the trial judgment in the present case - the Supreme Court concluded that policy infuses both stages of Anns. McLachlin C.J.C. wrote at 550-51:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

692 At the first stage of Anns the trial judge found, at para. 2441 of her reasons, a sufficient relationship of proximity to establish a prima facie duty of care:

> In all of the circumstances, I find that the auditors owed a prima facie duty of care to Morris. The test in Anns v. Merton London Borough Council, adopted by the Supreme Court of Canada in Hercules has been met here. A sufficient relationship of proximity or neighbourhood exists between the auditors and Morris such that carelessness on the part of the auditors would be likely to cause damage to Morris. The auditors were clearly aware that Morris was a 50% shareholder of IWS and a client. It was foreseeable that Morris would reasonably rely on the IWS financial statements [citations omitted].

693 Nonetheless, at the second stage of Anns, though "troubled" by the result, she concluded at paras. 2447 and 2449 that this prima facie duty was ousted by policy concerns about indeterminate liability:

> I agree with the submissions of counsel for Taylor Leibow that, absent a specific request by Morris for protection by the Auditors or by Taylor or by Wiseman, any duty of care arising from the audit engagement was owed to IWS.
>
> There was no evidence here to the effect that in respect of the audit Taylor Leibow was specifically retained to provide information to Morris. While I am troubled by this aspect of the case, I find that Taylor Leibow owed no duty of care in respect of the audit to Morris personally, that policy considerations about indeterminate liability override the prima facie duty of care. The facts here do not fall within the exceptions discussed by the Supreme Court in Hercules [citations omitted].

694 In our opinion, policy concerns at both stages of Anns negate any prima facie duty of care. We accept the trial judge's findings on the "proximity" between the parties. Proximity here means that Morris and Taylor Leibow had a sufficiently close relationship that in doing its audit work Taylor Leibow had an obligation to be mindful of Morris' legitimate interests: see Hercules, at 187-88. The evidentiary record supports this finding of proximity. For example, although IWS was Taylor Leibow's client, Wiseman acknowledged that the "real clients" were Morris and Chester.

695 We turn from this finding of proximity to policy considerations. In Hercules, LaForest J. concluded that in doing audit work for a company, in preparing reports and in reviewing a company's financial statements, auditors normally owe no duty of care to individual shareholders. Auditors perform these functions to permit shareholders as a group to collectively oversee the administration and management of a company. Ordinarily they do not do their work to enable individual shareholders to make personal business decisions.

696 Imposing a duty on auditors to look out for the interests of individual shareholders raises the concern first articulated by Cardozo C.J. in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.C.A. 1931) at 444, and often repeated since: that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". The Supreme Court of Canada has fastened on this concern as a policy consideration limiting the circumstances in which a duty of care is established. In most cases this policy concern will - at the second stage of Anns - negate any prima facie duty of care owed by auditors to individual shareholders of a company. The trial judge relied on this "residual" policy concern to negate the prima facie duty that Taylor Leibow owed to Morris. We agree with her reasoning on this point.

697 Admittedly, in Hercules LaForest J. recognized that there might be exceptional cases in which the policy concern about indeterminate liability did not arise and, thus, the prima facie duty of care owed by an auditor to an individual shareholder would not be negated. The exceptional case requires the shareholder to show two things: the auditor knows the shareholder's identity; and the shareholder uses the auditor's work for the specific purpose for which it was undertaken. In his reasons in Hercules, LaForest J. discussed these two requirements several times. For example, he wrote at 198:

> In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the Anns/Kamloops test and a duty of care may quite properly be found to exist.

698 Like the plaintiffs in Hercules, Morris has established the first requirement but not the second. And as in Hercules, Morris' failure to establish the second requirement negates the prima facie duty of care.

699 Taylor and Wiseman had known Morris for a very long time. This relationship alleviates any concerns about liability to an indeterminate class. However, Morris did not seek to use Taylor Leibow's work for the purpose for which it was undertaken. Taylor Leibow undertook its audit work for the typical purpose of an audit engagement, to permit the controlling directors and shareholders, Morris and Chester, to better administer and manage the business of IWS. It did not perform its au-

dit work to allow one shareholder, Morris, to make sure he was not being cheated by the other shareholder, Chester. In other words, by accepting an audit engagement for IWS, Taylor Leibow did not undertake to conduct its work with an eye to the personal interests of either of the two shareholders. To hold otherwise would expose Taylor Leibow, unknowingly, to liability in an indeterminate amount for an indeterminate time, here potentially over $50 million over the course of more than a decade.

700 Taylor Leibow would only have had a duty of care to look out for Morris' personal interests, and to warn him of any actions taken by his brother that were detrimental to those interests, if it had agreed to such an expansion of its mandate. Yet the evidence shows that Taylor Leibow never undertook or agreed to do work that it was not specifically asked to do. And the evidence shows that Morris never asked Taylor Leibow to expand its mandate to protect his interests or warn him about actions that might detrimentally affect his position in IWS: to the contrary, Morris' total reliance on Chester was central to his position in the litigation.

701 Indeed, the evidence is to the contrary. Morris never brought any of his business concerns to the auditors even after the estate freeze discussions in the 1970s aroused his suspicions about the future operations and control of IWS. In other words, he never retained Taylor Leibow to give him personal advice about his interests in IWS. Thus, in doing its audit work for IWS, Taylor Leibow had no obligation to bring the information it discovered to Morris' attention.

702 During its audits, Taylor Leibow did become concerned about whether the seemingly excessive bonuses to Chester's sons could be justified. It also learned about Robert's request not to include a related-party note for Greycliffe in IWS' financial statements. Wiseman spoke to Taylor about both matters, and Taylor then spoke to Linton and Chester, but not to Morris. In both instances Taylor Leibow's concerns were tax concerns. Therefore, Taylor went to the two people responsible for tax matters: Linton and Chester. Taylor Leibow had reason to be concerned about Revenue Canada; it had no reason to be concerned about one brother cheating the other.

703 Morris' submission that Taylor Leibow owed him a duty of care raises a second problem, a problem that arises out of the relationship between the parties and, thus, at the first stage of the Anns test. The problem is one of potential conflict of interest. Suppose Morris had gone to Taylor Leibow and said: "I am concerned about the way my brother is running IWS. When you do the audit, let me know if you find anything suggesting that my fifty per cent interest in the company is being diluted." Most likely, Taylor Leibow would have replied: "To comply with your request would put us into a conflict of interest with your brother and our client IWS. We cannot act."

704 During oral argument, counsel for Morris contended that the analysis in Hercules did not apply to a closely-held company such as IWS, which was more akin to a partnership between the two brothers. He argued that Taylor Leibow had a "whistle blower" obligation, which included telling one brother that the other was trampling on his interests. We take a different view. Especially in a closely-held company such as IWS, unless both "partners" agreed that the auditor would take on this whistle blower role, doing so would potentially put it in an untenable conflict of interest.

705 Therefore, concerns about Morris not using Taylor Leibow's work for the purpose for which it was undertaken and about a potential conflict of interest negate the prima facie duty of care that Taylor Leibow may have owed to Morris Waxman. Accordingly, we decline to give effect to this ground of appeal.

(b) Did the Trial Judge Err in Failing to Hold that Taylor Leibow Owed a Duty to Morris Beyond its Role as Auditor of IWS?

706 Morris contends that in assessing Taylor Leibow's obligation to him, the trial judge focused too narrowly on an auditor's duty to end users of audited financial statements. Morris submits that Taylor Leibow owed him a duty of care not just as the auditor of IWS, but as his long-time and trusted financial advisor and personal accountant. Morris says that this duty included the obligation to tell him of information contrary to his personal interests. Thus, if Taylor or Wiseman knew that his fifty per cent interest in IWS was being eroded, either had an obligation to tell him.

707 In support of this submission Morris points to these considerations: his long-standing relationship with Taylor and Taylor Leibow, stretching back nearly forty years; his "notes from the grave" in which he claimed that in business matters Taylor, Wiseman, and Chester were the people he most trusted; and Taylor's own acknowledgment that Morris and Chester were as close to him as any non-family members could be. Perhaps most important, Morris relies on Wiseman's evidence that during the discussions about an estate freeze, he felt an obligation and responsibility to make sure Morris understood that Chester was contemplating a 60/40 split in the ongoing ownership interests of IWS.

708 To us, this evidence falls short of establishing that Taylor Leibow had a general duty to warn Morris any time it discovered information suggesting his half-interest in IWS was being diminished. By themselves, neither the length of Taylor Leibow's relationship with Morris nor the closeness of that relationship can create the duty of care contended for by Morris. And Morris' "notes from the grave" - handwritten comments that were never communicated to Taylor or Wiseman - cannot create a duty of care either.

709 Whether a duty of care existed must depend on what Taylor Leibow was retained to do, and on the reasonable expectations of the parties arising from that retainer. Here, Morris' submission contradicts the undisputed evidence. Taylor Leibow was retained from time to time for very specific tasks: to review the tax returns of the Waxman family, including Morris, and to advise Chester and Morris during the estate freeze discussions, which explains why Wiseman brought the potential 60/40 split in IWS to Morris' attention.

710 Tellingly, Morris never retained Taylor Leibow to look out generally for his business or personal interests. He never looked on Taylor Leibow as his trusted personal or financial advisor. Indeed he never asked Taylor Leibow to provide him with financial or investment advice. And the trial judge found that, historically, Taylor Leibow never did anything for Morris that it was not asked to do.

711 Morris and Chester made business decisions about IWS and personal investment decisions within the Waxman family. They made them separately, or together, but typically without the advice of their outside auditor. Taylor Leibow was not consulted about the bonus payments. It was not consulted about the share sale or any of the discussions leading to it.

712 Absent a specific request to do so, Morris could not reasonably expect that Taylor Leibow would advise him of the possible erosion of his fifty per cent interest in IWS. Had Taylor Leibow been asked to accept such a retainer it may well have refused. For by accepting it, as we said earlier, the firm risked being in the middle of a conflict between two brothers and long-standing friends, who were the directors of an important corporate client.

713 Therefore, we conclude that Taylor Leibow owed no duty of care in tort to Morris personally. It owed no duty as auditor and it owed no duty based on its historical relationship with Morris and Chester. Taylor Leibow was the auditor for IWS and it was to the company and to the shareholders collectively that it owed a duty of care.

(c) Did the Trial Judge Err in Failing to Find that Taylor Leibow Owed a Fiduciary Duty to Morris?

714 Morris submits that the trial judge erred by failing to find that Taylor Leibow owed him a fiduciary duty, a duty that again would include advising him of information contrary to his interests. We decline to give effect to this submission for two reasons: the trial judge's express finding to the contrary; and the absence of the traditional hallmarks of a fiduciary relationship between Morris and Taylor Leibow.

715 The trial judge found at para. 2448 of her reasons that, "[o]n the facts of this case, given the authorities cited above, I find no specific circumstances sufficient to give rise to a fiduciary duty owed to Morris personally in respect of the audit."

716 A finding on the existence of a fiduciary duty is typically a question of mixed fact and law: the application of the well-recognized legal characteristics of a fiduciary relationship to the specific facts of any given relationship. Here, Morris does not suggest that the trial judge misapplied the law. Therefore, her finding that Taylor Leibow owed no fiduciary duty to Morris personally is largely factual and is entitled to deference on appeal: see Hodgkinson, supra at p. 425-6.

717 Morris seeks to escape the consequences of this finding by two alternative arguments. He argues that although the trial judge found that Taylor Leibow owed no fiduciary duty as auditor, she did not decide whether it owed an "independent" fiduciary duty. Alternatively, he argues that the trial judge's conclusion on fiduciary duty really just meant that Taylor Leibow owed no duty to Morris in tort. We do not agree with either argument.

718 We acknowledge that the trial judge's finding, uncharacteristically, is not as clear as it might be. It comes in a section of her reasons dealing with a duty of care in tort, and is in the middle of a series of three paragraphs under the heading "Taylor Leibow Owed No Duty of Care to Morris in the IWS Audit" (paras. 2447-49). Moreover, the scope of the phrase "in respect of the audit" is perhaps somewhat confusing. Nonetheless, we have no reason not to take the trial judge's words at face value.

719 Unquestionably, the trial judge knew the difference between a duty of care in tort and a fiduciary duty. No one could seriously suggest otherwise. To say that the words "in respect of the audit" limited the scope of the finding to Taylor Leibow's duty as auditor would mean that the trial judge failed to address Morris' claim of an independent fiduciary duty, a failure that would be inconsistent with the thoroughness of her reasons. Thus, we take her finding to mean that Taylor Leibow owed no independent fiduciary duty as well as no fiduciary duty as auditor to advise Morris of information contrary to his interests learned during its audits. Morris accepts that if this is our view of the scope of the trial judge's finding then, because of appellate deference to that finding, his submission must fail.

720 However, even if we were to accept the limited scope of the finding contended for by Morris, we see no basis for an independent fiduciary duty. Simply because Taylor Leibow is a firm of professional accountants and gave advice to Morris personally from time to time does not automati-

cally give rise to a fiduciary relationship between them: see Brant Investments Ltd. v. Keep Rite Inc., (1991) 80 D.L.R. (4th) 161 at 172 (Ont. C.A.); Roman Corp. v. Peat Marwick Thorne, (1994) 12 B.L.R. (2d) 10 at 28 (Ont. G.D.). Nor do Morris' assertions, largely self-serving, that he "trusted" and "relied on" Taylor Leibow create a fiduciary duty. We must consider whether their relationship is characterized by the accepted badges of a fiduciary relationship: whether Taylor Leibow had scope to exercise some discretion or power; if so, whether it could exercise that discretion or power unilaterally to affect Morris' legal or practical interests; and whether Morris was vulnerable to the exercise of that discretion or power.

721 None of these badges was present. When Morris consulted others about his own business and financial affairs, invariably he went to Chester, occasionally to Linton. He gave Taylor Leibow neither discretion nor power over his business affairs. Taylor Leibow learned about decisions taken by IWS, for example the bonuses, after they had been made. It had no power over the business interests of Morris, or indeed of IWS. Equally, Morris had no particular vulnerability to Taylor Leibow. He was the president of IWS, a director of the company and active in its significant operations. Taylor Leibow provided very few services to Morris personally. Save for preparing his tax returns, he did not rely on Taylor Leibow.

722 Either because of the trial judge's express finding or because the hallmarks of a fiduciary relationship are not present, we decline to give effect to Morris' submission that Taylor Leibow owed him a fiduciary duty.

(d) Did the Trial Judge Err in Finding that Taylor Leibow Could Rely on the Agreement and Undertaking in Defence of Morris' Claim on the Related-Party Transactions?

723 Although it is unnecessary to consider this issue because of our conclusion that Taylor Leibow owed no duty to Morris personally, for the sake of completeness we will address it.

724 In July 1998, after Morris had sued Taylor Leibow on the bonuses but before he had sued on the related-party transactions, Taylor Leibow gave him copies of its working papers. In exchange for doing so Morris signed - with legal advice - an "agreement and undertaking" in which he undertook not to sue Taylor Leibow for "any alleged negligence or other deficiency with respect to their accounting and auditing work". The full text of Morris' undertaking provided as follows:

> IN CONSIDERATION of the making available by Taylor Leibow of its working paper files for I. Waxman & Sons Limited for 1979 through 1984, Greycliffe companies for 1979, 1980, 1981 and 1983 and Icarus Leasing Inc. for 1982 and 1983, the undersigned hereby agree and undertake that they shall not commence any civil proceeding against Taylor Leibow claiming damages on the basis of any alleged negligence or other deficiency with respect to their accounting and auditing work with respect to the aforesaid companies for the fiscal years indicated above.

725 The trial judge concluded that the undertaking was akin to a release and she held that it barred Morris' claim against Taylor Leibow for negligently failing to include a note about the related-party transactions in IWS' financial statements.

726 Morris submits that Taylor Leibow cannot rely on the agreement and undertaking to bar his claim for three reasons: first, the undertaking releases only claims for a negligent audit, not for a failure to warn; second, the undertaking does not release Morris' claim in tort or breach of fiduciary duty against Taylor Leibow based on their long-standing relationship; and third, Taylor Leibow is precluded from relying on the undertaking because, before Morris signed it, Wiseman gave materially false evidence on discovery.

727 The first two reasons advanced by Morris depend on limiting the scope of the undertaking to release only claims for negligently performed audits. We do not agree that the undertaking is so limited. Its scope turns on how broadly the phrase "with respect to their accounting and auditing work" is defined.

728 In our view, the phrase is broad enough to bar Morris' claim of a failure to warn. If Taylor Leibow had a duty to warn Morris about IWS' related-party transactions with Greycliffe, that duty arose from its audit work. It was during its audit work that Taylor Leibow learned of, or should have learned of, the diversion of profits from IWS to Greycliffe. Thus, we think that the undertaking Morris signed released Taylor Leibow from all future claims arising from its audit work, whether the claim was for negligent misrepresentation or for a failure to warn, and whether it was based on Taylor Leibow's duty as auditor or on an independent duty derived from its long-standing association with Morris.

729 Morris' final attack on the undertaking rests on his assertion that Wiseman lied on discovery. Had Wiseman told the truth, Morris says he would have sued Taylor Leibow for failing to warn him about the related-party transactions before releasing any claims. We find Morris' position unpersuasive.

730 Wiseman was examined for discovery in 1997. During his examination he testified that when he conducted the 1981 and 1982 audits of IWS he was unaware of any material related-party transactions. Later, at trial, Wiseman testified that at the time of the 1981 and 1982 audits he was aware of the substantial related-party transactions with Greycliffe. The trial judge accepted Wiseman's evidence at trial.

731 When Wiseman gave his discovery evidence about the related-party transactions he qualified his answers by saying that he had not reviewed Taylor Leibow's working papers before being discovered. Indeed, almost twenty years had passed since he had last seen them. Wiseman later clarified his discovery evidence in a letter from his counsel dated November 16, 1998. Morris did not complain about this clarification. If Wiseman's original discovery evidence was inaccurate, it was not deliberately so. Indeed the trial judge did not find that Wiseman lied on his discovery.

732 Moreover, Wiseman's answers did not preclude Morris from suing Taylor Leibow on the related-party transactions. Before signing the undertaking Morris knew the following: he knew IWS' transactions with Greycliffe were not noted on IWS' financial statements; he knew Taylor Leibow had audited the statements; he had, and therefore must be taken to have known, the contents of Linton's working papers. And he had sued in the main action for alleged profit diversions. He could have expanded that allegation to include a claim against Taylor Leibow but chose not to do so.

733 For all these reasons we are satisfied that the trial judge was correct in her conclusion that Morris' undertaking barred his tort claim against Taylor Leibow for failing to warn him of IWS' related-party transactions with Greycliffe.

iv. Conclusion on Morris' Appeal

734 We conclude that the trial judge was correct in holding that Taylor Leibow owed neither a duty of care in tort nor a fiduciary duty to Morris. We also conclude that she was correct in holding that the agreement and undertaking that Morris signed barred his claim against Taylor Leibow on the related-party transactions with Greycliffe. For these reasons, we dismiss Morris' appeal against Taylor Leibow.

v. Taylor Leibow's Cross Appeal

735 Taylor Leibow cross-appealed against the trial judge's findings of negligence. However, counsel for Taylor Leibow did not press us to consider the cross-appeal if we dismissed Morris' appeal. As we have done so, apart from what we have already said, we think it unnecessary to further consider the cross-appeal.

G. Linton's Appeal

736 Wayne Linton has appealed the judgment against him in the Taylor Leibow action. The trial judge found him liable for knowingly assisting Chester in his dishonest breaches of fiduciary duty toward Morris. In some parts of her reasons she also appears to have found Linton liable on the basis of oppression. We need not consider whether in law Linton could be liable under s. 248 of the OBCA, because we have determined that she properly found him liable for knowing assistance, and liability under s. 248 would add nothing to her remedy.

737 In concluding that he was liable for knowing assistance, the trial judge underlined a number of the findings of fact involving Linton that she made in the main action. She found that he was aware of all the reasons that made Morris vulnerable to Chester's breaches of trust, including Morris' poor health in late 1983, and his complete trust in Chester in the conduct of the financial affairs of IWS.

738 The trial judge then went on to highlight various actions of Linton throughout the 1980s that demonstrate how faithfully he followed Chester's directions in complete disregard of Morris' best interests. She provided a lengthy list of these actions at para. 2565 of her reasons.

739 The trial judge concluded that Linton was actively involved in helping Chester to effect the 1979, 1981, and 1982 bonuses and to structure and implement the share sale. She found that he did so knowing that these transactions were dishonest breaches of fiduciary duty by Chester.

740 Turning to the profit diversions to Robert's companies, the trial judge found that Linton was aware of the nature and extent of those related-party transactions, but did not reflect them in his drafts of the IWS financial statements between 1980 and 1982. Indeed, he relayed to the auditors Robert's desire that there be no such disclosure. In general, she found that Linton did Chester's bidding in allowing Robert to improperly divert unreasonable profits to his companies. The trial judge concluded that by doing these things, Linton participated in Chester's dishonest breach of fiduciary duty to Morris.

741 She ordered that Linton pay damages to Morris in the same amounts as ordered against Chester for the consequences of the share sale during the period of constructive trust; for the 1979, 1981 and 1982 bonuses; and for the profit diversions before the share sale. She found IWS vicariously responsible for Linton's conduct and therefore held it liable in like measure. However, because in

most instances Linton acted at Chester's behest and did not personally benefit, she did not assess punitive damages against him.

742 In this court, counsel argued that Linton cannot be liable in knowing assistance in relation to the bonuses or the consequences of the share sale because no trust monies were involved. However, as we have explained earlier, this doctrine applies equally where the knowing assistance is of a dishonest breach of fiduciary duty. The findings of the trial judge make graphically clear that this was such a case, both concerning the bonuses for 1979, 1981 and 1982 and concerning the share sale.

743 Counsel also argues that the trial judge found Linton liable for the bonuses based on "collusion and knowing assistance of oppression", neither of which are pleaded nor viable in law. Although both phrases appear in her reasons, we think a fair reading is that neither served as a basis for liability. Rather, liability is squarely and expressly founded on Linton's knowing assistance of Chester's breaches of fiduciary duty. The trial judge's findings of fact amply sustain this conclusion.

744 Counsel's final argument in relation to Linton's liability for the bonuses and the share sale challenges the trial judge's findings of fact. In dealing with the appeal in the main action we have addressed the broad and detailed factual picture painted by the trial judge of the sorry history of IWS from 1979 to the time of trial and her detailed description of the roles of the various players in it. We have found no reason to interfere with her factual findings.

745 Counsel also says that the trial judge erred in finding Linton liable for the profit diversions based only on Linton's conveyance to the auditors of Robert's wish that the 1982 IWS financial statement not disclose related-party transactions. He argues that the real fault is that of the auditors, who made the final decision not to disclose, and since Morris did not read the statements, Linton's acts had no adverse effect in argument.

746 We do not read the reasons of the trial judge that way. We see her conclusion concerning Linton's role in the profit diversions to be based on her finding that he was actively involved in this particular dishonest breach of fiduciary duty by Chester. Although not expressly stated in her reasons, the trial judge's findings throughout concerning Chester, Morris and Linton make this conclusion inevitable.

747 We therefore dismiss Linton's appeal from the finding of liability against him. However, just as we did in the main action (and for the same reasons) we vary the judgment against Linton to provide for half the amount of profit diversions ordered by the trial judge. Otherwise Linton's appeal is dismissed.

VII

CONCLUSION

748 As indicated at the outset, we agree with the trial judge's disposition except in minor ways. For convenience we repeat these minor variations here.

- Robert, Warren and Gary are liable for only one half of the 1981 and 1982 bonuses that they received: see para. 556.
- Chester, IWS and Robert and his companies are liable for only one half of the amounts ordered by the trial judge in relation to the Greycliffe profit diversions: see para. 567.

* The order for damages in relation to the Ancaster property is set aside: see para. 570.
* Robert, Warren and Gary are liable for only one half of the post sale profits that they received: see para. 587.
* Ennis is liable for all losses flowing to Morris from having been deprived of a fifty per cent interest in IWS and from the lease, only to the end of January 1985: see para. 670.
* Linton is liable for only one half of the amounts ordered in relation to the Greycliffe profit diversions: see para. 747.

749 Despite these minor variations, overall we have found the trial judge's reasons thorough, lucid and fully reasoned. Our repeating reading of them in the course of preparing our own reasons have amply enhanced this view. The trial reasons represent a significant achievement at the end of a long and complex proceeding.

750 The parties have not yet addressed the issue of costs. We invite counsel to do so by written submissions. Before filing those submissions, counsel are to meet with Goudge J.A., who will determine the appropriate procedure.

751 The appeals are dismissed save in the limited respects we have indicated.

752 As we leave this case two impressions linger: the tragedy of a family shattered and the service accorded to the administration of justice by counsel and a trial judge who, in difficult circumstances, performed their roles in exemplary fashion.

DOHERTY J.A.
LASKIN J.A.
GOUDGE J.A.

cp/e/nc/qw/qlgkw/qlgxc

1 These reasons do not address appellate review of jury verdicts. Those verdicts, which of course are not supported by reasons, are tested against a reasonableness standard: McKinley v. B.C. Tel, [2001] 2 S.C.R. 161 at 191; Marshall v. Watson Wyatt & Co. (2002), 57 O.R. (3d) 813 at 819 (C.A.).

2 Mr. Evans had passed away.

TAB K

Case Name:
Calgary Airport Authority v. Aercap Group Services Inc.

Calgary Airport Authority
v.
Aercap Group Services Inc.

[2009] S.C.C.A. No. 464

[2009] C.S.C.R. no 464

File No.: 33432

Supreme Court of Canada

Record created: November 23, 2009.
Record updated: March 18, 2010.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Status:

Application for leave to appeal dismissed with costs (without reasons) March 18, 2010.

Catchwords:

Transportation law -- Air transport -- Airports -- Seizure and detention of aircraft -- Airport authority authorized to seize and detain aircraft for unpaid airport fees -- Detention order later set aside on ground that earlier repossession of plane took priority over order -- Whether airline owns aircraft for purposes of detention remedy as long as aircraft remains registered to it with Transport Canada -- Whether ownership ceases immediately upon lessor exercising self-help remedies regardless of aircraft's regulated aeronautical status with Transport Canada -- Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5, s. 9 -- Canadian Aviation Regulations, SOR 96/433, s. 101.01 "owner" -- Aeronautics Act, R.S.C. 1985, c. A-2, s. 3(1) "registered owner".

Case Summary:

Zoom Airlines Incorporated leased a Boeing 767 aircraft from the Respondent AerCap Group Services Inc. Although AerCap held legal title to the aircraft, as the lessor, Zoom was listed as its regis-

tered owner with Transport Canada, in compliance with the Aeronautics Act, R.S.C. 1985, c. A-2, and the Canadian Aviation Regulations, SOR 96/433.

In August 2008, Zoom was in financial difficulty. It owed airport fees to the Applicant Authority and was in default of its lease payments to AerCap. AerCap retained Skyservice Airlines Inc. as agent to repossess the aircraft upon arrival in Calgary. At approximately 2:23 p.m. on August 27, 2008, Barry Kendrick of Skyservice boarded the aircraft and informed the pilot he was taking possession of the aircraft. Kendrick collected the certificate of airworthiness, the certificate of registration and the logbooks. That same day, at about 4:00 p.m., unaware of Skyservice's actions, the Applicant Authority obtained an ex parte order seizing and detaining the aircraft pursuant to s. 9 of the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5. AerCap sought to set aside the order.

Counsel:

Gary Befus (Walsh Wilkins Creighton LLP), for the motion.

Barry R. Crump (Burnet, Duckworth & Palmer), contra.

Chronology:

1. Application for leave to appeal:

    FILED: November 23, 2009. S.C.C. Bulletin, 2009, p. 1711.
    SUBMITTED TO THE COURT: February 8, 2010. S.C.C. Bulletin, 2010, p. 178.
    DISMISSED WITH COSTS: March 18, 2010 (without reasons). S.C.C. Bulletin, 2010, p. 339.
    Before: LeBel, Deschamps and Cromwell JJ.

Procedural History:

Judgment at first instance: Order authorizing Airport Authority to seize and detain aircraft for unpaid airport fees set aside.
Court of Queen's Bench of Alberta, Kent J., September 4, 2008.

Judgment on appeal: Appeal dismissed.
Court of Appeal of Alberta, Berger (dissenting) and O'Brien JJ.A. and Phillips J. (ad hoc), September 23, 2009.

e/qlhbb

Court of Appeal File No.: C537
Court File No.: 10-8647-00CL
Court File No.: 10-8651-00CL
Court File No.: 10-8657-00CL
Court File No.: 10-8658-00CL

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC. of the City of Toronto, in the Province of Ontario

AND IN THE MATTER OF AN APPLICATION pursuant to Section 56 of the Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, as amended (Application by NAV Canada)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 (Application by the Greater Toronto Airports Authority)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 (Application by the Ottawa MacDonald-Cartier International Airport Authority)

COURT OF APPEAL FOR ONTARIO
(PROCEEDING COMMENCED AT TORONTO)

JOINT BRIEF OF AUTHORITIES OF THE RESPONDENTS NAV CANADA, GREATER TORONTO AIRPORTS AUTHORITY, AND OTTAWA MACDONALD-CARTIER INTERNATIONAL AIRPORT AUTHORITY

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