Court File No.: CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BOOK OF AUTHORITIES OF THORNELOE UNIVERSITY

(Appeal of decision of claims officer re loss of value claim, returnable November 18, 2022)

October 26, 2022

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CITATION: Laurentian University of Sudbury, 2021 ONSC 3272
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller*, *Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the Firm Capital Corporation, the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for Laurentian University Faculty Association (LUFA)

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union (LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan, Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory Authority

Sarah Godwin, for the Canadian Association of University Teachers

David Salter and Peter J. Osborne, for the Board of Governors

Rachel Moses, for Royal Trust

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Michelle Pottruff, for the Ministry of Colleges and Universities

Charlotte Servant-L'Heureux, for the Assemblée de la francophonie de l'Ontario

Linda Chen, for the Information and Privacy Commissioner of Ontario

HEARD: April 29, 2021

DECISION RELEASED: May 2, 2021

REASONS: May 7, 2021

ENDORSEMENT

[1] On Sunday, May 2, 2021, the following endorsement was released:

> [1] Thorneloe University ("Thorneloe") brings this motion under section 32(2) of the *Companies' Creditors Arrangement Act* ("CCAA") for an order that the following two agreements in the Notice of Disclaimer of Laurentian University of Sudbury ("Laurentian") dated April 1, 2021 are not to be disclaimed or resiliated:
>
> > (a) the Federation Agreement between Laurentian and Thorneloe, dated 1962 (the "Federation Agreement"); and,
> >
> > (b) the Financial Distribution Notice between Laurentian and Thorneloe dated May 1, 2019, amending the Proposed Grant Distribution and Services agreement between Laurentian, the University of Sudbury, Thorneloe University, and Huntington University dated November 10, 1993 (the "Financial Distribution Notice") (collectively, the "Agreements");
>
> and, for an order amending the Loan Amendment Agreement dated April 20, 2021 (the "DIP Amendment Agreement"), to delete the following condition:
>
> > 4. The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington

> University, Thorneloe University and the University of Sudbury (collectively, the "Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021 (the "New Disclaimer Term").

> [2] This motion was heard via Zoom on April 29, 2021.
>
> [3] The University of Sudbury also brought a motion pursuant to section 32(2) of the CCAA with respect to a Federation Agreement between Laurentian and the University of Sudbury. This motion was heard via Zoom on April 30, 2021 by Gilmore J.
>
> [4] This endorsement is being released concurrently with the endorsement of Gilmore J.
>
> [5] For reasons to follow, Thorneloe's motion is dismissed.

[2] These are my reasons.

BACKGROUND

[3] In 1960, Thorneloe, Huntington University ("Huntington"), and the University of Sudbury ("U Sudbury") (collectively, the "Federated Universities"), were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding. The Province of Ontario passed an *Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established. On September 10, 1960, U Sudbury and Huntington entered into Federation Agreements with Laurentian and in 1962, Thorneloe entered into a Federation Agreement with Laurentian (collectively, the "Federation Agreements").

[4] The Federated Universities agreed to suspend degree-granting authority (other than Theology, in the case of Thorneloe and Huntington) and effectively operate as a single university. The Federated Universities would teach courses to students for credit at Laurentian. Funding from the provincial government was provided to the Federated Universities, through Laurentian.

[5] The arrangement among the Federated Universities to distribute government grants is set out in the Proposed Grant Distribution and Services Fees Agreement dated November 10, 1993.

[6] The funding arrangement was changed commencing in the 2019 – 2020 academic year, per the Financial Distribution Notice.

[7] Laurentian wants to disclaim the Federation Agreements and the Financial Distribution Notice with respect to Thorneloe and U Sudbury.

[8] As referenced in the Third Report of the Monitor, the Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology

at Huntington and Thorneloe). All Federated University programs and courses are offered through Laurentian, and all students apply for admission to Laurentian. Students who enroll in a program at Laurentian may take elective courses at any or all of the Federated Universities as well as Laurentian. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of Laurentian, and these courses are credited towards a degree from Laurentian. Laurentian provides certain services to the Federated Universities, however, each of the Federated Universities is separately governed and manages its finances separately from Laurentian and each other.

[9] The Monitor also reported that as all students are students of Laurentian regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition. Laurentian manages admission. Students are billed tuition by Laurentian. Students then choose courses from a Laurentian course catalogue which includes courses offered through the Federated Universities.

[10] While Laurentian does not receive grant revenue or tuition revenue that is directly intended for the benefit of the Federated Universities, Laurentian and the Federated Universities have certain financial agreements in place pursuant to which Laurentian receives, allocates and distributes a portion of Laurentian's revenue to the Federated Universities in accordance with the funding formula (the "Federated Funding Formula"). Through this Federated Funding Formula, Laurentian compensates the Federated Universities for delivering programs and services to Laurentian students. The key terms of the Federated Funding Formula include the following:

(a) A portion of provincial grants received by Laurentian are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;

(b) A portion of tuition fees received by Laurentian are distributed to the Federated Universities based upon student enrolment and courses offered through the Federated Universities; and

(c) An offsetting charge for service fees charged by Laurentian to the Federated Universities in exchange for Laurentian providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities).

[11] As of the fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs through the three Federated Universities (271 full-time equivalents). This includes 91 full-time and part-time students of Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at U Sudbury (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents). The remaining students are enrolled in programs jointly offered by the Federated Universities.

[12] Students who enrolled at Laurentian have had the ability to take elective courses at any or all of the Federated Universities, as well as at Laurentian. The main activity of both U Sudbury

and Thorneloe is to offer elective courses through the Faculty of Arts for students enrolled in the Applicant's programs.

[13] Each of the Federation Agreements contains an aspirational statement which addresses the Federated relationship:

> [B]oth Laurentian University and [the Federated University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one… [a]nd to build a great institution of learning which shall forever be bilingual and nondenominational in its character.

[14] Laurentian has Indenture Agreements with each of the Federated Universities, pursuant to which the Federated Universities lease land owned by Laurentian and on which they have constructed their own buildings. Each indenture provides for lease terms of 99 years, with the possibility of further renewal.

[15] The indentures contain termination provisions which allow for the termination of the indenture if the relevant Federated University withdraws from the Federation with the Applicant. No notice of disclaimer was issued by Laurentian in respect of any of the indentures and the indentures are not the subject matter of this motion.

[16] Laurentian takes the position that the main activity of the Federated Universities is offering elective courses that are administered for Laurentian's students. Each time a Laurentian student takes an elective course through the Federated Universities, rather than an elective through Laurentian, that represents lost tuition revenue to Laurentian.

[17] Laurentian takes the position that in fiscal year 2020, as a result of Laurentian students' enrolment in programs and courses through the Federated Universities, Laurentian transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the administrative services fee of approximately $1.4 million, for a net transfer from Laurentian to the Federated Universities of approximately $7.7 million in fiscal year 2020.

[18] Laurentian has approximately 9,300 undergraduate and graduate students. Laurentian asserts that its Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for Laurentian to lose revenue because its students take elective courses offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities can otherwise be accommodated and enrolled in programs offered by Laurentian, Laurentian asserts that a substantial portion of the grant revenue represents lost revenue for Laurentian. Laurentian and the Monitor concede that Laurentian will not be able to accommodate 100% of the displaced students but anticipate that it will be able to accommodate most of them.

[19] Laurentian also asserts that approximately 70% of its revenues in 2019-2020 is comprised of tuition and grant funding, and, due to the freeze of tuition fees, Laurentian cannot increase

revenue through tuition fees. Thus, the only opportunity for Laurentian to fully utilize the revenue it receives in respect of its students is for them to be enrolled in programs and courses at Laurentian.

[20] Thorneloe presents the facts from its viewpoint. It considers that the funds flow through Laurentian to Thorneloe pursuant to the Financial Distribution Notice. The funds do not belong to Laurentian and the funds do not represent a subsidy. As set out in the Financial Distribution Notice, Laurentian charges Thorneloe an additional 15% of Thorneloe's earned government grants and tuitions.

[21] Thorneloe also points out that it is a small component of the Laurentian Federation, employing a total workforce of 28, including seven full-time faculty members, 12 sessional faculty members, six staff and three casual staff.

[22] Notwithstanding its small size, Thorneloe contends that it has a big impact. In 2019-2020, Thorneloe taught 2861 Laurentian students, representing 297 full-time equivalents ("FTEs"). In 2020-2021, Thorneloe taught slightly fewer (2477) Laurentian students, after it made the decision to close underperforming programs.

[23] Thorneloe also contends that the financial problems of Laurentian are not attributable to Thorneloe or the Federation model.

CCAA PROCEEDINGS

[24] Laurentian obtained an initial stay of proceedings under the CCAA on February 1, 2021. The objective of the CCAA filing was the subject of comment in the affidavit of Dr. Robert Haché, sworn January 30, 2021, filed in support of the initial application. Section VIII covers the "Proposed Restructuring of Laurentian", the "Evaluation of the Federated Universities Model" and the "Restructuring of Program Offerings".

[25] Paragraph 295 of the affidavit reads as follows:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) **Restructuring the Academic Model** by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and terminating the agreements and relationship with the Federated Universities; and
>
> (b) **Restructuring the Business Model** by updating business operations, restructuring existing obligations through a compromise in the CCAA and ultimately balancing the budget.

[26] Paragraph 298 reads, in part, as follows:

> [298] More particularly, during this CCAA proceeding, LU ("Laurentian") intends to:
>
> …
>
> (b) re-evaluate the Federated Universities model in such a way that the historic significance of the Federated Universities can be preserved while ensuring that the relationships reflect the current realities of each organization;

[27] Paragraphs 299 – 301 read as follows:

> [299] In 2019, LU provided notice of a change in the funding agreement between LU and each of the Federated Universities. While this amendment was necessary to make the funding arrangements consistent with metrics in respect of tuition and grants from the Province, further work is required. LU estimates that the Federated Universities model costs LU approximately $5 million each year.
>
> [300] Currently, the Federated Universities have duplicate organizational infrastructure, functions and services. Although LU respects the autonomy of the Federated Universities, the Federated Universities also have financial challenges. One successful outcome of this CCAA proceeding may be the remolding of the Federated Universities model in such a way that creates economies of efficiency for LU and the Federated Universities while maintaining the historical significance and identities of the Federated Universities.
>
> [301] This Court-supervised proceeding will assist LU in focusing its discussions and negotiations with leadership of the Federated Universities to arrive at a compromise and solution that is acceptable and, more importantly, ensures the long-term sustainability of LU. If necessary, LU may utilize the proposed mediation to address and resolve the Federated Universities model.

[28] The Honourable Justice Sean Dunphy conducted a judicial mediation to address a number of issues facing Laurentian. Although the contents of any discussions have not been made public, it is apparent that the issues as between Laurentian and the Federated Universities were discussed but were not resolved.

[29] On April 1, 2021, Laurentian gave Notice to Disclaim or Resiliate an Agreement with Thorneloe and with U Sudbury. The notice covered both the Federation Agreements and the Financial Distribution Notice.

[30] The Monitor approved the Notices of Disclaimer.

[31] On April 15, 2021, Thorneloe delivered a Motion Record opposing the Notice of Disclaimer issued to Thorneloe.

[32] U Sudbury also delivered a Motion Record opposing the Notice of Disclaimer. The motion was the subject of a bilingual hearing before Gilmore J.

ISSUE

[33] Thorneloe submits there is one issue to be determined on this motion: should the court prohibit the disclaimer?

ANALYSIS

[34] Section 32 of the CCAA addresses the disclaimer or resiliation of agreements.

[35] The debtor company may, on notice to the other parties to an agreement and the monitor, disclaim or resiliate an agreement to which the company is a party at the commencement of the CCAA proceedings: s. 32(1). The monitor must approve the proposed disclaimer or resiliation. Otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed or resiliated: ss. 32(1) and (3). The counterparty has 15 days to make an application to the court opposing the disclaimer or resiliation: s. 32(2). In deciding whether to make the order, the court is to consider, among other things, the factors set out in s. 32(4), which read as follows:

> **Factors to be considered**
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[36] Thorneloe makes the following arguments in opposition to the disclaimer:

(a) Thorneloe did not cause Laurentian’s financial problem;

(b) The disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make an insolvency filing pursuant to the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

(c) Thorneloe is immaterial to Laurentian’s financial situation and therefore, the disclaimer would not result in a material improvement to Laurentian’s restructuring;

(d) The relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply; and

(e) Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA.

[37] The Monitor approved the disclaimer for reasons set out in the Third Report as follows:

> 169. … [I]t is the Monitor's view that the Notices of Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant. In fact, it is the Monitor's view that without the Notices of Disclaimer, the Applicant is unlikely to be able to complete a viable plan of compromise or arrangement.
>
> …
>
> 172. While the net estimated savings achieved to date is significant and addresses the Applicant's operational deficit, it is unlikely to be sufficient to cover among other items: (a) the repayment of the DIP Facility (even if refinanced over time) and (b) payment of distributions to creditors pursuant to a plan of compromise or arrangement in connection with the compromise of their claims.
>
> 173. As a not-for-profit, LU is unable to issue equity to creditors. It has no or limited ability to service additional debt beyond the refinancing of the DIP. As set out above, LU has limited opportunity to drive increased revenue. Therefore, LU must, through its restructuring, generate sufficient savings to provide for the ability to make payments over time to its creditors in partial satisfaction of their claims. The savings generated to date through the LUFA Term Sheet, LUSU Term Sheet and non-union employee savings represent a significant component of the required savings, but not the entirety.
>
> 174. The Federated Universities model represents a significant cost to LU. In Fiscal 2020, LU transferred approximately $7.7 million to the Federated Universities as a result of LU students taking programs and courses offered through the Federated Universities. This included the transfer of approximately $3.5 million of grants received by LU, $5.3 million in net tuition collected from LU students and $0.3 million in material fees in respect of Federated Universities courses all offset by a 15% service fee of approximately $1.4 million. …
>
> 175. The Monitor understands that the majority of the funds transferred to the Federated Universities relates to the delivery by the Federated Universities of

> elective courses taken by students enrolled in LU programs as opposed to students enrolled in programs offered through the Federated Universities.
>
> 176. In conducting its review of its academic offerings and operational restructuring model, LU determined that it has the ability and capacity to offer a comprehensive list of programs and courses to LU students from the suite of programs and courses delivered by LU faculty in the absence of continuing the Federated Universities relationship. As a result, LU determined that it could retain the vast majority of the funds transferred to the Federated Universities and continue to support students without incurring those incremental costs.
>
> 177. As a result, LU is of the view that savings estimated in the range of $7.1 to $7.3 million annually can be generated through the disclaimer of the Federated Universities as part of this restructuring.
>
> 178. The Monitor recognizes the potential financial hardship that the Notices of Disclaimer may have for the Federated Universities. However, given the additional savings required for LU to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring, the Monitor is of the view that the disclaimer of the Federated Universities agreements is necessary.

[38] To counter the submissions of Laurentian and the views and recommendations expressed by the Monitor, Thorneloe filed a Report on Financial Impact of Termination of Federated Agreement and Financial Distribution Agreement on Thorneloe University. The Report was prepared by Mr. Allan Nackan, a partner with A. Farber & Partners Inc. Mr. Nackan has been identified as an expert for the purposes of providing his opinion. I am satisfied that Mr. Nackan is an expert in the area of insolvency and restructuring. However, Mr. Nackan acknowledged in cross-examination that he is not an expert in terms of government funding of universities and that he has no prior experience in determining university funding. His lack of industry-specific experience has to be taken into account when considering his report and conclusions.

[39] It is also necessary to acknowledge the expertise of Ernst & Young Inc., the court-appointed Monitor. The Monitor is an officer of the court, with a duty to be neutral and objective: *Bell Canada International Inc. (Re)*, [2003] CarswellOnt No. 4537 (S.C.). The principals of Ernst & Young Inc., including Sharon Hamilton, who signed the Monitor's Third Report, are widely acknowledged as being experts in the field of insolvency and restructuring. Moreover, the Monitor has been involved since the proceedings began and has extensive knowledge of the Applicant's operations and restructuring efforts.

[40] Farber was retained to provide an opinion on whether the termination of the Federated Agreement and the Financial Distribution Notice would result in significant financial hardships to Thorneloe, and whether or not the termination would enhance Laurentian's prospects of a viable compromise or arrangement.

[41] Farber concludes the termination of the Federated Agreement will cause serious financial hardship to Thorneloe as a consequence of which Thorneloe will have to resort to a formal insolvency process.

[42] Farber also concludes that the termination of the Federated Agreement will have an immaterial impact on overall costs reduction in Laurentian's restructuring process and is unlikely to enhance prospects of Laurentian making a viable plan.

[43] In a supplementary report, Farber concludes that:

- Laurentian is not facing an immediate liquidity crisis on May 1, 2021;
- there is no compelling reason that would necessitate termination of the federated arrangement with Thorneloe on May 1, 2021;
- from a financial perspective, Laurentian and the DIP Lender have not provided information to support the need for a Disclaimer Deadline of May 1, 2021.

[44] A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[45] In my view, the considerations in the Third Report of the Monitor reflect a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe. The Third Report discusses the financial challenges facing Laurentian and proposes solutions that could enhance the prospects of a viable plan of compromise or arrangement, while acknowledging the potential financial hardship on the Federated Universities. The Farber Report and the Supplementary Farber Report focuses of the impact of the disclaimer on Thorneloe and the short term DIP Financing requirements. In narrowing its focus, the Farber Report does not take into account that in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups. For this reason, I have concluded that the Third Report of the Monitor has to be given greater weight than the Farber Report and the Supplementary Farber Report.

[46] Laurentian submits that the Courts have identified guiding principles for the analysis:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings (see *Nortel Network Corp. Re,* 2018 ONSC 6257 at para. 27; *Aralez*

Pharmaceuticals Inc., Re, 2018 ONSC 6980 at para. 36; and *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f);

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial (see *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 ("*Timminco*"); see also *Homberg Invest Inc.*, 2011 QCCS 6376 at para. 103);

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer (see *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26);

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty (see *Timminco* at para. 60); and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA (see *Timminco* at para. 62).

[47] There is no doubt that Laurentian has significant financial challenges. There is also no doubt that, if a successful restructuring is to be achieved, it must be done on an expedited basis. If Laurentian is to successfully restructure its affairs, it is essential that it maintain continuity of operations. The spring term commences May 3, 2021 and extends until the latter part of July 2021. The fall term commences at the beginning of September 2021. If the restructuring is to succeed, Laurentian must be in a position to provide assurances to both its students and faculty that it has a viable plan that will ensure continued operations for both the spring term, the fall term and beyond.

[48] Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These include a downsizing of the number of programs being offered by Laurentian and also the necessity to arrive at new, sustainable collective agreements with LUFA and LUSU. These requirements and accommodations are set out in the motion to extend the stay of proceedings.

[49] Laurentian also identified, at the outset of the CCAA proceedings, that it would be necessary to have a fundamental readjustment or realignment with the Federated Universities.

[50] Although Thorneloe is of the view that its relationship with Laurentian has only a minor impact on the financial position of Laurentian, it seems to me that this view is far too narrow in scope. Laurentian has identified that if the disclaimers involving Thorneloe and U Sudbury are upheld, together with the revised agreement with Huntington, this will result in $7.7 million of additional funds remaining with Laurentian on an annual basis. This calculation has been identified by the Monitor and, in my view, represents a real source of annual financial relief for Laurentian.

[51] Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive

and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a “most favoured nation” clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.

[52] The Notices of Disclaimer are, in my view, central to the Applicant’s restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor’s Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[53] The Applicant contends that it simply cannot afford to continue its relationship with the Federated Universities. In order to right-size the University, Laurentian cannot continue paying for programs and courses supplied by the Federated Universities that it does not require and are revenue negative for Laurentian.

[54] The Applicant submits that it cannot simply “balance its budget” in order to achieve financial sustainability. It submits that it must generate positive cash flow from operations on an annual basis, prior to the funding of expenses, to achieve financial sustainability. In my view, this submission is consistent with the objective and necessity of achieving long-term sustainability.

[55] Laurentian has also submitted that the savings to be realized from the disclaimer are necessary for the purposes of submitting a viable plan. The Monitor is in agreement with this submission.

[56] Although the savings realized from the disclaimer do not, in isolation, represent a significant amount, in my view, that is not the end of the inquiry. In order to enhance the prospects of a viable plan of reorganization being put forward, it is necessary to assess the totality of what Laurentian is attempting to achieve in this restructuring.

[57] Laurentian suggests that savings have to be realized from a number of sources, including the Federated Universities. Without the total amount of savings being realized, Laurentian submits that it will been unable to put forward the basis of a plan that will be acceptable to its various constituents.

[58] It is necessary to take into account another factor, namely that there is evidence that Laurentian has achieved other milestones in its attempt to put forward a viable plan of reorganization. These include the revised relationships with LUFA and LUSU, the reduction in the number of courses, and the reduction in the number of staff. None of these milestones were realized without significant compromise and hardship being experienced by faculty, students and

the greater Sudbury community. Without such compromises, Laurentian will not be able to survive.

[59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.

[60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a "loan to own strategy". These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re)*, Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual

relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

[67] Thorneloe also raises the concern that the Disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make insolvency filings pursuant to the CCAA or the *Bankruptcy and Insolvency Act*.

[68] There is no doubt that this is a legitimate point being raised by Thorneloe. The impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form. However, Thorneloe was offered alternatives. The form of the Huntington Transition Agreement was offered to Thorneloe but was not accepted. More importantly, it is also necessary to take into account that if Laurentian's restructuring does not succeed and it ceases operations, Thorneloe, as conceded by its counsel, will also be unable to continue operations.

[69] Thorneloe also contests the disclaimers on the basis that the relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply. In my view there is no merit to this submission. The CCAA proceedings were commenced on February 1, 2021. The Initial Order declares that Laurentian is insolvent and is a company to which the CCAA applies. The disclaimer provisions in s. 32 are available to a debtor company. The exceptions set out in s. 32(9) have no application in the circumstances. Laurentian is entitled to utilize the disclaimer provisions in accordance with s. 32.

[70] Thorneloe also takes the position that Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA which provides:

> **Good faith**
>
> **18.6** (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith – powers of court**
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[71] In support of this argument, Thorneloe points to Laurentian's attempt to terminate its relationship with Thorneloe, knowing that the disclaimer will result in Thorneloe's insolvency, and to Laurentian's persistence in the face of evidence that termination will not materially assist its restructuring. Thorneloe also submits that Laurentian has consistently and continually wanted to terminate its relationship with Thorneloe and thereby failed to engage in good faith negotiations.

[72] I do not accept that Laurentian has acted in bad faith. Restructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not

necessarily mean that the other party has not been acting in good faith. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.

[73] Section 11.02(3) of the CCAA addresses the burden of proof on an application for an extension of the stay of proceedings other than the initial application. This includes a requirement that the applicant satisfy the court that it has acted, and is acting, in good faith and with due diligence. By supporting the application for the extension and upholding the disclaimer, it can be inferred that the Monitor does not support the argument of Thorneloe to the effect that Laurentian has been acting in bad faith.

[74] My summary of the factors set out in s. 32(4) of the CCAA is as follows:

(a) the Monitor approved the proposed disclaimer;

(b) the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Laurentian;

(c) the Notice of Disclaimer will have financial consequences to Thorneloe, but this is not a sufficient reason to disallow the Notice of Disclaimer. Thorneloe was offered an alternative, similar to Huntington, which was not accepted.

[75] In addition, it seems to me that, in the circumstances of this case, it is necessary to consider the broader implication of disallowing the Notice of Disclaimer – namely the potential demise of Laurentian.

[76] The dilemma facing the court is clear. If Thorneloe's motion succeeds, with the result that the Disclaimer is not effective, it could lead to an unraveling of Laurentian's restructuring plan and the collapse of Laurentian. This in turn would have significant impact on all faculty, students and the greater Sudbury community. It would also result in the financial collapse of Thorneloe. Obviously, this is not a desirable outcome.

[77] If the Notices of Disclaimer are upheld, I acknowledge that this could lead to the cessation of operations of Thorneloe. I do not lightly discount the impact on faculty, employees and students at Thorneloe, but the impact is significantly less than if Laurentian and Thorneloe are both forced to suspend or cease operations.

[78] Given these two undesirable options, the better choice or to put it another way, the least undesirable choice, is to uphold the Notices of Disclaimer.

DISPOSITION

[79] In the result, the motion brought by Thorneloe to invalidate the Notice of Disclaimer is dismissed.

Chief Justice G.B. Morawetz

Date: May 7, 2021

TAB 2

Most Negative Treatment: Not followed
Most Recent Not followed: Bosanac v. Bosanac | 2000 CarswellOnt 5808 | (Ont. S.C.J., Dec 19, 2000)

1998 CarswellOnt 2983
Ontario Court of Justice (General Division)

Passarello v. Passarello

1998 CarswellOnt 2983, [1998] O.J. No. 2792, 64 O.T.C. 118, 80 A.C.W.S. (3d) 1037

Christine Joan Passarello, Petitioner and Natale John Passarello, Respondent

Kiteley J.

Heard: February 16, 1998
Heard: February 17, 1998
Heard: February 18, 1998
Heard: February 19, 1998
Heard: February 20, 1998
Heard: February 24, 1998
Judgment: June 29, 1998
Docket: Toronto 95-MP-218509

Proceedings: additional reasons at (August 7, 1998), Doc. Toronto 95-MP-218509 (Ont. Gen. Div.)

Counsel: *David A. Jarvis*, on behalf of the Petitioner.
Daniel A. Barna, on behalf of the Respondent.

Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.i Entitlement to
Family law
VII Division of property
VII.3 Excluded assets
VII.3.c Gifts and inheritances
Family law
VII Division of property
VII.4 Valuation
VII.4.a Business
VII.4.a.iii Miscellaneous
Family law
VII Division of property
VII.7 Order for division
VII.7.a Factors in determining nature of order
VII.7.a.iii Miscellaneous
Family law
VIII Support

VIII.1 Issues common to child and spousal support
VIII.1.a Determination of income
VIII.1.a.v Miscellaneous
Family law
X Custody and access
X.1 Best interests of child generally
X.1.b Wishes of child
Family law
X Custody and access
X.1 Best interests of child generally
X.1.d Status quo
Family law
X Custody and access
X.1 Best interests of child generally
X.1.e Conduct of parent
X.1.e.vi Miscellaneous
Family law
X Custody and access
X.16 Miscellaneous
Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.f Factors
XVII.11.f.ii Conduct of litigation
Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.f Factors
XVII.11.f.v Success
XVII.11.f.v.B Miscellaneous

Headnote

Family law --- Custody and access — Factors to be considered in custody award — Conduct of parent — General

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Husband withdrew both children from school without advance notice to take physical custody of them before his motion for interim interim custody — Husband used his motion papers to convince school that he had legal authority to take custody of youngest child although husband was aware that he did not have legal custody — Husband asked both children to sign motion papers in contravention of order that neither party talk to children about proceedings — Husband's actions were devious and subversive and he attempted to drag children into parental conflict — Husband displayed no insight into anxiety and stress he caused youngest child through his behaviour — Should husband gain custody, child would learn not to respect wife and that manipulation of others was basic problem solving strategy — Husband's priority was obsession with winning his conflict with wife and not best interests of child — Wife granted custody of child.

Family law --- Custody and access — Factors to be considered in custody award — Wishes of child

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Youngest child was still residing with father despite order that husband return child to custody of wife — Evidence of witnesses was that child was ambivalent as to custody and his wishes changed — Husband only gave oldest child insurance monies he had been keeping for him after he moved in with husband — Husband's behaviour seriously undermined any significance to be placed on oldest child's preference in deciding what was appropriate for youngest child — It was possible that husband had also offered youngest child incentive for moving in with him — Wife granted custody of youngest child.

Family law --- Custody and access — Factors to be considered in custody award — Best interests of child generally

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Husband withdrew both children from school without advance notice to take physical custody of them before his motion for interim interim custody — Husband was ordered to return youngest child to custody of wife — Child had been living with wife all his life and with her as custodial parent for past three years — It was in child's best interests to preserve status quo — Child required stability, structure and encouragement to maximize his learning potential in view of his learning disability — Husband's behaviour in taking child from school for three days shortly before examinations showed failure to appreciate importance of schooling to child's future — Wife was responsible for attending to child's educational needs and was in better position to help child — Child had been residing in same area all his life and move would be disruptive as would change of school — Wife granted custody of child.

Family law --- Custody and access — Factors to be considered in custody award — Miscellaneous factors

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — It was important for youngest child to maintain contact with both parents — Wife was more likely to facilitate access to husband — Access arrangements had worked for two years and there was no evidence that wife impeded husband's access during that time — Husband would not have positive influence on access between child and wife — Wife granted custody of child.

Family law --- Family property on marriage breakdown — Valuation of specific assets — Business — Miscellaneous issues

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband had been locksmith for 29 years and incorporated locksmith business — Wife worked for almost three years in husband's business — Wife's evidence was of large amounts of unrecorded cash income from business — Husband's financial statement initially disclosed only employment income of $41,000 — On cross-examination husband agreed to existence of undisclosed cash and that he had mislead his accountant and revenue Canada about his true income — Husband's total annual income assessed at $66,000 — Third party made offer to purchase business for $230,000 plus amount of any shareholder loan — Value of business at valuation date was $230,000 and shareholder loan was $91,080.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Gifts and inheritances — Ontario

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband claimed that he had received gift of $100,000 from his brother after working for 20 years in his brother's locksmithing business — Husband alleged that $86,000 of that amount was reflected in his net family property as shareholder loan to company — Husband applied for exclusion of amount pursuant to s. 4(2) of Family Law Act — There was no documentary evidence to support alleged gift — Husband had failed to prove that alleged gift could be traced to shareholder's loan — Adverse inference was drawn from husband's failure to call brother as witness to corroborate gift — Monies were not gift but additional compensation for services rendered — Monies could not be excluded from property to be divided as husband failed to meet onus of establishing that funds constituted gift — Family Law Act, R.S.O. 1990, c. F.3, s. 4(2).

Family law --- Family property on marriage breakdown — Order for division of property — Factors to be considered in determining nature of order — Miscellaneous factors

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband's net family property was $332,595 and wife's was $86,804 — Husband owed wife equalization payment of $122,895 — Wife brought application for order transferring title of matrimonial home to her in consideration of part of equalization payment — Husband to transfer matrimonial home to wife and pay balance of equalization payment and other adjustments of $11,895.

Family law --- Support — Child support — Duty to contribute — Means of parents

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife granted custody of youngest child — Wife brought application for child support — Husband was self-employed and had obligation to provide documentation which would enable court to establish his current income — Husband did not meet obligation and court was entitled to draw inferences against him — Husband's annual income assessed at $72,600 — Husband to pay monthly child support of $589 pursuant to Federal Child Support Guidelines — Claim for child support for oldest child dismissed as he was no longer child of marriage — There was no evidence as to oldest child's attendance at school, dependency or income — Child Support Guidelines Regulations, O. Reg. 391/97.

Table of Authorities

Cases considered by *Kiteley J.*:

Amaral v. Amaral (1993), 50 R.F.L. (3d) 364 (Ont. Gen. Div.) — applied

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 2(1) "child of the marriage" [rep. & sub. 1997, c. 1, s. 1(2)] — referred to

s. 2(1) "child of the marriage" (b) — referred to

s. 16 — referred to

s. 16(8) — considered

s. 16(9) — considered

s. 16(10) — considered

s. 17 — referred to

Family Law Act, R.S.O. 1990, c. F.3

s. 4(2) — referred to

s. 4(2) ¶ 1 — considered

s. 4(3) — considered

s. 9(1) — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 85 — referred to

Regulations considered:

Family Law Act, R.S.O. 1990, c. F.3

Child Support Guidelines Regulations, O. Reg. 391/97

Generally

s. 3(2)

s. 8

***Kiteley J.*:**

Reasons for Decision

Introduction

1 This is a petition for divorce and corollary relief by the wife and counter petition for the same by the husband. The wife is 46 years old. The husband, who is also 46 years old, goes by the name of "Chris". Christine and Chris were married on July 28, 1972. They have two children: Tim who was born November 3, 1977 and Steven who was born February 15, 1983. Christine attempted to initiate a divorce in 1992 but reconciled with Chris for reasons indicated below. The spouses separated permanently on May 10, 1995.

Issues

2 Several issues arise in this action. Both parties are seeking custody of the youngest son, Steven. This arose as an issue shortly before trial. Christine is claiming child support for Steven, arrears of child support for Steven and Tim, and spousal support. Chris is seeking child support for Tim, who has been living with him since January. Both spouses have asked for the equalization of net family property.

Divorce

3 This petition for divorce had been initiated on the grounds of adultery. At the opening of the trial both parties consented to amendment of the petition to include separation as a grounds for divorce. Divorce judgment is granted (on grounds of separation) and takes effect 30 days after release of these reasons.

Procedural Background

4 The Petition for Divorce was issued on April 25, 1995. Christine left the matrimonial home with both boys on May 10, 1995. Since that time, there has been a significant amount of court intervention as the following summary indicates.

1. On May 18, 1995 Smith A.C.J. made an order in favour of Christine for interim interim custody of both children, and exclusive possession of the matrimonial home. A schedule of access was specified and both parties were ordered not to discuss any details of the proceedings with the children.

2. On June 1, 1995 Smith A.C.J. ordered interim interim child support of $700.00 per month per child, to be paid through the Family Support Plan. Chris was ordered as well to maintain the mortgage payments of $275.00 per month, and to maintain the status quo arrangement whereby he provided Christine with a late model van through a lease with Chris' business. Imperial Lock Company.

3. On June 21, 1995, Smith A.C.J. ordered either of the parties to make the house insurance payment of $780.00, and that the party to make the payment be entitled to a $390.00 credit on equalization of net family property.

4. On July 7, 1995, Jennings J. heard a motion by Christine to have Chris provide funds for her to have his business appraised. This motion was adjourned *sine die*, and Chris was given 30 days to provide a business appraisal. Chris was ordered to provide particulars with respect to certain paragraphs of his counter petition. Costs of the motion were awarded to Christine in the cause.

5. On July 9, 1995, Chris was charged with forcible entry, uttering death threats against Christine, and assault of Christine, after he kicked in the door of the matrimonial home. He pleaded guilty to and was convicted on October 23, 1995 of forcible entry, and given a conditional discharge with probation for two years and 120 hours of community service work. The conditions placed on him were that he was not to go within 100 metres of the matrimonial home, and he was to attend for counselling programs, including counselling for violence against women.

6. On August 10, 1995, Walsh J. made a number of orders. The Children's Lawyer was appointed to act as legal representative for both children. A restraining order as well as a non-depletion order were made against Chris. Chris was ordered to pay $565.00 to Christine for repair and maintenance of the matrimonial home. Chris's consent was dispensed with in relation to certain home insurance matters, and Chris was ordered to submit Christine's and the children's claims through his employment health insurance coverage, and to remit monies received to Christine.

7. On September 21, 1995 Beaulieu J. found Chris to be in contempt of order dated May 18 1995 that Christine have exclusive possession of the matrimonial home, and that neither party talk to the children about the proceedings. Costs were ordered against Chris, fixed at $750.00 and payable forthwith.

8. As a result of the failure by Chris to comply with the July 7th order to provide a business appraisal, on February 13, 1996 Epstein J. ordered Chris to pay disbursements of $3,500.00 plus GST to Christine to enable her to have his business appraised. Costs were ordered against Chris in any event of the cause.

9. On May 1, 1996 Wilson J. granted Chris a further seven days to comply with Epstein J.'s February 13, 1996 order (to pay Christine to have the business appraised). In the event that he did not comply within the seven days, Christine was free to move without notice to strike his pleadings.

10. On December 18, 1996 Walsh J. ordered Chris to produce a number of financial documents, being the 1995 and 1996 income tax returns, financial statements and T4 / T5 statements.

11. On May 15, 1997 E. MacDonald J. adjourned an undertakings motion, peremptory to Chris, to give Chris an opportunity to retain new counsel.

12. On May 29, 1997 Ferrier J. ordered costs against Chris fixed at $500.00 with respect to a motion to compel answers to undertakings.

13. On January 27, 1998 O'Connell J. ordered Chris to return Steven to the custody of his mother, and to pay costs of $3,000.00.

Credibility

5 I agree with Mr. Jarvis that, before embarking upon an analysis of the legal and factual issues, it is important to address the significant contradictions in the evidence led on behalf of the petitioner and the respondent. These contradictions are material to issues of custody and various aspects of the financial matters in issue.

6 Sopinka J. & Lederman J., *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1979) provides an instructive analysis on the assessment of credibility at 528 - 535. Several criteria are relevant, including the reasonableness of the evidence, contradictions in the evidence (internal consistency), whether or not the witness' character has been impugned, personality and demeanour, corroboration (external consistency), self interest, powers of observation and recollection, and capacity of expression. Untruths which are brought out in examination-in-chief are not as damaging to credibility as untruths which are brought out in cross-examination or by other evidence. The court should attempt to reconcile direct contradictions between the evidence of the witnesses.

Evidence led on behalf of Christine:

7 I found Christine's own evidence to be forthright, and her evidence to be internally consistent. I consider that Christine was candid in important respects which did not advance her cause. For example, she admitted that Steven had recently expressed interest in living with his father. She admitted that Steven had a good relationship with his father and wanted to see him.

8 Counsel for the husband attempted to undermine Christine's credibility without success. The only area in which there was a minor discrepancy was between Christine and Michelle May in that Christine said that Tim had not paid rent and Michelle said that he did. Christine gave evidence about her own experience. Michelle's evidence was based on what Tim had told her. Tim could easily have led Michelle to believe that he was paying rent when he wasn't. I do not consider this discrepancy to be material to assessing Christine's credibility.

9 Michelle May was called as a witness for the wife. She is 18 years old and has lived with Christine for the past year and a half. She was the girlfriend of Tim Passarello until, just before the trial, they broke up as a result of her involvement in testifying at the trial. Her evidence corroborates other witnesses who testified with respect to the events at a restaurant on January 19, 1998 which will be described later. She was the only witness as to the events in the matrimonial home on the morning when Chris brought the boys to remove their things from the home.

10 I found the evidence of this witness to be forthright and straightforward as well. She was detailed and confident in her recollection of events. For example, she stated that she knew when the boys were trying to get into the safe because she could hear the clanking of tools by the safe, which was right outside her bedroom door. Her testimony regarding her conversation with Chris on the evening of the restaurant incident is consistent with his description of the conversation. She was frank in her

examination-in-chief in admitting that when she told Chris to stop "yelling" that she may have been over-reacting. Further, she admitted that the boys had positive relationships with Chris, and that she thought they did not see him enough.

11 In an attempt to undermine her credibility, counsel for the husband played a recording of a telephone message in court, which Michelle left on Tim's answering service on the morning that she gave evidence. In the message, Michelle sounded quite angry and vindictive, and made vague threats about getting him and his family into trouble if he did not withdraw accusations he had made against her. Her explanation of the message was that it had to do with personal problems between Tim and herself, and that she was furious because the night before Tim had accessed her personal messages and changed the access code so that she could not access them, and because he had unplugged her water bed. Michelle was candid about this message in her examination-in-chief as well as in cross-examination. While this message illustrated a less impressive demeanour than the witness was displaying on the stand, it does nothing to undermine her evidence. While she may have threatened to get his family into trouble, her evidence did not have this effect. The telephone message reflected on a dispute between Michelle and Tim and did not impair the reliability of her evidence.

12 Michelle was cross examined on her living arrangements with Christine. She does not pay rent or room and board to live there. This arrangement could be seen as providing motivation for Michelle to tailor her testimony to the credit of Christine. Michelle admitted in cross-examination to being more sympathetic towards Christine. However, to the extent that this evidence may have undermined Michelle's credibility, it is offset by the fact that her involvement in the trial has virtually destroyed her relationship with Tim. This was a relationship of 6 years. In light of this, I find that Michelle's self interest does not compromise the value of her testimony. In any event, Michelle planned to move out shortly after the trial and would not have any dependency on Christine which might have affected her evidence.

13 As indicated above, there was a direct contradiction between the evidence given by Christine and Michelle. Christine testified that Tim did not pay any rent or room and board. Michelle testified that Tim did pay rent, and that it varied between $200.00 and $100.00. There was a strong reaction to Michelle's testimony in the facial expressions of the wife and her counsel, such that they were cautioned about it after the witness finished her testimony. Counsel for the husband argues that this reaction exacerbates the effect of this contradiction on the credibility of the witness, and that it supports an inference that the witness was coached. I find the reaction equally consistent with surprise, in keeping with the witness being mistaken - even honestly so. If the witness had been coached to say that Tim did not pay rent, it is unlikely that she would have testified that he did. I decline to draw the inference suggested.

14 Lynn Gorman testified for the wife. She is a single mother with two teenaged daughters. She was an employee of Alpha, a competing locksmithing company owned by Mark Fingarson. Gorman testified that she first met Chris in November of 1991 through his sports card business, and she subsequently developed a business relationship with him. Their relationship became intimate in March of 1992, and continued off and on until fall of 1994. Gorman was privy to negotiations between Chris and Mark Fingarson for the purchase of Imperial Lock by Alpha, and gave evidence as to the nature of the Imperial Lock business, contract negotiations, and alleged representations of undisclosed income made by Chris.

15 I will deal more closely with her evidence when I address the value of the business below. In summary, however, I found her evidence to be credible on the issue for which she was called namely to assist in establishing that Chris realized cash from sales and services which was unrecorded and was described as "under the table".

16 William Karam was called on behalf of the wife. I will deal with the specifics of his evidence shortly. However, I found him to be an excellent witness. He was forthright. He has had experience for many years with all members of the family and attempted to honestly respond to questions put to him.

Evidence led on behalf of Chris:

17 Robin Barker was called. He was the locksmith hired by Christine in January, 1998 to open the safe in the home. His evidence corroborated Christine's evidence about his services. His evidence did not contribute to the case advanced on behalf of Chris.

18 Mark Fingarson was called on behalf of Chris. His primary function was to explain the offer to purchase Chris business which Mark had made in 1993 and which the valuator on behalf of Christine had used as the basis upon which to value the business in May, 1995. His evidence was both interesting and helpful. Although he had reason to be aggrieved by the treatment he received from Chris and from Lynn Gorman, he delivered his evidence in a forthright manner. I accept much of his evidence.

19 Leaving aside the expert on the valuation of the shares of the business, Chris was the remaining witness. His evidence was incredible and untrustworthy. The examples which lead me to those conclusions are almost endless. The following is a sample.

20 Chris has little respect for court orders. He violated the order dated May 18, 1995 when he broke into the matrimonial home in the face of an order for exclusive possession; he violated the order of the same date when, in January, 1998, he showed both boys a motion record he had launched to change custody and had both boys initial his copy to establish that they had read it, all of that in the face of an order prohibiting either parent from discussing any details of the proceedings with the children; and he failed to comply with costs orders made by Beaulieu J. on September 21, 1995 ($750.00), by Ferrier J. in May, 1997 ($500.00) and by O'Connell J. in January, 1998 ($3,000.00).

21 The most egregious behaviour by Chris was manifested in the events on July 9, 1995. When he left the matrimonial home in May, he had removed only a few of his belongings. The correspondence makes it clear that considerable energy was devoted to retrieving more belongings and some furniture and furnishings. Those were packed by Christine and were picked up by Chris' representatives. He was enraged about the linens, the TV and the VCR. He literally broke into the home in a fit of anger. He was charged with forcible entry, uttering death threats and assault of Christine. He described the events in a matter of fact way when he gave his evidence-in-chief. He said he was angry so he "went over there and kicked the door in". He said that he knew he was wrong to have done that. However he insisted in cross-examination that he was provoked to do it by his wife's actions. He showed no insight into the effect of his actions on others. At no time did he apologize.

22 Chris' description must be contrasted with the events as described by Christine. It happened on Sunday. It isn't clear whether Steven was home. Tim was elsewhere. Christine received a phone call from Tim who said that his dad was on his way and he was furious because he didn't get a TV and VCR that he wanted. Tim phoned to warn his mother. Christine called the police. She was in the dining room calling the police when Chris broke in. He entered through the front door which was locked. He broke the frame by kicking where the lock was. The frame just ripped apart. He called Christine some "profound names". He threatened to kill her. Christine escaped by running to the neighbours. After the episode, she propped up 2 × 4's at the front door and back door. She installed a battery operated alarm system with a new access code to prevent Chris from gaining entry in the previous alarm system. She was and remains genuinely afraid of Chris.

23 Chris' propensity to over react with inappropriate anger was displayed on other occasions: at the baseball field in the summer of 1997 and at the restaurant on January 19, 1998. Indeed, there were flashes of barely controlled anger during the course of his evidence. This was most apparent when, on the morning of the second day of cross-examination, he took the initiative to ask the Court for permission to read in a statement which he had prepared over night. After many exchanges with counsel, I refused to permit him to do so. He was annoyed.

24 Chris also wielded his anger in non-physical ways. He clearly retaliated against Lynn Gorman after she signed an affidavit as requested by his wife's counsel. His action in telephoning Lynn Gorman's boss (Mark Fingarson) cost her her job. She was then a single mother with two teen age children. She remained unemployed for approximately 10 months. Similarly, after the restaurant episode in January with Bill Karam, Chris called Bill's estranged wife and stirred up their divorce proceedings by alleging that Bill and Christine had long been carrying on an affair.

25 When a spouse displays such unwarranted and inappropriate anger, and shows no real insight into the behaviour, this tends to undermine the value of his evidence. One must be cautious about the evidence of a person who tends to be motivated by uncontrollable anger and tends to lash out at others and to blame others.

26 Chris's evidence is also undermined by the fact that he appears to have no scruples. He admitted that he took advantage of Lynn Gorman by obtaining information from her about Mark Fingarson's business which he thought would help him in securing

the business of a client away from Fingarson. And he admitted that, in the same instance, he took advantage of Fingarson, a man whom he had known for over 15 years, with whom he had worked on many occasions, and who considered Chris not only a friend but almost a mentor in the industry. It was only after exploiting both of these "friends" that he turned Fingarson against Gorman, causing her to lose her job.

27 Some of Chris' evidence simply did not make sense. In cross-examination, Chris was asked about the furniture which had been purchased for the matrimonial home in the 12 to 18 months before the separation. Those expenditures were made during the time that Chris claimed he could not afford to properly value the shares of the business and consequently he was justified in relying on the offer to purchase by Mark Fingarson when making his capital gains election. As reflected in my notes, this exchange unfolded:

> Q. These house items were purchased at the very time you say you couldn't afford to have a valuation for capital gains purposes, you and your wife were able to afford $5,000.00 to $15,000.00 of furniture for the house?
>
> A. That was taken out of our shareholder's loan for the company.
>
> Q. You could have taken it from the shareholders' loan for the appraisal?
>
> A. I was trying to salvage what remained of our marriage.
>
> Q. You didn't say that yesterday.
>
> A. I wasn't asked.
>
> Q. And you were trying to salvage what remained of your relationship while you were seeing Gorman?
>
> A. I suppose.

28 As another example, he gave evidence trying to justify that an advance from his brother was a gift for which he was entitled to an exclusion:

> Q. Your worked for your brother's company?
>
> A. I worked for him for twenty and a half years.
>
> Q. You built it together?
>
> A. Yes
>
> Q. Do you have any note or letter from your brother that was made at the time you say these cash amounts were allegedly given confirming that they were a gift?
>
> A. There were no notes given. My brother is very thorough. He didn't give them to me, he had his wife give them to me.

29 Finally, as I will outline below, there were occasions when he admitted that he had mislead authorities, including the Bank, when he obtained financing. He mislead Revenue Canada with respect to the value of the shares in the capital gains election and with respect to cash which was not disclosed on the business financial statement or business tax return. He mislead the court in various respects affecting his financial circumstances not the least of which was the cash from the business which was not disclosed on the first of several court financial statements.

30 For the foregoing reasons, and considering the factors outlined in *The Law of Evidence, supra*, wherever there is a conflict in the evidence, I prefer the evidence led on behalf of Christine.

Custody of Steven

31 Since the separation, the wife has had custody of both boys. The order provided for access by Chris. A pattern had evolved whereby Steve's access times were Tuesday and Thursday evenings, and every second weekend. Before Tim moved to his dad's house in January, he had grown out of any pattern. Tim initially functioned as an intermediary because of the difficulty in Chris calling the house when he was on probation. On January 16, 1996 Cecilia Walker of the Office of the Children's Lawyer reported that Tim was not happy in this intermediary role and that he should be withdrawn. She recommended that the access be exercised on an ad hoc basis, as requested by the children and consented to by the parties. This ad hoc arrangement was then implemented with arrangements being made between Chris and the boys through the use of pagers. There was no evidence indicating any difficulty in the exercise of access once the arrangement was adjusted according to the Children's Lawyer's report, and the arrangement remained in place until the events of January 14, 1998 and the surfacing of custody as an issue in this trial.

Tim

32 While custody of Tim is not an issue in this trial, some background information about him is relevant to the issue of Steven's custody.

33 Tim is now twenty years old and taking a combination of grades 10, 11, and 12. He hopes to go to a community college to take an auto mechanic program. According to Christine's evidence. Tim has always had academic difficulty and his progress has been slow. Tim has been involved in Boy Scout activities from early in his childhood. He was a Cub Scout, then a Boy Scout, and is now a Rover, which is the Scouting group for young men between the ages of 18 and 26. He continues to be involved in Rover activities. Bill Karam is his Rover leader. Tim had been in a relationship with Michelle May until days before the trial began.

34 Tim has tried in various ways to keep himself from getting pulled into the conflict between his parents. He has indicated to the parties on a number of occasions that he does not want to take sides or be in the middle. One of the exhibits in this trial was a handwritten letter, dated July 8, 1995, in which Tim stated that he did not want to be mentioned in the court case, or be part of the court case, and that he wanted to be able to see his father when he wanted. Bill Karam, Tim's Rover leader, stated that Tim does not want to be in the middle, that he has complained about being forced to be in the middle and act as a go-between, and gets frustrated about the conflict.

Steven

35 Steven is now 15 years old and in grade 9. Like his brother Tim, Steven has had academic difficulties. He was diagnosed with a learning disability at the age of 8 and placed in special education programs through primary school, but was integrated into the regular classroom in grade 8. According to Christine, Steven can still have assistance from the school but he does not like to ask for it. He had difficulty with his last set of exams and was getting low marks. He continues to be involved in Boy Scouts. Chris testified that Steve wants to go into Rovers when he is older, that he respects and aspires his older brother when it comes to his dedication to Scouts and Rovers, and he wants to follow in his footsteps.

The Divorce Act

36 Section 16 of the *Divorce Act* sets out the factors to consider when making a determination of custody. The relevant provisions are:

> **s.16**
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Conduct of the Parties - s.16(9)

37 There was ample evidence in this case of conduct which is relevant to ability to parent. I will first deal with a series of events which occurred in January of this year. In brief, Chris withdrew Tim and Steven from school without advance notice on the morning of Wednesday, January 14, in order to take physical custody of them on the eve of Chris' motion for a change of interim interim custody. Chris and his brother brought the boys to the matrimonial home, where they packed up their belongings in garbage bags and tried to get into the safe while Chris waited in the van and his brother helped the boys carry their belongings. Steven was kept out of school on Thursday and Friday. On Monday, January 19, Christine and Bill Karam went to the school and picked Steven up at the end of the day. Christine, Bill Karam, Steven and Michelle went out for dinner together. During dinner, Steven received several pages from his father. After Steve responded to his father, Chris came and picked him up from the restaurant. Chris and Bill Karam had an altercation in the parking lot of the restaurant. Chris maintained custody of Steven until January 27, 1998, when O'Connell J. ordered that he be returned to his mother within six hours. Tim continues to reside with his father.

38 Chris testified that in order to get Steven out of school on the morning of January 14, he showed the school principal motion papers drawn up by Mr. Barna. These papers were intended to be used in Court proceedings to secure custody of Steven. Chris had had both boys sign the motion papers. (In his evidence, he explained this by saying that he did not want the boys to think he was doing anything behind their backs.) The principal got Steven from class and he left with his father. After picking Tim up from his school, they attended at the matrimonial home. Michelle was the only person home at the time. The evidence of Michelle and Chris about what occurred at the house that morning is substantially similar, except on the point of whether or not Chris's brother Sam went into the house and downstairs to the basement where the boys were attempting to get into the safe. I accept the evidence of Michelle when she testified that she clearly heard Sam in the basement of the house. Her bedroom is in the basement, and close to the safe which is under the stairs. The boys packed up clothes and personal items in garbage bags, as well as the collection of sports cards from the office in the basement, and brought them to the van. The boys returned a short time after leaving, having forgotten to pack dress clothes for an upcoming baptism.

39 On Monday January 19, Christine went with Bill Karam to the school to pick up Steven. Bill Karam testified that Christine asked him to attend for support because she was afraid that she would say something she should not say, in terms of being prohibited from talking to the boys about the case, and because she was afraid that Chris would be there and that he would be upset. They arrived at school at 2:50 pm.

40 Both Christine and Bill Karam testified that Steven appeared surprised but happy to see them at the school. Christine and Bill explained to Steven that Christine had lawful custody and what Chris did was wrong. Their testimony was that Steven appeared to be fine with leaving with them. Steven was dropped at his girlfriend's house for a pre-arranged visit. Later Bill and Christine came back to get him with Michelle May, and the four went out to dinner. Michelle also testified that Steven appeared to be fine, and that he was joking with her, as was his usual behaviour. Steven received a page from Tim while he was standing at the buffet with Michelle, and the two went to the phone together to call Tim. Michelle testified that she spoke to Tim on the phone, and that Tim had not told Chris about Steven being back with his mom because "he did not know how to do that". Michelle advised Tim to tell his father the truth. After that phone call, Michelle testified that "Steven was nervous ... he was trying to put a smile on his face ... he was anxious".

41 After sitting back down at the table with Bill Karam and Christine, Steven began getting pages from his father, with a "911" designation, signifying urgent. The evidence of Christine, Bill and Michelle was consistent in describing Steven as very upset and nervous. As reflected in my notes, Christine testified that:

> He has a nervous stomach. He gets agitated. He couldn't eat. He hadn't called his dad to tell him he wasn't going back to his dad's. He hadn't told his dad because he was afraid to and he wanted Tim to do that and Tim wouldn't. I told him to ignore it. He couldn't ... He was almost in tears.

Bill Karam testified that:

> As he got more and more pages, he got more and more quiet or nervous or agitated or upset ... Finally he said he was getting calls from his dad's store. He said he better call.

42 Michelle accompanied Steven to the phone to call his father. She testified that after speaking briefly with his father, Steven handed the phone to her and:

> He gave me the phone and was very upset and frustrated and confused and looked like he was going to cry. He told me to speak to his dad.

43 Michelle stated that she told Chris that Christine had custody of Steven, and she was told by Chris not to get involved. She stated that Chris wanted her to tell him where they were and she refused. She testified that Chris was raising his voice and she asked him not to yell at her. Then she handed the phone back to Steven. Steven asked Michelle to hand him one of the restaurant's business cards, which signalled to Michelle that he was telling Chris where they were.

44 According to my notes, Chris's testimony on this point was:

> He didn't want to tell me because he was afraid there would be a scene. I said that there wouldn't be a scene. I would just pick him up. This went back and forth about three times. Michelle got on the phone.... I spoke again to Steven. Steven gave me the address.

45 After the phone call, while the four were waiting for Chris to arrive at the restaurant, Michelle testified that:

> Steven was in a panic .... He was very very upset. He looked like he was going to cry. He wasn't his usual self.

Christine described that "he was pacing. He said I can't handle this." Bill Karam testified that:

> Steven came and said his dad was on his way. He left a full plate of food. He was told he didn't have to go. He said he better, that he didn't want his dad to cause a scene at the restaurant. Michelle said how about a walk. Steven said no I better be here when he gets there.

46 There are two versions of what happened when Chris was leaving the restaurant - Chris Passarello's and Bill Karam's. Both agree there was an altercation between them in the parking lot outside the restaurant. Both agree that Chris told Bill to stay away from his son. Both agree that Chris threatened to call Bill's ex wife and tell her that Bill and Christine had been having an affair (a threat he followed through on). The stories differ in respect of the language used by Chris and who was the aggressor. In both versions, Chris used foul language.

47 The distinction is the context in which the word "fuck" was used. Chris insists that contrary to Bill Karam's version, he did not say "stay away from my fucking son", but rather "stay away from my son you short fat fuck". Chris seemed to be under the impression that as long as the word "fuck" did not modify "my son", there was no problem with its use.

48 The other distinction is as to who was the aggressor. Chris testified that Bill Karam was coming towards him and "trying to get confrontational". Bill Karam testified that Chris was "in his face", "wagging his finger" and yelling, and that Steven had tried to move between them and Chris pushed him out of the way. Both agree that Steven was present throughout the confrontation.

49 Steven was not returned to the custody of Christine until January 27, 1998, when O'Connell J. ordered that he be returned within 6 hours of the Order. Costs, however, remain outstanding against Chris for $3,000.00.

50 I find that there are several aspects of these events which give rise to concern about Chris' ability as a parent. He used his motion papers to convince the school that he had legal authority to seize custody of Steven, knowing full well he did not have legal custody at the time. He had both boys sign these papers, which is clearly in contravention of a Court Order - a Court Order which was made to protect the boys from this kind of behaviour. When Chris and his brother brought the boys to the matrimonial home to pick up their things, the boys were acting in furtherance of Chris's agenda when they confiscated the sports card collection and attempted to access the safe. I do not accept that it was the boys' idea, or their concern, to take possession of the cards or to get into the safe. These were Chris's concerns. At the very least, this illustrates devious and subversive behaviour, and a willingness to drag the boys into the parental conflict. It was bad enough that Chris pulled the boys out of school and had them sneak into their house while their mother was at work to remove their belongings. But, in addition, Chris made them responsible for further provoking his dispute with Christine by retrieving 30 binders of sports cards and trying to get into the safe.

51 I also find that the incident at the restaurant was relevant to the issue of Chris's ability to parent. This was a highly distressing event for Steven. He told his father where they were because his father insisted, despite Steven's obvious discomfort with having his father attend at the restaurant. I prefer the version of events given by Bill Karam as to what happened in the parking lot. Chris could be seen to be the more aggressive of the two, even on his own evidence. The distinction in the context of the use of language is insignificant. What is significant is that foul, aggressive language was so freely used in front of a 15 year old boy by his father and against his Scout leader and life-long friend.

52 Chris showed no compunction in destroying his son's dinner with his mother and friends. I find that his actions that night were designed to regain the winning position in the competition he had instigated over custody of Steven. Satisfying this self interest was more important to Chris than the intense anxiety and stress it caused his son. At trial, Chris demonstrated no insight into how this kind of behaviour could impact on a child who is stuck between battling parents.

53 In making a custody determination, this Court must be concerned about what kind of a message this behaviour would send to a child. If Chris were the custodial parent and thus a more constant role model, it is likely that Steven would learn not to respect his mother and not to respect the Courts. He would probably learn that manipulation of others is a basic problem solving strategy. The Court must be concerned about Chris's ability to give the best interests of Steven priority over his own obsession with winning this conflict with Christine. I find that Chris' priority is his obsession with winning the conflict. Steven's rights will not be equal, let alone paramount.

Preferences of the Boys

54 On the first day of the trial, Mr. Spong made a request that he be permitted to represent the interest of Tim and Steve on the issue of custody. Since Tim is now 20 years old, I ruled that I have no jurisdiction to make an order with respect to his custody and would not permit Mr. Spong to represent his interests. Mr. Barna supported Mr. Spong's request with respect to Steven who turned 15 years old the day before the trial started. Mr. Jarvis conceded that I have jurisdiction to agree to Mr. Spong's request, but he opposed it. I made a preliminary ruling on the first day that I would not permit representation at that point, but I held that as the evidence at the trial unfolded, it might become apparent that some form of representation was required and I would then consider the issue. However, I had been told that Mr. Barna had had an occasion to seek advice from Mr. Spong in a motion in this action. Although the connection between Mr. Spong and Chris was minimal, in these circumstances, I held that there should be no connection. Consequently, I ruled that if I later concluded that representation for Steve was necessary, I would renew the existing order in place appointing the Children's Lawyer for that purpose. I have concluded that representation for Steve was not necessary and not desirable. I have heard from many sources that both boys wanted to be removed from the conflict. To authorize representation at this stage would mean that Steve would be even more in the centre of controversy. I heard sufficient evidence about Steve from others that separate representation would not be helpful. It was for the same reasons that I did not permit Chris' counsel to call Steve as a witness.

55 A great deal of emphasis in this trial was placed on the preferences of both boys about where they wanted to live. In regard to Steven's preferences, most of the testimony suggests that Steven is ambivalent, and that his wishes change. Michelle May testified that Steven sometimes wants to live with mom, sometimes with dad, and more recently he does not want to live

with either. She described him as "wanting to remain neutral". Bill Karam testified that Steven "flip flops" and has wanted to live with both parents, and that he recently stated at school that he wanted to "stay with his dad for a while". Christine described Steven as "sitting on a fence". She also testified that Steven recently told her that he wants to live with his father. Chris testified that his recent actions in taking Steven to live with him were in response to Steven expressing in November that he wanted to live with his dad. I find that Steven has recently expressed wishes to stay with his father, as described by the witnesses. However, I do not find this a persuasive reason to change the custody arrangements.

56 Evidence of Tim's preference to remain with his father since January 14, 1998 has been adduced in this trial to support the proposition that Steven also choses freely to live with his father. In determining the best custody arrangements for Steven, I place little weight on the fact that Tim is now living with his father, for the following reason.

57 At some point in 1995 or 1996 Tim was robbed of his jewellery at school. A claim was made against the house insurance policy, and the insurance company covered the loss by cheque made out to Tim and his father for $5,000.00. Part of the money was used to have replacement jewellery manufactured by a friend of Chris' for approximately $2,000.00. Chris testified that he felt he had to hold the remaining funds in trust for Tim, and this caused considerable conflict. I heard testimony from Christine, Chris, and Bill Karam, all to the effect that Tim believed he was entitled to the insurance proceeds, and that his father should not have kept them. This caused a great deal of conflict between Tim and his father. In his examination-in-chief, Chris testified that he had given the full amount of the remaining proceeds - $2,400.00 - to Tim, who put the money into chequing and savings accounts. In cross-examination, Chris admitted that he had only given the money to Tim since he left his mother's home and moved in with Chris in January. After refusing to give this money to Tim for well over a year, this recent change of heart causes me concern. The fact that the $2,400 was only handed over after Tim moved out of his mother's home and in with Chris seriously undermines any significance I might place on Tim's preference in deciding what is appropriate for Steven. On the contrary, if anything, it undermines the weight I attach to Steven's expressed wishes, as they were described through the witnesses and outlined above. Given the level of manipulation this father is capable of, I am not satisfied that Chris has not offered some kind of incentive to Steven for moving in with him.

Best Interests of the Child - s.16(8)

58 Over and above concerns about Chris's ability to parent, and preferences of the children, there are sound reasons for not disrupting the status quo. Steven has been living with his mother all of his life, and with her as custodial parent since 1995. She has been the one to take him to appointments and to Scouting events and to address his schooling needs. In the circumstances of this case, it is in Steven's best interests to preserve the status quo, for the following reasons.

> First, academics have not come easy to either of these boys. Given Steven's learning disability, he will require stability, structure and encouragement if he is to maximize the learning potential he has. This is a need, or circumstance of this child, to be considered in accordance with s.16(8) in determining his best interests. Chris's behaviour surrounding the January 14 incident illustrates that he does not place a high priority on Steven's educational needs, nor does he appreciate the importance of schooling to Steven's future. Steven was taken from school for three days shortly before exams, and kept home in order to accommodate Chris's fears that Christine would "harass" him at school. This was poor judgment. And it was a sacrifice of Steven's best interests in a deliberate attempt to pull him into the parental conflict. Christine has historically been responsible for attending to Steven's educational needs. Christine is in a better position to help Steven to maximize his potential in the area of education.
>
> Second, Steven continues to be involved in Scouts and aspires to continue with Rovers. This is also a need, or circumstance to be considered pursuant to s.16(8). Continued involvement in this organization should be encouraged. Bill Karam will be the Rover leader. I find that Chris is unlikely to put aside the conflict that arose during these proceedings between himself and Bill Karam, in order to provide support for Steven's continued involvement in this program.
>
> Finally, Steven has been living in the same place for his whole life, and undoubtedly has friends in the area. A move from Scarborough to Ajax at this time could be very disruptive for him. His school is in Scarborough. If he lives with his father, he would have to rely on Chris to drive him into school from Ajax. The other option would be for Steve to change schools

which may cause undue disruption, given Steve's academic challenges. I am not persuaded that responding to Steve's needs would be a priority for Chris.

Maximum Contact with Both Parents - s.16(10)

59 Section 16 also requires the court to consider the willingness of the parent seeking custody to facilitate contact with the other parent. It is important for Steven to continue to have a relationship with *both* parents, to the extent that that is possible. Of the two parents I find that Christine is more likely to facilitate access to the other parent. The access arrangements have worked for two years. There was no evidence before this Court of Christine impeding Chris's access to the boys during that time. On Chris's own evidence, the arrangement worked "extremely well". In light of the behaviour of Chris that was put in evidence before this Court, I do not feel confident that Chris would be as likely to have a positive influence towards access between Steven and Christine. In coming to this conclusion I place particular significance on the fact that Chris planned surreptitiously with the boys to take custody of them, without informing Christine.

Conclusion

60 For these reasons, Christine shall have custody of Steven with liberal access by Chris. Christine testified that the current arrangement is that she has to approve plans for access visits. This is to ensure that the access plans do not conflict with other arrangements. This suggestion came from the January 17, 1996 report of the Children's Lawyer. The suggestion also related to the right of Christine to rely on the times when access is scheduled so that she can order her own life accordingly, without Steven coming and going as he pleases. This is a reasonable condition and should continue. Consequently access arrangements will continue to be arranged between Steven and his father, provided they are cleared with Christine first.

Equalization of Net Family Property

61 The valuation date is May 10, 1995.

Matrimonial Home:

62 The parties agree that the value of the jointly owned home is $210,000.00. The wife seeks to retain the home in consideration of the equalization payment. I will address that issue below.

Contents of the Home

63 The issue of the contents of the home arose at trial. Chris took possession of his clothing, personal items, a TV and VCR following separation. The sports card collection has been in Chris's possession since January 14, 1998. The rest of the contents have remained in the possession of Christine. Christine's net family property statement, dated February 23, 1998 indicates that the contents of the home are "to be divided between the parties". No value is estimated. Counsel for Chris attempted to undermine her credibility by pointing out that her previous NFP statements indicated that the contents had been divided, because the words "to be" were not used. I consider the distinction immaterial. Chris's NFP statement dated January 23, 1998 lists $15,000.00 worth of general household contents in the wife's column. Chris gave evidence in chief, in the form of a list he had compiled shortly before trial, that the contents retained by Christine were worth $40,000.00, based on his recollection of cost of original purchase. However, in cross-examination, Chris testified that those estimates were of *values* and not of what was paid for the items. Chris seeks to have the $40,000.00 included in Christine's net family property. In his NFP statement he ascribes a value of $15,000.00 to general household contents in the wife's column.

64 In his submissions Mr. Jarvis suggested that the household contents be appraised and divided on the basis of flipping a coin. He also suggested that if the parties cannot agree on the format the contents could be put up for auction and sale and the proceeds divided. Mr. Barna suggested selling the contents would be easier but stated that the division based on the flipping of a coin would not be unreasonable.

65 It is unfortunate that this issue could not have been resolved before trial. Given the significant discrepancy between the spouses as to the value, and the high degree of conflict, an expedient, reliable and inexpensive solution is required. Section 9(1)

of the Family Law Act gives the court broad discretion in implementing the equalization of net family property. Accordingly, the contents of the matrimonial home will be decided on the basis of the following protocol:

1. the furniture and furnishings (including athletic and other equipment) which belong to Tim are his property;

2. the furniture and furnishings (including athletic and other equipment) which belong to Steve are his property;

3. Christine shall prepare a list of all other remaining items in or at the matrimonial home (other than her personal belongings);

4. in a meeting with counsel, Chris shall flip a coin. Christine will call the toss. If she guesses correctly, she will make the first selection. If she guesses incorrectly, Chris will make the first selection. They will then alternate selections until the list is exhausted;

5. the items removed by Chris in 1995 shall not be included in this process;

6. once the selections are made and recorded at the meeting, Christine shall, simultaneously with the payment required by Chris in Schedule B to these reasons, make the items available to be picked up by an agent acceptable to Christine. Chris shall pay the cost, if any, of the pick up.

7. there shall be no value attributed to either spouse in the net family property calculation on the assumption that the foregoing will yield a relatively equal disposition of the contents.

Jewellery

66 Chris asserts that the majority of his jewellery was held in the safe at the matrimonial home, and that Christine is now in possession of $2,500.00 worth of his jewellery. According to Chris's testimony, he took $1,350.00 worth of his jewellery with him when he vacated the matrimonial home on May 18, 1995, pursuant to court order. In cross-examination he admitted that when he vacated the home that day he took the time to change the combination on the lock to the safe, but that he did not have time to take his belongings out of it.

67 Christine testified that she does not have any of Chris's jewellery. Her testimony was that she did not have the combination to the safe, and thus had no access to its contents until it was opened by locksmith Robin Barker on January 24, 1998. She testified that all that was in the safe was the coin collection.

68 The evidence lacks clarity on both sides. The only solution is to find that Chris and Christine each have the jewellery to which s/he is entitled and no values shall be attributed in the net family property calculation.

Coin Collection

69 The coins are currently in the possession of the wife in the matrimonial home. According to Chris's financial statement, dated January 23, 1998, as well as his NFP statement, dated January 23, 1998, the Coin collection is valued at $6,000.00. In that 1998 statement, Chris has indicated that the coins are to be held in trust for the boys by Chris and thus excluded from his NFP pursuant to s.4(2) of the *Family Law Act*. Chris's May 15, 1995 statement indicates that he holds a 50% interest in the coins, valued at $3,000.00 but there is no indication of a trust. His July 5, 1995 financial statement is the first indication of a trust Christine's NFP statement, dated January 22, 1998, shows the coin collection in the husband's column, valued at $3,000.00. Her February 23, 1998, NFP statement shows the value of the coin collection to be $6,000.00.

70 Both parties seem to agree that the value of the coin collection was $6,000.00 on valuation date. In cross-examination Chris testified that the coins were "obviously mine". Christine testified that there was never discussion that the coins would be passed on to the children, only that the boys would each get an Olympic coin. She stated that if the coins were in trust for the children, she would hold them until they were distributed to the children, and that she was concerned that if Chris held them he would sell them and keep the money. Chris has the burden of proving the existence of a trust with respect to the coins. I

find there is no corroboration in the evidence for the existence of a trust. While neither party is against the idea of the coins being held in trust for the boys, there is no evidence of an intention to form a trust. The trust merely showed up on Chris's financial statement. Consequently, the coins will form part of Chris's NFP, valued at $6,000.00. Christine will make the coins available to be picked up by an agent of Chris' acceptable to Christine. The pick up shall occur at the same time as Chris' share of the contents is retrieved.

Scarborough Sports Cards Inc.

71 Scarborough Sports Cards Inc. was a company that Chris started with his friend Eric Gustavson. The asset owned by that company is a large sporting card collection. In his May 15, 1995 financial statement, Chris estimated the value of his 50% interest in the company to be $3,000.00. Chris has had possession of the collection since January 14, 1998 when the boys removed more than 30 binders of cards. Chris indicates in his NFP and financial statement sworn January 23, 1998 that the card collection is worth $3,500.00 and is held by him in trust for the children. He estimates his 50% interest in the value of this company to be $1,500.00. Christine testified that she had no idea what the cards were worth, other than the value ascribed to them by Chris.

72 As with the coins, there is no corroboration of this trust, and it is therefore reasonable that the card collection remain as part of the value of the company. I accept the values attributable by Chris. This leaves the total value of the company including the cards, at $5,000.00.

Wife's Account Receivable

73 Christine made a loan to Imperial Lock of $4,500.00 on October 6, 1994. She obtained the money to make the loan by cashing in an RRSP worth $5,000.00, from which $500.00 was withheld for income tax. She testified that she understood that she would receive $5,000.00 in repayment, because Imperial usually paid her taxes. Christine testified that she understood that this loan was to pay creditors of the business, but she found out later it was to pay back a loan to Lynn Gorman. Lynn Gorman testified that she had loaned $6,000.00 to Chris to open his Queen Street location, and that she called in the loan when she found out that he had gone to Atlantic City with Christine Lang. He repaid about $4,300.00 or $4,400.00 of the loan. This is reflected on Christine's financial and NFP statements as a $5,000.00 debt under accounts receivable. It is not reflected on Chris's NFP or financial statements, nor is it recognized in the business financial statement. Both counsel agreed in submissions to delete this item from the wife's accounts receivable. It shall be deleted and will not form part of the NFP calculations.

Account Receivable owed to Husband From Company

74 On December 14, 1990, Christine and Chris executed a mortgage in favour of the Royal Bank for $30,000.00, for which the matrimonial home was security. Chris testified that half of the money went into the business and half was spent on family debts and expenditures. Christine testified that the entire amount went to "pay bills at Imperial". The financial statements of Imperial Lock from 1992 through to 1996 have reflected this as a long term note payable to Chris under liabilities of the company. Christine testified that the mortgage payments are paid by Imperial. The tax returns indicate that Imperial Lock provides the funds to Chris who in turn pays the mortgage. The net effect is that vis a vis the Bank, Chris and Christine are both responsible for this obligation, yet Chris alone holds entitlement to recover the entire amount from the company. For *Family Law Act* purposes, the entire amount should be reflected in the husband's NFP as an account receivable, and as a liability.

Value of Imperial Lock Company

i) Undisclosed Income

75 It is the issue of the value of Imperial Lock on which the parties are the farthest apart. Central to the dispute is whether Chris realizes significant unrecorded cash income from the business. If so, it would have an impact on the value of Chris' shares for purposes of calculating his net family property. The resolution of that issue also has an impact on establishing Chris' income for purposes of applying the Child Support Guidelines.

76 Chris has been a locksmith for approximately 29 years. Before opening the Imperial Lock Company, he worked in his brother Leonard's locksmith company for 20 years. He has taken correspondence courses in locksmithing and also specialized training in opening safes. He has been an instructor in the area of opening safes for 18 years. He testified that there may be a dozen or so people in the province with his level of expertise in opening safes. He was instrumental in creating a professional organization.

77 Imperial Lock was incorporated in 1989 by Chris and partner Carmine Panaro. Christine worked at Imperial Lock in 1989, 1990 and part of 1991. She testified that during 1989 she worked two full time jobs, one with Imperial Lock and one with the Ontario Government. From April 1990 to September 1991, she worked full time at Imperial Lock. She returned to work with the Ontario Government in October, 1991, after finding that she and Chris simply could not work together. Chris purchased Mr. Panaro's shares in 1990, and Chris was the sole shareholder on valuation date, May 10, 1995. In mid 1994, Imperial Lock purchased a second location. On valuation date, Imperial Lock was operating at both locations - one at 2693 Eglinton Ave. East and one at 1616 Queen Street West - and had 7 employees and 4 repair trucks.

78 Imperial Lock is in the business of servicing, selling and opening safes and locks as well as retail sales out of both store locations. Additional services include the sale, installation and repair of doors, door handles and door closers. Chris asserts that his brother Leonard advanced money when the business started. I will deal with that issue below. The personal tax returns filed by Chris, and where available and reflecting income from Imperial Lock, also from Christine, indicated the following employment income:

Year	**Chris**	**Christine**	**Total**
1989	$12,721	unavailable	
1990	$25,400	unavailable	
1991	$39,039	unavailable	
1992	$40,565	$30,960	$71,525
1993	$39,077	nil	
1994	$41,738	nil	
1995	$39,187	nil	
1996	$39,244	nil	

79 Although T-4"s were required by law within a week of Chris' evidence, Chris did not produce a T4 for 1997. Mr. Barna did provide a photocopy of Chris' final pay cheque stub in 1997 which indicated gross income of $39,879.00. I was not given tax returns for Christine for 1989, 1990 and 1991, during parts of which years her only source of income was Imperial Lock. The only year in which Imperial Lock income is provided for Christine is a year in which she was working full time at her job with the Government of Ontario. In the one year in which both show income, the total employment income drawn for both of them was $71,525.00.

80 In addition to income reflected on a T4, Christine outlined the sources of unrecorded income as follows: some cash car calls when it was decided not to put the money through the till; sale of used safes; service calls on holidays where payment was substantially increased and was in cash. She also outlined the purchases or expenses made with such cash as follows: living room furniture; the dining room furniture and the washer and dryer were mostly cash; china dishes; Tim's trip to Washington; her own income tax owing at the time of filing the return. When she was employed by Imperial Lock. Christine's duties included maintaining the bookkeeping system and as a result, she had first hand knowledge of the opportunities for unrecorded cash. Christine made summaries of her estimate of expenses made by such cash. In 1992, the total was $8,674.00; in 1993, the total was $11,900.00; and in 1994, the total was $7,000.00. The 1992 total included $6,000.00 paid on account of her income tax. In that year, the tax return indicates that the balance due on filing was $6,079.00. The total for 1993 included $220.00 for income tax while the return indicates a refund of $54.00. The 1994 total includes payment of income tax of $1,879.00 while the return indicates a balance owing of $1,783.00. Two of the three years are accurate and the 1993 estimate is not significantly in error. The point is that a major portion of the unrecorded cash is corroborated.

81 Lynn Gorman's relationship started in the spring of 1992. Shortly after it began, Christine began divorce proceedings. Chris was upset by this. Lynn was very concerned by his threats and his behaviour. He told her he had bought a gun and he was going to say goodbye to his children. She understood that he was going to shoot himself. Two weeks later, he called her from hospital after having taken an overdose of Tylenol. She broke off the relationship. The affair resumed in the fall of 1992 and was intermittent until the fall of 1994. Christine said she stopped the divorce proceedings because of her concern about Chris' hysterical reaction.

82 Lynn's knowledge about Chris' financial affairs came from two circumstances. The first was what he told her when only the two of them were discussing matters. The second is when she was part of the many meetings between her boss and Chris when sale of Chris' business was discussed. The latter were protected by a confidentiality agreement signed at the time of the negotiations.

83 In their personal discussions, Lynn heard from Chris that his company was worth $1.5 million. Chris and her boss were customers of each other. On one occasion when Chris and Lynn were going away for the weekend, Lynn brought cash which her boss owed Chris and that was used as part of the expense for their hotel room. On one New Year's Eve, Chris made a service call to open a safe. He charged $500.00 for a job which took him 5 minutes.

84 Chris purchased used safes and sold them for cash without recording the purchase or the sale. Chris spoke about cash under the table numerous times and said it was as much as $50,000.00 in a year. In April, 1994, Lynn advanced a loan to Chris of $6,000.00 to help him to buy the Queen St. store. She called in the loan the day she found out that Chris was in Atlantic City with Christine Lang, the person with whom Chris now lives. The loan was paid in about November, 1994.

85 As indicated above, Lynn collaborated with Chris to provide information which may have assisted Chris in wrestling a security contract away from Lynn's boss. She contacted Christine to tell Christine what was going on between Lynn and Chris only after she discovered that Chris had developed a relationship with Christine Lang.

86 Lynn signed an affidavit for Christine as soon as the divorce proceedings began in 1995. As a result of Chris' call to Lynn's boss after that affidavit, Lynn lost her job and was unemployed for 10 months. While there is certainly an element of retaliation in Lynn's actions, I accept her evidence to the extent that it corroborates Christine's evidence of the accessibility to unrecorded cash.

87 I turn then to Chris' evidence. His first financial statement in the divorce proceedings was sworn on May 15, 1995. It disclosed only employment income of $41,000.00. He received Lynn Gorman's affidavit sworn May 17, 1995. He filed a financial statement dated July 5, 1995 in which he included $6,000.00 as "sporadic cash income for small jobs". In his financial statement sworn January 24, 1997, he showed income based on 1996 as employment income of $750.00 per week and $2,000.00 for the year for "purchases and sales of used safes". In the financial statement sworn January 23, 1998, he included "purchases and sales of used safes" at $750.00 for the year.

88 In response to an undertaking at discovery, he produced a list of the legal expenses he had paid since separation. In 1995 alone, he paid $22,126.80 of which $16,000.00 was paid by Imperial Lock and $6,126.80 was paid by him personally. As the summary of the procedural background at the outset indicates, there was considerable activity in 1995. While the specifics in the year of separation are less relevant than those before valuation date, evidence of unrecorded payments to Chris after valuation date would serve to corroborate a trend before valuation date.

89 In his examination-in-chief, Chris produced invoices designed to show that purchases and sales of used safes were recorded. Mr. Jarvis protested. Chris' explanation for the belated production of such business records was that no one had ever asked for documentation about whether the revenue from the sale of used safes was put through the company. I allowed the documents to be filed. Whether those specific invoices were ever requested, the issue of unrecorded income has been on the table for over 2.5 years. The explanation, which again seeks to blame others, was not credible.

90 In cross-examination, Chris agreed that there was undisclosed cash. He knew he was breaking the law by not reporting it to Revenue Canada. He agreed that unrecorded sales was a pattern which had been going on before separation. He agrees that he didn't disclose his true income to his accountant, but volunteered, again, that neither did his wife. He agreed that over 5 years, he had consistently mislead his accountant and Revenue Canada about his true income. On the subject of the loan from the Royal Bank, he agreed that he had mislead the bank in obtaining the loan by not disclosing a loan with his father. He denied ever telling Lynn Gorman that he made $50,000.00 under the table. But moments later he acknowledged that he had told Fingarson that "cash transactions could be had in the business. What she heard was my effort to make the business more attractive." He said that his talk to Fingarson about cash was a "sales tactic". He admitted that he had not told his business valuator about any cash transactions. Aside from the cash transactions, Chris admitted to using Imperial Lock funds for personal travel and automobile expenses. Chris seeks to minimize the available unrecorded cash. He says that business is poor and opportunities to take cash are few.

91 I will deal more fully later with the evidence of Mark Fingarson as it relates to the purchase price of Chris' business. On the subject of unrecorded cash, Mark gave this evidence. In response to the question as to whether Chris had made any representations to him about undisclosed cash, Mark said that in any business there is a certain amount of cash. He understood that cash went through the till or was brought in by the servicemen. He suggested however, that if you hide your cash, the bank will want to know what's going on. He didn't believe that Chris had ever mentioned a specific amount of cash as having been taken by Chris.

92 The business valuator engaged on behalf of Christine did not do a comprehensive analysis of unrecorded cash or payment for personal expenses for reasons to which I will refer below. The business valuator engaged by Chris had no knowledge of unrecorded cash and expenses paid by the company.

93 Mr. Jarvis has made submissions that Chris' real income is about $75,000.00 per year which is almost twice the income disclosed on his tax returns.

94 The burden of proof is on Chris to prove his income both for purposes of establishing value of his net family property and for purposes of establishing income for the child support calculation. I find that wherever an inference is to be drawn on this subject, it should be drawn against Chris since it was his legal responsibility to advance reliable evidence. Based on Chris' admission that there is unrecorded cash, the only issue is how much. For the year of separation, I find that Chris' total income is calculated as follows:

employment income as in T4		$39,187.20
legal fees paid		$16,000.00
car expenses, credit cards, miscellaneous income at 20% of employment income		$10,000.00
	total	$65,187.20
	rounded to	$66,000.00

95 I therefor attribute $26,000.00 as undisclosed income or expenses paid on his behalf. While the legal fees paid in that year were higher because of the separation, in view of the evidence of Christine and Lynn Gorman, and the admissions by Chris indicated above, I find that a pattern of income at that level should be attributed at least beginning in 1992, the year when the total income from Imperial Lock paid to Chris and Christine was $71,525.00 - in a year when Christine was not actively engaged in the company. If the business could support that level of income on T-4's for Chris and Christine and the $8,674.55 itemized by Christine, attributing $66,000.00 to Chris on a regular basis before separation might even be considered to be conservative.

ii) Value of the Shares

96 I turn then to the value of the shares of the business at valuation date. In his financial statement sworn in May 1995, Chris valued his shares at $190,000.00 without reference to a shareholder's loan. In his financial statement sworn July 5, 1995, the shares were "to be valued". In the financial statements sworn January 24, 1997 and January 23, 1998, Chris reflects the

value of the shares and of the shareholders advance at $131,966.00. In contrast, Mr. Jarvis asserts that the value of the shares including the loans is $350,000.00.

97 Glenn Bowman is an experienced chartered business valuator. He was retained by Mr. Jarvis after Chris failed to obtain his own appraisal of the business as anticipated by Jennings J. on July 7, 1995. The order of Epstein J. required Chris to pay $3,500.00 to enable Christine to engage her own appraisal. Mr. Bowman was given the unaudited financial statements for the period ended March 17, 1990, February 28, 1991 and the years ended February 28, 1992 to 1994. He also reviewed documents related to the offer to purchase by Fingarson and the capital gains election documents as well as Chris' tax returns for 1989 to 1994 and miscellaneous other documents. He had no source documents from the accountant such as working papers. He had no access to Chris. There were limitations on his engagement which included the documentation available to him and the cost. He pointed out that he had not sought external verification of the information provided. Nor had he investigated the extent to which Imperial Lock had unrecorded cash sales or paid for personal expenses of Chris and Christine.

98 Mr. Bowman relied on the offer to purchase made by Mark Fingarson. After the confidentiality agreement was made in April, 1993, negotiations began in earnest. The November 12, 1993 offer was for $270,000.00 plus the amount of any shareholder loan payable to Chris not yet repaid as at the date of closing. Once the written offer was made, Fingarson had an opportunity to do due diligence. His mother is a financial advisor. He and his mother spent time at the business observing and investigating. An agreement of purchase was never reached. Negotiations were halted about one year after they began.

99 Even though that deal never materialized, Chris used it as the basis for a capital gain election. In documents dated in February, 1994, Chris' accountant asked Chris' lawyer to document the reorganization to achieve the crystallization of the capital gains exemption using Section 85 of the *Income Tax Act*. Chris sold his common shares back to the corporation. The proceeds of sale were a new special class of preference shares and new common shares. The common shares were surrendered to the company at fair market value established at $350,000.00. The accountant established that value based on the Fingarson offer at $270,000.00 plus the shareholder advances at $61,996.00 and shareholder note payable at $29,084.00. The process was accelerated to take place prior to the introduction of the federal budget in which it was anticipated that the capital gains exemption would be modified or eliminated. Chris and Imperial Lock signed the share exchange agreement. Chris signed the special resolution of the shareholders, the resolutions of the board of directors and the subscription for shares. The articles of incorporation were amended. All of the foregoing was done in February, 1994.

100 By letter dated January 23, 1995. Chris' solicitors reported on the transaction including the basis upon which the fair market value of the common shares had been determined in consultation with the accountant, "which took into account, among other things, an offer in such amount received and rejected by the shareholder from a party dealing at arm's length from the parties". In April, 1995, Chris filed a personal tax return reporting the gain of $262,492.50.

101 In Mr. Bowman's report and in his evidence, he outlined the typical approaches for valuation of a business - either asset based or earnings/cash flow based. The limitations on his engagement precluded him from undertaking the detailed earnings/cash flow analysis he would have done. He prepared an analysis of the estimated goodwill implied by the purchase transaction. He concluded that the offer by Fingarson appeared to be "unusually high" but he considered it to be consistent with the existence of unreported income and personal expenses included in Imperial Lock's accounts. Based on the information available to Mr. Bowman, he understood that in addition to cash sales, personal expenses paid for by Imperial Lock included: travel; cellular phone calls; automobile expenses; legal fees relating to the matrimonial action; personal income taxes; home furnishings; and personal credit card charges. He concluded as follows:

> It is our view that the unreported income and personal expenses items paid by the company, would form part of the income stream that a purchaser would be willing to pay for, and that the existence of these items was considered by Mr. Fingarson in his determination of an approximate purchase price to offer for Imperial.
>
> Keeping in mind the concept of fair market value, we consider that the en bloc value implied by the contemplated purchase transaction by Mr. Fingarson of the shares of Imperial and the implied goodwill represents an open market transaction between informed, prudent and knowledgeable parties, acting at arm's length. The price offered by Mr. Fingarson reflected

> his assessment of Imperial, based on information provided by and discussions with Mr. Passarello, and, was based on the future expectations for Imperial at that point in time. The price offered by Mr. Fingarson in turn formed the basis of his valuation of Imperial for the purposes of a share capital reorganization, and in turn formed the basis of Mr. Passarello's valuation of Imperial for the purposes of calculating the capital gain reported on his 1994 personal income tax return.
>
> We requested, but have not been provided with financial statements for the fiscal years subsequent to 1994. We have not been provided with any information suggesting that the nature of Imperial's business operations, reported revenues, client base, operating expenses, and the apparent personal lifestyle continued to be enjoyed by Mr. Passarello, has changed significantly since February 28, 1994. Thus it would appear, that the estimated fair market value of Imperial on or about February 28, 1994 likely provides a reasonable approximation of the fair market value of the company on or about May 10, 1995.

102 Mr. W.A.D. Selby is also an experienced chartered business valuator. He was retained by Chris and prepared a report in December, 1996. He had access to the financial statements for the years ended February 1995 and 1996 and the election documents. He also had reviewed Mr. Bowman's report before he wrote his own. He concluded that the Fingarson offer did not reflect an indication of share value for a number of reasons. He ignored the Fingarson offer for purposes of valuing the shares. He reviewed the financial statements, made adjustments to determine maintainable earnings, arrived at an earnings multiple (3 times maintainable earnings) and concluded that:

> The value of the corporate shares would be no more than the shareholder's equity of $20,000.00 plus a nominal $30,000.00 amount to reflect Imperial's going concern nature. We set the value of the corporate shares at $50,000.00.

103 In addition, he pointed out that the debt to Chris in the amount of $81,966.00 would have to be addressed when "considering the overall investment in Imperial". In essence, he valued the shares at approximately $130,000.00.

104 I am compelled to disregard Mr. Selby's report for two reasons. He said in evidence that he did not consider the share reorganization and crystallization to reflect fair market value. He considered it unremarkable that Chris had represented to his lawyer, his accountant and Revenue Canada that it reflected fair market value. Consequently, he had no hesitation in disregarding it. I accept Mr. Bowman's evidence that that election for capital gains purposes must be at fair market value. The rejection of the transaction as at least an indicator of value was unreasonable. Secondly, Chris admitted that he did not tell Mr. Selby about unrecorded cash.

105 Chris has the burden of proof on this issue. In the absence of credible expert evidence, Chris' assertion that the shares were valued at approximately $130,000.00 has no basis and accordingly. Chris' evidence on that point must also be rejected.

106 Without any basis for Chris' valuation, the conclusion reached by Mr. Bowman is attractive. Chris can hardly complain that Mr. Bowman did not do a comprehensive earnings/cash flow analysis when the documents and information needed to conduct the analysis were not produced. The conclusion reached by Mr. Bowman is logical and well-reasoned.

107 However, I must consider the evidence of the arm's length purchaser. Mark Fingarson gave evidence with respect to the background and the negotiations. He agreed with Chris' evidence that the purchase price of $270,000.00 was Chris' number. He said that "until we arbitrarily pulled a number from the air, I wasn't going to get access" to Chris's records. He did due diligence with the assistance of his mother. He said that he felt it was worth "a lot less than the original asking price". Although the documentation was not produced, he said that he brought an offer back at $230,000.00. Together with the shareholder's loan, that would constitute an offer of $312,000.00.

108 Mr. Bowman's evidence that the Fingarson offer reflected fair market value was justified until the potential purchaser indicated that it was designed only to open the books and that in reality, the price was less. While I was inclined to rely on the Fingarson offer, particularly because of the representations to the accountant, lawyer and Revenue Canada which was explicit in the capital gains election process, I find that I am not at liberty to adopt that approach on the basis of Fingarson's evidence.

109 Fingarson would not have paid $270,000.00 plus the shareholder's loans. He offered $230,000.00 plus the shareholder's loans. The evidence of Mark Fingarson is compelling. It is reinforced by three further factors. The first is that I have found the income attributable to the business to be a healthy $66,000. Secondly, the current assets are valued at $186,021.00 and the capital assets valued before depreciation at $145,563.00 for a total of $331,584.00. The liabilities (current and long term) totalled $206,723.00, leaving a net of $124,861 - again, a healthy picture. Lastly, the burden of proof is on Chris to establish value. He cannot be seen to complain when I adopt the evidence of the witness whom he called. I therefore assess value at valuation date based on negotiations which concluded early in 1994. I find that the value of the shares at valuation date was $230,000.00 together with the shareholder's loans established by the accountant in the capital gains election valuation of $29,084.00 plus $61,996.00 for a total of $91,080.00.

Exclusion of Gift From Leonard

110 Section 4(2)1. of the *Family Law Act* allows the exclusion of

> *property*, other than the matrimonial home, that was *acquired* by gift or inheritance from a third person after the date of the marriage (emphasis mine)

111 Chris asserts that in 1989, he received a gift of $100,000.00 from his brother Leonard after working for 20 years in Leonard's locksmithing company. Chris asserts that $86,000.00 of that amount is reflected in his NFP as a shareholder loan to Imperial Lock. Thus, he is claiming an $86,000.00 exclusion pursuant to s.4(2) of the *Family Law Act*. There is no documentary evidence to support this alleged gift. The exclusion was not claimed until Chris' third financial statement sworn January 24, 1997. Leonard was not called as a witness despite the fact that he apparently lives in Toronto and could have been called.

112 The husband claimed in cross-examination that he had documentation in the form of a note from his brother verifying the gift, but that he left it at home because he did not know he would have to prove the gift. When pressed on the point - to the effect that it was incredulous that his lawyers told him about the exclusion but not that he had to prove it - he stated that he had also given a copy of the note to his previous lawyer. The opening balance statements of Imperial Lock were not produced in evidence to provide evidence of the initial infusion of capital. There is no corroboration provided by Chris that the source of the Shareholder's advance shown in the corporate financial statement was a gift from his brother.

113 The wife, in cross-examination admitted that the money to start the Imperial Lock business came from brother Leonard, in the amount of $110,000.00. She stated that it was not a gift though, but that it was "payment for services over the years". The husband also testified that the money had been advanced "in appreciation of looking after this company while he [Leonard] was away doing his wheeling and dealing". Both indicated the money was not advanced in a lump sum, but in periodic payments over the course of a year.

114 Section 4(3) of the *Family Law Act* places the onus of proving an exclusion on the party claiming it. Blacks Law Dictionary defines a "gift" as:

> A voluntary transfer of property to another made gratuitously and *without consideration*. ...Essential requisites of "gift" are capacity of donor, intention of donor to make gift, completed delivery to or for donee, and acceptance of gift by donee. (emphasis mine)

115 The problem with this exclusion lies in whether the husband has established that this $86,000.00 shareholders loan came from a gift from the brother. Section 4(2) allows exclusion of *property* that was *acquired* by gift or inheritance. Hence, it is not enough merely to show that Leonard advanced the money as a gift. The husband must prove that the property he seeks to exclude - the shareholder's loan - was acquired by the gift. Hence, while Christine corroborates that Leonard gave money to Chris, Chris has not produced any evidence to corroborate that it can be traced into the shareholder's loan. The opening balance sheets of the company were not introduced into evidence. The note from Leonard was not introduced into evidence. Leonard was not called as a witness.

116 *Amaral v. Amaral* (1993), 50 R.F.L. (3d) 364 (Ont. Gen. Div.) supports the propositions that where a transaction between family members is raised to reduce net family property the claimant should provide documentary corroboration. *Amaral*also supports the proposition that where evidence can be called to support the claim and is not, an adverse inference can be drawn against the claimant. Counsel for the wife invites me to draw an adverse inference against the husband for failing to call his brother as a witness to corroborate the gift. I agree. I also agree with Mr. Jarvis that the advance by Leonard could be characterized as a payment for past services rather than a gift. Chris was paid for his 20 years' service. But when Leonard sold the business, he was in the position to be generous and to recognize Chris for the many years of service. It was not a gift. It was additional compensation for services rendered and, in that sense, was an advance based on consideration. I conclude that while some monies were advanced by Leonard at that time, Chris has not met the onus of establishing that the funds constitute a gift as defined above or that the funds are traceable to the $86,000.00 shareholder's loan. This amount will not be excluded from the husband's NFP.

Liabilities

117 I received no evidence with respect to the $1,000.00 debt claimed by Christine. Mr. Jarvis conceded the absence of proof. That claim will be disregarded.

118 Chris has claimed a liability of $9,155.00 being the amount of income tax owed as of April 30, 1995 for the taxation year 1994. Mr. Jarvis opposes that deduction because historically Chris' income tax had been paid by the company and because the amount was never paid because it was offset by a 1995 tax refund of about $10,000.00. As the 1994 Income Tax return and Exhibit 28 indicate, tax was owing and unpaid at valuation date. The source of the funds or a post valuation date setoff are irrelevant. The deduction is allowed.

119 The debt owed to Chris' father predated the start of Imperial. A debt then outstanding was discharged as a result of an advance by Chris' father. Chris admitted that that debt was rearranged deliberately to enable Chris to apply for Bank financing for Imperial Lock without disclosing the debt. Christine and Chris and Gaspare Passarello signed a letter agreement dated March 1, 1989 in which they confirmed the loan of $60,000.00 to be paid in monthly installments at 10.5% interest and due in 5 years. The informal note specifies that "in the event of a marriage dispute or separation or death, it is agreed that both parties will be responsible for payment."

120 The debt was not discharged in 1994 at maturity. Shortly after the separation, a lawyer for the creditor wrote to both Chris and Christine demanding payment. Apparently, the note was converted to a mortgage registered December 22, 1995 in the principal amount of $54,784.97. Since the mortgage is a joint obligation, the current principal is relevant. Given the 1989 note and the 1995 mortgage, this liability should be attributed equally to the net family properties of Chris and Christine.

121 The Royal Bank debt was arranged in 1990. A mortgage in the amount of $30,000.00 was registered against title to the matrimonial home. Chris and Christine both signed as mortgagors. As of December 1997, the principal was $26,900.00. It was renewed for 6 months to July 1, 1998. Chris and Christine both signed the renewal. For reasons indicated above, the principal outstanding on this debt should be applied to the husband's net family property in order to mirror the shareholder's note payable.

122 The Royal Bank line of credit is another matter. Other than assertions that the financial statement and net family property statements were accurate, I can find no confirmation as to the amount of indebtedness at valuation date. In Chris' first financial statement, the line of credit is not mentioned. In subsequent financial statements, it is shown as a debt of the business for which Chris is the guarantor. I can find no justification for including $40,000.00 on Chris' personal financial statement or net family property statement. However in the net family property statement submitted on behalf of the wife, Mr. Jarvis has reflected the line of credit at $40,000.00 in the husband's NFP. On that basis. I allow a deduction for $40,000.00. This debt is secured by a collateral mortgage secured against the house. Given the disposition of property outlined in Schedule B at the end of these reasons, by September 1, 1998 Chris will use his best efforts to have this mortgage discharged, and report in detail in writing as to these efforts to the wife. If the Bank will not discharge this mortgage, Chris will indemnify Christine if the creditor ever seeks to realize on the security.

Conclusions on Equalization of Net Family Property

123 There are a number of items which I have not mentioned. Silence indicates that there is no dispute. The net family property calculation is attached as Schedule A. Order to issue that the husband owes to wife an equalization payment of $122,895.00.

Adjustments

Costs

124 There are outstanding costs orders against the husband as follows:

1)	September 21, 1995 Order of Beaulieu J. -	$ 750
2)	May 29, 1997 Order of Ferrier J. -	$ 500
3)	January 27, 1998 Order of O'Connell J. -	$3,000
Total -		$4,250

125 These orders were all outstanding at the date of the trial. The husband shall comply with those orders in the manner reflected in Schedule B.

Arrears of Support

126 The order dated June 1, 1995, awarded interim interim child support in the amount of $700.00 per month for each child. Paragraph 1 of the Order indicates that support is payable on the first of the month. Although it is arguable that Chris is liable for support for Tim for the whole month, Mr. Jarvis has asked for only $350.00 representing payment for half of the month. Arrears are owing for Steven for January and February. The total arrears owing at the time of the trial were $1,750.00. This amount is payable to the wife together with any other arrears accrued while the decision was under reserve. Payment shall be made in the manner reflected in Schedule B.

Van

127 On June 1, 1995 Smith A.C.J. ordered that:

> This Court Orders that on an interim / interim basis the respondent, through his company, shall maintain the status quo with respect to the Voyageur Van currently in the petitioner's possession.

128 The Voyageur Van was provided through a lease with Imperial Lock Company. The lease ended March 31, 1997. When the lease ended the monthly payments were between $460.00 and $500.00 per month. Chris did not renew the lease nor purchase the van for Christine. He offered Christine the use of a 1986 mini van. She declined the offer because it was not roadworthy, it was always in the shop for repairs, it only had two seats and the floor boards had given way.

129 Christine testified that she had to take public transportation between April and July of 1997. She purchased a car in July 1997 from the proceeds of RRSP savings.

130 Christine asserts that she incurred the following expenses as a direct result of Chris's failure to maintain the van for her use: $945.65 for injections to her knees, which deteriorated due to increased walking; $627.11 in lost wages as a result of a knee operation; $10,384.44 worth of RRSP's that she cashed in to use as a deposit on a car lease; $747.18 in car insurance; and $90.00 for the car licence.

131 Mr. Jarvis asserts that because Chris was under court order to continue to maintain the arrangement with the van, he is liable for all of these costs. I do not agree.

132 It is true that Chris did not seek to have the order amended to clarify that the replacement of the van was not his obligation. However it was an interim interim order made almost three years ago. Orders on that basis do not usually require the payor to make a capital acquisition when the lease runs out. It is not a reasonable interpretation of that order that Chris should be accountable for the replacement of the vehicle.

133 Consequently, Chris is not liable to Christine for the cost of purchasing (leasing) a new car. However, Christine's claim for the cost of insurance and licence is a reasonable one since payments for such expenses are in the nature of support, as anticipated by Smith A.C.J.. Order to go that Chris pay to Christine the amount of $837.00 for insurance and licence for 1 year in the manner reflected in Schedule B.

134 In any event, the medical reports of Dr. Sue-A-Quan and Dr. Gawel do not support a finding that there is a causal relationship between Christine's use of Public transit for a 4 month period and the medical expenses claimed. The claim for damages for expenses for knee injections and lost wages is dismissed.

House Insurance

135 On June 21, 1995, Smith A.C.J. ordered that one of the parties was to make the house insurance payment of $780.00, and that which ever party made the payment would be entitled to a $390.00 credit on equalization of net family property. It is not disputed that Christine made the payment. She will therefore receive the $390.00 credit in the manner set out in Schedule B.

Summary of Adjustments

136 Order to go that the husband shall pay to the wife $7,227.00 summarized as follows:

outstanding costs orders payable to Christine		$4,250.00
arrears of child support payable to Christine		$1,750.00
insurance premiums payable to Christine		$ 837.00
credit for Christine pursuant to order of June 21, 1995		$ 390.00
	TOTAL	$7,227.00

Matrimonial Home

137 Christine has asked for transfer of title from Chris to her in consideration of at least part of the equalization payment. She is prepared to assume responsibility for the Royal Bank first mortgage but resists responsibility for either the Gasper Passarello mortgage or the Royal Bank line of credit. Section 4 gives the court broad discretion in making orders to accomplish the equalization payment. Chris has shown no respect for Christine's rights. There is no reason to expect that that attitude will change. This is an appropriate case for such a transfer. Order to go vesting title of the home to Christine as of the last day evidence was heard, namely February 24, 1998.

138 Chris owes to Christine an equalization payment of $122,895.00 and adjustments of $7,227.00. Schedule B to the judgment summarizes the adjustments made as a result of the transfer which are reflected as follows:

1. Chris shall forthwith transfer all right, title and interest in the matrimonial home to Christine. If he fails to do so within 30 days of release of these reasons, Christine may apply ex parte for a vesting order;

2. the balance owed by Chris is $25,122.00

3. within 30 days of release of these reasons for decision, Chris shall cause the mortgage in favour of Gasper Passarello to be discharged;

4. if Chris is unable to fulfill paragraph 3, the mortgage shall remain on title until maturity provided that Chris indemnify Christine from any liability associated with that mortgage;

5. commencing July 1, 1998, Chris is responsible for making all payments (including periodic and at maturity) on the Gasper Passarello mortgage;

6. Chris and Christine shall forthwith take steps to renew the first mortgage to Royal Bank which is due July 1, 1998;

7. commencing on the first of the month after title is changed in accordance with paragraph 1, Christine shall assume all liability for the Royal Bank first mortgage (including periodic and at maturity) and, assuming Chris complies with paragraphs 3 or 4, she shall indemnify Chris from all liability associated with the Royal Bank first mortgage. Until such title change. Chris (or Imperial Lock) shall be responsible for making all payments on the Royal Bank first mortgage; and

8. Chris (or Imperial Lock) shall continue to be responsible for all payments associated with the Royal Bank line of credit (including periodic and when the debt is called).

Spousal Support

139 Christine is not seeking spousal support at this time. However she seeks an Order that the option of pursuing spousal support be left open to her should she experience a material change in circumstances.

140 Christine has a grade 8 education. At the age of 16, she left grade 9 to care for her parents. She worked for the next 9 years as a waitress, during which time she met Chris. Christine then worked for the Ontario Government in a variety of capacities from 1974 until the present time, with the exception of the period when she worked for Imperial Lock between 1989 and 1991. Her current income, according to her 1996 income tax return, which is the latest return filed with this Court, is $37,429.21. Counsel for the husband, in submissions stated her income to be $39,000.00. Counsel for the wife, in reply submissions, corrected this figure and stated it was $35,000.00. Christine did not testify as to her current salary. I find her salary at the date of the trial to be $37,429.21. Given the length of the marriage and the discrepancy in earnings, Christine is a dependent. Chris has the ability to pay spousal support. Christine is entitled to support. Mr. Jarvis has not asked that an order for periodic support be made. He has asked only that health benefits be continued. Order to go that husband maintain all coverage for the wife for as long as she is entitled to support.

141 Christine asserts that her loss of employment is imminent. She testified that she is on a contract position and that her contract expires March 31, 1998. She stated that her contract will not be renewed. Counsel for the husband elicited evidence in cross examination that Christine's one year contract positions have been consistently renewed since 1991, and there has always been a certain amount of uncertainty in the job. However Christine indicated that this time is different because when her job contract came up for renewal it was internally posted, and Christine applied for it, was interviewed and *did not get the job*. Her evidence was that the job was given to someone with more seniority. She testified that she hopes to find employment elsewhere, but that she will apply for the Ontario Government temporary employment service if she cannot find anything else. I find that her apprehension that she will be unemployed at the expiry of her contract at the end of March is a reasonable one. In view of my finding of entitlement, if, while waiting these reasons, Christine has become unemployed, she is entitled to apply immediately under s.17 of the *Divorce Act* to obtain an order for periodic support.

Child Support

i) Support for Steve

142 I turn to establishing Chris' income currently. I earlier held that his income was $66,000.00 in 1995. I have earlier listed his income as reflected on his tax returns. The financial statements for Imperial Lock for the years 1992 through 1996 indicate a steady increase in gross annual income as follows:

February 1992	$369,027
February 1993	$379,292
February 1994	$398,238

February 1995	$455,675
February 1996	$420,726

143 The company has experienced steady and sustained growth. In the absence of a financial statement for the year ended February 1997 and any preliminary information with respect to income/expenses/profit for the year ended February 1998 (which ended the week following the trial), I infer that that information would have shown even greater revenue and profitability. When self-employed, the Guidelines impose an obligation on the payor to provide documentation which would enable the court to establish current income. Chris had not done so. I am entitled to draw inferences against him. The company is now 9 years old. Chris is the sole proprietor. In the absence of a reliable calculation, it is reasonable to assume that Chris earns at least 10% more than in 1995. I find Chris' income is $72,600.00. According to the Child Support Guidelines, Chris shall pay child support in the amount of $589.00 per month commencing March 1, 1998. A support deduction order shall issue on request of Mr. Jarvis.

144 If Chris has paid no child support since the trial, the arrears shall be adjusted as in Schedule B. Chris shall provide health coverage as long as he is required to pay child support.

ii) Support for Tim

145 Chris also claims child support for Tim. Section 3(2) of the Guidelines states:

> s. 3(2) Unless otherwise provided under these Guidelines, where a *child to whom a child support order* relates is *the age of majority or over*, the amount of the child support order is
>
> > (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
> >
> > (b) *if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the conditions, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child*, (emphasis added)

146 At Christine's salary of $37,429.21 the Guideline amount owing for support of Tim would be $324. Section 8 of the Guidelines provides for a set off of support amounts where the spouses have split custody (each spouse has custody of one child). In this case the amount would be the difference between the Guideline amount of support owing to Christine for Steve's support ($589) and the Guideline amount owing to Chris for Tim's support ($324). The difference is $265, which would be the amount owing to Christine for Steve's support.

147 However, I find that it is inappropriate to apply the Guidelines in this case and I dismiss the claim for child support for Tim for two reasons. The first relates to Tim's status as a "child of the marriage" pursuant to the *Divorce Act*, and the second relates to Tim's needs and the financial ability of the parties to contribute to Tim's support.

148 Tim's entitlement to support depends on his status as a "child of the marriage" pursuant to the *Divorce Act*. Tim is over the age of majority. He is 20 years old, and will be 21 in November. His mother testified that Tim is taking a combination of grades 10, 11 and 12 and hopes to complete high school and then take an auto mechanics course in community college. He has had academic difficulties all through his life.

149 To qualify as an adult "child of the marriage" Chris must establish that Tim is unable to withdraw from the charge of his parents or to obtain the necessaries for life (section 2). I am not satisfied that Tim's situation is enough to bring him within the meaning of "child of the marriage" for three reasons. Firstly, there was no evidence as to whether Tim is currently attending school full or part time, and what the projected time for completion of his studies will be. Secondly, it has not been established that Tim is in a position of dependancy. There was no evidence about what Tim's needs are or his ability to contribute to his own support. While there were indications during the trial that Tim has worked and earned income in the past there was no specific evidence about Tim's current income. This information is relevant to the "condition, means and needs" of the child. It is particularly significant when the issue involves child support for a 20 year old man who has not yet completed grades 10,

11 & 12. Thirdly, Tim has had at least one period of absence from school, during which he probably lost his dependant status as a "child of the marriage". Chris said Tim was out of school and working between February and September 1997. Christine testified in cross examination that for a period of time while Tim was living with her he was out of school and working. It is questionable whether an adult child may regain their status as a "child of the marriage" after ceasing to qualify.

150 For a Court to impose an obligation on a parent to continue supporting an adult child there must be sufficient evidence to establish that the claim is justified. There was no such evidence presented in relation to Tim. Consequently Chris has failed to establish that Tim is entitled to support. In the absence of entitlement, it is inappropriate to apply the Guidelines.

151 The second reason for dismissing Chris's claim for child support is that there is little evidence of Chris's needs with respect to Tim's support and his financial ability to support Tim. Because Tim is over the age of majority, a budget should have been provided. Chris's current living arrangements with his common law partner, Christine Lang, are relevant to Chris's financial ability to provide support for Tim. The only evidence about this arrangement was the evidence given by Chris. He testified that he "makes available to her" (Christine Lang) $700 per month, and that the $700 covers his visa, amex, credit line and any outstanding bills he or Christine Lang may have. Christine Lang pays the mortgage and "virtually anything that my $700 will not cover", such as groceries. In other words, his arrangement with Christine Lang enables him to pay all of his expenses with a $700 monthly payment, or $8,400 per year. This is a very small portion of the $72,600 in income I have found to be available to Chris. Chris's company has shown steady growth in the past 10 years, and it is likely he will continue to have such generous resources at his disposal. Christine Passarello, on the other hand, has a tenuous grasp on a $37,000 per year job that she is likely to lose in the near future.

152 In light of these circumstances, I dismiss the claim for support for Tim.

153 While this decision is based on the two reasons expressed above, I note that a further consideration for this Court is the circumstances under which Tim left his mother's home and went to live with his father. I expressed concern earlier in these reasons about the possibility that money was offered by Chris to Tim as an incentive to move in with him. If Chris used money which arguably already belonged to Tim, to lure him away from his mother's home, on the eve of the trial after the status quo arrangement of almost three years, it would lead to an inference that the mother ought not to remain liable for Tim's support. At minimum, it indicates that Tim has deliberately withdrawn from his mother's care in circumstances indicating that Christine's support obligation should cease.

Security

154 Mr. Jarvis made tentative submissions with respect to security for Chris' obligation to make an equalization payment. Given the disposition with respect to the matrimonial home, I need not make any order. Security for the support obligations is not required in the circumstances of this case. Chris has an income source and I have made a support deduction order. The obligation will be enforced through the Family Responsibility Office if requested by Christine.

Conclusion

155 Mr. Jarvis will secure from Mr. Passarello's new counsel dates in the week of July 20, 1998 when I will hear submissions as to costs and pre-judgment interest. Mr. Jarvis will arrange a conference call in advance to arrive at an agreed upon timetable for making brief written submissions.

Schedule A

Net Family Property

	Husband	Wife
Value of Property at Valuation Date		
Matrimonial Home	$ 105,000.00	$ 105,000.00
Contents	--	--
Jewellery	--	--

Savings/RRSP	1,317.00		21,528.00
Coin Collection	6,000.00		--
Insurance	12,386.00		3,249.00
Sports Cards/ Scarborough	5,000.00		--
Account Receivable - Loan to Imperial	29,084.00		--
Shares	230,000.00		--
Shareholders Advance	61,996.00		--
A.	$450,783.00		$129,777.00
Less Liabilities at Valuation Date			
Royal Bank - as of Dec. 94	28,765.00		--
G. Passarello -	29,250.00		29,250.00
Tax at 25% RRSP			5,337.00
Income Tax for 1994	9,155.00		
Credit Cards			3,892.00
			1,705.00
	2,789.00		2,789.00
	582.00		
	1,960.00		
	1,870.00		
	3,817.00		
Royal Bank Line of Credit	40,000.00		
B.	$118,188.00		$42,973.00
Net Family Property (A.Minus B.)	332,595.00		86,804.00
Total Net Family Property		419,399.00	
Entitlement of Each (/2)			209,699.50 (209,700.00)
Equalization Owed by Husband	(122,895.00)		+ 122,895.00
	$ 209,700.00		$ 209,700.00

Schedule B

Summary of Payments Owed

Judgment Against Natale John Passarello:	
Equalization Payment	$ 122,895.00
Plus other adjustments	{*} +7,227.00
Balance owed to Christine Passarello	$ 130,122.00
Less Transfer of 50% interest in matrimonial home	-105.000.00
Balance owed to Christine Passarello	$ 25,122.00
Less Assumption of 50% of Royal Bank mortgage attributable to Natale John Passarello as July 1, 1998	{**} -$ 13,227.00
Balance owed to Christine Passarello and payable within 30 days of release of these reasons	$11,895.00

Notes: * increased to include arrears for child support since March 1, 1998, if any** assuming mortgage payments are current as required by the order of Smith A.C.J.

Order accordingly.

TAB 3

CITATION: Laurentian University v. Sudbury University, 2021 ONSC 3392
COURT FILE NO.: CV-21-656040-00CL
DATE: 20210507

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

RE: Laurentian University of Sudbury, Applicant/Responding Party

AND:

University of Sudbury, Moving Party

BEFORE: C. Gilmore, J.

COUNSEL: *D.J. Miller*, *Mitchell Grossell, Andrew Hanrahan, Fraser Hughes* and *Derek Harland*, Counsel for the Applicant/Responding Party

Ashley Taylor, Elizabeth Pillon and *Ben Muller* for the Court-appointed Monitor, Ernst & Young

Vern W. DaRe for the DIP Lender

André Claude and *Ronald W. Caza* for University of Sudbury Counsel for the Moving Parties

Demetrios Yiokaris and *Eugene Meehan* for Thorneloe University

Francis Poulin and *Charlotte Servant-L'Heureux* for the Assemblée de la francophonie de l'Ontario

Charles Sinclair for the Laurentian University Faculty Association

Tracey Henry and *Danielle Stampley* for the Laurentian University Staff Union

Peter J. Osborne and *David Salter* for the Board of Governors of Laurentian University

Aryo Shalviri and *Cristina Cataldo* for Royal Bank of Canada

Dylan Chochla for Toronto-Dominion Bank

Virginie Gauthier for Lakehead University

Natalie Levine for Huntington University

Donia Hashem for the Canada Foundation for Innovation

Sarah Godwin and *Immanuel Lanzaderas* for Canadian Association of University Teachers

Mark G. Baker and *Andre Luzhetskyy* for Laurentian University Students' General Association

HEARD: April 30, 2021

ENDORSEMENT

OVERVIEW

[1] Laurentian University ("LU") experienced a financial crisis and sought protection under *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, ("CCAA") on February 1, 2021. The CCAA protection included a stay of proceedings to February 10, 2021. The stay was subsequently extended to April 30, 2021. On April 29, 2021, the stay was extended to May 2, 2021 at 11:00 p.m. On May 2, 2021, the stay was extended to August 31, 2021.

[2] Since February 1, 2021, LU has undergone an overhaul of its entire financial and operational structure in order to create a sustainable operational future for the delivery of academic services. One component of the restructuring involved LU terminating its relationship with its three Federated Universities: the University of Sudbury ("SU"), Thornloe University ("Thornloe") and Huntington University ("Huntington") (together "the Federated Universities"). On April 1, 2021, LU issued a Notice of Disclaimer ("the Disclaimer") pursuant to s. 32 of the CCAA, in order to disclaim certain contracts between LU and the Federated Universities and in furtherance of the termination of the relationship with the Federated Universities.

[3] Huntington has come to an agreement with LU as to how to dissolve its partnership. Both Thornloe and SU proceeded with their motions to set aside the Disclaimer. Thornloe's motion was heard on April 29, 2021 by Chief Justice Morawetz. He extended the stay to May 2, 2021 at 11:00 p.m. and subsequently to August 31, 2021. I heard SU's motion on April 30, 2021. On May 2, 2021, Justice Morawetz and I released a brief endorsement dismissing both motions. In those endorsements it was indicated that detailed reasons for the dismissals would follow. These are the reasons on the dismissal of SU's motion.

BACKGROUND FACTS

[4] LU has been experiencing financial problems for many years. The crisis peaked in the spring of 2020 when LU's liabilities reached $322M. In August 2020, LU retained Ernst & Young to assist with its financial restructuring. On February 1, 2021, LU sought CCAA protection.

[5] LU sought and received Court approval for DIP financing of $25M. After Thornloe and SU filed their motions opposing the Disclaimer, LU filed a motion for an extension of the stay to August 31, 2021. LU sought additional DIP funding of $12M. The DIP lender agreed to provide additional funding of $10M; however, the Disclaimer of the agreements with Federated Universities was a pre-condition of the second advance.

[6] Under CCAA protection, LU's Senate passed a resolution in April 2021 approving its academic restructuring. This included the closure of 38 English-language and 27 French-language undergraduate programs and 11 graduate programs (4 in French and 7 in English) as they were identified as unsustainable.

[7] On April 7, 2021, LU signed agreements with its labour partners which included terminations, declarations that 116 positions were redundant, salary decreases and unpaid furlough days.

[8] LU operates within a federated structure whereby it has contracts with the three Federated Universities. Each of Thornloe, Huntington and SU is a separate legal entity with its own Board of Governors. Programs for all of the Federated Universities are offered through LU and receive credits towards a degree that is granted by LU. As of the Fall 2020 academic term, there were 69.6 full-time equivalent students at SU.

[9] LU entered into its Federation Agreement with SU on September 10, 1960. The Federation Agreements are substantially similar and include the following important terms:

a. Each of the Federated Universities agreed to suspend its degree-conferring powers (with certain limited exceptions) in favour of LU;

b. LU agreed to distribute to each Federated University a portion of the revenue it received for each student as reflected in the Financial Distribution Notice;

c. LU reserved certain land on its campus for the Federated Universities and the allocation was completed pursuant to indentures.

[10] Each of the Federation Agreements contains the following aspirational statement:

> Both Laurentian University and [Sudbury University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one … and to build a great institution of learning which shall forever be bilingual and non-denominational in its character.

[11] Each of the Federated Universities leases land from LU on which they have constructed their own buildings. The lease terms are for 99 years from September 1, 1963 with the possibility of further renewal. The indentures are not the subject of the Disclaimer.

[12] SU has two buildings on the LU campus; a main building for administration and a residence. The buildings were constructed at a cost of $5M.

[13] Pursuant to the Financial Distribution Notices, LU transfers to each of the Federated Universities a portion of the revenue it receives from the provincial government. The Financial Distribution Notices also provide that LU is permitted to assess a 15% administrative service fee ("the service fee") on grant and tuition revenue received. The net amount is then passed on to the Federated Universities. The service fee relates to LU's provision of central computing services, administration of pension and employee benefits, security and student support services.

[14] In 2020, LU transferred $7.7M to the Federated Universities, net of the service fee. According to the Monitor, LU requires this amount as part of its restructuring plan. That is, LU seeks to have the former students of SU, Thornloe and Huntington as part of its student body so that it is no longer required to transfer that revenue to the Federated Universities.

[15] Discussions with the Federated Universities about LU's financial crisis began in June 2020. According to the evidence of Dr. Robert Haché, the President and Vice-Chancellor of LU, he informed the Federated Universities from the start of negotiations that all options were on the table including ending the existing agreements with the Federated Universities.

THE ISSUES

Issue #1 - Discretion under the CCAA and the Duty of Good Faith

[16] Where a party seeks an order disallowing a Notice of Disclaimer, s. 32(4) of the CCAA requires the Court to consider the following list of non-exhaustive factors when deciding whether or not to permit or reject the disclaimer of an agreement:

a. First, whether the Monitor approved the proposed Disclaimer;

b. Second, whether the Disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

c. Third, whether the Disclaimer would likely cause significant financial hardship to a party to the agreement.

[17] Other relevant provisions in the CCAA include a requirement to act in good faith pursuant to s. 18.6:

> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[18] Further, relief granted under the CCAA is limited to what is "reasonably necessary for the continued operations of the debtor company" as per section 11.001:

> Relief reasonably necessary

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[19] SU argues that the duty of good faith in s.18.6 extends to Disclaimer Notices. SU relies on *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, a recent decision of the Supreme Court of Canada. The Court reiterated, at para. 49, that "the discretionary authority conferred by the CCAA…is not boundless" and that the Applicant (in this case LU) bears the burden of demonstrating that the order it seeks is appropriate in the circumstances, and that it has acted in good and with due diligence.

[20] The Court in *Callidus* goes on to explore the fairness element required in CCAA proceedings and that the Court must exercise its discretion to control the process if a party is acting in a manner that runs counter to the objectives of the CCAA or is acting for an "improper purpose": at para. 70.

[21] In the *Re Dallas/North Group Inc.* (2001), 148 OAC 288 (C.A.), the Court was critical of certain non-parties who brought bankruptcy proceedings against two debtors for an improper purpose. The Court was clear that the bankruptcy process cannot be used for such a collateral purpose.

[22] SU argues that LU has acted in bad faith by attempting to disclaim the Federation Agreement. Specifically, SU alleges that LU seeks to use the CCAA restructuring process for a collateral and improper purpose by effectively destroying a competitor. This is an abuse of process.

[23] In support of its position, SU referred to the case of *Dimples Diapers Inc. v. Paperboard Industries Corp.*, 1992 CarswellOnt 192 (Gen. Div.), at para 34, the Court quotes L. W. Houlden and C. H. Morawetz, *Bankruptcy Law of Canada*, 3rd. (Toronto: Carswell, 1989) at p. 2-45:

> When the effect of an agreement between the petitioning creditor and some non-creditors was to embroil the petitioning creditor in an improper objective of the purchasers of a business who as non-creditors had no status in the bankruptcy proceedings and were intermeddling in it, and the objective was to bring about the bankruptcy of the debtors, held — the whole proceeding was tainted and the petition must be dismissed: *Re Pappy's Good Eats Ltd.* (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.).

[24] SU submits that it is false to say that students of SU are all students of LU. They are students of the Federation. The fact that they enrol and receive their diplomas through LU is only because of the agreed upon structure of the Federation. SU has existed as an independent entity since 1910 and is on the same level as LU.

[25] SU claims that LU is attempting to use the CCAA for an illegitimate purpose. Using the bankruptcy system for an illegitimate purpose has been met with disapproval. In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), the Court held that the

CCAA should not be used by a debtor company for any purpose other than a “legitimate reorganization” and not for an “improper purpose”: at para. 84.

[26] At its most basic level, the disclaimer or termination of a contract must be “fair, appropriate, reasonable, and must have been issued after good faith negotiations”: *Re Allarco Entertainment Inc.*, 2009 ABQB 503, at para. 59. SU argues that LU could have but did not attempt alternate solutions, such as a renegotiation of its service fee with LU. It did not enter into the required good faith negotiations with SU.

[27] Further, the financial arguments advanced by LU in support of the disclaimer are not borne out. The expectation was that LU would charge a service fee sufficient to cover its administrative costs resulting in no net cost for LU for administering the enrolment of SU students. Terminating such a “net net” arrangement is contrary to LU’s obligation to act in the best interest of the Federated Universities.

[28] Dr. Haché did not agree that there was no cost to LU for the administration of SU’s students. His evidence on cross-examination was that having students take courses at SU resulted in a loss of potential revenue to LU. SU’s position was that LU had provided no research or modeling to justify or confirm that this was the case. LU has already saved $30M with its restructuring. Destroying the Federated Universities over unproven revenues of $7M does not justify the resulting devastation to SU.

Analysis

[29] I do not agree that LU has sought a Disclaimer of the Federation Agreements for a collateral, improper or illegitimate purpose. This is not a matter of putting a competitor out of business, it is simply a matter of putting an end to an unsustainable financial model within the context of difficult and urgent circumstances.

[30] It is important to review several facts which go to the core of this Disclaimer:

a. All of the students who attend SU are LU students;

b. SU currently has the equivalent of 108 students whereas LU has 9,000 students.

c. The Federation Agreements can be legitimately disclaimed pursuant to s. 32 of the CCAA.

d. The Disclaimer is approved by the Monitor. This recommendation is given significant weight under the statute.

e. Disallowing the Disclaimer would seriously diminish the prospects of a viable plan to be put to creditors. That is, a plan which includes funds that continue to flow away from LU is not viable.

f. Without the Disclaimer proceeding, the DIP lender will not make the additional $10M advance which would remove the ability of LU to file a proposal.

g. LU has been able to achieve significant costs savings, but this only places them at a break even point and without resources to pay its creditors.

h. The Federation Agreements contain only an aspirational clause with respect to their permanency.

i. There is nothing in the business plan which would preclude SU from independently providing religious or francophone-based offerings. It would simply no longer be possible to obtain an LU degree there.

j. In 2019, LU did try a new arrangement, with respect to its service fees, with the Federated Universities. Unfortunately, that was insufficient to overcome its financial distress.

k. With respect to its duty to consult SU, LU attempted negotiations with the Federated Universities as far back as the spring of 2020. The negotiations were only partially successful. As LU is now under the supervision of a Monitor in a Court proceeding, such negotiations are still available through the Court-appointed mediator who has worked hard and achieved good results with Huntington and the various employment stakeholders.

l. I reject the submission by SU that the Disclaimer came "out of the blue." As indicated by Dr. Haché, the concept of a termination of the Federation has always been on the table since LU's financial situation turned to crisis mode. As early as his affidavit of January 30, 2021, Dr. Haché deposed:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) Restructuring the Academic Model by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and **terminating the agreements and relationship with the Federated Universities** [Emphasis added];…

m. I do not find that LU has a legal duty to act in the interests of the Federation. LU's most significant duty at this time is to its creditors. As mentioned above, LU engaged in two months of intensive mediation with all of its stakeholders. It achieved positive results with Huntington and its unions. I agree with counsel for LU that failing to achieve a resolution with Thornloe and SU does not mean that LU was not making good faith attempts at resolution.

[31] SU provided a significant amount of case law to the Court. Unfortunately, none of it related to bad faith or an improper purpose in the context of Disclaimer Notice under s. 32 of the CCAA.

[32] Further, and contrary to SU's assertions, Dr. Haché's evidence was that LU has evolving modeling which includes the ending of the Federations Agreements.

[33] In summary, I find that the Disclaimer meets the requirements of s. 32(4) (a) and (b) in that the Monitor has approved the Disclaimer and that without the additional revenue from SU and the other Federated Universities, LU will not be able to put forward a viable plan for its creditors and will jeopardize further necessary DIP funding.

Issue #2 – Financial Hardship to SU and the DIP Lender Issue

[34] SU submits that termination of its employees will cost $4M and that the cost of maintaining its buildings is $400,000 per year. Without student tuition revenue it has no resources to pay these amounts.

[35] Mr. Pierre Riopel is the Chair of the Board of Regents of SU. In his cross-examination on April 24, 2021, he was asked about the $4M cost relating to employee terminations. He was frank in conceding he had no idea where that number came from but advised it was a collaboration with a lawyer, human resources and university staff.

[36] An undertaking was given to provide an analysis of that number. The answer to the undertaking is set out below:

> The $4M figure is a combination of statutory notice costs and severance payable to USudbury employees pursuant to the *Employment Standards Act*, worth approximately $800,000. The balance of the figure is a rounded liability estimate for additional compensation claimed by employees which may be owed pursuant to collective bargaining agreements as a result of permanent loss of employment.

[37] With respect to the $400,000 annual amount to maintain the SU buildings, Mr. Riopel also had no personal information as to how that number was arrived at, other than by university administrative staff. An undertaking was given to provide an explanation of those costs. The answer to the undertaking is set out below:

> The $400,000 figure is comprised of an estimate of the annual costs for building maintenance and repairs, including a figure for minimal staff salaries and benefits. This figure is based on USudbury not delivering any courses to Laurentian students, meaning no student and faculty and no operation of the residences.

[38] I find that the answers to the undertakings do not provide any form of reliable financial analysis as to the actual amounts for which SU submits it will be liable. They appear to be estimates only.

[39] There is no doubt that SU will suffer financial consequences as a result of the Disclaimer. However, the evidence provided by SU is insufficient to meet the threshold of a “significant financial consequence” required to disallow a disclaimer under the CCAA. Further, any financial consequences suffered by SU must be balanced with the overall financial considerations in the restructuring which go far beyond SU’s speculations of insolvency.

[40] SU submits that the Court is put in a difficult position. The Disclaimer is an abuse of process; yet, without it, the DIP Lender will not advance funds. SU adds that it was not permitted to cross-examine the DIP Lender or access communication between the DIP Lender and LU. Insolvencies under the CCAA should be pursued in accordance with the relevant law and not at the whim of the DIP Lender.

[41] I do not agree with SU that the DIP Lender is running this process or, as it submits, that the DIP Lender has “ousted the jurisdiction of the Superior Court.” First, the terms of the original DIP financing of $25M in February 2021, including its expiry on May 1, 2021, was well known to all stakeholders and approved by the Court. The funds were advanced at a critical time when instructors were being allocated for the 2021/22 academic year and offers being made to Grade 12 students. That is, it was critical that planning and resources for the Fall 2021 term be in place.

[42] The DIP Lender made submissions at the motion. While SU seemed concerned that such submissions were permitted, I saw no reason for the concern. Not surprisingly, the DIP Lender simply confirmed what was already widely known; the DIP Lender is a stranger to LU and was not a pre-filing lender. It is an arm’s length commercial lender who has risk in a novel lending situation where its security is over a public institution. It has already advanced a significant amount and has specific conditions on advancing more. One of those conditions is that the Disclaimers are in place such that LU can increase its revenues.

[43] SU complained that it was not given access to information as between LU and the DIP Lender so that it could satisfy itself that the Disclaimer was truly an essential term of the second advance. SU was given the opportunity to submit written questions but was dissatisfied with the answers.

[44] More importantly, however, it is LU who is under CCAA protection and not SU. The only way for LU to put forward a viable plan for its creditors is to temporarily increase its liabilities. It is bound to comply with the terms of the DIP Lender who advised the Court, through its counsel, that it had done a financial analysis which indicated that the Disclaimer of the Federated Agreements was essential for an increased revenue stream for LU.

[45] The Court also heard from the Monitor. The Monitor was of the view that the Disclaimer was necessary for LU to make a viable proposal to its creditors. The Monitor provided pre and post restructuring projections for the next five fiscal years, starting with 2021/22. Without any restructuring, LU is forecasted to have an operating deficit of $42M in 2021/22 and approximately $25M per year in the following four years. That is without accounting for any payments to the DIP Lender or other creditors.

[46] The post restructuring projections include a DIP facility of $35M, an assumption that the Notices of Disclaimer become effective on May 1, 2021 and that the claims of other creditors will be paid over time. That projection will result in a deficit of $12.5M in 2021/22 and an average surplus of $14M over the next four years. However, from this surplus must come the repayment of the DIP Lender at $4 to $10M per year and payments to creditors from a large claims pool (pre-filing lenders are owed over $100M).

[47] There is no reason not to accept the financial projections presented by the Monitor. They were not challenged by SU. The projections make it clear that the revenue gained by LU from the Disclaimer is essential for its survival in this restructuring. It is an unavoidable and somewhat stark reality.

Issue #3 – The Disclaimer's Effect on French Language Programming and Services

[48] SU makes the following arguments with respect to French Language rights and the effect of the Disclaimer on those rights:

a. SU is a designated "public service agency" within the meaning of the *French Language Services Act*, R.S.O. 1990, c. F.32. As such, the public has the right to receive services from it in French and the Province of Ontario must provide funding to ensure this.

b. Under s. 23 of the *Charter of Rights and Freedoms*, the Province of Ontario must implement institutional measures to give effect to the Franco-Ontarian community's right to receive an educational experience in French including the allocation of appropriate resources to entities such as the SU.

[49] Given the above considerations, LU must take the needs of the Franco-Ontarian community into account within the context of CCAA proceedings. SU submits that the Franco-Ontario community is concerned about the impact of these proceedings, including a disproportionate effect on French programs, courses and services. As SU points out, in the affidavit of the President of LU in support of the CCAA proceeding, he does not once mention French language rights.

[50] SU is concerned about the lack of French used in this proceeding and LU's failure to honour its commitments to French-language programs, courses and services. Those failures have been brought to LU's attention in the past by the Franco-Ontarian community.

[51] For several years, the Franco-Ontario community has expressed a desire for a university by and for francophones. A "bilingual" institution is not enough as English tends to be the dominant language in such institutions.

[52] On March 11, 2021, in consultation with the *Assemblée de la Francophonie de l'Ontario* ("AFO"), francophone stakeholders from Sudbury and other northern Ontario communities announced a resolution to become a university controlled by and for the Franco-Ontarian community.

[53] SU offered to take over all of LU's French courses to attain this goal. LU refused. SU submits that if the Disclaimer is permitted to proceed, LU will not be in a position to fulfill its obligations to the francophone community. Those obligations were already in jeopardy before the restructuring. With 40% fewer courses available for LU students this fall, it is simply a slap in the face to the francophone community to permit the Disclaimer to proceed.

Analysis

[54] It is clear from SU's resolution made in March 2021 (and prior to the Disclaimer being delivered) that SU found itself incompatible with the current bilingual and tri-cultural mandate of the Federated Universities. Indeed, the language in the agreement between LU and SU, dated September 10, 1960, is mandatory in that it requires SU and LU to work together to build an institution of learning "which shall forever be bilingual and non-denominational in character": at para. 17.

[55] Given SU's clear dissatisfaction with bilingual programming, and its criticisms of LU's commitment to the provision of French-language courses and services, it is hard to understand why SU is objecting to the Disclaimer.

[56] On the contrary, the March 2021 resolution sets out a completely different path for SU. That resolution specifically states that SU is to immediately take steps toward a university managed and controlled by Ontario francophones to offer courses and services in French, that the working language at SU will be French, that SU assumes the responsibilities of a designated service provider under the *French Language Services Act*, provides training for its instructors as required under the *Charter,* and develops partnerships with other (presumably francophone) post-secondary institutions.

[57] Following the March 2021 resolution, SU commissioned a business plan, dated April 2021, for the "Université francophone de Sudbury" which charted the transition for SU to reach its new goal. Its vision included the establishment of an independent secular university that offered French language programs to develop leadership, while preserving a francophone identity and offering a practical curriculum which was not constrained solely by academics. This is a laudable and important goal which it is hoped that SU can achieve in the near future.

[58] Finally, it would not benefit the francophone community if LU is forced into bankruptcy. That would no doubt result in no educational offerings to the francophone community at all. LU has made a firm commitment to continuing as a bilingual and tri-cultural institution. Indeed, much of its funding is tied to compliance with those goals. The current restructuring will ensure that the number of students currently enrolled in French courses (43 programs) is maintained.

[59] Previously, the majority of courses offered by SU were in English. Post Disclaimer, SU is free to re-invent itself as a francophone university and without the constraints of the Federation Agreements. Indeed, providing such an option to the northern community would be desirable and would not be impeded by LU's restructuring.

SUMMARY AND ORDERS

[60] It is this Court's view that a bankruptcy for LU must be avoided in keeping with the objectives of the CCAA. The bankruptcy for LU will displace students and faculty, and will have a detrimental effect on stakeholders, suppliers and service providers in the Sudbury community. Avoidance of a bankruptcy and all of its deleterious effects on LU and its community means, amongst other consequences, a dissolution of the Federation Agreements. Difficult decisions must sometimes be made with unpleasant consequences. This is one of those decisions.

[61] Given all of the above, I make the following orders:

a. The motion brought by the University of Sudbury is dismissed.

b. Costs of this motion are to be discussed amongst counsel. If no resolution can be reached, I can be spoken to by way of a scheduled Case Conference.

c. La traduction officielle en français suivra.

C. Gilmore, J.

Date: May 7, 2021

TAB 4

2017 ONSC 2595
Ontario Superior Court of Justice

Target Canada Co. (Re)

2017 CarswellOnt 9021, 2017 ONSC 2595, 280 A.C.W.S. (3d) 60

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

G.B. Morawetz R.S.J.

Judgment: May 19, 2017
Docket: CV-15-10832-00CL

Counsel: William Sasso, Sharon Strosberg, for Appellants, Pharmacist Representative Counsel
Stavros S. Gavrilidis, Dan D. Dimovski, for T. Pharmacy Ltd.
Alan Mark, Francy Kussner, Jesse Mighton, for Monitor, Alvarez & Marsal Canada
Jeremy Dacks, Shawn T. Irving, for Target Canada Entities

Related Abridgment Classifications
Contracts
XVI Franchising contracts
XVI.4 Construction and interpretation
XVI.4.e Default and termination provisions

Headnote
Contracts --- Franchising contracts — Construction and interpretation — Default and termination provisions

Franchisor was chain of retail department stores that had pharmacies in its stores — Franchisees owned and/or operated franchise pharmacies within stores pursuant to franchise agreements with five-year term — Agreements provided franchisor could terminate agreements after three years without cause by giving 60 days' notice — Franchisor was granted protection under Companies' Creditors Arrangement Act, and claims procedure order was made — Claims officer determined franchisees' damages were limited to three-year period, that 60-day notice period could occur before end of three-year period, that franchisees had some duty to mitigate despite agreements providing for contractual damages, and that franchisees were responsible for relocation and shut-down costs without contributions from franchisor — Franchisees brought motion pursuant to claims procedure order appealing from officer's rulings — Motion dismissed — There were no palpable and overriding errors of fact nor clear errors of law — Fact that franchisor had committed to providing support program to all franchisees for entire five-year term did not preclude franchisor from relying on termination provision — Officer was correct in applying prior authority and assuming none of franchisee agreements would have remained in effect past earliest dates on which franchisor could have terminated them — There was no palpable and overriding error in determination that franchisor could deliver notice of termination 60 days before three-year anniversary of agreements, such that termination would occur on third anniversary — There was no reviewable error in determination that franchisees continued to have some duty to mitigate even though agreements provided for contractual damages and that franchisees were responsible for relocation and shut-down costs without contributions from franchisor.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Agribrands Purina Canada Inc. v. Kasamekas (2011), 2011 ONCA 460, 2011 CarswellOnt 5034, 106 O.R. (3d) 427, 334 D.L.R. (4th) 714, 86 C.C.L.T. (3d) 179, 87 B.L.R. (4th) 1, 278 O.A.C. 363 (Ont. C.A.) — referred to

Bank of America Canada v. Mutual Trust Co. (2002), 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 287 N.R. 171, 159 O.A.C. 1, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — considered
Bowes v. Goss Power Products Ltd. (2012), 2012 ONCA 425, 2012 CarswellOnt 7721, 99 C.C.E.L. (3d) 152, 2012 C.L.L.C. 210-038, 293 O.A.C. 1, 351 D.L.R. (4th) 219 (Ont. C.A.) — considered
Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to
General Motors Corp. v. Tiercon Industries Inc. (2009), 2009 CarswellOnt 8164, 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to
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Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — followed
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Howard v. Benson Group Inc. (2016), 2016 ONCA 256, 2016 CarswellOnt 5382, 129 O.R. (3d) 677, 31 C.C.E.L. (4th) 18, 397 D.L.R. (4th) 485, 348 O.A.C. 381, 2016 C.L.L.C. 210-037 (Ont. C.A.) — considered
Target Canada Co., Re (2015), 2015 CarswellOnt 9199 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3
Generally — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 133(a) — considered
Franchises Act, R.S.A. 2000, c. F-23
Generally — referred to
Franchises Act, S.M. 2010, c. 13
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Generally — referred to
Franchises Act, S.P.E.I. 2005, c. 36
Generally — referred to

***G.B. Morawetz R.S.J.*:**

1 Sutts Strosberg LLP, in its capacity as Court Appointed Pharmacist Representative Counsel ("Rep Counsel") brought this motion pursuant to the Claims Procedure Order dated June 11, 2015 [2015 CarswellOnt 9199 (Ont. S.C.J. [Commercial List])] ("CPO") appealing the Common Issues Rulings of the Claims Officer, the Honourable Dennis R. O'Connor Q.C. (the "Claims Officer"), dated, respectively, June 28, 2016, August 19, 2016 and October 15, 2016 (the "Rulings"). T. Pharmacy Ltd. also brought a motion appealing the Rulings.

2 This endorsement relates to both motions.

3 At issue is the Claims Officer's determinations regarding certain common issues relating to the claims of a number of former pharmacist franchisee claimants who owned and/or operated franchise pharmacies within Target Canada Co.'s ("TCC") former retail outlets (such claimants collectively, the "Pharmacist Franchisees").

4 The list of common issues is set out in the Order of the Claims Officer dated May 3, 2016, attached as Schedule "A".

5 Seventy-five of the eighty originally disputing Pharmacist Franchisees have previously accepted offers made by the Monitor. These appeals were brought by the five remaining unsettled Pharmacist Franchisee claimants.

6 In this appeal, Rep Counsel raises three issues dealt with in the Rulings:

(a) EBIT Support Program. Is the Pharmacist Franchisee's period of loss resulting from the disclaimer of its Franchise Agreement the full remainder of the five (5) year period from the opening date of its Pharmacy?

(b) Effective Immediately clause. Properly interpreted, does Section 12.1 of the Franchise Agreement permit delivery of the sixty (60) day notice of termination prior to the third anniversary of the opening of the Pharmacy?

(c) Duty to mitigate. Are the Pharmacist Franchisees under a legal duty to mitigate under the principles set out in *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 (Ont. C.A.), given that the Franchise Agreements are found to be contracts of adhesion unilaterally terminable without cause by the Franchisor and the amount payable on termination limited by contract formula?

7 The Monitor conceded that the Pharmacist Franchisees are entitled to the assessment of the value of their claims and mitigation on an individual basis. Accordingly, a fourth ground of appeal respecting the uniform mitigation approach earlier used by the Monitor is not required to be pursued.

8 In addition to the issues raised by Rep Counsel, the following issues have also been identified by the appellant, T. Pharmacy Ltd.:

(d) Did the Claims Officer err in determining that the Pharmacist Franchisees are not entitled to any additional recovery in respect of the termination and relocation expenses incurred in winding down their Target pharmacy operations?

(e) Did the Claims Officer err in determining that the Pharmacist Franchisees are not entitled to any additional recovery in respect of generic drug rebates other than as set out in Franchise Agreement?

(f) Was the Monitor's methodology appropriate for assessing the Pharmacist Franchisees' lost future profits claim?

(This final issue was not addressed by reasons from the Claims Officer, having been resolved on consent of the parties (including then counsel for T. Pharmacy Ltd.) in the June 24 Order.)

9 The jurisdiction and standard of review applicable to this appeal are not in dispute.

10 The court has jurisdiction to hear the appeal pursuant to paragraph 44 of the Claims Procedure Order.

11 The applicable standard of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 8 and 25, which dictates that on appeal, findings of fact and factual inferences are not to be reversed absent a "palpable and overriding error". On a question of law, the standard is one of correctness.

12 *Housen*, *supra* relates to the review of decisions of a trial judge. This court has held that the same standard of review is to apply on an appeal of a Claims Officer's Ruling in an insolvency proceeding (see: *General Motors Corp. v. Tiercon Industries Inc.* (2009), 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) at para. 12, aff'd 2010 ONCA 666 (Ont. C.A.).

13 Counsel to the Monitor also noted that the Supreme Court of Canada has recently determined that the standard of review to be applied to a question of contractual interpretation is the same as for a question of fact, namely, a palpable and overriding error, holding:

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. See *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para. 50.

14 In the hearings before the Claims Officer, the record included documentary and affidavit evidence, expert reports, written and oral submissions from the Monitor, the appellants and the Target Canada entities.

Issue I: EBIT Support Program

15 One of the issues before the Claims Officer was with respect to the determination of the period of time for which the Franchisees should be entitled to damage to cover their loss of profit. Section 12.1 of the Franchise Agreement states:

> At any time following the third anniversary of the opening date of the Pharmacy, Franchisor may, at its option, terminate this Agreement without cause and all rights granted herein effective immediately, upon sixty (60) days prior written notice.

16 Accordingly, the Monitor based its assessment of damages on the assumption that the Franchisor would terminate each of the Franchise Agreements three years from the opening of the pharmacy. The Franchisees disputed the Monitor's interpretation of Section 12.1 and argued that Section 12.1 should be interpreted in light of the surrounding circumstances. One of those surrounding circumstances was the Franchisor's commitment to provide an EBIT Support Program to all Franchisees for the entire 5 year initial term of their Franchise Agreements. The Franchisees argued that in light of that commitment, it would have been a breach of the duty of good faith for the Franchisor to exercise its right of early termination under Section 12.1 of the Franchise Agreement.

17 The Claims Officer noted that the Franchisees did not put forward a competing interpretation to that found in the clear language of Section 12.1 and applied by the Monitor. He concluded that evidence of surrounding circumstances was not needed and would not be helpful in interpreting Section 12.1. The only exception was that evidence of the surrounding circumstances might be relevant to the Effective Immediately issue.

18 Rep Counsel submitted that the Claims Officer erred in determining that it was not a breach of a Franchisor's common law and statutory duties of good faith and fair dealing owed to each of these Franchisees to renege on the EBIT Support Program commitment by early termination in the third year of the Initial Term.

19 Rep Counsel further submitted that in the measurement of their damages, the Pharmacist Franchisees are legally entitled to be put in the same position they would have been in had the Franchise Agreements been performed by the Franchisor. Rep Counsel points out that a ruling in favour of the Pharmacist Franchisees on this issue would increase their Future Loss of Profits claim by two years to coincide with the Initial Term of five years, which they submit was the promised period of extended and enhanced financial benefits under the EBIT Support Program.

20 Rep Counsel submitted that applying the good faith obligation (referenced in Rep Counsel factum at paras. 42-49) to the facts that inform the EBIT Support Program, the Program requires consideration of three components - base guarantee, guest experience and prescription/script growth - which require ongoing pharmacy operations. Further, counsel submitted that the EBIT Support Program requires the continuation of pharmacy operations under the Franchise Agreement for the full five year Initial Term. Rep Counsel also submitted that the unqualified commitments by the Franchisor to enhance and extend the EBIT Support Program in June 2014 throughout the full Initial Term necessarily incorporates the commitment to operate throughout the Initial Term.

21 Rep Counsel further submitted that the Franchisor could not, under any circumstances, exercise early termination of the Franchise Agreements during the Initial Term without breaching the commitments made under the EBIT Support Program. In such circumstances, it would be a breach of the Franchisor's duty of good faith to exercise early termination under Section 12.1 of the Franchise Agreement.

22 The Claims Officer was alive to all the issues raised by Rep Counsel. The issue is referenced in the Ruling of June 28, 2016 in paragraphs 10, 16 and 23. However, it is in the Ruling of October 25, 2016, where this issue is extensively reviewed by the Claims Officer commencing at paragraph 35. The Claims Officer reviews the evidence at paragraphs 35-39.

23 The analysis commences at paragraph 40 and paragraph 41 is especially relevant:

> I find, as a matter of fact, that the evidence does not establish the "clear and unequivocal commitments" upon which the Franchisees' argument is premised. There can be no doubt that the Franchisor's representations and the various documents surrounding the EBIT Support Program demonstrated a clear intention, on the part of the Franchisor, to continue EBIT Support payments during the "initial five year term" of each Franchise Agreement. The issue, however, is whether those commitments could reasonably be read as superseding the Franchisor's right to terminate the Franchise Agreements under Section 12.1.1 find that they cannot. In my view, the only reasonable way to interpret the various statements and doctrines is that the Franchisor undertook to make EBIT Support payments during the initial five year term, <u>under those Franchise agreements that remained in effect during that period</u>. As I explained in My Previous Ruling, under the *Open Window* principle, I am required to assume that none of the Franchisee Agreements would have remained in effect past the earliest dates on which the Franchisor could have terminated them pursuant to Section 12.1.

24 For clarity, the *Open Window* principle is fully described in the Ruling of June 28, 2016, commencing at paragraph 40. The principle was formulated in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) *("Open Window")* and stands for the proposition that where an agreement has multiple modes of performance, the expectation damages assume the mode of performance that is the least burdensome to the defendant.

25 The Claims Officer based his conclusions upon eight specific findings, all of which are set out in paragraph 42 of the October 25, 2016 Ruling.

26 At paragraph 43, the Claims Officer summarizes the issue:

> In summary, I conclude that the Franchisees have failed to establish that there were no circumstances under which the Franchisor could have exercised its right of early termination under Section 12.1 of the Franchise Agreements while acting in good faith. As a result, I am required by the principle in *Open Window* to assume when calculating damages that the Franchisor was entitled to exercise the right of early termination on the earliest possible date. The answer to Common Issues 2 and 3 therefore remains, "no".

27 The Claims Officer's findings of fact and mixed fact and law attract substantial deference. I see no palpable and overriding error. On legal issues, the Claims Officer's reliance on the principle in *Open Window* is, in my view, correct. I give no effect to this ground of appeal.

Issue 2: Effective Immediately Issue

28 Rep Counsel submitted that the Effectively Immediately part of Section 12.1 of the Franchise Agreement is the ambiguous. Given than a franchise agreement is a contract of adhesion, any ambiguity must be read *contra proferentem* to the Franchisor. Rep Counsel submitted that properly read, Section 12.1 provides that notice of early termination may only be delivered "on or after the third anniversary of the opening date of the pharmacy". The Franchise Agreements and all Pharmacist Franchisees' rights would then terminate sixty days after delivery of the written notice. Given my conclusion with respect to the EBIT Support Program issue, a ruling in favour of the Pharmacist Franchisees on the Effectively Immediately issue will increase their Future Loss of Profit Claims by sixty days.

29 In the June 28, 2016 Ruling, the issue is clearly set out as follows:

> Issue No. 1: Based on ordinary contractual interpretation and damages assessment principles, does Section 12.1 of the Franchise Agreement operate to limit the Franchisees' recoverable losses under the Franchise Agreement to a period of three years from the opening of such Franchisees' pharmacy? Can the question be answered "Yes" without further evidence?

30 In his extensive analysis, the Claims Officer reviewed the legal principles governing contractual damages. He referenced the decision of the Supreme Court of Canada in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 (S.C.C.), and *Open Window*. He also noted that the Court of Appeal for Ontario specifically applied the *Open Window* principle to contracts of adhesion. See *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.).

31 The Claims Officer then addressed the Franchisees' unconscionability argument commencing at paragraph 53 of the Ruling. He rejected all arguments put forth by the Franchisees. He also noted that the Franchisees had, in any event, failed to point to any evidence that they might call that could lead the Claims Officer to conclude that Section 12.1 is unenforceable because of unconscionability.

32 The Claims Officer then addressed the Franchisees' argument that in order to properly interpret the Franchise Agreements, including Section 12.1, he must consider evidence of the surrounding circumstances, even if there is no ambiguity in the provisions of the contract. The Claims Officer agreed that he should hear all the evidence of surrounding circumstances that could possibly assist him in interpreting Section 12.1. However, the question was whether there was any relevant evidence, in addition to what was already in the record.

33 The Claims Officer did permit the parties to adduce additional evidence and make additional submissions with respect to the correct interpretation of the words "Effective Immediately", as used in Section 12.1 of the Franchise Agreements. This aspect of the Issue was addressed in the Ruling dated October 25, 2016.

34 At paragraphs 12 - 15, the additional evidence was reviewed.

35 The Claims Officer determined that Section 12.1 of the Franchise Agreements permitted the Franchisor to deliver a Notice of Termination sixty days *before* the three year anniversary of the relevant Franchise Agreement, such that the termination would occur on the third anniversary of the pharmacy's opening.

36 In his previous Ruling, the Claims Officer held that the language of Section 12.1 was clear and capable of only one interpretation. Specifically, he found that the effect of this section was to limit each Franchisee's recoverable losses under the Franchise Agreements to a period of three years from the opening of such Franchisee's pharmacy.

37 This finding was subject to one caveat. This related to the interpretation of the words "Effective Immediately", as used in Section 12.1. The Franchisees argued that these words should be interpreted so that the Franchisor could only deliver notice after the third anniversary of the opening of the Franchise, with the sixty day period running from that date.

38 The Monitor submitted that the Franchisor could deliver notice sixty days before the anniversary, so that the termination would occur on the third anniversary of the pharmacy's opening. The difference is that on the Franchisees interpretation, the relevant period for calculating their lost profits would be sixty days longer than that assessed by the Monitor. Counsel to the Monitor submitted that there was no basis for the court to interfere with the Claims Officer's conclusions.

39 The analysis of the Claims Officer is set out at paragraphs 16-29.

40 The Claims Officer concludes that the plain and ordinary meaning of the language in Section 12.1 must prevail and as he was able to interpret the section on the basis of ordinary principles of contractual interpretation, it was neither necessary nor appropriate to resort to the *contra proferentem* principle.

41 The Claims Officer concluded that for the purposes of assessing damages, the Monitor was correct in using a termination date on the third anniversary of the Franchise Agreements and not sixty days thereafter.

42 In my view, a complete answer to all arguments submitted by Rep Counsel on this issue has been provided by the Claims Officer, as summarized in the factum submitted by counsel for the Monitor. Paragraph 86 states:

> The Claims Officer applied well established law and principles and interpretation to reach a predictable conclusion, and the Monitor respectfully submits that this finding should be upheld by this Court. His interpretation of the contract was a mixed question of fact and law and cannot be set aside absent some palpable and overriding error, which there is not.

43 This issue was exhaustively reviewed by the Claims Officer. I accept the submissions of counsel to the Monitor. There is no palpable and overriding error on this issue. I give no effect to this ground of appeal.

Issue 3: Duty to Mitigate

44 On the Duty to Mitigate issue, the Claims Officer determined that the Pharmacist Franchisees further losses are temporally limited by the Franchisor's early termination rights, with their damages limited by the compensation formula set out in Section 12.8(b) of the Franchise Agreement.

45 The appellants argued that having determined that the Franchisor has replaced the uncertainty of common law assessment of contract damages with the certainty of a contract formula for lost recovery, there is no legal duty to mitigate under the principles set out *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 (Ont. C.A.).

46 The issue for determination is whether the Claims Officer erred in determining that the Pharmacist Franchisees are obligated to mitigate their losses with respect to their claims for lost future profits.

47 The appellants take the position that liquidated damages are not usually subject to an obligation to mitigate, and that all of the damages sustained are properly claimed as liquidated damages.

48 The Claims Officer addresses this issue in the August 19, 2016 Ruling commencing at paragraph 2. He rejects the argument put forth by the appellants. The Claims Officer fully addressed the argument based on *Bowes*, *supra*, noting that the problem with the argument put forth by the appellants is that in addressing the Franchisees claims, the Monitor did not apply mitigation to the payments required under Section 12.8(b) (Gross Sales Payout) of the Franchise Agreements. The Claims Officer notes that those are liquidated payments and as such, are not subject to mitigation. The Claims Officer adds that the Monitor, quite properly, has allowed the two percent (2%) payment in full for each of the Franchisees with no reduction for mitigation.

49 The Claims Officer also referenced the argument put forth by the appellants that because one of their claims is for contractually provided liquidated amounts (the 2%) their loss of future profit claims should be subject to the same principled that mitigation does not apply to liquidated contractually provided for damages.

50 The Claims Officer did not accept the argument of the appellants. He added that the Franchisees did not provide any authority for this approach and as he was not surprised that there does not appear to be any principled reason why because one claim is for a liquidated amount, other claims that are for non-liquidated damages should, for mitigation purposes, be treated as liquidated claims.

51 A second argument was put forward by the Franchisees as to why there is no duty to mitigate. The Franchisees took the position that, as a result of the June 28, 2016 Ruling, the Franchise Agreement should be treated as fixed-term contracts.

52 The Franchisees relied on *Bowes*, *supra* and *Howard v. Benson Group Inc.*, 2016 ONCA 256 (Ont. C.A.).

53 The Claims Officer addressed this argument at paragraphs 14-21 and concluded that the Franchisees were under a duty to mitigate the damage resulting from their claims for future loss of profits. The Claims Officer specifically refused to extend the principles narrowly applied to employment law (*Bowes* and *Howard*) to the franchisee context and that there was no precedent for any such extension. I agree with this conclusion.

54 On this issue, I conclude that the appellants have not demonstrated any error committed by the Claims Officer that would attract any type of appellate review. I give no effect to this ground of appeal.

T. Pharmacy

55 I now turn to additional T. Pharmacy appeals issues.

56 The issues raised in the Initial Factum, are more clearly restated in the Addendum to the Factum dated January 31, 2017.

57 Mr. Gavrilidis indicated that he supported the positions put forward by Rep Counsel.

Issue 4: Methodology for Assessing Lost Future Profits Claim

58 T. Pharmacy raised issues with respect to the methodology used by the Monitor for determining lost future profits.

59 This issue was resolved on consent in the Claims Officer's June 24, 2016 Order.

60 Paragraph 1-2 of the June 24 Order provides:

> This Court orders that Issues 4(i) and 4(ii) on the Common Issues List shall be answered in the affirmative such that Issue 4 is hereby fully and finally resolved without the need for any further adjudication.
>
> This Court orders that the Monitor shall not be required to file any evidence in respect of Issue 4.

61 Section 133(a) of the *Courts of Justice Act* provides that no appeal may be taken from an order made with the consent of the parties, without leave of the court.

62 I am in agreement with the submission of counsel to the Monitor to the effect that since T. Pharmacy Ltd. has not sought leave of the court to reopen the consensual resolution of Common Issues 4 set out in the June 24 Order, it is improper to include this issue in the appeal.

63 In my view, the issue has not been properly put before me and it is not necessary for me to consider same.

Issue 5: Recoverability of Termination Expenses

64 The position of the Franchisees is that they are entitled to recovery in respect of the types of expenses listed in Issue 5. Issue 5 reads as follows:

> Are the Franchisees also entitled to any recovery on account of any of the following:
>
> > (i) any amounts paid for employees' salaries, fees, expenses, notices of termination, payment to employees in lieu of notice and severance pay?
> >
> > (ii) any amounts paid to contractors during the shut-down?
> >
> > (iii) any costs of complying with regulatory requirements to shut down and/or to continue operation as an independent pharmacy?
> >
> > (iv) any loss in value of inventory and other assets? and
> >
> > (v) any costs incurred in respect of relocation of its pharmacies?

65 On this issue, I accept the submissions of counsel to the Monitor to the effect that these expenses are not recoverable. Under the Franchise Agreement, whenever and however the Franchise Agreement is terminated, the Pharmacist Franchisee is responsible for relocation and shut-down costs without contributions from the Franchisor. The Claims Officer extensively reviewed this issue in the June 28, 2016 Ruling commencing at paragraph 122.

66 The Claims Officer made reference to principles developed earlier in his Ruling to the effect that the proper approach to determine whether any of the Franchisees are entitled to recovery in respect of termination expenses is to ask whether they would have incurred such expenses if the Franchisor had terminated the Franchise Agreement after three years, pursuant to Section 12.1.

67 The Claims Officer again referenced the *Open Window* principle, and carefully reviewed the scheme of the Franchise Agreements with respect to termination. At paragraph 139 of his Ruling, he again stated the question that he had to answer, namely, whether there is anything in the Franchise Agreements that would entitle the Franchisees to recover the termination

expenses, not whether there are sections that expressly preclude such recovery. He found that nothing in the Franchise Agreements would have entitled the Franchisees to recover any portion of the termination expenses, in the event that the Franchise Agreements had been terminated pursuant to Section 12.1 of the Franchise Agreements.

68 At paragraph 147, the Claims Officer concluded:

> ... I conclude that there was no contractual bargain between the parties that the Franchisees would receive upon termination anything other than the 2% Payment. I am satisfied that the overall intent of Franchise Agreements was that the Franchisees, independent contractors, should bear their own costs of doing business, including any costs associated with the termination of the Franchise Agreements, whether that be at the end of a five year term, or after three years, pursuant to Section 12.1.

69 I am satisfied that the Claims Officer's conclusion are correct as a matter of fact and law and that no reason has been provided that would cause me to interfere with those determinations.

70 The Claims Officer did provide the Franchisees with an opportunity to adduce evidence establishing what he referred to as "non-Section 12.1 expenses", that is, expenses that would not have been incurred if the Franchise Agreements had been terminated pursuant to Section 12.1 in the normal course, rather than disclaimed in the CCAA proceedings.

71 T. Pharmacy advanced the argument that patient files, which were given to the Pharmacist Franchisees by TCC Pharmacy Post Disclaimer so that the Pharmacist Franchisees could carry on business if they so choose, somehow force the Pharmacist Franchisees to relocate, which they would not have done as these unwelcomed patient files had not been forced upon them.

72 This argument was rejected by the Claims Officer in the August 19 Ruling at paragraphs 52-60.

73 The Addendum Factum also sets out on page 24 that T. Pharmacy should receive a recovery in respect of the bank debt it incurred in opening a new pharmacy operation.

74 This argument was rejected by the Claims Officer in the June 28 Ruling at paragraphs 138-139. The Claims Officer noted that it is inherent in the Franchisees status as independent contractors that the Franchisees be responsible for their own costs and expenses. The Claims Officer found nothing in the Franchise Agreements that would have entitled the Franchisees to recover any portion of the termination expenses, in the event that the Franchise Agreements had been terminated pursuant to Section 12.1 of the Franchise Agreements.

75 I am satisfied that the Claims Officer's conclusions are correct statements of fact and law, and there is no basis on which to interfere with these conclusions. I give no effect to this ground of appeal.

Issue 6: Generic Drug Rebates

76 T. Pharmacy also submits that it should receive a recovery based on rebates received by TCC Pharmacy, above what is provided in the Franchise Agreements at Section 5.3. T. Pharmacy takes the position that TCC Pharmacy breached paragraph 5.2 of the Franchise Agreement by not sharing rebate allowances in Ontario, which are not prohibited by law.

77 Counsel to the Monitor submitted that the Monitor's assessment of the Pharmacist Franchisees claim included the contemplated recovery of respective generic drug rebates, based on a percentage of each Pharmacist Franchisees historical rebate payment received from TCC Pharmacy. Specifically, the Monitor's lost profit calculation issued included a recovery line item for "discounts and rebates" under the "other operating income" heading. The Monitor contended that the lost profit calculation did recognize the only form of rebates required under the Franchise Agreements that could be shared with the Pharmacist Franchisees and that there was no basis for T. Pharmacy assertion that the Monitor did not recognize any recovery on account of rebates.

78 The Claims Officer addressed this issue in the June 28 Ruling at paragraphs 162-164. The Claims Officer was satisfied that the language of Section 5.3 of the Franchise Agreements was clear and that the first and fourth paragraphs indicate that the Franchisor is entitled to receive and retain rebates for its own use without accounting or sharing with the Franchisees. As such,

there is no duty to account or to disclose the Franchisees in the amount of such rebates. The Claims Officer also referenced the third paragraph as being an exception to the general approach found in the first and fourth paragraphs and that viewed objectively, the language provides for a scheme where there is no contractual obligation on the part of the Franchisor to share or to account for rebates.

79 I am satisfied that the Claims Officer reached a correct conclusion of fact and law in this finding and that there is no basis for appellate intervention. I give no effect to this ground of appeal.

Disposition

80 In the result, the appeals brought by the five remaining unsettled Pharmacist Franchisees claimants do not establish any palpable and overriding error of fact, nor a clear error of law. There is no basis to interfere with the Claims Officer's Ruling. Accordingly, the appeals are dismissed.

81 If the parties are unable to agree on the issue of costs, a 9:30 a.m. appointment should be scheduled through the Commercial List Office.

Schedule"A"

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (the *"Applicants")*

FINAL LIST OF COMMON ISSUES AS DETERMINED MAY 3, 2016

Target Canada Pharmacy Franchising LP *("TCC Pharmacy")*, was franchisor to 94 separate franchisees (individually a *"Franchisee"*, and collectively, the *"Franchisees")* operating in-store Target-branded pharmacies across Canada, outside of Quebec. The in-store pharmacies were operated pursuant to franchise agreements between each Franchisee and TCC Pharmacy, as franchisor, and related documents and agreements, Each Target Canada Pharmacy Franchise Agreement (each, a *"Franchise Agreement")*, each Target Pharmacy Franchise Disclosure Document (including any applicable Statements of Material Change), franchise amending agreements entered into by certain of the Franchisees (for example, conversion bonus agreements), and the Financial Support Package 2014 as amended by the letter from Jeff May dated June 13, 2014 outlining the details of the EBIT Top Up Support Program are collectively, and as applicable to each Franchisee, referred to herein with the Franchise Agreement as the *"Franchise Documents"* [1] The Franchise Agreement granted each Franchisee a license to operate the Target-branded pharmacy using certain Target Pharmacy trade-marks. The Franchisees were typically independent corporations which, in the majority of cases, were wholly-owned by a licensed pharmacist (individually, a *"Pharmacist"*, and collectively, the *"Pharmacists").* Both the Franchisee and the Pharmacist is a party to the Franchise Agreement because, among other things, in order to operate a pharmacy franchise, a licensed pharmacist is required under applicable regulations to be present at the premises during operating hours. The Franchisees and Pharmacists are hereinafter collectively referred to as the *"Pharmacist Franchisees".* In addition to the entitlements set out in the express terms of the Franchise Agreement, TCC Pharmacy introduced and implemented the EBIT Top Up Support Program in February 2014 to provide financial support to eligible Franchisees, which support program was modified and enhanced for the benefit of eligible Franchisees in June 2014.

The Monitor and Pharmacist Representative Counsel agree that the appropriate measure of the damages arising from the disclaimer of each Franchise Agreement is that the Franchisee should be put in the same position in which it would have been had the Franchise Agreement been performed by TCC Pharmacy.

The common issues of the Pharmacist Franchisees are as follows:

DISCLAIMER OF FRANCHISE AGREEMENTS

1. Based on ordinary contractual interpretation and damages assessment principles, does Section 12.1 of the Franchise Agreement operate to limit the Franchisee's recoverable losses under the Franchise Agreement to a period of three years from the opening of such Franchisee's pharmacy? Can the question be answered 'Yes' without further evidence?

2. If the answer to Issue 1 is yes, does the common law duty of good faith and/or the statutory duty of good faith and fair dealing under applicable franchise legislation [2] in the Regulated Provinces [3] impact TCC Pharmacy's ability to rely on such provision to limit the recoverable losses of Franchisees? Can the question be answered 'No' without further evidence?

3. If the answer to Issue 1 is yes, does the common law duty of honest performance impact TCC Pharmacy's ability to rely on Section 12.1 of the Franchise Agreement to limit the recoverable losses of Franchisees? Can the question be answered 'No' without further evidence?

4. Is the methodology set out in each Notice of Revision or Disallowance issued by the Monitor to each Franchisee a correct approach to measure:

(i) Joss of future profits (including treatment of the OTC Royalty Payment and EBIT Top Up Support Program) in connection with the Franchise Agreement; and

(ii) Gross Sales Payout, as set out in section 12.8(b) of the Franchise Agreement?

With respect to Common Issue #4, it is agreed that the Monitor will justify its approach to the determination of damages with evidence. The Monitor will not assert its methodology is entitled to deference,

5. Are the Franchisees also entitled to any recovery on account of any of the following:

(i) Any amounts paid for employees' salaries, fees, expenses, notices of termination, payment to employees in lieu of notice, and severance pay?

(ii) Any amounts paid to contractors during shut down?

(iii) Any costs of complying with regulatory requirements to shut down and/or to continue operation as an independent pharmacy?

(iv) Any loss in value of inventory and other assets?

(v) Any costs incurred in respect of relocation of its pharmacy?

(vi) Any other obligations upon shut down? *[NTD: To be identified by Pharmacist Representative Counsel by May 24, otherwise to be removed.]*

Can the question be answered 'No' for any of these categories without further evidence?

6. If the answer to any of the items under Issue 5 is yes;

(i) Does the aggregate amount of such entitlements exceed the $25,000 amount allowed by the Monitor "to compensate [each Franchisee] for certain costs incurred and other miscellaneous items"?

(ii) If the answer to Issue 6(i) is yes, what additional amount would be reasonable?

MITIGATION

7. The claimants acknowledge that they had a duty to mitigate in the circumstances of this case. The common issue to be determined, if possible, is whether a uniform approach or approaches to mitigation should be adopted.

OTHER ISSUES

8. Are the Franchisees entitled to any revenues received by the Franchisor or its Affiliates before or after the Initial Order based on the sale of products and services to the Franchisees other than as provided for in the Franchise Agreement? Can this question he answered 'No' without further evidence?

If the answer to 8 is 'Yes', should there be an accounting?

CONFIRMATION OF ISSUES

Pharmacist Representative Counsel hereby confirms that the above list is an exhaustive list of the common issues of the Pharmacist Franchisees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2016.

Graphic 1

Footnotes

1 Unless otherwise stated, references to a particular section of the Franchise Agreement herein shall refer to the Target Canada Pharmacy Franchise Agreement among each Pharmacist Franchisee and TCC Pharmacy.

2 Specifically, *Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000*, c 3; *Franchises Act, RSA 2000*, c F-23; *Franchises Act*, RSPEI 1988, c F-14.1; *Franchises Act*, SNB 2014, c; *The Franchises Act*, CCSM c F156.

3 Specifically, Ontario, *Alberta*, New Brunswick, Prince Edward Island and Manitoba (collectively, the "*Regulated Provinces").*

TAB 5

Caution
As of: October 26, 2022 6:43 PM Z

Jim's Hot Shot Serv. v. Continental W. Ins. Co.

Supreme Court of North Dakota

June 28, 1984

Civil No. 10,577

Reporter

353 N.W.2d 279 *; 1984 N.D. LEXIS 333 **

Jim's Hot Shot Service, Inc., Plaintiff, Appellant and Cross-Appellee v. Continental Western Insurance Company, Defendant, Appellee and Cross-Appellant, and Sun West Insurance Agency, Defendant

Subsequent History: **[**1]** Rehearing Denied July 19, 1984.

Prior History: Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gerald G. Glaser, Judge.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

Shot, Hot, new trial, damages, district court, destroyed, proximate cause, measure of damages, issue of damages, trial court, diminution, certificate, asserts, delivery service, market value, destruction, losses, amended judgment, loss of profits, dollars, percent, Oil

Case Summary

Procedural Posture

Appellant insured sought review of an order from the District Court of Burleigh County, South Central Judicial District (North Dakota), which granted appellee insurer a new trial on the issue of damages in the insured's action against the insurer for negligently destroying the insured's delivery service business. The insurer cross-appealed on the issue of proximate cause.

Overview

The insurer negligently released a statement to be filed with the state public service commission announcing that the insured's insurance coverage had been cancelled for nonpayment of premiums. The insured filed an action for damages against the insurer in which the insurer claimed that the insurer's negligent actions caused the insured to lose customers thereby ultimately destroying its entire business. The jury entered a damage award in favor of the insured. The trial court granted the insurer's motion for a new trial on the issue of damages. On appeal, the insured contended that the trial court abused its discretion in granting the insurer a new trial on the issue of damages. The court affirmed the judgment of the trial court in part and reversed the judgment in part. The court held that: (1) the business owner's opinion of the value of the business did not constitute substantial evidence in support of the jury's damage determination; (2) the issue of proximate cause, under the particular facts of the case, was so interrelated with the issue of damages that in the interest of justice, a new jury on remand should be instructed to redetermine both issues.

Outcome

The court affirmed the trial court's orders to the extent that they reflected a grant of a new trial on the issue of damages. The court reversed the trial court's orders to the extent that they reflected a denial of the request for a new trial on the issues of proximate cause. The court remanded the case for a new trial on the issues of proximate cause and damages.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Remedies > Damages > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] Relief From Judgments, Motions for New Trials

A trial court may grant a new trial where it appears that excessive damages are given under the influence of passion or prejudice. N.D. R. Civ. P. 59(b)(5). The trial court may also grant a new trial if the evidence is insufficient to justify the verdict. N.D. R. Civ. P. 59 (b)(6).

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Remedies > Damages > General Overview

HN2[] Types of Damages, Compensatory Damages

The standard for determining what constitutes an excessive verdict varies but generally includes one or more of the following: The amount is so unreasonable and extreme as to indicate passion or prejudice on the part of the jury; the award is so excessive as to be without support in the evidence; the jury verdict is so excessive as to appear clearly arbitrary, unjust, or such as to shock the judicial conscience.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN3[] Judges, Discretionary Powers

A N.D. R. Civ. P. 59(b) motion for a new trial is addressed to the sound discretion of the trial court, and the trial court's decision to grant a new trial is disturbed on appeal unless a manifest abuse of discretion is shown. In making its determination, the trial court may, within limits, weigh the evidence and judge the credibility of the witnesses to determine whether or not the verdict is against the weight of the evidence.

Evidence > ... > Testimony > Lay Witnesses > General Overview

HN4[] Testimony, Lay Witnesses

The court recognizes that an owner may testify as to the value of his property without qualification other than the fact of ownership. However, an owner's opinion of value is insufficient to support a value determination by the factfinder if it is given without a valid basis or is based upon improper facts or analysis.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Remedies > Damages > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN5[] Relief From Judgments, Motions for New Trials

Under N.D. R. Civ. P. 59(b), the trial court may grant a new trial if the damages appear excessive or if there is insufficient evidence to justify the verdict or other decision. Although the trial court, under subsection five of the rule, may order a reduction of the verdict or condition the grant of a new trial upon a refusal to remit excess damages, it does not require the trial court to choose either alternative over granting a new trial without condition.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

HN6[] Jury Trials, Province of Court & Jury

The question of proximate cause is an element separate from a determination of negligence, and it is a question of fact for the jury to determine.

Torts > ... > Types of Damages > Property Damages > Measurements

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

Torts > Negligence

HN7[] Property Damages, Measurements

Every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault a compensation therefor in money that is called damages. Detriment is a loss or harm suffered in person or property. The measure of damages for injuries caused by negligence is that amount that reasonably, fairly, and adequately compensates a party for the loss proximately caused by or resulting from the negligence of the other party, whether such damage could have been anticipated or not. Loss of profits is an appropriate element of damage, but there can be no recovery for loss of profits if it is uncertain whether any profit involved would have been earned. The loss, in other words, must not be speculative.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Torts > Business Torts > General Overview

Torts > Remedies > Damages > General Overview

Torts > Negligence > General Overview

HN8[] Measurement of Damages, Foreseeable Damages

When the claim is that a business was destroyed by negligence, the measure of damages is the difference in fair market value immediately before the negligence caused damage and the fair market value that remained when the business stopped, together with any losses incurred in the interim. If a breach of duty proximately causes no appreciable detriment to the party affected, it is entitled to recover nominal damages.

Torts > Remedies > Damages > General Overview

Torts > Business Torts > General Overview

HN9[] Remedies, Damages

Generally, one cannot recover as damages both diminution in value of a business as well as loss of future profits because future profit potential is a factor utilized in calculating market value and, as such, is compensated for in the diminution of value award. However, loss of profits prior to cessation of a damaged business is properly allowable as an element of damages in addition to an allowance for market value diminution because the interim profit losses experienced prior to liquidation of the business are not reflected or compensated for in the market value determination.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > General Overview

HN10[] Jury Trials, Jury Instructions

If, when viewed as a whole, the jury instructions fairly and adequately apprise the jury of the law, they are not overturned on appeal.

Counsel: Rauleigh D. Robinson, Bismarck, North Dakota, for Plaintiff, Appellant and Cross-Appellee Jim's Hot Shot Service, Inc.

Fleck, Mather, Strutz & Mayer, Bismarck, North Dakota, for Defendant, Appellee and Cross-Appellant

Continental Western Insurance Company, argued by Thomas A. Mayer.

Zuger & Bucklin, Bismarck, North Dakota, for Defendant Sun West Insurance Agency. No appearance.

Judges: Sand JJ., Gierke, Pederson, VandeWalle, J. Opinion of the Court by Erickstad, Chief Justice.

Opinion by: ERICKSTAD

Opinion

[*280] The plaintiff, Jim's Hot Shot Service, Inc. (Hot Shot) filed this action in the District Court of Burleigh County alleging that the defendants, Continental Western Insurance Company (Continental) and Sun West Insurance Agency (Sun West), negligently destroyed its delivery service business. The case was tried before a jury which determined that Hot Shot suffered total damages of $1,500,000; that Continental's negligence caused 70 percent of the damages **[**2]** suffered by Hot Shot; that Hot Shot's contributory negligence caused 30 percent of the damages it suffered; and that Sun West was not negligent.

On November 4, 1983, the district court entered an order granting Continental's motion for a new trial on the issue of damages but denying Continental's motion for a new trial on the issue of proximate cause. An Amended Judgment on Jury Verdict was entered on November 7, 1983, awarding Hot Shot $1,050,000 plus interest and costs against Continental. An Amended Judgment was entered on November 9, 1983, dismissing Hot Shot's action against Sun West. On November 22, 1983, the district court entered an Order Partially Vacating Judgments under which the court vacated the damage award provided under **[*281]** the November 7, 1983, Amended Judgment on Jury Verdict, in accord with its November 4, 1983, order granting Continental a new trial on the issue of damages.

Hot Shot filed an appeal from the amended judgments and the order partially vacating judgments through which it has raised, in essence, the following sole issue:

(1) Whether or not the district court abused its discretion in awarding Continental a new trial on the issue of **[**3]** damages.

Continental filed a cross-appeal through which it has raised, in essence, the following two issues:

(1) Whether or not the trial court abused its discretion in refusing to grant Continental a new trial on the issue of proximate cause.

(2) Whether or not the trial court improperly instructed the jury on the measure of damages.

Neither party to this appeal disputes the jury determination that Continental and Hot Shot were negligent on a 70 percent/30 percent apportionment basis, respectively. Also, neither party disputes the jury determination that Sun West was not negligent, and the amended judgment dismissing Hot Shot's action against Sun West has not been appealed.

We affirm that part of the district court's orders of November 4, 1983, and of November 22, 1983, granting Continental a new trial on the issue of damages; we reverse that part of the court's orders denying Continental's request for a new trial on the issue of proximate cause; and we remand the case to the district court for a new trial on the issues of damages and proximate cause.

During 1980, Jim Mosbrucker commenced a "hot shot" or quick delivery service in the Williston Oil Basin which was **[**4]** subsequently incorporated as Jim's Hot Shot Service, Inc. As a prerequisite to commencing the delivery service, Mosbrucker obtained a certificate of convenience and necessity from the North Dakota Public Service Commission as well as an interstate certificate from the Interstate Commerce Commission. Mosbrucker also obtained insurance required for operating a hot shot delivery service from the Continental Western Insurance Company.

During July, 1981, Continental negligently caused a statement to be filed with the North Dakota Public Service Commission erroneously stating that Hot Shot's insurance coverage had been cancelled for nonpayment of premiums. The Public Service Commission suspended Hot Shot's certificate of authority on November 23, 1981, but approximately three weeks later the PSC reinstated the certificate upon receiving Continental's confirmation that Hot Shot did have liability insurance coverage. Prior to the reinstatement of Hot Shot's certificate the Oil Patch Hotline, a trade publication in the Williston Oil Basin, reported on December 3, 1981, that Hot Shot's certificate of authority had been suspended for lack of insurance coverage. Hot Shot ceased to operate during **[**5]** December, 1982. Hot Shot filed this action for damages, in September, 1982, asserting that Continental's negligent actions caused Hot Shot to lose customers thereby ultimately destroying its entire business.

On appeal, Hot Shot asserts that the district court abused its discretion in granting Continental a new trial on the issue of damages. We disagree.

HN1[] A trial court may grant a new trial where it appears that excessive damages have been given under the influence of passion or prejudice. Rule 59(b)(5), N.D.R.Civ.P. The trial court may also grant a new trial if the evidence is insufficient to justify the verdict. Rule 59(b)(6), N.D.R.Civ.P. In Cook v. Stenslie, 251 N.W.2d 393 (N.D. 1977), Justice Sand, writing for the majority, stated that HN2[] the standard for determining what constitutes an excessive verdict varies but generally includes one or more of the following:

> "The amount is so unreasonable and extreme as to indicate passion or prejudice on the part of the jury; the award is so excessive as to be without support in the evidence; the jury verdict is so excessive **[*282]** as to appear clearly arbitrary, unjust, or such as to shock the judicial conscience, 22 Am.Jur.2d ***[**6]*** Damages § 366." [Case cites omitted.] 251 N.W.2d at 396.

HN3[] A Rule 59(b), N.D.R.Civ.P., motion for a new trial is addressed to the sound discretion of the trial court, and the trial court's decision to grant a new trial will not be disturbed on appeal unless a manifest abuse of discretion is shown. Okken v. Okken, 325 N.W.2d 264 (N.D. 1982). In making its determination, the trial court may, within limits, weigh the evidence and judge the credibility of the witnesses to determine whether or not the verdict is against the weight of the evidence. Okken, supra.

Hot Shot asserted that through the negligent acts of Continental its delivery operation was destroyed. David Eckroth, a certified public accountant, testified on Hot Shot's behalf that the book value of the corporation was $77,784 but that the total value of the corporation was $514,497. Allen Wolfe, a certified public accountant testifying on Continental's behalf, stated that Hot Shot had "book value tangible assets" of $29,000. He concluded, "beyond that, I would have a very difficult time assigning value to this company." The jury verdict was far in excess of the amount of damages supportable by the testimony **[**7]** of the certified public accountants that testified as expert witnesses on this issue.

Jim Mosbrucker, Hot Shot's sole owner, testified with regard to Hot Shot's value for purposes of affixing damages. Mosbrucker testified that in his opinion the corporation was worth $4,500,000. Mosbrucker obtained that figure by multiplying Hot Shot's 1981 gross revenue of approximately $450,000 times a factor of 10. However, Mosbrucker conceded on cross-examination that during 1981 the corporation's taxable income, as shown on its federal tax return, was approximately $68,000 and that its net profit after taxes was approximately $58,000.

During direct examination, Mosbrucker explained the method he used for arriving at his opinion of the corporation's value:

> "Q. Jim, in your complaint, you alleged that you have sustained damages to your company of three million dollars; is that right?
> "A. That's right.
> "Q. What makes you think so?
> "A. I am sorry. I don't understand your question.
> "Q. Well, how have you arrived at that figure?
>
> "A. Well, first of all, I went and I took our annual earnings, our income, and that was well over or right at 450 thousand dollars. I took that figure. I know of **[**8]** some other businesses that used a figure and compounded, and what they did was by annual earnings per year times ten. That would put us to like 4 1/2 million dollars.
> So I don't think that I would have needed 4 1/2 million dollars in 1981, so that's where I would be satisfied with seventy-five percent of that."

During cross-examination, Mosbrucker further testified:

> "Q. Now, yesterday, Mr. Mosbrucker, and, I think, earlier today, you explained to us how you arrived at the value of your business; correct?
> "A. Yes.
> "Q. And, as I understand, that was sort of an arithmetick [arithmetic] exercise in which you took your 1981 gross revenue of approximately 450 thousand dollars and multiplied that by ten.
> "A. That's right."

HN4[] This Court has recognized that an owner may testify as to the value of his property without qualification other than the fact of ownership. *See, In Re Heart River Irrigation District, 78 N.D. 302, 49 N.W.2d 217 (1951)*. However, an owner's opinion of value is insufficient to support a value determination by the factfinder if it is given without a valid basis or is based upon improper facts or analysis. *See,* Rich v. Eastman Kodak Company, 583 ***[**9]*** F.2d 435 (8th Cir. 1978); United States v. Sowards, ***[*283]*** 370 F.2d 87 (10th Cir. 1966); Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780 (1976); Arkansas State Highway

Commission v. Geeslin, 247 Ark. 537, 446 S.W.2d 245 (1969); Ada Oil Company v. Logan, 447 S.W.2d 205 (Tex. Civ. App. 1969); Ward v. Deck, 419 S.W.2d 286 (Mo. Ct. App. 1967); Shelby County R-IV School District v. Herman, 392 S.W.2d 609 (Mo. 1965).

Mosbrucker, in effect, derived his opinion of the corporation's value by capitalizing gross revenues by a factor of ten. He did not attempt to provide a rational basis for his method of valuation, and his method is not explained or supported by the testimony of either of the certified public accountants that testified at the trial.

In concluding that the evidence was insufficient to support the jury's verdict of $1,500,000 the district court stated, "Mosbrucker's explanation of how he arrived at the value of his business demonstrated that he has no actual knowledge of its value or of a rational manner in which the value might be computed." We agree with the district court that Mosbrucker's opinion of Hot Shot's value did not constitute substantial **[**10]** evidence in support of the jury's damage determination. Having reviewed the entire record, we conclude that the district court did not abuse its discretion in granting Continental a new trial on the issue of damages on the ground that there was insufficient evidence to support the $1,500,000 verdict.

Hot Shot asserts that if there was insufficient evidence to support the damages awarded by the jury, the trial court was required to offer Hot Shot a remittitur. We disagree. ***HN5***[ ] Under *Rule 59(b), N.D.R.Civ.P.*, the trial court may grant a new trial if the damages appear excessive or if there is insufficient evidence to justify the verdict or other decision. Although the court, under subsection 5 of the rule, "may" order a reduction of the verdict or condition the grant of a new trial upon a refusal to remit excess damages, it does not require the court to choose either alternative over granting a new trial without condition. *Neibauer v. Well, 319 N.W.2d 143 (N.D. 1982)*.

On its cross-appeal, Continental asserts that the district court abused its discretion in refusing to grant a new trial on the issue of proximate cause. We agree for the reason that the issue of proximate cause, under **[**11]** the particular facts of this case, is so interrelated with the issue of damages that in the interest of justice the new jury on remand should be instructed to redetermine both issues.

Hot Shot introduced evidence that its customers stopped using Hot Shot's delivery service when they were informed that Hot Shot's certificate of authority had been suspended for lack of insurance. Continental introduced evidence that the proximate cause of Hot Shot's decrease in business and ultimate "destruction" was attributable to various factors such as the slowdown of oil drilling activities in the Williston Oil Basin and problems Hot Shot was experiencing in providing adequate delivery service to its customers.

HN6[ ] The question of proximate cause is an element separate from a determination of negligence, and it is a question of fact for the jury to determine. *Knorr v. K-Mart Corporation, 300 N.W.2d 47 (N.D. 1980)*. Under the particular facts of this case, the question as to the amount of damages for which Continental is liable to Hot Shot is inextricably interwoven with the issue of proximate cause. In determining the amount of damages, if any, for which Continental is liable to Hot Shot, the jury **[**12]** must determine to what extent the decline in Hot Shot's business was caused by Continental's negligent actions and to what extent, if any, the decline was caused by other factors unrelated to Continental's actions. We conclude, therefore, that in the interest of justice it is necessary on remand for the new jury to redetermine both issues of proximate cause and damages.

On its cross-appeal, Continental also asserts that the district court improperly instructed **[*284]** the jury on the measure of damages. We disagree.

With regard to the issue of damages, the trial court instructed the jury as follows:

> "DAMAGES ***HN7***[ ] Every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault a compensation therefor in money which is called damages. Detriment is a loss or harm suffered in person or property. The measure of damages for injuries caused by negligence is that amount which would reasonably, fairly, and adequately compensate a party for the loss proximately caused by or resulting from the negligence of the other party, whether such damage could have been anticipated or not. Loss of profits is an appropriate element of damage, **[**13]** but there can be no recovery for loss of profits if it is uncertain whether any profit involved would have been earned. The loss, in other words, must not be speculative."
> "MEASURE OF DAMAGES
>
> "In my opening instructions I discussed to some extent the measure of damages. ***HN8***[ ] When, as in this case, the claim is that a business was

destroyed by negligence, the measure of damages is the difference in fair market value immediately before the negligence caused damage and the fair market value that remained when the business stopped, together with any losses incurred in the interim.

"If a breach of duty has proximately caused no appreciable detriment to the party affected, it is entitled to recover nominal damages.

"The fact that I give you instructions on damages or that counsel for any party may have discussed the subject is not to be taken by you as any intimation by me or as any admission by a party of its liability for the damages claimed by another party."

Continental asserts that the court's instruction improperly implied that the business was destroyed and thereby removed the determination of whether or not there was a destruction of the business from the jury. We disagree. The **[**14]** instruction states that there is a "claim" that a business was destroyed by negligence. The instruction does not intimate whether or not the claim is supported by the evidence.

Continental also asserts that the proper measure of damages is loss of profits caused by the defendant's negligence and that the court's instruction encourages a double recovery by allowing Hot Shot to recover diminution in market value as well as losses incurred during the period between the occurrence of the negligence and the cessation of the business. During the trial, Hot Shot attempted to prove that, although Continental's negligence ultimately destroyed the corporation, it attempted for approximately one year to continue to operate and that it did so at reduced profit levels. The court's instruction, in essence, authorized the jury, upon finding that Continental's negligence destroyed the corporation, to award Hot Shot diminution in value of the business caused by Continental's negligence as well as losses attributable to Continental that Hot Shot incurred prior to its destruction.

HN9[] Generally, one cannot recover as damages both diminution in value of a business as well as loss of *future* profits **[**15]** because future profit potential is a factor utilized in calculating market value and, as such, is compensated for in the diminution of value award. *See, Gustafson v. General Motors Acceptance Corporation, 470 F.2d 1057 (8th Cir. 1973)*; *Albrecht v. Herald Company, 452 F.2d 124 (8th Cir. 1971)*. However, loss of profits prior to cessation of a damaged business is properly allowable as an element of damages in addition to an allowance for market value diminution because the interim profit losses experienced prior to liquidation of the business are not reflected or compensated for in the market value determination. *See, Albrecht, supra; Farmington Dowel Products Company v. Forster Manufacturing* ***[*285]*** *, 421 F.2d 61 (1st Cir. 1970)*; *See also, Atlas Building Products Company v. Diamond Block & Gravel Company, 269 F.2d 950 (10th Cir. 1959)*.

With regard to the measure of damages for a business destroyed by alleged anti-trust violations, the Federal Court of Appeals for the First Circuit stated in *Farmington, supra*:

> "The district court -- correctly, we believe -- confined Farmington to lost profits from 1956 to February 28, 1958, the date when Farmington **[**16]** went out of business, plus the 'going concern' value of Farmington on that date. . . . This method seems an adequate basis for giving full relief to the injured plaintiff Farmington: its lost profits to the time of cessation of business and the value which the business would have had at that time but for Forster's illegal actions." *421 F.2d at 81*.

As in *Farmington, supra*, the trial court in this case, properly, we believe, authorized the jury to award Hot Shot losses incurred subsequent to Continental's negligence but prior to "destruction" of the business in addition to the diminution in value of the business caused by Continental's negligence.

Continental cites *Sawyer v. Fitts, 630 S.W.2d 872 (Tex. Ct. App. 1982)* and *Aetna Life & Casualty Company v. Little, 384 So. 2d 213 (Fla. Dist. Ct. App. 1980)*, for the proposition that when a business is destroyed the measure of damages is the diminution in value of the business without an additional allowance for loss of profits. We believe that there is a distinction between the fact situation in this case and the fact situations under *Sawyer, supra*, and *Aetna, supra*, which justifies a different measure of damages **[**17]** in this case.

The businesses in *Sawyer, supra*, and *Aetna, supra*, were destroyed in literally a matter of minutes. In *Sawyer, supra*, a men's clothing store was destroyed when a wall collapsed causing the roof of the business to fall, burying the entire premises with "brick, mortar and beams." In *Aetna, supra*, the business ceased to operate when a personal injury judgment creditor executed on the business. Neither business in *Sawyer, supra*, or *Aetna, supra*, continued to operate subsequent to the acts that caused their destruction. In this case, unlike the situation in those cases, Hot Shot continued operations for approximately one year after the negligence had occurred which, it is alleged, ultimately destroyed the business.

Under the particular facts of this case, we believe the district court correctly instructed the jury that it could award losses incurred subsequent to the negligence and prior to "destruction" of the business in addition to diminution in value. ***HN10***[] If, when viewed as a whole, the jury instructions fairly and adequately apprise the jury of the law, they will not be overturned on appeal. *South v. National Railroad Passenger Corporation, 290* ***[**18]*** *N.W.2d 819 (N.D. 1980)*. We conclude that the court's instructions to the jury on the measure of damages sufficiently apprised the jury of the law in that regard.

In accordance with this opinion, the court's orders of November 4, 1983, and November 22, 1983, are affirmed to the extent that they reflect a grant of a new trial on the issue of damages and are reversed to the extent that they reflect a denial of the request for a new trial on proximate cause. We remand this case to the district court for a new trial on the issues of proximate cause and damages.

Sand JJ., Gierke, Pederson, VandeWalle, J. concur.

End of Document

TAB 6

Indu Craft v. Bank of Baroda

United States Court of Appeals for the Second Circuit

September 2, 1994, Argued ; February 3, 1995, Decided

Docket Nos. 94-7089, 94-7127

Reporter

47 F.3d 490 *; 1995 U.S. App. LEXIS 2193 **

INDU CRAFT, INC., Plaintiff-Appellant-Cross-Appellee, v. BANK OF BARODA, Defendant-Appellee-Cross-Appellant, Counterclaim-Plaintiff, KRISHNAKANT C. CHOKSHI, Defendant-Appellee.

Prior History: [1]** Plaintiff Indu Craft, Inc. appeals from the grant in part, and defendant Bank of Baroda cross-appeals from the denial in part, of a judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* entered in the United States District Court for the Southern District of New York (Bernikow, M.J.) following a four-week jury trial.

Disposition: Reversed and remanded.

Core Terms

damages, prima facie tort, matter of law, lost profits, counterclaim, cause of action, jury award, earnings, letter of credit, magistrate judge, fixed cost, garments, breach of contract, line of credit, arrive, jury verdict, calculate, valuation, fiscal, costs, contract claim, good faith, manufacturers, duplicative, multiplier, suppliers, offset, sales

Case Summary

Procedural Posture

Plaintiff bank customer and defendant bank both appealed the judgment of the United States District Court for the Southern District of New York, which granted in part and denied in part defendant's motion for judgment as a matter of law, pursuant to *Fed. R. Civ. P. 50*, in plaintiff's contract and tort action based on a revolving credit agreement between plaintiff and defendants, bank and a bank official.

Overview

Plaintiff bank customer brought a breach of contract and tort action against defendants, bank and a bank official, based on a revolving credit agreement between the parties. Defendant bank counterclaimed to recover money that plaintiff owed defendant bank on plaintiff's line of credit. A jury verdict awarded plaintiff damages on the contract and tort claims, and denied damages to defendant bank on its counterclaim. A magistrate judge granted defendant bank's motion for judgment as a matter of law, vacating plaintiff's damage award and further denying defendant bank damages on its counterclaim. Plaintiff and defendant bank both sought review. On appeal, the court reversed the rulings on the motion for judgment as a matter of law and remanded. On remand, the court ordered the district court to reinstate plaintiff's damage award, and to reduce the award by the amount due to defendant bank on plaintiff's line of credit because plaintiff was fully compensated by its damage award. The court held that plaintiff's award was based on sufficient evidence to prove lost value and that the jury's verdict was not duplicative because it allocated damages between the two causes of action.

Outcome

The court reversed and remanded the ruling on defendant bank's motion for judgment as a matter of law, which vacated plaintiff bank customer's damage award and further denied defendant bank's counterclaim, in plaintiff's contract and tort action against defendants, bank and a bank official. The court held that plaintiff's damage award was based on sufficient evidence of its loss of value due to defendants' actions.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of

Review > De Novo Review

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

The court's scope of review from a grant or denial of judgment as a matter of law is the same standard as the trial court applies, determining whether viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons could reach. The court's review is de novo.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Breach > General Overview

HN2[] **Types of Damages, Compensatory Damages**

The general rule for measuring damages for breach of contract is the amount necessary to put the plaintiff in the same economic position he would be in had the defendant fulfilled his contract. When computing damages for a defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > Breach > General Overview

HN3[] **Types of Damages, Compensatory Damages**

Revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach. In the typical contract action such an offset usually consists of variable costs, that is, those costs that would be incurred solely as a result of performance under the contract. But when the breach brings an end to a plaintiff's business the sums to be offset may often include, in addition, fixed costs. Fixed costs are those expenses that would be incurred as a result of the overall operation of a business, including overhead such as rent, utilities, insurance, salaries and the like.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Business Torts > General Overview

HN4[] **Types of Damages, Compensatory Damages**

Where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN5[] **Types of Damages, Compensatory Damages**

If a plaintiff shows it more likely than not that it suffers damages, the amount of damages need only be proved with reasonable certainty.

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN6[] **Types of Damages, Compensatory Damages**

The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages.

Torts > Intentional Torts > Prima Facie Tort > Defenses

Torts > Intentional Torts > Prima Facie Tort > General Overview

HN7[] **Prima Facie Tort, Defenses**

Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts, which would otherwise be lawful.

Torts > Remedies > Damages > General Overview

HN8[] **Remedies, Damages**

A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery.

Civil Procedure > ... > Jury Trials > Verdicts > Inconsistent Verdicts

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

HN9[] **Verdicts, Inconsistent Verdicts**

A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict.

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

Torts > Remedies > Damages > General Overview

HN10[] **Multiple Defendants, Distinct & Divisible Harms**

A jury's award is not duplicative simply because it allocates damages under two distinct causes of action.

Counsel: PETER J. SCHMERGE, New York, New York (Jonathan A. Chase, Michele C. Petitt, Eaton & Van Winkle, New York, New York, of counsel), for Appellant Indu Craft, Inc.

FRANK H. PENSKI, New York, New York (Nixon, Hargrave, Devans & Doyle, New York, New York, of counsel), for Appellees Bank of Baroda and Krishnakant C. Chokshi.

Judges: Before: KEARSE, CARDAMONE, and PIERCE, Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*492] CARDAMONE, *Circuit Judge*:

Plaintiff Indu Craft, Inc. appeals and defendant Bank of Baroda cross-appeals from a judgment of the United States District Court for the Southern District of New York, Bernikow, Magistrate Judge, granting in part and denying in part the Bank's motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50* after a four-week jury trial in an action based on a revolving credit agreement between Indu Craft and the Bank. Krishnakant **[**2]** C. Chokshi, an officer of the Bank, was also named as a defendant. Under the agreement the Bank would make advances to and issue letters of credit on behalf of Indu Craft for the purpose of financing its business. When Indu Craft refused to make an investment for the benefit of Chokshi's son, the Bank reduced Indu Craft's line of credit and took other steps that effectively drove it out of business.

Plaintiff filed suit against the Bank in October 1987, alleging three causes of action, only two of which are relevant to this appeal. The first of these causes of action was that the Bank breached its covenant of good faith and fair dealing implied in the revolving credit agreement; the second cause of action alleged that the Bank and Chokshi committed a *prima facie* tort against plaintiff. The Bank counterclaimed for approximately $ 1.7 million that Indu Craft still owed it under the line of credit loan. The action was referred for all purposes to the magistrate judge, where a jury trial was held. The jury returned a $ 3.25 million verdict in plaintiff's favor on the contract and *prima facie* tort causes and a verdict also in its favor on the Bank's $ 1.7 million counterclaim. The **[**3]** Bank then moved for judgment as a matter of law or, in the alternative, for a new trial with respect to both verdicts.

The magistrate judge, in a ruling that is the subject of this appeal, held that neither of Indu Craft's contract and tort causes of action could stand. While it found Indu Craft had shown a breach of the implied covenant of good faith, it also believed plaintiff had failed to prove damages and that the tort damages returned by the jury were duplicative of the contract damages. This ruling wiped out plaintiff's $ 3.25 million jury verdict. The magistrate judge at the same time denied the Bank's motion for judgment on its $ 1.7 million counterclaim against plaintiff because, as it stated, the Bank had prevented Indu Craft from performing under the note.

In our view the magistrate judge wrongly deprived plaintiff of its $ 3.25 million jury verdict on its contract and tort causes of action, and also wrongly denied the Bank's motion for judgment on its $ 1.7 million counterclaim, perfectly illustrating the accuracy of the proverb that "two wrongs don't make a right."

BACKGROUND

Indu Craft is a New York corporation that imported ladies' sportswear from the Far East and **[**4]** sold those goods at wholesale in the United States. Its founder, president and sole shareholder was Hemant C. Mehta. The business involved placing orders for garments with plaintiff's foreign suppliers and promptly arranging for the issuance of letters of credit in their favor. The letter of credit guaranteed the manufacturer of the goods that it would be paid when the garments were shipped. In those foreign countries **[*493]** where Indu Craft's suppliers were located, letters of credit were needed by manufacturers to ensure compliance with quota restrictions on exports. Normally, suppliers will not ship -- and sometimes will not even begin to manufacture -- garments until they receive a letter of credit. Because the garment industry is, by its very nature, seasonal, delay is very detrimental in selling a line of clothes. Due to this time factor, a delay in the issuance of a letter of credit inevitably results in a slowdown of production or a holding up of the shipment of merchandise, causing a concomitant loss of business.

As a result of the good relationships between Indu Craft and its suppliers, and contrary to industry practice, its manufacturers often began production of garments relying **[**5]** on the assurance that a letter of credit would be speedily forthcoming. Swift delivery was a critical element in Indu Craft's success, enabling its merchandise to appear in American retail stores earlier than its competitors' garments. The benefit of timeliness increased initial sales and created generally more profitable reorders.

Indu Craft's relationship with the Bank began in 1983 when it was granted a $ 500,000 line of credit. The line of credit was periodically increased, reaching $ 2.7 million in December 1986. The line then included an overdraft facility of $ 1.2 million. During this period the relationship between plaintiff and defendant was marked by informality. In some instances credit was increased despite a decline in Indu Craft's sales or its failure to realize sales projections. On numerous occasions plaintiff was permitted to exceed its line of credit overdraft limit, sometimes by as much as 40 percent. Further, the Bank typically granted applications for letters of credit within 24 hours of application. This ready access to credit gave Indu Craft an ability to have its merchandise manufactured and shipped quickly to the United States.

The connection between plaintiff **[**6]** and defendant began to wear thin in November 1986 following a discussion in which Chokshi suggested that Mehta invest in a computer business for the benefit of Chokshi's son, Anil. After evaluating this proposal Mehta determined not to invest and informed Chokshi and Anil of his decision in February 1987. A month later the Bank demanded that Indu Craft immediately reduce its $ 1.3 million overdraft to its pre-set limit of $ 1.2 million. Defendant then informed plaintiff, without prior notice, that its line of credit had been reduced from $ 2.7 million to $ 2.3 million and the overdraft sublimit reduced from $ 1.2 million to $ 1.0 million. Chokshi conceded at trial that he had falsely informed Indu Craft that this reduction was directed by the Bank's central office in Bombay, India, when in fact the central office had no knowledge of the reduction.

After Mehta's rejection of the proposal to invest in the computer business for Anil Chokshi, further letters of credit were substantially delayed, if issued at all. The Bank also began to demand that applications for such letters be backed by confirmed orders from 100 percent of Indu Craft's customers. That requirement had never before **[**7]** been imposed, and it was not then imposed on other Bank customers seeking letters of credit. Defendants knew that commercial practices in the garment industry made a requirement of confirmed orders commercially impossible to comply with. No letters of credit were issued to Indu Craft after May 4, 1987.

From April through September 1987 Indu Craft complained to the Bank's central offices about the curtailment of its credit and the difficulties it was experiencing obtaining letters of credit. Numerous Bank officers repeatedly told plaintiff that its credit would be restored and its difficulties solved. Nonetheless, because of the delays and refusal by the Bank to issue new letters of credit, Indu Craft's suppliers stopped producing goods and delayed shipment of those goods they did produce. Garments arrived late and had to be sold at substantial discounts. As a result, Indu Craft ceased operations in November 1987 and brought the instant action against the Bank.

At trial the jury found the Bank's actions were not taken in good faith but grew out of Mehta's refusal to invest in the computer business for Anil Chokshi and thus violated the covenant of good faith and fair dealing implied **[**8]** in the loan documents. The jury also found the Bank and Chokshi acted with malice **[*494]** to injure Indu Craft and that such action constituted a *prima facie* tort. Plaintiff was found by the jury to have been damaged in the amount of $ 3 million on its contract claim, but it was also found to have failed to mitigate $ 1 million of this amount. In addition, the jury awarded plaintiff $ 1.25 million on its *prima facie* tort claim. Prior to being discharged, the jury was polled and stated it was their intention that the cumulative award to Indu Craft be $ 3.25 million. On the Bank's counterclaim for the $ 1.7 million due on the note, the jury concluded that the Bank had wrongfully interfered and prevented Indu Craft from repaying the loan and thereby denied the Bank any recovery on its counter-claim.

When, as noted earlier, the Bank moved for judgment as a matter of law contending that all the jury verdicts should be overturned as a matter of law, the magistrate judge found that although plaintiff had proven the loss of value of its business as a going concern, it had failed to produce proof of its variable expenses and fixed costs. Thus, the magistrate concluded plaintiff had failed **[**9]** to prove lost profits, requiring a judgment dismissing the jury's contract damages award. The magistrate also vacated the *prima facie* tort award on the grounds that it was duplicative of the contract damages award. The magistrate upheld the jury's verdict on the Bank's counterclaim, observing that the Bank's actions taken in bad faith wrongfully prevented Indu Craft from repaying the note.

Indu Craft appeals the grant of judgment as a matter of law with respect to its contract and tort causes of action and the Bank appeals the denial of judgment with respect to its counterclaim. For the reasons stated below we reverse and remand with directions to the magistrate judge to reinstate the jury verdicts on plaintiff's contract and tort causes of action, and also reverse the denial of defendant's motion for judgment on its counterclaim and remand for the magistrate judge to grant that motion.

DISCUSSION

We discuss briefly at the outset ***HN1***[] our scope of review from a grant or denial of judgment as a matter of law. On appeal, we apply the same standard as the trial court, determining whether "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without **[**10]** weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.'" *Samuels v. Air Transport Local 504, 992 F.2d 12, 14 (2d Cir. 1993)* (quoting *Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970))*. Our review is *de novo*. *See* Fiataruolo v. United States, 8 F.3d 930, 938 (2d Cir. 1993); Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1046 (2d Cir. 1992). We turn to an analysis of the merits.

I Contract Award

The magistrate judge determined that Indu Craft presented sufficient evidence to prove the loss of its value as an ongoing business. It also determined that plaintiff's evidence of lost profits failed to take into account variable and fixed costs and was therefore insufficient as a matter of law. Faced with adequate proof of the lost value of the business and inadequate proof of lost profits, the trial court nonetheless granted judgment as a matter of law in favor of the Bank. While we agree with the magistrate judge's conclusions **[**11]** regarding the sufficiency of the proof regarding loss of value and the insufficiency of the lost profits evidence, we are unable to adopt the trial court's view that the evidence, as a whole, failed to support the jury's damages award.

A. *Proof*

We summarize the evidence presented to support these two methodologies of proving loss. Plaintiff's owner, Mehta, testified at trial regarding the calculation of lost profits, which proof was contained in a four volume document admitted into evidence. It furnished factual information on cost of goods sold and sales prices received to establish gross profits for these same goods. With respect to goods whose delivery was delayed, the document and summary sheets reflected the actual costs and actual sales to arrive at one component of lost profits. With respect **[*495]** to goods never imported, the exhibit projected the costs of the goods and projected sales to arrive at the other component of lost profits. These were added together to arrive at gross lost profits of approximately $ 2.6 million.

Indu Craft's expert witness, Bernard Augen, testified as to a valuation of Indu Craft's business. Valuation began with Indu Craft's stated earnings from **[**12]** its 1986 fiscal year, which were used to project earnings for fiscal 1987. Augen testified that fiscal 1986 earnings were used because earnings in fiscal 1987 were affected by a non-recurring event, an embargo of a country from which Indu Craft imported garments. The exclusion of non-recurring events was referred to as "normalizing." Augen then assumed earnings growth from fiscal 1986 to fiscal 1987 based on Indu Craft's historical earnings growth and multiplied this number by an earnings multiplier -- based on earnings of publicly traded companies in the apparel industry -- to arrive at a range of values for plaintiff's business.

Augen stated that apparel companies had multipliers ranging from 5.2 to 11. Due to Indu Craft's small size relative to publicly traded companies, multipliers at the low end of the range were used. Using this valuation process the expert witness arrived at values for Indu Craft ranging from $ 3.3 million to $ 5 million, with a mid-range of $ 4.3 million.

B. *Law of Damages*

We begin analysis of this proof by noting that "***HN2***[] the general rule for measuring damages for breach of contract has long been settled. It is the amount necessary to put the plaintiff **[**13]** in the same economic position he would have been in had the defendant fulfilled his contract." *Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92 (2d Cir. 1984)*; *see also* 5 Arthur L. Corbin, *Corbin on Contracts*, § 992, at 5 (1964); 11 Samuel Williston, *A Treatise on the Law of Contracts*, § 1338, at 198 (3d ed. 1968). In implementing this general rule, we have stated that when computing damages for a defendant's wrongful conduct, "if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss." *S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 852 (2d Cir. 1987)* (*quoting* *Stern v. Satra Corp., 539 F.2d 1305, 1311-12 (2d Cir. 1976))*.

These precepts require that ***HN3***[] revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach. In the typical contract action such an offset usually consists of variable costs, that is, those costs that would have been incurred solely as a result of performance **[**14]** under the contract. *See, e.g., Lindblad Travel, 730 F.2d at 92-93*. But when the breach brings an end to a plaintiff's business the sums to be offset may often include, in addition, fixed costs. Fixed costs are those expenses that would have been incurred as a result of the overall operation of a business, including overhead such as rent, utilities, insurance, salaries and the like.

C. *Resolution of Damages Proof*

Indu Craft concedes that it proffered no evidence with respect to fixed costs. Decisional law analyzing the role of fixed costs in damages calculations is sparse since most breaches of contract in a business setting do not result in the termination of a business. Plaintiff relies on our decision in *Lindblad Travel, 730 F.2d at 93*, for its view that overhead costs need not be deducted from income to calculate damages. That reliance is misplaced. *Lindblad* determined that fixed costs should not have been included in the damages calculation where plaintiff was an ongoing business whose fixed costs were not affected by the breach. *Id*.

In the present case, plaintiff's cessation of business may very **[**15]** well have reduced or eliminated fixed overhead costs. Such savings, resulting from the Bank's breach, are properly offset from lost profits. Hence, the failure to deduct fixed costs when utilizing lost profits to calculate damages renders such measurement too imprecise for judicial use. However, proof of lost profits is but one method of proving the amount necessary to restore plaintiff to the economic position he would have been in absent the breach. An **[*496]** alternative methodology, extrapolating the value of a business as an ongoing entity from the company's past earnings, establishes a plaintiff's damages without suffering the same defect. By resorting to past earnings, this methodology already incorporates the necessary deduction of fixed and variable costs, providing an accurate measurement of plaintiff's loss as adjusted for savings resulting from the breach.

In fact, when the breach of contract results in the complete destruction of a business enterprise and the business is susceptible to valuation methods, such an approach provides the best method of calculating damages. *Cf. Sharma v. Skaarup Ship Management Corp., 916 F.2d 820, 825 (2d Cir. 1990)* **[**16]** ("***HN4***[] where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages"), *cert. denied*, *499 U.S. 907, 113 L. Ed. 2d 218, 111 S. Ct. 1109 (1991)*. The methodology of determining a business's earnings and applying an earnings multiplier to fix the value of a business that was completely terminated is one we have approved. *See* *Lamborn v. Dittmer, 873 F.2d 522, 533-34 (2d Cir. 1989)*.

The Bank attacks various aspects of the testimony offered by the plaintiff's expert. To the extent he departed from general valuation practices or adopted procedures subject to criticism, defendant had ample opportunity to elicit these facts and argue them to the jury. The expert's training and background and the procedures he followed in arriving at a valuation presented the jury with the question of whether or not to accept the expert's opinion and what weight to give it. *See* *Enercomp, Inc. v. McCorhill Pub., Inc., 873 F.2d 536, 550 (2d Cir. 1989)*.

Further, when reviewing the sufficiency of the damages evidence, we are guided by the principle that ***HN5***[] if a plaintiff **[**17]** has shown it more likely than not that it has suffered damages, the amount of damages need only be proved with reasonable certainty. *See* *W.L. Hailey & Co. v. County of Niagara, 388 F.2d 746, 753 (2d Cir. 1967)* (collecting New York cases). New York has long had an established rule that:

> When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain.

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209, 4 N.E. 264 (1886); *see* *Randall-Smith, Inc. v. 43rd St. Estates Corp., 17 N.Y.2d 99, 105-06, 268 N.Y.S.2d 306, 215 N.E.2d 494 (1966)*. ***HN6***[] The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages. *See* *Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977)*. Indu Craft's proof of value of its business as a going concern was adequate **[**18]** to meet these tests for sufficiency.

After expressly finding that plaintiff's proof of lost value was sufficient, we are at a loss as to why the trial court then set aside the jury award. The jury's special verdict sheet made no distinction between the two methods of proving damages, and the figures were well within the range testified to by plaintiff's expert who set a low value of $ 3.3 million and a mid-range of $ 4.3 million. The jury found that Indu Craft was damaged in a total amount of $ 4.25 million, less $ 1 million for a failure to mitigate, for net total damages of $ 3.25 million. Had lost profits evidence not been presented, evidence of the lost value of Indu Craft as a going enterprise, standing alone, would have been sufficient to support the jury's award of damages. Hence, the judgment as a matter of law with respect to the contract claim must be reversed and the jury award reinstated, although the award must be modified as we discuss in a moment.

II *Prima Facie* Tort Award

We pass now to discussion of the grant of the motion for judgment as a matter of law setting aside the *prima facie* tort jury award. That award was amply justified by the proof. The Bank **[**19]** and Chokshi engaged in deliberate delay in issuing letters of credit **[*497]** and made an unprecedented demand only on plaintiff that such letters be backed by confirmed orders from all of plaintiff's customers. Their conduct ultimately drove Indu Craft out of business. The jury was entitled to find that this web of wrongdoing was not woven by innocent hands. Clearly the same wrongdoing also served as the basis for the jury finding that defendants intentionally acted with malice and without excuse to injure Indu Craft, thereby committing a *prima facie* tort against plaintiff. *See* *Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142, 490 N.Y.S.2d 735, 480 N.E.2d 349* ("***HN7***[] Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." (internal quotes omitted)).

As pointed out above, the jury awarded Indu Craft $ 2 million on its breach of contract claim, after adjusting for its failure to mitigate damages, and $ 1.25 million on its *prima facie* tort claim. Upon plaintiff's counsel's request, the trial court asked the jury foreman if the jury meant Indu Craft to receive a total **[**20]** award of $ 3.25 million or if the *prima facie* tort award was meant to be subsumed by the larger contract award. The foreman responded that the intended award was $ 3.25 million, which, upon being polled, the jury confirmed. The magistrate then ruled on the motion for judgment as a matter of law that the awards were duplicative for the same injury and vacated the *prima facie* tort award.

HN8[] A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery. *See* *Wickham Contracting Co.*

v. Board of Educ., 715 F.2d 21, 28 (2d Cir. 1983). The question we must answer was whether this doctrine was violated by the jury's award for defendants' *prima facie* tort. **HN9**[] A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict. *See* Machleder v. Diaz, 801 F.2d 46, 57 (2d Cir. 1986), *cert. denied*, *479 U.S. 1088, 94 L. Ed. 2d 150, 107 S. Ct. 1294 (1987)*; Minpeco, S.A. v. Hunt, 718 F. Supp. 168, 181 (S.D.N.Y. 1989). This role derives from the Seventh Amendment's obligation on courts not to recast factual findings **[**21]** of a jury, *see* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 7 L. Ed. 2d 798, 82 S. Ct. 780 (1962), and is based on the notion that "juries are not bound by what seems inescapable logic to judges." Morissette v. United States, 342 U.S. 246, 276, 96 L. Ed. 288, 72 S. Ct. 240 (1952).

The jury's award of a net total of $ 3.25 million was in accordance with the expert's testimony. While it is possible that the jury impermissibly compensated Indu Craft twice for the same injury, it is equally rational to believe that the jury found that Indu Craft suffered $ 3.25 million worth of injuries and merely allocated that amount between the two different causes of action, one for breach of contract and one for tort. *See* Gentile v. County of Suffolk, 926 F.2d 142, 153-54 (2d Cir. 1991) (where jury awarded $ 75,000 for state malicious prosecution claim and $ 75,000 for federal § 1983 claim, conceivable that jury found $ 150,000 of unduplicated injuries and merely split the amount equally).

That the jury meant the total award to be $ 3.25 million is clearly supported by their responses when being polled after the verdict. **HN10**[] A jury's award **[**22]** is not duplicative simply because it allocates damages under two distinct causes of action. *See* id. at 154. The Bank made no showing other than the allocation of the award. Thus, it failed to establish the jury awards were duplicative. Because of our duty to reconcile a jury's verdict whenever possible, we think this award easily reconcilable and see no impermissible double recovery in the jury contract and tort awards. As a consequence, the judgment must be reversed and the jury's *prima facie* tort award reinstated.

III The Counterclaim

We now consider the remaining issue, which is the denial of the Bank's motion for judgment as a matter of law on its $ 1.7 million contract claim after the jury returned a no cause for action against it. Under its line of credit Indu Craft owed the Bank approximately $ 1.7 million for which the Bank asserted a counterclaim. Plaintiff admits this amount was outstanding, but maintains the Bank's actions in driving it out of **[*498]** business prevented it from performing under the note and thereby excuse performance. This "prevention doctrine" is often viewed as a corollary to the implied covenant of good faith. *See Sharma v. Skaarup Ship Management Corp., 699 F. Supp. 440, 449 (S.D.N.Y. 1988)*, **[**23]** *aff'd*, *916 F.2d 820 (2d Cir. 1990)*, *cert. denied*, *499 U.S. 907, 113 L. Ed. 2d 218, 111 S. Ct. 1109 (1991)*. The jury agreed that the Bank prevented plaintiff's performance and returned a verdict on the counterclaim in favor of Indu Craft. The district court denied the Bank's motion for judgment as a matter of law.

While the parties have exerted much energy disputing the applicability of the prevention defense to the note, we are persuaded by a more compelling rationale urged by the Bank that judgment should have been granted. It is the purpose of damages under a breach of contract action to place the aggrieved party in the same economic position that it would have occupied absent the breach. *See* Lindblad Travel, 730 F.2d at 92. Awarding Indu Craft the value of its business and at the same time relieving it from its obligation under the note actually places Indu Craft in a better economic position than it would otherwise have occupied, a result the law disfavors. To avoid such a windfall and place Indu Craft in the position it would have been in but for the Bank's breach of contract, the debt under the note must be set off from **[**24]** the damages owed Indu Craft.

CONCLUSION

Accordingly, we reverse the magistrate judge's disposition of the motion for judgment as a matter of law and remand to that court for it to reinstate the jury verdicts on Indu Craft's breach of contract and *prima facie* tort causes of action totalling $ 3.25 million, and for it to offset this total by the amount due the Bank under the note amounting to approximately $ 1.7 million, by granting the Bank's motion for judgment under its contract claim.

Reversed and remanded.

End of Document

TAB 7

Most Negative Treatment: Check subsequent history and related treatments.

1985 CarswellOnt 1034
Ontario Court of Appeal

Ronald Elwyn Lister Ltd. v. Dayton Tire Canada Ltd.

1985 CarswellOnt 1034, [1985] O.J. No. 2633, 30 A.C.W.S. (2d) 455, 52 O.R. (2d) 88, 9 O.A.C. 39

Ronald Elwyn Lister Limited, Ronald E. Lister and Joan C. Lister, Plaintiffs (Respondents/Appellants by Cross-Appeal) v. Dayton Tire Canada Limited, Defendant (Appellant/Respondent by Cross-Appeal)

Morden, Thorson and Goodman JJ.A.

Judgment: April 24, 1985

Counsel: *Earl A. Cherniak Q.C.* and *Mary Anne Sanderson*, for the defendant, appellant and respondent to the cross-appeal.
Mark G. Appel Q.C. and *Paul Henry*, for the plaintiffs, respondents and appellants by cross-appeal.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.c Miscellaneous
Remedies
I Damages
I.1 Causation
I.1.h Pure economic loss
Remedies
I Damages
I.12 Exemplary, punitive and aggravated damages
I.12.e Trespass
Headnote
Damages --- Remoteness and foreseeability — Torts — Economic loss
Franchisor seizing assets of franchisee defaulting under debenture as well as assets of proprietorship owned by principal of franchisee -- Franchisee and proprietor suing for wrongful seizure of assets -- Trial Judge finding in favour of franchisee on basis of inadequate notice, and for proprietor on ground that debenture not covering his assets -- Trial Judge awarding compensatory damages to be determined on reference to Master -- Trial Judge incorporating Master's findings into "final judgment" -- Supreme Court of Canada affirming trial judgment -- Franchisor appealing Master's findings -- Appeal allowed, judgment set aside and assessment of damages substituted -- Remoteness principle requiring damages flowing as direct result of tort -- Master's award of 30 years' net profit to franchisee as future income being purely arbitrary and calculated upon erroneous principles -- Plaintiff still in existence and able to carry on new business unlike cases of death or total disability -- Principles for evaluating going concern reviewed -- Damages awarded in amount of lesser of business loss evaluation and asset evaluation -- Court declining to award both damages for value of business as going concern and damages for value of assets converted -- Such award amounting to double recovery.
Damages --- Exemplary and punitive damages — Grounds for awarding exemplary and punitive damages — Trespass — Trespass to chattels
Franchisor seizing assets of franchisee defaulting under debenture as well as assets of proprietorship owned by principal of franchisee -- Franchisee and proprietor suing for wrongful seizure of assets -- Trial Judge finding in favour of franchisee on basis

of inadequate notice, and for proprietor on ground that debenture not covering proprietorship assets -- Trial Judge awarding exemplary damages to be determined on reference to Master -- Trial Judge incorporating Master's findings into "final judgment" -- Supreme Court of Canada affirming trial judgment -- Franchisor appealing Master's findings -- Appeal allowed, judgment set aside and assessment of damages substituted -- Master having failed to distinguish between seizure of franchise assets covered by debenture and seizure of proprietorship assets not covered by debenture -- Knowing seizure of goods to which defendant had no rights being more reprehensible than mere seizure upon inadequate notice -- Defendant franchisor having deliberately continued to detain proprietorship assets after learning franchisee having no interest in them -- Exemplary damages against defendant with respect to proprietorship assets affirmed -- Exemplary damages with respect to franchisee assets reduced as wilful conduct less reprehensible in this case.
Practice --- Judgments and orders — Interest on judgments
Franchisor seizing assets of franchisee defaulting under debenture as well as assets of proprietorship owned by principal of franchisee — Franchisee and proprietor suing for wrongful seizure of assets — Trial Judge finding in favour of franchisee on basis of inadequate notice, and for proprietor on ground that debenture not covering his assets — Trial Judge awarding exemplary damages to be determined on reference to Master — Trial Judge incorporating Master's findings into "final judgment" — Supreme Court of Canada affirming trial judgment — Franchisor appealing Master's findings — Appeal allowed, judgment set aside and assessment of damages substituted — Master awarding interest on damages awarded for loss of future income — Act providing for award of interest in addition to value of goods converted — Act not authorizing interest awards on amounts over and above value of goods converted — Court not allowing interest on award used to set off debenture debt — Judicature Act, R.S.O. 1970, c. 228, s. 39(3).

***Morden J.A.*:**

1 The major issues in this appeal by the defendant and cross-appeal by two of the plaintiffs arise out of the determination of the amount of compensation to be awarded to the plaintiff Ronald Elwyn Lister Limited (Lister Limited) and to the plaintiff Ronald E. Lister for the conversion of the business assets of each of them by the defendant Dayton Tire Canada Ltd. (At the relevant times Dayton's name was Dunlop Canada Limited and I shall refer to the defendant as Dunlop.) Some knowledge of the history of this proceeding is important for an understanding of these issues and I shall first set forth an outline of it and of certain background facts. I reserve, until I deal with the particular issues to which they relate, reference to further relevant facts.

THE HISTORY OF THIS PROCEEDING AND BACKGROUND FACTS

This Action

2 In January of 1973 Lister Limited and Mr. and Mrs. Ronald E. Lister commenced this action against Dunlop for certain relief. Broadly speaking and in so far as it relates to the present issues this relief involved:

(a) damages for wrongful seizure of Lister Limited's assets and of Mr. Lister's assets held by a sole proprietorship which he carried on under the name of Lister Autopar, by a receiver appointed by Dunlop under the terms of a debenture issued by Lister Limited to Dunlop dated June 23, 1970;

(b) damages for alleged misrepresentation by Dunlop to the Listers before the execution of a franchise agreement between them dated June 23, 1970; and

(c) a declaration that an agreement dated May 31, 1972 between Dunlop, Chrysler Canada Limited, and the Listers was void because of duress exercised by Dunlop on Mr. and Mrs. Lister.

3 The action was successful, at the conclusion of appeals through to the Supreme Court of Canada, with respect to the relief described in paragraph (a) but unsuccessful with respect to the relief described in paragraphs (b) and (c).

4 Under the franchise agreement Lister Limited was given the right to sell Dunlop products at retail outlets in Guelph and, commencing in 1971, in Orangeville. On June 23, 1970 Lister Limited executed a demand debenture in favour of Dunlop which secured the payment of $175,000 with an interest rate of 12% calculated and compounded annually.

5 Lister Limited's franchise business operated at a loss. It owed a substantial amount of money to Dunlop. Dunlop decided to exercise its rights under the debenture and on March 20, 1972 served on Lister Limited, among other documents, a demand for payment of the sum of $127,160.84 alleged to be owing under the debenture and a notice directed to Lister Limited and its directors which stated that by reason of the default under the debenture Dunlop had exercised its powers under the debenture and appointed Mr. Lloyd Young as receiver and manager. Mr. Young went into possession of the Guelph and Orangeville premises on March 20, 1972 and a Mr. Ron Ogg, a Dunlop employee, took over the day to day operation of the business.

6 In June of 1971 Mr. Lister became a distributor of "Autopar" automobile parts and accessories under an agreement with Chrysler Canada Limited dated June 18, 1971. Mr. Lister sold these parts from both the Guelph and Orangeville premises. Dunlop did not object to this arrangement. The receiver seized not only the Lister Limited assets but, also, Mr. Lister's Autopar assets.

The Judgment at Trial

7 The trial judge, Rutherford J., held that the seizure of the Lister Limited assets was wrongful because Dunlop had not given Lister Limited a reasonable time to pay following the formal demand. The seizure of the Lister Autopar assets was wrongful on the simple ground that they were not covered by the debenture and the receiver, accordingly, had no right at all to possess them.

8 The trial judge also held that Lister Limited and Mr. Lister were entitled to exemplary damages for the unlawful seizures. He did not assess either these damages or the compensatory damages but, rather, directed that they be determined by a master on a reference. Rutherford J.'s reasons are reported at 19 O.R. (2d) 380.

9 The terms of Rutherford J.'s formal order are important and read as follows:

> **[Re Lister Limited]**
>
> 1. THIS COURT DOTH ORDER AND DIRECT that there be a reference before the Master at Toronto to take the following accounts and to determine the following amounts:
>
> > (a) An accounting in respect of the amounts properly payable by Lister Limited to the defendant as of March 20, 1972;
> >
> > (b) An accounting in respect of the realization of the accounts receivable of Lister Limited by the Receiver from and after March 20, 1972, and
> >
> > (c) An accounting in respect to the sale of stock, equipment and other assets seized from Lister Limited on March 20, 1972.
>
> 2. THIS COURT DOTH FURTHER ORDER AND DIRECT that the Master, in determining the amounts required by paragraphs 1(b) and 1(c) hereof be and he is hereby directed to determine whether the realization of the accounts receivable and the disposition of the assets seized by the defendant via its agent the receiver were properly carried out and if not, the amounts that would have been received, had the assets in question been properly disposed of and the accounts receivable properly realized.
>
> 3. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master assess the damages suffered by the corporate plaintiff as a result of the defendant's wrongful seizure of assets, such damages sounding in trespass and conversion.
>
> 4. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master, in making the assessment ordered in paragraph 3 hereof consider, inter alia:
>
> > (1) The findings made pursuant to paragraph 2 hereof;

(2) The fact that the defendant's seizure destroyed the corporate plaintiff's business and the loss of potential future income resulting from the destruction of the business of the corporate plaintiff.

5. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master assess an amount to be paid by the defendant to the corporate plaintiff as exemplary damages and that in making such an assessment he consider, inter alia, the following:

(1) The wilful nature of the defendant's trespass and conversion;

(2) The presence of an armed security guard at the time of the initial demand at the Guelph premises.

[Re R. E. Lister]

6. THIS COURT DOTH FURTHER ORDER AND DIRECT that the Master assess the damages suffered by the plaintiff, Ronald E. Lister, as a result of the defendant's wrongful seizure and detention of Autopar inventory and that in making such an assessment he consider, inter alia, the following:

(a) The autopar stock seized by the defendant and the value thereof;

(b) The amount of autopar stock sold by the defendant and the value thereof, if any, prior to the release of the balance of the stock to Chrysler;

(c) The value of the inventory released to Chrysler;

(d) Whether the disposition of any autopar stock was properly carried out and, if any, a determination of the amount that would have been received had the stock been properly disposed of;

(e) The loss of potential future income resulting from the destruction of the autopar business by the defendant.

7. THIS COURT DOTH FURTHER ORDER AND DIRECT that the Master assess an amount payable by the defendant to the plaintiff Ronald Lister, as exemplary damages and that in making such assessment he consider, inter alia, the wilful nature of the defendant's conduct as manifest in its continued detention of the Chrysler parts after becoming aware of the corporate plaintiff's lack of interest.

[Re Lister Limited]

8. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the corporate plaintiff pay to the defendant, the amount that the Master shall find payable should any amount be so found pursuant to paragraph 1(a) hereof forthwith after the confirmation of his report.

9. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant pay to the corporate plaintiff the amounts that shall be found by him to be payable by the defendant to the corporate plaintiff pursuant to paragraphs 3 and 5 hereof, forthwith after the confirmation of the said report.

[Re R. E. Lister]

10. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant pay to the plaintiff, Ronald E. Lister, the amounts found due and payable by the Master pursuant to paragraphs 6 and 7 hereof forthwith after confirmation of his report.

11. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of the said reference shall be reserved until the Report of the Master pursuant hereto is received by the Court.

12. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant do pay to the plaintiffs, their costs of this action to date in full, on a party and party basis forthwith, after the taxation hereof.

13. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that in all other respects this action is dismissed.

10 It may be noted that the paragraphs relating specifically to Lister Limited are 1-5 and 8 and 9 and those relating specifically to R.E. Lister are 6, 7 and 10.

The Appeal and Cross-Appeal to the Court of Appeal

11 Dunlop appealed to the Court of Appeal from this judgment and the individual plaintiffs cross-appealed with respect to the denial of their claim to be relieved from obligations to pay on guarantees given to Dunlop. The Court of Appeal, in allowing Dunlop's appeal, held that in the circumstances of the case Lister Limited had been allowed a reasonable time to meet the demand for payment and that, accordingly, the seizure was lawful. It further held that while damages should be paid for the seizure of Mr. Lister's Autopar assets the award of exemplary damages was "not appropriate". The cross-appeal was dismissed. The Court of Appeal's reasons are reported at 27 O.R. (2d) 168.

The Appeal to the Supreme Court of Canada

12 The plaintiffs appealed from the order of the Court of Appeal to the Supreme Court of Canada. The Supreme Court allowed the appeal and restored the trial judgment without variation. In the result, then, the compensation payable to Lister Limited and to Mr. Lister was to be determined by the master under the directions contained in the formal judgment which I have quoted. The reasons of the Supreme Court are reported at [1982] 1 S.C.R. 726.

The Reference before the Master

13 The reference was conducted by Master W. C. McBride. He made the following findings. (The references in square brackets are to the paragraphs in the formal judgment which directed the reference.)

1. Amount payable by Lister Limited to Dunlop, upon consent of parties [para.1(a)]	$127,855.41
2. Accounts receivable realized [para.1(b)]	23,229.13
3. Amount realized for stock [para.1(c)]	27,418.00
Amount realized for fixtures and other assets [para.1(c)]	11,550.00
4. (a) Total amount that would have been realized if accounts receivable properly realized, 23,229.13 (see para.2 above) plus 16,500 [para.2]	39,729.13
(b) Total amount that would have been realized if the inventory supplied by Dunlop properly disposed of, 27,418.00 (see para.3 above) plus 10,000 [para.2]	37,418.00

(c) Total amount that would have been realized if non-inventory assets properly disposed of, 11,550.00 (see para.3 above) plus 32,700.00 and 5,000 for motor vehicle leases [para.2]	49,250.00
[The total of 4(a), (b) and (c) is	$126,397.13.]
5. Damages suffered by Lister Limited [para.3]	
(a) for loss of assets 126,397.13, rounded to	126,000.00
(b) for loss of potential future profits, calculated from 1972	450,000.00
6. Exemplary damages for Lister Limited [para.5]	35,000.00
7. Damages suffered by R.E. Lister (Autopar business) [para.6]	
(a) for wrongful seizure and detention of Autopar inventory	35,000.00
(b) for loss of potential future profits calculated from 1972	300,000.00
8. Exemplary damages for R.E. Lister [para.7]	35,000.00

14 In the result the total damages of Lister Limited were assessed at $611,397.13 rounded off to $611,000.00 and those of R. E. Lister at $370,000. The master left the matter of interest for the consideration of the judge "who receives my report". The plaintiffs then brought the report before Rutherford J. on a motion in which the notice said that the relief requested was "an Order disposing of the matters left outstanding by [the master]" (they related to set-off, prejudgment interest, and costs) and "such other matters as counsel may advise and this court permit." Material filed later with Rutherford J. shows that the parties, or, at least, the plaintiffs, sought "a single judgment incorporating the Master's figures in your disposition" (paragraph 3(b) of the plaintiffs' reply submission to Rutherford J.).

The Further Judgment of Rutherford J. on the Report

15 In what is entitled the Final Judgment Rutherford J. "adopted" the report of the master with the single exception of refusing to round down the $126,397.13 amount in paragraph 5(a) and he then "incorporated" the report into the judgment. The judgment also contained the following dispositions:

16 (1) It set off against the $127,855.41 owing to Dunlop the amount of $126,397.13 in damages and ordered that the resulting difference together with prejudgment interest on it (the total being $3557.72) be paid to Dunlop.

17 (2) It added prejudgment interest of $310,852.27 on that part of the $450,000.00 portion of the judgment in favour of Lister Limited that Rutherford J. considered did not represent pecuniary loss arising after the date of the judgment, with the result that the total judgment in favour of Lister Limited was $795,852.27.

18 (3) It added prejudgment interest of $340,844.13 on that part of the $300,000 portion of the judgment in favour of R. E. Lister that Rutherford J. considered did not represent pecuniary loss arising after the date of the judgment and on the award of $35,000 general damages with the result that the total judgment in favour of R. E. Lister was $710,844.13.

19 (4) Costs of the reference, of an application before the Chief Justice of the High Court and of the application before Rutherford J. were awarded to the plaintiffs.

20 The procedure followed after the report was settled was unusual. It appears to me that having regard to the basic form of the trial judgment the proper confirmation procedure would have been for the report to be filed and notice of filing to be served and for the challenges to the report to be raised by way of appeal. See former rules 512 and 513 and Williston and Rolls, *The Law of Civil Procedure* (1970), at pp.1009-1016. I do not think that the paragraph in the original judgment respecting the reservation of the costs of the reference until the report of the master was "received" by the court of itself dictates a different course. The judge hearing the appeal could have disposed of the matter of costs. See, generally, *Martin v. Cornhill Insurance Co. Ltd.*, [1935] O.R. 239 at 242. In any event, we were informed that counsel for the parties (Mr. Cherniak and Ms. Sanderson did not represent Dunlop at that time) together decided upon the course that was followed, although, apparently, not upon all of its details. On the motion before Rutherford J. counsel for Dunlop objected to the report, submitting that it contained "fundamental errors in principle". Counsel for Dunlop further submitted that, although counsel for the plaintiffs had argued that for Rutherford J. to consider Dunlop's objections was in effect to have a judge sit on appeal from the report, "[w]e make no apology for that result which has always been the effect of a reference by the trial judge to a master for assessment and report back to the trial judge for final judgment". (I do not read the trial judgment as being one directing a "report back" except, possibly, with respect to costs.)

21 Counsel for the plaintiffs were adamant that the judge should not concern himself with the legal or factual merits of the master's report. It was noted that the transcript of the evidence given before the master was not yet available.

22 The learned judge, obviously, acceded to the plaintiff's submissions and, apart from the very minor variation of not rounding off one of the calculations, adopted the master's report.

23 Both of the standard procedures for having a challenged report confirmed (by way of appeal or on the report back to the referring court) require the confirming judge to vary the report in the respects in which it reflects error if the error is of such a nature that it requires correction, or, at least, to refer the matter back to the master. The process followed in this case has resulted in the appeal before us being one straight from the master without our having the benefit of the confirming judge's views. Further, I am not satisfied that there has been any net saving of time or expense in the procedure that was followed. If the confirming judge had addressed himself to the merits of the report and varied it in accordance with his views on the merits, further steps in the proceeding might have been unnecessary. If a transcript of the evidence was necessary, as I think it clearly was, the judge's consideration of the report should have been deferred until the evidence was before him.

24 I note that counsel for the plaintiffs asked the judge to express his comments in principle on the master's method of assessment because such comments "could be of great assistance to the parties and to the appellate forum". The judge's reasons express no opinion whatsoever on the method of assessment. Before us counsel for the plaintiffs submitted that the judge in adopting the report must be taken to have considered that its approach was in accord with his trial judgment. I would say, quite simply, having regard to the main submission made before him on behalf of the plaintiffs that he should merely incorporate the report in his final judgment, and the absence of anything in his reasons given on the plaintiffs' motion which can be construed as approval of the reasoning in the report, that I do not consider that there is any substance in this argument.

THE INITIAL MAJOR SUBMISSIONS ON THE APPEAL AND THE CROSS-APPEAL BEFORE THIS COURT

25 Although they can only be fully understood in the context of the master's reasons for decision, to which I shall be referring shortly, it is convenient to list these submissions at this point. Some of them were modified in the course of the argument.

The Appeal by Dunlop

26 1. The master erred in awarding damages for future loss of profits of Lister Limited and R. E. Lister rather than considering the potential loss of future income as a factor in determining the damages payable for wrongful seizure.

27 2. There was no basis for capitalizing the loss of future profits over an arbitrary period of time.

28 3. The damages for loss of future profits were not foreseeable and were too remote.

29 4. The master erred in principle in his treatment of the accounting, and in his assessment of damages for Lister Limited, with respect to:

(a) accounts receivable;

(b) inventory supplied by Dunlop;

(c) office furniture, machinery, tools and equipment.

30 5. The master erred in awarding the $35,000, or any damages at all, to R. E. Lister for the seizure and detention of the Autopar assets.

31 6 Rutherford J. erred in setting off Lister Limited's damages against the amount it owed to Dunlop.

32 7. Rutherford J. erred in awarding prejudgment interest for the period before November 25, 1977 and in awarding interest from that date at other than 8 $^{1}/_{4}$% on those portions of the judgment on which interest was properly awarded.

33 8. The master erred in awarding punitive damages for matters which were not relevant and the total award of $70,000 for punitive damages was excessive.

The Cross-Appeal by Lister Limited and R.E. Lister

34 1. The master erred with respect to the damages he found relating to the seizure of Lister Limited's assets in that they should have been assessed on the basis of Lister Limited's normal selling price.

35 2. Rutherford J. erred in not awarding prejudgment interest on the entire amount of the general damages assessed for Lister Limited and R. E. Lister.

36 3. With respect to Lister Limited, Rutherford J. should have awarded set off not only with respect to the under-realization and the damages respecting the receiver's disposition of assets (totalling $126,397.13) but also with respect to the total general damages.

THE MASTER'S REASONS RESPECTING LISTER LIMITED'S CLAIM: REALIZATIONS BY THE RECEIVER, DAMAGES, AND LOSS OF POTENTIAL FUTURE INCOME

37 This part of the case is concerned with the directions given to the master in paragraphs 1(b) and (c), 2, 3, and 4 of the formal judgment which I have set forth earlier in these reasons.

Accounts Receivable

38 With respect to the accounts receivable the master found that $23,229.13 out of what was "in reality" available for collection ($41,000) was collected. He also found that a further $7500.00 would have been collected "had the receiver gone about this particular endeavour with a more positive attitude" and taken certain particular steps which he had not taken. He also allowed $9,000.00 for a debt owing by Dunlop to Lister Limited shown in Lister Limited's records. In the result he found that the receiver should have realized a total amount of $39,729.13. This amount is challenged by Dunlop as being too high.

Dunlop Inventory

39 Lister Limited's inventory supplied to it by Dunlop was purchased by tender by Dunlop for $27,418. The master found that this was an adequate and reasonable amount in the circumstances. No one would have been prepared to pay more for it on a sale by tender. The standard which the master applied was that of "a liquidation sale properly carried out".

40 In dealing with the question of damages "for the wrongful seizure and sale" of the assets the master found the total cost of the Dunlop inventory to Lister Limited to be $40,000. Because of certain sales made by the receiver during the period March 21 to April 21, 1972 he assessed the cost to Lister Limited of the Dunlop inventory sold by the receiver to Dunlop at $37,500.

41 Lister Limited argued that it was entitled to damages amounting to the full normal selling price of the inventory seized. The master did not think this was a sound submission. He reviewed several judicial decisions. He said that "the measure of damages should be the victim's actual loss, and not necessarily the market, retail or other value of the goods converted." He observed that Lister Limited had operated at a loss and said that "[t]he fact is that the cost to Lister Limited of the Dunlop merchandise plus the cost of selling it was greater than the selling price which I assume represented the market value". He further said that "[c]learly, Lister Limited suffered no loss by having this merchandise taken from it" and that "[i]t is accordingly not entitled to damages for the wrongful seizure of the Dunlop inventory." However, he went on to hold that Dunlop could not be permitted to profit by its wrongdoing and that Lister Limited was entitled to the difference between what it paid for the Dunlop inventory, $37,500.00, and what Dunlop paid to re-acquire it, $27,418.00. Since the sum of $37,500 was not mathematically precise he allowed $10,000 for this difference. In the result he allowed $37,418.00 under this heading. Dunlop submits that the master erred in allowing the additional $10,000. Lister Limited submits that he should have allowed the normal selling price.

The Non-Dunlop Inventory

42 This received very little treatment in the master's reasons and none in his report. There was evidence that this inventory (comprising items such as oils, wheels, anti-freeze and other like materials) cost Lister Limited $8,400. Lister Limited was claiming some $25,254.16 for it. The master held that there was no evidence of which he was aware that Lister Limited had been selling this merchandise at other than a loss in the months before the conversion. He held that Lister Limited suffered no loss as a result of the seizure of this inventory and was entitled to no damages in respect of it.

43 Lister Limited submitted that it should receive $25,000 for this part of the seizure or, at the least, $8,400.00. Dunlop submitted that the result was right.

Non-Inventory Assets

44 These were referred to in the master's reasons as "the fixtures and other assets" and comprised office furniture, machinery, tools and equipment. While the evidence and the master's reasons could be clearer on this (the discrepancies in the reasons seem to be clarified in the report itself) it appears that the receiver sold these assets for $11,550.00 in separate lots of $7,300.00 and $4,250.00, respectively. The master found these sales to be no reflection at all of the value of these assets. Lister Limited's evidence was that these assets had a market or replacement value at the date of conversion of $54,719.26. The master allowed a further $32,700 in addition to the $11,550.00 under this heading and, also, $5,000 for the residual value of three motor vehicle leases respecting vehicles which Lister Limited had leased from a dealer. The total under this heading was, then, $49,250.00.

45 Dunlop attacks the addition of $32,700.00 to this part of the claim on the basis that the master had held that the sale which resulted in the proceeds of $11,550 had been "properly conducted".

46 I shall deal with the contentions respecting the four areas of loss just described later in these reasons in my determination of Lister Limited's compensatory damages.

Loss of Potential Future Profit

47 Colin Loudon of the firm of Peat, Marwick, Mitchell & Co., chartered accountants, and the manager of that firm's valuation department, gave expert evidence on behalf of Dunlop on this issue. I shall have more to say about his evidence later in these reasons but for now quote the whole of the master's reasons on the loss of potential future profit. They deal, in passing, with one aspect of Mr. Loudon's evidence. They read:

> The overwhelming issue between the parties in respect of the assessment of these damages is that of the potential future income of Lister Ltd. The defendant, with an inflexibility that almost attracts admiration, insists that there is no loss of

potential future income because Lister Ltd. would never have generated a profit no matter how long its corporate existence might have been allowed to continue. The plaintiffs argue that the potential for profit in the future was a lot more than that.

I propose to deal first with the expert's report filed, in part only, by the defendant. The author of the report appears to be Peat, Marwick, Mitchell & Co., chartered accountants. In fact the substantial author of the report is Mr. Colin Loudon of that firm. I have read the report as filed and the transcript of Mr. Loudon's cross-examination. Having done that I have little difficulty in dismissing the report as being of no assistance whatever to me in making the assessment of loss of potential future profits of Lister Ltd. and Lister Autopar.

The cross-examination of Mr. Loudon clearly established several facts. Perhaps the most significant is that Mr. Loudon simply could not handle the concept of potential future profits in the absence of a so-called "track record". If there were no profits in the past there could be no potential profits in the future, according to him. That is a comfortable position to take but it is not one I am permitted to hold. It also lacks merit. Mr. Loudon and his colleagues made no effective attempt to determine why Lister Ltd. had not shown a profit in its 19 months of corporate life. They made no outside investigation at all, no attempt to seek information from Lister himself, his salesman, Moriarity, the staff of Lister Ltd. or any of its customers. They learned nothing of the vicious treatment accorded Lister Ltd. by Dunlop in respect particularly of stocking and competition. They knew nothing of Lister's plans to become a distributor for Goodrich, to terminate the Dunlop franchise and to operate out of the Orangeville premises which he owned.

It must surely be obvious to anyone concerned with this matter that on March 19, 1972, the Dunlop franchise held by Lister Ltd. had no future. However Lister Ltd. did, potentially. Really what Mr. Loudon and his colleagues did, in accordance with their instructions, was to attempt to value Lister Ltd. as a business in February, 1972. With the documentary evidence made available to them they had little difficulty in concluding that the business was worth nothing. That is of no assistance to me whatever. I am concerned with the potential future of Lister Ltd. after March 20, 1972.

In his evidence, Mr. Loudon said he thought a year and a half to two years would be sufficient time for Lister Ltd. to be "approaching an established market standpoint." If that means what I think it does then Mr. Loudon is in conflict with the officers of Dunlop and Chrysler regarding the length of time required to establish a franchise dealership.

For these reasons I do not propose to rely on Mr. Loudon's evidence or the Peat, Marwick report in considering the matter of the potential future profitability of Lister Ltd.

. . . . .

The final item of general damage awarded to Lister Ltd. is the loss of potential future profit. I have already stated why I do not find the defendant's evidence in this regard to be of any assistance to me. That evidence consists of the Peat, Marwick, Mitchell & Co. report as filed and the evidence of Colin Loudon. There was no other evidence regarding potential future profits adduced by the defendant. The plaintiff's evidence on this issue consists of that of Lister, Moriarity and Lacey, the last named being the tire sales manager or representative for the Guelph, Orangeville area for B. F. Goodrich Co. in 1972.

I accept the evidence offered on behalf of Lister Ltd. that in the early part of 1972 Lister had resolved to terminate the Dunlop franchise, vacate the Guelph premises, move the Lister Ltd. operation to his own premises in Orangeville and become a Goodrich warehousing dealer for about the same area as he had been servicing as a Dunlop dealer unless Dunlop changed its treatment of him by resolving some of the difficulties he outlined in his letter of November 8, 1971 to J. Flynn, Dunlop's regional manager, filed as trial Ex.35. He obviously waited too long and Dunlop moved first.

However, it is clear from the evidence that in March, 1972, the future of Lister Ltd. was with the prospective arrangement with Goodrich, not with Dunlop. The Goodrich tires were superior to the Dunlop stock, they had to be, and their availability was much better than anything Dunlop had been able to achieve. Indeed, Lister's evidence was that Lister Ltd. had lost substantial sales of farm equipment tires in the Orangeville area because Dunlop could not meet reasonable delivery dates or could not supply the required tires at all.

> I have a little doubt but only a little, that had Lister Ltd. succeeded in making the move to Orangeville and the switch from Dunlop to Goodrich it would have become a profitable operation. It is in this respect that I think Lister Ltd. was deprived of future profits by the seizure of March 20, 1972. It is perhaps worth noting that according to trial Ex.15 and Lister's own evidence Lister Ltd. had gross sales in its first year of $235,000.00. Its sales in its final eight or nine months of corporate activities were at the rate of about $250,000.00 per annum. These gross sales rates were achieved in spite of the direct competition from Dunlop and the poor quality of the Dunlop inventory which Lister testified never did improve while Lister Ltd. was in the business.
>
> In attempting to assess the probable future profits of Lister Ltd. it is necessary to consider several limiting factors. These include the unpredictability of the tire business, and, for that matter, the economy generally, the uncertainty of the future of Lister Ltd. should Ronald Lister's health have failed, or worse, and the uncertainty that must almost always exist in the type of dealership arrangement that Lister Ltd. would probably have made with Goodrich. It seems to me that these factors would be given due weight if the potential profit were discounted by 50%. With regard to Ronald Lister himself I might point out that he was 42 years old in 1972 and has survived the last 11 years in apparently good health, although I should think that selling tires would be easier on one's constitution than living with this kind of lawsuit for that period of time.
>
> In my opinion, Lister Ltd. would probably have realized annual gross sales of $500,000.00 relatively quickly under the prospective arrangement with Goodrich and the Sunoco stations with which Goodrich had an arrangement somewhat similar to that Chrysler had with British Petroleum. Lister Ltd. would not have had to start all over again with Goodrich. It already had its sales and service organization and a large number of accounts most of which would probably have stayed with it.
>
> There is no reason why Lister Ltd., under its prospective dealership arrangement with Goodrich, and perhaps, in the future if it became advisable, with one of the other tire companies, could not have enjoyed a corporate life of 100 years or more. The length of its life has nothing to do with the continued existence of any of its officers and shareholders. I think, however, that as a practical matter I should limite the potential life of Lister Ltd. to 30 years. There must be a limit to the distance one can peer into the future. I think a net profit of 10% of gross profits or, in this case, $50,000.00 per year would not be improbable under a reasonable working arrangement with Goodrich. The actuarial evidence called by the plaintiffs seems to establish the present value of $50,000.00 per year for 30 years at about $900,000.00. The application of the 50% discount factor reduces this to $450,000.00, and that is the amount I assess as damages to Lister Ltd. for loss of potential future profits.

Summary

48 As indicated earlier in these reasons the master added the various damage items together and assessed Lister Limited's total damages at $611,000.00. This amount includes an award of punitive damages of $35,000 with which I shall deal later in these reasons.

THE MASTER'S REASONS RESPECTING R.E. LISTER'S CLAIM (re AUTOPAR BUSINESS): DAMAGES AND LOSS OF POTENTIAL FUTURE INCOME

Damages for Wrongful Seizure and Detention of Autopar Inventory

49 As indicated earlier in these reasons the master assessed Mr. Lister's damages for the wrongful seizure and detention of the Autopar inventory at $35,000.00. With respect, it is difficult to understand the master's reasons in support of this award and Mr. Appel candidly stated that he could not support it on the basis of the master's reasons, which were flawed. However, he said that it could be supported on a different line of reasoning. I shall defer reference to these submissions until later.

Loss of Potential Future Profit

50 Once again it is of assistance to quote that part of the master's reasons which are concerned with this issue:

Again, as in the case of Lister Ltd., I find the defendant's evidence, consisting of the report of Peat, Marwick, Mitchell & Co. and the evidence of Colin Loudon, to be of no assistance to me in assessing the damages of Ronald Lister. Indeed, with respect to the Autopar franchise, Colin Loudon conceded in cross-examination that the report was in error in stating that it, like Lister Ltd., was unprofitable. It had made a small profit.

. . . . .

The evidence concerning the creation, operation and future prospects of the Lister Autopar franchise was given by Lister and Moriarity and by James Hollister, who was an officer of Chrysler Canada Ltd. from 1960 to 1973. The evidence at trial of the late M.A. Closs, also an officer of Chrysler in 1971-2 was read into the record in these proceedings. In my opinion the most compelling evidence is that of James Hollister. He terminated his association with Chrysler in 1973 and since about 1975 has had no apparent contact with Ronald Lister. He was a disinterested and credible witness. In 1971, when the Lister Autopar franchise was created, Hollister was dealer wholesale development manager in charge of customer development for Chrysler. He said he had known Ronald Lister since the early 1960's and Lister had an excellent background for an Autopar franchise. He testified that Chrysler had a contract with British Petroleum Ltd. to supply batteries and accessories to B.P. service stations of which there were 35-40 in the Guelph service area. He said he would expect Lister Autopar to have realized gross sales of $3,000.00-$4,000.00 annually per service station. His evidence was that Lister Autopar would have been the exclusive Autopar dealer in the area. His estimate was that Lister Autopar, servicing the Guelph area B.P. stations as well as selling Autopar parts to other Guelph area accounts as they were developed, would have had gross sales of $250,000.00 in the second year of operation and $500,000.00 in the third year. He said the existing Autopar franchise in Kitchener was to be phased out and that area with a sales potential of $500,000.00 annually would have been assigned to Lister Autopar. His evidence was that Chrysler would not have objected to Lister Ltd. switching from Dunlop to Goodrich as a tire supplier. He said it might have been a plus for Chrysler had that been done. It undoubtedly would have been a plus for everyone concerned, including Dunlop.

Mr. Hollister also testified that a receivership or bankruptcy would be very damaging to one's business reputation, that it would be difficult now for Lister to get back into the franchise business because he would lack credibility due to these proceedings, that Chrysler would not have been opposed to Lister continuing with the Autopar franchise after the March 20, 1972 seizure, had Dunlop permitted him to do so, that it was reasonable for Lister to rely on Dunlop's assurances for an exclusive franchise territory, its sales forecast and the supply of a reasonable inventory, and that if these conditions were broken it would be virtually impossible for the franchise to succeed and, finally, that if Dunlop controlled all of Lister's property in June, 1972, by mortgages or otherwise, Chrysler would not have continued with him as an Autopar distributor.

Hollister's gross sales estimate for Lister Autopar was $500,000.00 annually after the second year with a potential for the same annual sales for the Kitchener area when and if that were assigned to him. The discount factor[s] I mentioned in respect of the potential future profits of Lister Ltd. apply to the Lister Autopar franchise. In addition the uncertainty of Lister ever being given the Kitchener area should not be minimized. Finally, the fact that the Autopar operation could not be switched to a different supplier if Chrysler decided to terminate the franchise, unlike the case of Lister Ltd. where the supply could have been and probably would have been switched from Dunlop to Goodrich, put Lister Autopar very much at the mercy of Chrysler which at any time could have changed its corporate policy in such a way as to have eliminated Autopar franchises in general and Lister Autopar in particular.

In giving effect to the estimated sales potential of Lister Autopar and the discount factors as I have just referred to them, and assuming on this basis a franchise life of 15 years, I would allow the potential future profit at 40% of a 10% net profit on annual sales of $600,000.00 for 15 years, the present value of which is, according to the actuarial evidence, $300,000.00. The terms of 30 years for Lister Ltd. and 15 years for Lister Autopar run from 1972, not the present time.

Summary

51 As is indicated earlier in these reasons the master added together the $35,000.00 damages for the wrongful seizure of the Autopar inventory, punitive damages also in the amount of $35,000.00, and the $300,000.00 for loss of future profit to arrive at a total assessment for R. E. Lister of $370,000.00.

DAMAGES TO BE DETERMINED BY THIS COURT

52 Both parties concurred in the submission to this court that if we were of the opinion that the master's assessment of damages was in error and could not stand we should determine the damages ourselves rather than remitting them for re-assessment by a judge or master. We accede to this submission.

THE DETERMINATION OF LISTER LIMITED'S COMPENSATORY DAMAGES

53 I use the term compensatory to distinguish this part of the reasons from that concerned with punitive damages.

54 The key directions are contained in paragraphs 3 and 4 of the trial judgment which, for convenience, I repeat:

> 3. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master assess the damages suffered by the corporate plaintiff as a result of the defendant's wrongful seizure of assets, such damages sounding in trespass and conversion.
>
> 4. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master, in making the assessment ordered in paragraph 3 hereof consider, inter alia:
>
>> (1) The findings made pursuant to paragraph 2 [relating to the amounts that would have been received on proper realizations and dispositions] hereof;
>>
>> (2) The fact that the defendant's seizure destroyed the corporate plaintiff's business and the loss of potential income resulting from the destruction of the business of the corporate plaintiff.

55 It is clear that the major direction is contained in paragraph 3. I interpret it as directing, no more and no less, that the damages are to be assessed according to the appropriate legal principles which are applicable to the determination of damages resulting from the tort of conversion. The directions in paragraph 4 are to be followed in the context of the general framework of assessment of conversion damages. On the positive side paragraph 4 contains the direction that the master is to take into account that the seizure destroyed Lister Limited's business. However, on the negative side, it does not direct that the master is to award, separately, damages respecting the seizure of the assets, taking into account under-realizations, etc. and, also, compensation for loss of potential future income. To repeat, the governing direction is in paragraph 3 and paragraph 4 merely directs the master to "consider" the matters referred to in it (although it contains the finding that the business was destroyed) in implementing paragraph 3. This interpretation is made clear by the terms of paragraph 9.

56 In my respectful view the master erred in two major respects. First, he added the damages which he found to flow directly from the seizure of the assets of Lister Limited to the damages for loss of future income without giving any consideration to whether this involved an element of double recovery or duplication. This is contrary to the direction in the judgment and the law of damages. Secondly, he calculated the amount of the loss of future income on arbitrary and erroneous principles. I shall return to these points shortly.

57 The master found, on a large quantity of evidence, aspects of which were capable of supporting different conclusions, that Lister Limited had a potential for future profit in the tire business as a Goodrich dealer. This finding is attacked by Dunlop but, in my view, it is clearly supportable by the evidence and I see no compelling reason for interfering with it. In this respect I interpret the direction in paragraph 4(2) of the trial judgment as referring to Lister Limited's tire business generally and not as confined to the Lister Limited Dunlop franchise business. Dunlop was merely a vehicle for Lister Limited to carry on the tire business and it was open to Lister to continue its business after securing a new supplier.

58 Dunlop submits that the damages in this respect were not foreseeable and too remote. Since we are concerned with damages flowing from an intentional tort I regard the remoteness principle as requiring that the damages flow as a direct result of the tort: *McGregor on Damages*, 14th ed. (1980), para.1087, note 33; Hart and Honoré, *Causation in the Law* (1959) at p.235; and *Allan*

v. New Mount Sinai Hospital (1980), 28 O.R. (2d) 356 at 365. In this regard, it is clearly a supportable finding on the evidence that, but for the tort, the only reasonable course of action open to Lister Limited was to acquire a new supplier, namely Goodrich.

59 The master completely disregarded Mr. Loudon's evidence because Mr. Loudon was of the view that there would be no future profit for Lister Limited as a Dunlop dealer and the master took a different view of Lister Limited's profit potential. In my view, while the master was quite entitled to take the view that Lister Limited did have a future profit potential he was not, on this account, justified in rejecting all of Mr. Loudon's evidence, and, in particular, his evidence on how predicted future profits (if there were such a prediction) are to be valued in the context of a business loss claim.

60 While the calculation of damages and, particularly, damages with respect to future loss, is far from an exact science and inevitably must involve some steps which could be called arbitrary, there are degrees of arbitrariness. In my respectful view, there was no warrant in the evidence, or in principle, for the master to award Lister Limited thirty years of net profit. This was completely arbitrary. Why thirty years? Why not fifteen or forty-five? A slight variation in the number of years results in a large variation in the ultimate award. The reducing of the award to its present value in 1972 does not, of course, cure this error.

61 The master seems to have treated the case as virtually the same as one where damages for personal injury resulting in a total permanent disability over a particular number of future years are to be determined - or one where damages for a fatal accident are to be determined, where a similar approach is adopted. It was not this kind of case but, rather, one where a business was destroyed and the task was to determine the compensation in money for this destruction. Unlike in the case of death or total permanent disability, the plaintiff in this case is still in existence and able to carry on a new business. The plaintiff could not recover more than the value of the business it lost (which, of course, takes into account predicted future profits). It appears that the master's approach results in an award of an amount greatly exceeding this value.

62 The only evidence in the case bearing on the determination of the damages flowing from the wrongful seizure having regard to the fact that the business was destroyed was that of Mr. Loudon and it, apart from what Mr. Loudon had to say about eliminating duplication in the valuation, is unchallenged. In this respect it should be noted that Lister Limited maintained before this court that the master's approach should be accepted but did not advance any arguments in support of it as far as principles relating to damages are concerned.

63 Mr. Loudon gave evidence that the value of a business sold as a going concern is typically related to the prospective earning capability of the business subject to the limitation that the value cannot be less than the liquidation value -that is, what would be received by the owners of the business upon a complete sale of assets and settlement of all liabilities. In other words, it is the greater of the amount reflecting the going concern approach and the amount reflecting the liquidation approach that is regarded as the value of the business.

64 The most common method of determining going concern value is that which relates to the capitalization of the future anticipated income of the business. This approach contemplates the estimation of a maintainable income level after tax and its capitalization at a rate of return which an investor would consider appropriate to the business in question. The determination of the rate of return involves a consideration of the rate of return on alternative investments followed by certain adjustments. The approach can be based on the risk-free investment adjusted for the risk involved in an equity investment as opposed to a more secure investment.

65 The greater the risk in the business the higher the rate of return that is required by the investor. In 1972 an example of a risk-free investment would be a Government of Canada long term bond which yielded between 6 and 7 per cent per annum. A prudent investor in a tire or automobile parts business as that of Lister Limited in 1972 would expect a rate of return of between 10 and 12 per cent. Mr. Loudon said that these rates would be applied "if the earnings could be considered quite stable and secure". If the earnings were less secure the rate, as indicated, would be higher.

66 The multiplier which is applied to the projected annual income is determined by dividing 100 by the capitalization rate. Accordingly, the capitalization rate and the multiplier have an inverse relationship - with the result that the higher the

capitalization rate is the lower the multiplier will be. Capitalization rates of 10 to 12 percent translate into multipliers of approximately 10 to 8.3.

67 I turn now to the application of this approach to the facts of this case. I am not prepared to disturb the master's determination of future annual gross sales of $500,000 as a starting point in the calculation. It is supportable on the evidence as is the determination of a net profit of 10%, $50,000.00. Lister Limited submits that in continuing with the calculation this amount of $50,000, or something close to it, should be used and that the amount should not be reduced by 50% for contingencies, which is the amount of the master's reduction. The risks, it submits, should be taken into account in the fixing of the multiplier to be applied to after-tax profit, which is presumably somewhere between 8.3 and 10. In considering this submission it is useful to review the risk factors and other factors bearing on net profits that were revealed in the evidence.

68 As indicated in the quotation from the master's reasons set forth earlier in these reasons the master took into account the unpredictability of the tire business and of the economy generally, Mr. Lister's health, and the uncertainty that must always exist in the type of dealership arrangement that Lister Limited probably would have made with Goodrich.

69 There was evidence in the form of the Peat Marwick report which was filed during Mr. Loudon's evidence that "the general economic outlook in early 1972 was optimistic as the Canadian economy demonstrated signs of recovering from the recession of 1970-71. Within the tire and auto services industry reasonable prospects for growth appeared to exist." Reference was made to a statement of the president of Dunlop "that the tire industry would remain highly competitive with continuing pressure on market prices." Further, "[t]he recent entry of Michelin into the market and the unknown extent of duty-free privileges accorded to that company was cited by industry executives as a major cause of uncertainty." Accordingly, while the outlook was far from pessimistic in the tire business the master probably was not too far off the mark in giving some effect to the "unpredictability" of the tire business.

70 For the purposes of the approach which I am following, the factor of Mr. Lister's health, which the master took into account, is not relevant. It would be of no concern to a purchaser of the business. We do not know what particular weight the master gave to this factor but since he noted that Mr. Lister was apparently in good health at the time of the reference it is probable that he did not attribute too much to it. In any event, as I have said, we cannot take it into account.

71 As far as competition was concerned, as was noted in the Peat Marwick report, the franchise was issued to Lister Limited at no cost to it, indicating that there was relatively easy entry into the market. This is not to suggest, of course, that someone without sales facilities could become a competitor.

72 According to the approach we are following the appropriate multiplier is to be applied to a predicted stable and secure after-tax level of income. With this in mind I am not prepared to depart from the general view of the master on what deduction should be made for contingencies. The risks involved in his contingencies could materialize at any point following the purchase of the business and it would be unrealistic to think that they could be adequately taken into account by going to the low end of the 8.3 to 10 range of multipliers. As I have said, this range itself assumed a stable income. Mr. Loudon made the point this way: "If the earnings could be considered quite stable and secure, then I think an investor would be looking at a rate of return in the neighbourhood of ten to twelve percent". This range applied to both the tire dealerships and automobile parts businesses. Any departure from what could be considered a stable after-tax income would require a multiplier lower than 8.3.

73 The only adjustment that I would make to the master's deduction for contingencies would be to reduce it by 5% to eliminate the probably minor effect which he gave to the factor of Mr. Lister's health, a factor which, as I have said, we cannot take into account. Accordingly, the deduction should be 45% of $50,000.00, which leaves us with a net income of $27,500.00 as what might be called a relatively secure or stable net income. The next step is to deduct income tax (at 25%) of $6,875.00 to result in a projected after-tax annual income of $20,625.00. In selecting the multiplier I would resolve the uncertainties of choice within the range described in Mr. Loudon's evidence in favour of the innocent party, the plaintiff, and use 10. This results in an amount of $206,250.00.

74 This calculation, however, does not end the process in this case. The purchaser in buying the business as a going concern is entitled to buy it debt-free. In the same vein if the business has a surplus of current assets the purchaser should pay for these. I do not consider the fixed assets with which the company carries on its business to be current assets for this purpose. They are something that the purchaser is entitled to receive as part of the purchase price of a going concern. If they were not owned by the business free of debt the purchaser would have to acquire them thereby increasing the amount of his investment and decreasing his rate of return. In this respect I consider the fixed assets of Lister Limited to be no more and no less than were required to operate the business as a going concern.

75 I turn now to Lister Limited's debt situation. As has been noted Lister Limited's obligation to Dunlop on the date of the receivership was $127,855.81. Against this amount Lister Limited should be entitled to set off the following:

```
Realizable accounts
receivable as found by the
master                          $39,729.13
Dunlop inventory at cost         40,000.00
Other inventory at
cost                              8,400.00
                                ----------
                                $88,129.13
                                ----------
```

76 The net deficit (after $88,129.13 is deducted from $127,855.81) which should be deducted from the capitalized value is $39,726.68. The resulting capital value after $39,726.68 is deducted from $206,250.00 is $166,523.32.

77 Mr. Cherniak submits that there should be a further deduction of two years after-tax profits for the time required to make the company profitable. The evidence was not uniform on the period of time that it would take for the 'new' business to achieve annual sales of $500,000. Mr. Moriarity said it would be three years. I think a deduction of two years after-tax profits is too much. Obviously some profit would be earned over the two year period and, further, there is no reason why a notional purchaser of the business should receive as a deduction from the purchase price the total amount of the profits which might otherwise be earned rather than the amount discounted as of the date of the notional purchase. Taking these factors into account I would deduct only one year's after-tax profits, $20,625.00. This results in a net valuation of $145,898.32. I would round this off to $146,000.

78 I turn now to the matter of double recovery or duplication which I referred to earlier. Lister Limited cannot recover both the value of its business as a going concern and, also, damages based on the value of its assets that were converted. The latter are, logically, contained in the former. They are reflected in the profit earning potential of the company which is embodied in the capitalization approach. To give both net asset value and the value of the business as a going concern would be contrary to the business practice reflected in Mr. Loudon's evidence and, also, the law respecting damages. See Waddams, *The Law of Damages* (1983) at pp.357-58.

79 How does the principle respecting double recovery apply in the present case? To answer this question we are first required to examine the parties' contentions respecting the master's findings relating to the compensation specifically referable to the accounts receivable, the inventory and the non-inventory assets. I shall deal with these contentions briefly at this point.

Accounts Receivable

80 There is evidence which supports the master's finding of $39,729.13 under this heading and I am not persuaded that he was wrong at arriving at this amount.

Dunlop Inventory

81 I am not disposed to interfere with the master's finding of $37,418.00 with respect to this category. The basic principle is that the plaintiff is to be compensated for its loss resulting from the conversion. A result that furnishes the plaintiff with the total cost to it of the inventory seized, in the particular circumstances of this case, comes close to accomplishing this result. I think that it is open to the plaintiff to say that regardless of the difficulties it may have had selling the inventory it is at least entitled to the cost of replacing what was taken. I am not persuaded what the normal selling price of this inventory would have been or, if it had been obtained, that Lister Limited, having regard to all of the attendant costs to be deducted from it, would have been better off than it would be by receiving the cost of the goods.

82 Lister Limited relied on *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, [1952] 1 All E.R. 796 in support of the normal selling price measure of damages. In doing so it admittedly was departing from the compensation for loss principle in favour of one based on the value of the benefit or advantage enjoyed by the wrong-doer. I do not think that the approach in *Strand Electric*, and similar cases (see Waddams, *The Law of Damages* (1983), pp.544-47), should be applied in this case. Dunlop, although a converter, in no way enjoyed the benefit of the property seized, in the same way as did the defendant in *Strand Electric*, to make it a reasonable proposition that it should compensate the plaintiff for more than its proven loss. I might usefully add at this point that, in so far as the element of wilfulness is present and considered relevant to the matter of doing justice in the case, there is the right to claim exemplary damages. I deal with this subject later in these reasons.

The Non-Dunlop Inventory

83 I think that the approach to this part of the claim is substantially governed by the same one as that taken to the Dunlop inventory. One might infer that the master was not impressed with the evidence relating to the claim for $25,254.16 but, in any event, his conclusion that there was no evidence that Lister Limited was selling at other than a loss, by which I take it he meant the net result after all sales costs were deducted, was supportable. He should, however, have allowed $8,400.00, the cost of this inventory, under this heading.

Non-Inventory Assets

84 I can see no justification for interfering with the master's disposition in this category. The witness Moriarity, who had considerable experience in this branch of the automotive parts business, supported the valuation of $54,719.21. Even though the master was of the view that there was no evidence before him "that would support a conclusion that the liquidation sale was not properly carried out" this in no way justifies treating the sale price as cogent evidence of value. It was, as the master said, a distress price. I cannot say that the master was wrong in arriving at his total valuation of $49,250 under this heading.

Summary

85 The total of the damages covered by the four categories I have just dealt with is $134,797.13. Even without taking into account Lister Limited's obligation to Dunlop of $127,855.41 this is less than the business loss valuation of $146,000.00 and so this latter figure must be taken as the total compensatory damages for Lister Limited.

86 I should mention, as is apparent in the calculations made under the capitalization approach, that this approach carries with it the satisfaction of the Lister Limited debt to Dunlop and the set-off issue is accordingly resolved in favour of Lister Limited in this way. This is conceded by Dunlop. As I have just indicated, if the damages covered by the four categories had exceeded $146,000 this would not have settled the accounts between the parties. There still would have been the set-off issue respecting the obligation to Dunlop. I also mention that it was submitted on behalf of Dunlop that if the capitalization approach was followed there would be no issue of mitigation to be resolved.

THE DETERMINATION OF R.E. LISTER'S COMPENSATORY DAMAGES

87 The principles and approach which I applied with respect to the Lister Limited compensatory damages are equally applicable here. It follows that the master, in my view, erred: (a) in adding the general damages for seizure and detention

($35,000.00) to the amount that he allowed for potential future profit ($300,000.00); and (b) in the manner in which he determined the award for loss of potential future profit.

88 As I have said, Mr. Appel submitted that the master's reasons for assessing the damages for wrongful seizure and detention of the Autopar inventory at $35,000 could not be supported but that the award could be justified on a different line of reasoning. Since I agree with the first part of this submission there is no point in setting forth or describing the master's reasons in any detail. I shall, however, refer to two aspects of it before turning to Mr. Appel's submissions.

89 The master found "[o]n uncertain evidence" that the receiver had sold Autopar stock having a cost price to Lister of $3,500. It is argued on behalf of Mr. Lister, and not denied, that neither the receiver nor Dunlop accounted to Mr. Lister for this. The master also found that "[t]he evidence establishes that there was a shortfall of $8,240.00 on the Autopar returns to Chrysler".

90 It is submitted on behalf of Mr. Lister that the seizure and return of the Autopar parts involved the following losses:

(a) the shortfall of $8,240.00;

(b) sales by the receiver of $3,500;

(c) lost rebates from Chrysler on the entire amount seized of $21,600.00; and

(d) lost potential profits on tires sold to Mr. Lister which he had at his farm of $1,760.00.

91 The evidence respecting the shortfall of $8,240 was conficting and confusing. The amount was mentioned in the evidence which Mr. Leon Closs, a Chrysler employee, had given at the trial before Rutherford J. Mr. Closs died before the reference and his trial evidence was read into the record on the reference. He had testified that as of February 1973 after all of Chrysler's parts had been returned to it by Mr. Lister the shortfall was $8,239.99. This evidence is directly contradicted by the terms of the three party agreement entered into by Dunlop, Chrysler and the Listers on May 31, 1972 in which it is recorded that Mr. Lister was indebted to Chrysler in the amount of $82,927.00 at that time and that upon the delivery to Chrysler of the Autopar parts which Mr. Lister then had at his two locations the debt of $82,927.00 would be fully satisfied. The delivery was made and I would rely upon the agreement in concluding that Mr. Lister is not indebted to Chrysler.

92 While the item of $3,500 merits separate treatment, the balance of Mr. Lister's claim, having regard to the principle of duplication applied with respect to the determination of Lister Limited's damages, even if it has some independent merit, cannot be allowed as such. Whatever its merit it is fully accounted for in the capitalization of profits to be awarded for the destruction of the Lister Autopar business.

93 The following might usefully be said. The receiver had the Autopar parts in his possession for just over two months, from March 20 to May 31, 1972. Having regard to the sales and profit record of Lister Autopar to that date ($56,000 sales for the past eight months and it was about breaking even during the preceding six month period) it is difficult to see how the detention of the goods could directly have resulted in loss of profits for the period of $35,000 or the $23,360 which appears to be sought in items (c) and (d) above.

94 I can see no reason why the defendant should not account to Mr. Lister for the sale of the stock costing Lister $3,500.00. There is no finding on what the receiver received for this stock (the master acknowledged that the evidence on which the finding itself was made was uncertain) and since it is claimed at its cost price of $3,500 I would allow this amount.

95 I turn now to that part of the claim relating to the loss of potential future profit. I have earlier quoted in full the master's reasons in support of his award of $300,000.00. I need not repeat what I said with respect to the error in the approach to the determination of Lister Limited's loss of profit and what, in my view, is the correct approach. My comments are equally applicable with respect to Lister Autopar.

96 Notwithstanding the errors in the master's approach some of the master's reasoning, in my view, can be usefully used in the determination of the proper amount. It may have been that the master's estimate of the annual gross sales at $600,000.00

on the basis of the evidence of Mr. Hollister and others was at the upper end of the potential range, having regard to the fact that the sales in the eight months preceding the seizure were about $56,000.00, but I am prepared to accept the $600,000.00 amount and that the net profit would be 10%, $60,000.00, as a starting point in the calculations - and then give consideration to the factors that should be applied to determine a predictably stable and maintainable net income for the business.

97 As far as contingencies were concerned the master in arriving at his 60% discount took into account the following:

(a) the same ones he considered with respect to the Lister Limited claim;

(b) the uncertainty of Mr. Lister being given the Kitchener area;

(c) the fact that the Autopar operation could not be switched to a different supplier if Chrysler decided to terminate the franchise; and

(d) the fact that Lister Autopar was at the mercy of Chrysler because it could have eliminated Autopar franchises in general and Lister Autopar in particular.

98 Once again it is contended on behalf of Mr. Lister that $60,000 should be regarded as a reasonably maintainable net profit, that it should not be subject to significant reduction for contingencies, and that any risk factors should be taken into account in selecting the applicable multiple, which is presumably within the range of 8.3 and 10. In considering this submission I would refer back to the relevant general factors discussed respecting Lister Limited which the Peat Marwick report indicated also applied to Lister Autopar.

99 There are certain additional features which should be considered. It appears from the Chrysler-R.E. Lister distributorship agreement of June 18, 1971 that by its terms Mr. Lister was not given any exclusive rights to sell Autopar products. Mr. Lister had "the non-exclusive right to purchase" from Chrysler automotive parts and was entitled to "merchandise" them "to contractual and/or non-contractual accounts" in a particular identified area. Chrysler had the right to reduce or otherwise change the area. The master said that it was Mr. Hollister's evidence that Mr. Lister would have been the exclusive Autopar dealer in the area. Mr. Hollister's evidence makes it clear that the only "protected accounts" for Lister in the Guelph area would have been some thirty-four or thirty-five B.P. stations. Apart from this arrangement, which was "contract business", Mr. Hollister testified that Mr. Lister could sell anywhere and, indeed, anyone else could sell anywhere. Matched against the terms of the agreement Mr. Hollister's evidence is somewhat confusing but the net result seems to be that the arrangement was not one which gave Mr. Lister exclusive rights with respect to all potential customers in the area.

100 Again, as far as competition was concerned, and as was noted in the Peat Marwick report, the franchise was issued to Mr. Lister at no cost to him, indicating that there was relatively easy entry into the market.

101 The terms of the agreement gave Mr. Lister little security. The agreement was to terminate automatically on the 31st day of December, 1971 or on the 31st day of December in any subsequent year unless it was renewed by the mechanism provided for in the agreement. This required Chrysler to notify Lister at least thirty days before the date of automatic termination. In addition Chrysler had the right to terminate the agreement at any time if Mr. Lister failed "to satisfy Chrysler that [Lister] has met the qualifications and fulfilled the requirements of the Agreement." On his part Mr. Lister could terminate the agreement on thirty days notice to Chrysler. Without suggesting that the relationship between Mr. Lister and Chrysler had not been a good one, the nature of the legal relationship between them was such that Lister or any other franchisee had virtually no protection should Chrysler be motivated at any time in the future to terminate the agreement.

102 The only adjustment that I would make to the master's deduction of 60% for contingencies would be to reduce it by 5%, as in the case of Lister Limited, since the factor of Mr. Lister's health should not be taken into account. Accordingly, I would arrive at a deduction of 55% with the result that I would select $27,000 as an appropriate amount for a predicted average net income. From this income tax (at 25%) of $6,750.00 should be deducted to arrive at the amount to which the multiplier of 10 should be applied, $20,250. The resulting capitalization of net profits is $202,500.

103 Mr. Cherniak has submitted, as in the case of Lister Limited, that there should be a deduction from this amount of two years after-tax profits to cover the time required to make the business profitable. Again, I think that a deduction of two years profits is too much. I would deduct half this amount, $20,250. The assessment of the business loss is then, $182,250, which I would round off to $182,000.

104 Any damages for the temporary conversion of the Lister Autopar assets before they were returned to Chrysler, could not, as I have indicated, possibly exceed the amount of $182,000.00 and so $182,000.00 represents the total damages for the conversion of the Lister Autopar assets.

EXEMPLARY DAMAGES

105 The following are the paragraphs in the trial judgment directing the assessment of exemplary damages:

> **Re Lister Limited**
>
> 5. THIS COURT DOTH FURTHER ORDER AND DIRECT that the said Master assess an amount to be paid by the defendant to the corporate plaintiff as exemplary damages and that in making such an assessment he consider, inter alia, the following:
>
> (1) The wilful nature of the defendant's trespass and conversion;
>
> (2) The presence of an armed security guard at the time of the initial demand at the Guelph premises.
>
> **Re R. E. Lister**
>
> 7. THIS COURT DOTH FURTHER ORDER AND DIRECT that the Master assess an amount payable by the defendant to the plaintiff Ronald Lister, as exemplary damages and that in making such assessment he consider, inter alia, the wilful nature of the defendant's conduct as manifest in its continued detention of the Chrysler parts after becoming aware of the corporate plaintiff's lack of interest.

106 The bases of the finding of trespass and conversion respecting Lister Limited and R. E. Lister are not the same. It will be recalled that the seizure of Lister Limited's assets was unlawful because Dunlop had not given Lister Limited reasonable time to comply with the demand for payment which was made on March 20, 1972, whereas there was no basis at all for the seizure of Mr. Lister's Autopar assets. They were not covered by the debenture which Dunlop sought to enforce against Lister Limited.

107 The findings of the trial judge and the observations of Estey J. for the Supreme Court of Canada bearing on exemplary damages are relevant. At trial Rutherford J. said:

> Returning to the case at bar, it is clear that once Mr. Lister received formal demand for the amount due to Dunlop under the debenture, there was no intention of allowing the plaintiffs any reasonable time to make payment. Even before Mr. Lister had finished reading the demands for payment, Mr. Young was stepping forward to identify himself as the receiver thenceforth in charge of running the business and to serve Mr. Lister with notice of his purported appointment. (19 O.R. (2d) 380 at 402-403.)
>
> . . . . .
>
> Included among the assets seized by the receiver on March 20, 1972, was an inventory of Autopar automobile parts, apparently with a value of in the neighbourhood of $100,000. These parts had been sold by Chrysler Canada Limited (hereafter "Chrysler") to Mr. Lister in his personal capacity. Mr. Lister's evidence, which I accept, was that he informed Mr. Young on March 20, 1972, that the Chrysler parts were owned by him (Lister) personally. In any case, Mr. Young was formally notified by a letter from Chrysler's solicitors dated March 23, 1972 (ex. 69), that the parts in question had been sold by Chrysler to Lister personally and that Chrysler was a creditor of Lister in respect thereof. (Further reference will be made to ex.69 later.) A copy of this letter was sent to Dunlop's solicitors who subsequently advised that the receiver

would retain possession of the Chrysler parts but would take no steps in respect thereof until he received their (Dunlop's solicitors) opinion as to the ownership of the parts: see ex.70. (19 O.R. (2d) 380 at 385-386.)

. . . . .

The Master shall be further directed to assess an amount payable by Dunlop to the corporate plaintiff in respect of exemplary damages. I am aware that such a direction is not usual (although a similar procedure was followed in *West City Motors Ltd. et al. v. Delta Acceptance Corp. Ltd.*, [1963] 2 O.R. 683, 40 D.L.R. (2d) 818) but I feel that it would be appropriate for the Master to make this determination in the context of an over-all assessment of damages. I find that exemplary damages are appropriate in this case given the wilful nature of the defendant's trespass which was manifest in the decision to seize without giving the corporate plaintiff a reasonable time to comply with its demand for payment. The plaintiffs also relied on the presence of armed security guards at the Guelph and Orangeville premises on and after March 20, 1972, as constituting high-handed conduct on the part of the defendant justifying the assessment of further exemplary damages. However, I would not attach a great deal of significance to this factor on the facts before me, although I agree that such conduct, at least in respect of the presence of a guard at the time of the initial demand at the Guelph premises, should be taken into account by the Master in making his assessment. (19 O.R. (2d) 380 at 411-412.)

. . . . .

The Master shall be further directed to assess an amount payable to Mr. Lister in respect of exemplary damages. I find the justification for awarding such damages once again in the wilful nature of the defendant's conduct which was manifest in its continued detention of the Chrysler parts after becoming aware of the corporate plaintiff's lack of interest therein. (19 O.R. (2d) 380 at 412-413.)

108 Estey J. in the Supreme Court of Canada said:

The Court of Appeal made no mention of the issue of exemplary damages as awarded by the trial Judge other than to observe that such an award was "not appropriate" in the case of the Autopar seizure. In its order the Court of Appeal did not include any exemplary damages for either seizure. The facts and circumstances of the receiver's entry into possession with an armed guard and the protracted delay by Dunlop in replying to the demand for the return of the Autopar parts to Chrysler are sufficient basis in my view for the exercise of the trial Judge's discretion to award exemplary damages here. The place in the law of Ontario of exemplary damages for wrongful seizure was not argued here nor does the record reveal any argument being directed below to the right of a trial Judge to make such an award in law. Accordingly, the matter is taken no further than to restore that aspect of the trial judgment. ([1982] 1 S.C.R. 726 at 748-749.)

109 The following excerpts from the master's reasons are relevant to this issue:

During the course of the reference, much evidence was adduced concerning the events that preceded the date of the purported seizure, March 20, 1972. Some of that evidence dealt with events surrounding the establishment of the franchise. Most or all of it went in over the objections of the defendant which argued that I was limited in my inquiry to the events of March 20, 1972 and later. I felt at the time of the objections and am now convinced that I was right in receiving that evidence. I am charged with assessing exemplary damages against the defendant in favour of Lister Ltd. and Lister personally. The conduct of the officers of the defendant toward Lister from the outset of their ill-starred relationship is surely material to my considerations in this regard.

. . . . .

The remaining assessments to be made are those of exemplary damages in favour of Lister Ltd. and Ronald Lister as proprietor of Lister Autopar.

Dunlop's reprehensible conduct toward Lister commenced during the negotiations for the franchise. Although the learned trial judge has found that the conduct of the Dunlop officials was not such as to support a claim for damages for deceit, that conduct was surely repulsive and offensive to one's sense of business decency. It began with the refusal to let Lister examine the sales records of the Dunlop store he was inheriting although they were apparently available at Dunlop's head office at Whitby. It continued through the supply of defective inventory, the development of direct competition by Dunlop in the area of operation of Lister Ltd. and the establishment of other dealers in that area. It would be difficult to imagine a more vicious course of conduct on the part of a franchisor. It may not have amounted to deceit in law but it certainly was corporate murder in fact.

The kind of corporate mendacity practiced by Dunlop on Lister Ltd. is well illustrated by the letter written by Flynn to Lister, dated October 21, 1971, and filed as trial Ex. 34. In it Lister is berated for stocking tires other than Dunlop inventory. The last paragraph of that letter is:

> Our Company's major aim is to have our Franchise Dealers operating profitably, projecting a good customer image with a long term association.

This at a time when Flynn must have known "the Company" was busy cutting the legs from under Lister Ltd. with direct competition it could not be expected to override. Also it was written some three weeks after Flynn had received a memorandum from the regional credit manager for Dunlop, Herrington, recommending among other things that the Lister Ltd. franchise be terminated. What hypocrisy!

The fact that Dunlop gave Lister Ltd. no notice before appointing a receiver and having him seize the company is indicative of a high degree of largely unexplained malevolence on the part of Dunlop. As far as I am aware, Dunlop never demanded payment from Lister Ltd. before March 20, 1972. The receiver just moved in on that date without notice. I cannot understand how Dunlop's solicitors could have advised that no notice was required. The particular solicitor who gave that advice is one who is ostensibly an expert in receivership and bankruptcy law. He should have known that "reasonable notice" was required in the case of *West City Motors Limited and Leslie v. Delta Acceptance Corporation Limited*, [1963] 2 O.R. 683, a case that had obviously been in the reports for nine years when Dunlop was advised no notice was required. Even for one who thought the *West City Motors* case was distinguishable the warning was there.

Counsel for the plaintiffs in argument wondered why Dunlop moved in on Lister Ltd. without notice. Its officers knew he could not run away and that he had substantial assets. He concluded there was no evidence why they did it. Counsel for the defendant in argument suggested that what was in the mind of the Dunlop officials on March 20, 1972, was important in gauging the degree of reprehensibility of their conduct. Of course, no evidence was called on this point but it seems likely that the Dunlop officials were the crew of a foundering ship and were prepared to destroy Lister Ltd. if it would help to keep Dunlop afloat a little longer. I suggest that is why they moved into Lister Ltd.'s sales area with direct competition. They deserve the severest condemnation for their treatment of Lister Ltd. This includes the contemptuous and arrogant conduct of the receiver and the almost unbelievable employment by him of armed and uniformed guards.

Lister Autopar was also destroyed by the total lack of concern by Dunlop and its legal advisers for fair play and decency. The evidence is that Lister Autopar's franchise with Chrysler would have continued had the strutting receiver not grabbed the Autopar inventory. There is no evidence of the slightest sense of urgency on the part of Dunlop or its advisers to give effect to the fact that Lister owned that inventory personally. The evidence suggests that Dunlop was mainly interested in putting Lister out of business. This it did, illegally.

110 I shall deal with the exemplary damages of Lister Limited and R. E. Lister separately.

111 With respect to Lister Limited the only relevant claim was that for the wrongful seizure of its assets. It is clear from the master's reasons that he based his award, in part, on matters quite outside the scope of this claim and of paragraph 5 - specifically on the pre-franchise agreement and pre-seizure conduct of Dunlop, which conduct, incidentally, had been held by the trial judge not to be actionable. On this ground alone the award, unless it can be independently justified, cannot stand. Also, I think Dunlop is right in saying that there was no evidence at all supporting the view that "the Dunlop officials were the crew of a foundering ship and were prepared to destroy Lister Limited if it would help to keep Dunlop afloat a little longer". The closest finding of the trial judge with respect to Dunlop's motives is as follows: "It was decided by, at the latest, the beginning of March, 1972 that this situation [Lister Limited's indebtedness] had become intolerable and a decision was taken by the defendant to terminate the Lister franchise and realize on its security" (19 O.R. (2d) 380 at 384).

112 The trial judge made a finding that the trespass and conversion were of a wilful nature. There are, I think, degrees of wilfulness. In this case there is no doubt that Dunlop had the right to enforce its security against Lister Limited. In this respect Estey J. said:

> That Dunlop was entitled to enforce its debenture by reason of the default of the Company under the promissory note and demand obligation secured by the debenture there is no doubt and no argument. ([1982] 1 S.C.R. 726 at 733.)

The problem was that Dunlop followed the wrong procedure by not giving Lister Limited the reasonable time to pay required by the circumstances. However, in this regard it was acting on legal advice. This would indicate that it did not intentionally violate Lister Limited's rights. The fact that the advice turned out to be wrong does not detract from this. Respecting the deliberate nature of Dunlop's conduct we have the observation of the trial judge which I have quoted that there was no intention of allowing the plaintiffs any reasonable time to pay.

113 As far as the conduct of the trespassing receiver which is relevant to the issue of exemplary damages is concerned, there is also a finding by the master that he adopted a "cavalier" attitude to the realization of the receivables, a finding which I would not disturb.

114 There is also evidence by Mr. Lister as to the arrogant attitude adopted by the receiver in his conduct of the receivership generally. No general finding was made on this by the master.

115 The direction with respect to the exemplary damages of R. E. Lister is set forth in paragraph 7 of the formal judgment. It sets forth the main consideration to be taken into account: the wilful nature of Dunlop's conduct in continuing to detain the Autopar parts after it knew that Lister Limited had no interest in them. The receiver was told by Mr. Lister on March 20, 1972 not to touch the Autopar inventory because it was owned by Mr. Lister personally and not Lister Limited. He repeated this information to the receiver more than once. Dunlop, as I have already said, was aware of Mr. Lister's separate Autopar business and so should have been alert to the fact that there would be inventory on the premises not owned by Lister Limited. I will not go into all of the aggravating features of Dunlop's indefensible and callous conduct with respect to the Autopar parts beyond saying that it destroyed Mr. Lister's Autopar business and resulted in Chrysler making a bankruptcy petition against him.

116 I turn now to the amounts of the awards for exemplary damages. As may be gathered I regard the conduct respecting Lister Autopar as being significantly more reprehensible than that relating to Lister Limited. I would not interfere with the $35,000.00 award respecting Lister Autopar. On the other hand, for the reasons I have given I do not think the award of $35,000.00 in favour of Lister Limited can stand, chiefly because it was significantly based on improper considerations. Also, for the reasons I have given, I do not think that its "wilfulness" is of the most serious kind. Dunlop at least thought with reason that it was acting within the law even if it did not intend to give Lister Limited any time to pay. I would reduce the award from $35,000 to $20,000 for Lister Limited.

PREJUDGMENT INTEREST

117 By reason of the basis on which I have assessed the damages of Lister Limited and R. E. Lister some of the initial submissions which were made on the appeal and the cross-appeal respecting Rutherford J.'s disposition of the interest claims no longer have the relevance that they at first had. Nonetheless it is of assistance as a matter of providing context for the issues respecting interest with which I must deal to recapitulate, briefly, the dispositions below and the submissions made with respect to them.

118 As I have said the master did not deal with the matter of interest. Rutherford J. dealt with it on the motion respecting the master's report as follows. He allowed interest on that portion of the $450,000 damages for loss of potential future profits of Lister Limited which, according to his calculation, related to the 12 year period from March 20, 1972 to the date of his judgment, March 16, 1984. The 12 year portion was $256,444 and the amount of interest was $310,852.27. The rate of interest which he selected was 8 per cent per annum from March 20, 1972 until November 24, 1977 and 12% per annum from and including November 25, 1977 to the date of judgment.

119 By reason of s.36(5)(d) of the *Judicature Act*, R.S.O. 1980, c.223, which provides that interest shall not be awarded on that part of the judgment that represents pecuniary loss arising after the date of the judgment, he refused to award interest on the balance of the $450,000. He mentioned no authority for the award of interest for the period from March 20, 1972 to November 24, 1977. He exercised his discretion under s.36(6)(b) of the *Judicature Act* in selecting the interest rate of 12% for the period from November 25, 1977. Apparently the basic rate required by s.36(3) was 8 $^{1}/_{4}$%.

120 He followed the same approach with respect to the damage for loss of future profits ($300,000.00) and $35,000.00 "general damages" for R. E. Lister. The total amount for pre-judgment interest was $340,844.13.

121 In the appeal Dunlop originally submitted that no interest should have been awarded for the period before November 25, 1977 and that the rate of interest for the period from November 25, 1977 to the date of judgment should be 8 $^{1}/_{4}$%. In the cross-appeal it was submitted on behalf of Lister Limited and R. E. Lister that the trial judge misapprehended the nature of the present value calculation in determining that a portion of the damages included future pecuniary losses forbidden by s.36(5)(d) and that interest should have been awarded on the full amount of the awards for loss of future profits.

122 Mr. Cherniak has withdrawn his challenge to the 12% interest rate and Mr. Appel acknowledges that the point raised in his cross-appeal is not relevant if the business loss damages are calculated on the going concern basis that I have followed. In the result the only area of contention that remains is that relating to the plaintiffs' entitlement to prejudgment interest for the period March 20, 1972 to November 25, 1977.

123 Before the amendment of the *Judicature Act*, R.S.O. 1970, c.228 by 1977 (Ont.), c.51, s.3 (which amendment enabled a court to award prejudgment interest in judgments for the payment of money on both liquidated and unliquidated claims) the power of the court to award prejudgment interest was circumscribed. The general rule was that the court could not award interest in judgments for unliquidated damages. There were two exceptions. One involved cases in which the claim was, as far as formal classification was concerned, one for damages but in reality amounted to one for payment of a just debt improperly withheld, and therefore covered by s.38 of the *Judicature Act*, R.S.O. 1970, c.228: *Popular Industries Ltd. v. Frank Stollery Ltd*. (1973), 1 O.R. (2d) 372. The other exception was provided for in s.39(3) of the *Judicature Act*, R.S.O. 1970, c.228 which read:

> (3) In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon.

124 In my view, if Lister Limited and R. E. Lister are entitled to prejudgment interest for the period March 20, 1972 to November 25, 1977 the only possible basis of entitlement must be s.39(3). They submit that it enables the court to award interest on the whole of their compensatory damages, that is on the damages for the destruction of the business which include, as indicated earlier in these reasons, the damages for the conversion of the inventories. It is contended on behalf of Dunlop that the provision enables the court to award interest only on the value of the goods converted. There could be no issue at all on this point, of course, if the provision used "on" in place of "over and above" before "the value of the goods". There could then be no answer to Dunlop's position.

125 The origin of s.39(3) is s.29 of the *Civil Procedure Act*, 3 & 4, Will. 4, c.42 (1833) (better known as *Lord Tenterden's Act*) which was in substantially the same terms. One difference is that the original statute said "may ... give Damages in the Nature of Interest" whereas s.39(3) says "may give interest in the nature of damages". There appear to be no reported decisions on the precise point raised. However, I have little doubt that Dunlop's contention that the provision enables interest to be awarded only on the value of the goods converted and not this *and* the consequential damages flowing from the conversion is the correct interpretation. I say this because I think the provision recognizes the general rule at common law that in actions for conversion the damages should be the value of the property converted at the time of conversion (see Roscoe's *Nisi Prius*, 18th ed. (1907), p.979 and *McGregor on Damages*, 14th ed. (1980), p.719, footnote 38) and that its purpose was to confer power on the court to award further damages in addition to the value of property converted, in the form of interest to compensate a plaintiff for not having the use of this value from the time of the conversion.

126 Both versions of the provision make it clear that the interest is damages, a form of consequential damages. The view at the time of the enactment of s.29 of the *Civil Procedure Act* was that damages for trover (conversion) "were limited to the value of the property". See *Balme v. Hutton* (1833), 9 Bing 471 at 477. Roscoe's *Nisi Prius*, 18th ed. (1907) at p. 927, citing *Balme v. Hutton*, says that s.29 was unnecessary for trespass (as opposed to conversion) actions because in these actions the damages "are unlimited". This, as indicated, was not felt to be the case for conversion actions and accordingly the statute did serve a useful purpose with respect to them.

127 I do not think that, having regard to the restricted view which the law took of the right to interest on various kinds of claims for money and which excluded entirely interest on claims for unliquidated damages (see the historical review in *The London, Chatham and Dover Railway Company v. The South Eastern Railway Company*, [1893] A.C. 429) it would be accurate to interpret s.29 (and s.39(3) of the *Judicature Act*) as conferring a right to claim interest on the consequential damages. To repeat, the interest itself is a form of consequential damages "over and above", i.e. "on", the value of the goods.

128 The plaintiffs rely on three decisions in support of their claims for interest on the total damages: *Cullen v. Affiliated Realty Corporation Limited*, Ont. H.Ct., October 30, 1978; *Re Weiss Air Sales Ltd.* (1982), 134 D.L.R. (3d) 706; and *Multivision Films Incorporated v. McConnell Advertising Co. Ltd.* (1983), 37 C.P.C. 307. In my view none of them support the plaintiffs' claim in this respect.

129 The judgment in *Cullen* was given in 1978 and the award of interest on damages for conversion of personal property to commence on April 3, 1973 was given under s.38(6) of the *Judicature Act*, R.S.O. 1970, c.228 as enacted by 1977 (Ont.), c.51, s.3(1). With respect, by the terms of s.3(2) of 1977 (Ont.), c.51, s.38(6) had no application to the period before November 25, 1977. However, the award of interest appears to have been based on the value of the property converted and on nothing more, and so the result is supportable for the period before November 25, 1977 under the former s.39(3).

130 In *Weiss Air Sales* the court appears to have allowed pre-November 25, 1977 interest on the proceeds of sale of inventory unlawfully seized on the basis that it was "fair and equitable". Once again the basis on which the interest was awarded did not exceed the value of the inventory seized and sold and, thus even if the case were not a proper one for the "fair and equitable" principle (payment of a just debt improperly withheld) it would seem to be covered by former s.39(3).

131 The decision to award pre-November 25, 1977 interest in *Multivision Films* was based on the just debt improperly withheld principle and did not cover anything in the nature of consequential damages.

132 What use can be made of s.39(3) in this case? It could be said that since the damages which the plaintiffs are receiving are for the destruction of their businesses, which exceed the damages based on the value of the property converted for the conversions alone (the principle respecting double recovery prevents the plaintiffs receiving both) that we are left with a judgment for unliquidated damages and that no prejudgment interest is awardable. I would not follow this particular approach because I think that it can be effectively argued that the conversion damages based on the value of the goods converted are still "in" the amount recovered and could support an award of interest. However, on the facts of this case if the value of the assets alone (including, for the purposes at hand, the amount of the accounts receivable) were looked to as supporting a claim for interest one could not leave out of the picture the outstanding interest bearing obligation of Lister Limited to Dunlop in the amount of $127,855 which is very close to the total value of the assets realized. If the value of the assets is to be used to extinguish this obligation then it cannot be used again to support a claim for interest. This is made plain in Rutherford J.'s judgment. He used the $126,397.13 damages for conversion to extinguish, substantially, the $127,855.41 obligation and did not, accordingly, award interest on the $126,397.13. It would not be in Lister Limited's best interest to use its claim for any other purpose than notionally to pay off this obligation and so I will not pursue the matter of its claim to interest for the period before November 25, 1977 any further.

133 As far as R. E. Lister is concerned any claim that it would have for interest relating to the temporary conversion of his assets would be clearly duplicated by the notional consequential damages portion of its award of $182,000 (see Waddams, *The Law of Damages* (1983) at pages 18-19, 107-108, 475-476 and 510-511) and could not succeed. He should, however, have

interest on the $3,500.00 which I have allowed for the sale of the stock at 8% per annum from May 1, 1972 to November 25, 1977 and thereafter at 12% per annum.

SUMMARY OF ULTIMATE DISPOSITION OF APPEAL AND CROSS-APPEAL

134 In the result I would allow the appeal, set aside the judgment of Rutherford J., and give judgment as follows:

(1) Lister Limited is entitled to recover:

(a) damages for trespass and conversion in the amount of $146,000.00 with interest at 12% per annum from November 25, 1977 to March 16, 1984 (the date of Rutherford J.'s judgment which adopted the report); and

(b) $20,000 for exemplary damages.

(2) Lister Limited is entitled to a declaration that its obligation to the defendant on the debenture dated June 23, 1970 is fully satisfied.

(3) R. E. Lister is entitled to recover:

(a) damages for trespass and conversion in the amount of $182,000 with interest at 12% per annum from November 25, 1977 to March 16, 1984;

(b) $35,000 for exemplary damages; and

(c) $3,500.00 with interest at 8% per annum from May 1, 1972 to November 25, 1977 and at 12% per annum from November 25, 1977 to March 16, 1984.

(4) With respect to costs to and including the motion before Rutherford J. I would make the same order as did Rutherford J. in paragraph 5 of his formal judgment which amounts to awarding the plaintiffs their costs of each step from and including the reference to and including the motion before him.

(5) Dunlop has enjoyed substantial success in this appeal and should receive the costs of the appeal.

135 I would dismiss the cross-appeal without costs.

TAB 8

1989 CarswellBC 331
British Columbia Court of Appeal

McLachlan v. Canadian Imperial Bank of Commerce

1989 CarswellBC 331, [1989] 4 W.W.R. 341, [1989] B.C.W.L.D. 1106, [1989] C.L.D. 578, [1989] B.C.J. No. 389, 14 A.C.W.S. (3d) 184, 35 B.C.L.R. (2d) 100, 57 D.L.R. (4th) 687, 73 C.B.R. (N.S.) 48

McLACHLAN v. CANADIAN IMPERIAL BANK OF COMMERCE, HENFREY & COMPANY LIMITED and TOPLEY

Taggart, Lambert and Locke JJ.A.

Judgment: March 8, 1989
Docket: Vancouver Nos. CA007942; CA007947

Counsel: *W.S. Berardino, Q.C.*, and *L.A. Fenlon*, for appellant Canadian Imperial Bank of Commerce.
K.J. Smith and *D.J. Chernichen*, for appellants Henfrey & Company Limited and Colin Topley.
H. Shroff, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Remedies

I Damages

I.12 Exemplary, punitive and aggravated damages

I.12.e Trespass

Headnote

Damages --- Exemplary and punitive damages — Grounds for awarding exemplary and punitive damages — Trespass — Trespass to chattels

Secured creditors — Rights under s. 178 of Bank Act — Defendant bank wrongfully seizing plaintiff's business assets purportedly under Bank Act, s. 178 — Defendants' actions resulting in destruction of plaintiff's business and bankruptcy — Court finding survival of business likely had wrongful acts not occurred — Defendants liable for damages for trespass — Damages including amount required to pay out all creditors, costs of bankruptcy and net worth of business to shareholders prior to trespass — Exemplary damages of $25,000 awarded — Appeal and cross-appeal from assessment of damages dismissed.

Receivers — Duties and liability — Defendant bank employing defendant receiver to seize plaintiff's business assets purportedly under Bank Act, s. 178 — Defendants' actions resulting in destruction of plaintiff's business and bankruptcy — Bank and receiver effecting seizure in high-handed manner in spite of bank's knowledge of defects in security — Receiver wrongfully refusing to accept plaintiff's offer of partial payment without referring offer to bank — Court assessing exemplary damages of $25,000 against bank and receiver — Appeal dismissed.

Costs — Award of costs — Plaintiff succeeding in action against bank for trespass resulting in loss of plaintiff's business — Appeal court upholding trial court's refusal to award solicitor-and-client costs merely because bank better able to pay costs of litigation.

The plaintiff was the principal shareholder of K. Ltd., an automobile dealership. The company had two loan arrangements with the defendant bank, an operating line of credit ("O.L.C.") in the sum of $250,000 and a wholesale floor plan ("W.F.P.") in the sum of $1,040,000. Money advanced under the latter was for the purchase of new cars subject to wholesale conditional sales contracts in which the vendor's interest had been assigned by the manufacturer to the bank. The company never owned the new cars so purchased. The bank obtained documents from the company purporting to give the bank security under s. 178 of the Bank Act for all loans or advances. The bank eventually became concerned about the financial health of the company and called both loans. On the same day, the bank appointed the defendant H. & Co. as its representative for the purpose of realizing on its s. 178 security, whereupon H. & Co. immediately changed the locks at the company's premises and took possession of its assets. The next day, the plaintiff approached an H. & Co. employee, offering to pay off the O.L.C., but was told he would not be allowed back in possession unless both loans were paid in full. The company subsequently went bankrupt, and the plaintiff sued for damages for trespass. At a trial on the issue of liability, it was held that the employee had wrongfully refused to accept payment of the O.L.C. and that such payment would have terminated his right to remain on the premises. Furthermore, the bank could not have relied on its s. 178 security had the O.L.C. been paid off, since property given as such security must be owned by the borrower and the new cars purchased under the W.F.P. were not owned by the company. On a subsequent assessment of damages, the plaintiff was awarded $200,000 as the value of the business, as a going concern, that had been destroyed by the trespass, plus $25,000 as exemplary damages because of the way the trespass had been committed. As well, an amount was awarded equal to creditors' claims which had not been paid in the forced liquidation. The defendants appealed from that assessment and the plaintiff cross-appealed.

Held:

Appeal and cross-appeal dismissed.

Damages had been assessed based on the finding at the first trial that the trespass had occurred on the date of initial entry and seizure by H. & Co. That was the clear finding of the trial judge, and there was no basis for suggesting that the assessment should have been made later, after much of the business had collapsed due to the seizure. A challenge to the valuation of the shareholders' equity which had resulted in the award of $200,000 was based on the fallacy that valuation is a mathematical exercise rather than an assessment based on judgment. The overall result did not become wrong merely because one of the factors in the calculation was flawed. The trial judge had adopted the conclusion that the business would have survived had the trespass not occurred. He had balanced positive and negative factors in reaching that conclusion, and there was no basis for interfering with it.

The award of exemplary damages against the bank was justified, since the bank had known that the s. 178 security did not extend to the new cars. Moreover, the award was properly made against H. & Co. and its employee, since the latter had rejected the plaintiff's offer to pay off the O.L.C. without referring that offer to the bank.

As for the cross-appeal, there was no error, as alleged, in the assessment of damages, nor was it wrong not to award solicitor-and-client costs merely because the bank was better able to pay the costs of litigation.

Table of Authorities

Cases considered:

Cyprus Anvil Mining Corp. v. Dickson (1986), 8 B.C.L.R. (2d) 145, 33 D.L.R. (4th) 641 (C.A.) — *referred to*

Kavcar Invt. Ltd. v. Aetna Fin. Services Ltd., Ont. S.C., Hollingworth J., Ottawa-Carlton No. 9074/80, 11th April 1986 (not yet reported) — *referred to*

Lewis v. Todd, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1 [Ont.] — *referred to*

Ord v. Ord, [1923] 2 K.B. 432 — *considered*

Ronald Elwyn Lister Ltd. v. Dayton Tire Can. Ltd. (1985), 52 O.R. (2d) 88, 9 O.A.C. 39 (C.A.) — *referred to*

Statutes considered:

Bank Act, S.C. 1980-81-82-83, c. 40, Pt. 1 [now R.S.C. 1985, c. B-1]

s. 178

Rules considered:

British Columbia Supreme Court Rules, 1976

R. 39(22) [am. B.C. Reg. 517/79]

Appeal from judgment of Gould J., 13 B.C.L.R. (2d) 300, 65 C.B.R. (N.S.) 166, assessing damages for trespass to land and chattels.

***Lambert J.A.* (*Taggart J.A.* concurring):**

I

1 The plaintiff, and his company, Kay Motors Ltd., had operated an automobile dealership in Trail since 1953. The defendant, Canadian Imperial Bank of Commerce, had been the business's banker from the outset. Both the automobile business and the

economy of Trail were severely hit by the recession of 1981/82. In 1981 the plaintiff suffered the first loss that had been incurred in the regular business of the dealership since it began almost 30 years earlier.

2 Early in 1982 the bank decided to call its loans to the company, and to enforce its security. It appointed the defendant, Henfrey & Company Ltd. as its representative. Henfrey, in turn, assigned to the defendant, Colin Topley, the task of carrying out Henfrey's obligations as the bank's representative.

3 In 1983, the plaintiff brought this action for damages for wrongful acts, particularly trespass to land and chattels, which occurred in the course of the security realization, and which the plaintiff said caused him to lose his business and which he said forced the business into bankruptcy.

4 An order was made directing that all issues of liability be tried separately from all issues of damages. The liability trial took place before Mr. Justice Mackoff who decided that the defendants were liable to the plaintiff with respect to the trespass to land and chattels. The damages trial took place before Mr. Justice Gould. He assessed damages on a going concern basis at the amount necessary to enable the trustee in bankruptcy of the business to pay out all its creditors, plus $200,000 representing the going concern value of the shareholders' equity, $25,000 as exemplary damages, and $114,941 as court order interest, for a subtotal of $334,941, to go to the shareholders. The total award of damages was subject to some adjustments for costs and expenses.

5 An appeal was brought from the judgment of Mr. Justice Mackoff but it was abandoned. This appeal is from the judgment of Mr. Justice Gould.

6 The reasons of Mr. Justice Gould are reported at (1987), 13 B.C.L.R. (2d) 300, 65 C.B.R. (N.S.) 166. They incorporate the reasons of Mr. Justice Mackoff [reported at 58 C.B.R. (N.S.) 113].

7 The facts were set out fully in the two sets of reasons. I will assume that anyone interested in these reasons is familiar with the reasons of Mr. Justice Mackoff and the reasons of Mr. Justice Gould.

II

8 There were two separate loan arrangements. The first was an operating line of credit, authorized at $250,000. It ran in the usual way with advances being made every day or so against new promissory notes given at regular intervals, and with receipts from accounts receivable being applied against the loan in regular amounts and so paying off the oldest notes. The second loan arrangement was a wholesale floor plan, which provided funds for the company to purchase its new car inventory. That loan arrangement was authorized at a limit of $1,040,000. The company purchased new cars from General Motors on conditional sale contracts and General Motors then assigned the vendor's interest in the conditional sale contracts to the bank against the funds, up to $1,040,000, advanced by the bank to General Motors.

9 On 23rd September 1981 the company had given an assignment under s. 178 of the Bank Act to the bank. It had also given a general assignment of accounts receivable. In addition, there were some specific chattel mortgages granted by the company to the bank with respect to the financing of specific automobiles, perhaps some of those used in the Budget Rent-A-Car business operated under franchise by the company. Most of the cars in the Budget business were leased. The company had also granted mortgage and debenture security to other creditors.

10 In early February 1982 Mr. McLachlan had a meeting with the bank's manager in Trail. Mr. McLachlan understood after the meeting that the bank did not wish to continue to carry the loans, and that he had until the end of February to make arrangements for retiring the loans by the end of March.

11 On 16th March 1982 the bank's manager in Trail asked Mr. McLachlan to come to the bank's offices. Mr. McLachlan did so. He was handed two letters of demand drawn by the bank's solicitors. One demanded payment of $256,239.24, principal and interest, represented by 21 demand notes. The interest component was $2,239.24, so the operating loan was more or less current. The other demanded payment of $1,045,762.87 as the aggregate of the balances outstanding under conditional sale

agreements and chattel mortgages. The 21 notes were presented to the ledger keeper of the Trail branch of the bank at 11:45 a.m. on 16th March. The meeting between the manager and the plaintiff took place some time after that.

12 About an hour later, Mr. Topley, with other employees of the bank and of Henfrey & Company Ltd., arrived at the business premises of the company and took possession. Mr. Topley presented as his authority a form of notice of seizure of property under s. 178 of the Bank Act. The notice recited the failure of the company to pay $256,239.24 which had been demanded an hour earlier and said that the bank:

> 13 ... does hereby take possession of all the property covered by the security, namely All inventory including *new* and used vehicles, parts, tires, accessories, etc., present and future (hereinafter referred to as the "property") now situate at 2880 Highway Drive, Trail, B.C. and 2865 Highway Drive, Trail, B.C. [my emphasis]

The notice appointed Henfrey & Company Ltd. as the representative of the bank to take possession of the property covered by the security and the premises, buildings, plant, undertaking, tools, machinery and equipment of the company. The bank also appointed Henfrey & Company Ltd. as bailiff in possession of the vehicles covered by the wholesale floor plan. Mr. Topley arranged to change some of the locks; he put stickers on the new cars showing that they were for sale at a discount; and he behaved as if the whole business was under his control as the bank's representative.

14 Mr. Topley seized the Budget Rent-A-Car fleet that was on the lot and he seized the cars that were returned to the premises, as they came in. This caused Budget to cancel the franchise and General Motors to revoke the leases of the cars.

15 The whole seizure exercise attracted a lot of publicity in the Trail community.

16 Mr. McLachlan was known and trusted in his business community. His friends offered to give him a helping hand. On 18th March he went to the manager of the Toronto Dominion Bank with the offers of his friends to stand as guarantors. He asked for a loan of $300,000. The manager agreed to recommend an operating loan of that amount. Mr. Justice Mackoff found that the loan would have been forthcoming if Mr. McLachlan had called for it to be advanced. On 18th March (Mr. Justice Gould) or on 19th or 20th March (Mr. Justice Mackoff), Mr. McLachlan spoke to Mr. Topley and offered to pay out the operating loan in return for resumption of control of his business. Mr. Topley rejected the offer and said that payment of the full total of the operating loan plus the wholesale floor plan loan would be required before the bank would relinquish control of the undertaking to Mr. McLachlan. While Mr. Topley was the bank's representative, it seems that he did not pass Mr. McLachlan's offer on to the bank.

17 Mr. Topley remained in control of the business and the premises and he carried out the liquidation of assets, selling the automobiles at a discount. The company was left without any means of survival and on 16th May 1982 it made an assignment in bankruptcy. By then it had no alternative.

III

18 This action was begun in August 1983. The plaintiff was originally Kay Motors Ltd. and the only defendant was Canadian Imperial Bank of Commerce. On the application of the trustee in bankruptcy of the company, Mr. McLachlan was substituted for Kay Motors Ltd. as plaintiff and Henfrey & Company Ltd. and Colin Topley were added as defendants. In the statement of claim it was alleged that the s. 178 assignment was void; that no reasonable time was given to respond to the demand for payment before the seizure of the new cars, the used cars, the parts, and the business; that the bank should have accepted payment in full of the operating loan when that payment was offered, and the bank should have relinquished its possession of the premises and its control of the business at that time, retaining only the possession of the new cars under its wholesale conditional sale contracts; and that the bank was a trespasser to land and to chattels. The plaintiff claimed damages for the trespass and claimed separately for failure to give a reasonable time to pay the promissory notes following the demand. The latter claim may be said to have been for breach of an implied contract. But if no reasonable time was given then that failure would have turned an otherwise lawful entry into a trespass. So the failure to give reasonable notice is both a ground for a claim in breach of contract and also a basis on which a claim for trespass could rest.

19 Mr. Justice Mackoff, in his reasons, said that the s. 178 assignment should not have covered new cars, because the new cars were owned by the bank and not by the company, the vendor's interest under the wholesale conditional sale contracts having been assigned by General Motors to the bank. Section 178 of the Bank Act only permits security to be given over property owned by the grantor of the security. Mr. Justice Mackoff also said that the bank, through Mr. Topley, should have accepted the payment of the operating loan in full and should have relinquished its possession of the premises and its control of the business, retaining only the new cars. Mr. Justice Mackoff's reasons concluded in this way [p. 308]:

> 20 Therefore, once the $256,000 was paid, the agent's authority would be at an end and he would have no further legal right nor authorization to remain in possession of the premises. Thereafter he would become a trespasser.
> 21 As to the W.F.P. debt, the bank could sue to recover that amount or remove the new automobiles, but the bank through its agent could not seize the plaintiff's premises for that indebtedness. The plaintiff says that as a result of the defendants' trespass he was prevented from carrying on the business of selling used cars, servicing and other business incidental to the automotive trade and thereby suffered damage. I find the defendants liable for such damage.
> 22 Having reached that conclusion it remains unnecessary for me to deal with the matter of reasonable notice.

23 Mr. Justice Mackoff added a memorandum to his reasons, six months later, in these terms:

> 24 Concerning the new automobiles (w.f.p.). On the evidence, I conclude that even if reasonable notice had been given the plaintiff would not have been able to arrange for the necessary funds required to pay in full his indebtedness to the bank, within the time given by such notice.

25 The formal judgment of Mr. Justice Mackoff made this order and this order only:

> 26 This Court Orders that the defendants are liable to the plaintiff for damages to be assessed and costs to be taxed.

27 The damages were assessed by Mr. Justice Gould. He decided that damages should be awarded only for the trespass to land and to chattels and not for any separate cause of action, perhaps in contract, for failure to give reasonable notice. He decided that the business would have survived if the trespass had not occurred. So he evaluated the business as a going concern. He declined to project a profit pattern and so did not adopt the net cash flow method of valuing the business as a going concern. Instead he made his best estimate of assets and liabilities, which showed a shareholder's equity of about $300,000, he discounted that shareholder's equity to $200,000, and he decided that the $200,000 represented the going concern value which had been destroyed by the trespass. He also awarded an amount equal to the claims of creditors which had not been paid in the forced liquidation. That amount was based on the theory that they would have been paid in full if the business had been permitted to continue. Mr. Justice Gould awarded $25,000 as exemplary damages because of the way in which the trespass was committed. He had particular regard to the finding that the bank knew that it had no right of entry under its s. 178 security with respect to collection of its wholesale loans on new cars, yet had made its entry in relation to new cars and the new car premises under that power. Mr. Justice Gould also awarded $114,941 as court order interest. Some adjustments were made for costs and for expenses.

IV

28 The first ground of appeal is that Mr. Justice Gould valued the business as of 16th March 1982, the date of the initial entry and seizure by the bank's representative, whereas the appellants say he should have made the valuation as of about 22nd March 1982, the time when the bank's representative would have relinquished the premises if Mr. McLachlan's offer to pay out the operating loan had been accepted. The theory behind this ground of appeal is that an analysis of Mr. Justice Mackoff's reasons is said to support the view that his finding of liability for trespass rested only on the wrongful rejection of the offer to pay out the operating loan. The difference between the valuation on 16th March and the valuation of 22nd March is that much of the business collapsed, or suffered a fatal blow, in that period because of the actions of the bank's representative and that the defendants should not be liable for the losses in that period if their actions were not wrongful in that period.

29 In my opinion, Mr. Justice Mackoff must have concluded that the trespass occurred on 16th March 1982. It is only on that basis that his statement that it was unnecessary for him to deal with the matter of reasonable notice could have been correct.

30 The claim was for a trespass on 16th March and thereafter. The judgment was that the defendants were liable for damages to be assessed. The presumption must be that the liability is for the claim that was alleged. If it was for only a part of the claim, or for a limited period, then those restrictions on the liability should have appeared in the order.

31 For the two reasons set out in the two preceding paragraphs, I would not accede to this ground of appeal.

32 I propose to add two comments. The first is that the bank's representative made his entry and seizure within an hour of the demand being made on the promissory notes which recorded the operating loan. It would have required extraordinary circumstances to justify an entry after such a short period following the demand. There was no evidence to which we were referred which could indicate the existence of such extraordinary circumstances. My second comment is that if the business could have recovered if there had been no trespass on 16th March, it could also have recovered from a lawful entry on 16th March if the premises and all cars and equipment other than the new cars had been relinquished on 22nd March. I see no reason not to accept Mr. McLachlan's evidence that other sources of new cars could have been found. So I do not accept the argument that the business which had a going concern value on 16th March should be regarded as having merely a break-up value on 22nd March.

33 There is a second aspect of the first ground of appeal. It is that Mr. Justice Mackoff, in the concluding paragraphs of his reasons, as I have set them out, said that the plaintiff, as a result of the defendants' trespass, was prevented from carrying on the business of selling used cars, servicing, and other business incidental to the automotive trade. Mr. Justice Mackoff, in that passage, did not specifically mention the new car business. So the counsel for the defendants argued that no damages should be awarded for loss of the new car business.

34 The new cars could have been properly seized and removed from the premises. But more new cars could have been brought in. So the wrongful occupation of the premises prevented the continuation of the new car business even if the new cars themselves had been taken away and sold by the defendants. I consider that the loss of the new car business, as opposed to the new cars, comes within the liability judgment of Mr. Justice Mackoff. Any ambiguity in his reasons should be resolved in favour of common sense and consistently with the evidence.

35 I would reject the first ground of appeal. I will examine the remainder of the grounds of appeal and the grounds of cross-appeal on the basis that the trespass started on 16th March 1982, that it continued without interruption thereafter, and that it put an end to the whole business, including the new car business, all of which could have continued if it had not occurred.

36 The second ground of appeal is that Mr. Justice Gould did not have wholly accurate evidence before him with respect to the claims of creditors. It is said that, as a result, the liabilities were $3,576,272 rather than $3,485,272, and the shareholder's equity should have been $205,000 rather than $296,000.

37 In my opinion, this argument rests on the fallacy that valuation is a mathematical exercise rather than an assessment based on judgment. The weight that is to be attached to the alternative methods of valuation and the allowances that are to be made for potential inaccuracies arising from the hypothetical factors incorporated within each method, remain matters of informed judgment and assessment. See *Cyprus Anvil Mining Corp. v. Dickson* (1986), 8 B.C.L.R. (2d) 145, 33 D.L.R. (4th) 641 (C.A.), on valuation. See *Lewis v. Todd*, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1 [Ont.], on the relationship between the mathematical calculations of the indicia of valuation and the final damage award.

38 Mr. Justice Gould made a painstaking valuation on the basis of the evidence before him. Some parts of that evidence may have been more accurate than other parts. But the overall result does not become wrong because one of the factors in one of the calculations is shown to have been flawed.

39 I do not consider that the figure of $200,000 for the shareholder's equity portion of the damage award is inordinately high, or based on the wrong principle, or in any other respect wholly erroneous.

40 I would reject this ground of appeal. Having reached that conclusion it is not necessary for me to deal with the application to adduce fresh evidence. The new evidence related to this second ground of appeal and would not have affected my conclusion.

41 The third ground of appeal is that Mr. Justice Gould is said to have erred when he adopted the conclusion that the business would have survived if the trespass had not occurred. His decision that the business should be valued as a going concern rested on that conclusion. Mr. Justice Gould's alleged error is said to flow from a mistaken finding that significant additional cash would have been injected into the business. But it is said that the Toronto Dominion Bank loan could only have added $44,000, once the Canadian Imperial Bank of Commerce operating loan was paid off, and that the sale of the service station would only have produced enough funds to pay off the mortgage on the station itself.

42 In my opinion, these and other points relating to the viability of the business are all factors that would have influenced whether the company could have survived. They must be balanced against the positive factors such as the factor that the company had a long record of good management and profitability and the fact that steps were being taken to reduce the overhead and consolidate the business on a more economical basis.

43 In my opinion, the factors mentioned by counsel for the appellant under this heading do not require or permit the court to substitute a different view of whether the business would have survived, if the trespass had not occurred, for the view reached by the trial judge.

44 I would reject this ground of appeal.

45 The fourth ground of appeal is that, for the reasons given with respect to the third ground of appeal, the going concern method of valuation was wrong and that a value based on liquidation should have been used.

46 For the reasons already given with respect to the third ground of appeal, I would reject this ground of appeal.

47 The fifth ground of appeal is raised only by the defendants Henfrey & Company Ltd. and Colin Topley. It is that Mr. Justice Gould erred in awarding exemplary damages against them.

48 The award of exemplary damages against the bank rested principally on the fact that the bank authorized an entry and seizure under s. 178 security when officers of the bank knew that the security did not extend to the new cars or to the new car business and did not justify a general entry and seizure of the new car premises and the new cars themselves. The new cars could be seized and removed only under the wholesale conditional sale contracts.

49 The award of exemplary damages against Henfrey & Company Ltd. and Colin Topley rested principally on the fact that, on conflicting evi dence, the trial judge found that Mr. Topley had rejected the offer of Mr. McLachlan to pay off the operating loan in full, and that he did so without referring Mr. McLachlan's offer to the bank.

50 In my opinion, both of the activities that I have described as giving rise to the awards of exemplary damages were sufficient to support a finding of the degree of high-handedness that is necessary before an award of exemplary damages can be made. I would not interfere with the trial judge's decision to award exemplary damages in this case.

V

51 There was a cross-appeal.

52 The first ground of cross-appeal was that the trial judge erred in valuing the real estate and franchise of the company, and the lease and rental units. Counsel for Mr. McLachlan went through the evidence in relation to those assets. He pointed out that there was support in the evidence for a higher value than the valuation reached by the trial judge. He also argued that the valuation reached by the trial judge for the main building was the result of averaging the two appraisals of the building that were introduced in evidence and that reaching a result by averaging constitutes an error in law.

53 In my opinion, the evidence supports the values arrived at by Mr. Justice Gould. It is an error in law to arrive at a value by averaging two or more appraisals without the exercise of any judgment as to whether the appraisals are entitled to equal weight. However, it is not an error of law to decide that each of the appraisals is equally valuable as an expression of opinion and that the averaging of the two appraisals provides the most accurate value that can be arrived at on the basis of the evidence. I consider that the trial judge adopted the latter approach in this case.

54 Accordingly, I would reject the first ground of cross-appeal.

55 The second ground of cross-appeal is that Mr. Justice Gould erred in discounting the net worth of the company by $96,000 from $296,000 to $200,000. For the reasons given with respect to the second ground of appeal, I would reject the second ground of cross-appeal.

56 The third ground of cross-appeal is that the award of exemplary damages was excessively low. I consider that the two elements of highhandedness on which the award for exemplary damages rested, as I have set them out with respect to the fifth ground of appeal, do not require or permit a higher award for exemplary damages than the award that was made. I would not interfere with that award.

57 The fourth ground of cross-appeal is that the trial judge erred in not awarding solicitor-and-client costs. The argument in support of this ground is that there is a gross disparity of funds at the disposal of the parties for the purposes of litigation. While that is so, it is not a reason for awarding solicitor-and-client costs. No other argument was advanced. I do not consider that there was any argument that could have been advanced. I would reject the fourth ground of cross-appeal.

58 The fifth ground of cross-appeal was that Mr. Justice Gould, in his award, contemplated a different distribution of damages than the distribution agreed between the trustee in bankruptcy of the company and Mr. McLachlan, at the time the company's cause of action was assigned to Mr. McLachlan and the assignment was approved by the court. It was open to Mr. Justice Gould to make the distribution that he did, as a matter of damages, notwithstanding the agreement between the trustee and Mr. McLachlan, and notwithstanding that the assignment had been approved by the court.

59 I would reject the fifth ground of cross-appeal.

VI

60 I would dismiss the appeal with costs. I would dismiss the cross-appeal with costs.

***Locke J.A.*:**

61 Thomas Younger McLachlan ("McLachlan") for many years operated in Trail, British Columbia the General Motors car dealership known as Kay Motors Ltd. ("the company"). This action [appeal from 13 B.C.L.R. (2d) 300, 65 C.B.R. (N.S.) 166] was originally commenced by the company on 2nd April 1982 against the defendant Canadian Imperial Bank of Commerce ("the bank") following the company's voluntary assignment into bankruptcy.

62 McLachlan is a respected Trail businessman, and his company operated a business enterprise consisting of new car sales, a used car business, an allied garage and repair business, and also the Budget Rent-A-Car franchise for the locality. He had dealt with the bank for over 30 years and was found by the trial judge to be a man of unquestionable integrity.

63 In 1979, the company had two credit facilities at the bank. The first of these was the operating line of credit ("O.L.C.") (working capital credit account) in the sum of $250,000. The second was a dealer's wholesale floor plan ("W.F.P.") in the sum of $1,040,000. Moneys advanced under the W.F.P. were for the purchase of new car inventory only. The units were purchased by the plaintiff from General Motors Limited pursuant to wholesale conditional sales contracts, which contracts were then assigned by General Motors to the bank. Thus the company never owned the new automobiles so purchased.

64 There are two important provisions in the various documents supporting the W.F.P. loan:

65 (i) the "Conditions of Sale" provided by cl. (4) that in the event of default the seller (the bank) was entitled to take possession of the property and to enter upon the premises where it was and remove it.

66 (ii) Clause 4 of the chattel mortgages gave a right to the mortgagee bank, after taking possession, to maintain the property on the premises and have the free use and enjoyment of all necessary buildings for the proper maintaining of the goods and to keep them there until the mortgagee decided, in its discretion, on the disposition.

67 In the spring of 1981 the bank felt unsafe and decided to take an assignment under s. 178 of the Bank Act. The application provided for security for all loans or advances granted under a revolving line of credit for $1,290,000. This standard s. 178 security document provided by cl. 6 that the bank might, from time to time, without any previous notice or demand, enter and use all or any of the buildings, plant or undertaking, to possess and use any of the tools, machinery, and equipment, and to occupy and use the equipment till the same was realized by sale.

68 The trial judge found that the bank always recognized it possessed two forms of security; it kept different books, and it knew that W.F.P. loans were not part of the s. 178 security, if only for the reason that the W.F.P. was used to finance cars and these cars in the dealer's possession were all subject to chattel mortgages granted to the bank and were not the property of the debtor but in fact of the bank itself.

69 The automobile business took a bad downturn in 1981; the bank eventually deemed itself insecure and on Tuesday, 16th March 1982 three bank representatives presented the plaintiff and his company with two separate documents. The first was a demand for payment of the O.L.C. indebtedness amounting to $256,239.24 represented by certain demand notes. The second was a demand under the W.F.P. agreement for immediate payment of the balance outstanding under 99 chattel mortgages charging vehicles and amounting to $1,045,762.87 and advised that unless this demand was met forthwith, civil proceedings to realize upon the conditional sales agreement and chattel mortgages would be commenced.

70 About one hour after the presentation of these demands, one Topley of the appellant Henfrey & Co. attended the company premises and served a notice which said:

> 71 Notice of Seizure of Property Covered by Security Given Under S. 178 of the Bank Act ...
> 72 Take notice that by reason of failure to pay to the Canadian Imperial Bank of Commerce on demand the sum of $256,239.24 the Bank, pursuant to security granted to it by the company under s. 178 of the *Bank Act* does hereby take possession of all the property covered by the security, namely:
> 73 all inventory, *including new* and used *vehicles*, parts, tires, accessories, etc.
> 74 now situated at (the company premises) ... [emphasis mine]

And it recited portions of s. 6 of the s. 178 security document previously referred to, in particular, the right to use the premises.

75 Topley as agent for the bank then took possession of all the company premises, changed all the locks, and allowed access to company personnel only during office hours. He put large stickers on every car on the company premises, including some owned by customers, and also including a number of cars used for the Budget Rent-A-Car fleet (these latter were subsequently released).

76 The seizure received instant local notoriety; the redoubtable McLachlan went to the Toronto Dominion Bank, made arrangements with some friends for their guarantees, received assurance from the Torzonto Dominion Bank and on Thursday, 18th March attended Topley and offered to pay the O.L.C. in full. Topley refused, demanded payment of the other million dollar indebtedness in addition and continued to occupy the premises.

77 On Wednesday afternoon, 17th March, McLachlan got a telephone call from one Belzberg, who controlled the Budget franchises to the effect that G.M.C. and the bank between them had pulled in all the Budget fleet; that there were no cars available at the Castlegar airport; and that if there were not cars at the airport on Monday morning (the 22nd) he would cancel the Budget franchise. McLachlan received such telegram cancellation on a day about 20th, 21st or 22nd March.

78 With the bank's agent in continuing possession and all other negotiations failing, the usual dreary cycle of salvage sales and creditors' claims ran its full course with the result that on 13th May 1982 the company went bankrupt.

79 On 25th August 1983 McLachlan, having taken an assignment of the cause of action from the trustee, commenced these proceedings.

80 The pleadings are not models of precision but basically pleaded a wrongful seizure and sale and asked for damages for breach of contract and for trespass, conversion, destruction of the company's business, and exemplary damages. The defence was a denial, a reasonable delay between demand and seizure, and a plea of no damage.

81 On 12th March 1984, a praecipe was filed in the Vancouver Registry, which reads:

> 82 Pursuant to the directions of Mr. Justice Murray ... it is ordered that the issue of liability between the plaintiff and the defendant Canadian Imperial Bank of Commerce only, be determined prior to the other issues herein. By consent, set the matter down for trial of the aforesaid issue of liability between the plaintiff and the defendant Canadian Imperial Bank of Commerce for hearing on December 3, 1984. Trial of the action on all other issues will commence on September 3, 1985 ...

83 The above consent was filed pursuant to R. 39(22) which reads:

> 84 22. The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.

85 A 17-day trial on liability commenced in December 1984 [reported at 58 C.B.R. (N.S.) 113]. At the opening of the trial plaintiff's counsel made two points: that the money, when demanded, could have been repaid, but the bank did not vacate the premises (I assume this to mean commission of a trespass). Second, with regard to the W.F.P., there was no reasonable notice of seizure, and the bank had no right to occupy premises at all, only to seize and take away. The bank admitted (1) it had no right to seize the new cars under the s. 178 security document, or (2) to seize without reasonable notice under the W.F.P.

86 The long trial continued and Mackoff J. gave judgment on 6th November 1985. He separated the rights of the bank arising from the indebtedness under s. 178 and those under the W.F.P. and said [p. 121]:

> 87 ... the bank recognized right from the outset that the wholesale loans would not be legally enforceable on the entire s. 178 security.
>
> 88 In view of the evidence above set out, the bank cannot be heard to say at trial that the full $1,300,000 advanced was all wrapped up in the validly given part of the s. 178 assignment.
>
> 89 In any event, in the notice of seizure under s. 178 served upon the plaintiff, the bank appointed the agent and authorized him to enter and to take possession of the premises pursuant to the s. 178 assignment and cl. 6, solely because of the plaintiff's failure to pay $256,000 (O.L.C. loan). No similar authorization was given to the agent by the bank with regard to the $1,040,000 owing under the W.F.P. Therefore, once the $256,000 was paid, the agent's authority would be at an end and he would have no further legal right nor authorization to remain in possession of the premises. Thereafter he would become a trespasser.
>
> 90 As to the W.F.P. debt, the bank could sue to recover that amount or remove the new automobiles, but the bank through its agent could not seize the plaintiff's premises for that indebtedness. *The plaintiff says that as a result of the defendants' trespass he was prevented from carrying on the business of selling used cars, servicing and other business incidental to the automotive trade and thereby suffered damage. I find the defendants liable for such damage*.
>
> 91 *Having reached that conclusion it remains unnecessary for me to deal with the matter of reasonable notice*. [emphasis mine]

92 The parties took thought as to the implications of the reasons for the damage assessment and filed written memoranda of argument. On 29th April 1986 plaintiff's counsel recited the above-mentioned paragraph of Mackoff J.'s judgment and went on to say:

> 93 *Counsel for the Bank took the position before Mr. Justice Finch that damages to be assessed should not take into account the loss of the business relating to the sale of new cars since the Bank was entitled to take these cars back under their conditional sales agreement. Counsel for the defendants state that such position is implied from the foregoing passage in the reasons for judgment*.
> 94 *On the other hand, as counsel for the plaintiff, our position is that damages to be assessed herein should be for the destruction of the entire business of the company*. It was conceded during the trial on behalf of the defendants that the Bank was only entitled to demand repayment of the W.F.P. loans and to seize the new vehicles *after first having given reasonable notice to the company*. It is our position on behalf of the plaintiff that because the judgment provided for an all-embracing liability, it did not deal with the issue of reasonable notice. *Moreover, the defendant's trespass effectively shut down the entire business of the company and the plaintiff is therefore entitled to all damages resulting from the conversion of the company's inventory charged to the Bank including the new and used vehicles, parts, accessories, etc. and all damages which resulted from the forced liquidation and bankruptcy of all other assets of the company resulting from continuous and uninterrupted trespass by the Bank upon the company's lands, buildings, and premises* ... [emphasis mine]

95 Counsel for the defence replied on 30th April 1986 saying:

> 96 As stated by Mr. Shroff, it is the Bank's position that the assessment of damages should not include the loss of the portion of the business relating to the sale of new cars. As indicated by Mr. Shroff, we interpret the passage from the reasons for judgment quoted in his letter to mean that the Bank could have removed the new automobiles.
> 97 *We agree that the Bank was obliged to give reasonable notice in calling the wholesale floor plan loan. However, it is our contention that the evidence clearly showed that Mr. McLachlan could not have repaid this portion of the loan within a period of time which under any test could be deemed reasonable. In other words, even if the Bank had given reasonable notice, no damages have been suffered by the company since the amount required to repay the wholesale floor plan portion of the debt could not have been found within the reasonable notice period* ... [emphasis mine]

98 Mackoff J. considered the arguments and on 29th May 1986 filed a memorandum to his reasons for judgment reading:

> 99 Concerning the new automobiles (W.F.P.). On the evidence, I conclude that even if reasonable notice had been given the plaintiff would not have been able to arrange for the necessary funds to pay in full his indebtedness to the bank, within the time given by such notice.

100 The judgment was then entered in general terms:

> 101 The Court orders that the defendants are liable to the plaintiff for damages to be assessed.

102 The damage assessment trial opened before Gould J. on 9th June 1986. After the opening, defence counsel submitted to the judge that he had a fundamental objection. He said:

> 103 ... that offer [of payment of the O.L.C.] as Mr. King has advised you, took place on the 18th of March. There was a specific finding of fact in two places in his reasons for judgment by Mr. Justice Mackoff that *Mr. McLachlan could have raised money through the Toronto-Dominion Bank within a few days of that date, and that thereafter Mr. Topley was a trespasser* and had no longer any right to remain in possession of the premises *so that the trespass on which liability has been found was that trespass and Mr. Justice Mackoff has specifically directed that the plaintiff have judgment against the defendant for damages flowing out of that trespass* and he has specifically said in his reasons that that includes *only* the carrying on the business of selling used cars, servicing and other business incidental to the automotive trade and has excluded from that the new car business, new cars having been seized under conditional sales agreement on March 16th ... [emphasis mine]

And later:

> 104 What I am saying, my Lord, *if there was a seizure on the 16th without appropriate notice, which might have otherwise been wrongful, Mr. Justice Mackoff made a finding of fact no loss flowed from that, in any event*, so it is not open to the court now to assess damages flowing from that, in my respectful submission, and I come back to what I say is a very specific finding of fact that *the wrong here was the trespass that occurred within a few days of March 18 and is only damage flowing from that that this court is to assess* ... [emphasis mine]

105 Gould J., in a later part of the transcript, after the question of reasonable notice had been agitated, said on 10th December:

> 106 With reference to the matter of what damages should be assessed, I have expressed the view more than once that the matter of adequacy of notice is an issue or rather at large, in arriving at damages here particularly because there were pleaded a claim for punitive or exemplary damages ... I have come to the conclusion in conformity with submissions by counsel namely that damages being assessed here are the damages that flow from the trespass and only that. Consequently, in arriving at this assessment the matter of adequacy or inadequacy of notice will not be considered at all. The matter of exemplary or punitive damages of course, is still at large in the sense that there should, or should not be, any such award for the trespass ...

107 Counsel for the plaintiff in the damage assessment before Gould J. presented his evidence on the basis that whatever the bank did resulted in the destruction of the business enterprise Kay Motors Ltd. Extensive expert evidence was presented in a 25-day trial. In essence, Gould J. canvassed the judgment of Mr. Justice Mackoff and then made several findings of fact, some of which overlapped:

108 1. He accepted the finding of Mackoff J. that the offer to repay the wholesale floor plan should have been accepted and thereafter the bank had no right to occupy the premises.

109 2. The trespass was a direct cause of the closing down and ultimate destruction of the company's business.

110 3. If there had been no trespass, the company would have survived.

111 4. The Budget franchise was cancelled as the direct result of action on the 16th. If the bank had behaved lawfully on 16th March and accepted the offer of 18th or 19th March, the Budget franchise would have been reinstated.

112 5. Every car on the company premises was stickered and this helped to destroy the company.

113 6. The plaintiff says the unlawful act destroyed a surviving business.

114 Before this court the appellants argued a first and principal point. It was expressed succinctly in its factum:

> 115 ... *The Learned Trial Judge Erred in Law by Failing to Assess the Damages Resulting From the Basis of Liability Determined by Mr. Justice Mackoff at the Hearing on Liability.*
> 116 1. It is respectfully submitted that the liability judgment was final and all liability issues were res judicata, and the learned trial judge erred in assessing damages on a new ground of liability found by him.
> 117 2. The jurisdiction of the trial judge was limited to the assessment of the damages for which the defendants were found liable at the liability trial, and it is not open to a judge assessing damages in a split trial to alter the earlier findings of liability, to find liability on a different ground, and then to assess damages flowing from that new finding of liability.
> 118 3. The plaintiff claimed damages for trespass on two alternative grounds and, by operation of Rule 39(22), only the issue of liability was to be determined by Mr. Justice Mackoff in the trial which commenced December 4, 1984. Mr. Justice Mackoff granted judgment to the plaintiff for damages to be assessed, and that judgment was perfected by entry on July 17, 1986.
> 119 4. The judgment having been drawn up and entered, it could only be varied by appeal, and Mr. Justice Gould had no jurisdiction on assessment of damages to amend or vary it ...

> 120 [5.] To determine what damages were to be assessed, and what question of fact and law were decided by Mr. Justice Mackoff, Mr. Justice Gould should have looked to the entered judgment and to the reasons for judgment of the liability portion of the trial ...

121 If the appellant is correct in its submission, it is obvious that there would have to be a revision of Mr. Justice Gould's judgment because that learned judge assessed damages on the basis of the destruction of the entire enterprise (the plaintiff's submission) and not upon the value of what was left after the new car factor had been subtracted from any value of the business as a whole (the defendant's submission).

122 Gould J. expressly decided that his assessment of damages would not have any foundation based upon the question of lack of reasonable notice, and indeed his judgment is based squarely and only on the results of the trespass he described.

123 The plea is one of res judicata. The shortest definition of the plea of which I know is in *Ord v. Ord*, [1923] 2 K.B. 432, where Lush J. said [p. 439]:

> 124 The words ... explain themselves. If the res — the thing actually and directly in dispute — has been already adjudicated upon ... by a competent court it cannot be litigated again.

And he also said [p. 442]:

> 125 It is often necessary to see what the evidence before the Court at the previous trial was in order to see what the precise facts were which afterwards cannot be disputed.

126 In circumstances such as the present with a split trial, where Mackoff J. stated [p. 121]:

> 127 The plaintiff says that as a result of the defendant's trespass he was prevented from carrying on the business of selling used cars, servicing and other business incidental to the automotive trade and thereby suffered damage. I find the defendants liable for such damage.

It is necessary to ascertain exactly what trespass and what property or thing was affected by the trespass, the value of which was to be later quantified.

128 On 16th March 1982 Kay Motors was a going concern. This concern carried on the business of (1) selling used cars, (2) servicing, and (3) other business incidental to the automobile trade. It also sold new cars, basically on consignment from the bank, the real owner of the cars. It also operated a Budget Rent-A-Car franchise. Minus the rental franchise there was still a going business. Minus the new car sales there was still a going business. This was testified to by McLachlin in his evidence at pp. 160 and 352:

> 129 Q. But if you could have operated your business without the new cars, what damage had been done would have prevented in your view, requesting help from Mr. Belzberg?
> 130 A. If that point had arisen, I would have asked Mr. Belzberg for help. If they had just taken the new cars and allowed me to carry on the business, then G.M. had said, "We don't want to give you the fleet, we don't want to finance the fleet", then *I would have had no problem in getting Mr. Belzberg to finance the fleet*. That question was never put to me or the point was never raised.
> 131 Q. *So, you're saying, as I understand it, if the Bank had vacated the premises and given you your used cars and your parts and accessories, then you could have still operated the Budget fleet with the help of —*
> 132 A. — *carrying on the whole business with the exception of the new vehicles they were holding. But the Bank would have been glad to sell me these new vehicles one by one if the occasion demanded*.
> 133 Q. You say the Bank would have been happy to sell you those?
> 134 A. Certainly they would ... [emphasis mine]

And at transcript p. 352:

135 A. ... The only thing that I did tell them was if I could clear off the Section 178 that covered the parts, the used cars, the tires, the inventory of the business, I understood I could do that because I was given two demand letters. *I thought if I paid the one, the bank could take their cars on their Dealer Plan and do what they pleased with them. But I was back in business. I could operate. I had used cars. I could pick up new cars from wherever I wanted them and I could have operated and run the business*.
136 Q. How could you have picked up new cars without obtaining financing from some other source for the new cars?
137 A. I was only going to pay off the Bank $250,000 and I was borrowing $300,000. I had $50,000 to start with.
138 Q. All right.
139 A. And I still had my accounts receivable coming in ... [emphasis mine]

140 McLachlan here clearly says — and there is no evidence to contradict it — that he could have operated his business without the new cars, and was satisfied he could have got someone else to finance the new cars, and in particular, could have got the Budget financing out of Belzberg or others. Gould J. agreed with him. So, with or without new cars and car rental, he had a going concern which included premises in use and facilities in place and out of which people worked.

141 What damage to this concern resulted from the acts of the bank?

142 1. The initial 16th March entry and possession of the premises under s. 178 documents was legal. It seems that half an hour after the entry it was carried on in an illegal way by stickering the new cars.

143 2. On 18th March an offer and promise to pay was made but no money was produced. It would have been reasonable for Topley to have remained in possession pending production of cash and a reasonable time for this would have been Monday, 22nd March. Thereafter, any possession at all was illegal, and it so remained.

144 In the result, a wrongdoer by conduct walked into a going business on Tuesday, 16th March and never left until the business went bankrupt. The O.L.C. loan was never repaid, though the money was available, because the creditor would not take it and continued to occupy the premises wrongly. The saving of a rental franchise was effectively stopped. A new car sales business — only an adjunct to the whole establishment, and which could have been refinanced — vanished.

145 The plaintiff said he wanted damages for the destruction of his business. Mackoff J. said he [p. 121]:

146 ... was prevented from carrying on the business of selling used cars, servicing, and other business incidental to the automotive trade ...

Gould J. said [p. 311]:

147 I find that the trespass was a direct cause of the closing down and ultimate total destruction of the company's business.

And later [p. 313]:

148 In this court's view there would not have been a liquidation, orderly or otherwise, if the trespass had not taken place and the offer accepted, but instead the company would have survived.

And again [p. 316]:

149 There is no doubt whatsoever that if the bank had acted lawfully on 16th March and accepted the offer on 18th or 19th March the Budget franchise would have been reinstated.

The Budget franchise was cancelled because the bank seized assets in excess of the limits of their lawful possession and powers. This caused both the cancellation of the franchise and prevented its reinstatement. Belzberg said:

150 If you have no cars at the airport by Monday, the franchise will be cancelled ...

151 And it was, two or three days later. The trial judge found that:

> 152 ... every car in sight was stickered and this helped to destroy the company.

Having made these findings he then went on to say:

> 153 ... I have found that the company would have survived: and what was the value of the company if there was no tort?

154 The appellants argue that Mackoff J.'s words are words of limitation. For the reasons I have expressed in the above analysis I do not accept this argument, and I think that Mr. Justice Gould addressed himself to the correct question. He did not exceed the scope of the original judgment so as to give rise to a valid plea of an offence against the doctrine of res judicata.

155 The appellants take issue with the learned trial judge's assessment of damages as follows:

156 1. That certain findings of fact are incorrect because they were based upon incomplete evidence. Later facts establish that the total liabilities estimated by the trial judge as $3,576,272 were in fact $91,000 less. There was a motion to admit fresh evidence of this on the hearing of the appeal. I would not admit the evidence or disturb the result. I am not of the view that a shortfall of $91,000 amid these very large numbers would have materially affected either the financial situation of the company — considering all the unknowns — or the trial judge's ultimate opinion. The judge considered all relevant factors and reached a conclusion.

157 2. The next objection is that there was a wrong estimate of the cash available to the company; the trial judge found that the company would have survived and he said [p. 318]:

> 158 The negative factors above catalogued are prima facie supportive of the bank's theory that liquidation was inevitable even if the tort had not taken place, but in finality that argument is flawed. Most of the difficulties would have been cured by *a sizeable injection of cash, and the rest would have been rendered survivable, by, again, a sizeable injection of cash*. [emphasis mine]

159 The appellants say the words "a sizeable injection of cash" means "available as working capital" and then point out that some of the items mentioned would have had to be used to pay off immediate debts and immediate mortgages. But the trial judge, in my opinion, has considered this situation. He does not differentiate as to which is to be used to meet the immediate difficulty, or which later; and he considers the possibility of a shortfall; he goes on to consider that if $200,000 had not been available from Belzberg as promised, other assets would have been on hand or at least certain to come. He then says [p. 318]:

> 160 These facts and probabilities, in this court's view, rebut the bank's submission that had it acted lawfully liquidation would have been nevertheless inevitable.

161 There was evidence from which the learned trial judge could draw the above conclusion and there is no ground for interference.

162 3. The next submission is that given the actual liabilities of the company, the availability of only a limited cash injection, the company's history of losses, and other circumstances in which the company found itself in March of 1982, it is evident that the company could not have been sold as a going concern.

163 Mr. Justice Gould found that the company could be sold as a going concern, based on all the evidence he heard, and a trial judge could decide one way or the other. As there was substantial evidence to support the trial judge's view I would not disturb his reasons.

164 Once the above conclusion is reached, and the method adopted by the trial judge accepted, there is no reason to consider other methods of valuation argued, all of which were dealt with by the judge in giving his reasons. In particular, he canvassed the two leading cases on other methods of valuation: *Ronald Elwyn Lister Ltd. v. Dayton Tire Can. Ltd.* (1985), 52 O.R. (2d)

88, 9 O.A.C. 39 (C.A.), and *Kavcar Invt. Ltd. v. Aetna Fin. Services Ltd.*, Ont. S.C., No. 9074/80, 11th April 1986 (not yet reported). The trial judge, in my opinion, effectively distinguished these two cases.

165 In my view, the findings on damages should not be disturbed.

166 A further ground of appeal raised only by the respondents Henfrey & Co. and Colin Topley is that the trial judge was in error in awarding punitive damages against them.

167 In my opinion, the conduct of Topley in rejecting out of hand the offer of McLachlan to pay the O.L.C. in full and not to seek the instructions of his principals fully warrant the award made.

168 There were some cross-appeals as to the following:

169 1. an error of the trial judge in assessing the damages;

170 2. an unreasonably low award of punitive damages;

171 3. there should have been an award of solicitor-and-client costs instead of party-and-party;

172 4. the trial judge's distribution of damages ought to have been made differently.

173 1. There was evidence to support the trial judge's damage assessment. He reached the figure he did using his judgment as to the worth of the evidence in its various aspects.

174 2. As to punitive damages, while I might have awarded more, this is a matter within the discretion of the trial judge, which in my opinion he properly exercised.

175 3. No ground was shown for interfering with the trial judge's discretion as to costs, and

176 4. the distribution he made was quite within his power and judgment to do.

177 I would dismiss all the cross-appeals.

178 In the result, all the appeals and all the cross-appeals are dismissed.

Appeals dismissed.

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TAB 9

Adding up the Damage: Lost Profits vs. Business Value

28 July, 2015

Ephraim Stulberg

Canada

When a business is destroyed as a result of wrongdoing, there are two commonly used methods by which the plaintiff's damages may be measured. One method is to appraise the value of the plaintiff's business at the date of loss; the loss to the plaintiff is the amount that the plaintiff could have sold the business for at the date of the loss. Another method is to calculate the plaintiff's annual loss of profits.

Under the business valuation method, the remedy applied is to have the defendant "purchase" the destroyed business from the plaintiff at its "fair market value" at the date of the loss. This value will be equal to the present value of the cash flows that would accrue to the owner of the business over its lifetime. A risk-adjusted discount rate is applied to convert these projected annual cash flows to a single "present value" lump sum. In cases where the business is assumed to have been likely to carry on in perpetuity, the annual discount rate may be converted into a single multiplier – for example, if the appropriate discount rate is 20 per cent, the multiplier would be 1 / 0.2 = 5.

Under the lost-profits method, one forecasts the annual profits for the destroyed business based on the actual economic and industry conditions from the date of the damage to the date of trial and on into the future. As with the business valuation method, under the lost-profits method, the plaintiff's lost profits should be discounted to reflect the fact that the projected profits were by no means "riskless."

would have performed absent the wrongdoing. Failure to do so can result in significantly higher damage calculations under the lost-profits method than under the business valuation method, as illustrated in the case of *Agribrands Purina Canada Inc. v. Kasamekas* ([2010] O.J. No. 84; [2011] O.J. No. 2786).

In *Agribrands*, the plaintiffs entered into an agreement which called for them to be exclusive distributors of Purina-branded feed in Halton County, Ont. beginning in 1991. The plaintiffs soon discovered that Agribrands was continuing to supply feed to rival distributors. As a result, the plaintiffs suffered and were forced out of business altogether in early 1992.

The plaintiffs' expert calculated lost profits of between $3.1 million and $4.2 million from the date of breach until the projected retirement of the owners, a period of 28 years. Most of this period fell between the date of the wrongdoing and the date of trial. It appears that the plaintiff's expert did not apply a discount rate to the past loss of profits, resulting in a large damage calculation. The court ruled that a lost-profits calculation over such a lengthy period was too speculative, particularly for a new business. It instead accepted the business valuation method advocated by the defendants' expert, and arrived at a significantly lower damage figure based on a multiple of three times the plaintiff's projected profits.

One key difference between the business valuation methodology and the lost-profits method concerns the issue of hindsight. The business valuation method imagines that the plaintiff would have sold the damaged business immediately prior to the damage occurring; it attempts to estimate the proceeds the plaintiff could have received at that point in time. Such a price would only have been negotiated based on facts known at that date. To the extent that no sale of the business was actually contemplated, a loss calculation based on the value of the business can lead to an amount far different than would have been achieved by the plaintiff but for the loss had they continued to operate the business. In such cases, an analysis of lost profits based on hindsight will prove more realistic.

This issue was addressed in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* [2004] B.C.J. No. 2337. The plaintiff filed suit after almost all of the investment advisers at one of its offices joined a competitor in 2000. The plaintiff's expert estimated the change in the value of the affected branch resulting from the co-ordinated departure; the valuation, being at a point in time, failed to consider the downturn in the financial markets as a result of the bursting of the "tech bubble" shortly following the breach. The court rejected the business valuation method for this reason, noting that to "artificially" ignore these relevant developments in the economy would be to provide a "windfall" for the plaintiff.

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the *Agribrands* damages award, noting that the trial judge was not justified in assuming that, but for the breach, the plaintiff would have continued as a Purina dealer for any longer than the original term of the contract.

The business valuation and lost-profits approaches often yield similar damages calculations. When they do not, it is often due to one of the factors noted above. Courts may also subjectively prefer one approach over the other. Experts are therefore well advised to consider calculations under each methodology and adopt the approach that best fits the facts of the case.

By Ephraim Stulberg. Published in the January 30, 2015 edition of Lawyers Weekly.

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Industries

- Professional Services

Services

- Business Valuation
- Lost Profits

TAB 10

Damages Measured by Lost Profits or Lost Business Value?

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In commercial litigation matters, including contract disputes, intellectual property infringement, fraud and unfair competition or negligence claims, a primary role of a financial expert is to quantify economic damages that may have been suffered by the plaintiff or to defend against such claimed damages. Economic damages are meant to restore the plaintiff to the financial position the plaintiff would have been in, "but for" the defendant's alleged harmful acts.

When quantifying economic damages, financial experts are commonly faced with the question of which approach may be most appropriate to use — lost profits or lost business value?

Lost Profits Approach
When the harm is for a finite period of time and is related to a separately identifiable cash flow, a lost profits approach is generally to a lost business value analysis due to the finite period of damages. This approach represents the difference between profits the plaintiff would have attained, "but for" the harmful event, and profits actually attained. Profits can be defined variously depending on the venue, facts and circumstances of the underlying engagement. The calculated lost profits are then adjusted for mitigation, if any. A lost profits analysis is commonly employed in breach of contract, intellectual property and general commercial litigation cases.

There are five generally accepted methods in calculating lost profits: sales projection, before and after, accounting for profits, yardstick and market share methods.

1. Financial experts commonly apply the sales projection method which compares forecasted profits before the harmful event to actual profits after the harmful event.

2. The before-and-after method, which compares profits before the harmful event to profits after the harmful event, is appropriate for many businesses.

3. The accounting for profits method is based on incremental sales or profits achieved by the defendant as the result of the harmful event. While applying this method, financial experts should be reasonably certain that the plaintiff would have attained the same amount of sales or profits as the defendant, "but for" the harmful event.

4. The yardstick method compares profits to a quantifiable yardstick, before and after the harmful event. This method is typically used in industries where profit margins are closely tied to a measurable yardstick such as the price of raw material.

5. The market share method is based on the market share the plaintiff would have attained, "but for" the

harmful event. This method may be suitable for industries where reliable data regarding the overall market is readily available.

Lost Business Value
In circumstances where the loss of earnings is considered or assumed to be permanent and into perpetuity, or where a business is destroyed completely, a lost business value approach is generally appropriate. This approach is commonly applied in business destruction, shareholder oppression, dissenting shareholder and tax court.

There are three generally-accepted approaches used in a lost business value determination analysis: the asset-based, market and income approaches. Using each of these approaches, a business valuation is performed before the date of harm and after the date of harm, with the resulting difference regarded as the lost business value.

1. The asset-based approach involves analyzing the plaintiff’s tangible and intangible assets net of liabilities. This approach does not directly address the operating earnings of the business and, as such, is useful in estimating the value of a non-operating business where cash flows are nominal, such as a holding company or an asset-intensive business.

2. The market approach uses pricing multiples taken from guideline companies or transactions and applies these multiples to the appropriate performance measure of the company being valued. One of the challenges in using this approach occurs when only limited guideline company or transaction data can be identified.

3. The income approach calculates a business’s value by applying a discount or capitalization rate to a measure of its expected future earnings to arrive at a present value of the future benefit streams. This approach is commonly used in estimating the value of both publicly-traded and closely-held businesses.

The Differences
Theoretically, both the lost profits and lost business value approaches should result in the same amount of damages. However, in practice, financial experts often arrive at different conclusions because of the following differences in procedure:

Terminal Value
A key difference between a typical lost profits and a lost business value determination analysis using the income approach involves the application of a terminal value, which is calculated based on the assumption that the business has an indefinite life, whereas lost profits are generally finite in nature. In a lost business value analysis, it is assumed that the terminal cash flows are permanently impaired while, in a typical lost profit analysis, the harmful event does not impact the terminal cash flows, and the impairment is only for a finite period of time.

Measurement Date
Often, the measurement date for the lost profits approach is the date of trial, while the measurement date for the lost business value approach is the date of harm. Generally, when using the lost profits approach, all information available up to the date of trial, irrespective of the date of harm, is considered in calculating damages. By contrast, in some jurisdictions, when using the lost business value approach, information available subsequent to the date of harm is typically excluded and only information known or knowable as of the date of the harm is considered in calculating damages.

Discount Rate
In a lost business value approach, the discount rate used is reflective of the overall risk of a business (i.e., invested capital). In lost profits analysis, the discount rate used is reflective of risk associated with specific cash flows. Depending on the circumstances, the risk associated with specific cash flows can be higher or lower than risk associated with an overall business. For example, risk associated with a specific research and development (R&D) project may be higher than risk associated with a portfolio of R&D projects, all

other things being equal. Alternatively, risk associated with a long-term contracted client with increasing purchases is lower than risk associated with multiple clients with decreasing purchases. Risk-adjusted discount rates in lost profits analysis include: weighted average cost of capital (WACC), cost of equity, plaintiff's internal rate of return, cost of debt, returns on investments of similar businesses, and risk-free returns. In lost business value analysis, WACC is commonly used, as well as equity rates utilizing the capital asset pricing model.

Consideration of Expenses
In lost profits analysis, generally only incremental costs are included, but there are exceptions in different venues. These incremental costs include variable and some semi-variable costs. In the lost business value approach, all costs related to the generation of overall revenue and profits, including fixed costs, are included.

Taxes
Lost profits are calculated on a pre-tax basis and an after-tax discount rate is applied. Lost business value is based on after-tax cash flows and after-tax discount and capitalization rates.

Using Both Methodologies
A plaintiff is not entitled to duplicative damages. Therefore, if both lost profits and lost business value approaches are applied in calculating damages, the financial expert should ensure that doing so will not cause duplicative damages. However, both approaches together can be applied in certain circumstances, as in the case of the slow death of a business. During the slow death of a business, lost profits are calculated for the time period between the harmful event and up to the complete destruction of the business. For the time period subsequent to the complete destruction of business, lost business value is calculated.

Conclusion
Depending on the facts and circumstances of litigation, either lost profits or lost business value approaches can be utilized. Whichever approach is used, the financial expert should ensure that the methodology and related processes are described fully and correlate to the cause of damage.

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TAB 11

Business value as a measure of loss in litigation contexts: Reflecting business "reality" over hypothetical "fantasy"

Farley J. Cohen and Prem M. Lobo

> *"Is this the real life? Is this just fantasy? Caught in a landslide, no escape from reality…"*
> ~ Freddie Mercury / Queen, "Bohemian Rhapsody"

In commercial litigation matters, counsel for both plaintiff and defence often find themselves obliged to turn their attention from the initial (and ever important) liability portion of the case to the also-important damages portion. With respect to damages, counsel need to consider, among other things, what damages will be claimed at trial, how to prove damages, what case law may apply with respect to specific damages being claimed, and whether damages-quantification expert witnesses need to be retained to prepare a report and testify at trial.

The purpose of damages is most often to restore a plaintiff to the position he or she would have been in had an alleged wrongful act or breach not occurred. In many commercial litigation contexts, this requires an analysis of the cash flows that would have been earned by a plaintiff "but for" an alleged wrongful act or breach and comparing these with the actual cash flows that were earned by the plaintiff, with the difference representing the quantum of loss.[1]

In some contexts, as an alternative to the "but for" versus actual lost cash flow[2] analysis, a business value approach may be considered to quantify loss. Namely, loss may be quantified as the "fair market value" (or the diminution in fair market value) of a business, contract, stream of income or other specified asset as a result of the wrongful act or breach. For instance, assume that a business has suffered harm as a result of an alleged wrongful act. Instead of quantifying loss as its lost cash flows for a finite period of time, the loss may be calculated as the loss in value of the entire business, indefinitely.

Expert witnesses are usually retained when the quantification of loss is not readily apparent to the court and requires specialized accounting or financial analyses to assist the court in determining what amount of damages to award. Expert witnesses often have to make important decisions with respect to whether a "lost cash flow" versus a "business value" approach is applicable in a particular case. Litigation counsel, in turn, need to understand the rationale for the approach chosen or suggested by the expert and need to play an active role in providing the expert with relevant case law on the subject.

Farley J. Cohen (left) and Prem M. Lobo (right) are principals of *Cohen Hamilton Steger & Co. Inc.* in Toronto.

The choice of "lost cash flow" versus a "business value" approach can have a significant impact on the dollar value of loss being claimed. In addition, the inappropriate use of one or another in a particular context may impact the credibility of the expert witness and jeopardize the claim for damages.

This article addresses the situations in which a "lost cash flow" approach versus a "business value" approach to quantifying loss is appropriate. Although it is written from the perspective of an expert witness who has to decide between the two approaches, it is directed towards litigation counsel who have to understand the approach chosen and its underlying rationale, ensure consistency with relevant case law and, potentially, cross-examine an expert witness on his or her choice of one method over another.

In particular, this article will touch on the following topics:

- What is meant by a "business value" approach to quantifying loss versus a "lost cash flow" approach?
- In what litigation contexts might it be appropriate/inappropriate to use a business value approach to quantifying loss?
- What are the underlying assumptions behind using a business value approach to quantify loss, and when are these assumptions valid?
- What are some of the special issues that need to be considered when applying a business value versus lost cash flow approach to quantify loss?

The theory of loss quantification and the difference between a business value and lost cash flow approach to loss quantification

The purpose of loss quantification

In order to fully understand the business value approach to loss quantification, it is helpful to begin with first principles – namely, by discussing the purpose behind the quantification of loss.

The ultimate objective of loss quantification is to calculate, in an objective and independent manner, with due diligence and consideration of the available facts, assumptions and restrictions of each situation, the financial loss, if any, incurred by a plaintiff as a result of the alleged actions of a defendant. A quantification of loss should normally restore a plaintiff to the position that he or she would have been in had an alleged wrongful act or breach not occurred.

The loss quantification is usually prepared at a particular (current) assessment date. Relative to the current assessment date, loss may have occurred in prior periods (i.e., a "past loss") and may be expected to continue into future periods (i.e., a "future loss"), either for a finite period of time or, sometimes, indefinitely into the future.

"Compensation" or "restitution" is an important characteristic of loss quantification. Eminent Canadian law professor and author Stephen Waddams states that "the object of compensatory damages is to put the party complaining in the position that would have been occupied 'if the wrong had not been done' or 'if his rights had been observed.'"[3] Note that it is ultimately up to a court to decide whether a particular amount (or amounts) quantified by a valuator (or valuators) will restore a particular plaintiff to a position of "wholeness," or whether some alternate amount(s) or other remedy established by the court would be more equitable.

Lost cash flow approach

Often, the quantification of loss requires the determination of the cash flows that a plaintiff business or individual would have earned but for the alleged wrongful actions of another party (the defendant) and comparing these with the actual cash flows that the plaintiff did generate. The difference between the two represents the quantum of loss. As such, this approach will be referred to as the "lost cash flow" approach.

Assume that the plaintiff, Company A, manufactures and sells two models of window blinds to retailers – the "Sunrise" and the "Sunset." Prior to the infringement described below, each model accounted for 50 per cent of total company sales. The mechanical components and operating process of the Sunrise are protected under patents held by Company A, whereas the Sunset is not. Assume that the defendant and competitor, Company B, has replicated the Sunrise blind, which it sells at a lower price and under the name "Eclipse." Company A alleges that the Eclipse blind infringes its patents on the Sunrise, and has initiated legal action against Company B.

Company A has noticed a significant loss in Sunrise sales that corresponds roughly to the time that Company B began selling Eclipse blinds. Sales of Sunset blinds before and during the alleged infringement have remained constant and are expected to continue as such.

If Company A takes Company B to court and successfully proves infringement, then Company A will likely be able to recover its losses arising from its lost Sunrise sales.[4]

Company A would have experienced a *past loss* from the start of the infringement period up to the loss assessment date, represented by the difference between the cash flow that Company A would have earned from the Sunrise blind "but for" the alleged infringement and the cash flow that Company A actually earned from selling the Sunrise blind to the loss assessment date. Company A will also likely experience a *future loss* from the loss assessment date to the date that Company B is ordered by the court to stop selling infringing Eclipse blinds.

Some observations to be made from this example are as follows:

- Company A has experienced lost cash flow, but the loss is *not* expected to continue *indefinitely* into the future.
- The lost cash flow relates to one product, but Company A continues to sell another product, which is unaffected by the infringement.
- Company A has remained and is expected to continue in operation despite the infringement.

Given the above facts and context, in this situation, the use of a lost cash flow approach is appropriate.

Business value approach

In contrast to the "temporary" business loss example presented above, there may be circumstances whereby the loss is more "permanent" in nature, and the quantification of loss may require the valuation, on the basis of fair market value, of a division of or an entire business, contract, stream of income or other specified asset. These circumstances may arise in "tort" or "breach of contract" contexts as discussed in the next section of this article, "The appropriateness of using a business value approach."

Consider, for example, the fact situation outlined in the example above, whereby Company B infringes on Company A's patents on Sunrise blinds. However, this time, assume that the Sunrise is the only line of blinds that Company A manufactures and sells. As a result of the infringement, Company A has experienced a significant decline in Sunrise sales. Company A attempts to recover market share by cutting selling prices but is unsuccessful. Company A encounters financial difficulties, is unable to introduce an alternative product or pursue another course of action to alleviate its difficulties and is forced to cease operations.

If the shareholders/stakeholders of Company A take Company B to court and successfully prove infringement, they may be able to claim lost cash flow from the infringement until the date that Company A ceases operations (the "cessation date") and, more significantly, may be able to claim the business value of Company A as at this date. The business value represents the loss of "permanent"/ongoing future cash flow value as a result of the infringement.

In this case, the lost cash flow is represented by the difference between the cash flow that Company A would have earned from the Sunrise blind "but for" the alleged infringement, and the actual cash flow earned from selling the blind. The lost business value represents the ongoing and permanent loss of future cash flow from the cessation date going forward into perpetuity.

Some observations to be made from this example are as follows:

- Company A has experienced lost cash flow, and the cash flow loss *is* expected to continue indefinitely into the future, representing a loss of business value.
- The cash flow loss relates to the only product Company A manufactures and sells, and has affected its ability to operate as a viable business.
- Company A has ceased its business operations completely as a result of the infringement.

Given the above facts and context, and, in particular, the indefinite duration of the loss in this situation, the use of a lost cash flow approach for the past loss and a business value approach for the future loss is appropriate.

The appropriateness of using a business value approach

Now that the distinctions between the business value and lost cash flow approaches have been discussed, identifying the circumstances in which it is appropriate to use one approach rather than the other can be explored.

Permanent loss of business or cash flow

The *permanence* of the loss in question is an important criterion to justify the use of a business value approach in a loss quantification context. Permanence can manifest itself in the following scenarios (among others):

- There is a *complete* business shutdown or cash flow loss.
- The business *winds down* initially, and then there is a complete shutdown or cash flow loss (the "slow death" scenario).
- A *portion or segment* of a business shuts down (or there is a *partial* cash flow loss), but the rest of the business carries on operations.

Complete business shut down or cash flow loss

A business value approach is applicable in situations where a business has been permanently and completely shut down or destroyed as a result of the actions of a defendant.

For example, assume that Company A was a successful manufacturing business operating from owned premises. Company A hired Company B to carry out roof and structural repairs at its premises. During the process, some of Company B's staff were negligent in their work. As a result, the roof at the premises collapsed, destroying Company A's equipment and inventory and forcing manufacturing operations to cease. Company A's customers were greatly inconvenienced and chose to purchase from a competitor. Customers have indicated that they have signed contracts with the competitor and will not return to Company A, destroying any hope of Company A rebuilding its business. In this situation, Company A can likely seek to recover its lost business value against Company B.

The concept of quantifying loss using business value where there is a permanent and complete loss of business is cited in a number of Canadian and U.S. legal cases. In *Jim's Hot Shot Service Inc. v. Continental Western Insurance Co. and Sun West Insurance Agency*,[5] the court indicated that "when, as in this case, the claim is that a business was destroyed by negligence, the measure of damages is the difference in fair market value immediately before the negligence caused damage and the fair market value that remained when the business stopped…"

Similarly, in *Taylor v. B. Heller and Co.*[6] the court recognized that "the action for damages for destruction of a business [should be] measured by the difference between the value of the business before and after the injury or destruction."

In either case, the value of the business after a complete business shutdown would either be negligible or represent any net residual proceeds received or recoverable from the liquidation of any remaining assets.

Other notable cases that echo the same concept include *Indu Craft Inc. v. Bank of Baroda*[7] and *Aetna Life & Casualty Co. v. Little*.[8]

Business winds down initially, and then completely shuts down

A business value approach is also applicable in situations where a business has been harmed, carries on operations for a period of time during which it experiences lost cash flows, and then is forced to cease operations as a result of the harm (sometimes described as the "slow death" scenario).

For example, assume that Company A was a food service business involved in supplying meals for airlines. Company A obtained the necessary licences, permits and approvals from government regulators to allow it to operate as a food service business. Company A also obtained comprehensive insurance coverage from Company B, an insurance provider. In January 2009, Company B erroneously filed a statement with government regulators indicating that Company A's insurance coverage had been terminated for non-payment of premiums. Company A's licences were suspended for two months and then reinstated when the erroneous insurance statement was rectified. However, in that time, many of Company A's airline customers stopped purchasing from Company A, and over the course of 2009, others also followed. Company A experienced ever-increasing operating losses as 2009 proceeded, before shutting down operations in December 2009.

In pursuing legal action in a situation in which the alleged action led to a company's demise, the plaintiff can seek to recover lost cash flow for the period during which it attempted to continue to operate, as well as lost business value with respect to lost cash flow beyond January 2010.

The concept of quantifying both lost cash flow during a business wind-down and lost business value for lost future value is cited in *Jim's Hot Shot Service Inc. v. Continental Western Insurance Co. and Sun West Insurance Agency.*[9] In this case, the court indicated that "loss of profits prior to cessation of a damaged business is properly allowable as an element of damages in addition to an allowance for a market value diminution because the interim profit losses experienced prior to liquidation of the business are not reflected or compensated for in the market value determination."

A portion or segment of a business shuts down

A business value approach is also applicable in situations where a segment of a business or a distinct stream of cash flow has been permanently lost as a result of some harm done, but the overall business continues to operate.

For example, assume that Company A sources and sells promotional merchandise such as embossed pens, golf balls, calculators and USB keys to businesses. The company is organized into three geographical divisions – Eastern, Central and Western Canada – each of which is headed by a sales manager. As the head office is in Europe, Company A relies on each manager to effectively run his or her division and manage customer relations. Assume that the manager for Eastern Canada resigns, sets up a competing business and improperly solicits all or most of the Eastern Canada customers away from Company A. Company A is unable to mitigate and as a result is forced to terminate Eastern Canada operations and divest its remaining assets.

In pursuing legal action against the manager arising from a breach of fiduciary duties and solicitation of customers, Company A may be able to claim lost business value due to the permanent loss of Eastern Canada operations.

Inability to fully mitigate loss of business or cash flow

What is implicit in the "permanence" criterion discussed above is the assumption that the business in question is unable to fully mitigate its lost business or cash flow. Stated another way, in order to be able to claim "business value" as a measure of loss, a plaintiff usually needs to demonstrate that it was unable to recapture or replace lost business, or restart business operations, or somehow alleviate its "permanent" loss.

In the above example, in order to successfully claim the business value of its Eastern Canada division as its loss, Company A will likely have to demonstrate that it was unable to recapture the solicited customers or, if it attempted to do so, why its efforts were unsuccessful.

With respect to mitigation, a plaintiff is expected to make "reasonable" attempts to minimize its losses; a plaintiff will usually not be faulted where mitigating would necessitate taking on excessive risks, or pursuing financially or operationally infeasible or uneconomical alternatives.

Breach of contract

The term of a contract and the clauses in a contract are usually very important in determining whether a lost cash flow approach or business value approach is applicable in a particular scenario.

Contract clauses or term of a contract

To illustrate the importance of contract clauses, assume that Company B licenses Company A to manufacture shoes under a designer brand owned by Company B. Company A pays a royalty to Company B but otherwise keeps the profits from sales of licensed apparel. The licence is a "contract" that stipulates various terms, conditions and responsibilities of both parties. It renews automatically every five years but can be terminated at the option of either party with four months' notice. The licence had been renewed continuously since it was awarded 20 years ago.

Assume that Company B is dissatisfied with the marketing and sales performance of Company A and decides to terminate the licence two years into the current five-year term, effective immediately. The licence in question is crucial for Company A's survival, and without it the company is forced to cease operations.

Company A pursues legal action against Company B, alleging breach of contract. If Company A successfully proves a breach of the contract by Company B, the question is whether it will be able to claim lost business value or lost cash flow and, if the latter, over what period of time. Contractual terms indicate that either party could terminate the contract with four months' notice. Notwithstanding the fact that the licence contract was renewed over the past 20 years, Company A may be entitled to receive its lost cash flow for only a four-month period from the date of termination. As an alternative, at most, Company A might be entitled to claim its lost profits for the remainder of the current contract term (i.e., for three years). Given the clear "out" clause in this particular contract or, at most, the remaining three-year contract term, a quantification of lost business value would not seem to be appropriate in this context.

One of the leading Canadian authorities on contractual damages is *Hamilton v. Open Window Bakery Ltd.*[10] In this case the plaintiff, Hamilton, had entered into a 36-month contract with the defendant, Open Window Bakery ("OWB"), to market and sell baked goods in Japan. The contract could be terminated immediately without notice if Hamilton acted in a manner that was "detrimental to the reputation and well-being of OWB," or could be terminated with three months' notice after commencement of the 19th month of the contract.

OWB proceeded to terminate the contract 16 months into its term, effective immediately, alleging that Hamilton had indeed acted in a manner that was detrimental to the reputation and well-being of OWB.

Initially the trial judge held that OWB had wrongfully terminated the contract, and awarded damages representing the remaining payments that would have been made over the remaining 36-month term, less a factor of 25 per cent to reflect the risk that OWB may have exercised its right to terminate at some point before the end of the term of the contract.

The Court of Appeal, however, held that the three-month notice-period clause in the contract represented the "minimum guaranteed benefits" under the contract and, therefore, the maximum amount of damages that could be payable to the plaintiff.

On appeal before the Supreme Court of Canada, the court noted that where a contract has alternate modes of performance (for example, the ability to terminate upon notice or the ability to terminate based on other clauses), the mode that is least burdensome to the defendant should be awarded. Based on this, the Supreme Court dismissed the appeal regarding damages, agreeing with the three-month notice period as the basis for damages.

In *Open Window Bakery* the alternative damages periods that were considered ranged from a contractually stated notice period to the remaining term of the contract in question. Given the clear contractual clauses in this case (and, potentially, contextual factors, such as the lack of past contract renewals), a claim for ongoing contract losses/business value was not advanced or considered.

Exceptions

From the discussion above, it follows that if contractual exit clauses or the contract term are not clearly set out, a claim for business value might be an option, given the particular contextual factors of a loss quantification scenario. For instance, in the example of the shoe manufacturer cited above, assume that the licence in question did not specify a term or did not specify any clear notice period for termination. In this case, a valuator might consider that the contract in question would continue to be valid and enforced by both parties indefinitely into the future, thus supporting the use of a business value approach.

Additionally, in some cases, business value may be claimed if the breach of contract was particularly egregious or in particularly bad faith. For example, in *United Roasters Inc. v. Colgate-Palmolive Co.*[11] the plaintiff was awarded compensation for loss of business value in a breach of contract case. The defendant terminated a contract during a period when its right to do so was unchallenged. However, upon terminating the contract, the defendant refused to return the plaintiff's manufacturing assets, putting the plaintiff out of business. In effect, although the defendant terminated the contract pursuant to the contractual terms, its actions before and after the termination were egregiously harmful to the plaintiff. In this case, awarding the plaintiff its lost cash flow over a normally reasonable notice period was not considered fair.

Methodology and other issues to consider

Methodology

Generally speaking, the methodology behind a business value approach has many similarities to that used in a lost cash flow approach. However, subtle differences should be noted, particularly with respect to the quantum of the discount rate to use, whether or not hindsight can be used, and the inclusion of post-purchase synergies (see table on next page).

Hindsight

The question of whether and how to consider hindsight when quantifying loss using a business value versus lost cash flow approach is an important one. Hindsight in valuation and loss quantification contexts refers to the use of "actual" information

	Lost Cash Flow Approach	Business Value Approach
1.	Assumes a "temporary" loss of cash flow.	Assumes a "permanent/perpetual" loss of cash flow.
2.	Often associated with the scenario in which there is a temporary or partial business shutdown or a temporary or partial shutdown of a segment of a business.	Often associated with the scenario in which there is a complete business shutdown or a complete shutdown of a segment of a business.
3.	Actual cash flow assumed to eventually recover to "but for" levels.	Assumes inability of plaintiff to fully mitigate lost cash flow.
4.	Usually applicable in breach of contract contexts with notice periods or contract termination provisions.	Usually applicable in breach of contract contexts where business destroyed or contract termination provision was not specified.
5.	Calculations based on pre-tax cash flow.	Calculations based on after-tax cash flow.
6.	Uses after-tax discount rates.	Uses after-tax discount/capitalization rates.
7.	Discount rates reflect the risks associated with the shorter "lost cash flow" time period in question.	Discount rates used reflect long-term operating, competitive and financing risks.
8.	Hindsight usually is admissible.	Hindsight usually is not admissible; some exceptions do exist.

(financial data, facts, economic data and so on) known after a particular valuation date or loss assessment date.

The general rule is that hindsight is not admissible in business value contexts except to test the reasonability of assumptions or projections made at the valuation date, whereas hindsight *is* normally admissible in loss quantification contexts. However, what is less clear is which approach to take when business valuations and loss quantifications intersect, as in the case of business valuations that are prepared for loss quantification purposes.

It is generally accepted that a valuation is prepared at a specific point in time and, therefore, should reflect facts, information and expectations known at that time. For instance, the court in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*[12] summarized the accepted approach to hindsight when it stated "the established legal principle is that, in the process of valuing shares at a particular date, hindsight information is generally inadmissible." The court went on to note that

> it would appear that two general exceptions to the principle have been recognized in Canadian case law. The first exception would appear to be that factual hindsight information – but not opinions or mixed facts and opinions – may be used for two purposes: firstly, to compare actual results achieved after the valuation date against projected or forecasted corporate results said to be reasonably foreseeable on the valuation date; and secondly, to challenge the reasonableness of assumptions made by the valuators. The second exception to the general principle would appear to be that hindsight information may be used to determine the correct value as of the valuation date of an unchanged component…in existence as of the valuation date.

It is also generally accepted that the objective of loss quantification is to restore an injured party to the position it would have been in had an alleged wrong not been committed or had a contract been fulfilled. In restoring a plaintiff to a condition of "wholeness," an examination of actual facts and events arising after the date of the alleged wrong is needed to forecast what would have happened "but for" the alleged wrong, and to compare it with what actually happened as a result of the alleged wrong.

The challenge arises when valuations are prepared for the purpose of quantifying loss. In most cases, hindsight will not be permissible. However, in some instances, in order to restore a plaintiff to a position of "wholeness," there might be compelling arguments to use hindsight in a valuation. Put another way, in some situations, if hindsight were not to be used, this would result in either a windfall gain or unfair penalization of a plaintiff.

Courts have support the limited use of hindsight in contexts similar to that described above. For example, in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*,[13] in attempting to determine the value of a patent in a breach of contract case the court noted "an imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent." The court noted that when time has elapsed since the valuation date in question, "experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages and forbids us to look within."

In short, while not permissible in most valuation scenarios, hindsight may be permissible in particular contexts in which valuations are prepared for the purpose of quantifying loss in order to make plaintiffs "whole" again.

Conclusion

The decision whether to claim lost cash flow versus business value as damages is an extremely important one for counsel, one that often depends on the facts of a particular legal context. Counsel (and damages quantification experts) need to be able to distinguish between a business value approach and lost cash flow approach to quantifying loss, understand the appropriateness of using a business value versus lost cash flow approach in particular loss quantification contexts, and understand the methodology used for either approach.

What is clear from the analysis in this article are the following:

- There are similarities between a business value and lost cash flow approach; for instance, a projected/estimated stream of "forgone cash flow" is the foundation upon which either calculation is based. Indeed, a lost cash flow approach may be seen as a subset of the business value approach.

- There are also differences between the two approaches; for example, aside from the fact that the lost cash flow and business value approaches encompass shorter and longer time periods respectively, there may be differing risks and discount rates, and differing treatments of hindsight between the approaches.
- There are specific circumstances in which a business value approach is more appropriate than a lost cash flow approach, and vice versa.

Ultimately, a quantification of loss in a litigation context needs to reflect the facts of the case and "business reality." If a business is permanently shut down with no hope of mitigation, this "reality" may suggest a business value approach, as compared with a situation in which a business suffers a partial loss of cash flow for a finite period of time, a "reality" that may suggest a lost cash flow approach. If counsel or damages quantification experts "force" a business value approach in a context in which it is not applicable, it may take the damages claim into the realm of fantasy and threaten the credibility of the claim for damages.

Perhaps, when deciding the appropriateness of a particular loss quantification approach or considering the reasonability of assumptions used in arriving at a particular quantum of loss, counsel and damages quantification experts may be well served to repeat to themselves the enigmatic yet soul-searching words of the great Freddie Mercury: "Is this the real life? Is this just fantasy?"

The answer to this question may well lead to a better matching of a particular loss-quantification approach with the factual context it is better suited for.

Notes

1. This article uses the terms "loss" and "damages" interchangeably. Technically, "loss" refers to the harm alleged to have been suffered by a plaintiff, whereas "damages" refers to a sum of money that a court decides is reasonably fair compensation for alleged losses.
2. Also referred to as "lost profits."
3. In *The Law of Damages* (Toronto: Canada Law Book, 2009) at section 5.20.
4. Assume also that Company A has elected to claim "damages" against Company B rather than an "accounting of profits" earned by Company B from the infringing product.
5. 353 NW 2d 279 (ND 1984).
6. 364 F 2d 608, 612 (6th Cir 1966).
7. 47 F 3d 490 (2d Cir 1995).
8. 384 So 2d 213 (Fla Dist Ct App 4th Dist 1980).
9. 353 NW 2d 279 (ND 1984).
10. [2004] 1 SCR 303, 2004 SCC 9.
11. 649 F 2d 985 (4th Cir 1980), 454 US 1054, 102 SCt 599, 70 L Ed 2d 590 (1981).
12. 2002 OTC LEXIS 2992 (SCJ).
13. 289 US 689 (1933).

» **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

Applicant

Court File No.: CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THORNELOE UNIVERSITY
(Appeal of decision of claims officer re loss of value claim, returnable November 18, 2022

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