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

REPLY BOOK OF AUTHORITIES OF THORNELOE UNIVERSITY

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

November 14, 2022

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TAB 1

Court of Queen's Bench of Alberta

Citation: 321665 Alberta Ltd. v. ExxonMobil Canada Ltd., 2011 ABQB 292

Date: 20110527
Docket: 9703 06830
Registry: Edmonton

Between:

321665 Alberta Ltd.

Plaintiff

- and -

ExxonMobil Canada Ltd., formerly known as Mobil Oil Canada Ltd. and Husky Oil Operations Ltd.

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil

The Action

[1] The Plaintiff has commenced a private enforcement action against the Defendants for damages for an alleged breach of the *Competition Act* and in addition seeks damages for tortious conspiracy and interference with its business relations.

The Evidence

A. 321665 Alberta Ltd.

i) Gary Whelen

[2] 321665 Alberta Ltd. was incorporated in 1984 and operated under the trade name Kolt Oilfield.

[3] Gary Whelen is the president and owner of the company. Prior to its incorporation, he worked in the oil industry and moved to Rainbow Lake in 1980. Rainbow Lake is a very small community in northwest Alberta with a population of approximately 1200 located 900 km. north of Edmonton. It is accessible by one highway and by air.

[4] After moving to Rainbow Lake, Whelen, through Kolt, did fluid hauling for various oil companies in the Rainbow Lake area starting in 1984.

[5] He purchased land in the town and moved in a 40' x 60' metal building which was used to service the vehicles the company operated. Rainbow Lake is small and isolated, thus it is necessary to provide accommodation for employees and he acquired a mobile trailer for this purpose. He hired a full time mechanic and drivers and, as well, used the services of owner operator trucks which operated under Kolt's dispatch system. It is necessary to have an onsite mechanic as there are no equipment dealers in the area because of the small size and remoteness of the community.

[6] He testified that the Rainbow Lake oilfield is a discrete oil field. Most wellsites are accessible by private oil company roads only which are not well marked and anyone working in the area must be familiar with the location of wells.

[7] Fluid hauling requires specialized trucks equipped with radios and safety equipment as Rainbow Lake is a sour gas area. Service must be provided on a 24 hours a day seven day a week basis and accordingly a dispatch system is required.

[8] At the time Whelen started Kolt, the ordering of fluid hauling services was done at the local level on the basis of "you call we haul". As such, personal contacts were essential and eventually Whelen knew virtually everybody connected with the oil industry in the Rainbow Lake area. He was active in the community and for one term served as a town councillor. He aggressively pursued sales opportunities with various oil companies in the area with the result that over time the business expanded. By 1992 he was operating 19 units although as business would fluctuate he would purchase and dispose of trucks. He purchased replacement used trucks as required.

[9] Initially, his main customer was Canterra, which was later purchased by Husky. Eventually Husky became Kolt's largest customer. Husky's main battery is a 20 minute drive from the town of Rainbow Lake whereas Mobil's main battery is a 25 minute drive.

[10] Whelen testified that it was not economical to operate outside of the Rainbow Lake area although from time to time Kolt did some work in the Zama oil field located north of Rainbow Lake as well as some work in northeastern British Columbia.

[11] Oil field drilling is primarily done in the winter. During the summer project work is done and on average 70% of Kolt's revenue was generated in the winter and 30% in the summer. He

observed that the summer project work would sustain the company over the lean summer revenue period until winter freeze up, allowing for the resumption of drilling.

[12] When Kolt first started operating there were several other firms supplying fluid hauling services in the Rainbow Lake area, but by 1996 Kolt's only competitor was Cardusty Trucking which had a base of operations in Rainbow Lake as well as a number of other areas in Alberta and BC. Kolt's sole base of operations was Rainbow Lake. Each company offered essentially the same service; that is fleet fluid hauling.

[13] Kolt's financial year end was April 30th. The main source of revenue for Kolt was derived from Husky and Mobil. For the years 1994 to 1996, revenue was as follows, which figures are rounded and exclusive of GST:

> 1994 Husky - $1,036,000 Mobil - $67,000 - Total $1,103,000 or 58% of its revenue
>
> 1995 Husky - $951,000 Mobil - $120,000 - Total $1,071,000 or 56% of its revenue
>
> 1996 Husky - $1,075,000 Mobil - $92,000 - Total $1,167,000 or 53.7% of its revenue

[14] On May 24, 1996 Mobil, on behalf of itself and Husky, sent a letter to Cardusty and Kolt advising that they were looking at different ways of dealing with fluid hauling and were possibly considering using one fluid hauling company exclusively.

[15] A meeting was arranged for June 12, 1996 at the Mobil battery at Rainbow Lake. Whelen represented Kolt and Dusty Hill of Cardusty Trucking was present. Kim Boles of Mobil ran the meeting.

[16] Boles demanded that Whelen and Hill disclose the financial particulars of their businesses, including profit margins. Whelen testified that he felt extremely uncomfortable about this demand but felt he had no alternative but to comply and did so.

[17] On July 7, 1996 Mobil forwarded a letter to Kolt requesting detailed financial information. Whelen testified that he felt that he had no alternative but to reply and did so, in writing, on August 1, 1996. His letter contained the following statements:

> My opinion of the enhanced supplier relationship is that it will eliminate the very competitive nature of this business thus costing both sides in efficiency and improvement. This factor will cause these benefits to be short term and looking ahead poses question as to the overall benefits achieved. Rate comparisons through the industry show that we have in Rainbow Lake very competitive rates for our services.
> I feel this problem should be addressed very seriously by the decision committee.

[18] On November 13, 1996 Whelen was advised at a meeting at the Mobil battery that Kolt would no longer be retained to do fluid hauling for Husky or Mobil. He was extremely worried

following the meeting as he could not see how Kolt could survive. Kolt was allowed to complete work it had started but was not going to get any new work from the Defendants except for emergency fluid hauling. Whelen felt that he was faced with financial disaster as he could no longer deal with two of the largest oil companies in Rainbow Lake. In fact, after November 13, 1996 Kolt did no new work for Husky or Mobil.

[19] The rumour mill in Rainbow Lake was flourishing and he felt that there was a perception developing that Kolt was not as good a company as Cardusty. In addition, his employees were extremely concerned about the viability of the company and the security of their employment.

[20] By May, 1997 the company was in dire financial straights. Its trucks were parked, most of its employees had left and there was only enough work for one truck which was not working full time. The heavy duty mechanic who had been with Kolt for 12 years resigned and relocated to Grande Prairie.

[21] He contemplated moving to another area but had no contacts, no contracts and decided that this would involve high risk, with no guarantee of a financial return, He felt that the risks and costs were simply too high. The company shut down fluid hauling operations on May 15, 1997 and Kolt's assets were sold.

[22] Whelen confirmed that after Mobil and Husky terminated the services of Kolt he continued to bid on work in the Rainbow Lake area. He bid on a Gulf project in the Hay Lake area north of Rainbow Lake but was not successful. He personally attended on every Kolt customer and was very active in the field.

[23] One of Kolt's biggest customers was Canadian National Resources Limited (CNRL). For the year ending April 30, 1997 Kolt billed it approximately $218,000. In the spring of 1997 CNRL connected its wells in the area to a pipeline thus eliminating virtually all of its fluid hauling requirements.

[24] Whelen acknowledged in cross examination that there was no guarantee of any amount of revenue from Husky or Mobil and that it was a competitive market for fluid hauling.

[25] He also acknowledged that prior to the shutting down of Kolt he had started a golf course business in the Red Deer area, which he still operates.

[26] His family moved to Red Deer in 1996, but he stayed in Rainbow Lake until the spring of 1997 at which time the assets of Kolt were sold.

[27] I found Gary Whelen to be a very credible witness.

ii) Bryan Bailey

[28] Bryan Bailey was qualified as a chartered business valuator qualified to give expert opinion evidence on the quantification of economic loss. He prepared a detailed report dated June 24, 2008. He acknowledged some arithmetic errors in the report and provided corrections during his testimony.

[29] Mr. Bailey's report contains a number of calculations of estimated economic gains which accrued to the Defendants as a result of the decision to sole source fluid hauling to Cardusty. Given that there is no claim for unjust enrichment or similar equitable claim being advanced, I have ignored these portions of his report.

[30] His report and oral testimony apportion the Plaintiff's losses into two general categories. The first relates to losses between November 13, 1996 and May 15, 1997 coupled with a loss of investment value and the second involves a loss of continuing profits after May 15, 1997. I have rounded his calculations which are exclusive of prejudgment interest.

[31] He estimates the claim for losses up to May 15, 1997 coupled with a loss of investment value as of that date to be in the range of $453,000 to $554,000 on a pre-tax basis and $424,000 to $514,000 on an after tax basis.

[32] His calculation of this portion of the claim was based on Kolt recovering $520,000 from the liquidation of its assets, which figure is reflected in Kolt's financial statements. He also factored into his calculations that Kolt had a good will value over and above its hard asset value.

[33] Respecting the claim for future loss of profits, Mr. Bailey's calculations were made on the basis that Kolt would have continued fluid hauling up to the time the Rainbow Lake field ceased production which was assumed to be April 30, 2023.

[34] Given that his report was prepared in 2008 he prepared his calculation of this portion of the claim for the period 1997 to 2008 and 2009 to 2023.

[35] On a pre-tax basis he estimated the loss of profits for the period 1997 to 2008 to be between $3.8 million and $4.4 million and for the period 2009 to 2023 to be $2 million to $2.3 million resulting in a total of $5.8 million to $7.7 million.

[36] On an after tax basis he estimated the loss of profits for the period 1997 to 2008 to be between $2.4 million and $2.8 million and for the period 2009 to 2023 to be $1.5 million to $1.7 million resulting in a total of $3.9 to $4.5 million.

[37] As part of his analysis of Kolt's financial statements Mr. Bailey calculated earnings from fluid hauling before adjustment for interest, taxes, depreciation and amortization. Accountants refer to this calculation by the acronym EBITDA.

[38] He calculated a weighted average of EBITDA to the years 1992 to 1996 to be $424,000 and EBITDA per hauling unit to be $47,000 in 1995 and $48,000 in 1996.

iii) Read-ins from Examinations for Discovery

[39] The Plaintiff read in as part of its case extensive portions of Examinations for Discovery of representatives of the Defendants. While it is not necessary for me to summarize these read-ins, I have considered this evidence in reaching my decision.

B. Mobil Oil Canada Ltd. now known as ExxonMobil Canada Ltd.

i) Kim Boles

[40] Kim Boles was produced as the officer of Mobil. He confirmed that Mobil has 100% owned properties in the Rainbow Lake field as well as a 50/50 interest with Husky in other properties which Husky operated.

[41] As the 50% owner of the jointly owned properties Mobil paid 50% of the expenses and thus was very concerned about operating costs in the Rainbow Lake area.

[42] Mobil had fluid hauling needs for its solely owned properties and was aware that fluid hauling was an integral part of the jointly owned properties. Mobil had a form of service agreement it used for fluid hauling containing a 20 day termination clause with no guarantee of volumes to be hauled.

[43] In 1995 Boles was appointed a change agent for Mobil in the Rainbow Lake area. He was charged with the responsibility of implementing a policy within the company which required a 12% increase in the rate of financial return and a 20% reduction in total sales costs. Mobil documents exhibited at trial referred to the company possibly leaving Canada if these financial goals, referred to as the “prize”, were not attained.

[44] In the 1995-96 period Mobil and Husky were working towards developing a synergy to reduce costs on the jointly owned properties. Mobil was aware that fluid hauling was its second largest cost item and was keenly interested in trying to reduce the cost of fluid hauling.

[45] Boles described that Mobil was trying to create an enhanced supplier relationship (ESR) which essentially involved a partnership between Mobil and the supplier. He described the goal as creating a win-win for both Mobil and the supplier. He conceded that an ESR did not necessarily equate to a single source supplier.

[46] He testified that Mobil was not trying to erode the profit margins of its suppliers, including its fluid haulers. Mobil and Husky created a fluid hauling team to work on reducing fluid hauling costs as part of the joint synergy initiative known by the acronym Mosky. No attempt was made to undertake a competitive bid process.

[47] On May 24, 1996 Boles wrote to Cardusty and Kolt requesting that both companies send representatives to a meeting at the Mobil battery at Rainbow Lake on June 5, 1996 although the meeting actually proceeded on June 12th.

[48] Both Mr. Whelen representing Kolt and Mr. Hill representing Cardusty appeared. They were asked to discuss the details of their financial operations and were asked to comment on a flip chart which the fluid hauling team had prepared which contained an estimate of the costs of running fluid hauling operations including profit margin.

[49] Following the meeting, minutes were prepared for the fluid hauling team in which it was confirmed that the team was proposing some follow up steps, including using one fluid hauling company exclusively. This was followed up by a formal recommendation to senior management of both Mobil and Husky on June 25, 1996 that the companies jointly utilize one fluid hauling supplier for their operations at Rainbow Lake.

[50] On July 9, 1996, Boles on behalf of Mobil and Gordon Olson on behalf of Husky, wrote a detailed letter to Kolt requesting a response to a detailed series of questions including a request to provide a complete breakdown of the financial operations of Kolt, including its profit. Whelen, on behalf of Kolt, provided a lengthy response on August 1, 1996.

[51] In his testimony, Boles stated that competition “had gotten Mobil to where it was at” and Mobil needed a 20% cost savings respecting its Rainbow Lake operations.

[52] He testified that at some point Whelen told him that if Kolt lost the Husky and Mobil business it would be out of business, but he did not believe this and thought that Kolt could pick up other business in the area but offered no evidence in support of this proposition.

[53] On October 3, 1996 Boles emailed the public relations department of Mobil advising that the single source decision “might cause Kolt to raise some eyebrows”.

[54] Boles was transferred out of the area in the spring of 1997 and was not able to describe what costs savings were actually achieved through the use of a single source for fluid hauling. He denied any intent to reduce competition and stated that the sole goal was to reduce costs.

[55] In cross examination Boles admitted that the direction to achieve a 12% increase in ROFA and a 20% in costs savings put pressure on him as a change agent to achieve these results.

[56] He acknowledged being aware that Mobil and Husky could not collude on pricing and he also acknowledged that as a result of the demands of Mobil and Husky these companies became fully aware of the intimate financial details of Kolt’s operations.

[57] It was put to him that because he stated that competition had gotten prices to where they were, it was necessary to remove the competition to “get prices to the right spot” and he conceded that this was correct.

[58] He testified that the deadline for setting the 1997 budget was September 30, 1996. The budget contained an estimated reference to expected costs savings, but not a specific estimated savings for fluid hauling. He conceded that if Kolt had not responded to the demand for financial information, it would have received no further work from Mobil or Husky.

[59] As part of the Mosky initiative all Mobil and Husky employees in the Rainbow Lake area were expected to cooperate in order to achieve the 20% cost reduction meaning that they had to change their behaviour and were directed to use Cardusty exclusively for fluid hauling purposes effective November 13, 1996, except in emergency situations which never arose.

C. Husky Oil Operations Ltd.

i) Ronald Arnason

[60] Ronald Arnason is an engineer who worked for Husky for many years in various capacities. In 1996 he was the District Manager of Operations for the Rainbow Lake area.

[61] He confirmed that the bulk of Husky's interests were in the 50/50 properties. All of the Husky production of oil and natural gas went to the Husky plant located in the area. Husky was the operator of the 50/50 properties pursuant to an agreement with Mobil.

[62] Prior to 1995-1996 there was some tension between Husky and Mobil over operating expenses for the 50/50 properties. A decision was made by senior management of both companies that something had to change and a decision was made to develop a joint synergy for the 50/50 properties with the goal of improving efficiency and increasing financial return.

[63] The initial strategy meeting was held on November 30th and December 1, 1995. Three teams were to be set up with the field operation team being germane to this litigation.

[64] The field operation team undertook a review of all aspects of the Rainbow Lake operations for both companies and identified that fluid hauling was the second largest cost "bucket".

[65] Arnason testified that fluid hauling is an integral part of operations at Rainbow Lake as production from wells not connected by a pipeline to the plant must be trucked to the plant for processing.

[66] In 1996 Kolt and Cardusty were the main companies providing fluid hauling in the Rainbow Lake area and essentially offered the same service. In addition, there were some small operators, including lease operators who would work through the dispatch system of Kolt or Cardusty.

[67] The fluid hauling team estimated that $600,000 per year savings could be achieved for fluid hauling by increasing efficiency. Arnason testified that this figure was only an estimate and was not able to provide any detailed calculation as to how this figure was selected.

[68] Arnason testified that the purpose of entering into the enhanced service relationship (ESR) was to reduce costs of operation, not to reduce the operating profit of the service supplier. He acknowledged that an ESR did not necessarily mean that there would have to be a sole source for fluid hauling.

[69] The fluid hauling team recommended a single source for fluid hauling by July 19, 1996, but Arnason, on behalf of Husky, felt that more study of the issue was required before a decision could be finalized.

[70] Arnason acknowledged that Kolt and Cardusty were essentially tied after the evaluation process was conducted. He observed that Kolt's fleet was a bit older and had only 100 barrel tanks whereas Cardusty had some larger units. The drivers of both firms were interviewed and the drivers for Cardusty scored slightly higher than the drivers for Kolt. There was also a concern that Gary Whelen had moved his family to Red Deer.

[71] In September 1996 a decision was made to name Cardusty as the sole source for fluid hauling in the Rainbow Lake area for Husky and Mobil. Arnason recalled that after the decision was made Whelen told him that this would put him out of business. Arnason did not accept this and felt that there would be other opportunities for Kolt in the Rainbow Lake area. He denied any attempt on his part personally, or on the part of Husky, to harm Kolt.

[72] In cross examination, Arnason acknowledged that prior to the decision to name Cardusty as the sole source for fluid hauling, local field operators were at liberty to contact fluid haulers individually, whereas after the change all field operators were instructed to only deal with Cardusty and could only retain the services of Kolt on an emergency basis. He estimated that Husky's annual budget for emergency fluid hauling was $15,000-$20,000 per year. Husky never again used Kolt for fluid hauling after November 13, 1996.

[73] Arnason admitted that Husky did not use fluid haulers from the Zama Lake area as it was simply not economical to use fluid haulers outside of Rainbow Lake as this would result in a slower response time and create more inefficiency.

[74] He acknowledged that realistically Kolt had no option but to participate in the evaluation process if it wanted to keep doing work for Husky.

[75] Arnason assumed that the unsuccessful fluid hauler would make up the lost revenue through other business in the area and that the successful company would give up some of its work in favour of the unsuccessful company but offered no evidence in support of either proposition.

ii) David Jones

[76] In 1996 Jones was a field operator for Husky at Rainbow Lake. He was asked to join the fluid hauling team with the hope of streamlining fluid hauling and improving efficiency. He confirmed that Mosky involved Husky and Mobil properties at Rainbow Lake only.

[77] His primary area of concern was environmental health and safety (EHS). He did evaluations of both Kolt and Cardusty and noted some deficiencies with respect to both. The evaluations produced a virtual tie between the two companies.

[78] Jones was aware that Cardusty was chosen as the sole source fluid hauler for Husky and Mobil whereas previously the field operator was able to select which fluid hauler to call. He did recall that his immediate supervisor, Mr. Priest, had asked the field operators to alternate between Kolt and Cardusty to maintain fairness and give Husky the benefit of two fluid hauling options.

[79] Jones was questioned as to what tracking of cost savings was undertaken after Cardusty became the sole source for fluid hauling. He testified that he was personally involved in working at the Cardusty office in Rainbow Lake to monitor data regarding items like volumes hauled, but this posting was only temporary and he was not replaced.

iii) Brian Reinhart

[80] Reinhart is involved with Husky's heavy oil operations at Lloydminster spanning the Alberta-Saskatchewan boundary. He is currently in charge of fluid hauling.

[81] Following a significant cost increase in 2005, resulting in the termination of its fluid hauling contract, Husky contracted with six other fluid hauling firms. Costs continued to rise and eventually Husky decided to purchase its own trailers and currently has 70 in service. These are large six axle tanks for highway use only.

[82] Reinhart acknowledged that Lloydminster is a city of approximately 27,000 with numerous towns and cities accessible in both Alberta and Saskatchewan. Reinhart did not testify to having any involvement in, or knowledge of, Husky's operations at Rainbow Lake.

iv) Dr. Douglas West

[83] Dr. Douglas West is an industrial economist qualified to give expert evidence in the area of competition.

[84] He testified that there are two aspects of market definition, product market definition and geographic market definition. A calculation of market share is necessary as it does provide some indication of possible market power.

[85] He testified that oil field fluid hauling can be treated as a relevant product market for purposes of a competition analysis in this case and that the relevant geographic market in this case would include Rainbow Lake, Zama and northeastern British Columbia. He acknowledged that summer access is much more limited than winter access.

[86] He testified that because he had very limited data with respect to other oil field haulers, including Cardusty, it is not possible to do a detailed market analysis.

[87] He opined that one of the significant issues in determining market power is whether there are entry barriers to other companies wanting to enter the area or exit barriers to a supplier like Kolt relocating to another area.

[88] He testified that it would be easy to enter this market as all one would require would be a truck which would involve low capital set up costs and that there were no obvious impediments to other oil field fluid haulers entering this market. He indicated that the labour market would not be particularly specialized.

[89] In his opinion, the selection by Husky and Mobil and an ESR could not lead to a lessening of competition and noted that there was no presumption that Husky and Mobil would use multiple oil field fluid hauling suppliers. It is not uncommon in a competitive market for some firms to fail and opined that the Plaintiff could have continued to service other customers in the Rainbow Lake area, but provided no evidence in support of this proposition.

[90] He concluded that capital is very mobile and that in this case Kolt could have left the Rainbow Lake area and redeployed its entire fluid hauling business to other markets. He provided no details as to whether other markets were available.

[91] He acknowledged that he has never been to Rainbow Lake and did not purport to have any knowledge about fluid hauling.

v) Lorne Siebert

[92] Lorne Siebert was qualified as a chartered business valuator qualified to give expert opinion evidence on the quantification of economic loss. He was called to rebut the report and testimony at trial of Brian Bailey.

[93] He undertook a review of the financial statements for Kolt respecting fluid hauling operations and concluded that it was well capitalized, debt free and had cash on hand in excess of $200,000 when fluid hauling operations ceased on May 15, 1997.

[94] He observed that in the years 1993 to 1997 the company spent $82,000-$91,000 per year net of disposals to maintain and replenish its fleet. Revenues were in the range of $2 million per year. In 1996, 54% of its revenue originated from Husky and Mobil and he noted a seasonal

variable with 55% of the revenues being earned in the May to November period and the balance in the November to April period.

[95] He opined that the company was profitable on an operating income basis with annual earnings averaging $300,000 per year during the years 1992 to 1996, excluding 1995 when earnings dropped to $82,000.

[96] His financial analysis of Kolt was similar in many respects to Mr. Bailey's analysis, but differed in some major areas.

[97] Through no fault on his part, he erroneously assumed that Kolt continued to earn income from Husky and Mobil after November 13, 1996. He prepared amended financial tables correcting this error with the result that he conceded that his calculations were very similar to Mr. Bailey's.

[98] He proceeded on the assumption that Kolt could have continued operating profitably notwithstanding the loss of revenue from Husky and Mobil. Using this approach he submitted that Kolt's losses would be calculated on the basis of lost revenue from Husky and Mobil. In reaching this conclusion he conceded that Kolt, in order to survive, would have to become smaller and less profitable.

[99] He assumed that operating expenses would decline proportionally with declining revenues, but provided no evidence in support of this proposition.

[100] He disagreed with Mr. Bailey's conclusion that Kolt had a good will value over and above its hard asset value. He opined that a trucking business would not ordinarily attract a good will valuation.

[101] He also postulated that a shorter time could be used for calculating losses than the suggested time by Mr. Bailey, being the life of the Rainbow Lake oil field, but declined to specify a reduced time frame.

[102] He offered no opinion as to whether the Plaintiff's losses should be calculated on a pre-tax or after tax basis.

Claim for Damages for Breach of the *Competition Act* R.S.C., 1985 c. C-34

a) The Statutory Scheme

[103] The purpose of the *Act* is described in para. 1.1:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[104] Section 45 deals with conspiracy:

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of conspiracy

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

[105] Section 36(1) creates a private right of action to claim damages for a breach of Part VI of the Act:

Recovery of damages

Any person who has suffered loss or damage as a result of

a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceeding under this section.

b) Could the Defendants Breach s. 45 of the *Competition Act* Respecting the 50/50 Properties?

[106] In closing argument, counsel for Mobil submitted that it would be technically impossible for the Defendants to be in breach of s. 45 as they were the co-owners of the 50/50 properties and thus were one entity incapable of entering into an anti-competitive agreement amongst themselves. No authority was cited in support of this submission.

[107] During the trial a Memorandum of Agreement was exhibited, dated October 14, 1964 between Mobil's predecessor, Socony Mobil Oil of Canada, Ltd. and Banff Oil Ltd. which was the original oil producer in the Rainbow Lake field. Husky is the successor to Banff.

[108] Paragraph 29.1 of the agreement reads as follows:

29. RELATION OF PARTIES

> 29.1 The Joint Operators shall hold the joint lands as tenants in common. Nothing herein contained shall ever be construed as creating a partnership of any kind, joint venture, association or a trust, or as imposing upon any one or more of the Joint Operators any partnership duty, obligation or liability.
>
> The duties, obligations and liabilities of the Joint Operators shall be individual and separate and not joint or collective.

[109] Paragraph 29.1 is a complete answer to Mobil's argument. As tenants in common the Defendants could indeed enter into an anti-competitive agreement and thus could be in breach of s. 45.

c) Did the Defendants Breach s. 45 of the *Competition Act*?

i) ***R. v. Nova Scotia Pharmaceutical Society (No. 2)***

[110] In ***R. v. Nova Scotia Pharmaceutical Society (No. 2)*** [1992] 2 S.C.R. 606, referenced as ***PANS***, the Supreme Court of Canada upheld the constitutional validity of s. 32(1)(c) of the *Combines Investigation Act* which has now been renamed the *Competition Act* R.S.C., 1985, c. C-34. Section 45 of the current *Act* is the equivalent of s. 32 of the previous *Act*.

[111] At para. 73 the basic structure of the section was described:

> 73 The offence created by s. 32(1)(c) comprises two material elements:
>
> 1. An agreement entered into by the accused ("Every one who conspires, combines, agrees or arranges with another person"); and
>
> 2. An undue prevention or lessening of competition flowing from this agreement ("to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property ...").
>
> There is furthermore a mental element to this offence, which I will discuss in Part VI of these reasons.

[112] The meaning of “unduly” has been the subject of much judicial comment and the following passages are found at paras. 79, 80 and 83:

> 79 This court has already interpreted the word "unduly" on a number of occasions . . .
>
> 80 The meaning of "unduly" has usually been described by reference to various synonyms. In *Weidman*, Anglin J. adopted the string of synonyms given in *R. v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505 (Ont. C.A.), at p. 520 [C.C.C.] ("improper, inordinate, excessive or oppressive"). This string has been mentioned in all subsequent judgments of this court on the issue . . . given that a controversy had arisen, Parliament saw fit to add s. 32(1.1) to the Act, thus dispelling any doubt as to the state of the law. Anglin J.'s reasons in *Weidman* remain authoritative. Instead of adding to this string of synonyms, I will adopt the reasons of Clarke C.J.N.S. in the instant case at p. 157 [C.C.C.]:
>
>> While the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.
>
> Clarke C.J.N.S. has touched upon the very nature of "unduly": while this word does not have a precise technical meaning, it does have a common meaning, and it expresses a notion of seriousness or significance.
>
> . . .
>
> 83 The legal content of s. 32(1)(c), however, is not exhausted by a search for the meaning of unduly. Section 32(1)(c) must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the Act. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law, pertaining to the determination of undueness under s. 32(1)(c), and as such most relevant. I will look at each in turn.

[113] The court emphasized the significance of this legislation to Canadian Public Policy at paras. 84, 87 and 89:

> 84 At the outset, it must be noted that the Act is central to Canadian public policy in the economic sector, and that s. 32 is itself one of the pillars of the Act.
>
> . . .

87 The content of the 1889 Act was progressively enlarged, until it grew into the current Act. In *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, Dickson C.J.C. wrote for the court at p. 676 [S.C.R.]:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

The Act can thus be seen as a central and established feature of Canadian economic policy.

. . .

89 This court has made numerous remarks on the public policy interests underlying s. 32(1)(c) of the Act. These remarks, found in *Weidman*, *Stinson-Reeb*, *Container Materials*, and *Aetna Insurance*, supra, are perhaps best summarized in this passage from the majority judgment in *Howard Smith*, supra, at p. 411 [S.C.R.]:

> The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(c). Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability.

[114] The court mandated a two step inquiry in determining whether a breach of s. 32 has been established and the following passages appear at paras. 96, 97, 98, 100, 101, 103, 107 and 108:

96 First of all, there are two major elements to this inquiry, that is (1) the structure of the market, and (2) the behaviour of the parties to the agreement. As a preliminary step, definition of the relevant market is required. Many decisions have explicitly adopted this approach (*J.W. Mills & Son Ltd. v. R.*, [1968] 2 Ex. C.R. 275, 56 C.P.R. 1, at p. 303 [Ex. C.R.]; ...

97 I will not venture into the intricacies of outlining the relevant market, other than to repeat that it comprises both geographical and produce or service aspects, as was stated in *J.W. Mills*, at p. 303 [Ex. C.R.]. Definition of the relevant market is a fairly circumscribed process, even though it may require considerable inquiry (see *R. v. Metropolitan Toronto Pharmacists' Assn.* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.)).

98 The structure-behaviour framework of analysis remains merely a convenient way of approaching conspiracy problems, and it should not be seen as a rite of passage. Indeed, to a certain extent, the determination of whether an agreement unduly restricts competition involves an examination not only of market structure and firm behaviour separately, but also of the relationship between them, as Gibson J. remarked in *J.W. Mills*, at p. 309 [Ex. C.R.].

a. Market structure

99 . . . Indeed market share as such cannot suffice to conclude on the structure of the market, and s. 32(1)(c) would lose some of its effectiveness and would stray from its objectives if it incorporated a market-share threshold. Market share alone is not determinative, as was rightly pointed out in *Canadian General Electric*, at p. 501 [C.C.C.].

100 The aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement, as was said in *Canadian Coat & Apron Supply Ltd.*, at p. 64 [Ex. C.R.]. In this respect, many factors other than market share are relevant. Some were listed in *J. W. Mills*, at pp. 307-308 [Ex. C.R.]: (1) the number of competitors and the concentration of competition, (2) barriers to entry, (3) geographical distribution of buyers and sellers, (4) differences in the degree of integration among competitors, (5) product differentiation, (6) countervailing power and (7) cross-elasticity of demand (see also *Canadian General Electric*, supra). This list is not limitative . . .

101 Market power is the ability to behave relatively independently of the market. This is precisely what s. 32(1)(c) of the Act seeks to prevent. As this court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act. When it occurs in the context of a conspiracy to restrict competition, s. 32(1)(c) will apply. It can be presumed that Parliament did not wish s. 32(1)(c) to apply in the absence of market power. Absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures (see Dunlop, supra, at p. 114).

103 The application of s. 32(1)(c) of the Act does not presuppose such a degree of market power, as s. 32(1.1) clearly enunciates. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this (see *R. v. Abitibi Power & Paper Co.* (1960), 36 C.R. 96, 36 C.P.R. 188, 131 C.C.C. 201 (Que.), at pp. 249-252 [C.C.C., pp. 146-149 C.R.]).

b. Behaviour

107 The second part of the framework found in case law involves an examination of the behaviour of firms. In both *R. v. McGavin Bakeries Ltd.* (No. 6) (1951), 13 C.R. 63, 3 W.W.R. (N.S.) 289, 101 C.C.C. 22 (Alta.), at p. 303 [W.W.R. (N.S.)], and *Canadian General Electric*, supra, at pp. 531-532 [C.C.C.], the court considered which facet of competition was affected by the agreement (price, quality, service or other) and whether it was the prime concern of the buying public. The object of the agreement is without doubt the most important behavioural element in the inquiry, but others may be relevant, such as the manner in which the agreement has been or will be carried out and, in general, any behaviour that tends to reduce competition or limit entry (see *J. W. Mills*, supra, at p. 309 [Ex. C.R.]).

108 The aim of the inquiry is the likely effect of the agreement. I can only quote from *R. v. Northern Electric Co.*, 21 C.R. 45, [1955] O.R. 431, 111 C.C.C. 241, 24 C.P.R. 1, [1955] 3 D.L.R. 449 (H.C.), at p. 469 [D.L.R.]:

> In considering whether the agreement or conspiracy comes within the statute, one does not judge the unlawfulness by what was done pursuant to the agreement (although this may be evidence of the agreement) but ... one examines the nature and scope of the agreement as proved and decides whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue.

See also *Aetna Insurance*, supra, at p. 747 [S.C.R.]. The agreement must be or must have been likely to injure competition, irrespective of any actual effect it may have had (although evidence of the effects offers good guidance as to the likely effects of the agreement). Some agreements do not constitute behaviour likely to injure competition, while others are highly injurious.

ii) Determining Market Structure in this Case

[115] As noted at para. 100 of ***PANS***, the aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement. The analysis is contextual and must

reflect the unique features of fluid hauling in Rainbow Lake in 1996-1997 and more specifically, fleet fluid hauling.

a) The Product Market of Fluid Hauling

[116] Dr. West agreed that fluid hauling would constitute a recognized product market.

b) The Number of Providers of Fleet Fluid Hauling

[117] It is uncontroverted that in 1996 Kolt and Cardusty were the only companies offering fleet fluid hauling in Rainbow Lake and that they essentially offered the same type and quality of service.

c) Rainbow Lake as a Geographic Market for Fluid Hauling

[118] One of the factors pertinent to the issue of market structure is whether a geographic market area can be identified?

[119] It is uncontroverted that Rainbow Lake is a discrete oil and gas field. The town of Rainbow Lake is in a remote area of the Province accessible by one highway only.

[120] Oil and gas production from the Rainbow Lake field, which is not transported by pipeline, is processed by large batteries in the area requiring that crude oil be trucked to them.

[121] Fluid hauling for the Rainbow Lake area is based at or near the town of Rainbow Lake. Mr. Arnason from Husky confirmed in his testimony that Husky used only fluid haulers based in Rainbow Lake.

[122] The Defendants recognized their Rainbow Lake properties as distinct business units with resident employees, including local managers. Significantly, the Mosky joint synergy initiative involved only the Rainbow Lake properties. Estimated cost savings and enhancement of value involved only these properties.

[123] Fluid hauling is time sensitive requiring that trucks be available any time of the night or day. There is no evidence that fluid hauling from other areas, including Zama City or Northeast British Columbia, was ever utilized because these other areas are too far away and therefore it is not economical to operate trucks from that distance. There is no evidence that fluid hauling in the Rainbow Lake area was part of a larger market area.

[124] During the trial, the Plaintiff entered into evidence a map of the Rainbow Lake area marked with a red square identifying Gary Whelen's estimate of the boundaries of the Rainbow Lake fluid hauling market area. I accept that this red square has no technical validity but rather is only an estimate of market boundaries.

[125] It bears noting however, that this estimate is very similar to an estimate of the boundaries of the Rainbow Lake field provided by the officer of Husky in response to undertakings from Examinations for Discovery.

[126] I find as a fact that the boundaries of the Rainbow Lake fluid hauling market are as follows:

1. The north boundary bisects Zama Lake and is situated between the 112th and 113th Township lines;
2. The south boundary is situated between the 104th and 105th Township lines;
3. The west boundary is the Alberta/British Columbia boundary and;
4. The east boundary is the Chinchaga River.

[127] In the result, I reject Dr. West's opinion that the Rainbow Lake geographic area for fluid hauling would include the Zama oil and gas field, including Zama City or Northeastern British Columbia. In reaching this conclusion, I am mindful that evidence at trial disclosed occasional work in these areas by Kolt.

[128] I also reject Dr. West's purported listing of other companies providing fluid hauling in Northwestern Alberta in 1996/1997. As will be discussed below, the Defendants called no evidence to substantiate the information provided to him about the availability of other fluid haulers.

d) Kolt's Market Share

[129] Whelen testified that he estimated the total market for fluid hauling in Rainbow Lake in 1996 to be between \$3.5 million to \$4 million per year. No evidence was called as to the amount of revenue Cardusty was generating in the Rainbow Lake area.

[130] Whelen's estimate was based on his observations as to the number of fluid hauling trucks being operated by Cardusty. He estimated that Kolt and Cardusty were roughly dividing fleet fluid hauling in the Rainbow Lake area and thus he extrapolated an estimate of market size based on Kolt's revenue.

[131] The Defendants argue that the Plaintiff bears the onus of proving the size of the market and because of the absence of detailed market data, its claim must fail.

[132] I do not agree. In ***PANS*** at para. 99, the court specifically rejected the notion that market share is determinative or that a market share threshold can be established. Market share is one of a number of factors to be considered in determining the degree of market power of the parties to the agreement.

[133] Husky is the dominant oil and gas producer in the area and operates a large processing plant which handles production from Husky and Mobil's joint properties and which also services production from a number of small producers in the area. The existence of this processing plant serves to enhance Husky's market power in that area.

[134] Fluid hauling is an essential and integral part of oil and gas production. The evidence overwhelmingly establishes that fluid hauling requirements for the Rainbow Lake field were based at Rainbow Lake because of the need to respond quickly to a request for service and also because it is not economical to service the Rainbow Lake area from elsewhere.

[135] Kolt's records clearly establish that Husky and Mobil were high volume customers generating revenue for the company in excess of $1 million per year for 1994, 1995 and 1996. The evidence clearly establishes that the volumes of fluid hauling for Husky and Mobil combined were such that fleet service was required. The Defendants conceded that their combined annual budgets for fluid hauling were approximately $1.7 million per year.

[136] In each of these years this revenue was more than one-half of Kolt's total revenue from fluid hauling operations. The balance of revenue for each of these years came from a variety of sources, none of which were nearly as high in volume as Husky and Mobil combined.

[137] Prior to November 1996 Kolt and Cardusty were the only fluid haulers in the Rainbow Lake area offering fleet service. Kolt and Cardusty offered essentially the same service. Kolt would retain the services of local owner operators who operated under Kolt's dispatch system.

[138] ***PANS*** requires a contextual analysis of market share. A proper analysis of the degree of market power of Husky and Mobil must be viewed through the prism of fluid haulers at Rainbow Lake offering fleet service.

[139] Husky and Mobil had enormous degrees of market power over fluid haulers offering fleet service because ongoing fleet service could only be sustained if there were significant volumes of product to be hauled to justify the expense of acquiring and operating a fleet of trucks, including the need to maintain a local maintenance shop with a resident mechanic as well as accommodation for employees.

[140] There is no evidence that any of the other oil and gas producers in the area had sufficient volumes of production to justify maintaining fleet service. CNRL's decision to link its wells to a pipeline in the spring of 1997, thus obviating its need for fluid hauling, exacerbated Kolt's predicament.

[141] It bears noting that prior to the embarking on the joint synergy initiative with Mobil, Husky had directed its field operators at Rainbow Lake to fairly allocate fluid hauling between Kolt and Cardusty, thus allowing a competitive market to thrive. Husky considered that this result was beneficial for itself and the community of Rainbow Lake.

[142] Significantly, the Plaintiff is not alleging anti-competitive pricing but rather this is a case involving the alleged intentional exclusion of the Plaintiff from the opportunity to compete for the business of Husky and Mobil.

[143] The decision by Husky and Mobil in November 1996 to use only a single source for fluid hauling resulted in a markedly different market structure arising. Competition among fleet haulers was effectively eliminated.

[144] As discussed in ***PANS*** at para. 101, this is the very antithesis of free competition. Whereas previously Kolt had demonstrated that it could compete successfully in the market, the decision to grant Cardusty the exclusive right to provide fluid hauling for Husky and Mobil prevented Kolt from competing in the marketplace for this revenue. Having built up the infrastructure required to compete for fleet fluid hauling, it lost the revenue base necessary to sustain the infrastructure.

[145] The fact that Husky and Mobil were able to eliminate Kolt as a fleet service provider is in of itself proof of the degree of market power these companies had.

e) Barriers to Entry into the Market

[146] Dr. West opined that the Defendants did not have the power to behave independently of the market because there were no barriers to entry for other businesses wishing to provide fluid hauling service in Rainbow Lake and also opined that there was nothing preventing Kolt from relocating to another market area.

[147] In his opinion, an oil field fluid hauling business could be set up at a relatively low cost and observed that Kolt had no contracts with Husky or Mobil thus any fluid hauling business which was more efficient could compete with Kolt or Cardusty.

[148] While acknowledging that Kolt had a shop in Rainbow Lake located on land it owned, and that it provided camp style accommodation to its employees, he concluded that these start up costs would not be large. He made no comment about the value of personal contacts with field operators which would be a significant factor for any new competitor entering that area.

[149] I do not accept Dr. West's opinion respecting entry or exit barriers, which is based on a theoretical analysis which does not accord with the actual market realities in Rainbow Lake at that time.

[150] Dr. West, who has never been to Rainbow Lake and who has no actual knowledge of the fluid hauling business, undertook no research about the actual costs of setting up a fluid hauling operation in Rainbow Lake in 1997, including land purchase or leasing costs to accommodate a fully equipped truck maintenance facility and employee accommodation expenses. He did not consider that truck drivers require sour gas training and familiarity with the local area as oil well access roads are unmarked.

[151] The Defendants called no evidence on what start up costs would have actually amounted to at the time. While I accept that start up costs would not be prohibitive, they would nonetheless be significant and operate as a barrier to entry.

[152] Given that there is no factual basis for his opinion on the subject of start up costs, his evidence is theoretical, speculative and therefore of limited probative value.

[153] As well, Dr. West's opinion that a more efficient fleet fluid haulers could displace Kolt or Cardusty ignores the evidence at trial that both of these companies were experienced, efficient fleet fluid haulers. There is a complete absence of evidence that any potential competitor could have been more efficient.

[154] In addition, Dr. West assumed that there were other fluid haulers besides Kolt or Cardusty operating in Rainbow Lake at that time. In fact, the evidence overwhelmingly establishes that there were only two fleet fluid haulers in the area at that time and that owner operators operated under the Kolt or Cardusty dispatch systems.

[155] There is no evidence that prior to November 13, 1996 or in the period between November 13, 1996 and May 15, 1997 any potential competitor in the fleet fluid hauling market was considering starting operations in Rainbow Lake. I do not accept that the factual reality that there were only two fleet fluid haulers operating in Rainbow Lake in 1996 was mere happenstance.

[156] Moreover, Dr. West ignored the reality that the decision made on November 13, 1996 to sole source Husky and Mobil's fluid hauling to Cardusty would operate as a barrier to entry because any potential competitor wishing to provide fleet fluid hauling would be concerned that a revenue pool of $1,700,000 per year would not be accessible.

[157] Dr. West's conclusion that Kolt could have moved its fleet elsewhere was not supported by any evidence of an available location which could have accommodated a fleet of eight trucks. Moreover, as will be discussed below, the burden is on the Defendants to establish a failure to mitigate. Dr. West's conclusion has the effect of reversing this evidentiary burden and therefore does not withstand scrutiny.

[158] In the result, I attribute little weight to his testimony.

iii) Behaviour of the Defendants

[159] Virtually all of the evidence at trial respecting the behaviour of the Defendants was admitted and overwhelmingly confirmed by documentary evidence.

[160] Oral testimony during the trial, coupled with documentary evidence exhibited, clearly establishes that Husky and Mobil entered into a joint synergy agreement with the stated purpose of reducing their costs of operations at Rainbow Lake, thus enhancing their profits. Their focus

was on reducing total system costs (TSC) but the only aspect of this agreement pertinent to this litigation was cost reduction in connection with fluid hauling.

[161] By the early fall of 1996 the fluid hauling team was recommending to senior management for both Husky and Mobil that a single source for fluid hauling be utilized replacing a system under which Kolt and Cardusty roughly divided the work between them.

[162] A target for cost savings for fluid hauling was set in the estimated amount of $600,000 per year. Total cost savings were referred to as the "prize". In a general way cost savings were incorporated into the 1997 operating budget which was prepared in September 1996, but no specific amount was identified for fluid hauling cost savings.

[163] The fluid hauling team met with representatives of Kolt and Cardusty, which companies were asked to disclose their operating financial particulars, including profit margins.

[164] The fluid hauling team was not satisfied with the results of this consultation process and by October 1996 recommended to senior management for both Husky and Mobil that a single source for fluid hauling be selected.

[165] Approval was received from senior management to proceed. Selection criteria were established and the two companies participated in the selection process. Both companies had very similar scores with Kolt scoring 66.03 and Cardusty 65.24.

[166] Ultimately Cardusty was selected and on November 13, 1996 Mr. Whelen was advised of the decision and that while Kolt could finish jobs in progress, thereafter it would only be retained to provide fluid hauling to Husky and Mobil on an emergency basis. In fact, Husky and Mobil never again retained Kolt for new work.

[167] Husky and Mobil admit entering into the agreement to sole source their fluid hauling requirements but argued that this was done for the purposes of efficiency and enhancing their profit margins for their Rainbow Lake operations.

[168] In ***PANS*** at para. 89 the court rejected the notion that an efficiency defence is available, for to accept such a defence would have the effect of rendering s. 45 nugatory.

[169] It is not disputed that Mobil initiated the joint synergy initiative and that Mr. Boles, Mobil's change agent, was tasked with implementing it. Husky willingly participated in the process.

[170] The following passages from his trial testimony at pages 210, 211, 222 and 223 are instructive as to how he perceived competition as being an impediment to achieving cost savings for fluid hauling and that, therefore, competition had to be removed:

Q Now, at that point, sir, is it fair to say that competition had got the prices for fluid hauling where they were?
A Yes, that was our thinking at the time and that was why we moved and were able to make this statement.

Q And, sir, if you could take competition out of it and all you were focused on was doing business, then you could get prices to where the right spot would be. Correct?
A If we focused on total system cost and it was about pricing was the total systems cost for fluid hauling. Price was -- the price was the price. It was total system costs that we were looking at, and that's where we got the 20 percent of the 3 million dollars was total system costs.

Q Okay. And if you could take the competition out and all you were focused on was doing business, you could get prices to where the right spot would be. Correct?
A Yeah, the price -- year, the prices were the prices.

Q It was competition got the prices to where they were. Correct?
A Yeah.

Q Yes?
A That was our -- yeah.

Q And the fluid-hauling team, the discussion came around to the other side, that competition had also got you to where the prices were, and if you could take competition out and all you were focused on was doing business, you could get your prices to where the right spot would be. Correct?
A No. Well -- yeah. Sorry. If I could take competition out?

Q Yes.
A That's -- yeah. No, what we were -- what we were saying was that competition got us to where we were. So competition -- to continue to try to work with this competition model was not going to get us the savings that we were looking for. It wasn't getting us to this new way of doing business.

. . .

Q And you read Mr. Whelen's opinion on the Enhanced Supplier Relationship and his concern that it will eliminate the competitive nature of the business?
A M'hmm.

Q And you didn't agree with that?
A No, we didn't agree as a team.

Q And part of that disagreement had to do with the prices being where they were because of that existing competition?
A M'hmm.

Q Yes?
A Yeah. That's what we had said, that competition has got us a dollar-per-hour price as to where we are now and what we want to focus on is total system cost. So it's a much bigger and a different way of thinking than what we had gotten to right now as far as how the traditional you call, we haul pricing had been.

Q And you wanted to move beyond what competition had achieved and enhance your total system costs through something new?
A Yes.

iv) Conclusion on Whether the Defendants Breached s. 45 of the *Competition Act*?

[171] The Defendants readily admit entering into an agreement to use a single source for fluid hauling. The issue is then reduced to whether this agreement unduly lessened competition in breach of s. 45 of the *Competition Act*?

[172] Using the two stage inquiry prescribed in ***PANS***, I have concluded that the Plaintiff has proven that the Defendants entered into an agreement to unduly lessen competition for fluid hauling in a recognized market area, thus breaching s. 45 of the *Competition Act*.

[173] The Plaintiff had no contractual entitlement to revenue from the Defendants for fluid hauling, but did have the legal protection, afforded to it by s. 45, to have the opportunity to compete in the marketplace for this revenue. The decision by the Defendants to use Cardusty exclusively for their fluid hauling requirements prevented the Plaintiff from competing for this business.

[174] This conclusion is entirely consistent with interpreting the *Competition Act* in a manner which protects competition, not the individual competitor.

[175] It necessarily follows, that I reject Dr. West's conclusion that the agreement by the Defendants to use Cardusty as their sole source for fluid hauling did not unduly lessen competition.

[176] It is uncontroverted that as of November 13, 1996, Kolt was excluded from providing fluid hauling to Husky and Mobil. Dr. West's opinion does not accord with the facts in this case, that is, Kolt was a fleet fluid hauler denied the opportunity to compete for $1.7 million per year of fluid hauling revenue from Husky and Mobil notwithstanding that the company had demonstrated over a number of years that it had the infrastructure in place to provide fleet fluid hauling services and competed effectively with Cardusty.

[177] The agreement by the Defendants to use Cardusty exclusively for their fluid hauling requirements not only unduly lessened competition, it eliminated it.

Claims in Tort

[178] In its Amended Statement of Claim, the Plaintiff claims damages pursuant to s. 36 of the *Competition Act* for a breach of s. 45 of the *Act*. Damages are claimed as well for the tort of conspiracy, the tort of interference with economic relations and the tort of interference with business relations.

[179] The latter two torts are identical, thus for the sake of convenience I will jointly consider them under the heading of interference with economic relations.

[180] In ***Westfair Foods Ltd. v. Lippens Inc.*** (1989), 64 D.L.R. (4th) 335 at page 345 the Manitoba Court of Appeal held that pursuit of a remedy under s. 36 of the *Competition Act* did not preclude the plaintiff in that case from pursuing an alternative claim for conspiracy in the same action. The court noted that a claim pursuant to s. 36 is restricted to special damages whereas general damages and special damages can be pursued in a claim for conspiracy.

[181] The court in ***Westfair*** made no mention of other claims in tort but I see no reason why the same logic would not apply, particularly given that the measure of damages would be identical.

a) Conspiracy

[182] In ***Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*** [1983] 1 S.C.R. 452 the tort of conspiracy was defined in para. 33:

> 33 Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > (1) Whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

> (2) Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[183] In this case the plaintiff is asserting a conspiracy under the second branch only and relies on the breach of s. 45 of the *Competition Act* as the unlawful act.

[184] At para. 34 the court made the following observations about constructive intent:

> 34 In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[185] The officers produced on behalf of Mobil and Husky each testified that the predominant purpose of the Mosky initiative was to reduce costs and enhance profits.

[186] While I accept this, I also accept that the Defendants should have known that the Plaintiff would suffer economic loss if it could no longer compete with Cardusty to supply fluid hauling services to them. The Defendants were fully aware of the volumes being hauled by Kolt for them and the amounts of revenue generated.

[187] Secondly, the Defendants had requested and received from Kolt full particulars of its business operations, including its profit margin.

[188] Thirdly, the Defendants were fully aware of the circumstances of the Rainbow Lake market for fluid hauling. They knew that Kolt and Cardusty were the only two fluid hauling companies offering fleet service in Rainbow Lake. It defies belief that the Defendants were not aware that the decision to award Cardusty the sole right to haul fluids for them would not have had a devastating financial impact on Kolt particularly given that Kolt got no new work from them after November 13, 1996 resulting in a sudden and precipitous drop in revenue in excess of $1 million per year. The economic losses of the Plaintiff are outlined below.

[189] Mr. Boles for Mobil and Mr. Arnason for Husky testified that they presumed that Kolt would pick up business elsewhere in the Rainbow Lake area. Arnason testified that he thought Cardusty would give some its business to Kolt. Their testimony in this regard was factually groundless, disingenuous and completely self serving.

[190] In the result, the Plaintiff has proven the tort of conspiracy under the second branch entitling the Plaintiff to damages.

b) Interference with Economic Relations

[191] In ***Conway v. Zinkhofer*** 2008 ABCA 392, at para. 41 the Alberta Court of Appeal outlined the three elements constituting this tort:

> There are three elements to the tort of unlawful interference with economic relations: (i) an intention to injure; (ii) interference with the other party's business by illegal or unlawful means; and (iii) resultant economic loss: *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* 2003, 65 O.R. (3d) 30, 227 D.L.R. (4th) 458 (Ont. C.A.) at para. 44.

[192] In ***Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada*** 2003, 65 O.R. (3d) 30 at para. 46, the Ontario Court of Appeal discussed what was required to prove the first element of this tort:

> 46 To satisfy the first element, Reach need not prove that PMAC's predominant purpose was to injure it. This first element of the tort will be met as long as PMAC's unlawful act was in some measure directed against Reach. That is so even if -- as PMAC claims -- its predominant purpose was to advance its own interest and those of its members. In short, "The defendant's manoeuvre must have been targeted against the plaintiff, although its predominant purpose might well have been to advance his own interests thereby rather than to injure the plaintiff." See John G. Fleming, *The Law of Torts*, 9th ed. (1998), at p. 769.

[193] See also ***Barber v. Vrozos*** 2010 ONCA 570 at para. 52:

> 52 To satisfy the element of intent, the respondents did not need to prove that Molson's predominant purpose was to injure them. It was sufficient to establish that Molson's unlawful act was in some measure directed against the respondents: *Reach M.D.*, at para. 46. This requirement was met because the trial judge found that Molson sold water rights to GMIC after having sold them to Vrozos. Molson did so with knowledge that Vrozos had sold the water rights to the respondents and that permitting GMIC to sell water would interfere with the respondents' exclusive water rights and reduce the respondents' profits.

[194] The Plaintiff has proven the first element of this tort, that is, a constructive intention to injure it.

[195] The second element is established by the breach of s. 45 of the *Competition Act* and the third element by the economic loss sustained by the Plaintiff outlined below.

[196] Accordingly, the Plaintiff has established an entitlement to damages for this tort as well.

Assessment of Damages

a) Expert Accounting Evidence

[197] I find that the Plaintiff's financial expert, Mr. Bailey, and the Defendants' financial expert, Mr. Siebert, were both very credible.

[198] With the exception of a disagreement as to whether Kolt had a good will value, the two experts substantially agreed on what the financial statements for Kolt disclosed.

[199] Mr. Bailey opined that Kolt did have a good will value whereas Mr. Siebert valued Kolt only on the basis of asset value.

[200] I prefer the opinion of Mr. Bailey over that of Mr. Siebert respecting the good will issue.

[201] The evidence at trial clearly established that Mr. Whelen built Kolt's fluid hauling business from personal contacts in Rainbow Lake over a period of 13 years. Rainbow Lake is a small community and over time he knew everybody associated with the oil industry. He served as a town councillor at one point and was active in community affairs. His family lived in the community and Kolt's sole base of operations was Rainbow Lake.

[202] Prior to the decision to sole source fluid hauling, a decision as to which fluid hauler to call was made by the local field operators who were personally acquainted with Mr. Whelen.

[203] The evidence clearly establishes that he had actual hands-on knowledge with the oil and gas industry, including all aspects of fluid hauling. He testified to having personally attended at virtually every well site in the Rainbow Lake field.

[204] In my view, the uncontroverted evidence at trial strongly supports the argument that Kolt had a good will value which must be considered in assessing damages and find as a fact that Mr. Bailey's estimate of good will is reasonable and should be accepted.

[205] Mr. Bailey prepared his calculations both on a pre-tax and after tax basis. He offered no opinion as to which approach is more correct. As noted, Mr. Siebert offered no opinion on this issue.

[206] Counsel for the Plaintiff argued that damages at large should be awarded on a pre-tax basis as the Plaintiff would have had the benefit of structuring its business affairs to minimize tax liability. Defence counsel took no position on this issue.

[207] I agree with counsel for the Plaintiff that damages at large should be awarded on a pre-tax basis.

b) Time Period for Assessing Damages

[208] In his expert report, Mr. Bailey opined that one method of valuing damages would be to estimate a loss of earnings for Kolt over the expected life of the Rainbow Lake oil and gas field. Based on published data, he used 2023 as being the likely date when the market for fluid hauling in that area would cease to exist as the Rainbow Lake field would stop producing.

[209] As noted, Whelen was advised of the decision to sole source fluid hauling to Cardusty on November 13, 1996 and ceased operating Kolt on May 15, 1997. The trial took place accordingly, 14.5 years after the decision to sole source fluid hauling.

[210] The evidence is clear that Kolt never had any contracts with the Defendants or indeed any other customers which provided any guarantee of amounts to be hauled or a given amount of revenue.

[211] The evidence is also clear, however, that Kolt started operation in 1984 and was a well run, profitable business up to November 13, 1996 when it was denied the opportunity to compete for new business from Husky and Mobil.

[212] It is uncontroverted that most oil producers at Rainbow Lake cannot operate without fluid hauling and that large producers require fleet fluid service. In 1996 only Kolt and Cardusty offered fleet service for fluid hauling in Rainbow Lake.

[213] A significant issue in the assessment of damages is over what period of time should damages be assessed?

[214] Undeniably, the oil and gas business is cyclical. Oil and gas prices are not fixed and will fluctuate for many reasons, including geopolitical factors beyond the control of any party. It is admitted by the Defendants that the Rainbow Lake field is still producing oil and gas.

[215] I accept that contingencies, both positive and negative, apply to the assessment of damages in this case.

[216] There was no guarantee that Kolt would continue in business, but Whelen testified that he wanted to and the uncontroverted evidence at trial establishes that Kolt was financially stable, debt free and well managed. On an annual basis, money was spent maintaining and renewing the fleet of trucks. As noted above, I believe Whelen's evidence that he wanted to continue operating Kolt.

[217] Mr. Siebert, the chartered business evaluator retained by the Defendants, noted that Kolt was profitable, well capitalized, debt free and had $200,000 in the bank when it ceased fluid hauling operations. He confirmed that the company spent $80,000-$90,000 per year on fleet maintenance and renewal. This is strong evidence that Kolt would have continued operating and that Whelen wanted to remain in the fluid hauling business for the long term.

[218] By any measure, Whelen had developed a business model for Kolt which was highly successful and could have carried on business well into the future. He had a proven 13 year track record. At the time of trial, Whelen appears to be in robust health and is still active as a businessman. There is no evidence of any impediment which would have otherwise prevented him from carrying on his fleet fluid hauling business.

[219] I accept that it does become more difficult over a lengthy period of time to predict the future and have concluded on the basis of the evidence presented to me, that the appropriate period of time to assess damages is the period of time between November 13, 1996 and the date of trial, a period of approximately 14.5 years. In other words, damages would only be assessed to the date of trial and not beyond.

[220] This methodology of assessing damages admittedly applies no contingency adjustment prior to trial, however, a contingency adjustment is recognized by terminating damages at trial and disallowing any future claims.

[221] Given that Rainbow Lake is still an operating oil and gas field, this methodology for assessing damages is much more likely to result in a realistic assessment of damages contrasted to an assessment based on future predictions which is always problematic.

[222] This methodology also recognizes that the essence of assessing compensatory damages in this case is whether or not the Plaintiff has proven that, but for the unlawful conduct of the Defendants, would it still be operating a fleet fluid hauling business in Rainbow Lake? The Plaintiff has proven that the answer is in the affirmative.

[223] During argument I was advised that while Husky is still actively conducting operations at Rainbow Lake, Mobil has disposed of its assets in that area. In my view, this is irrelevant to the assessment of damages as any purchaser of the Mobil assets would have the same requirements for fluid hauling as Mobil did.

c) Mitigation

i) Defining the Term

[224] It is trite law that a plaintiff who has been wronged must take reasonable means to mitigate losses arising from the wrongful act. Whether a plaintiff failed to take reasonable steps to mitigate losses is a question of fact dependent on the circumstances of each case.

ii) Burden of Proof

[225] In ***Michaels v. Red Deer College*** [1976] 2 S.C.R. 324 at p. 330 the Supreme Court of Canada confirmed the principle that the defendants carry the burden of establishing that the plaintiff failed to mitigate its losses:

> It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper

> industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract.

Cheshire and Fifoot, supra, expressed the position more tersely as follows:

> But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

iii) Required Standard of Mitigation

[226] In ***Janiak v. Ippolito*** [1985] 1 S.C.R. 146 at p. 161 the Court described what standard of mitigation is required:

> In Asamera Oil Corp. v. Sea Oil & General Corp., [1979] 1 S.C.R. 633, Estey J. stated at p. 649 that "A plaintiff need not take all possible steps to reduce his loss". He is only bound to act like "a reasonable and prudent man": British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Company of London, [1912] A.C. 673 (H.L.). The steps he takes, Lord Macmillan said in Banco de Portugal v. Waterlow and Sons, Ltd., [1932] A.C. 452, at p. 506, "ought not to be weighed in nice scales".

iv) Have the Defendants established that the Plaintiff failed to mitigate its losses?

[227] Mr. Whelen testified that after being advised on November 13, 1996 that Kolt would no longer be hauling for Husky and Mobil except on an emergency basis, he was faced with a financial crisis.

[228] At the time he had a fleet of eight trucks operating with a resident manager, a full time resident dispatcher and a full time resident mechanic. Kolt’s entire operations at that time were geared for a fleet fluid hauling operation in competition with Cardusty, which was the only other fleet fluid hauler in the Rainbow Lake area.

[229] Fluid hauling is seasonal with the bulk of revenue earned during the winter months when all wells in the area are accessible. Whelen testified that in order to sustain Kolt’s fleet during the lean summer months it was critical to continue Kolt’s revenue stream. Fluid hauling for Husky and Mobil was a priority, particularly during the summer period.

[230] He acknowledged that Kolt had many other customers but none were generating revenues nearly as substantial as Husky and Mobil combined. CNRL was a major customer but by the spring of 1997 had linked its wells to a pipeline, thus eliminating most of its requirements for fluid hauling.

[231] Whelen testified that between November 13, 1996 and May 15, 1997 when he ceased operating Kolt, he made efforts to find new customers but was unsuccessful. Kolt's revenues plummeted and Whelen decided by May 15, 1997 that he had no alternative but to shut Kolt down.

[232] He did consider moving Kolt's operations to another area, including Zama City, but felt that this was too risky as there were already fluid haulers based there and he had no contacts in that area.

[233] The Defendants, in arguing that the Plaintiff failed to mitigate losses, rely heavily on the evidence of their accounting expert, Mr. Siebert.

[234] Mr. Siebert testified that Kolt's falling revenues after the decision of November 13, 1996 required the company to restructure and downsize. He conceded that falling revenue would necessarily result in Kolt having to reduce its fleet size. He suggested that Kolt could have reconfigured its employee structure by reducing the full time status of the resident manager, dispatcher and heavy duty mechanic. He opined that Kolt could remain profitable if it downsized, albeit at a lower level of profitability.

[235] The issue of whether the Defendants have met the burden of establishing that the Plaintiff failed to mitigate its losses can be boiled down to the question of whether a plaintiff, in the position of Kolt, can be legally obligated to restructure in order to survive operating on a smaller scale and producing lower profits?

[236] In my view, it cannot. The obligation on the part of any party which claims to have been wronged is to act reasonably.

[237] The authorities dealing with mitigation do not support the proposition that a party which has been wronged is required to undertake extraordinary measures to stay in business. The following passages from ***Michaels*** are instructive at pages 328 and 329:

> Both Duff J. and Anglin J. in the Cockburn case quoted words spoken by James L.J. in Dunkirk Colliery Co. v. Lever [(1878), 9 Ch. D. 20.], at p. 25, and also quoted by Lord Haldane in British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd. [[1912] A.C. 673.], at p. 689. These were both sale of goods cases, and in speaking of damages, Lord Haldane said this:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in Dunkirk Colliery Co. v. Lever, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise that in the ordinary course of business."
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

[238] In ***Calmonton Investments Ltd. v. Tangye*** (1988) 87 A.R. 22, at pages 28 & 29 the Alberta Court of Appeal emphasized that the standard of mitigation is a conservative one and that a party which has been wronged is not legally required to undertake risky measures:

> Second, the law does not exact perfection or hindsight by the creditor (landlord). His test is relatively lax: whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice. See Banco de Portugal v. Waterlow & Sons, [1932] A.C. 452, 506 (H.L. (E)). The creditor need not take risky, expensive or unethical steps to mitigate: Waddams, Law of Damages ss. 1202-05 (1983); Cheshire & Fifoot's Law of Contract, 533 (10th ed.); 1 Chitty on Contracts, ss. 1593-94.

[239] No authority has been cited wherein any court has accepted the proposition that a plaintiff business, which has been wronged, should have to downsize in order to survive.

[240] The Defendants cite the decision of ***Sunshine Vacation Villas Ltd. v. Governor and Co. of Adventures of England Trading into Hudson's Bay*** [1982] B.C.J. No. 1702 in support of their argument that the Plaintiff failed to mitigate its damages.

[241] In ***Sunshine***, the court was dealing with a loss of profit claim respecting potential travel agency locations which did not open as a result of a breach of contract by the defendant. The trial judge found a failure to mitigate as there was evidence at trial that the plaintiff anticipated searching out other landlords and locations, but failed to do so. Damages were reduced by 50%.

[242] The British Columbia Court of Appeal in its decision, cited [1984] B.C.J. No. 1794, varied the judgment, but did not vary the mitigation reduction of 50% based on the finding of

fact by the trial judge and had the plaintiffs sought out alternative locations it could have found adequate alternative locations about half way through the three year period during which damages were assessed.

[243] The ***Sunshine*** decision was cited with approval in the Alberta case of ***Alberta Sussex Insurance Agency Inc. v. Canada Brokerlink Inc.*** 2006 ABQB 608.

[244] I do not accept that the reasoning in ***Sunshine*** has any application to this case. In ***Sunshine*** there was clear evidence that the plaintiff made no reasonable efforts to search out alternative locations in which it could have carried on business.

[245] The evidence before me is that Gary Whelen made reasonable efforts to carry on business after November 13, 1996, but was forced to cease operations on May 15, 1997.

[246] Neither the trial decision or decision of the British Columbia Court of Appeal in ***Sunshine*** support the proposition that Kolt, in order to satisfy its obligation to mitigate, was required to down size and reduce its level of profitability in order to survive.

[247] Prior to November 13, 1996, it is uncontroverted that the Plaintiff was a profitable, well managed fluid hauling business operating with a fleet of eight trucks, a resident full time manager, resident dispatcher and resident heavy duty mechanic. The Plaintiff employed experienced fluid hauling drivers and was able to provide mobile home accommodation in Rainbow Lake which is an important aspect of maintaining employees in that remote area. Kolt owned land in town on which was located a fully equipped mechanical shop.

[248] Kolt had demonstrated over a number of years of profitable operation that it could flourish in a competitive market for fleet fluid haulers in that area. The company expended money annually to maintain and renew its fleet of trucks.

[249] The Plaintiff had a full legal entitlement to carry on with its business model which included a fleet of trucks. The Defendants caused harm to the Plaintiff and cannot seek refuge behind the argument that the Plaintiff could have survived if it downsized. Mr. Seibert’s testimony on this issue does not assist the Defendants’ position, rather it confirms that Kolt’s actions were legally justifiable.

[250] Moreover, the Defendants presented no evidence that any other location in Alberta or British Columbia, including Zama City, with oil field activity, had capacity, at that time, to absorb a fleet fluid hauling operation the size of Kolt. Blindly attempting to move a fleet of trucks without knowledge of an available market would involve unacceptable risk which legally was not required.

[251] Mr. Arnason testified that after Kolt shut down on May 15, 1997 several firms other than Cardusty became involved in fluid hauling in the Rainbow Lake area. He mentioned that Wayne Warner was operating a fleet of trucks for a period of time and then converted his operation into

a pressure truck operation. Eldon Warner, who is Wayne's bother, then started up a fluid hauling business operating eight or ten trucks which is still operating. Eldon Warner did no significant work for Husky other than emergency hauls.

[252] He testified that Cardusty was bought out in approximately the year 2000 by Formula One Trucking, which is a large firm and that Ever Ready Trucking moved in after the year 2000. In 2003 it was awarded the contract to haul for Husky.

[253] The Defendants called no witnesses from any of these trucking firms to testify. While I accept that Mr. Arnason's testimony constitutes some evidence of what happened after Kolt ceased operating, his testimony on this subject was vague and not particularized or verified.

[254] Moreover, the critical time period for assessing the adequacy of mitigation is the time period between November 15, 1996 and May 15, 1997. In other words, the adequacy of mitigation is determined based on the plaintiff's state of knowledge at that time. At the time, Mr. Whelen did not have the benefit of the perfect wisdom of hindsight therefore why should the Defendants be entitled to claim the benefit of it, particularly given that they carry the burden of proving a failure to mitigate?

[255] In the result, the Defendants have failed to establish that the Plaintiff did not act reasonably in ceasing fluid hauling operations on May 15, 1997.

[256] Whelen testified that before and after the decision of November 13, 1996 he wanted to keep Kolt operating. I believe him and find as a fact that prior to and after November 13, 1996 his efforts to keep Kolt operating were reasonable, genuine and undertaken in good faith.

[257] I also find as a fact that by May 15, 1997 he had no realistic alternative but to cease fluid hauling operations completely and liquidate Kolt's assets.

[258] The joint decision of the Defendants to single source fluid hauling with Cardusty doomed Kolt to financial failure. Whelen took all reasonable steps to salvage the situation and in doing so did everything the law required.

d) Relevance of the Plaintiff's Golf Course Business

[259] In his testimony Whelen stated that prior to ceasing fluid hauling operations he began developing a golf course near Red Deer and indeed, is still operating it at the time of trial. Before the decision was made to sole source fluid hauling to Cardusty, Whelen had moved his family to Red Deer and ultimately moved there himself after liquidating Kolt's assets in May of 1997.

[260] The Defendants submit that Whelen, having moved his family to Red Deer would not have pursued both businesses and thus would have shut down the fluid hauling business in any event.

[261] Whelen testified that prior to the decision of November 13, 1996 to sole source fluid hauling to Cardusty, Kolt had a complete infrastructure in place for a fleet fluid hauling service including a competent resident manager, Mr. Richards.

[262] Additionally, Whelen had a great deal of hands-on involvement with Kolt and built up the business over time. As with many business, however, the need for his personal involvement lessened over time and there was no evidence that the company could not have operated both the fluid hauling and golf course businesses concurrently with each being profitable.

[263] On the basis of the evidence presented I find as a fact that he would have continued fleet fluid hauling operations had Kolt not been excluded from competing for Husky and Mobil business and would have concurrently pursued the golf course enterprise. I have already concluded that but for the unlawful conduct of the Defendants, the Plaintiff would have continued fleet fluid hauling up to the date of trial. In the result, the golf course business of the Plaintiff has no relevance to the assessment of damages for the loss of the fleet fluid hauling business.

e) Should damages be assessed only for the loss of revenue from the Defendants?

[264] Closely related to the mitigation issue is the issue of whether damages should only be assessed for the loss of revenue from the Defendants?

[265] Mr. Siebert opined that Kolt's loss of income should only be assessed for the loss of revenue from the Defendants whereas Mr. Bailey opined that the proper methodology is to consider that Kolt entirely ceased fluid hauling operations in May 1997 following the precipitous drop in income starting on November 13, 1996.

[266] I have already concluded that Mr. Whelen made every reasonable effort to salvage the financial crisis he was facing and thus the Defendants failed to establish a failure to mitigate damages. As noted above, I find as a fact that the actions of the Defendants left him with no other option but to cease fluid hauling operations and liquidate the assets of Kolt.

[267] It necessarily follows that damages must be assessed for the failure of Kolt as a whole and not just on the basis that it suffered a loss of revenue from the Defendants.

f) Assumed Fleet Size

[268] Having concluded that Kolt's losses should be calculated on the basis of the complete loss of its business, the issue then arises as to what size of fleet fluid hauling trucks Kolt would have continued to operate had it not been forced out of business?

[269] Mr. Whelen testified that Kolt's fleet size fluctuated and at one time he was operating 19 trucks. In 1996 eight trucks were being operated.

[270] I accept that, but for Kolt being forced out of business, it would have continued fleet operations. The evidence overwhelmingly establishes that Kolt had a complete infrastructure in place to operate a fleet service and had a proven track record of operating a well managed, profitable fleet fluid hauling service. Kolt expended money each year to service and renew its fleet of used trucks. I also accept that over time the size of Kolt's fleet may have continued to fluctuate somewhat.

[271] I have concluded that the most reasonable assumption as to ongoing fleet size is that Kolt would have continued to operate a fleet of eight trucks up to the time of trial.

g) Adverse Inference

[272] During argument, counsel for the Plaintiff argued that an adverse inference should be drawn against the Defendants for failing to produce records of the amount of revenue paid by them to Cardusty before and after November 13, 1996. It was argued that the Defendants had this information in their possession and control and it should have been produced.

[273] Counsel for the Defendants strenuously objected, noting that the Plaintiff could have sought production of this information many years ago during the discovery process but failed to do so.

[274] They also observed that the file was under case management by my colleague Ross, J. who dismissed an application to amend the Statement of Claim to include a claim for unjust enrichment on the basis that it would be unfair to the Defendants to produce such records many years after the litigation commenced.

[275] I agree with the position of the Defendants and refuse to draw an adverse inference against them for not producing information of what amounts were paid to Cardusty.

h) Section 36(1) of the *Competition Act*

[276] The Supreme Court of Canada dealt with the significance of this section, previously numbered s. 31(1), in ***City National Leasing Ltd. v. General Motors of Canada Ltd.*** [1989] 1

S.C.R. 641:

> 71 I am of the opinion that the necessary link between s. 31.1 and the Act exists. Section 31.1 is an integral, well-conceived component of the economic regulation strategy found in the Combines Investigation Act. Even if a much stricter test of fit were applied — for instance, one of "necessarily incidental" — s. 31.1 would still pass the test. Under the test of "functionally related" the section is clearly valid.

72 Section 31.1 is one of the arsenal of remedies created by the Act to discourage anti-competitive practices. Section 31.1 simply serves to reinforce other sanctions of the Act. The other remedial responses include orders of the Restrictive Trade Practices Commission (Part IV.1), interim injunctions (Part IV), and criminal sanctions (Part V). Like the other remedies, s. 31.1 is intimately linked to the Combines Investigation Act. It takes on meaning only by reference to other provisions of the Act and has no independent content. As a result, the section is carefully bounded by the parameters of the Combines Investigation Act. It provides a private remedy only for particular violations of the Act and does not create a private right of action at large.

73 Section 31.1 of the Combines Investigation Act is also fundamentally integrated into the purpose and underlying philosophy of the Combines Investigation Act. There is a close congruence between the goal of enhancing healthy competition in the economy and s. 31.1 which creates a private remedy dependent for its effectiveness on individual initiative. The very exercise of the remedy in s. 31.1 by a company against a competitor whose behaviour has transgressed the code of conduct established by the Act may be said to reflect and promote the spirit of competition informing the Combines Investigation Act. In my view, the intimate tie between the purpose of the Act and a privately initiated and privately conducted enforcement mechanism is a strong indication that s. 31.1 is enmeshed in the fabric in the Act.

74 It is important to note that s. 31.1 does not create a general action for damages. Before any person can recover under s. 31.1 he or she must have suffered loss or damage as a result of (i) conduct contrary to Part V of the Act or (ii) the failure of the defendant to comply with an order of the commission or a court under the Act. . . It seems to me that s. 31.1 is fully integrated into the Act, indeed, it is a core provision of the very pith and substance of the Act. As the Attorney General of Canada submits, the civil action for damages provided by s. 31.1 for an occurrence of the anti-competitive practices set out in s. 34(1)(a) is clearly as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties. Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act. In this respect s. 31.1 is part of a legislative scheme intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance." (per MacGuigan J. at p. 77 [[1985] 2 F.C.] in Que. Ready Mix.)

i) Damages in Tort

a) Damages at Large

[277] In ***Canada Cement LaFarge***, the British Columbia Court of Appeal, in its decision, cited [1981] 4 W.W.R. 385 at p. 418, upheld the trial judge's decision that in a case of civil conspiracy damages are at large.

[278] The same approach was adopted in ***Claiborne Industries Ltd. v. National Bank of Canada*** [1989] O.J. No. 1048. At para. 147 of that decision the following statement was made:

> 147 The award should be such as a reasonable person would ascribe in the circumstances. . .

[279] Damages for tortious interference with economic relations are also at large.

[280] In ***Polar Ice Express Inc. v. Arctic Glacier Inc.*** 2007 ABQB 717, varied as to costs only 2009 ABCA 20, Marceau, J. dealt with this issue and the following passages appear at paras. 116-118:

> 116 If the defendant's wrongful interference or the breach procured by it is such that, in the ordinary course of business, it would inflict damage on the plaintiff, it is unnecessary for the plaintiff to prove particular damage. When the damage can be proved or inferred, the plaintiff is entitled to recover in respect of the damage which was a consequence of the tort, if not too remote (Exchange Telegraph Co. v. Gregory, [1896] 1 Q.B. 147).
>
> 117 According to the authors of Remedies in Tort at p. 8-35, damages for inducing breach of contract or unlawful interference with economic relations may be awarded for all loss that flows from the tortious act. The plaintiff is not limited to what could have been recovered in an action in contract. The damages which may be awarded include those that were reasonably foreseeable to the defendant, including losses on other contracts which the defendant could foresee. Damages for these torts are "at large." They take into account not only the plaintiff's pecuniary loss but also non-pecuniary damages for such matters as injured feelings, loss of reputation and the nature of the conduct.
>
> 118 Both pecuniary and non-pecuniary damages are compensatory. They are considered general damages. "At large" damages need not be pled separately.

[281] Greckol, J. in ***Kotch v. Casino St. Albert Inc.***, 2005 ABQB 649 emphasized that damages at large are intended to compensate for the totality of the impact of the wrongful conduct on the plaintiff and the following passage appears at para. 190:

> 190 Damages for interference with economic interests are difficult to assess because the compensation is to put the Plaintiffs back in the position they were in

> before the Defendants interfered with their economic interests. Damages in these circumstances are not calculable in the same way they might be for interference with contractual relations, because a contract, by definition, has an ascertainable value. As such, damages for interference with economic interests are not precise calculations, but rather are "at large" and depend on a consideration of the overall effect of the Defendants' actions. As Rand J. stated in Roncarelli v. Duplessis, [1959] S.C.R. 121 at 144 to 145, in a case that concerned damages associated with abuse of public power: "... Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of its broad features ..."

[282] In ***Drouillard v. Cogeco Cable Inc.***, 2007 ONCA 322 the following passage appears at para. 42:

> 42 Damages for the tort of inducing breach of contract are "at large." As set out by Lord Hailsham in Broome v. Cassell & Co. Ltd., [1972] A.C. 1027 at 1073 (H.L.):
>
> The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent.

[283] After considering all of the evidence at trial I have concluded that the Plaintiff should be awarded damages at large in the amount of $5 million. This award, which is exclusive of pre-judgment interest, is compensatory only. As punitive damages are being considered separately, this award for damages at large does not include any amount to reflect denunciation or punishment for the conduct of the Defendants.

b) Punitive Damages

[284] The Plaintiff seeks an award of punitive damages against each Defendant in the amount of $1 million.

[285] A party which establishes an entitlement to compensatory damages is not necessarily entitled to punitive damages, which are awarded sparingly.

[286] In ***Whiten v. Pilot Insurance Co.*** 2002 SCC 18, the Supreme Court of Canada reviewed the law respecting the awarding of punitive damages. The court at paras. 67 to 76 outlined the principles governing such an award:

> 67 First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in Vorvis, supra, at pp. 1104-6. The control

mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in Hill, supra, or breach of fiduciary duty as in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, but Vorvis itself affirmed the availability of punitive damages in the exceptional case in contract. In Denison v. Fawcett, [1958] O.R. 312, the Ontario Court of Appeal asserted in obiter that on proper facts punitive damages would be available in negligence and nuisance as well. In Robitaille v. Vancouver Hockey Club Ltd. (1981), 124 D.L.R. (3d) 228, the British Columbia Court of Appeal awarded punitive damages in a negligence case on the principle that they ought to be available whenever "the conduct of the defendant [was] such as to merit condemnation by the [c]ourt" (p. 250). This broader approach seems to be in line [page635] with most common law jurisdictions apart from England.

68 Second, there is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in Hill, supra, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").

69 Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. . .

70 Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in Cassell, supra, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.

71 Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

72 Sixth, it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

> 73 Seventh, none of the common law jurisdictions has adopted (except by statute) a formulaic approach, as advocated by the intervener the Insurance Council of Canada in this appeal, such as a fixed cap or fixed ratio between compensatory and punitive damages. The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.
>
> 74 Eighth, the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in Rookes, supra, and affirmed here in Hill, supra.
>
> . . .
>
> 76 Tenth, and finally, there is substantial consensus (even the United States is moving in this direction) that punitive damages are not at large (as pointed out by Cory J. in Hill, supra, at para. 197) and that an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case.

[287] With these governing principles in mind, I identify the following as relevant to considering an award of punitive damages in this case:

1. The conduct of the Defendants was planned and deliberate with the goal of furthering their own economic interests. Senior management of both companies approved the joint synergy initiative.

2. The Defendants are sophisticated corporations with access to legal advice. They have complete familiarity with competition issues and indeed “combines” concerns are referred to in some of the documents exhibited at trial.

3. As part of the joint synergy initiative the Defendants requested that the Plaintiff disclose the full particulars of its business operations, including profit margin. At the initial meeting where this was discussed Whelen and a representative of Cardusty were present and Whelen testified to feeling very uncomfortable having this type of discussion particularly in the presence of his closest competitor.

   I accept Whelen’s evidence that he did indeed feel uncomfortable and was fully justified in feeling that way. I reject the evidence of Mr. Boles who denied that a representative of Cardusty was present at the time of the discussion with Whelen.

Moreover, I also accept that Whelen's evidence that realistically he had to participate in this process or Kolt would have no chance of maintaining a business relationship with Husky or Mobil.

The conduct of Husky and Mobil in this regard was abusive and insensitive, particularly given that Kolt had a long-standing business relationship with both companies and had provided good service.

4. Husky and Mobil ignored Whelen's warnings that their decision to single source fluid hauling to Cardusty would put Kolt out of business. The evidence discloses no effort by Husky or Mobil to investigate Whelen's concerns in order to ascertain if they were legitimate. Instead, Boles and Arnason chose to arbitrarily dismiss them.

5. Both Husky and Mobil were cavalier in blindly assuming that Kolt would simply pick up business elsewhere. There is no evidence that these companies gave any thought to the fact that Kolt was a full service fleet operator and had a complete infrastructure in place to provide that service. Husky and Mobil never considered that a domino effect would result from their decision, that is, that Kolt's employees would fear for their economic futures and quit, which they did. Moreover, there is no evidence that the Defendants gave consideration to the fact that some Kolt employees were living in a mobile trailer supplied by Kolt and that a loss of employment might also result in a loss of accommodation. This would be an added incentive to abandon employment with Kolt.

6. There is no evidence that the Defendants gave serious consideration to implementing either a competitive bid system or a common dispatch system neither of which would have been anti-competitive.

7. Husky and Mobil faced no regulatory sanction for their conduct.

8. In the 1996 and 1997 time period Husky and Mobil had substantial operations in the Rainbow Lake area. The companies sought to increase their net present value of their Rainbow Lake assets by an estimated $100 million by embarking on the joint synergy initiative. Only part of this would relate to fluid hauling, but documents exhibited at trial contain an estimated savings for fluid hauling of $600,000 per year. Fourteen years have elapsed since Kolt ceased fluid hauling operations.

   There is no evidence as to whether the Defendants did or not achieve cost savings for fluid hauling as a result of the decision to sole source fluid hauling to Cardusty. Similarly, if cost savings were achieved for fluid hauling, there is no way of calculating the value of these savings, that is, the savings could have been more or less than $600,000 per year.

> Notwithstanding the impossibility of determining whether the Defendants achieved a cost savings and, if so, how much, and notwithstanding that there is no claim for unjust enrichment, it is still necessary to consider the award for punitive damages in the financial context of large scale commercial operations undertaken by the Defendants for profit. Moreover, they engaged in anti-competitive behaviour for the purpose of monetary gain.

9. Damages at large have been awarded in the amount of $5 million.

[288] Bearing in mind the foregoing, I have concluded that an award of punitive damages against each Defendant in the amount of $500,000 is appropriate.

[289] These punitive damage awards are being made in the two tort actions concurrently. It is not necessary for me to decide if punitive damages are available in the s. 36 claim.

Conclusion

[290] In the result, the Plaintiff is entitled to a judgment against the Defendants for damages at large in the amount of $5 million together with a judgment for punitive damages against each Defendant in the amount of $500,000.

[291] As previously agreed, counsel will present further argument on the issues of pre-judgment interest and costs.

Heard on April 4-8, 13-15, 18, 19, 20, 27, 28 and May 4 & 5, 2011.
Dated at the City of Edmonton, Alberta this 27th day of May, 2011.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

R. L. Duke, Q.C. and G. J. Thorlakson
Miller Thomson LLP
for the Plaintiff

J. J. Patterson and R. Quinlan
Fraser Milner Casgrain LLP
for Husky Oil Operations Ltd.

M. A. Morrison and A. S. Grant
Blake, Cassels & Graydon LLP
for Mobil Oil Operations Ltd.

TAB 2

Most Negative Treatment: Varied
Most Recent Varied: Agricultural Research Institute of Ontario v. Campbell-High | 2002 CarswellOnt 818, 157 O.A.C. 116, 58 O.R. (3d) 321, [2002] O.T.C. 420, 112 A.C.W.S. (3d) 670, 48 R.P.R. (3d) 9, [2002] O.J. No. 996 | (Ont. C.A., Mar 14, 2002)

2001 CarswellOnt 418
Ontario Superior Court of Justice

Agricultural Research Institute of Ontario v. Campbell-High

2001 CarswellOnt 418, [2001] O.J. No. 460, 103 A.C.W.S. (3d) 8

In the Matter of the Arbitration Act, S.O. 1991. c. 17, as amended

In the Matter of an Appeal from the Award of the Honourable Mr. J.R. Barr, Q.C.

Agricultural Research Institute of Ontario and Her Majesty The Queen in Right of Ontario, Appellants and Karen Campbell-High and Daniel Dean High, Respondents

Gravely J.

Heard: January 19, 2001
Judgment: February 2, 2001
Docket: 1014/00Z

Counsel: *Robert H. Ratcliffe*, for Appellants
Joseph M. Gottli, for Respondents

Related Abridgment Classifications
Contracts
IX Performance or breach
IX.1 General principles
Public law
I Crown
I.1 Contractual principles regarding Crown
I.1.e Termination of contract by Crown
Public law
I Crown
I.6 Practice and procedure involving Crown in right of province
I.6.h Costs
I.6.h.i Costs against Crown
Real property
III Sale of land
III.4 Remedies
III.4.h Damages
III.4.h.vii Measure of damages
Real property
III Sale of land
III.4 Remedies
III.4.m Practice and procedure
III.4.m.iv Costs

Headnote

Sale of land --- Remedies — Damages — Measure of damages

Landowners entered into agreement with Agricultural Research Institute of Ontario (ARIO) to permit registration of restrictive covenant on title in return for payment of $239,674 — Restrictive covenant would restrict use of land to growing of tender fruit — Change of government led to cancellation of program and ARIO did not complete transaction — Landowners were awarded summary judgment declaring that province had breached contract and repudiated it — Arbitrator assessed damages at full amount — Province and ARIO appealed — Appeal dismissed — Arbitrator's award was varied to remove paragraph ordering that payment of damages was contingent on landowners tendering covenant — Condition requiring tendering by landowners of restrictive covenant was obiter — Arbitrator was correct in finding that landowners were entitled to full purchase price — No claim for specific performance was made in action and arbitrator's only mandate was assessment of damages — Funds provided for under agreement were of substantial importance to landowners — Restrictive covenant was never registered on title — Landowners were entitled to be put in same position as if contract had been performed — No mitigation was possible for landowners as ARIO no longer had interest in acquiring restrictive covenant.

Table of Authorities

Cases considered by *The Honourable Mr. Justice R.T.P. Gravely*:

100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd. (1978), 88 D.L.R. (3d) 1, 20 O.R. (2d) 401 (Ont. C.A.) — applied

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17

s. 45(1) — considered

***The Honourable Mr. Justice R.T.P. Gravely*:**

Background of the Appeal

1 In 1995, the then N.D.P. Government of Ontario initiated the $20-million Niagara Tender Fruit Lands Program. Lands that were unique for their ability to produce tender fruits were to be protected by an agreement between landowners and the Agricultural Research Institute of Ontario (ARIO) on behalf of the Province. Land parcels selected for enrolment in the program were evaluated in terms of how well they met the program's goals. In exchange for signing the agreement, the landowner received a payment from the program determined by a formula which included agricultural considerations as well as the threat of conversion of the land to non-agricultural uses. The agreement incorporated a restrictive covenant. With the registration of the agreement, ARIO was to be granted a real property interest in the parcel of the landowner and the covenant was to be binding on subsequent purchasers. By the terms of the covenant the use of the lands was restricted in perpetuity to the growing of tender fruit.

2 The respondent landowners entered into an agreement with ARIO under the program to permit the registration of a restrictive covenant in return for the payment of $239,674.00. Before the agreement could be implemented, a new government came to power in Ontario and cancelled the program. ARIO then advised the respondents it would not be completing the transaction. In this action for damages for breach of contract, the respondents were awarded summary judgment for a declaration that the appellants had breached the contract and had repudiated it and directing that damages be arbitrated.

3 The appellants are seeking leave to appeal and if leave is granted, to appeal from the interim and final awards of the Arbitrator, the Honourable J.R. Barr, Q.C. The basis of the appeal is that in making the interim award the Arbitrator erred in assessing the damages at the full amount of the purchase price of $239,674.00 and in directing that the damages were to be paid:

> Provided that within the time limited for appeal of the final award on this reference, the Claimants shall have tendered to the Respondents a restrictive covenant as provided for by the contract...

Leave to Appeal

4 Section 45(1) of the *Arbitrations Act*, 1991 allows an appeal on a question of law with leave which is to be granted only if:

(a) The importance to the parties of the matters at stake in the arbitration justifies an appeal;

(b) Determination of the question of law at issue will significantly affect the rights of the parties.

5 The evidence is clear that the funds provided for under the agreement are of substantial importance to the respondents. While the amount involved may not be significant to the appellants, I accept that the precedent set by the decision of the Arbitrator has important ramifications for them.

6 There are two legal issues:

1. When the statement of claim and the reference order referred only to damages, was it open to the Arbitrator to make an order equivalent to specific performance?

2. Did the Arbitrator apply the correct legal test for measurement of damages?

7 Issue number one might have marginal significance, but issue number two is crucial to the rights of the parties and leave to appeal is granted.

Position of Appellants

8 The central question in the appeal is whether damages equivalent to the full purchase price should have been awarded when the lands of the respondents are not now encumbered by the restrictive covenant contemplated by the agreement.

9 Mr. Ratcliffe takes the position that this would be a windfall to which the landowners are not entitled. Instead, they should have received only nominal damages or compensation for their out-of-pocket expenses.

Measurement of Damages

10 The law as to computation of damages for breach of contracts of sale of interests in land was reviewed by the Ontario Court of Appeal in *100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (Ont. C.A.).

11 The following principles were set out:

1. So far as money can do it the plaintiff is entitled to be put in the position it would have been in if the contract had been performed.

2. The normal measure of damages for loss of bargain is the difference between the contract price and the market value.

3. Resale price is evidence of the market value.

4. The mitigation doctrine is a "necessary corollary to the compensatory principle" and is "latent in normal rules of quantification". (p.416)

12 The interest in land contracted for here was a restrictive covenant. The starting point for measurement of the owner's loss of bargain is the purchase price. From that is to be deducted the market value of the property. Typically, that value is determined by resale and the owner is required to mitigate damages by obtaining the best possible resale terms. Here there was no resale because, as found by the Arbitrator, the restrictive covenant has no market value. Its value was unique to the appellants, namely, to further the specific objective of protecting tender fruit the future for the benefit of the people of Ontario and of Canada. Under those circumstances, there is nothing the respondents could do to mitigate the damages they suffered as a result of the loss of their bargain. They have always been ready, willing and able to close the transaction. That they may be no worse off now than before the agreement was entered into is irrelevant. While there would appear to be an element of unfairness in the owners receiving the full purchase price when their farm is now not diminished in value, as it might have been by the registering of the covenant, there is no other way consistent with principle to measure the loss of the value of their bargain. The respondents are not required

to sell their farm to try and mitigate their damages or to produce evidence of its before-and-after market value. Their agreement was to sell a covenant, not the farm. Furthermore, as the Arbitrator found, the whole point of the transaction for the owners was to pay down their debt and remain tender fruit farmers forever. From their perspective, therefore, the negative impact of a registration of the restrictive covenant may not have been very significant. There was no evidence called by the appellants about the ultimate effect on the financial welfare of the respondents of the presence or absence of the registration. Conceivably, future zoning or other government regulation could even render the registration of the covenant of little consequence.

13 In my view, the Arbitrator was correct in finding that the owners were entitled to be paid damages equivalent to the full purchase price.

"Specific Performance" Award

14 Both counsel suggest the Arbitrator should not have made the payment of damages contingent upon the tendering by the owners of a restrictive covenant. That directive, they suggest, was in the nature of a specific performance order. There was no claim for specific performance in the action and the Arbitrator's only mandate in the referral order was to assess damages.

15 When the reasons of the Arbitrator are read as a whole, it is clear the assessment of damages was made on its own. The two portions of the award are not linked and the condition may be viewed in the nature of an obiter. A somewhat similar proviso on an assessment of damages was made by the trial judge in the *100 Main Street Ltd.* case, supra. While the appeal was allowed on other grounds, this portion of the reasons appears not to have troubled the Court.

16 Mr. Ratcliffe makes clear his clients at this point have no interest in receiving or registering a restrictive covenant. The Niagara Tender Fruit Lands Program is at an end. This pre-condition to the payment of the damages no longer has any significance and should be removed.

Motion to Amend the Statement of Claim

17 Mr. Gottli sought leave at the conclusion of argument to amend his statement of claim to ask for specific performance of the ARIO contract or equitable damages in the alternative. In view of my findings, that motion is redundant and is dismissed as moot.

Conclusion

18 The Arbitrator's award is varied to delete the requirement of the tendering of a restrictive covenant. The appeal is otherwise dismissed. Costs may be spoken to.

Appeal dismissed.

TAB 3

2005 CarswellOnt 105
Ontario Superior Court of Justice

AWS Engineers & Planners Corp. v. Deep River (Town)

2005 CarswellOnt 105, [2005] O.J. No. 68, 136 A.C.W.S. (3d) 269, 249 D.L.R. (4th) 478, 40 C.L.R. (3d) 223

IN THE MATTER OF THE ARBITRATION ACT, 1991, S.O. 1991, C. 17 AND IN THE MATTER OF AN ARBITRATION

AWS ENGINEERS AND PLANNERS CORP. (formerly Azurix North America Engineering Corp.) (Plaintiffs) v. THE CORPORATION OF THE TOWN OF DEEP RIVER (Defendant)

Lalonde J.

Judgment: January 13, 2005
Docket: 01-CV-019224

Counsel: Helmut R. Brodmann for Plaintiff
Russell Kronick, Q.C. for Defendant

Related Abridgment Classifications
Alternative dispute resolution
IV Arbitrators
IV.3 Powers and duties of arbitrators
IV.3.d Functus officio
Alternative dispute resolution
IX Appeal from arbitration awards
IX.2 Question of law
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.d Miscellaneous
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.d Damages
II.6.d.i Penalties and liquidated damages
II.6.d.i.B Application of damages provisions
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.q Miscellaneous

Headnote
Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal

Plaintiff failed to complete construction by date specified in contract — Contract contained liquidated damages clause — Dispute was referred to arbitrator pursuant to Arbitration Act, 1991 — Arbitrator in interim award held that defendant was entitled to liquidated damages of $260,100 and could advance other claims for consequential damages — Arbitrator in subsequent decision held that plaintiff was entitled to credit of $260,100 against additional damages proved — Defendant applied for leave to appeal — Application granted — Appeal involved questions of law alone as required by Act — Whether arbitrator was functus officio after interim award with respect to assessment of consequential damages involved proper understanding of legal principle — Interpretation of damages clause was question of law for same reason — Presence of factual elements in arbitrator's interpretation of contract was not fatal — Both issues also had significant precedential value — Appeal met tests of importance and significant impact on parties' rights.

Alternative dispute resolution --- Arbitrators — Powers and duties of arbitrators — Functus officio

Plaintiff failed to complete construction by date specified in contract — Contract contained liquidated damages clause — Dispute was referred to arbitrator pursuant to Arbitration Act, 1991 — Arbitrator in interim award held that defendant was entitled to liquidated damages of $260,100 and could advance other claims for consequential damages — Arbitrator in subsequent decision held that plaintiff was entitled to credit of $260,100 against additional damages proved — Defendant appealed — Appeal dismissed — Standard of review on question of law was correctness — Arbitrator correctly held that he was not functus officio with respect to assessment of consequential damages — Interim award did not decide those issues in any final manner.

Construction law --- Contracts — Breach of terms of contract — Damages — Penalties and liquidated damages — Application of damages provisions

Plaintiff failed to complete construction by date specified in contract — Contract contained liquidated damages clause — Dispute was referred to arbitrator pursuant to Arbitration Act, 1991 — Arbitrator in interim award held that defendant was entitled to liquidated damages of $260,100 and could advance other claims for consequential damages — Arbitrator in subsequent decision held that plaintiff was entitled to credit of $260,100 against additional damages proved — Defendant appealed — Appeal dismissed — Standard of review on question of law was correctness — Arbitrator correctly interpreted clause as not permitting recovery of all claims — Liquidated damages were intended to be estimate of actual damages — Recovery of all damages claimed in addition to interim award would permit windfall — Recovery of consequential damages was intended to compensate for damages unforeseen by parties' agreement or not otherwise accounted for in liquidated damages amount — Engineering costs were potentially available as consequential damages if proved.

Table of Authorities

Cases considered by *Lalonde J.*:

Agricultural Research Institute of Ontario v. Campbell-High (2001), 2001 CarswellOnt 418 (Ont. S.C.J.) — considered

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 (S.C.C.) — referred to

Calabrese v. Weekes (2003), 2003 CarswellOnt 4058, 38 B.L.R. (3d) 221 (Ont. S.C.J.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — followed

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201, 1991 CarswellBC 269, 1991 CarswellBC 925 (S.C.C.) — referred to

Chandler v. Assn. of Architects (Alberta) (1989), [1989] 6 W.W.R. 521, 36 C.L.R. 1, [1989] 2 S.C.R. 848, 70 Alta. L.R. (2d) 193, 40 Admin. L.R. 128, 62 D.L.R. (4th) 577, 99 N.R. 277, 101 A.R. 321, 1989 CarswellAlta 160, 1989 CarswellAlta 620 (S.C.C.) — considered

Dascon Investments Ltd. v. 558167 Ontario Ltd. (1993), 1993 CarswellOnt 3659 (Ont. Gen. Div.) — considered

Denison Mines Ltd. v. Ontario Hydro (2002), 2002 CarswellOnt 88, 154 O.A.C. 42, 58 O.R. (3d) 26 (Ont. C.A.) — referred to

Denison Mines Ltd. v. Ontario Hydro (2002), 2002 CarswellOnt 2950, 61 O.R. (3d) 291 (Ont. S.C.J.) — followed

Gore Mutual Insurance Co. v. TTC Insurance Co. (2004), 10 C.C.L.I. (4th) 238, 2004 CarswellOnt 1296 (Ont. S.C.J.) — considered

Harder v. Sheehan & Rosie Ltd. (2002), 2002 CarswellOnt 3115, 20 C.C.E.L. (3d) 126, 29 B.L.R. (3d) 140 (Ont. S.C.J.) — considered

Jevco Insurance Co. v. Pilot Insurance Co. (2000), 2000 CarswellOnt 2072, 19 C.C.L.I. (3d) 189, 49 O.R. (3d) 760, [2000] I.L.R. I-3863, 14 M.V.R. (4th) 313 (Ont. S.C.J.) — considered

National Ballet of Canada v. Glasco (2000), 2000 CarswellOnt 1974, 186 D.L.R. (4th) 347, 49 O.R. (3d) 230, 3 C.C.E.L. (3d) 141 (Ont. S.C.J.) — followed

Pachanga Energy Inc. v. Mobil Investments Canada Inc. (1993), 15 Alta. L.R. (3d) 1, 149 A.R. 73, 63 W.A.C. 73, [1994] 3 W.W.R. 350, 1993 CarswellAlta 203 (Alta. C.A.) — considered

VAV Holdings Ltd. v. 720153 Ontario Ltd. (1996), 1996 CarswellOnt 4233 (Ont. C.A.) — considered

Wawanesa Mutual Insurance Co. v. Co-operators General Insurance Co. (2004), 2004 CarswellOnt 4598 (Ont. S.C.J.) — referred to

887574 Ontario Inc. v. Pizza Pizza Ltd. (1995), 23 B.L.R. (2d) 259, 1995 CarswellOnt 1206 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17

Generally — referred to

s. 45 — referred to

s. 45(1) — considered

s. 45(1)(a) — referred to

s. 45(1)(b) — referred to

s. 45(3) — considered

s. 46 — referred to

s. 46(1) ¶ 3 — referred to

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

***Lalonde J.*:**

Nature of the Motion

1 This is an appeal taken by the Corporation of the Town of Deep River ("the Town"), pursuant to the *Arbitration Act, 1991*, S.O. 1991, C. 17, from the decision of the arbitrator, William L. Neville, in this matter, dated August 19, 2004, wherein the arbitrator found, in part, that the Town must prove all of its damages on a balance of probabilities and that, in calculating those damages, AWS Engineers and Planners Corp. ("AWS") is entitled to a credit of the liquidated damages awarded to the Town, as against the total damages.

Issues

A. *Should this Court grant leave to appeal to the appellant, the Town of Deep River? More specifically, is the ground of appeal a question of law, a question of mixed fact and law, or a question of fact?*

B. *If leave is granted based on a "question of law," what should be the appropriate standard of review with respect to the arbitrator's decision of August 19, 2004?*

C. *If leave is granted based on a "question of law," was the arbitrator in this case functus officio following his Interim Award #1, dated June 20, 2003, and his decisions, dated August 20, 2003 and January 9, 2004, and, therefore, without jurisdiction to make his decision, dated August 19, 2004, which is the subject of this appeal?*

D. *In addition, or in the alternative, if leave is granted based on a "question of law," did the arbitrator err in law in his interpretation of the agreement between the parties?*

The Facts

2 This action arises from a contract between AWS and the Town for the design and construction of a sewage treatment facility at lands, located in the Town of Deep River.

3 The original contract price for the construction of the facility was $5,132,765. The contract was to have been completed by April 2000. It was not.

4 This action was commenced in Pembroke, Ontario, on August 31, 2001, pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C. 30, as amended, as court file number 01/942. The Town defended the action and counterclaimed against AWS for damages. The action was brought within Ottawa Case Management, as action number 01-CV-019224, on consent, pursuant to the Order of Rutherford J., dated November 16, 2001.

5 Pursuant to the Order of Master Beaudoin, obtained on consent on August 22, 2002, the parties were directed to proceed to arbitration before William L. Neville, with the arbitration to commence on November 26, 2002.

6 No formal arbitration agreement was ever entered into by the parties and the arbitration simply proceeded, pursuant to the provisions of the *Arbitration Act, 1991*, *supra*. The parties specifically reserved onto themselves such rights of appeal or judicial review, as may be available to them, under ss. 45 and 46 of the *Arbitration Act, 1991*.

7 After thirty-nine days of evidence heard during the period from November 26, 2002 to May 14, 2003, the arbitration was adjourned to permit the arbitrator an opportunity to prepare Interim Award #1, which was released on June 20, 2003. Under Procedural and Evidentiary Considerations, at paragraph 9 of Interim Award #1, the arbitrator stated as follows:

> This interim award ("***Interim Award #1***") shall deal with issues of liability and some but not all claims for damages. Following its release, the parties will have 45 days to work with my findings herein so as to arrive at a comprehensive arrangement on the reconciliation of accounts, including all damages, as claimed between them. This time period may be extended but only on the consent of both parties. In the absence of such consent, then 45 days *after* the date of Interim Award #1, my current intention is to require a further attendance before me by counsel to address one or more aspects of damages before I am prepared to start drafting Interim Award #2. (I will probably require a period of 30-60 days to draft and release Interim Award #2 once I start to compose it.) Upon Interim Awards #1 and #2 being issued, I will then invite submissions from counsel on pre-judgment or contractual interest and costs and such submissions will be made by counsel in person on a date to be fixed by me. After submissions on interest and costs, I will issue a Final Award to deal with these collateral questions.

8 Among other findings and rulings made in Interim Award #1, the arbitrator held that the Town was entitled to liquidated damages from AWS for the failure of AWS to achieve substantial performance within the time specified under the contract.

9 Pursuant to Article 10.1(a) of the Information For Tenderers (the "liquidated damages" clause), the parties agreed that, in the event all of the work called for, under the contract, was not completed by the final completion date (July 17, 2000, as found by the arbitrator) that AWS would pay to the Town the sum of $900 per day, for costs incurred by the Town, for each and every calendar day beyond the final completion date that the work remained uncompleted.

10 Article 10.01(a) further provided that:

> It is agreed that this amount is an estimate of the actual damage to the Owner, which will accrue during the period in excess of the prescribed completion date.

11 After a lengthy analysis, the arbitrator ruled in Interim Award #1 that AWS pay to the Town the total sum of $260,100, as and for liquidated damages for the failure of AWS to complete the work by the prescribed completion date of July 17, 2000. Damages were awarded under this head for the period July 17, 2000 to June 6, 2001, on which date it was ruled that substantial performance of the contract had been achieved by AWS.

12 At paragraph 265 of Interim Award #1, upon ruling that the Town shall have no further claim for liquidated damages after June 6, 2001, the arbitrator stated that:

> ... the Town is still free to advance other claims such as consequential damages etc. for the liquidated damages clause itself makes clear within it that this claim is "in addition to and without prejudice to any other remedy, action or other alternative that may be available to the Owner". ...

13 In this regard, at paragraph 315 of Interim Award #1, the arbitrator specifically reserved to himself jurisdiction over any further claim by the Town for "...consequential damages, all questions of a final accounting between the parties, including interest and costs and any directions or rulings required with respect to implementing this Award including the dispersal of funds".

14 The parties failed to come to any resolution of the remaining issues, following the release of Interim Award #1, and they met with the arbitrator on August 20, 2003, with respect to the Town's consequential damage claim and the further prosecution of the arbitration.

15 Pursuant to the direction issued by the arbitrator on August 20, 2003, the Town delivered a Damages Brief to AWS on September 15, 2003. The Town was seeking, by way of consequential damages from AWS, the sum of $733,320.23.

16 AWS subsequently brought an omnibus motion before the arbitrator on December 12, 2003, for further direction regarding the sufficiency of the productions made by the Town in its Damages Brief, and related matters involving the contract credits and consequential damages.

17 The arbitrator issued a further direction, dated January 9, 2004, making certain findings regarding the contract credits and accounting issues, among other things, and further, requiring the Town to prepare and deliver certain affidavit materials, together with supporting documentation.

18 Following the release of the arbitrator's January 9, 2004 direction, a dispute arose between the parties on how to calculate the Town's consequential damages, if any such damages could be proven.

19 Although not apparent from the Town's Damages Brief, it transpired that the Town was seeking to recover, as "consequential damages", among other amounts, all of the engineering fees billed to the Town after July 1, 2000 — that is, after the prescribed completion date for the project and up to the present. Such damages would include the period during which the arbitrator awarded the Town liquidated damages, as well as other costs incurred, including interest charges on monies borrowed to finance the project. These amounts, if provable, would be in addition to the $260,100 awarded to the Town, by the arbitrator, in Interim Award #1.

20 It was the position of AWS that it ought to be given a credit for the $260,100 awarded as liquidated damages against any further claim by the Town for engineering fees, or other damages, incurred either before or after the June 5, 2001 substantial performance date. It was, and is, the position of AWS that liquidated damages must be a genuine, covenanted pre-estimate of loss. That is, the damages must represent an actual loss to the Town. It cannot simply be a windfall to the Town.

21 It was the position of AWS that if the Town were allowed to pursue as consequential damages all of its engineering fees, as well as all other costs allegedly incurred by the Town, both before and after June 6, 2001 (the substantial completion date), in addition to the liquidated damages already awarded to the Town, it would have secured a $260,100 windfall from AWS.

22 It was in this context that a further motion was brought by AWS before the arbitrator on June 24, 2004, resulting in the arbitrator's Rulings and Directions now under appeal (in part).

23 In the June 24, 2004 motion for directions, the arbitrator was asked by AWS, *inter alia*, to determine, in calculating any damage award ultimately made in favour of the Town in its counterclaim, whether AWS ought to be given a credit as against

the engineering fees, and other costs, as claimed by the Town as consequential damages for the $260,100 awarded to the Town for liquidated damages.

24 The Town took the position at the hearing of the motion that the arbitrator was *functus officio* as regards the issue in light of his earlier findings on liquidated damages.

25 In a lengthy and detailed analysis, the arbitrator ruled that he was *functus officio* with respect to the awarding of liquidated damages to the Town, the time frame within which liquidated damages were appropriate, and the calculation used for determining the quantum of the liquidated damages.

26 However, in a detailed analysis commencing at paragraph 35 of the Rulings and Directions, the arbitrator ruled that the Town was not relieved of the evidentiary burden of actually proving its damages "... simply because a component of its claim was for a stipulated sum":

> "To put it another way: if the stipulated sum was intended to be a genuine pre-estimate of the Town's damages but has not proven to be, then that sum should **<u>not</u>** be considered an amount of money which the Town is automatically entitled to receive — separate and apart from the Town's actual damages."
>
> Rather, the arbitral tribunal must — first and foremost — assess the extent of the Town's recoverable damages and the Town, for its part, must discharge the normal evidentiary onus that is shouldered by any Plaintiff. It must establish its damages actually suffered on a balance of probabilities. That must be the fundamental exercise undertaken in determining the validity of the Town's various damage claims and their value as advanced pursuant to its counterclaim.
>
> To the extent that the Town's damages, as assessed by me, amount to less than or equal to $230,722.36, then the Town shall be entitled to a credit as against monies otherwise owned to Azurix in the sum of $230,722.36. In other words, the parties shall be held to the bargain stipulated in the Liquidated Damages Clause. By comparison, to the extent that the Town's damages exceed $230,722.36, then the Town shall be entitled to the sum of $230,722.36 as liquidated damages and the excess above that as its additional damages.
>
> Proceeding in this fashion is utterly consistent with the principles of damages as enunciated by Waddams and as discussed at the inception of this section. It will enable the Town to be placed in the same position as it would have been if the Contract had been performed on time by compensating it for those damages which were within the reasonable contemplation of the parties or reasonably foreseeable at the time the Contract was entered into.

Town's Position

Issue A — This appeal is an appeal on a question of law and satisfies the two tests set out in s. 45(a) and (b)

27 This appeal satisfies the two tests set out in s. 45 of the *Act*. First, the importance of the matter lies in the financial impact of the result. The effect of the decision would be to reduce the amount of damages that the Town may be entitled to by several hundred thousand dollars.

28 Second, a determination of the question of law, namely the interpretation of Clause 10 of the contract, will significantly affect the rights of the parties. The interpretation of a provision in a contract is a matter of law.

29 The issue raised, whether the arbitrator had jurisdiction to make the decision, is also a matter of law, and assuming the two tests are met, is, therefore, also appealable under s. 45.

Issue B — Appropriate standard of review

30 Counsel for the Town argued that the standard is correctness and if the question decided by the arbitrator pertains to a specific question of law, then a certain amount of deference comes into play.

Issue C — Having regard to the Award, the Direction, and the Ruling, the Arbitrator is functus officio and the Decision should be set aside.

31 Counsel for the Town argued that the issue of liquidated and consequential damages had been considered on three occasions by the arbitrator: first, in the Award; second, in the Directions; and third, in the Ruling. Reading these three decisions together, and given the history of the matter, he submitted that the arbitrator has already decided that engineering fees are not to be considered as being subsumed in liquidated damages, but rather they are consequential damages or "additional damages" (as that term is used by the arbitrator in the decision appealed from). Therefore, the total amount of the engineering fees attributable to the breach of contract are payable *in addition to* the liquidated damages amount. (Emphasis added.)

32 Counsel for the Town pleaded that the doctrine of *functus officio* was considered by the Supreme Court of Canada in *Chandler v. Assn. of Architects (Alberta)*, [1989] S.C.J. No. 102 (S.C.C.). He cited paragraph 20 of Justice Sopinka's reasons, as follows:

> ...As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, supra.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief that would otherwise be available on appeal.
>
> Accordingly, the principal should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.).
>
> In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the Architects Act. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider that matter afresh and render a valid decision. ...

33 In the case at bar, counsel for the Town argued that the arbitrator made a final disposition and is *functus officio*.

Issue D — If the arbitrator is not functus, a plain reading of the language of Clause 10 of the contract indicates that engineering fees are a separate head of consequential damages and thus are payable, in addition to liquidated damage. To hold otherwise means the arbitrator erred in law.

34 Counsel for the Town quoted the liquidated damages clause found in the contract, as follows:

> **10. — Liquidated Damages**

.1(a) It is agreed by the Parties to the Contract that in case all the work called for under the Contract is not finished or completed by the final completion date as specified in the Form of Tender, damage will be sustained by the Owner and the parties hereto agree that the Contractor will pay to the Owner the sum of $900.00 plus site inspection and survey crew costs, the staffing and administration costs and all other costs, incurred by the Owner for each and every calendar day beyond the final completion date specified above that the work remains uncompleted. It is agreed that this amount is an estimate of the actual damage to the Owner, which will accrue during the period in excess of the prescribed completion date.

.1(b) In addition to the amounts outlined in .1(a) above, should the Contractor fail to complete the Works by December 31, 2000, the Contractor shall pay to the Owner the sum of all monies that the Owner would have received from the Provincial Funding program.

.2 The Owner may deduct any amount due under this paragraph from any monies that may be due or payable to the Contractor on any account whatsoever. The liquidated damages payable under this clause are in addition to and without prejudice to any other remedy, action or other alternative that may be available to the Owner.

35 The Town argued that facts, which led to the error, are as follows:

(a) Following the delivery of the Award, counsel met with the arbitrator for the purpose of determining, *inter alia*, what documentary evidence would be required by the arbitrator in order to assess consequential damages. By a Direction ("the Direction") dated August 20, 2003, the arbitrator gave instructions on how the documentation to support the consequential damages claims, including the claim for engineering fees, should be presented.

(b) Pursuant to the Direction, on September 15, 2003, the Town delivered a Damages Brief together with considerable documentation in support of each of the claims for consequential damages referred to therein. The documentation included all of the invoicing records of the engineers in respect of the engineering fees and included copies of the backup material in support of each of the invoices. The Damages Brief calculated the Town's damages, by adding consequential damages, including engineering fees, to the liquidated damages amount.

(c) Following the delivery of the Damages Brief and supporting material, certain questions were raised by AWS. Accordingly, a meeting was held with the arbitrator on November 6, 2003, to obtain further directions. Both counsel, as well as the arbitrator, were aware at that time that the engineering fees were claimed as consequential damages and that the amount claimed was in addition to the amount of the liquidated damages. No objection was taken at that time by either counsel for AWS and the arbitrator that engineering fees were being considered as a separate head of damages, apart from and in addition to the liquidated damages.

(d) Pursuant to the arbitrator's instructions at the November 6, 2003 meeting, the arbitrator heard a motion on December 10, 2003, brought by AWS, for further directions regarding the sufficiency of the productions made by the Town, pursuant to the Direction, as well as other related matters pertaining to contract credits and certain of the consequential damages being claimed by the Town other than the engineering fees.

(e) On January 9, 2004, the arbitrator issued his Ruling (the "Ruling"). Once again, it was considered that the engineering fees were a separate head of damages and would be calculated independently of liquidated damages. In addition to the foregoing, the arbitrator made certain findings regarding contract credits and other accounting issues. He also ordered the Town to prepare and deliver certain affidavit material, together with supporting documentation, in connection with certain other consequential damages claims.

(f) It was only after the Ruling of January 9, 2004 and the Town's compliance therewith that AWS took the position that engineering fees were included within liquidated damages amount. To this end, AWS brought the motion that has resulted in the decision appealed from.

36 The fundamental error made by the arbitrator that led to the result, which is the subject of this appeal, is found in paragraph 40 of the decision. In deciding that the Town had what he called "three options", the arbitrator has effectively re-written the contract. This interpretation of the damages clause, as adopted by the arbitrator, could only be supported if the clause had used the word "or" instead of the word "plus", and if the words "whichever is the greater" were added after the words "other costs". Thus, in order to support this interpretation that part of Clause 10.1 would have to be read, as follows:

> ...the Contractor will pay to the Owner the sum of $900.00 *or* site inspection and survey crew costs, the staffing and administration costs and all other costs, *whichever is the greater* incurred by the owner... (Italics and emphasis added to support the point.)

It is this construction of the clause that was the foundation of the finding in paragraph 47 that is the subject of this appeal.

37 Notwithstanding the contractual interpretation adopted by the arbitrator to support the decision, the proposition that engineering fees are payable, in addition to liquidated damages, is supported on two contractual grounds: first, they are included in the language in the second part of Article 10.1 that is found after the figure of $900 referred to in the Article; and second, or in the alternative, they fall in the category of consequential damages flowing from the breach.

38 Thus, the contract, using clear and unambiguous language, creates two separate heads of damages. The first head is liquidated damages. Since some of the Town's damages for delay may be difficult to quantify, the parties had agreed on a genuine pre-estimate of what those damages would be. In support of this proposition, the last sentence in Article 10.1(a) of the contract states:

> It is agreed that this amount is an estimate of the actual damage to the Owner which will accrue during the period in excess of the prescribed completion date.

39 After establishing the liability to pay $900 per day, Article 10.1 includes the word "plus", which is inserted after the words "the sum of $900". This language creates the second head of damages i.e., those damages that are not included in and a part of the $900 per day liquidated damages. The contract clearly provides that the sum of $900 *does not* include those heads of cost listed after the word "plus". In the decision, the arbitrator has now renamed these damages to be the "additional costs". These additional costs are for "site inspection and survey crew costs, the staffing and administration costs, and *all other costs* incurred by the owner for each and every calendar day beyond the final completion date specified above that the work remains uncompleted". (Emphasis added.) Whether they are called consequential or additional damages, the language of the clause dictates the result: these damages are in addition to liquidated damages.

40 The words following the word "plus" in Clause 10.1 must be given meaning. There is no ambiguity. The first calculation required by the contract is the number of days to which the $900 amount applies. The calculation of costs of site inspections and survey crew costs, the staffing and administration costs, and all other costs incurred by the owner are then added to that amount. Engineering costs would be included within the concept of "other costs". These amounts taken together would constitute the Town's damages.

41 The language in Article 10.2 further supports the conclusion that consequential/additional damages stand alone as a head of damages. It provides that the liquidated damages claim is "in addition to and without prejudice to any other remedy, action or other alternative that may be available to the owner". The arbitrator has found that the "other remedy" is the pursuit of a claim for what he called in the Award "consequential damages" and what he has now called "additional damages".

42 Consequential damages are those damages that are in addition to liquidated damages. They flow directly from the breach and constitute a second set of damages. While liquidated damages need not be proved, consequential damages must be proved. The fact that they are capable of proof sets them apart from liquidated damages. *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (S.C.C.), at paragraph 55.

43 Consequential damages are often referred to in the same breath as "special damages". This would suggest that there is some certainty to the notion in terms of the amount of the claim. *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at paragraph 40.

44 Consequential damages can be thought of as losses that do not flow directly from the act, but only from the consequences of such act.

45 In the alternative, if it is determined that the engineering fees ought to be included within the amount found as the liquidated damages, then this can only apply to those fees incurred by the Town, up to June 7, 2001. From and after that date, any engineering fees would not be part of liquidated damages, because no liquidated damages award was made following that date.

46 If engineering fees are "subsumed" in liquidated damages, it could only be the engineering fees incurred during the period of time to which the liquidated damages applied that would be so subsumed. This period of time ended on June 7, 2001. Engineering fees incurred outside of the time of the application of liquidated damages would not be included.

47 If this alternative is adopted, the amount of engineering fees to be included in liquidated damages is the sum of approximately $130,000, representing the amount of engineering fees billed to the Town from July 17, 2000, the date of the breach of contract to June 6, 2001, the date that the arbitrator decided ended the period of liquidated damages. This would mean that the total claim for engineering fees, being the sum of $346,541, should be reduced by $130,000, inasmuch as this amount is part of the claim for liquidated damages. In the result, the claim for engineering fees, as consequential damages, would be $216,541. This amount would be added to the amount found to be liquidated damages.

48 The arbitrator decided that, while liquidated damages terminated on June 6, 2001, other claims, such as consequential damages, could be pursued without reference to the June 6th date. Thus, it was clearly contemplated that, if the Town continued to incur costs after June 6th related to the delay in completion, those costs would be recoverable if proved. This would apply to engineering fees, as well as other costs.

49 If engineering fees are now held to be part of liquidated damages, and assuming that the engineering costs attributable to the breach of contract are either equal to, or exceed the amount found as owing for liquidated damages, the result would mean that the Town would be unable to recover any other costs it has incurred that do not permit easy proof. This then raises the question: what about the other costs, such as overhead and administration costs that the Town may have incurred during the period of delay? It was the difficulty in the proof of these costs that compelled the parties to agree to the provision for liquidated damages in the sum of $900 per day. To now say that all of the liquidated damages should refer to engineering fees alone would be to re-write what the parties had agreed to. In these circumstances, there would be no recovery for costs that have been incurred by the Town and that the parties had agreed to as a pre-estimate of that loss and those costs.

50 The Town's damages should be calculated by adding the engineering costs attributable to the breach of contract, as determined by the arbitrator, and the other consequential/additional damages, as finally assessed, to the amount of liquidated damages.

51 In the alternative, the engineering costs incurred up to June 7, 2001, should be subsumed in and credited as against the amount of liquidated damages, and the engineering fees incurred after that date, together with all other consequential/additional damages, should be assessed and the amount added to the liquidated damages amount.

AWS' Position

Issue A — Is the Town entitled to pursue an appeal in this matter, pursuant to s. 45(3) of the Arbitration Act, 1991?

52 Counsel for AWS pointed out that s. 45(3) of the *Arbitration Act, 1991*, cited by the Town as grounds for this appeal, provides:

> If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

53 He then argued that the parties never entered into an arbitration agreement and, consequently, no provision was made for an appeal to the court from the arbitrator's rulings -apart from any right of appeal, or judicial review, as may be available to the parties under the *Arbitration Act, 1991*. Accordingly, it is the position of AWS that the Town has no basis upon which to launch an appeal, pursuant to s. 45(3).

54 AWS maintained that s. 45(1) of the *Arbitration Act, 1991* deals with the situation of appeals on a question of law where the arbitration agreement is silent on the matter of appeals. Section 45(1) provides as follows:

> **45.**(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

55 AWS argued that, at best, an appeal to this Court would lie on a question of law only, with leave.

56 It is the position of AWS that, as this matter involves questions of fact, or mixed fact and law, that no appeal is available, pursuant to s. 45(1) of the *Act*, or any other provision of the *Act*. The Town obviously recognized this, which is why the appeal was initially launched, pursuant to s. 45(3). AWS' interpretation of the law and the fact is, as follows:

> (a) Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed fact and law are questions about whether the facts satisfy the legal tests.
>
> *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).
>
> (b) An error of law on the face of the award means that there can be found in the award, or a document actually incorporated therein, some legal proposition that is the basis of the award, and it can be said it is erroneous.
>
> (c) The arbitrator is merely interpreting the provisions of the contract, in light of the issues raised with him of the quantification and calculation of the damages, if any, which may be awarded to the Town. This is clearly something he had not been asked to do before. The arbitrator has also set out some broad principles of the characterization of damages for breach of contract to which the Town takes no issue. Apart from the issue of *functus officio*, the "fundamental error", complained of by the Town, has to do with the interpretation of the damages clause.
>
> (d) In this regard, the arbitrator is forging no new legal principle, or setting any precedent; he is construing the provisions of the agreement between the parties, based on the facts and evidence put before him at the arbitration — and the law of damages, as understood by him. This is precisely the task he was appointed to perform. There is no principle of law at issue in the appeal. The Town specifically has taken no issue with respect to the arbitrator's interpretation of the law, but rather his interpretation of the contract.
>
> (e) The interpretation of the provisions of a contract and its application to certain legal principles is not solely a question of law — it is a question of mixed fact and law.

Issue B — What is the appropriate standard of review of the arbitrator's ruling?

57 If the Court is prepared to entertain a review of the arbitrator's decision, it is the position of AWS that, given the length and complexity of the proceedings, the expertise of the arbitrator in construction-related commercial disputes, and the absence of an arbitration agreement, the standard of review of the decision ought to be one of reasonableness.

58 Counsel for AWS posed the following question: is the arbitrator's construction of the contract so totally unreasonable as to require intervention by the court? In this regard, it cannot be argued that the questions put to the arbitrator were entirely within his competence (they clearly were). Indeed, the parties chose the arbitrator specifically because he has substantial experience in the arbitration of commercial/construction disputes.

59 Interim Award #1 involved a very lengthy and detailed analysis of the many issues in dispute between the parties. The arbitrator's subsequent Ruling and Directions, including the one under appeal, involve a careful and thoughtful analysis of the further issues presented to him.

60 With respect, the Court should be reluctant to venture into a re-examination of the conclusions of fact, or mixed fact and law, reached in this matter by the arbitrator. *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).

Issue C — Is the arbitrator functus officio on the issue of the calculation of liquidated and consequential damages?

61 Counsel for AWS cited *Black's Law Dictionary*, Fifth Edition, West Publishing Co., which defines "*functus officio*", as follows:

> Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further forth or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

62 It is the position of AWS that the arbitrator has not "fulfilled the function" or "accomplished the purpose" he was appointed to. To date, the arbitrator has rendered an interim award dealing with issues of liability and some but not all claims for damages, as well as ruled on a number of related and collateral issues, involving further claims between the parties. The arbitration itself continues and the arbitrator has made it clear that Interim Award #1 was only the first of three awards he anticipated preparing, and that the three awards would collectively constitute what he referred to as the "Final Award".

63 AWS pointed out that the arbitrator, in his ruling of August 19, 2004, cites the Supreme Court of Canada's decision in *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.), as authority for the legal principal that, once an arbitral tribunal has made a final decision in respect of a matter before it, its jurisdiction is spent and the matter adjudicated cannot be revisited, merely because the tribunal has changed its mind, made an error within jurisdiction, or because there was a change in circumstances.

64 AWS reminded this Court that the arbitrator stated in his ruling of August 19, 2004 that, with respect to the following matters dealt with in Interim Award #1, he is *functus officio*:

> a. Striking down liquidated damages clause;
>
> b. The timeframes during the life of the project in which liquidated damages were appropriated;
>
> c. The calculation to be used for determining those liquidated damages.

65 AWS conceded that the arbitrator is *functus officio* with respect to these issues. The arbitrator made it clear in Interim Award #1, however, that he was dealing with issues of liability and some "...but not all claims for damages". He noted at paragraph 314 of his decision that the Town's consequential damages claim — apart from liquidated damages — would have to be assessed:

> I have reserved my jurisdiction on the Town's consequential damages, *all questions of a final accounting between the parties*, including interest and costs and any directions or rulings required with respect to implementing this award including any dispersal of funds. (Emphasis added.)

66 It is AWS' position that the arbitrator had, prior to his ruling of August 19, 2004, made no determination as to how the Town's consequential damages claim, if any, ought to be calculated in light of the liquidated damages award. There is no mention of this issue in his subsequent Rulings and Directions, prior to August 19, 2004. Moreover, the arbitrator specifically reserved to himself all questions of a final accounting between the parties, which, it is submitted, would include the overall calculation of damages.

67 AWS relied on the fact that, commencing at paragraph 35 of the Arbitrator's Rules and Directions of August 19, 2004, the arbitrator went through a lengthy analysis as to how the liquidated damages awarded in the matter "fit within the global concept of damages". This is the first instance when the arbitrator addressed this issue directly.

68 Moreover, AWS pointed out that the arbitrator stated at paragraphs 45 and 46, the following:

> To put it another way: if the stipulated sum was intended to be a genuine pre-estimate of the Town's damages but has not proven to be, then that sum should **not** be considered an amount of money which the Town is automatically entitled to receive — separate and apart from the Town's actual damages.
>
> Rather, the arbitral tribunal must — first and foremost — assess the extent of the Town's recoverable damages and the Town, for its part, must discharge the normal evidentiary onus that is shouldered by any Plaintiff. It must establish its damages actually suffered on a balance of probabilities. That must be the fundamental exercise undertaken in determining the validity of the Town's various damage claims and their value as advanced pursuant to its counterclaim.

69 As a result, AWS argued that the arbitrator could not be *functus officio* with respect to an issue not previously addressed by him and that he has specifically reserved to himself in the interim award.

Issue D — Did the arbitrator err in his interpretation of the agreement?

70 AWS pointed out that the arbitrator, at paragraph 265 of Interim Award #1, has interpreted the liquidated damages clause as allowing the Town to pursue a further claim for what the arbitrator has termed "consequential loss" beyond the Town's entitlement to liquidated damages:

> ... the Town is still free to advance other claims such as consequential damages etc. for the liquidated damages clause itself makes clear within it that this claim is "in addition to and without prejudice to any other remedy, action or other alternative that may be available to the Owner". ...

71 AWS argued that what the Town has done is taken this as an invitation to pursue a claim for all of its alleged losses, direct or consequential, arising from this matter — without regard to the provisions of the liquidated damages clause that clearly states that liquidated damages represent "actual damage to the Owner".

72 As a result, AWS claimed that a review of the Town's Damages Brief reveals that the Town is seeking to recover, as "consequential loss", such varied items as the cost of decant equipment, the relocation of pipes and valves, the engineering fees, OCWA monthly charges and capital expenditures, as well as the Town's interest charges on funds purportedly borrowed to fund the project. In other words, the Town is attempting to recover, as "consequential loss", every possible expenditure and item of loss allegedly suffered by the Town in the period following the scheduled completion date.

73 This, according to AWS, is patently unfair and a tortured interpretation of the liquidated damages clause. If it were so, it would result in the Town recovering all of its costs, howsoever incurred, following the substantial completion date — and it would receive, in addition, a further $260,100.

74 AWS reminded this Court that the arbitrator clearly recognized this false reality in his analysis of the damages issue commencing at paragraph 38 of his August 19, 2004 Rulings and Directions, as follows:

> Certainly, one logical conclusion is that where a party ("***Party A***") has bargained for a stipulated sum being due and payable in the event that the other party ("***Party B***") does not meet some measure of contract performance (i.e. completion by a specified date), then Party A is relieved of the evidentiary onus of establishing the quantum of its damages. Party A need only establish, on a balance of probabilities, that specific breach of contract by Party B and, the breach established to the satisfaction of the court or arbitral tribunal, no extensive inquiry need be embarked upon by the trier of fact in order to assess Party A's damages. One looks to the contract. The agreement contains an agreed-upon stipulated sum or formula as a genuine pre-estimate of damages and that is the sum of calculation to be used to determine the damages to which Party A ought be entitled. Case Closed.
>
> The matter becomes more complicated when the agreement between the parties — such as the Contract under consideration — provides for a stipulated sum payable on breach of contract as a genuine pre-estimate of damages and then reserves onto Party A the right to advance yet other cumulative claims: e.g. for impact costs, for loss of funding, for further and better remedies. This is more than a liquidated damages clause, — notwithstanding the heading used for Article 10 in the Contract. It is more of a hybrid clause or omnibus provisions in which the Town, in entering into the Contract, spelled out its collective range of remedies in the event of default by lack of completion or untimely completion of the Project by Azurix.
>
> To come to the point: in interpreting the parties' intention as minuted in Article 10 of the *Information For Tenderers* forming part of the Contract, I detect that the Town, as Party A, was vested with at least three options if Azurix, as Party B, did not perform the Contract by the agreed-upon completion date. [In laying out all three options, I assume, in each case, that the stipulated sum is not a penalty but, rather, a genuine pre-estimate of damages.]

75 Moreover, AWS pleaded that the arbitrator, finding that the Town had chosen to pursue a remedy for relief (in addition to the liquidated damages awarded), cannot be relieved of its obligation of actually proving those damages. In a carefully reasoned analysis of the law of damages (to which the Town takes no issue), the arbitrator finds 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 — but in no better position than that.

> Proceeding in this fashion is utterly consistent with the principles of damages as enunciated by Waddams and as discussed at the inception of this section. It will enable the Town to be placed in the same position as it would have been if the Contract had been performed on time by compensating it for those damages which were within the reasonable contemplation of the parties or reasonably foreseeable at the time the Contract was entered into.

76 As a result, AWS concluded that the arbitrator's interpretation of the liquidated damages clause in the context of the overall dispute between the parties is entirely reasonable and defensible, and arrived at a result that is fair to both the Town and AWS.

Analysis and Discussion

1. — Is the appeal based on a question of law? And if so, should leave to appeal be granted?

The Statutory Framework

77 This appeal is brought pursuant to s. 45(1) of the *Arbitration Act, 1991*, S.O. 1991, C. 17.

78 It does not appear to be highly contested that the requirements of "importance" and "significant impact on the parties' rights" have been fulfilled; hundreds of thousands of dollars are at stake, and likely any future disputes between the parties with respect to this contract hang in the balance.

79 As for the other requirement, that the appeal must be based on a question of law, this is a highly contested issue between the parties. The wording and scheme of the statute make it clear that the appeal must be based on a question of *pure* law, not one of mixed fact and law, since questions of mixed fact and law are dealt with in s. 45(3), which specifies that a party may appeal an award on a question of mixed fact and law "if the arbitration agreement so provides". Here, there was no arbitration agreement in place; the only way for this Court to hear this appeal is if it grants leave under s. 45(1).

Relevant Case Law

80 There are only a handful of cases, which discuss the meaning of a "question of law" under s. 45(1) of the *Arbitration Act, 1991*.

81 One case with similar issues to those raised in this appeal is *Agricultural Research Institute of Ontario v. Campbell-High*, 2001 CarswellOnt 418 (Ont. S.C.J.), where Gravely J. granted leave to appeal from an arbitrator's award, concluding that the issue of whether the arbitrator erred in assessing the damages to be awarded from a breach of contract dispute was indeed a "question of law" as per s. 45(1) of the *Arbitration Act, 1991*. Unfortunately, however, Gravely J. offered no explanation or analysis of this finding.

82 The case which is perhaps most similar to the present one is *Denison Mines Ltd. v. Ontario Hydro*, [2002] O.J. No. 3464 (Ont. S.C.J.) [hereinafter *Denison*]. In that case, an arbitration panel made an award dismissing a claim by *Denison* for payment from Ontario Hydro following a breach of contract, concluding that *Denison* had selected an inappropriate remedy to set-off. On Denison's appeal from the arbitration award, Ground J. of the Ontario Superior Court of Justice found that the issues in dispute between the parties were: "the interpretation of the Sale Agreement and of the Housing Finance Agreement entered into between the parties, whether *Denison* had elected an inconsistent remedy to set-off and the effect of such an election, and whether the arbitration panel properly applied common law and equitable principles of set-off rather than applying the provisions of the contracts between the parties dealing with set-off" (at para. 5). Ground J. found that all three issues were "predominantly questions of law," and was not swayed by Ontario Hydro's arguments that the issues involved applying the law to a certain set of facts and were therefore questions of mixed fact and law:

> It cannot be that leave to appeal cannot be granted simply because certain issues to be determined on the appeal which are questions of law might be decided differently if different findings of fact had been made. An appeal court can deal with questions of law taking the factual matrix as agreed by the parties or as found by the arbitrator. (para. 5)

83 In the end, however, Ground J. denied leave to appeal to *Denison*, but only because the determination of the questions of law at issue would not significantly affect the future rights or relationships of the parties, as per s. 45(1)(b) of the *Arbitration Act, 1991*. The Ontario Court of Appeal allowed *Denison*'s further appeal and overturned Ground J.'s ruling, but only on the issue of the importance of the determination of the questions of law on the parties' rights, not on whether there was a question of law — see [2002] O.J. No. 91 (Ont. C.A.).

84 The reasoning in *Denison* seems to implicitly borrow from *Dascon Investments Ltd. v. 558167 Ontario Ltd.*, [1993] O.J. No. 731 (Ont. Gen. Div.) [hereinafter *Dascon*], in which McNeely J. ruled that a dispute over an arbitrator's interpretation of the phrase "prevailing market rental" in the parties lease agreement was a "question of law" notwithstanding the fact that the arbitrator developed his interpretation of the phrase partly based on the facts of the case:

> ¶ 5 The issue submitted to the arbitrator by agreement of the parties was to determine "the prevailing market rental". Such a determination involved of necessity the arbitrator as an incident of determining what the amount of the prevailing market rental should be to determine the meaning of the expression "prevailing market rental" as used in clause 2.02 of the lease. It was not necessary for the arbitrator to determine the meaning of the expression at large or divorced from the context of this particular lease although expert evidence was in fact called by both parties as to what is generally meant by expressions such as market rental.

85 Therefore, according to both *Denison* and *Dascon*, the presence of factual considerations or elements in an arbitrator's interpretation of a contract or agreement is not fatal, and the issue may still be characterized as a "question of law" for purposes of appeal.

86 It should be noted that the ruling in *Denison* (i.e., that the issues involved questions of law, despite a consideration of how the facts affected the interpretation of a contract) might constitute a "break" with the more conventional view on questions of law versus questions of mixed fact and law. In *Pachanga Energy Inc. v. Mobil Investments Canada Inc.*, [1993] A.J. No. 946

(Alta. C.A.) [hereinafter *Pachanga*], for example, a unanimous Alberta Court of Appeal refused to grant *Pachanga* leave to appeal an arbitrator's award under a statutory provision very similar to s. 45(1), because the Court determined that the grounds of appeal involved questions of mixed fact and law:

> ¶ 2 ...On the face of the award, the arbitrator reached his conclusion as to the method of assessment of compensation only as a result of his reasoning as to the facts of the case and what their significance was in regard to the correct method to be used for the assessment. His choice of method was not dictated by what would be the normal approach to the assessment of damages in favour of a purchaser to which the vendor has failed to deliver all that it had agreed to deliver. Rather, he chose the method he considered appropriate only after an analysis of the facts which in his view were such that this was a case in which the equipment's value could be arrived at only after taking into account that the value would have to take a number of future and "conjectural" contingencies into account. Because of this, the normal criteria of valuing a chattel or a fixture were not appropriate. So the arbitrator was, as counsel for Mobil has said to us, "driven by his view of the evidence" to some different method. That method, in these circumstances, does not appear to us to be clearly wrong, and in any event in the circumstances does not properly give rise to a question of law. The correctness of the choice of method of assessment turns upon the arbitrator's analysis of the facts. It is therefore properly characterized as a question of mixed fact and law.

87 This seems consistent with the Supreme Court of Canada's discussion of questions of fact, law, and mixed fact and law, in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), which was decided after *Pachanga* but prior to *Denison*. At paragraph 35, Justice Iacobucci for the Court made the following distinctions:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

88 Likewise, in *Harder v. Sheehan & Rosie Ltd.*, [2002] O.J. No. 3673 (Ont. S.C.J.), Hendersen J. determined that it was a "question of mixed fact and law" whether or not an arbitrator properly granted an interim injunction prohibiting one party from carrying on business during the litigation over a non-competition clause in an agreement between the parties. Although no explicit reasoning is offered, it would appear that Hendersen J. was swayed by the fact that the conditions attached to the interim injunction order were highly specific to the facts of the case and that this was not merely a question of whether the arbitrator had applied the proper legal test.

89 In a more recent case, *Gore Mutual Insurance Co. v. TTC Insurance Co.*, [2004] O.J. No. 1359 (Ont. S.C.J.) [hereinafter *Gore*], C. Campbell J. distinguished the case before him from *Denison* only by noting that the dispute in *Gore* involved much more factual issues than in *Denison*:

> ¶ 11 The issue that was before the Arbitrator was in essence the standard of care to be employed by an adjuster. It would appear that there was no evidence called as to what the standard of care was in the industry or evidence of any expert with respect to such standards.
>
> ¶ 12 In the absence of evidence of standard of care, the Arbitrator was left to make a determination about the appropriateness of the adjuster's conduct on the particular facts of the case before him.
>
> ¶ 13 In the absence of evidence regarding the appropriate standard, I am satisfied that the determination by the Arbitrator was one of fact or at best for the Applicant, one of mixed fact and law.

90 It would appear, then, that the more conventional view is that, once an arbitrator's award or decision involves at least some significant consideration of the facts of the case when determining, interpreting, or applying a particular legal test or contractual provision, then the issue is more properly one of "mixed fact and law," with the result that leave to appeal under s. 45(1) of the

Arbitration Act, 1991 will generally not be given. However, *Denison* appears to bring a well-reasoned and principled perspective on this issue, without making a major break with the case law.

91 An alternative but related approach to the determination of whether an issue raises a question of law or a question of mixed fact in law is a focus on the precedential value of the decision under review. More specifically, if a decision potentially forges a new legal principle, or has a potentially wide impact on future cases, it will be considered a question of law; conversely, if the decision is very specific to the facts, and will generally not have any impact on future disputes or cases, then it is a question of mixed fact and law. At paragraphs 36-37 of *Southam*, Iacobucci J. provides some useful examples:

> ¶ 36 For example, the majority of the British Columbia Court of Appeal in Pezim, supra, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.
>
> ¶ 37 By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact... Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

92 This reasoning was upheld in *National Ballet of Canada v. Glasco*, [2000] O.J. No. 2083 (Ont. S.C.J.) [hereinafter *Glasco*], another appeal from an arbitration award, at para. 41.

Application to the Facts

93 In this case, there are two grounds of appeal proposed by the Appellant (the Town of Deep River): first, that the arbitrator was *functus officio* following his earlier decisions and was therefore without jurisdiction to make an additional ruling on damages on August 19, 2004; and second, that the arbitrator erred in interpreting the parties' agreement in such a way as to permit the engineering fees to be "subsumed" in the liquidated damages amount and/or in permitting the liquidated damages amount is to be credited against the total amount of damages sustained by the Town.

94 In my opinion, both of these issues are "questions of law" and leave to appeal is granted.

95 First, the question of whether the arbitrator was *functus officio* involves a proper understanding of a specific legal principle for which there is established jurisprudence. Although this question involves a consideration or application of legal tests and principles to the facts of the case, this does not automatically preclude the possibility that it represents a "question of law," as per the decisions in *Denison* and *Dascon*, *supra*. A question of law may involve a partial application or consideration of a factual context without being re-classified as a "question of mixed fact and law."

96 Second, the issue of the arbitrator's interpretation of the parties' agreement as to the proper assessment of damages is also a question of law despite the fact that the arbitrator's decision may have been influenced by the facts of the case (more specifically, by the Town of Deep River's claim for actual damages), for the same reasons. This ground of the appeal states that

the arbitrator erred in his interpretation of clause 10 of the parties' agreement with respect to the proper measure and assessment of damages to be awarded to the Town of Deep River upon breach of contract.

97 The arbitrator interpreted clause 10.2 as expressing the possibility that "consequential damages" could be found in addition to the liquidated damages already awarded to the Town. However, the arbitrator also ruled that in calculating such additional damages, a credit equal to the amount of liquidated damages should be granted in favour of AWS Engineers, such that the Town would be entitled to: 1) liquidated damages, and 2) consequential damages only in excess of the amount of liquidated damages. The Town of Deep River argued that this interpretation is an error of law in that it misconstrues both the wording of the contract and the parties' intentions. The Town also argues that the exclusion of engineering fees was an error of law. In my opinion, the Town is correct in arguing that these may be "questions of law," potentially subject to appeal, notwithstanding the fact that the arbitrator's conclusions in this regard may have been influenced or affected by the amount or nature of the consequential damages sought by the Town of Deep River.

98 With regard to the question of "precedence" (or the presence of a "new" legal principle, or the importance of the decision to future litigants, judges or lawyers) in determining whether an issue is a question of law or a question of mixed fact and law, both the issue of *functus officio* and the interpretation of the contract and the assessment of damages involve considerations of principles of law which could in fact have tremendous significance for future legal disputes involving the proper measure of damages in a breach of contract case.

99 I rule that the appeal is based on a question of law, and I made a finding that the criteria in s. 45(1)(a) or (b) have been met.

2. — What is the Appropriate Standard of Review?

100 The appropriate standard of review of the arbitrator's award is one consistent with the jurisprudence on appeals and judicial reviews of decision-makers where the issue is one of "pure law," since an appeal in this case is permitted only with respect to questions of law. Typically, such issues are reviewed or appealed on a standard of "correctness," which involves a lower level of deference to the decision-maker's discretion and authority.

101 The first recent case to cite "correctness" as the appropriate standard of review in an appeal from an arbitrator's award was *887574 Ontario Inc. v. Pizza Pizza Ltd.*, [1995] O.J. No. 936 (Ont. Gen. Div. [Commercial List]) [hereinafter *Pizza Pizza*]. In that case, MacPherson J. made the following comments in determining the appropriate standard of appellate review:

> ¶ 17 Second, I do not think that any of the indicia that might lead a court to imply that there should be deference to the arbitrator's decisions is present in this case. In the leading recent case on the standard of judicial review of the decisions of specialized tribunals, *Pezim v. British Columbia (Superintendent of Brokers)* [See Note 3 below], [1994] 2 S.C.R. 557, Iacobucci J. said this, at p. 590:
>
>> ...At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal ...
>>
>> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where ... there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question ...
>
> Note 3: Although Pezim was a case dealing with a specialized administrative tribunal created by a legislature, in my view much of what the court says is equally applicable to a specialized private arbitrator agreed upon by the parties and confirmed by court order.
>
> ¶ 18 In a very recent decision, *Wedekind v. Ontario (Ministry of Community and Social Services)* (1994), 21 O.R. (3d) 289, the Court of Appeal conducted a similar review of the factors relevant to a determination of the appropriate standard of review. Griffiths J.A. [See Note 4 below] said, at p. 296:

> [T]he jurisdiction of a court of appeal is much broader than the jurisdiction of a court on judicial review. Where there is a statutory right of appeal which allows the appellate court to substitute its opinion for that of the tribunal on questions of law or mixed questions of law and fact, and where the tribunal has no greater expertise than the court on the issue, then the standard of review is one of correctness.

Note 4: The court was unanimous on this point. Weiler J.A. dissented on other grounds.

¶ 19 I believe that all of the factors mentioned by Iacobucci J. in Pezim and Griffiths J.A. in Wedekind point to the conclusion that the standard of review in this case is correctness. The Minutes of Settlement provide for an appeal. They contain no privative clause or indeed qualifying language of any kind. And, given that the essence of the arbitrator's decision was his interpretation of various provisions of a contractual document, the Franchise Agreement, in light of the relevant principles of contract law, it would appear that he would not have any greater expertise than a court interpreting the same document.

102 The reasoning and conclusion in *Pizza Pizza* was upheld in *Jevco Insurance Co. v. Pilot Insurance Co.*, [2000] O.J. No. 2259 (Ont. S.C.J.) at para. 9: "the standard of review on an appeal from a private arbitration (absent any specific provision to the contrary in the arbitration agreement) is one of correctness. I respectfully adopt the analysis and conclusion reached by MacPherson J. in this regard in *887574 Ontario Inc. v. Pizza Pizza Ltd.*, [1995] O.J. No. 936, 23 B.L.R. (2d) 259 (Ont. Gen. Div. [Commercial List])." In the present case, there is no private arbitration agreement, which would displace the presumption of a standard of review of correctness.

103 In *Glasco*, *supra*, Swinton J. also found that the appropriate standard of review in an appeal from an arbitrator's award pursuant to s. 45 of the *Arbitration Act, 1991*, is that of "correctness":

> [43] The Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 has summarized various factors that should be considered in determining the standard of review, including privative clauses, the expertise of the tribunal, the purpose of the legislation being applied, and whether the review is with respect to a question of law or fact. Here, the appeal concerns a question of law only. There is no greater expertise in the arbitrator than the courts in the application of the law relating to interlocutory injunctions. Therefore, the standard of review is correctness.

104 This reasoning and conclusion was confirmed and approved in *Harder*, *supra*, at para. 23. Correctness was also affirmed as the appropriate standard of review most recently in *Wawanesa Mutual Insurance Co. v. Co-operators General Insurance Co.*, [2004] O.J. No. 4588 (Ont. S.C.J.) at para. 22 (albeit on consent of the parties).

105 The only case which suggests a more deferential standard of review is *Calabrese v. Weekes*, [2003] O.J. No. 4176 (Ont. S.C.J.) [hereinafter *Calabrese*]. At para. 29, Himel J. writes:

> ¶ 29 Under the 1991 Arbitration Act, the standard of review of a decision of an arbitrator is one of "patent unreasonableness". That test was upheld in the decision of *Vav Holdings Ltd. v. 720153 Ontario Ltd.* [1996] O.J. No. 4008 (C.A.. The standard of patent unreasonableness is a very strict test: see *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.), at p. 690. Courts must look to the plain wording of the agreement.

106 However, it should be noted that the *VAV Holdings Ltd. v. 720153 Ontario Ltd.* [1996 CarswellOnt 4233 (Ont. C.A.)] case referred to in *Calabrese* dealt with the standard of review on an application pursuant to s. 46(1), para. 3 of the *Arbitration Act, 1991*, not s. 45(1). Section 46(1), para. 3, allows a court to set aside an arbitration award if it deals with a dispute "that the arbitration agreement does not cover, or contains a decision on a matter beyond the scope of the agreement." Since an arbitration agreement would clearly fall within the jurisdiction of the arbitrator, a high degree of deference on such issues would be warranted on appellate review.

107 In the present case, the issues in dispute (the interpretation of a contract, and whether or not the arbitrator was *functus officio*) are not matters within the sole jurisdiction of the arbitrator; they are questions of law in which an arbitrator has no particular expertise over that of courts; the appropriate standard of review is therefore one of correctness. In other words, the arbitrator's award (and in particular, his interpretation of the contract) is required to be "correct" for it to be upheld in this Court.

3. — Was the arbitrator functus officio?

108 Assuming that leave to appeal is granted, the first "question of law" which serves as a ground of appeal is whether or not the arbitrator in this case was *functus officio* and therefore without jurisdiction to decide on the assessment of damages following his earlier rulings and decisions.

109 The Town of Deep River argued that the arbitrator's prior rulings and decisions which dealt (in part) with liquidated and consequential damages, and with the proper assessment and amount of the Town's recovery, rendered the arbitrator *functus officio* with respect to the issue of assessment of damages. More specifically, the Town argued that the arbitrator had already decided: 1) that liquidated damages would be awarded *in addition to* any consequential damages, and 2) that engineering fees would be an additional head of damages apart from the liquidated damages amount. The arbitrator's decision on August 19, 2004, which concluded that AWS should be credited with an amount equal to the liquidated damages amount in calculating the Town's consequential damages, and which excluded recovery for engineering fees, was therefore allegedly made without jurisdiction.

110 In response, AWS Engineers claimed that the interim nature of the arbitrator's ruling on August 19, 2004 (given that it did not decide with any finality the actual amount of damages owing to the Town of Deep River) makes a finding of *functus officio* virtually impossible; the arbitrator has not "fulfilled the function" or "accomplished the purpose" he was appointed or selected to do, as the phrase "functus officio" is intended to express. Furthermore, AWS Engineers also pointed out that the arbitrator explicitly stated on August 19, 2004 that he was in fact *functus officio* with respect to certain issues, since final decisions had indeed been made on those issues: the possibility of striking down the liquidated damages clause; the timeframes during the life of the project in which liquidated damages were relevant; and the calculations to be used in determining the amount of liquidated damages. The arbitrator also made it clear that the Town's claim for consequential damages, apart from liquidated damages, would still have to be determined, proven, and assessed. The arbitrator was therefore not *functus officio* with respect to any issues concerning consequential damages, and any issues concerning the final amount owing to the Town of Deep River. Finally, AWS Engineers argued that the arbitrator never addressed the proper measure of consequential damages in any of his previous rulings.

111 AWS has correctly pointed out that the arbitrator is not *functus officio* with respect to the assessment of consequential damages, given that such issues had not been decided by the arbitrator in any final manner. Furthermore, with respect to the exclusion of at least some of the engineering fees related to sludge storage from the Town's claim, a careful reading of the arbitrator's ruling on August 19, 2004 reveals that this exclusion did not stem from a decision to prevent any recovery for engineering fees as a "reversal" of the arbitrator's previous rulings on engineering fees as a separate head of additional damages. At paragraph 49 of the August 19, 2004 decision, the arbitrator made the following statement:

> Since the Town failed to make out its claim with respect to the lack of sludge storage capacity, it follows that the Town is not entitled to be compensated for any professional fees expended either by Jp2g or OCWA in addressing sludge storage issues. Such professional services are *non-recoverable* and must be excluded from the claims being put forward as part of the Town's Additional Claims.

112 The exclusion of the engineering fees for sludge storage was therefore not a wholesale exclusion of such fees merely because the arbitrator decided that engineering fees were subsumed in the liquidated damages amount; rather, the exclusion is consistent with the arbitrator's earlier rulings that all additional consequential damages must be *proven*. Therefore, because the Town failed to make out its claim with respect to such expenses, those expenses cannot be recovered as consequential damages. With respect to other types of engineering fees, I was unable to find anything in the arbitrator's decision of August 19, 2004, which specifically excluded such fees from being potentially recoverable under "consequential damages."

113 As a result, the arbitrator cannot be said to have been *functus officio* with respect to the engineering fees, or with respect to the assessment of consequential damages.

4. — Did the arbitrator err in his interpretation of the agreement?

114 The second "question of law" which serves as a ground of appeal is whether or not the arbitrator in this case erred in law in his interpretation of clause 10 of the parties' agreement.

115 The arbitrator's interpretation of the proper assessment of damages as set out in the provisions of the parties' agreement is "correct" and there was no error of law.

116 First, the arbitrator was correct in interpreting clause 10.2 as establishing the principle that claims for loss in addition to amounts recovered as liquidated damages were recoverable. The wording of the section ("in addition to and without prejudice to any other remedy, action or other alternative that may be available") clearly supports this conclusion.

117 Second, the arbitrator was correct in finding that the possibility of awarding "consequential damages" did not necessarily permit recovery of *any* amount claimed by the Town of Deep River in addition to the amount for liquidated damages. Clause 10.1(a) clearly indicates that the amount specified as liquidated damages ("$900.00 plus site inspection and survey crew costs, the staffing and administration costs and all other costs") is intended to be "an estimate of the actual damage to the Owner, which will accrue during the period in excess of the prescribed completion date." Because the amount for liquidated damages is meant to represent an estimate of the "actual damage," recovery for "actual damage" claimed by the Town *in addition to* an amount already planned for, as an estimate of "actual damage" would effectively permit a windfall to the Town. This is why a credit in the amount of liquidated damages (which have already been awarded to the Town) should be applied to the calculation of the Town's "actual damage" — i.e., to prevent double-recovery. The recovery of amounts permitted under the rubric of "consequential damages" is clearly intended to compensate the Town for any additional damage which was unforeseen by the parties' agreement on liquidated damages, or for any unforeseen losses which arose as a consequence of the breach of contract which would not otherwise be accounted for in the liquidated damages amount.

118 Third, the arbitrator was correct in insisting that all amounts claimed by the Town as "consequential damages" must be properly proven; there is no automatic entitlement to such damages. As a result, the exclusion of recovery for engineering fees related to sludge storage was correct in that it reflected the Town's failure to prove its claim for such losses.

119 Finally, the arbitrator was correct in his interpretation that engineering costs are potentially available as "consequential damages" in addition to the $900.00 set aside for liquidated damages. However, the arbitrator is also correct in concluding that the amount for liquidated damages should be credited against the total amount of "actual damage" claimed by the Town, to prevent double-recovery; and the arbitrator was correct in concluding that *all* consequential damages must be proven to be recoverable.

120 Therefore, on my reading of the facts, the arbitrator's awards and rulings, and the parties' submissions, the arbitrator did not err in law in his interpretation of the parties' agreement with respect to the proper assessment of damages.

Conclusion

121 Based on the above analysis, I grant leave to appeal, but dismiss the appeal, since the arbitrator was not *functus officio* and was correct in his interpretation of the parties' agreement.

Costs

122 The parties gave me their submissions on costs. As the respondent AWS was successful on this motion, costs are awarded to AWS Engineers and Planners Corp. in the amount of $2,200, to be paid within 30 days of the date of this endorsement. I accept the hourly rate of $250 and the 15 hours spent by the solicitor for the respondent, as well as the $1,200 counsel fee on the motion. The respondent is entitled to $75 in disbursements, including GST.

Appeal dismissed.

TAB 4

CITATION: Laderoute v. Heffernan, 2019 ONSC 914
COURT FILE NO.: FC-15-1538-1
DATE: 2019/02/06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Julie Marie-Josée Laderoute	)	Tanya Davies, for the Applicant
Applicant	)	
– and –	)	
Scott Edward Birrell Heffernan	)	
Respondent	)	Frederic P. Huard, for the Respondent
	)	**HEARD:** February 4, 2019

MID-TRIAL RULING
VOIR DIRE ON EXPERT QUALIFICATIONS

SUMMERS J.

Introduction

[1] In this proceeding, the applicant, Ms. Laderoute, seeks to set aside the Separation Agreement that she and the respondent signed on May 9, 2014 and the Amending Agreement that they subsequently entered into on November 27, 2015. If the agreements are set aside, she seeks orders for the equalization of net family property, retroactive child support and spousal support. If the claim to equalize net family property proceeds, the primary dispute relates to the value of the two Irish pubs owned by the respondent, Mr. Heffernan.

[2] Both parties hired experts to value the businesses. The applicant hired J.C. Desnoyers of SME Business Appraisers Inc. Mr. Desnoyers' qualifications were not contested. He is a Chartered Business Valuator and has been qualified as an expert witness many times. Mr.

Heffernan hired Arthur Kostaras of Akros Accounting and Financial (“Akros”). Ms. Laderoute challenged his qualifications to give expert evidence.

[3] This is my ruling on the voir dire held to determine the admissibility of Mr. Kostaras’ evidence.

Admissibility of Expert Evidence

[4] Expert evidence is an exception to the rule prohibiting witnesses from giving their opinion about matters before the court. For the opinion of an expert to be admissible, it must meet a two-stage test; See *R. v. Mohan*, [1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

Stage 1 – The Threshold Criteria

[5] The first stage of the test was established in *Mohan;* see paras 17-21. It requires the party seeking to introduce the evidence to satisfy certain criteria:

1. The evidence must be logically relevant;
2. It must be necessary to assist the judge by providing information that is outside his or her experience and knowledge;
3. The absence of a rule that would otherwise operate to exclude the evidence; and
4. The expert must be properly qualified to give opinion evidence.

[6] There are additional considerations that arise, in this part of the test, when the case involves novel science. They have no relevance in the circumstances of this proceeding.

[7] Here, the scrutiny is on the qualifications of Mr. Kostaras as an expert in business valuation. According to *Mohan*, for a witness to be properly qualified as an expert, he or she must have “acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify”; see para 31.

[8] Mr. Kostaras is the president and sole owner of Akros. He testified that he is a Chartered Professional Accountant (CPA) by training with a specialty in corporate finance and business valuations. His website indicates that he is also a Certified Management Accountant (CMA) and a CF. The nature of this latter designation was not explained. Prior to establishing Akros, Mr. Kostaras testified that he was the Director of Finance for a multi-faceted business resource group out of Saskatoon. After that role, he was president of a company in Calgary that focused on land purchases and land development. Mr. Kostaras said that he had been in the accounting field for approximately 35 years. Aside from his articles between 1988 and 1990, he did not identify the dates associated with any of his past positions or the date that he founded Akros. He did not provide his resumé to the court or attach a copy of it to his report.

[9] Mr. Kostaras is not a Chartered Business Valuator (CBV) but states that his CPA and corporate finance designation qualify him to do business valuations. In particular, he points to the two-year program he completed in corporate finance as providing him with the specific training needed to do this work. When asked how many hours of study were dedicated to the area of business valuations, he was unable to answer but believed it was at least a third of the program. He did not say how the course was delivered, whether it was full-time or part-time, or when he completed it.

[10] Mr. Kostaras testified that corporate finance and business valuations are the focus of his practice. His website includes other practice areas: Accounting and Financial Statements, Brokerage, Business Brokerage, Strategic Planning and Business Plans, Cash Flow Management and Forecasting. When asked how many valuations he had completed, Mr. Kostaras said he had done 15 to 20 formally and at least 200 informally. The formal valuations were done for two purposes: rollovers under s. 85 of the *Income Tax Act* and business brokerage. When Mr. Kostaras was asked what he meant by informal valuations, he said that his work in corporate finance involves him in many roles and transactions on behalf of clients including land purchases, negotiating for their financing needs and the like. As I understood his evidence in this regard, it was to say that the nature and scope of his work had, by times, included preparation of an informal business valuation. What that might look like was not explained.

[11] Mr. Kostaras acknowledged that none of his past valuation work was done for the purposes of family law. The report he prepared for Mr. Heffernan was his first. He confirmed that he has never been qualified as an expert witness. His prior valuation engagements did not involve litigation.

[12] Mr. Kostaras did not identify any professional affiliations, presentations or articles written by him in the field of business valuations. When asked about his knowledge of the restaurant industry, Mr. Kostaras answered that he knows it very well. He said he had recently purchased a minority interest in a local restaurant. He said he had valued this particular business and had learned a lot through his involvement as an investor and in his role as a consultant.

[13] In my view, business valuation is a highly specialized area of the accounting profession. It is a pursuit that is often described as being an art as well as a science. Mr. Kostaras does not hold the recognized CBV professional designation and did not testify to any particular experiential learning, mentoring, or guidance that in certain circumstances might be considered as an acceptable substitute for the formal certification. Without more, I do not accept on its face Mr. Kostaras' statement that a program designed to teach special skills in corporate finance, by dedicating a third of the course to the field of business valuation, can also deliver the degree of knowledge and training in that area that one would require to be considered an expert. For these reasons and based on the evidence before me, I am not persuaded that Mr. Kostaras has the necessary expertise to qualify him to give expert evidence on the value of Mr. Heffernan's businesses. As a result, I find the respondent has not satisfied the threshold criteria in the first stage of the admissibility test. Accordingly, Mr. Kostaras is not permitted to provide the court with opinion evidence.

<u>Stage 2 – The Judge as Gatekeeper</u>

[14] Apart from my conclusion that Mr. Kostaras is not properly qualified to give expert evidence, I also consider the second stage of the admissibility test as established in *White Burgess*. This stage is the discretionary gatekeeping role of the trial judge. Rather than admitting expert evidence and considering weaknesses only when deciding the weight to be given to it, the judge, as gatekeeper, is required to consider the frailties in the evidence at the

second stage of the admissibility test. It is at this juncture, that the court must "weigh the strength or cogency of the evidence against its potential prejudice in the sense that it may be used by the trier of fact for an impermissible purpose, may create unfair prejudice against the opponent, or may confuse or mislead the trier of fact, thereby rendering the trial unfair, or result in an inefficient and costly trial"; see *Sopinka, Lederman & Bryant, The Law of Evidence in Canada, Fifth Edition*, at p. 875. For the reasons set out below, I find that the frailties in Mr. Kostaras' report create more risk than value to the court. The potential prejudice of admitting outweighs the probative value. Accordingly, I exercise my gatekeeping discretion and rule Mr. Kostaras' evidence to be inadmissible.

[15] Mr. Kostaras testified that he did his best to follow the Canadian Institute of Chartered Business Valuators Standard No. 110 when he prepared his report. I find he did not do so in some important respects. One example is the requirement in Standard 110 that says a valuation report shall state the purpose for which it was prepared. Here, Mr. Kostaras called his report a "Business Analysis and Valuation Report for Connors Irish Pub and Connors Gaelic Pub (collectively known as Connors)", yet on page 16, he describes the nature and scope of engagement as "*limited to the preparation of annual cash flow statements*…" (Emphasis added). Somewhat consistent with this stated purpose, there is an earlier statement in the same section that requires Mr. Heffernan to be responsible for providing Akros Financial with "accurate and complete information *necessary for the preparation of the Schedules of Income Available for Support*" (emphasis added). This section further requires that Mr. Heffernan "will be responsible for the final review of the *Schedules of Income Available for Support* (emphasis added) to ensure that they are accurate and complete and include all necessary information…..". In my view, when read together with subsequent sections of the report that disclose cash flow projections for the business as far out as the year 2020, these statements suggest that the primary purpose of the report is to prepare annual cash flow statements and schedules of available income for support purposes. Although Mr. Kostaras called his analysis a valuation report and testified that the purpose of the report is implicit in the document itself, I do not find this to be the case unless it is a cash flow analysis and business plan for the future. Mr. Kostaras also said that his analysis is implicitly a comprehensive report, however, CBV Standard 110 requires the level of report to be stated explicitly. Mr. Kostaras' report contains no such statement.

[16] Consistent with the observation that the purpose of the report appears to be income and cash flow projections and not the historical valuation of the business on a fixed date, the Nature and Scope of Engagement section further references what Mr. Heffernan will be responsible to do when managing his business in the future. These include devising internal control systems, safeguarding assets, maintaining an efficient accounting system, designating employees to oversee the services provided by Akros and evaluate the adequacy and results of those services. The report also requires Mr. Heffernan to be responsible for designing and implementing programs and controls to prevent and detect fraud and for informing Akros about known or suspected fraud that involves related parties who have significant roles in the internal controls of the business where the fraud may have a significant impact on their engagement. In my view, these remarks are more akin to a business analysis or strategic plan than a business valuation report.

[17] Similarly, the Disclaimer section of the report states that it was prepared based on information provided by Mr. Heffernan *for the express purpose of "preparing and providing various documents including a risk assessment matrix, income schedules, an implementation/action plan, and other information."* (Emphasis added). Once again, there is no mention of a business valuation – an omission that, in my view, calls into question the relevance and reliability of the report in relation to the purpose for which it is being offered. The text of the report itself suggests that it may well have been prepared for reasons that do not include valuing Mr. Heffernan's business.

[18] When measured under CBV Standard 110, other deficiencies in Mr. Kostaras' report include: its failure to identify whether it is a comprehensive report, an estimate, or a calculation of value; the absence of a date on the report itself; and the fact that the valuation date is buried in the fine print in the middle of the report.

[19] I also note Mr. Kostaras' testimony that he has come to consider Mr. Heffernan as a friend – someone he holds in high regard. He subsequently assured the court of his independence and the objectivity he brought to bear in the preparation of his report, however, at this gatekeeping stage of the admissibility test, I would be remiss to disregard their current relationship entirely. In this regard, I must also note Mr. Kostaras' failure to sign and attach to

his report the acknowledgement of expert's duty as required by rule 20.1 of the *Family Law Rules*, O.Reg. 114/99.

[20] For these reasons, I find Mr. Kostaras' evidence to be inadmissible.

Madam Justice D. Summers

Released: February 6, 2019

CITATION: Laderoute v. Heffernan, 2019 ONSC 914
COURT FILE NO.: FC-15-1538-1
DATE: 2019/02/06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Julie Marie-Josée Laderoute

Applicant

– and –

Scott Edward Birrell Heffernan

Respondent

MID-TRIAL RULING
VOIR DIRE ON EXPERT QUALIFICATIONS

Summers J.

Released: February 6, 2019

TAB 5

1988 CarswellOnt 688
Ontario Supreme Court, Court of Appeal

Erco Industries Ltd. v. Allendale Mutual Insurance Co.

1988 CarswellOnt 688, [1988] O.J. No. 2, 25 O.A.C. 130, 29 C.C.L.I. 4, 62 O.R. (2d) 766, 8 A.C.W.S. (3d) 20

ERCO INDUSTRIES LTD. v. ALLENDALE MUTUAL INSURANCE CO.

Cory, Finlayson and McKinlay JJ.A.

Heard: November 2-6, 1987
Judgment: January 4, 1988
Docket: Nos. CA 468/84, CA 3649/81

Counsel: *John W. Adams, Q.C.*, *Dana B. Fuller* and *Daniel G. Shand*, for appellant (plaintiff).
R.A. Smith, Q.C., and *H.J. Marin*, for respondent (defendant).

Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.g Reversing findings of fact
XXIII.13.g.ii Finding by judge alone
XXIII.13.g.ii.E Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.f Preparation for trial
XXIV.9.f.i Expert assistance
Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.i Witness fees and expenses
XXIV.9.i.i Expert witness
XXIV.9.i.i.B Miscellaneous

Headnote
Practice --- Practice on appeal — Powers and duties of appellate Court — Reversing findings of fact — Finding by Judge alone
Practice --- Costs — Particular items of costs — Preparation for trial — Expert assistance
Practice --- Costs — Particular items of costs — Witness fees and expenses — Expert witness
Proximate cause — Damage to furnace caused by "ferrophosphorous breakout" — Loss excluded by terms of policy excluding cost of repairing fault which permitted accidental escape of molten material.
An insured sued to recover indemnity under an insurance contract for damages occasioned to a furnace. The furnace was used to produce phosphorous. At trial each side presented a theory of how the damage occurred. The trial Judge accepted the theory of the defendant that the damage was caused by "ferrophosphorous breakout". As a result, most of the damage was excluded by the terms of the policy which excluded "the cost of repairing the fault which permitted [the] accidental escape [of molten material]". The insured appealed objecting to various findings and rulings of the trial Judge, including his acceptance of the insurer's theory of how the damage occurred, and objecting to the awarding of costs to the insurer for experts' reports that were delivered during trial with less than 5 days notice to the insured. The insurer cross-appealed, contending that the trial Judge erred in failing to award certain costs.

Held:

The appeal and cross-appeal were dismissed.

There was no error committed by the trial Judge. There was ample evidence to support the trial Judge's findings of fact and the inferences he drew were reasonable and clearly based upon the evidence which was before him.

The Rules of Practice gave the trial Judge the discretion to abridge the time prescribed by the Rules. In this case, the parties agreed to waive the notice provisions for delivery of the experts' reports and this lack of notice could not then be raised by the insured on the question of costs. The trial Judge properly exercised his discretion with regard to the costs of these reports.

While certain of the costs identified in the cross-appeal could have been awarded by the trial Judge, it was not essential that he exercise his discretion by doing so. There was no error in the trial Judge failing to award the costs sought by the insurer.

Table of Authorities

Cases considered:

All Nations Trading Corp. v. Lumbermen's Mutual Casualty Co., 37 O.R. (2d) 12, [1982] I.L.R. 1-1513 (Ont. C.A.) [leave to appeal to Supreme Court of Canada refused (1982), 37 O.R. (2d) 12 (S.C.C.)] — *distinguished*

Borland v. Muttersbach (Muttersback) Estate, 49 O.R. (2d) 165, 8 C.C.L.I. 232, 15 D.L.R. (4th) 486, [1985] I.L.R. 1-1851, supplementary reasons at 8 C.C.L.I. 264, [1985] I.L.R. 1-1939 (Ont. H.C.), reversed in part 53 O.R. (2d) 129, 16 C.C.L.I. 177, 23 D.L.R. (4th) 664, [1986] I.L.R. 1-2003 , supplementary reasons at (1986), 17 C.C.L.I. xxxix (note) (Ont. C.A.) — *applied*

Lensen v. Lensen, 23 C.P.C. (2d) 33, [1988] 1 W.W.R. 481 (S.C.C.) — *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 (S.C.C.) — *referred to*

York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd., Ont. H. C., Reid J., February 12, 1986 — *applied*

Statutes considered:

Judicature Act, R.S.O. 1980, c. 223 —

s. 80(1)

Rules considered:

Ontario Rules of Practice —

R. 178

The judgment of the Court was delivered by *Cory J.A.*:

1 This is an appeal from a decision that was based primarily upon the trial Judge's findings of fact and the inferences which he drew from the evidence. There was ample evidence upon which he could base these findings of fact, and the inferences which he drew were reasonable and clearly based upon the evidence which was before him. In my view, there was no error committed by the trial Judge and I agree with his findings of fact and inferences.

Factual Background

2 The action was brought by Erco Industries Limited (Erco) against its insurer, Allendale Mutual Insurance Company (Allendale), for damages occasioned to a furnace. Erco operated the furnace in question to produce phosphorus. For the purposes of this appeal it is not necessary to go into great detail as to its make-up.

3 The Long Harbour furnace is a very large apparatus comprised of a steel casing some 3/4 inch thick encircling the hearth, which itself is made up of three layers of carbon blocks, to a total of 64 inches in depth. The furnace is designed to generate temperatures of up to 2000 degrees centigrade and high pressures in order to draw off the phosphorus vapour. It was the conclusion of the trial Judge that the hearth, the steel casing, and the supporting beams are all integral parts of the furnace. The hearth cannot be deemed to be an entity separate from the steel casing, as the casing is designed to obtain and maintain the necessarily high heat and pressure.

4 Before the incident which gave rise to this action, the furnace had been shut down, and recently restarted. The furnace is constructed in such a manner that after a shutdown, it will not be at full operating capacity for approximately 10 days. During that time, the paste between the carbon blocks will expand to seal off the furnace.

5 Raw phosphorus in solid form is placed in the furnace at start-up time. Its properties are such that it is a solid below 45 degrees centigrade, a liquid from 45 degrees centigrade to 280 degrees centigrade, while at 280 degrees centigrade, it vaporizes. Phosphorus ignites when exposed to oxygen in the atmosphere. Therefore, the atmosphere inside the furnace must be "inert", that is to say, oxygen-free.

6 During start-up, the phosphorus is vaporized, but condenses to a liquid on cooler surfaces within the confines of the furnace. The liquid phosphorus is said to be a "searching liquid" in that it runs down inside the furnace walls, penetrating the voids and percolating throughout the furnace wherever the temperature exceeds 45 degrees centigrade. Liquid phosphorus can penetrate the steel walls and flow out of small cracks in the steel casing. Once outside, it may spontaneously ignite upon contact with the oxygen in the air outside the furnace.

7 On April 1, 1979, the furnace was started. At 7:30 a.m. on April 4, leaking liquid phosphorus and burning phosphorus were observed in the area of No. 6 taphole, where a repaired crack in the wall had opened up, permitting the phosphorus to escape. The same morning, smoke, which was the product of phosphorus combustion, began to fill the furnace building and became increasingly intense.

8 Significantly, both cooling fans were switched off by 9:30 a.m. the same morning. The amount of burning outside the furnace increased, creating high heat and flame. Burning liquid phosphorus and phosphoric acid were observed dripping from the back of the furnace casing and were collected in buckets on the floor beneath the furnace. Grouting paste and sand were applied by men in rotating shifts in an attempt to put out the fire. At 11:23 a.m. that morning, the furnace was shut down. The area below the wall crack was then observed to be glowing red and bulging.

9 During the afternoon and evening of April 4, there was little change in conditions outside the furnace. Burning phosphorus and acid continued to flow and the sanding and grouting operations were continued. At 3:30 p.m., one of the furnace cooling fans was started in reverse in an attempt to draw the smoke and fumes outside the building by way of the air ducts underneath the furnace. At 10 p.m., it was decided that grouting was not having any useful effect, but men continued to apply sand and soda ash to neutralize the acid through the early hours of the morning. By 8 a.m. of April 5, the burning phosphorus was restricted and clean-up operations were undertaken. On April 6, phosphorus continued to burn some 10 feet under the furnace. When the fire was out, inspection revealed the following damage to the furnace.

Damage to the Wall and Lip Place

10

(a) A previously-repaired horizontal crack in the steel wall plate beneath No. 6 taphole had opened up and been extended;

(b) An 18-inch vertical crack had developed in the wall plate extending above the horizontal crack;

(c) Beneath the horizontal crack the wall plate had bulged outward;

(d) A large, irregularly-shaped hole had developed in the wall plate and lip plate a short distance below the intersection of the horizontal and vertical cracks.

Damage to Floor Plate

11

(a) A large, irregularly-shaped hole was observed in the steel floor plate, commencing directly below the wall plate damage and running under the furnace for approximately 10 feet;

(b) The floor plate damage appeared to travel a short distance along the duct immediately below the wall plate damage, then cross over one grillage beam, and thereafter along the adjacent duct;

(c) At various points, there was warpage of the remaining floor plate and thinning or erosion of both sides of the edge of the remaining floor plate.

Damage to the Grillage Beams

12 There was extensive wastage of grillage beams Nos. 1, 2 and 3.

The Erco Position as to the Cause of the Damage

13 It was the position of Erco firstly that the damage resulted from an "acid attack". This attack would be produced as a result of the combustion of phosphorus with the oxygen in the air which would remove the water from the surrounding atmosphere to form phosphoric acid and meta-acids. These acids, it is said, would corrode the steel from the outside, with the rate of corrosion increasing rapidly as temperatures increased.

14 Erco developed a second theory which, although it had been mentioned before trial, did not become a significant factor in Erco's position until 5 weeks into the trial when it became apparent that the "acid attack" theory could not be maintained on the evidence. More will be said on this point later in these reasons.

15 At the 5-week stage, Erco adopted the position that the damage also resulted from "phosphiding" or "alloying". Pursuant to that theory, it was said that in an oxygen-free atmosphere at temperatures above 1050 degrees centigrade, phosphorus vapour would rapidly waste steel by reacting with the steel to create an iron-phosphorus alloy. Below 1050 degrees centigrade, wastage by phosphiding can occur, but to a lesser degree and at a much slower rate. Erco attempted as well to argue that the damage to the furnace was, to some extent, caused by a combination of "phosphiding" and "acid attack".

The Allendale Position as to the Cause of the Damage

16 Allendale contended that the damage resulted from a "ferrophosphorus breakout" (FP breakout). It was contended on behalf of Allendale that molten FP (which occurs at and above 1300 degrees centigrade) will dissolve and thus waste steel extremely rapidly. Allendale's position was that at the same time that the fire occurred, ferrophosphorus in molten form was able to flow through "rat holes", that is to say, a series of small cracks or flaws in the carbon block crucible. It then reached the steel plate and was directed down inside the steel wall before breaking through the steel casing.

The Agreement of the Parties

17 The parties agreed at the outset of the trial that the cause of the incident was either the escape of molten FP as contended by Allendale, or a combination of phosphiding and acid attack, as alleged by Erco. It was further agreed that there could be no other cause of the incident, and as well, that it could not have been caused by a combination of the theories of Erco and Allendale. Partly as a result of this agreement, much of the evidence submitted by both sides was directed to demonstrating that the damage could not have been caused by the theory of the opponent.

The Insurance Policy

18 Generally speaking, it can be said that if the Erco theory as to the cause of the damage is correct, then there is coverage under the relevant terms of the insurance policy. On the other hand, if Allendale is correct, little if any of the damages will be covered by the policy of insurance. The relevant terms of the insurance coverage are as follows:

This Policy covers any direct loss or damage as defined and limited herein and elsewhere in this Policy to the herein insured property caused by perils hereinafter defined:

Molten Material

13. Heat from molten material which shall have accidentally escaped from equipment, but there shall be no liability assumed by the terms of this clause for:

(a) loss or damage to such escaped material;

(b) the cost of removing or recovering such escaped material;

(c) *the cost of repairing the fault which permitted such accidental escape*.

(emphasis added)

The Trial

19 All of the specific objections to the findings and rulings of the trial Judge, set out under the headings which will follow, must be considered in light of the way the trial proceeded. It will be remembered that counsel for the parties had agreed that the damage had to have been occasioned either as postulated by Erco or as contended by Allendale. There could be no middle ground and no finding that a combination of the two theories caused the damage. The positions of the contending parties had been set out well in advance of the trial. In addition, both parties were ably represented by leading and experienced counsel. Counsel had agreed that although many reports had been received before trial and duly exchanged, further expert reports would be forthcoming during the proceedings and these were to be exchanged as soon as they were received by each counsel.

20 The trial continued over 9 weeks. In his opening, which lasted for 2 days, counsel for Erco went to great lengths in reviewing the position of Allendale that the damages were caused by a breakout, with the molten FP flowing through "rat holes". He took great pains to indicate that he would demonstrate that the Allendale theory was erroneous and that an FP breakout could not have caused the damage.

Refusal of the Trial Judge to Permit Certain Reply Evidence to be Called

(a) Proposed Reply Evidence as to the Calculations Used by Dr. Eager

21 In the course of his reasons, the trial Judge stated that he was impressed by Dr. Eager, an expert witness called on behalf of Allendale. He observed that Dr. Eager's evidence appeared to him to be given in a straightforward and credible manner and he accepted it. He went so far as to say that the evidence of Dr. Eager was almost sufficient in itself for him to make his findings in favour of Allendale. In my view, he would have been justified in basing his conclusions upon the evidence of Dr. Eager alone.

22 Dr. Eager was cross-examined extensively by counsel for Erco, who was also in possession of Dr. Eager's lengthy report. Dr. Eager based his evidence in part on calculations made as to the rate of flow of FP through narrow apertures. No objection was taken or challenge made to these calculations during the cross-examination. Without any cross-examination upon the subject, Erco then sought to adduce evidence in reply which would challenge the calculations put forward by Dr. Eager. The trial Judge carefully considered the request and then denied it. I believe he was correct in the position that he took.

23 It would be unfair to permit the defendant Erco to call such evidence in reply, particularly as Dr. Eager would be deprived of any opportunity to explain the basis of his calculations, and as Erco had been given every opportunity to explore the validity of the calculations during the cross-examination. Further, the trial Judge indicated that the appellant would be granted an adjournment to consider the expert evidence and prepare for further cross-examination if it wished. Additionally, Erco could conduct further examinations for discovery if it saw fit to do so. In light of these circumstances, it was reasonable and appropriate for the trial Judge to refuse to permit such evidence to be called by way of reply. It was argued that any unfairness to Dr. Eager

could be rectified by permitting him to give evidence by way of rebuttal. However, to encourage such procedures would have the effect of making long trials interminable.

(b) Proposed Reply Evidence with Regard to Thermocouples

24 The case itself proceeded in a unique manner, in that Erco tendered, as part of its case, some of the reports prepared for Allendale by experts it had retained, together with a videotape of a phosphorous burning test. Then expert witnesses called by Erco, in the words of counsel, "critiqued" the reports, prepared for Allendale. For example, Factory Mutual had carried out certain tests as to the effect of burning phosphorus upon steel, in an attempt to simulate the incident. In order to measure the temperatures generated in the steel by the burning phosphorus, measuring devices known as "thermocouples" were inserted into the metal. Erco had in its possession the outline of the tests and their results long before the trial. The test report was filed by Erco. The test was thus put in as part of Erco's case, and it indicated that burning phosphorus could not produce temperatures high enough to result in "phosphiding". Mr. Napier, an expert called by Erco, "critiqued" the test, but voiced no criticism of the way in which the thermocouples were used. He did not suggest that there should have been any particular or special shielding of the thermocouples, although he said they did not provide the best method of measuring temperatures. There was no other criticism raised with regard to the manner in which the thermocouples were used by Erco during the presentation of its case.

25 Later, Erco sought to call Dr. Smith in reply. He would have testified that because the thermocouples were not shielded, their readings could be in error by as much as 200 to 300 degrees centigrade. The trial Judge refused to grant permission to call Dr. Smith.

26 Erco was aware of the tests and the manner in which they were conducted before the trial as they were part of Allendale's productions. The manner in which Erco chose to proceed and its failure to challenge the use of unshielded thermocouples in its own case all militated against permitting the proposed reply evidence. In the circumstances, it would be unfair to permit Erco to call reply evidence as to the effect of shielding the thermocouples. The trial Judge properly exercised his discretion in refusing to permit such evidence in reply as it would have been a classic case of the plaintiff attempting to "split his case", and the prejudice to the defendant was very clear. If the defendant had put the videotaped tests in as part of its defence, it would have done so through the experts who conducted these tests, and they would have testified as to the adequacy of their test procedures. As no attack was made by Erco in chief on these aspects of the test procedures, Allendale did not address them in its defence. There is no provision in our Rules of Practice for a reply to a reply, but even if the Judge in the exercise of his overall discretion in a long trial were to agree to permit such a procedure, we are informed that the experts in question were out of the country and not available.

The Temperature of the Burning Phosphorus

27 It was said that the trial Judge erred with regard to his conclusion as to the temperature of the burning phosphorus outside the furnace and the results that would flow from that conclusion. Again, I can see no merit in this allegation.

28 Dr. Eager, whose evidence was accepted by the trial Judge, testified that carbon flame is hotter than phosphorus flame and that the maximum temperature for carbon flame is 1000 degrees centigrade. He stated that it was impossible, therefore, to get a temperature of over 1000 degrees centigrade with burning phosphorus. The temperature of burning phosphorus was significant to the determination of the cause of damage to the furnace, particularly to the floor plate. Mr. Napier for Erco testified that the damage to the floor plate was caused by the acid carried under the furnace by the cooling fans. Dr. Holmes, testifying as an expert for Erco, attributed the same damage to phosphiding. The phosphiding theory would require heat of over 1100 degrees centigrade. Mr. Napier's theory of acid damage also required high heat.

29 It was quite reasonable for the trial Judge to accept the evidence of Dr. Eager that even if the flames outside were pulled under the furnace they could not have generated a temperature in excess of 1000 degrees centigrade. This finding, coupled with the evidence that the damage to the furnace plate was inside and not outside, effectively demonstrated the weaknesses of Erco's theories as to the cause of damage. I can find no error in the findings of the trial Judge in this regard.

Adverse Inferences Drawn by the Trial Judge

30 Erco complained of two adverse inferences drawn by the trial Judge. The first pertains to the failure of Erco to call as witnesses the employees who cut away the bustle plate of the furnace in the vicinity of the heaviest damage. Secondly, the trial Judge drew an adverse inference from the revelation by Erco's counsel and one of Erco's experts to another Erco expert that a sample taken from the damaged portion of the furnace revealed that the damage had been occasioned to the inside wall of the furnace.

31 The bustle plate was composed of thin sheet steel that encircled much of the furnace. The condition of the thin steel on the bustle was significant in that it might have given some indication of the cause of the damage to the furnace. The trial Judge drew an adverse inference from this omission to call the employees involved in its removal.

32 Erco contends that sufficient evidence as to the condition of the bustle was given by supervisory personnel who testified. I cannot accept that submission. Mr. Brazier, who wrote the first report on the damage for Erco, referred to the bustle damage as minimal. Mr. Ralph, the plant engineer, said the bustle had some jagged edges but could not tell if they were the result of wasting or whether parts had been cut away. Mr. Barnett admitted there was no mention of damage to the bustle plate in the Brazier report and that this absence would be harmful to Erco's theories of damage.

33 In the absence of any positive evidence as to the nature of the damage to the bustle plate and the importance of such evidence, it was appropriate for the trial Judge to draw an adverse inference from the failure to call the worker who cut away the bustle plate.

34 As to the second inference, there was an agreement at trial that counsel could relate to their expert witnesses only the evidence given by lay witnesses. Although experts' reports were to be exchanged as soon as they were received, there was to be no disclosure of the testimony of other experts. This was particularly important as the outcome of the trial was really dependent upon the assessment made of that testimony by the trial Judge.

35 A sample of the steel casing had been taken from the damaged portion of the furnace. As a result of its shape, it was referred to at trial as "Little Italy". That sample had been prepared for micro-photography and examined at Factory Mutual for Allendale. The sample demonstrated that the damage to the steel had been occasioned from inside the furnace. This was devastating to the theory that the damage was done by acid attack, which could only be occasioned from outside the furnace.

36 The acid attack theory was the primary position of Erco and it was stressed during the first 5 weeks of trial. When the evidence as to Little Italy was revealed to Dr. Holmes, one of Erco's experts, his opinion changed. Before he was aware of the sample, it was his view that the majority of the damage to the furnace was due to acid attack rather than phosphiding. Afterwards, he became more supportive of the phosphiding theory, which alone could be compatible with damage to the inside of the furnace. In the circumstances, I believe the trial Judge was correct in drawing an adverse inference from the disclosure by Mr. Brazier and counsel for Erco to Dr. Holmes of the testimony as to Little Italy.

Inadequate Preparation of the Sample "Little Italy"

37 It was said the trial Judge erred by failing to find that the important exhibit Little Italy was improperly prepared for micro-photography. There is no merit in that contention. It is sufficient to say there was evidence, particular that of Mr. Tatar, upon which the trial Judge could rely in reaching his conclusion that the exhibit was, indeed, properly prepared.

The Failure of the Trial Judge to Find There Was no Trace of Ferrophosphorus Under the Furnace or in the Carbon Blocks of the Hearth

38 I can find no error in the failure of the trial Judge to find support for Erco's position in the alleged absence of FP under the furnace or of traces of FP in the carbon blocks.

39 On the evidence, it is most unlikely that any traces of FP could be found on the carbon blocks. After the fire, the blocks of the hearth were broken up by firing over 2000 rounds from a kiln gun at them in a procedure which seemed to resemble the

firing of an anti-tank gun at a brick wall. It would be strange indeed, if any traces of FP could be found in the resulting rubble. As well, the Erco employees were not specifically looking for FP traces and, in the circumstances, were not likely to find any.

40 Similarly, on the floor beneath the furnace, slag-like material was found. It was conceded that this material would resemble FP, and that it may well have been FP. In any event, the material was cleared away after the incident.

The Trial Judge, it Was Said, Created his own Scientific Theory

41 Erco contended that the trial Judge, in drawing the conclusion that the presence of dripping liquid phosphorus contradicted the phosphiding theory, created his own scientific theory and became his own expert. This position was based upon his alleged failure to distinguish between the temperature of an area on the furnace wall and the temperature of burning phosphorus, itself. I can find no support for this submission of the appellant.

42 There was agreement, as there had to be, that if liquid phosphorus was observed, it must be at a temperature of 280 degrees centigrade or less. At 280 degrees centigrade, the liquid phosphorus would vapourize and obviously could no longer be seen as a dripping liquid. In my view, the trial Judge went no farther than is required of any arbitrator in drawing a reasonable inference from the observations of witnesses. Indeed, the very statement of claim filed on behalf of the appellant indicated that burning liquid phosphorus was indicative of temperatures of 280 degrees centigrade. Further, it was claimed the presence of liquid phosphorus at the cracks or holes in the furnace indicated a temperature that was too low to permit ferrophosphorus to come out of the furnace. A number of witnesses recounted their observations of liquid phosphorus being seen at various points on the furnace. Those observations indicate the low temperature of the furnace plate at those points. There can be no quarrel with the inferences drawn by the trial Judge from these observations.

Escape from the "Equipment"

43 Erco contended that the trial Judge was in error in holding that the "equipment" was the entire furnace, including the steel casing. I can see no basis for that submission. It is absolutely clear from the exhibits filed by Erco that the furnace was comprised of the hearth, the enclosing 3/4-inch steel casing making up the sides, the top and bottom plate and, as well, the furnace braces or buckstays. They were all an integral part of a single piece of equipment, the furnace. The hearth was of no use without the encircling steel casing. The encircling steel casing was needed for its refractory capacity to build up the temperature within the furnace to 2000 degrees centigrade, and to build up the pressure so that the phosphorus gas could be taken off by way of the vent ducts of the furnace. The following is taken from an exhibit filed by Erco, describing the furnace and its operation:

> The furnace, which comprises a steel casing provided with a massive carbon lining, referred to as the crucible, and covered with a monolithic refractory dome, is designed to contain the high temperature products of the melt, the burden charge and the phosphorus vapour and carbon monoxide gases arising from the reaction and emitting from the furnace off-take duct for onward processing.
>
> Processed carbon block is the generally accepted material used for forming the furnace crucible; it resists attack from the ferrophosphorus although ferrophos can erode away the surface, it is resistant to slags although, again, it can be attacked by slags that are abnormally high in phosphorus content.
>
> The principal design feature of the furnace crucible is to ensure and maintain a freeze line of the molten media near to, but preferably removed from, the inner face of the crucible and so maintain temperatures that are near to, or below, solidification phase of the slag and ferrophos.
>
> Most, if not all, P4 furnaces are provided with external shell air/water cooling to help maintain the desired isotherms, the Long Harbour furnaces are air cooled throughout, i.e. bottom and side walls.
>
> The Long Harbour furnaces, for the load they are desired to carry, are probably the largest of their kind; they are also provided with carbon hearths of 64" depth, built up in three layers of carbon block, bedded on a 4" depth of high grade

refractory screed applied across the bottom of the furnace case, and with side walls of 39" total thickness constructed from two thicknesses of carbon block held in position by monolithic rammed joints of heat curing carbon paste.

The dome cover is of monolithic construction from high grade refractory materials.

The carbon steel casing of the furnace is mounted on a suitably designed H beam grillage, which in turn is supported from the floor on the necessary concrete plinths.

The air cooling of the furnace is provided from two air fans, each of 45,000 cfm capacity, where the air is fed to the underside of the furnace and evenly distributed throughout the bottom using the H beam grillage (which is provided with bottom sealing plates) as the distribution ducts. The peripheral of the furnace case is fitted with an outer jacket from the base of the grillage upwards, referred to as the 'bustle', thereby directing the air upwards and across the suface of the furnace outer wall casing.

44 That description is sufficient in itself to put an end to the appellant's contention. The "equipment" can be none other than the entire furnace, including the steel casing and buckstays.

Strength of the FP Breakout Theory

45 There is no basis for any of the objections to the trial Judge's findings of fact or inferences. In each case, there is ample evidence upon which he could base his findings and draw those inferences. As well, it should be noted that there seems to be overwhelming evidence which supports the theory of FP breakout as the cause of the damage, as opposed to either the acid damage theory or phosphiding theory.

46 It may be sufficient simply to refer again to the exhibit Little Italy. That exhibit not only demonstrated that the damage occurred from inside the furnace, but it also indicated that there was a narrow heat-affected zone working from the inside, outward. The narrow heat-affected zone is typical of FP breakout, and is contrary to either the phosphiding theory, which requires the normalization of the steel throughout from either inside out or outside in in a uniform manner, or the acid damage theory, which would require the damage to be occasioned from outside the furnace. In all the circumstances, the evidence more than amply justified the conclusions reached by the trial Judge.

The Deference that Must Be Displayed by Appellate Courts to Findings of Fact Made by the Trial Judge

47 *All Nations Trading Corp. v. Lumbermen's Mutual Casualty Co.*, 37 O.R. (2d) 12, [1982] I.L.R. 1-1513 (Ont. C.A.) [leave to appeal to Supreme Court of Canada refused (1982), 37 O.R. (2d) 12 (S.C.C.)], was relied upon by Erco as an example of an Appellate Court overruling a trial Judge on findings of fact. That case is readily distinguishable. In *All Nations Trading Corp.*, the trial Judge had found that the appellants had exceeded their loan limit at the bank, and that the bank was pressing for reduction of the loan. It was also found that immediately prior to the act of arson, the sales of the appellant had decreased, that inventory was high and that much of the appellant's stock was becoming obsolete. These findings were contrary to the evidence. The bank records indicated that the appellant had not reached its loan limit and the bank was not pressing for reduction of the loan. The independently audited statements indicated that sales had not decreased, that inventory was not high and that the appellant's stock was not becoming obsolete. In the face of that independent and irrefutable evidence, it was clear that errors had been made in the factual findings. It was thus appropriate for this Court to conclude that that there had been palpable and overriding errors made by the trial Judge, and thus, to direct a new trial. 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 (S.C.C.) and *Lensen v. Lensen*, Supreme Court of Canada, released December 3, 1987 [now reported 23 C.P.C. (2d) 33, [1988] 1 W.W.R. 481]. The *All Nations Trading* case has, therefore, no application to the disposition of this appeal.

The Trial Judge, it Was Said, Erred in Awarding Allendale its Costs of Experts' Reports Delivered During the Trial or Less than Five Days Before Trial and the Witnesses' Travel and Accommodation Expenses

48 The costs in this case fell to be determined pursuant to s. 80(1) of the *Judicature Act*, R.S.O. 1980, c. 223. Pursuant to that section, a trial Judge has full discretion to determine by whom and to what extent "costs of and incidental to" the proceedings should be paid:

> 80.-(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge are in the discretion of the court or judge, and the court or judge has full power to determine by whom and to what extent the costs shall be paid.

49 The section indicates that the trial Judge was not bound by the tariff prescribed by the Rules of Practice that were then in force. In *Borland v. Muttersbach (Muttersback) Estate*, 49 O.R. (2d) 165, 8 C.C.L.I. 232, 15 D.L.R. (4th) 486, [1985] I.L.R. 1-1851, supplementary reasons at 8 C.C.L.I. 264, [1985] I.L.R. 1-1939 (Ont. H.C.), reversed in part 53 O.R. (2d) 129, 16 C.C.L.I. 177, 23 D.L.R. (4th) 664, [1986] I.L.R. 1-2003, supplementary reasons at (1986), 17 C.C.L.I. xxxix (note) (Ont. C.A.), this Court approved the decision of a trial Judge awarding costs to the successful party which were over and above the tariff items prescribed by the Rules. This was also done, I believe quite properly, by Reid J. in *York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd.*, Ont. H.C., released February 12, 1986 (unreported endorsement).

50 No error was made by the trial Judge in awarding Allendale the costs of experts' reports even though they were delivered during the trial with less than 5 days' notice to Erco. Pursuant to R. 178 of the Rules of Practice in force at that time, it was provided that "the court may ... enlarge or abridge the time prescribed by the rules ... for doing any act ...". It was therefore within the trial Judge's discretion to abridge the time. It appears to have been especially appropriate for the trial Judge to abridge the time appropriate in light of the agreement of counsel at trial that they would exchange their reports as soon as they received them during the course of the trial. The parties agreed to waive the notice provisions for the delivery of these reports and this lack of notice cannot now be raised by Erco on the question of costs. It was appropriate for the trial Judge in this case to award Allendale the costs of the experts' reports and the witnesses' travel and accommodation expenses.

51 The trial Judge properly exercised his discretion with regard to these costs and there should be no variation of his order.

Cross-appeal with Regard to Costs

52 By way of cross-appeal, Allendale contended that the trial Judge erred in failing to award the following costs:

> (a) the costs of experts consulting with and educating counsel;
>
> (b) the costs of investigating scientific literature;
>
> (c) the costs of experiments and research included in the reports of the experts;
>
> (d) the costs of experiments and scientific investigation reflected in the videotapes and photographs;
>
> (e) the costs of experts advising counsel in respect of the plaintiff's experts' reports and in assisting in preparation for and cross-examination at trial; and
>
> (f) the costs of experts attending for the purpose of listening to the evidence of other witnesses.

53 In my view, there can be no doubt that the costs claimed in (e) and (f) could have been awarded by the trial Judge.

54 In *Borland v. Muttersbach (Muttersback) Estate*, supra, at p. 190 [49 O.R., p. 258 8 C.C.L.I.] the trial Judge awarded the following amounts:

> The plaintiffs are entitled to their costs against the defendants Muttersbach and Royal Insurance, the same to be taxed forthwith and to include:
>
> a. Allowance for two senior and one junior counsel for the time each was actually present at trial.

b. The reasonable fees of all expert witnesses including the costs of their reports and time spent in court, whether waiting, advising counsel or giving evidence.

c. The reasonable costs of reports filed where the authors were not called.

d. Their reasonable cost of the photographs filed or copies prepared for the court and for counsel.

55 Certain of those allowances were beyond the tariff provisions. Nonetheless, that specific award of costs was upheld in this Court in *Borland v. Muttersbach (Muttersback) Estate*, 53 O.R. (2d) 129 at 148 [16 C.C.L.I. 177 at 200]. However, although there was authority which would have permitted the trial Judge to exercise his discretion in the manner suggested, it was not essential that he do so. In the circumstances of this particular case, we can find no error in the trial Judge failing to award the costs sought by Allendale in the cross-appeal.

56 In the result, the appeal will be dismissed with costs and the cross-appeal will be dismissed, but without costs.

Appeal and cross-appeal dismissed.

TAB 6

Southcott Estates Inc. *Appellant/Respondent on cross-appeal*

v.

Toronto Catholic District School Board *Respondent/Appellant on cross-appeal*

Indexed as: Southcott Estates Inc. *v.* Toronto Catholic District School Board

2012 SCC 51

File No.: 33778.

2012: March 20; 2012: October 17.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Commercial contracts — Remedies — Specific performance — Duty to mitigate — Single-purpose company entering into agreement for purchase of land — Vendor breaching contractual obligations — Company seeking specific performance — Whether single-purpose company must mitigate its losses — Whether plaintiff seeking specific performance has obligation to mitigate its losses — Whether trial judge erred in concluding there were no comparable properties available for mitigation.

The appellant S is a single-purpose company incorporated solely for the purpose of a specific land purchase, with no assets other than money advanced to it by its parent company for the deposit relating to such purchase. It entered into an agreement of purchase and sale for a specific property with the respondent. When the respondent failed to satisfy a condition and refused to extend the closing date, S sought specific performance of the contract. It argued that it was not required to mitigate its losses. The trial judge refused to award specific performance but awarded damages to S in the amount of $1,935,500. The Court of Appeal concluded that the respondent had breached its contractual obligations but that S had failed to take available steps to mitigate its losses. It reduced the damage award to a nominal sum.

Southcott Estates Inc. *Appelante/intimée au pourvoi incident*

c.

Toronto Catholic District School Board *Intimé/appelant au pourvoi incident*

Répertorié : Southcott Estates Inc. *c.* Toronto Catholic District School Board

2012 CSC 51

N^{o} du greffe : 33778.

2012 : 20 mars; 2012 : 17 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Contrats — Contrats commerciaux — Recours — Exécution intégrale — Obligation de mitiger le préjudice — Promesse d'achat d'un terrain par une société à but unique — Inexécution de la promesse de vente par le promettant-vendeur — Demande d'exécution intégrale par la société — Une société à but unique doit-elle mitiger ses pertes? — La demanderesse qui cherche à obtenir l'exécution intégrale a-t-elle l'obligation de mitiger ses pertes? — Le juge de première instance a-t-il eu tort de conclure qu'aucun immeuble comparable n'aurait pu servir à mitiger le préjudice?

L'appelante S est une société à but unique constituée dans le seul but d'acheter un terrain en particulier. Elle n'a pas d'actifs autres que l'argent avancé par sa société mère pour le dépôt à verser en vue de cet achat. S a conclu avec l'intimé une promesse d'achat et de vente du terrain en cause. Lorsque l'intimé a fait défaut de satisfaire à une des conditions de l'entente et a refusé de proroger la date de clôture, S a réclamé l'exécution intégrale du contrat. Cette dernière a plaidé qu'elle n'était pas tenue de mitiger ses pertes. Le juge de première instance a refusé d'ordonner l'exécution intégrale du contrat mais a accordé à S la somme de 1 935 500 $ à titre de dommages-intérêts. La Cour d'appel a conclu que l'intimé n'avait pas respecté le contrat mais que S avait omis de prendre les mesures appropriées pour mitiger ses pertes. Elle a ramené à une somme symbolique le montant accordé à titre de dommages-intérêts.

Held (McLachlin C.J. dissenting): The appeal and cross-appeal should be dismissed.

Per LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.: Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case. As a general rule, a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps.

The main issue is whether S, a single-purpose corporation, was excused from mitigating its losses when the vendor breached the agreement of purchase and sale, and particularly when it had promptly brought an action for specific performance. As a separate legal entity, S was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens. One such responsibility is to take steps to mitigate losses. A plaintiff cannot recover losses that could reasonably have been avoided. S sought specific performance and was therefore ready to complete the purchase. Its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources that were not tied up as a result of the breach alleged. S can hardly argue that the same money would not have been available for mitigation. In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because the corporation is a single-purpose corporation within a larger group of companies, would give these corporations an unfair advantage. If single-purpose corporations were not required to mitigate their losses, this could expose defendants contracting with such corporations to higher damage awards.

This Court has recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance. If the plaintiff has a "fair, real, and substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case. A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate interest" in specific performance unless he can show that money is not a complete remedy because the

Arrêt (la juge en chef McLachlin est dissidente) : Le pourvoi et le pourvoi incident sont rejetés.

Les juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Karakatsanis.: La notion de mitigation du préjudice repose sur l'équité et le bon sens et vise à assurer la justice entre les parties en fonction des circonstances propres à l'espèce. En principe, un demandeur ne peut se faire indemniser d'une perte qu'il aurait pu éviter par des précautions raisonnables.

La principale question en litige est de savoir si S, une société à but unique, était relevée de son obligation de mitiger ses pertes lorsque le promettant-vendeur n'a pas respecté la promesse d'achat et de vente, en particulier lorsqu'elle a rapidement intenté une action en exécution intégrale. En tant qu'entité juridique distincte, S était tenue de mitiger ses pertes en faisant diligence pour trouver une autre propriété. Quiconque choisit de bénéficier des avantages de la constitution en société doit en supporter les inconvénients. La société a notamment la responsabilité de prendre des mesures pour mitiger ses pertes. Un demandeur ne peut se faire indemniser des pertes qu'il pouvait raisonnablement éviter. S réclamait l'exécution intégrale; elle était donc prête à parfaire l'achat. Sa demande subsidiaire de dommages-intérêts pour préjudice indirect dépendait de l'obtention, pour elle, de capitaux lui permettant de parfaire la vente. En fait, les deux demandes étaient fondées sur la possibilité d'obtenir des ressources qui n'étaient pas bloquées par suite de l'inexécution reprochée. S ne peut guère prétendre que les mêmes fonds n'auraient pas pu servir à mitiger le préjudice. À défaut d'éléments de preuve concrets démontrant le manque de ressources, le fait de conclure que les pertes ne peuvent raisonnablement être évitées du simple fait qu'il s'agit d'une société à but unique membre d'un consortium de sociétés aurait pour effet de conférer à ces sociétés un avantage injustifié. Si les sociétés à but unique n'étaient pas tenues de mitiger leurs pertes, les défendeurs qui signent des contrats avec elles seraient susceptibles d'être condamnés à des dommages-intérêts plus élevés.

Notre Cour a reconnu que dans certains cas, l'inaction du demandeur peut se justifier malgré le fait qu'il n'a pas réussi à obtenir l'exécution intégrale. Si le demandeur réclame l'exécution intégrale en se fondant sur des « motifs équitables, réels et importants » ou un « intérêt important et légitime », son refus d'acheter un autre bien peut être justifié, compte tenu des circonstances de l'espèce. Un demandeur privé d'un immeuble de placement ne peut exiger l'exécution intégrale en invoquant des « motifs équitables, réels et importants » ou un « intérêt important et légitime » que s'il peut démontrer que l'octroi d'une somme d'argent ne land has "a peculiar and special value" to him. S has not demonstrated such a claim and therefore cannot justify its inaction. S was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability, for which damages were an adequate remedy.

Where it is alleged that the plaintiff has failed to mitigate, the defendant bears the burden of proving that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible. Whether or not there were comparable properties and whether they are profitable is a finding of fact. The trial judge made a palpable and overriding error in finding there were no comparable mitigation opportunities. He failed to consider the reasonable and available inferences arising from expert evidence regarding other land suitable for development sold in the area, the investment properties purchased by the parent company of S and the absence of evidence to the contrary. The respondent discharged the burden of showing that there were other comparable development properties available in the relevant time period to mitigate the losses.

Per McLachlin C.J. (dissenting): The Board, having breached the contract, bears the onus of proving that S unreasonably failed to mitigate its loss. This entails establishing, on a balance of probabilities: (1) that an opportunity to mitigate the loss was available to S; and (2) that S unreasonably failed to pursue that opportunity. The trial judge's finding that the Board failed to establish that S had an opportunity to mitigate is sufficient to dispose of the appeal. This finding was grounded in the evidence and did not constitute palpable and overriding error. The Board failed to prove that another property comparable to the one that S sought to purchase was available. Neither the evidence of the Board's expert witness nor that of purchases by other subsidiaries of S's parent company established that a comparable property was available for S.

Moreover, S could not be unreasonable in failing to mitigate its loss because it reasonably maintained its action for specific performance. The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its potential loss of damages at the same time.

constituerait pas une réparation complète parce que cet immeuble a « une valeur particulière » pour lui. S n'a pas démontré que tel était le cas et elle ne peut donc justifier son inaction. Elle avait entrepris cette opération commerciale dans le but de réaliser un profit. Les caractéristiques particulières de l'immeuble tenaient seulement à sa valeur du fait qu'il pouvait s'avérer rentable, et les dommages-intérêts constituaient une réparation adéquate.

Lorsqu'il est allégué que le demandeur n'a pas mitigé le préjudice, il incombe au défendeur de démontrer que le demandeur n'a pas pris toutes les mesures raisonnables pour mitiger le préjudice et que la mitigation était possible. La question de savoir s'il existait des immeubles comparables et s'ils étaient rentables est une question de fait. Le juge de première instance a commis une erreur manifeste et dominante en affirmant qu'il n'y avait pas de possibilités de mitiger le préjudice. Il n'a pas considéré les inférences raisonnables que lui présentaient le témoignage de l'expert relativement à d'autres terrains susceptibles de mise en valeur vendus dans la région, les immeubles de placement acquis par la société mère de S ainsi que l'absence de preuve contraire. L'intimé s'est acquitté du fardeau de démontrer qu'il existait, au cours de la période en cause, d'autres immeubles de placement comparables qui auraient pu servir à mitiger les pertes.

La juge en chef McLachlin (dissidente) : Il incombe au conseil scolaire, qui n'a pas respecté le contrat, de prouver que le défaut de S de mitiger sa perte n'était pas justifié. Cela signifie qu'il doit établir, suivant la prépondérance des probabilités, (1) que S avait eu une possibilité de mitiger la perte et (2) que le défaut de S de se prévaloir de cette possibilité n'était pas justifié. La conclusion du juge de première instance selon laquelle le conseil scolaire n'a pas établi que S avait eu une possibilité de mitiger sa perte suffit pour disposer du pourvoi. La preuve appuyait cette conclusion qui n'était entachée d'aucune une erreur manifeste et dominante. Le conseil scolaire n'a pas prouvé qu'il se trouvait sur le marché une propriété comparable à celle que S avait tenté d'acquérir. Ni le témoignage de l'expert cité par l'intimé ni la preuve des acquisitions faites par d'autres filiales de la société mère de S n'ont établi que S pouvait trouver une propriété comparable.

De plus, S ne pouvait agir de façon injustifiée en faisant défaut de mitiger sa perte parce qu'elle était justifiée de maintenir son action en exécution intégrale. Le dépôt d'une demande d'exécution intégrale n'est pas compatible avec l'acquisition d'un bien de substitution. Le demandeur qui agit raisonnablement ne peut réclamer l'exécution intégrale du contrat et en même temps

There is no basis on which to conclude that S acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. S had a "fair, real, and substantial justification" for claiming specific performance. The property was uniquely suited to S's needs for single-family residential development within the City of Toronto. The evidence supported the view that there were no comparable substitute properties.

Furthermore, it is difficult to conclude that S unreasonably failed to mitigate given that S lacked the financial capacity to go into the market and purchase a substitute property.

Cases Cited

By Karakatsanis J.

Referred to: *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279; *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415; *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By McLachlin C.J. (dissenting)

Asamera Oil Corp. v. Seal Oil & General Corp., [1979] 1 S.C.R. 633; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Roper v. Johnson* (1873), L.R. 8 C.P. 167; *Lagden v. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Andros Springs v. World Beauty*, [1970] P. 144; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415.

Statutes and Regulations Cited

Education Act, R.S.O. 1990, c. E.2.

mitiger sa perte éventuelle. Rien ne permet de conclure que S n'était pas justifiée de maintenir sa demande en justice pour exécution intégrale au lieu de mitiger sa perte. S avait des « motifs équitables, réels et importants » de réclamer l'exécution intégrale du contrat. La propriété se prêtait particulièrement bien aux besoins de S pour la construction d'un complexe résidentiel unifamilial dans la ville de Toronto. La preuve appuyait la prétention selon laquelle aucun terrain de substitution comparable n'était disponible.

En outre, il est difficile de conclure que le défaut de S de mitiger sa perte était injustifié étant donné qu'elle n'avait pas la capacité financière d'acheter sur le marché un terrain de substitution.

Jurisprudence

Citée par la juge Karakatsanis

Arrêts mentionnés : *Asamera Oil Corp. c. Seal Oil & General Corp.*, [1979] 1 R.C.S. 633; *British Westinghouse Electric and Manufacturing Co. c. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74; *Red Deer College c. Michaels*, [1976] 2 R.C.S. 324; *Evans c. Teamsters Local Union No. 31*, 2008 CSC 20, [2008] 1 R.C.S. 661; *Redpath Industries Ltd. c. Cisco (Le)*, [1994] 2 C.F. 279; *Kosmopoulos c. Constitution Insurance Co.*, [1987] 1 R.C.S. 2; *Semelhago c. Paramadevan*, [1996] 2 R.C.S. 415; *Adderley c. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

Citée par la juge en chef McLachlin (dissidente)

Asamera Oil Corp. c. Seal Oil & General Corp., [1979] 1 R.C.S. 633; *British Westinghouse Electric and Manufacturing Co. c. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *Dunkirk Colliery Co. c. Lever* (1878), 9 Ch. D. 20; *Janiak c. Ippolito*, [1985] 1 R.C.S. 146; *Darbishire c. Warran*, [1963] 1 W.L.R. 1067; *Red Deer College c. Michaels*, [1976] 2 R.C.S. 324; *Roper c. Johnson* (1873), L.R. 8 C.P. 167; *Lagden c. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277; *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670; *Andros Springs c. World Beauty*, [1970] P. 144; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Apeco of Canada, Ltd. c. Windmill Place*, [1978] 2 R.C.S. 385; *Semelhago c. Paramadevan*, [1996] 2 R.C.S. 415.

Lois et règlements cités

Loi sur l'éducation, L.R.O. 1990, ch. E.2.

Authors Cited

Bates, Paul. "Mitigation of Damages: A Matter of Commercial Common Sense" (1992), 13 *Advocates' Q.* 273.
McGregor, Harvey. *McGregor on Damages*, 18th ed. London: Sweet & Maxwell/Thomson Reuters, 2009.
Siebrasse, Norman. "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.
Yorio, Edward. "A Defense of Equitable Defenses" (1990), 51 *Ohio St. L.J.* 1201.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Blair and MacFarland JJ.A.), 2010 ONCA 310, 104 O.R. (3d) 784, 261 O.A.C. 108, 319 D.L.R. (4th) 349, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, [2010] O.J. No. 1772 (QL), 2010 CarswellOnt 2602, setting aside a decision of Spiegel J. (2009), 78 R.P.R. (4th) 285, [2009] O.J. No. 428 (QL), 2009 CanLII 3567, 2009 CarswellOnt 494. Appeal and cross-appeal dismissed, McLachlin C.J. dissenting.

J. Thomas Curry, *Milton A. Davis* and *Paul-Erik Veel*, for the appellant/respondent on cross-appeal.

Andrew M. Robinson, *Elizabeth K. Ackman* and *Andrea Farkouh*, for the respondent/appellant on cross-appeal.

The judgment of LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] Real estate developers frequently create single-purpose corporations for the sole purpose of purchasing and developing properties for profit. The corporation has limited liability and no assets other than those that arise from the particular real estate investment. The issue raised in this appeal is whether such a single-purpose corporation is excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and

Doctrine et autres documents cités

Bates, Paul. « Mitigation of Damages : A Matter of Commercial Common Sense » (1992), 13 *Advocates' Q.* 273.
McGregor, Harvey. *McGregor on Damages*, 18th ed. London : Sweet & Maxwell/Thomson Reuters, 2009.
Siebrasse, Norman. « Damages in Lieu of Specific Performance : *Semelhago v. Paramadevan* » (1997), 76 *R. du B. can.* 551.
Yorio, Edward. « A Defense of Equitable Defenses » (1990), 51 *Ohio St. L.J.* 1201.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Ontario (les juges Sharpe, Blair et MacFarland), 2010 ONCA 310, 104 O.R. (3d) 784, 261 O.A.C. 108, 319 D.L.R. (4th) 349, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, [2010] O.J. No. 1772 (QL), 2010 CarswellOnt 2602, qui a infirmé une décision du juge Spiegel (2009), 78 R.P.R. (4th) 285, [2009] O.J. No. 428 (QL), 2009 CanLII 3567, 2009 CarswellOnt 494. Pourvoi et pourvoi incident rejetés, la juge en chef McLachlin est dissidente.

J. Thomas Curry, *Milton A. Davis* et *Paul-Erik Veel*, pour l'appelante/intimée au pourvoi incident.

Andrew M. Robinson, *Elizabeth K. Ackman* et *Andrea Farkouh*, pour l'intimé/appelant au pourvoi incident.

Version française du jugement des juges LeBel, Deschamps, Abella, Rothstein, Cromwell et Karakatsanis rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] Des promoteurs immobiliers créent fréquemment des sociétés à but unique dans le seul objectif d'acquérir des immeubles et de les mettre en valeur pour réaliser un profit. Les sociétés à but unique sont des sociétés à responsabilité limitée qui ne possèdent comme actifs que ceux découlant du placement immobilier qu'elles font. Dans ce pourvoi, la question est de savoir si une telle société à but unique est dispensée de mitiger ses pertes en cas

particularly when it has promptly brought an action for specific performance. The further issue is whether the trial judge erred in his finding that there were no other "comparable" properties available to mitigate the loss.

[2] The appellant, Southcott Estates Inc., was part of the Ballantry Group of associated companies that acquired and developed land in the Greater Toronto Area ("GTA"). Southcott was a single-purpose corporation, without assets, created for the sole purpose of developing the property that is the subject of this action. When the vendor, the Toronto Catholic District School Board, failed to satisfy a condition and refused to extend the closing date, Southcott sought specific performance of the contract. It argues that it was not required to mitigate its losses.

[3] The trial judge ((2009), 78 R.P.R. (4th) 285) found that the Board had breached the agreement of purchase and sale and had failed to prove that Southcott could have mitigated its damages. He awarded damages for loss of chance of profit. He refused to order specific performance, finding that the property was not "unique" and damages were an adequate remedy.

[4] The Ontario Court of Appeal (2010 ONCA 310, 104 O.R. (3d) 784) concluded that while the trial judge correctly found that the Board had breached its contractual obligations, he had erred in his approach to mitigation. The court concluded that Southcott had unreasonably failed to take available steps to mitigate its loss and reduced the damage award granted at trial to a nominal sum.

[5] Southcott did not appeal the trial judge's refusal to award specific performance. However, it

d'inexécution de la promesse de vente par le promettant-vendeur, en particulier lorsque la société a fait diligence pour intenter une action en exécution intégrale. L'autre question est de savoir si le juge de première instance a eu tort de conclure qu'il n'existait pas d'autres immeubles « comparables » pouvant servir à mitiger la perte.

[2] L'appelante, Southcott Estates Inc., fait partie du groupe Ballantry de sociétés associées qui achètent et mettent en valeur des terrains dans la région métropolitaine de Toronto. Il s'agit d'une société à but unique sans actif qui a été constituée dans le seul but de mettre en valeur l'immeuble faisant l'objet de la présente action. Lorsque le promettant-vendeur, le Toronto Catholic District School Board (le « conseil scolaire »), a fait défaut de satisfaire à une des conditions de l'entente et a refusé de proroger la date de clôture, Southcott a réclamé l'exécution intégrale du contrat. Cette dernière plaide qu'elle n'était pas tenue de mitiger ses pertes.

[3] Le juge de première instance ((2009), 78 R.P.R. (4th) 285) a conclu que le conseil scolaire avait violé la promesse de vente et qu'il n'avait pas démontré que Southcott aurait pu mitiger ses dommages. Il a condamné le conseil scolaire à verser des dommages-intérêts à Southcott pour l'indemniser de la perte de possibilité de réaliser un profit. Il a refusé d'ordonner l'exécution intégrale du contrat, estimant que l'immeuble n'était pas « unique » et que les dommages-intérêts constituaient une réparation adéquate.

[4] La Cour d'appel de l'Ontario (2010 ONCA 310, 104 O.R. (3d) 784) a statué que, bien que le juge de première instance ait eu raison de conclure que le conseil scolaire n'avait pas respecté ses obligations contractuelles, il avait commis une erreur dans sa façon d'aborder la question de la mitigation du préjudice. La cour a conclu que Southcott avait, sans raison valable, omis de prendre les mesures appropriées pour mitiger ses pertes et a ramené à une somme symbolique le montant accordé en première instance à titre de dommages-intérêts.

[5] Southcott n'a pas fait appel du refus du juge de première instance d'ordonner l'exécution intégrale.

maintains its losses were not avoidable. The questions raised in this appeal are:

1. Should a single-purpose company mitigate its losses?

2. To what extent must a plaintiff mitigate where the plaintiff has made a claim for specific performance?

3. Did the trial judge err in concluding that there was no evidence of comparable profitable properties available for mitigation?

[6] For the reasons that follow, I conclude that Southcott cannot recover losses that it could reasonably have avoided. I agree with the Court of Appeal that the trial judge erred in concluding that there was no evidence of other development properties that Southcott could have purchased in mitigation. I would dismiss the appeal.

II. Facts

[7] Southcott is a wholly owned subsidiary of Ballantry Homes Inc. and part of a larger group of companies called Ballantry Group of Companies ("Ballantry" or "Ballantry Group"). The Board is a School Board created pursuant to the *Education Act*, R.S.O. 1990, c. E.2, whose affairs were run by a publicly elected Board of Trustees.

[8] Having determined that certain land within a school property was surplus to its needs, the Board put it up for sale. Intending to use the land for residential development, Southcott agreed to purchase the 4.78 acres of land for $3.44 million. It paid a 10 percent deposit and the parties agreed to a closing date of August 31, 2004. It was a condition of the agreement that the Board obtain a severance from the Committee of Adjustments on or before the closing date. On August 30, 2004, the parties

Elle soutient toutefois que ses pertes étaient inévitables. Le présent pourvoi soulève les questions suivantes :

1. Une société à but unique devrait-elle mitiger ses pertes?

2. Dans quelle mesure un demandeur doit-il mitiger ses pertes lorsqu'il a réclamé l'exécution intégrale du contrat?

3. Le juge de première instance a-t-il eu tort de conclure qu'aucun élément de preuve ne démontrait l'existence d'immeubles rentables comparables qui auraient pu servir à mitiger le préjudice?

[6] Pour les motifs qui suivent, je conclus que Southcott ne peut recouvrer les pertes qu'elle aurait raisonnablement pu éviter. Je suis d'accord avec la cour d'appel pour dire que le juge de première instance a eu tort de conclure qu'aucun élément de preuve n'indiquait l'existence d'autres immeubles susceptibles d'être mis en valeur que Southcott aurait pu acheter pour mitiger son préjudice. Je suis d'avis de rejeter le pourvoi.

II. Les faits

[7] Southcott est une filiale à cent pour cent de Ballantry Homes Inc. Elle est membre d'un consortium de sociétés appelé Ballantry Group of Companies (« Ballantry » ou le « groupe Ballantry »). Le conseil scolaire a été créé sous le régime de la *Loi sur l'éducation*, L.R.O. 1990, ch. E.2. Il est dirigé par une assemblée de conseillers scolaires élus par la population.

[8] Après avoir constaté qu'il n'en avait pas besoin, le conseil scolaire a décidé de mettre en vente une parcelle du terrain d'une école. Entendant se servir de ce terrain pour y ériger un complexe domiciliaire, Southcott a convenu d'acheter les 4,78 acres de terrain en question pour 3,44 millions de dollars. Elle a versé en dépôt une somme correspondant à 10 p. 100 du prix d'achat et les parties ont arrêté le 31 août 2004 comme date de clôture. Une condition de l'entente prévoyait que le conseil

agreed to extend the closing date to January 31, 2005.

[9] The Board applied for a severance in November; it was advised that a development plan was necessary but chose to proceed without one. On December 16, 2004, at the municipality's request, the Committee of Adjustments deferred the severance application hearing as premature because it was not accompanied by a development plan. At that time, it became clear to Southcott and the Board that the transaction could not be completed by the closing date of January 31, 2005. The Board refused Southcott's request to extend the closing date, declared the transaction to be at an end, and returned Southcott's deposit.

[10] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and commenced an action for specific performance or, in the alternative, for damages.

[11] Southcott admitted that it never had any intention to mitigate its loss and, indeed, never tried to mitigate (para. 137 of the trial judge's decision). Southcott was a single-purpose company incorporated solely for the purposes of this development project and had no assets other than the money advanced by Ballantry for the deposit. It never intended to purchase other land. In fact, Southcott's principal testified at trial that there was no question of it purchasing other land, given that it was involved in this litigation (para. 18 of the Court of Appeal's decision).

[12] The Board led expert evidence that 81 parcels of vacant development land in the GTA were sold between the date of breach and the date of trial. The land was suitable for residential development and within the parameters, of size and

scolaire obtienne une disjonction du comité des dérogations au plus tard à la date de clôture. Le 30 août 2004, les parties sont convenues de proroger la date de clôture au 31 janvier 2005.

[9] Le conseil scolaire a présenté sa demande de disjonction en novembre. On l'a informé qu'il devait joindre un plan d'aménagement à sa demande, mais il a choisi de poursuivre ses démarches sans plan d'aménagement. Le 16 décembre 2004, à la demande de la municipalité, le comité des dérogations a reporté l'examen de la demande de disjonction, estimant qu'elle était prématurée parce qu'elle n'était pas accompagnée d'un plan d'aménagement. À ce moment, il est devenu évident pour Southcott et le conseil scolaire qu'ils ne pourraient parfaire l'opération avant la date de clôture du 31 janvier 2005. Le conseil scolaire a refusé la demande de Southcott de proroger la date de clôture, a déclaré l'opération caduque et a remis à Southcott la somme versée en dépôt.

[10] En faisant valoir que le conseil scolaire avait manqué à son obligation de tout mettre en œuvre pour obtenir la disjonction, Southcott a introduit une action en vue d'obtenir l'exécution intégrale du contrat ou, à titre subsidiaire, des dommages-intérêts.

[11] Southcott a admis qu'elle n'avait jamais eu l'intention de mitiger sa perte et qu'en réalité, elle n'avait jamais essayé de la mitiger (par. 137 de la décision du juge de première instance). Southcott était une société à but unique constituée exclusivement en vue de ce projet d'aménagement et n'avait comme actif que l'argent avancé par Ballantry pour verser le dépôt. Elle n'avait jamais eu l'intention d'acquérir un autre terrain. En fait, le directeur de Southcott a expliqué au procès qu'il n'était pas question que Southcott acquière un autre terrain puisqu'elle était en cause dans le présent litige (par. 18 de la décision de la Cour d'appel).

[12] Le conseil scolaire a établi par expert que 81 terrains vagues susceptibles d'être mis en valeur avaient été vendus dans la région métropolitaine de Toronto entre la date du manquement et celle du procès. Le terrain en question se prêtait à

price, of other lands purchased by the Ballantry Group.

l'aménagement d'un complexe résidentiel et équivalait en gros, sur le plan de la superficie et du prix, aux autres terrains achetés par le groupe Ballantry.

[13] Corporations within the Ballantry Group purchased seven parcels of land for development purposes during this same period. The principal of Ballantry testified that it was always in the market for new land, had the financial means to make the purchases, and it would have made these purchases even if Southcott had completed the land purchase from the Board (para. 138 of the trial judge's decision).

[13] Au cours de la même période, des sociétés du groupe Ballantry ont acheté sept parcelles de terrain en vue de les aménager. Le directeur de Ballantry a expliqué que ce groupe était toujours à la recherche de nouveaux terrains, qu'il disposait des moyens financiers nécessaires pour en acquérir et qu'il aurait acquis ces terrains même si Southcott avait réussi à acheter le terrain du conseil scolaire (par. 138 de la décision du juge de première instance).

III. Decisions Below

III. Décisions des juridictions inférieures

[14] At trial, Spiegel J. concluded that the Board had failed to take all reasonable steps to fulfill the severance condition. It breached its best efforts obligation by failing to contact relevant city staff; delaying in processing the severance application; failing to include the proposed plan of use with the severance application; submitting an improper survey; failing to seek appropriate advice; ignoring the advice of the Committee of Adjustments; proceeding with the application for severance even after being advised that it was incomplete and failing to keep Southcott informed (paras. 71-87).

[14] Au procès, le juge Spiegel a conclu que le conseil scolaire n'avait pas pris toutes les mesures raisonnables pour satisfaire à la condition relative à la disjonction. Selon lui, le conseil scolaire avait manqué à son obligation de déployer les efforts nécessaires en ne communiquant pas avec les employés municipaux compétents, en retardant le traitement de la demande de disjonction, en ne joignant pas à sa demande de disjonction le plan d'aménagement proposé, en soumettant un levé incorrect, en ne cherchant pas à obtenir des conseils éclairés, en ne tenant pas compte de l'avis du comité des dérogations, en poursuivant sa demande de disjonction même après avoir été avisé qu'elle était incomplète et en ne tenant pas Southcott au courant (par. 71-87).

[15] The trial judge found that had the Board used its best efforts, the severance would likely have been granted, and the transaction would have been completed by the closing date. The trial judge was satisfied that the Board's breach caused Southcott's loss (paras. 93-116).

[15] Le juge de première instance a estimé que, si le conseil scolaire avait déployé les efforts nécessaires, la disjonction aurait probablement été accordée et l'opération se serait concrétisée avant la date de clôture. Le juge de première instance s'est dit convaincu que les pertes subies par Southcott étaient attribuables à l'inexécution du contrat par le conseil scolaire (par. 93-116).

[16] Turning to remedy, Spiegel J. found that specific performance was not an appropriate remedy as the land did not have the quality of uniqueness (paras. 128-33).

[16] En ce qui concerne la réparation, le juge Spiegel a conclu que l'exécution intégrale ne constituait pas une réparation appropriée étant donné que le bien-fonds en question ne possédait pas les caractéristiques nécessaires pour être considéré comme unique (par. 128-133).

[17] However, he concluded that Southcott was entitled to damages. He rejected the Board's argument that Southcott had in fact mitigated damages because the Ballantry Group made several purchases subsequent to the breach of the agreement:

> I find that these subsequent purchases were collateral, independent transactions that did not arise out of the consequences of the breach. In all the circumstances, I do not consider these transactions as mitigatory. [para. 143]

[18] The trial judge found that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate its loss. He held that there was no evidence that any of the available properties were actually offered for sale or could have been profitably developed and he was not satisfied that the properties were comparable (paras. 144-46). He therefore awarded Southcott damages in the amount of $1,935,500 which represented the loss of a 60 percent chance to make profits in the amount of $3,225,827.

[19] On appeal, the Board did not dispute the findings that it had breached its obligation to use its best efforts to obtain the severance required to complete the sale. It challenged the findings of causation and mitigation.

[20] Sharpe J.A., writing for the Court of Appeal, rejected the first ground of the Board's appeal, that the trial judge erred in finding that the Board's breach was the cause of the failure to obtain the severance by the closing date (paras. 11-14).

[21] Regarding the issue of whether the losses could have been avoided, however, the Court of Appeal concluded that the trial judge had erred in law in finding that the Board had not shown that

[17] Il a toutefois conclu que Southcott avait droit à des dommages-intérêts. Il a rejeté l'argument du conseil scolaire suivant lequel Southcott avait effectivement mitigé le préjudice étant donné que le groupe Ballantry avait acheté plusieurs autres terrains après l'inexécution du contrat :

> [TRADUCTION] J'estime que ces acquisitions ultérieures étaient des opérations accessoires et distinctes qui étaient sans rapport avec l'inexécution. Compte tenu de l'ensemble des circonstances, je suis d'avis qu'aucune de ces opérations ne pouvait servir à mitiger le préjudice. [par. 143]

[18] Le juge de première instance a estimé que le conseil scolaire ne s'était pas acquitté du fardeau de démontrer que Southcott ne s'était pas prévalue des possibilités raisonnables qui s'offraient à elle de mitiger ses pertes. Il a estimé que rien n'établissait que l'une quelconque des propriétés disponibles avait été effectivement offerte en vente ou aurait pu être mise en valeur de façon rentable, ajoutant qu'il n'était pas convaincu que les immeubles étaient comparables (par. 144-146). Il a par conséquent accordé à Southcott la somme de 1 935 500 $ à titre de dommages-intérêts, ce qui correspondait à la perte d'une possibilité de 60 p. 100 de réaliser un profit de 3 225 827 $.

[19] En appel, le conseil scolaire n'a pas contesté la conclusion suivant laquelle il avait manqué à son obligation de tout mettre en œuvre pour obtenir la disjonction exigée pour parfaire la vente. Il a contesté les conclusions relatives à la causalité et à la mitigation du préjudice.

[20] S'exprimant au nom de la Cour d'appel, le juge Sharpe a rejeté le premier moyen d'appel invoqué par le conseil scolaire suivant lequel le juge de première instance avait commis une erreur en concluant que le fait que l'on n'avait pas obtenu la disjonction avant la date de clôture était attribuable à l'inexécution du contrat par le conseil scolaire (par. 11-14).

[21] En ce qui concerne la question de savoir si les pertes auraient pu être évitées toutefois, la Cour d'appel a conclu que le juge de première instance avait commis une erreur de droit en concluant

Southcott could have mitigated its losses. First, Southcott's admission that it had no intention of taking any steps to mitigate was sufficient to satisfy the onus resting upon the Board and to shift the evidentiary onus to Southcott to demonstrate that, even if it had attempted to mitigate, it could not have done so. Second, the trial judge erred in dealing with the Board's evidence regarding the land that was available: "By requiring the Board to prove . . . the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level" (para. 25). Finally, the trial judge failed to consider that Ballantry's purchases of other lands clearly demonstrated that the directing mind of Southcott knew that investment quality lands, suitable for profitable development, were available on the market. The Court of Appeal stated that Southcott was a distinct legal entity that could not avoid mitigating its loss by arguing that it was a part of Ballantry: the obligation to mitigate rested with Southcott (paras. 24-27).

[22] The Court of Appeal concluded that while Southcott had made out its case for breach of contract, it failed to make out a case for either specific performance or damages. The appropriate award was for nominal damages in the amount of $1.

IV. Mitigation — General Principles

[23] This Court in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric*

que le conseil scolaire n'avait pas démontré que Southcott aurait pu mitiger ses pertes. Tout d'abord, le fait que Southcott avait admis n'avoir eu nullement l'intention de prendre quelque mesure que ce soit pour mitiger ses pertes suffisait pour permettre au conseil scolaire de se décharger du fardeau de preuve qui reposait sur lui et pour déplacer ce fardeau sur Southcott, qui devait alors démontrer que, même si elle avait tenté de mitiger ses pertes, elle n'aurait pas pu le faire. Deuxièmement, la cour a jugé que le juge de première instance avait commis une erreur dans la façon dont il avait traité les éléments de preuve présentés par le conseil scolaire au sujet des terrains qui étaient disponibles : [TRADUCTION] « En l'obligeant à démontrer [. . .] la rentabilité de diverses parcelles, le juge de première instance a imposé au conseil scolaire un critère tellement exigeant qu'il ne pouvait s'attendre de façon réaliste à ce qu'il puisse y satisfaire » (par. 25). Enfin, le juge de première instance n'avait pas tenu compte du fait que les achats d'autres terrains effectués par Ballantry démontraient de façon évidente que le dirigeant de Southcott savait que des terrains de placement de qualité qui se prêtaient bien à une mise en valeur rentable étaient disponibles sur le marché. La Cour d'appel a affirmé que Southcott était une entité juridique distincte qui ne pouvait éviter de mitiger sa perte en plaidant qu'elle faisait partie du groupe Ballantry : Southcott conservait l'obligation de mitiger son préjudice (par. 24-27).

[22] La Cour d'appel a conclu que, même si elle avait démontré le bien-fondé de ses arguments en ce qui concerne la rupture du contrat, Southcott n'avait pas réussi à démontrer qu'elle pouvait réclamer une exécution intégrale ou des dommages-intérêts. La cour a estimé qu'il convenait d'accorder la somme d'un dollar à titre de dommages-intérêts symboliques.

IV. Mitigation du préjudice — Principes généraux

[23] Dans l'arrêt *Asamera Oil Corp. c. Seal Oil & General Corp.*, [1979] 1 R.C.S. 633, notre Cour a cité (aux p. 660-661) et approuvé l'énoncé suivant formulé par le vicomte Haldane, lord chancelier, dans l'arrêt *British Westinghouse Electric*

Railways Company of London, Ltd., [1912] A.C. 673, at p. 689:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[24] In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Asamera*; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30).

[25] On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1992), 13 *Advocates' Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279, at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between

and Manufacturing Co. c. Underground Electric Railways Company of London, Ltd., [1912] A.C. 673, p. 689 :

[TRADUCTION] Le principe fondamental est donc la compensation des pertes pécuniaires découlant naturellement de l'inexécution; mais ce principe est mitigé par un autre qui veut que le demandeur ait l'obligation de prendre toutes mesures raisonnables pour mitiger le préjudice résultant de la rupture du contrat et ne puisse être indemnisé pour la partie du préjudice qu'il aurait ainsi pu éviter.

[24] Dans l'arrêt *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74, au par. 176, notre Cour a expliqué que « [l]es pertes qui auraient pu être évitées par des précautions raisonnables se définissent comme celles qui sont, en fait, attribuables à l'inaction du demandeur plutôt qu'à la faute du défendeur. » En principe, un demandeur ne peut se faire indemniser d'une perte qu'il aurait pu éviter par des précautions raisonnables. Lorsqu'il est allégué que le demandeur n'a pas mitigé le préjudice, il incombe au défendeur de démontrer non seulement que le demandeur n'a pas pris toutes les mesures raisonnables pour mitiger le préjudice, mais encore qu'il était possible de mitiger le préjudice (*Red Deer College c. Michaels*, [1976] 2 R.C.S. 324; *Asamera*; *Evans c. Teamsters Local Union No. 31*, 2008 CSC 20, [2008] 1 R.C.S. 661, par. 30).

[25] Par contre, un demandeur qui prend effectivement des mesures raisonnables pour mitiger ses pertes peut recouvrer, à titre de dommages-intérêts, les frais et les dépenses qu'il a engagés pour prendre ces mesures raisonnables, à condition que ces frais et dépenses soient raisonnables et qu'ils aient véritablement été engagés pour mitiger les dommages (voir P. Bates, « Mitigation of Damages: A Matter of Commercial Common Sense » (1992), 13 *Advocates' Q.* 273). L'évaluation des dommages est par conséquent une question d'appréciation. Comme la Cour d'appel fédérale l'a déclaré dans l'arrêt *Redpath Industries Ltd. c. Cisco (Le)*, [1994] 2 C.F. 279, p. 302 : « La Cour doit s'assurer que la victime est dédommagée de sa perte; mais elle doit en même temps s'assurer que l'on ne profite pas de

the parties in the particular circumstances of the case.

la personne responsable. » La notion de mitigation du préjudice repose sur l'équité et le bon sens et vise à assurer la justice entre les parties en fonction des circonstances propres à l'espèce.

A. *Should a Single-Purpose Company Mitigate its Losses?*

A. *Une société à but unique devrait-elle mitiger ses pertes?*

[26] Southcott argues that the Court of Appeal failed to recognize the unique circumstance of a single-purpose corporation in mitigating contractual loss; as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. Further, it submits that it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate. In this case, Southcott acted reasonably, within its ordinary course of business and promptly brought this lawsuit.

[26] Southcott soutient que la Cour d'appel n'a pas reconnu la situation singulière dans laquelle se trouve une société à but unique lorsqu'il s'agit de mitiger les pertes afférentes au contrat; en tant que société à but unique, Southcott n'avait pas d'actif et il lui était impossible de mitiger ses pertes sans une importante injection de capitaux de sa société mère ou sans mandat lui permettant de le faire. Elle fait par ailleurs valoir que les personnes qui contractent avec une société à but unique pourraient raisonnablement s'attendre à ce que celle-ci dispose de ressources limitées et à ce que son mandat soit restreint. Dans le cas qui nous occupe, Southcott a agi de manière raisonnable, dans le cours normal de ses affaires, et elle a intenté cette poursuite sans tarder.

[27] Southcott sought specific performance and was therefore ready to complete the purchase. In any event, its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources, resources that were not tied up as a result of the breach alleged. Indeed, the alleged breach in this case did not affect Southcott's ability to obtain capital. Southcott can hardly argue that the same money would not have been available for mitigation.

[27] Southcott réclamait l'exécution intégrale; elle était donc prête à parfaire l'achat. En tout état de cause, sa demande subsidiaire de dommages-intérêts pour préjudice indirect dépendait de l'obtention, pour elle, de capitaux lui permettant de parfaire la vente. En fait, les deux demandes étaient fondées sur la possibilité d'obtenir des ressources, ressources qui n'étaient pas bloquées par suite de l'inexécution reprochée. D'ailleurs, dans le cas qui nous occupe, la présumée inexécution n'a eu aucune incidence sur la capacité de Southcott d'obtenir des capitaux. Southcott ne peut guère prétendre que les mêmes fonds n'auraient pas pu servir à mitiger le préjudice.

[28] Further, the question is factual and it was not suggested at trial that Southcott had no access to capital or that borrowing money would have been unreasonably risky or costly. Southcott did not argue that it was impecunious at trial.

[28] En outre, la question est factuelle et l'on n'a pas prétendu au procès que Southcott ne pouvait se procurer des capitaux ou encore qu'il aurait été beaucoup trop risqué ou coûteux d'emprunter de l'argent. Au procès, Southcott n'a pas plaidé l'impécuniosité.

[29] In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably

[29] À défaut d'éléments de preuve concrets démontrant le manque de ressources, le fait de

avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

conclure que les pertes ne peuvent raisonnablement être évitées du simple fait qu'il s'agit d'une société à but unique membre d'un consortium de sociétés aurait pour effet de conférer un avantage injustifié à quiconque opte pour la société à but unique pour mener ses affaires. De plus, le fait de ne pas obliger les sociétés à but unique à mitiger leurs pertes ferait en sorte que les défendeurs qui signent des contrats avec elles seraient susceptibles d'être condamnés à des dommages-intérêts plus élevés que ceux réclamés de façon raisonnable par d'autres demandeurs et ce, uniquement en raison des actifs limités de ces sociétés.

[30] The trial judge found that the purchases of development land by other corporations within the Ballantry Group did not in fact mitigate Southcott's loss; that finding is not challenged here. As noted above, he found that the other properties purchased by other members of the Ballantry group were "collateral" in the sense that the purchases would have occurred whether or not the defendant had breached its contract with Southcott (para. 143). However, because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens: *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at pp. 10-12. Southcott is entitled to the benefits of limited liability, but it is also saddled with the responsibilities that all legal entities have. The requirement to take steps to mitigate losses is one such responsibility. A plaintiff cannot recover losses that could reasonably have been avoided. The overriding issue here is whether Southcott's inaction was reasonable, and if not, whether it could have reasonably mitigated if it had tried to do so.

[30] Le juge de première instance a conclu que l'achat de terrains susceptibles d'être mis en valeur par d'autres sociétés du groupe Ballantry n'avait pas en fait mitigé la perte de Southcott; cette conclusion n'est pas contestée en l'espèce. Tel qu'indiqué précédemment, le juge a estimé que l'acquisition d'autres propriétés par les autres membres du groupe Ballantry constituait des [TRADUCTION] « opérations accessoires » en ce sens que les propriétés auraient été acquises indépendamment de la rupture, par la défenderesse, du contrat conclu avec Southcott (par. 143). Toutefois, parce que Southcott est une entité juridique distincte, l'achat d'autres immeubles comparables par d'autres sociétés du groupe Ballantry n'a pas fait en sorte que ces immeubles ne « pouvaient plus servir » à mitiger le préjudice. En tant qu'entité juridique distincte, Southcott était tenue de mitiger ses pertes en faisant diligence pour trouver une autre propriété. Quiconque choisit de bénéficier des avantages de la constitution en société doit en supporter les inconvénients : *Kosmopoulos c. Constitution Insurance Co.*, [1987] 1 R.C.S. 2, p. 10-12. Southcott a le droit de bénéficier des avantages d'une responsabilité limitée, mais elle doit aussi assumer les responsabilités qu'ont toutes les entités juridiques. La nécessité de prendre des mesures pour mitiger ses pertes constitue l'une de ces responsabilités. Un demandeur ne peut être indemnisé d'un préjudice qu'il aurait raisonnablement pu éviter. La principale question en l'espèce est de savoir si l'inaction de Southcott était raisonnable et, dans la négative, si elle aurait raisonnablement pu mitiger ses pertes si elle avait tenté de le faire.

B. *Southcott Was Required to Mitigate Losses Despite its Claim for Specific Performance*

[31] Specific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation. Obviously, if Southcott had purchased a property in mitigation, it may not have been able to complete its agreement of purchase and sale of the Board's surplus land if ultimately successful in its claim for specific performance. When can a plaintiff seeking specific performance justify inaction and recover losses which may otherwise have been classified as avoidable?

[32] The trial judge found that Southcott did not have a viable claim for specific performance. He found that while the business opportunity may have been unique, the property itself was not. The trial judge found that what was at issue here was a straightforward business plan, the failure of which could be measured in damages (para. 132). The Court of Appeal agreed. The trial judge's decision not to order specific performance is not challenged in this appeal.

[33] However, Southcott submits that even though it was unsuccessful in its claim for specific performance, it proceeded expeditiously and the claim had real substance because the property was a unique opportunity, given its location and the rarity of such properties in the GTA. As a result, it says that it was not reasonable to attempt to mitigate; the remedy of specific performance would become illusory.

[34] Southcott suggests that there are two separate questions that a court must ask in cases where a plaintiff seeks specific performance: (1) should specific performance be awarded? And if the answer is no, (2) is this plaintiff justified in its mitigatory inaction? Southcott says that the trial judge conflated these two questions and did

B. *Southcott était tenue de mitiger ses pertes malgré sa demande d'exécution intégrale*

[31] L'exécution intégrale est une réparation fondée sur l'equity qui se concilie mal avec le principe de la mitigation du préjudice. De toute évidence, si elle avait acheté un autre immeuble pour mitiger ses pertes, Southcott n'aurait peut-être pas été en mesure de parfaire la vente du terrain excédentaire du conseil scolaire dans l'hypothèse où elle aurait finalement obtenu gain de cause dans sa demande d'exécution intégrale. Dans quels cas le demandeur qui réclame l'exécution intégrale peut-il justifier son inaction et être indemnisé pour des pertes qui auraient autrement pu être considérées comme évitables?

[32] Le juge de première instance a conclu que Southcott n'était pas fondée à réclamer l'exécution intégrale. Il a estimé que, même si l'occasion d'affaires était peut-être unique, la propriété elle-même ne l'était pas. Il a conclu qu'il s'agissait en l'espèce d'un plan d'affaires simple dont l'échec pouvait être quantifié en termes de dommages-intérêts (par. 132). La Cour d'appel s'est dite du même avis. La décision du juge de première instance de ne pas ordonner l'exécution intégrale du contrat n'est pas contestée dans le présent pourvoi.

[33] Southcott affirme toutefois que, même si elle n'a pas obtenu gain de cause en ce qui concerne sa demande d'exécution intégrale, elle a agi rapidement et sa demande est sérieuse, étant donné que l'immeuble en question était une occasion unique, vu son emplacement et la rareté des propriétés de ce genre dans la région métropolitaine de Toronto. Elle soutient par conséquent qu'il n'était pas raisonnable de tenter de mitiger son préjudice : la réparation que constitue l'exécution intégrale serait devenue illusoire.

[34] Suivant Southcott, le tribunal doit se poser deux questions distinctes lorsqu'un demandeur réclame l'exécution intégrale (1) y a-t-il lieu d'ordonner l'exécution intégrale? Si la réponse à cette question est négative (2) ce demandeur est-il justifié de ne pas prendre de mesures pour mitiger le préjudice? Southcott affirme que le juge de première

not consider whether it was justified in failing to mitigate.

[35] This Court dealt with this issue in *Asamera*, at pp. 668-69:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found. . . .
>
> . . .
>
> . . . Where . . . circumstances reveal a substantial and legitimate interest in seeking [specific] performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then [be able to] recover losses which in other circumstances might be classified as avoidable and thus unrecoverable . . . .

[36] This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "<u>some fair, real, and substantial justification</u>" for his claim or "<u>a substantial and legitimate interest</u>" in seeking specific performance (*Asamera*, at pp. 668-69 (emphasis added)). This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation. See N. Siebrasse, "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

[37] *Asamera* set out the general principles governing mitigation: was the plaintiff's inaction reasonable in the circumstances, and could the plaintiff have mitigated if it chose to do so. Those principles apply to a plaintiff seeking specific performance. If the plaintiff has a "substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other

instance a confondu ces deux questions et qu'il a omis de se demander si Southcott était justifiée de ne pas mitiger le préjudice.

[35] Notre Cour a examiné cette question dans l'arrêt *Asamera*, p. 668-669 :

> Pour qu'un demandeur puisse invoquer une action en exécution intégrale pour justifier son omission d'acheter des biens de remplacement pour limiter le préjudice, son action en exécution intégrale doit être fondée sur des motifs équitables, réels et importants. . .
>
> . . .
>
> . . . Le seul cas où un demandeur peut justifier son inaction est celui où l'action en exécution intégrale, par opposition à une action en dommages-intérêts, est fondée sur un intérêt important et légitime; dans ce cas, s'il n'obtient pas l'exécution intégrale, il peut obtenir des dommages-intérêts pour des pertes qui, en d'autres circonstances, auraient pu être évitées et pour lesquelles il n'aurait donc pas pu se faire indemniser. . .

[36] Ainsi, notre Cour a reconnu que dans certains cas, l'inaction du demandeur peut se justifier malgré le fait qu'il n'a pas réussi à obtenir l'exécution intégrale, lorsque les circonstances révèlent que sa demande est fondée sur des « <u>motifs équitables, réels et importants</u> » ou qu'un « <u>intérêt important et légitime</u> » lui permet de réclamer l'exécution intégrale (*Asamera*, p. 668-669 (je souligne)). Cela ne signifie pas que le demandeur qui présente une telle demande ne devrait pas tenter de mitiger son préjudice; on reconnaît plutôt qu'une telle demande d'exécution intégrale indique ce qu'il faut entendre par comportement raisonnable du demandeur pour mitiger le préjudice. Voir N. Siebrasse, « Damages in Lieu of Specific Performance : *Semelhago v. Paramadevan* » (1997), 76 *R. du B. can.* 551.

[37] L'arrêt *Asamera* énonce les principes généraux régissant la mitigation du préjudice : l'inaction du demandeur était-elle raisonnable dans les circonstances, et le demandeur aurait-il pu mitiger le préjudice s'il avait choisi de le faire? Ces principes s'appliquent au demandeur qui cherche à obtenir une exécution intégrale. Si le demandeur a des « motifs [. . .] importants » ou un « intérêt

property may be reasonable, depending upon the circumstances of the case.

important et légitime » qui lui permet de réclamer l'exécution intégrale, son refus d'acheter un autre bien peut être raisonnable compte tenu des circonstances de l'espèce.

[38] The statements in *Asamera* dealing with specific performance and the determination of what is reasonable conduct must be read in light of *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. In that case, the Court acknowledged that "[w]hile at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case" (para. 20). The Court thus found that it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases" (para. 21). Specific performance will be available only where money cannot compensate fully for the loss, because of some "peculiar and special value" of the land to the plaintiff (para. 21, citing *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, at p. 240).

[38] Les énoncés que l'on trouve dans l'arrêt *Asamera* au sujet de l'exécution intégrale et de ce qu'il faut entendre par comportement raisonnable doivent être interprétés en fonction de l'arrêt *Semelhago c. Paramadevan*, [1996] 2 R.C.S. 415. Dans cet arrêt, la Cour a reconnu que « [m]ême si, à une certaine époque, la common law considérait chaque bien immeuble comme étant unique, ce n'est plus le cas avec l'évolution du développement immobilier moderne » (par. 20). La Cour a par conséquent conclu qu'« [o]n ne saurait présumer que des dommages-intérêts pour la rupture du contrat de vente d'un immeuble constitueront une réparation inadéquate dans tous les cas » (par. 21). Le demandeur ne pourra obtenir l'exécution intégrale que si l'octroi d'une somme d'argent ne pourrait l'indemniser complètement de la perte en raison de la « valeur particulière » que le terrain en question peut avoir pour lui (par. 21, citant l'arrêt *Adderley c. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, p. 240).

[39] The overriding issue is therefore whether Southcott's inaction was reasonable. Southcott argued at trial that the fact that the property was uniquely well situated gives it the unique character required to constitute a fair justification for specific performance (para. 119 of the trial judge's decision).

[39] La question essentielle est donc de savoir si l'inaction de Southcott était raisonnable. Southcott a soutenu au procès que l'emplacement idéal de l'immeuble lui conférait le caractère unique nécessaire pour justifier sa demande d'exécution intégrale (par. 119 de la décision du juge de première instance).

[40] I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding

[40] Je suis d'accord avec les juridictions inférieures pour dire qu'il ne s'agit pas en l'espèce d'un cas où la demanderesse pouvait raisonnablement refuser de mitiger son préjudice. Le juge de première instance a clairement indiqué que la seule caractéristique qui rendait ce terrain unique pour Southcott était le fait qu'il s'agissait d'un investissement particulièrement intéressant, et qu'il ne s'agissait pas d'un cas où les dommages-intérêts étaient trop spéculatifs ou incertains pour constituer une réparation satisfaisante. Les caractéristiques uniques avaient trait seulement à la rentabilité du projet immobilier et les dommages-intérêts

the quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

constituaient une réparation adéquate (par. 126 et 128). Le calcul des profits n'était ni conjectural ni spéculatif car il ne s'agissait pas d'un projet complexe, et le seul point de discorde entre les parties concernant le montant des dommages-intérêts portait sur le moment de la vente des unités achevées et le taux de vente de ces unités (par. 130 et 132).

[41] A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera*, at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing *Adderley*, at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

[41] Un demandeur privé d'un immeuble de placement ne peut exiger l'exécution intégrale en invoquant des « motifs équitables, réels et importants » ou un « intérêt important et légitime » (*Asamera*, p. 668-669) que si l'octroi d'une somme d'argent ne constituerait pas une réparation complète parce que cet immeuble a une « valeur particulière » pour lui (*Semelhago*, par. 21, citant l'arrêt *Adderley*, p. 240). Southcott ne pouvait faire une telle affirmation. Elle avait entrepris cette opération commerciale dans le but de réaliser un profit. Les caractéristiques particulières de l'immeuble tenaient seulement à sa valeur du fait qu'il pouvait s'avérer rentable. Southcott ne peut donc pas justifier son inaction.

C. *The Trial Judge Erred in Finding no Evidence of Comparable Profitable Properties Available for Mitigation*

C. *Le juge de première instance a commis une erreur en concluant à l'absence de preuve de l'existence d'immeubles comparables rentables pouvant servir à mitiger le préjudice*

[42] In this case, Southcott admitted that it made no efforts to mitigate — on the basis that it was not obliged to do so. Southcott submits that the Court of Appeal erred in shifting the onus to the plaintiff based on the admission by Southcott's principal that he had no intention to mitigate through Southcott. Southcott says that the Board did not provide the trial judge with evidence that there was a comparable profitable investment property available for sale. The trial judge found that there were no comparable or profitable properties. Southcott submits that the Court of Appeal erred in disregarding the trial judge's finding of fact and in substituting its own.

[42] Dans le cas qui nous occupe, Southcott a admis n'avoir fait aucun effort pour mitiger sa perte — parce qu'elle estimait ne pas y être tenue. Southcott plaide que la Cour d'appel a commis une erreur en déplaçant le fardeau de la preuve sur elle parce que son directeur avait admis n'avoir nullement l'intention de mitiger le préjudice de Southcott. Cette dernière affirme que le conseil scolaire n'a pas fourni au juge de première instance une preuve de l'existence d'une propriété de placement comparable et rentable offerte en vente. Le juge a conclu qu'il n'y avait pas de propriétés comparables ou rentables. Southcott plaide que la Cour d'appel a commis une erreur en écartant la conclusion de fait tirée par le juge de première instance et en y substituant la sienne.

[43] The entirety of the trial judge's analysis on this issue was as follows:

[43] Voici le texte intégral de l'analyse de cette question faite par le juge de première instance :

There was no evidence that the properties referred to [by the Board's expert] were actually available to the public for sale but only that they had been sold. Also there was no evidence that had these properties been purchased that they could have been profitably developed. In any event, I am not satisfied that the evidence established that these were comparable properties or that had they been purchased, that the plaintiff's loss would have been avoided or reduced. [para. 144]

[44] Regarding the failure to mitigate, the Court of Appeal found that the trial judge had erred in law:

First, Southcott's admission that it had no intention of taking any steps to mitigate its loss was sufficient to satisfy the onus resting upon the Board to prove failure to mitigate and to shift the evidentiary onus to Southcott of demonstrating that, even if it had attempted to mitigate, it could not have done so. Southcott led no evidence to that effect. In my view, the trial judge erred by holding that the Board had failed to meet the onus imposed upon it to prove that Southcott had failed to mitigate its damages.

. . . By requiring the Board to prove the precise manner in which 81 parcels of investment land had been sold or to prove the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level, particularly in the face of Southcott's admission that it had no intention to mitigate and of the evidence that Ballantry actually did find other suitable development properties to purchase.

Third, the trial judge erred in the manner in which he dealt with the evidence of purchases made by Ballantry. Those purchases clearly demonstrate that the directing mind of Southcott knew that investment-quality lands, suitable for profitable development, were available on the market. [paras. 24-26]

[45] As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the

[TRADUCTION] Il n'y avait aucun élément de preuve démontrant que les immeubles mentionnés par [l'expert du conseil scolaire] étaient effectivement offerts en vente au public. La preuve indiquait seulement que des immeubles avaient été vendus. Il n'y avait également aucun élément de preuve permettant de conclure que, si l'on avait acheté ces immeubles, on aurait pu les mettre en valeur de façon rentable. En tout état de cause, je ne suis pas convaincu que la preuve a établi que ces immeubles étaient des immeubles comparables ou que, si elle les avait achetés, la demanderesse aurait pu éviter ou diminuer sa perte. [par. 144]

[44] En ce qui concerne l'omission de mitiger le préjudice, la Cour d'appel a conclu que le juge de première instance avait commis une erreur de droit :

[TRADUCTION] Tout d'abord, le fait que Southcott avait admis qu'elle n'avait nulle intention de prendre quelque mesure que ce soit pour mitiger ses pertes suffisait pour permettre au conseil scolaire de se décharger du fardeau de preuve qui reposait sur lui et pour déplacer ce fardeau sur Southcott, qui devait alors démontrer que, même si elle avait tenté de mitiger ses pertes, elle n'aurait pas pu le faire. Southcott n'a soumis aucun élément de preuve en ce sens. À mon avis, le juge de première instance a commis une erreur en estimant que le conseil scolaire ne s'était pas déchargé du fardeau qui lui incombait de démontrer que Southcott n'avait pas mitigé ses pertes.

. . . En obligeant le conseil scolaire à démontrer de manière précise comment les 81 parcelles de terrain de placement avaient été vendues ou à prouver que certaines d'entre elles étaient rentables, le juge de première instance a imposé au conseil scolaire un critère tellement exigeant qu'il ne pouvait y satisfaire, d'autant plus que Southcott avait admis qu'elle n'avait nullement l'intention de mitiger le préjudice, et compte tenu des éléments de preuve suivant lesquels Ballantry avait effectivement trouvé et acheté d'autres propriétés susceptibles d'être mises en valeur.

Troisièmement, le juge de première instance a commis une erreur dans la façon dont il a traité les éléments de preuve relatifs aux achats d'autres terrains effectués par Ballantry. Ces achats démontrent de façon évidente que le dirigeant de Southcott savait que des terrains de placement de qualité qui se prêtaient bien à une mise en valeur rentable étaient disponibles sur le marché. [par. 24-26]

[45] Comme nous l'avons déjà signalé, lorsqu'il est allégué que le demandeur n'a pas mitigé ses pertes, la charge de la preuve selon la prépondérance

defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found.

[46] Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. Further, while I agree that the trial judge erred in dealing with the Board's evidence regarding the availability of the 81 properties, the error is best approached as an evidentiary issue rather than as one engaging the burden of proof.

[47] The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

[48] For the reasons that follow, I agree with the Court of Appeal that the trial judge erred in principle by failing to consider relevant evidence. In particular, Ballantry's subsequent purchases were evidence that other development properties were reasonably available. These errors skewed his factual analysis on the issue of mitigation. I conclude that the trial judge made a palpable and overriding error in finding that there were no comparable profitable mitigation opportunities: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

(1) The Expert Evidence of Comparable Properties

[49] At trial, the Board presented evidence that 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building

des probabilités repose sur le défendeur, qui doit établir non seulement que le demandeur n'a pas fait d'efforts raisonnables pour trouver un bien de substitution, mais également qu'il était possible de trouver un bien de substitution rentable et valable.

[46] Ainsi, il serait erroné de prétendre qu'il n'incombait pas au défendeur de démontrer qu'il était possible de mitiger les dommages même lorsque le demandeur n'a rien fait pour les mitiger. De plus, même si j'estime que le juge de première instance a commis une erreur dans son analyse de la preuve relative à la disponibilité des 81 immeubles faite par le conseil scolaire, il est préférable d'aborder cette erreur en disant qu'elle tient à une question de preuve plutôt qu'à l'application du fardeau de la preuve.

[47] La conclusion relative à la question de savoir si Southcott aurait pu mitiger le préjudice suppose l'application d'une norme juridique; il s'agit d'une question mixte de fait et de droit. La question de savoir s'il existait des immeubles comparables et s'ils étaient rentables est une question de fait. Dans sa décision, la Cour d'appel en vient implicitement à qualifier de déraisonnables les conclusions de fait du juge de première instance.

[48] Pour les raisons qui suivent, je suis d'accord avec la Cour d'appel pour dire que le juge de première instance a commis une erreur de principe en n'examinant pas les éléments de preuve pertinents. Plus particulièrement, les achats subséquents de Ballantry démontraient que d'autres terrains susceptibles d'être mis en valeur étaient raisonnablement disponibles. Ces erreurs ont faussé l'analyse factuelle sur la question de la mitigation du préjudice. Je conclus que le juge de première instance a commis une erreur manifeste et dominante en affirmant qu'il n'y avait pas de possibilités d'acquérir une propriété rentable comparable permettant de mitiger le préjudice : voir *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10.

(1) La preuve d'expert relative aux immeubles comparables

[49] Au procès, le conseil scolaire a présenté des éléments de preuve établissant que 81 parcelles de terres en friche propres à être mises en valeur et 49

were available for sale in the GTA and were in fact sold in the period between January 31, 2005 and the time of trial (para. 136 of the trial judge's decision). The parameters that the Board's expert used in selecting alternative available parcels were sales of land between $1,000,000 and $27,000,000, that had an estimated time to develop of one year or less, and that could be developed for low to medium density residential. These parameters were chosen to match the parameters of the actual purchases made by the Ballantry Group.

[50] Nevertheless, the trial judge concluded that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate. He found that: there was no evidence that the 81 properties were actually available to the public for sale; there was no evidence that, had these properties been purchased, they could have been profitably developed, and the plaintiff's loss could have been avoided or reduced; and in any event, these properties were not comparable properties.

[51] The trial judge failed to consider the available and reasonable inferences of the Board's evidence that there were 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building sold during the time period in issue here. In cross-examination, the Board's expert witness admitted being unaware of the marketing strategies used to sell the 81 properties sold during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 232-33). However, notwithstanding that answer, it is an obvious inference that if 81 properties suitable for development were offered for sale, and were in fact sold, then investment properties were available to developers for sale, particularly in the absence of evidence to the contrary.

propriétés foncières subdivisées en lots constructibles étaient en vente dans la région métropolitaine de Toronto et avaient effectivement été vendues au cours de la période comprise entre le 31 janvier 2005 et la date du début du procès (par. 136 de la décision du juge de première instance). L'expert du conseil scolaire avait retenu les paramètres suivants pour le choix des parcelles de substitution disponibles : des terrains vendus pour un prix variant entre 1 000 000 $ et 27 000 000 $ qui pourraient être mis en valeur dans un délai maximum d'un an et qui se trouvaient dans une zone résidentielle familiale à densité faible à moyenne. Ces paramètres avaient été retenus parce qu'ils correspondaient aux achats effectivement effectués par le groupe Ballantry.

[50] Le juge de première instance a néanmoins conclu que le conseil scolaire ne s'était pas acquitté du fardeau qui lui incombait de démontrer que Southcott ne s'était pas prévalue d'une possibilité raisonnable qui s'offrait à elle de mitiger ses pertes. Selon lui, la preuve ne démontrait pas que les 81 propriétés étaient effectivement offertes en vente au public, et que, si elle avait acheté ces propriétés, la demanderesse aurait pu les mettre en valeur de façon rentable, évitant ou diminuant ainsi ses pertes. Toujours selon le juge, de toute façon, ces propriétés n'étaient pas des propriétés comparables.

[51] Le juge de première instance n'a pas considéré les inférences raisonnables que lui présentait la preuve faite par le conseil scolaire suivant laquelle 81 parcelles de terrain en friche prêtes à être mises en valeur et 49 propriétés subdivisées en lots constructibles avaient été vendues au cours de la période en cause. En contre-interrogatoire, l'expert cité par le conseil solaire a reconnu ne pas connaître les stratégies de mise en marché appliquées pour la vente des 81 immeubles vendus au cours de la période durant laquelle, selon le conseil scolaire, Southcott aurait pu mitiger ses pertes (d.a., p. 232-233). En dépit de cette réponse toutefois, on pouvait inférer tout naturellement que, si 81 terrains se prêtant à une mise en valeur avaient été offerts en vente et avaient effectivement été vendus, il existait donc des immeubles de placement qui étaient offerts en vente aux promoteurs immobiliers, en particulier en l'absence de preuve contraire.

[52] Further, the trial judge failed to consider whether the fact that all of the properties the Board's expert testified to were capable of being brought to development in a year could support an inference that their development was profitable. Reasonable inferences of profitability could be drawn based upon the size and price of property or the fact that land was purchased for development purposes by experienced developers. The trial judge did not turn his mind to this evidence.

[52] De plus, le juge de première instance n'a pas examiné si le fait que tous les immeubles étaient susceptibles, selon la déposition de l'expert cité par le conseil scolaire, d'être mis en valeur au cours de l'année pouvait permettre d'inférer que leur mise en valeur était rentable. Il était raisonnablement possible de déduire la rentabilité en se fondant sur la superficie et le prix des terrains, ou sur le fait que des promoteurs d'expérience ont acquis des terrains pour les mettre en valeur. Le juge de première instance ne s'est pas préoccupé de ces éléments de preuve.

[53] Finally, the trial judge also failed to consider that an adverse inference against Southcott could be drawn from the fact that it led no evidence about the profitability of the alternative development opportunities.

[53] Enfin, le juge de première instance n'a pas tenu compte non plus de la possibilité de tirer une inférence défavorable à Southcott du fait que cette dernière n'a avancé aucun élément de preuve au sujet de la rentabilité des autres terrains susceptibles d'être mis en valeur.

(2) The Purchases by Ballantry

(2) L'achat de terrains par Ballantry

[54] I agree with the Court of Appeal that the trial judge also erred in failing to consider whether the purchases by the Ballantry corporations provided evidence of other profitable properties available in mitigation. As noted above, the trial judge found (at para. 143) that the other properties purchased by other members of the Ballantry Group were "collateral" in the sense that the transactions would have occurred whether or not the defendant had breached its contract with Southcott and did not represent actual mitigation due to Southcott's distinct legal personality. This is not challenged.

[54] Je suis d'accord avec la Cour d'appel pour dire que le juge de première instance a aussi commis une erreur en ne cherchant pas à savoir si l'achat de terrains par les sociétés du groupe Ballantry offrait la preuve de l'existence d'autres terrains pouvant servir à mitiger le préjudice. Tel qu'indiqué précédemment, le juge de première instance a conclu (au par. 143) que les autres immeubles acquis par d'autres sociétés du groupe Ballantry étaient [TRADUCTION] « accessoires » en ce sens que ces acquisitions auraient été faites indépendamment de la violation, par la défenderesse, de son contrat avec Southcott et ne constituaient pas une véritable mitigation du préjudice en raison de la personnalité juridique distincte de Southcott. Ce point n'est pas contesté.

[55] The trial judge did not go on to consider, however, whether these transactions established that those same properties were evidence of "available" comparable mitigation opportunities in the market. Because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. In effect, the trial judge ignored the separate legal personalities

[55] Le juge de première instance ne s'est toutefois pas demandé ensuite si ces opérations démontraient que ces mêmes terrains permettaient d'établir que des occasions comparables pouvant servir à mitiger le préjudice « s'offraient » sur le marché. En raison de l'identité juridique distincte de Southcott, l'acquisition d'autres immeubles comparables par les autres sociétés du groupe Ballantry ne faisait pas en sorte que ces immeubles soient

of Southcott and the other corporations in the Ballantry Group by failing to consider those purchases as evidence of the existence of mitigation opportunities.

« non disponibles » pour mitiger le préjudice. En fait, le juge de première instance a fait abstraction de la personnalité juridique distincte de Southcott et des autres sociétés du groupe Ballantry lorsqu'il n'a pas tenu compte de ces acquisitions comme preuve de l'existence de possibilités de mitiger le préjudice.

[56] The Ballantry Group companies purchased seven other development properties subsequent to the breach of the agreement, ranging in size from 2.3 acres to 110.8 acres and in price from $3.3 million to $27.1 million. In particular, two specific purchases were clearly comparable. Southcott had agreed to purchase 4.78 acres of land for $3.44 million in August 2004. Ballantry corporations purchased 2.7 acres for $3.3 million in August 2005 and 2.3 acres for $6 million in December 2006.

[56] Postérieurement à la violation du contrat, les sociétés du groupe Ballantry ont acheté sept autres propriétés susceptibles d'être mises en valeur. Ces propriétés avaient une superficie variant entre 2,3 acres et 110,8 acres et leur prix oscillait entre 3,3 millions de dollars et 27,1 millions de dollars. Parmi ces propriétés, deux en particulier étaient de toute évidence comparables. Southcott avait convenu d'acheter 4,78 acres de terrain pour 3,44 millions de dollars en août 2004. Les sociétés du groupe Ballantry ont acheté 2,7 acres pour 3,3 millions de dollars en août 2005 et 2,3 acres pour 6 millions de dollars en décembre 2006.

[57] The defence raised by Southcott, which was accepted by the trial judge, was that the purchases by Ballantry Group of development lands in the GTA were purchases which would have been made in any event, regardless of whether Southcott purchased the Board's property. However, it is no answer to say that other companies in the same corporate group would have purchased the other available lands in any event. It was clear from the testimony of the president of Southcott and co-owner of Ballantry that the Ballantry Group was always purchasing promising development land and that the different companies were simply used as different vehicles to invest.

[57] Selon le moyen de défense invoqué par Southcott et accepté par le juge de première instance, les achats, par le groupe Ballantry, de terrains susceptibles d'être mis en valeur dans la région métropolitaine de Toronto étaient des achats qui auraient été faits de toute façon, peu importe que Southcott achète ou non le terrain du conseil scolaire. Toutefois, il ne sert à rien de dire que d'autres sociétés du même groupe d'entreprises auraient de toute façon acheté les autres terrains disponibles. Il ressort à l'évidence du témoignage du président de Southcott, qui est également copropriétaire de Ballantry, que le groupe Ballantry achetait toujours des terrains susceptibles d'être mis en valeur et qu'il se servait simplement de différentes sociétés pour diversifier les modes de placement.

[58] It was a choice on the part of the principals of the Ballantry Group as to which corporate entity would be used for each purchase and they elected not to use Southcott. In addition, the trial judge found that "[t]he plaintiff['s] proposed development here was not complex, but rather a relatively straightforward plan for the development of 48 semi-detached residential units" (para. 132). In

[58] Les dirigeants du groupe Ballantry ont fait le choix de la personne morale qui serait utilisée pour chacun de ces achats et ils ont écarté Southcott. Le juge de première instance a par ailleurs fait observer que [TRADUCTION] « [l]e projet immobilier proposé par les demandeurs en l'espèce n'avait rien de complexe; il s'agissait d'un plan relativement simple prévoyant la construction

these circumstances, a straightforward development could have been carried out on a different property by Southcott, had it wanted to mitigate its loss. This corresponds to the modern reality recognized in *Semelhago* that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products" (para. 20).

[59] As the Court of Appeal concluded (at paras. 25-26), the Ballantry Group's purchases of other properties was evidence that other suitable development lands *were* available and the decision not to purchase them in Southcott's name was based on other considerations. I agree with the Court of Appeal that the trial judge erred in failing to consider these purchases as evidence of other available and comparable development properties.

V. Conclusion

[60] In conclusion, the trial judge erred in failing to consider relevant evidence and made a palpable and overriding error of fact in concluding that Southcott could not have reasonably avoided its loss.

[61] He failed to take into account in his analysis of the mitigation issue that Southcott had simply refused to take any mitigatory action. He failed to consider the evidence of Ballantry's purchases as supporting the inference that alternative parcels were available and that their development was sufficiently profitable to meet Ballantry's requirements. He conflated a lack of evidence regarding the marketing of parcels with a lack of evidence that any of the parcels had been available for sale. He failed to consider whether the fact that all of the properties the Board's expert testified were development properties capable of being brought to development in a year could support an inference that their development was profitable. Finally, he failed to consider the fact that Southcott

de 48 habitations jumelées » (par. 132). Dans ces conditions, Southcott aurait pu réaliser un projet tout aussi simple sur un autre terrain, si elle avait voulu mitiger ses pertes, ce qui correspond à la réalité moderne reconnue dans l'arrêt *Semelhago*, en l'occurrence que « [t]outes les propriétés, qu'elles soient résidentielles, commerciales ou industrielles, sont maintenant produites en série de la même façon que les autres biens de consommation » (par. 20).

[59] Ainsi que la Cour d'appel l'a conclu (au par. 25-26), l'achat d'autres propriétés par le groupe Ballantry démontre que d'autres terrains convenables qui se prêtaient à une mise en valeur *étaient* disponibles et que la décision de ne pas les acheter au nom de Southcott était motivée par d'autres considérations. Je suis d'accord avec la Cour d'appel pour dire que le juge de première instance a commis une erreur en ne considérant pas l'achat de ces autres terrains comme une preuve qu'il existait d'autres terrains comparables qui pouvaient être mis en valeur.

V. Conclusion

[60] En conclusion, le juge de première instance a commis une erreur en ne tenant pas compte des éléments de preuve pertinents, et il a commis une erreur de fait manifeste et dominante en concluant que Southcott n'aurait pas pu raisonnablement éviter sa perte.

[61] Dans son analyse de la question de la mitigation du préjudice, le juge de première instance n'a pas pris en compte le fait que Southcott avait tout simplement refusé de prendre des mesures pour mitiger sa perte. Il n'a pas tenu compte des acquisitions faites par le groupe Ballantry comme preuve permettant d'inférer que d'autres parcelles de terrain étaient disponibles et que leur mise en valeur était suffisamment rentable pour satisfaire aux exigences du groupe Ballantry. Il a confondu l'absence de preuve relative à la mise en marché des parcelles de terrain avec le manque de preuve qu'aucune des parcelles de terrain n'avait été disponible sur le marché. Il ne s'est pas demandé si le fait que toutes les propriétés qui, selon la déposition de l'expert cité par le conseil scolaire, constituaient des propriétés

did not lead evidence to challenge the Board's evidence regarding alternative development opportunities.

susceptibles de mise en valeur au cours de l'année, pouvait permettre d'inférer que leur mise en valeur était rentable. Enfin, il n'a pas tenu compte du fait que Southcott n'a présenté aucun élément de preuve à l'encontre de la preuve présentée par le conseil scolaire relativement aux autres propriétés susceptibles d'être mises en valeur.

[62] In these circumstances, the Court of Appeal was entitled to look at the record and conclude that the trial judge's findings regarding mitigation were not available to him on the evidence. The evidence of the Ballantry purchases, in the context of Southcott's refusal to mitigate, established that there were opportunities to mitigate by purchasing other development land in the GTA. Failure to mitigate reduces damages. The Court of Appeal concluded that, based upon the investment properties purchased by Ballantry, and in the absence of evidence to the contrary, the Board discharged the burden of showing that other investment properties were available in the relevant time period to mitigate the losses and that the trial judge's finding that there were no comparable properties was not open to him on the evidence. I agree.

[62] Dans ces conditions, la Cour d'appel pouvait examiner le dossier et conclure que le juge de première instance ne pouvait pas, vu la preuve dont il disposait, tirer les conclusions auxquelles il en est arrivé au sujet de la mitigation du préjudice. Les éléments de preuve relatifs aux acquisitions de terrains par Ballantry démontraient, eu égard au refus de Southcott de prendre des mesures pour mitiger ses pertes, qu'il existait des possibilités de mitiger le préjudice en achetant d'autres terrains susceptibles d'être mis en valeur dans la région métropolitaine de Toronto. Le défaut de mitiger ses pertes entraîne une réduction du montant des dommages-intérêts. La Cour d'appel a conclu que, compte tenu de l'achat d'immeubles de placement par Ballantry, et en l'absence d'éléments de preuve contraires, le conseil scolaire s'était acquitté du fardeau de démontrer qu'il existait, au cours de la période en cause, d'autres immeubles de placement qui auraient pu servir à mitiger les pertes, de sorte que la preuve dont disposait le juge de première instance ne lui permettait pas de conclure qu'il n'y avait pas d'immeubles comparables. Je partage cet avis.

[63] I would dismiss the appeal with costs. In light of the result on the main appeal, I need not consider the cross-appeal. The cross-appeal should be dismissed without costs.

[63] Je suis d'avis de rejeter le pourvoi avec dépens. Compte tenu de l'issue du pourvoi principal, il n'est pas nécessaire que j'examine le pourvoi incident et je suis d'avis de le rejeter sans dépens.

The following are the reasons delivered by

Version française des motifs rendus par

[64] THE CHIEF JUSTICE (dissenting) — Damages for breach of contract may be reduced if the plaintiff unreasonably fails to mitigate its loss. To show that a plaintiff unreasonably failed to mitigate its loss, the defendant who is in breach of the contract must establish: (1) that an opportunity to mitigate the loss existed; and (2) that the plaintiff acted unreasonably in failing to take that opportunity.

[64] LA JUGE EN CHEF (dissidente) — Les dommages-intérêts pour rupture de contrat peuvent être réduits lorsque le demandeur omet, sans justification, de mitiger sa perte. Pour démontrer que le défaut du demandeur de mitiger sa perte n'était pas justifié, le défendeur qui n'a pas respecté le contrat doit établir (1) l'existence d'une possibilité de mitiger la perte, et (2) que le défaut du demandeur de se prévaloir de cette possibilité n'était pas justifié.

[65] The trial judge found as a fact that the defendant had not proved that Southcott had an opportunity to mitigate. This finding, in my view, was grounded in the evidence. This is sufficient to dispose of the appeal. However, if such opportunity were found to exist, I see no basis on which to conclude that Southcott acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. It follows, in my view, that the judgment of the Court of Appeal should be set aside, and the trial judge's conclusion that the plaintiff established breach of contract and damages should be restored.

[65] Le juge de première instance a conclu que le défendeur n'avait pas prouvé que Southcott avait eu une possibilité de mitiger sa perte. Selon moi, cette conclusion était appuyée par la preuve. Cela suffit pour trancher l'appel. Cependant, s'il fallait conclure à l'existence d'une telle possibilité, je ne vois rien qui permette de conclure que Southcott n'était pas justifiée de maintenir sa demande en justice pour exécution intégrale au lieu de mitiger sa perte. Il s'ensuit à mon avis que le jugement de la Cour d'appel devrait être annulé et qu'il y aurait lieu de rétablir la conclusion du juge de première instance selon laquelle la demanderesse a prouvé la rupture du contrat et les dommages.

I. Background

I. Contexte

[66] The Toronto Catholic District School Board contracted with Southcott Estates Inc. for the sale of 4.78 acres of surplus land for $3.44 million. The closing date was August 31, 2004. Southcott was a wholly owned subsidiary of Ballantry Homes Inc., which was in the business of buying property and developing it for residential purposes. Southcott was a single-purpose company created expressly and only for the purpose of buying this parcel of land and developing it with single-family homes. Southcott had no assets except for the deposit it paid on the land.

[66] Le Toronto Catholic District School Board (le « conseil scolaire ») a conclu avec Southcott Estates Inc. un contrat pour la vente d'un terrain de 4,78 acres, dont il n'avait pas besoin, au prix de 3,44 millions de dollars. La date de clôture était le 31 août 2004. Southcott est une filiale à cent pour cent de Ballantry Homes Inc., dont les activités consistent à acquérir des propriétés et y ériger des immeubles résidentiels. Southcott est une société à but unique créée expressément dans le seul but d'acquérir cette parcelle de terrain et de la mettre en valeur en y construisant des résidences unifamiliales. Southcott n'a aucun actif à l'exception de la somme d'argent versée en dépôt pour l'acquisition du terrain.

[67] The land was part of a larger parcel on which school buildings were located so the agreement was conditional upon the Board obtaining a severance from the Committee of Adjustments on or before the closing date. The agreement was signed on June 14, 2004, but only became firm on August 23, 2004. The Board, realizing it might not be able to get severance of the property by the closing date of August 31, 2004, asked Southcott to extend the closing date to a fixed date after severance. Southcott was willing to extend the August 31 closing date, but insisted on a firm final date of January 31, 2005.

[67] Le terrain faisant partie d'une plus grande parcelle sur laquelle se trouvent les immeubles d'une école, le contrat était conditionnel à ce que le conseil scolaire obtienne du comité des dérogations une disjonction au plus tard à la date de clôture. Le contrat a été signé le 14 juin 2004, mais il n'est devenu définitif que le 23 août 2004. Constatant qu'il risquait de ne pas obtenir la disjonction à la date de clôture prévue pour le 31 août 2004, le conseil scolaire a demandé à Southcott de proroger la date de clôture à une date fixe postérieure à la disjonction. Southcott a accepté de proroger la date de clôture du 31 août, mais elle a insisté pour que la date définitive soit fixée au 31 janvier 2005.

[68] The Board's application for severance was heard on December 16, 2004. It was deferred because the Board had failed to include a development plan in its application. This made it impossible for the Board to comply with the January 31, 2005 closing date. Southcott requested the Board to extend the closing date. The Board refused this request, declared the transaction to be at an end, and returned Southcott's deposit.

[69] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and brought an action for specific performance or, in the alternative, damages.

[70] The trial judge held that the plaintiff was not entitled to an order for specific performance because the property was not sufficiently unique to satisfy the requirements of that remedy. However, he awarded damages in the amount of $1,935,500, representing the loss of a 60 percent chance to make profits in the amount of $3,225,827. He rejected the Board's argument that Southcott had failed to act reasonably to mitigate its loss, holding that the Board had not established as a matter of fact that mitigation opportunities were available.

[71] The Court of Appeal reversed the trial judge's decision and set aside the award for damages, essentially holding that the evidence, properly viewed, established an unreasonable failure to mitigate.

II. The Requirements of Mitigation

[72] The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided: *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 660; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673 (H.L.), at p. 689;

[68] La demande de disjonction du conseil scolaire a été examinée le 16 décembre 2004. La décision a été retardée parce que le conseil scolaire n'avait pas joint à sa demande un plan de mise en valeur. De ce fait, le conseil scolaire n'a pu respecter la date de clôture du 31 janvier 2005. Southcott a demandé au conseil scolaire de proroger la date de clôture. Le conseil scolaire a refusé, a déclaré l'opération caduque et a remboursé à Southcott la somme versée en dépôt.

[69] Southcott a fait valoir que le conseil scolaire avait manqué à son obligation de tout mettre en œuvre pour obtenir la disjonction et a introduit une action visant à obtenir l'exécution intégrale du contrat ou, à titre subsidiaire, des dommages-intérêts.

[70] Le juge de première instance a conclu que la demanderesse n'avait pas droit à l'exécution intégrale parce que l'immeuble n'avait pas le caractère unique qui lui aurait permis de répondre aux exigences nécessaires à l'obtention de cette réparation. Il a toutefois accordé la somme de 1 935 500 $ à titre de dommages-intérêts, ce qui correspondait à une perte de chance de 60 p. 100 de réaliser un profit de 3 225 827 $. Il a rejeté l'argument du conseil scolaire selon lequel Southcott a omis sans justification de mitiger sa perte et a conclu que le conseil scolaire n'avait pas établi au regard des faits l'existence de possibilités de mitiger la perte.

[71] La Cour d'appel a infirmé la décision du juge de première instance et annulé la condamnation aux dommages-intérêts; elle a essentiellement conclu que la preuve, appréciée comme il se doit, avait établi une omission injustifiée de mitiger le préjudice.

II. Les exigences en matière de la mitigation du préjudice

[72] Selon le principe de la mitigation du préjudice, un demandeur ne peut obtenir des dommages-intérêts pour des pertes qui auraient raisonnablement pu être évitées : *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, p. 660; *British Westinghouse Electric and Manufacturing Co. c. Underground Electric Railways Company*

Dunkirk Colliery Co. v. Lever (1878), 9 Ch. D. 20 (C.A.), at p. 25. A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at pp. 166-67; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.), at p. 1075.

[73] The defendant, having breached the contract, bears the onus of proving that the plaintiff unreasonably failed to mitigate its loss: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 330-31; *Roper v. Johnson* (1873), L.R. 8 C.P. 167. This entails establishing, on a balance of probabilities: (1) that opportunities to mitigate the loss were available to the plaintiff; and (2) that the plaintiff unreasonably failed to pursue these opportunities.

[74] Failure to mitigate may not be unreasonable for a variety of reasons. One such reason may be a "fair, real, and substantial justification" for claiming specific performance: *Asamera*, at pp. 667-68. Another may be lack of financial resources: *McGregor on Damages* (18th ed. 2009), at para. 7-088. The rules for mitigation "do not require the injured party to do what he cannot afford to do when he is seeking to reduce the damages payable by the wrongdoer": *Lagden v. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277, at para. 51 (*per* Lord Hope); see also *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670.

[75] Unreasonable failure to mitigate loss reduces damages to the extent that mitigation would have avoided the loss: see *Andros Springs v. World Beauty*, [1970] P. 144 (C.A.), at p. 154 (*per* Lord Denning). If a mitigation opportunity would only partially avoid the plaintiff's loss, then only a partial reduction in damages can be justified.

of London, Ltd., [1912] A.C. 673 (H.L.), p. 689; *Dunkirk Colliery Co. c. Lever* (1878), 9 Ch. D. 20 (C.A.), p. 25. Un demandeur n'a pas d'obligation contractuelle de mitiger le préjudice, et en ce sens, l'expression « obligation de limiter le préjudice » est trompeuse. Cependant, lorsque le demandeur omet sans justification de mitiger sa perte, les dommages-intérêts pour rupture de contrat peuvent être réduits : *Janiak c. Ippolito*, [1985] 1 R.C.S. 146, p. 166-167; *Darbishire c. Warran*, [1963] 1 W.L.R. 1067 (C.A.), p. 1075.

[73] Il incombe au défendeur, qui n'a pas respecté le contrat, de prouver que le défaut du demandeur de mitiger sa perte n'était pas justifié : *Red Deer College c. Michaels*, [1976] 2 R.C.S. 324, p. 330-331; *Roper c. Johnson* (1873), L.R. 8 C.P. 167. Cela signifie qu'il doit établir, suivant la prépondérance des probabilités, (1) que le demandeur avait eu des possibilités de mitiger sa perte et (2) que son défaut de se prévaloir de ces possibilités n'était pas justifié.

[74] Diverses raisons peuvent faire en sorte que l'omission de mitiger le préjudice sera justifiée. L'existence de « motifs équitables, réels et importants » de demander l'exécution intégrale peut constituer l'une de ces raisons : *Asamera*, p. 667-668. Le manque de ressources financières peut constituer une autre raison : *McGregor on Damages* (18e éd. 2009), par. 7-088. Les règles relatives à la mitigation du préjudice [TRADUCTION] « n'exigent pas de la personne lésée qu'elle fasse ce qu'elle n'a pas les moyens de faire lorsqu'elle cherche à diminuer le montant des dommages-intérêts que doit payer l'auteur du préjudice » : *Lagden c. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277, par. 51 (lord Hope); voir également *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670.

[75] L'omission injustifiée de mitiger la perte diminue le montant des dommages-intérêts dans la mesure où la mitigation aurait permis d'éviter la perte : voir *Andros Springs c. World Beauty*, [1970] P. 144 (C.A.), p. 154 (lord Denning). Si une possibilité de mitiger le préjudice permettrait seulement d'éviter en partie la perte, une diminution partielle seulement des dommages-intérêts peut être justifiée.

III. Opportunity to Mitigate

[76] The trial judge found that the Board had not discharged its onus of proving that Southcott unreasonably failed to mitigate its loss because it did not establish that the opportunity to mitigate existed. This finding must stand unless it constitutes palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[77] The Board sought to prove that mitigation opportunities existed in two ways — through the testimony of an expert witness and with evidence of purchases made by other Ballantry companies.

A. *The Evidence of the Expert Witness*

[78] The trial judge found that the Board's expert witness's evidence did not establish opportunity to mitigate the loss.

[79] The Board's expert presented evidence of 81 parcels of raw land and 49 subdivided properties that were purchased in the Greater Toronto Area ("GTA") between January 31, 2005 and the time of trial. The trial judge found a number of shortcomings in this evidence.

[80] First, there was no evidence that the alleged properties the expert referred to were actually available to Southcott; the Board's expert witness admitted to being entirely unaware of whether substitute property was available to the public for sale during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 233).

[81] Second, the evidence did not establish that these properties were comparable to Southcott's target property ((2009), 78 R.P.R. (4th) 285, at para. 144). Little was known about the properties identified by the Board's expert witness beyond their size, cost, and nearest major intersection. Most were outside the City of Toronto. The properties vary widely in both size and price, including parcels as

III. Possibilité de mitiger le préjudice

[76] Le juge de première instance a conclu que le conseil scolaire ne s'était pas acquitté de son fardeau de prouver que le défaut de Southcott de mitiger sa perte n'était pas justifié parce que le conseil scolaire n'avait pas établi l'existence d'une possibilité de la mitiger. Cette conclusion ne peut être écartée que si elle est entachée d'une erreur manifeste et dominante : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10.

[77] Le conseil scolaire a eu recours à deux moyens pour tenter de prouver l'existence de possibilités de mitiger la perte — par le témoignage d'un expert et par la preuve des acquisitions faites par d'autres sociétés du groupe Ballantry.

A. *La déposition de l'expert*

[78] Le juge de première instance a conclu que la déposition de l'expert cité par le conseil scolaire n'avait pas établi une possibilité de mitiger la perte.

[79] L'expert cité par le conseil scolaire a affirmé que 81 parcelles de terres en friche et 49 propriétés foncières subdivisées avaient été achetées dans la région métropolitaine de Toronto entre le 31 janvier 2005 et la date du début du procès. Le juge de première instance a relevé dans cette preuve un certain nombre de lacunes.

[80] Premièrement, il n'y avait pas de preuve que Southcott pouvait effectivement acquérir les propriétés en question dont l'expert faisait état; ce dernier a admis qu'il ne savait pas du tout si ces propriétés avaient été offertes en vente au public pendant la période durant laquelle, selon le conseil scolaire, Southcott aurait pu mitiger son préjudice (d.a., p. 233).

[81] Deuxièmement, la preuve n'établissait pas que ces propriétés étaient comparables au terrain que Southcott souhaitait acquérir ((2009), 78 R.P.R. (4th) 285, par. 144). On savait peu de choses au sujet des terrains indiqués par l'expert cité par le conseil scolaire, si ce n'est leur superficie, leur coût et le grand carrefour le plus rapproché. La plupart se trouvaient à l'extérieur de la ville de Toronto. La

large as 123.988 acres, as small as 0.251 acres, and costing as much as $23.77 million. The trial judge concluded that the comparability of these properties to Southcott's 4.78 acre target property had not been established.

[82] Third, the trial judge found that the evidence did not establish that alternate properties could have been profitably developed (para. 144). Only a profitable development would mitigate Southcott's loss; an unprofitable one would aggravate it. A plaintiff is not required to take foolish steps that would not reduce its loss. The Board's expert presented no evidence on the potential profitability of the properties he referred to.

[83] The Court of Appeal criticized the trial judge's finding that the evidence did not establish profitability, on the ground that he raised the burden of proof on the Board to an unrealistic level (2010 ONCA 310, 104 O.R. (3d) 784, at para. 25). With respect, the burden was clear — the Board had to establish that alternate properties could have been profitably developed on a balance of probabilities. There is no indication that the trial judge failed to appreciate this basic principle. See *World Beauty*, at p. 154.

[84] The trial judge found that the Board's expert witness failed to establish that Southcott had opportunities to mitigate its loss. This finding finds support in the evidence and is not vitiated by legal error. It follows that it cannot be set aside: *Housen*.

B. *The Evidence of Purchases by Other Ballantry Companies*

[85] The second way the Board sought to discharge its onus of showing opportunity to mitigate was by evidence that other Ballantry companies had made purchases of development land in the GTA at the relevant time. The Board argued that

superficie et le prix de ces terrains varient considérablement; les parcelles peuvent avoir de 0,251 à 123,988 acres et le prix peut atteindre 23,77 millions de dollars. Le juge de première instance a conclu que la comparabilité de ces propriétés par rapport au terrain de 4,78 acres que Southcott souhaitait acquérir n'avait pas été établie.

[82] Troisièmement, le juge de première instance a conclu que la preuve n'avait pas établi que les propriétés indiquées par l'expert auraient pu être mises en valeur de façon rentable (par. 144). Seule une mise en valeur rentable pouvait mitiger la perte de Southcott; une mise en valeur non rentable l'aurait accrue. Un demandeur n'est pas tenu de prendre des mesures futiles qui ne réduiraient pas sa perte. L'expert cité par le conseil scolaire n'a présenté aucune preuve de la rentabilité éventuelle des propriétés qu'il a mentionnées.

[83] La Cour d'appel a critiqué la conclusion du juge de première instance suivant laquelle la preuve n'avait pas établi la rentabilité, parce que le juge avait imposé au conseil scolaire un fardeau de preuve excessif (2010 ONCA 310, 104 O.R. (3d) 784, par. 25). Avec égards, le fardeau de preuve était clair — le conseil scolaire devait établir suivant la prépondérance des probabilités qu'il était possible pour Southcott d'effectuer une mise en valeur rentable d'une autre propriété. Rien n'indique que le juge de première instance n'a pas apprécié ce principe fondamental. Voir *World Beauty*, p. 154.

[84] Le juge de première instance a conclu que l'expert cité par le conseil scolaire n'avait pas établi que Southcott avait eu des possibilités de mitiger sa perte. Cette conclusion est appuyée par la preuve et n'est entachée d'aucune erreur de droit. Elle ne doit donc pas être écartée : *Housen*.

B. *La preuve des acquisitions faites par les autres sociétés du groupe Ballantry*

[85] En tant que deuxième moyen pour s'acquitter de son fardeau d'établir la possibilité de mitiger la perte, le conseil scolaire a mis en preuve des acquisitions, par d'autres sociétés du groupe Ballantry, de terrains destinés à être mis en valeur

these other Ballantry purchases had in fact mitigated the loss caused by the Board's breach.

dans la région métropolitaine de Toronto à l'époque en cause. Le conseil scolaire a plaidé que ces autres acquisitions du groupe Ballantry avaient en fait mitigé la perte causée par l'inexécution du contrat par le conseil scolaire.

[86] The trial judge accepted the Board's invitation to consider the matter from the perspective of the Ballantry Group as a whole, effectively piercing the corporate veil. He concluded that Ballantry's subsequent purchases were collateral, independent transactions that could not have avoided the loss arising from the Board's breach of contract (para. 143): see *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385, at p. 389. Leaving aside the question of whether piercing the corporate veil in these circumstances was appropriate, the trial judge's analysis was not in error. The trial judge's reasoning was that the Ballantry Group, with extensive access to credit, was limited only by the number of properties it could find. The more good properties it could find, the more money it stood to make. In this sense, other purchases by the Ballantry Group were collateral rather than substitutions for the Board's property.

[86] Le juge de première instance a accepté, à la demande du conseil scolaire, d'examiner l'affaire du point de vue du groupe Ballantry dans son ensemble, levant ainsi le voile corporatif. Il a conclu que les acquisitions subséquentes du groupe Ballantry constituaient des opérations accessoires et distinctes qui n'auraient pas permis d'éviter la perte découlant de l'inexécution du contrat par le conseil scolaire (par. 143) : voir *Apeco of Canada, Ltd. c. Windmill Place*, [1978] 2 R.C.S. 385, p. 389. Abstraction faite de la question de l'opportunité de lever le voile corporatif dans ces circonstances, l'analyse du juge de première instance n'était pas erronée. Il a considéré que le groupe Ballantry, jouissant d'un important accès au crédit, n'avait d'autre limite que le nombre de propriétés qu'il pouvait trouver. Plus le groupe Ballantry pouvait trouver de bonnes propriétés, plus il pouvait réaliser des profits. En ce sens, les autres propriétés acquises par le groupe Ballantry demeuraient accessoires et ne pouvaient être substituées à la propriété du conseil scolaire.

[87] The trial judge, having dealt with the purchases of other Ballantry companies in this way, did not make a finding on whether these properties offered mitigation opportunities for Southcott, as an independent legal entity. The evidence, however, does not support such a finding, in my view. First, there was no evidence that the properties purchased by other Ballantry companies were available to Southcott. At best, Southcott would have been competing with its sister companies for these properties. Whether it would have succeeded in acquiring a comparable property was a matter of speculation.

[87] Après avoir disposé ainsi de la question des acquisitions des autres sociétés du groupe Ballantry, le juge de première instance ne s'est pas prononcé sur la question de savoir si ces propriétés offraient à Southcott, en tant qu'entité juridique distincte, des possibilités de mitiger sa perte. Toutefois, la preuve ne permet pas, selon moi, de conclure en ce sens. Premièrement, aucun élément de preuve n'indiquait que Southcott aurait pu acquérir les propriétés acquises par les autres sociétés du groupe Ballantry. Au mieux, Southcott aurait fait concurrence à des sociétés sœurs pour l'achat de ces propriétés. La question de savoir si elle aurait réussi à acheter une propriété comparable relève de la conjecture.

[88] Second, the evidence did not establish that other Ballantry Group purchases were comparable to Southcott's target property. Under its contract

[88] Deuxièmement, la preuve n'a pas établi que les autres propriétés achetées par le groupe Ballantry étaient comparables à celle que Southcott

with the Board, Southcott was purchasing a 4.78 acre parcel located in a desirable residential neighbourhood of the City of Toronto suited to the development of 48 semi-detached residential units (para. 132). There was no evidence that any of the other Ballantry purchases were comparable. It is not enough to show that some development land may have been available to companies which may have had different development strategies. Ballantry had wide ranging interests in residential real estate development throughout the GTA. Southcott had a narrower, specific development objective. To show opportunity to mitigate, the Board had to prove that a property comparable to the one that Southcott sought to purchase was available.

[89] I respectfully cannot agree that two of the subsequent Ballantry purchases were clearly comparable to Southcott's target property (Karakatsanis J., at para. 56). The first (a parcel of 2.7 acres for $3.3 million) was 43 percent smaller than Southcott's target property, cost 70 percent more per acre, and was purchased for the development of a retirement home. The second (a parcel of 2.3 acres for $6 million) was 51 percent smaller than Southcott's target property, cost 260 percent more per acre, and was purchased for development of a high rise building. On the record, these properties were not comparable to the property that Southcott sought to acquire: a 4.78 acre parcel suited to the development of 48 semi-detached residential units. The remaining Ballantry purchases were even less comparable to Southcott's target property. The Board had the burden of establishing the comparability of these properties. It failed to do so.

[90] I see no error in the trial judge's conclusion that the evidence as to other Ballantry properties did not establish opportunities to mitigate the loss suffered as a result of the Board's breach of contract.

voulait acquérir. Aux termes de son contrat avec le conseil scolaire, Southcott achetait, dans un quartier résidentiel recherché de la ville de Toronto, une parcelle de terre de 4,78 acres qui se prêtait à la construction de 48 habitations jumelées (par. 132). Aucune preuve n'indiquait qu'un des autres terrains acquis par le groupe Ballantry était comparable. Il ne suffit pas de démontrer que des sociétés préconisant des stratégies de mise en valeur différentes auraient pu acquérir un terrain se prêtant à la mise en valeur. Les intérêts de Ballantry en matière de projets immobiliers résidentiels dans la région métropolitaine de Toronto étaient très variés. Le projet de mise en valeur envisagé par Southcott était plus restreint et plus précis. Pour démontrer une possibilité de mitiger le préjudice, le conseil scolaire devait prouver qu'il se trouvait sur le marché une propriété comparable à celle que Southcott avait tenté d'acquérir.

[89] Avec égards, je ne partage pas l'opinion de la juge Karakatsanis (au par. 56) suivant laquelle deux des propriétés acquises subséquemment par le groupe Ballantry étaient de toute évidence comparables à celle que Southcott souhaitait acheter. La première (une parcelle de 2,7 acres payée 3,3 millions de dollars) était 43 p. 100 plus petite, coûtait 70 p. 100 plus cher l'acre et a été achetée pour y construire une maison de retraite. La seconde (une parcelle de 2,3 acres payée 6 millions de dollars) était 51 p. 100 plus petite que le terrain recherché par Southcott, coûtait 260 p. 100 plus cher l'acre et a été achetée pour y construire un immeuble de grande hauteur. Selon le dossier, ces propriétés n'étaient pas comparables à celle que Southcott voulait acquérir : une parcelle de 4,78 acres qui se prêtait à la construction de 48 habitations jumelées. Les autres propriétés acquises par le groupe Ballantry étaient encore moins comparables à celle que Southcott voulait acheter. Le conseil scolaire avait le fardeau d'établir la comparabilité de ces propriétés. Il ne l'a pas fait.

[90] Selon moi, le juge de première instance a eu raison de conclure que la preuve relative aux autres propriétés acquises par le groupe Ballantry n'a pas établi des possibilités de mitiger la perte attribuable à l'inexécution du contrat par le conseil scolaire.

IV. Did Southcott Act Reasonably?

[91] The trial judge's finding that the Board failed to establish that Southcott had opportunities to mitigate its loss is sufficient to dispose of the appeal. However, I offer the following comments on whether the Board established, as it was also required to do, that failure to take advantage of any proven opportunities for mitigation was unreasonable.

[92] In my view, it is difficult to conclude that Southcott acted unreasonably. The first reason is that it had a "fair, real, and substantial justification" for claiming specific performance of the contract: *Asamera*, at pp. 667-68. In such circumstances, a plaintiff is not required to mitigate. As explained in *Asamera*, this is simply an application of the rule of mitigation requiring the plaintiff to act reasonably in the circumstances:

> Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable . . . . [pp. 668-69]

[93] The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its loss at the same time. It makes no sense for a reasonable plaintiff seeking specific performance to effectively concede defeat and buy a substitute property. The plaintiff could end up with two properties — one it wanted and one it did not. Furthermore, an action for specific performance is often motivated by the unavailability of substitutes in the marketplace. A plaintiff's reasonable claim that substitutes are unavailable is inconsistent with the ability to acquire a substitute in the marketplace (E. Yorio, "A Defense

IV. Southcott a-t-elle agi raisonnablement?

[91] La conclusion du juge de première instance selon laquelle le conseil scolaire n'a pas établi que Southcott avait eu des possibilités de mitiger sa perte suffit pour disposer du pourvoi. J'ajoute toutefois les observations qui suivent quant à savoir si le conseil scolaire a établi, comme il devait également le faire, qu'il aurait été injustifié pour Southcott de ne pas se prévaloir de possibilités prouvées de mitiger le préjudice.

[92] À mon avis, il est difficile de conclure que Southcott a agi de manière injustifiée. Tout d'abord parce qu'elle avait des « motifs équitables, réels et importants » de réclamer l'exécution intégrale du contrat : *Asamera*, p. 667-668. Dans de telles circonstances, un demandeur n'a aucune obligation de mitiger sa perte. Ainsi que l'explique la Cour dans *Asamera*, il s'agit simplement de l'application de la règle en matière de mitigation du préjudice selon laquelle le demandeur doit agir raisonnablement dans les circonstances :

> Le seul cas où un demandeur peut justifier son inaction est celui où l'action en exécution intégrale, par opposition à une action en dommages-intérêts, est fondée sur un intérêt important et légitime; dans ce cas, s'il n'obtient pas l'exécution intégrale, il peut obtenir des dommages-intérêts pour des pertes qui, en d'autres circonstances, auraient pu être évitées et pour lesquelles il n'aurait donc pas pu se faire indemniser. [p. 668-669]

[93] Le dépôt d'une demande d'exécution intégrale n'est pas compatible avec l'acquisition d'un bien de substitution. Le demandeur qui agit raisonnablement ne peut réclamer l'exécution intégrale du contrat et en même temps mitiger son préjudice. Il est illogique pour le demandeur raisonnable qui cherche à obtenir l'exécution intégrale d'un contrat de concéder la victoire à la partie adverse et d'acquérir un bien de substitution. Il risquerait de se retrouver avec deux propriétés — celle qu'il voulait obtenir et une autre dont il ne voulait pas. En outre, l'action en exécution intégrale est souvent motivée par l'absence de biens de substitution sur le marché. Il est incohérent que le demandeur qui allègue de manière justifiée l'absence de biens de substitution

of Equitable Defenses" (1990), 51 *Ohio St. L.J.* 1201).

[94] In the end, the trial judge dismissed the claim for specific performance. However, that does not mean that Southcott acted unreasonably in pursuing the claim. Whether a plaintiff had a "fair, real, and substantial justification" for maintaining a specific performance claim is a different question from whether specific performance should be granted at the conclusion of the trial when all the evidence is in and appraised by the trial judge. Plaintiffs can never be certain that an action for specific performance will succeed, particularly as this is an equitable, discretionary remedy. Demanding that losses be mitigated unless success in obtaining specific performance is assured would deter valid claims for specific performance and hold plaintiffs to an impossible standard.

[95] The trial judge, while ultimately rejecting Southcott's claim for specific performance, did not find that Southcott acted unreasonably in pursuing that remedy. Nor does there appear to be a basis for such a finding. It can be fairly argued that Southcott did not act unreasonably in pursuing specific performance of the contract. The property was uniquely suited to Southcott's needs for single-family residential development within the City of Toronto. Though the common law presumption of the uniqueness of real property no longer holds, a claim for specific performance may still be reasonable if a property has unique characteristics such that a substitute property is not readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22. Southcott's contention that there was no comparable substitute property found support in the evidence.

[96] Another reason for failing to acquire and develop a substitute property, assuming such a

sur le marché ait la possibilité d'acquérir ces mêmes biens (E. Yorio, « A Defense of Equitable Defenses » (1990), 51 *Ohio St. L.J.* 1201).

[94] En définitive, le juge de première instance a rejeté la demande d'exécution intégrale. Cela ne signifie pas cependant que Southcott a agi de façon déraisonnable en présentant cette demande. La question de savoir si le demandeur avait des « motifs équitables, réels et importants » qui le justifiaient de donner suite à son action en exécution intégrale se distingue de celle de savoir s'il y a lieu d'ordonner l'exécution intégrale à l'issue du procès, une fois que toute la preuve est versée au dossier et appréciée par le juge de première instance. Les demandeurs ne peuvent jamais avoir la certitude que leur action en exécution intégrale sera accueillie, d'autant plus qu'il s'agit d'une réparation en equity qui est discrétionnaire. Exiger des demandeurs qu'ils mitigent leurs pertes s'ils ne sont pas assurés d'obtenir une ordonnance d'exécution intégrale les dissuaderait de présenter des demandes valides d'exécution intégrale et leur imposerait une norme impossible à satisfaire.

[95] Tout en rejetant finalement l'action de Southcott en exécution intégrale, le juge de première instance n'a pas conclu que Southcott avait agi de manière déraisonnable en exerçant ce recours. Rien ne semble appuyer une telle conclusion. On pourrait à juste titre prétendre que Southcott était justifiée de réclamer l'exécution intégrale du contrat. La propriété se prêtait particulièrement bien aux besoins de Southcott pour la construction d'un complexe résidentiel unifamilial dans la ville de Toronto. Même si la présomption de la common law en faveur du caractère unique des biens immeubles n'a plus sa place, une action en exécution intégrale peut quand même être justifiée si un bien possède des caractéristiques uniques faisant en sorte qu'il ne serait pas facile de le remplacer par un autre bien : *Semelhago c. Paramadevan*, [1996] 2 R.C.S. 415, par. 22. La preuve appuyait la prétention de Southcott selon laquelle aucun terrain de substitution comparable n'était disponible.

[96] Le manque de ressources financières constitue une autre raison pour laquelle Southcott n'a pas

property had been available, is that Southcott lacked financial resources. Southcott did not have the financial capacity to go into the market and purchase a substitute property. It was a single-purpose company with no assets other than the $344,000 advanced to it by Ballantry for the deposit on the target property (trial judgment, at para. 137). Whether it could have obtained financing to buy a different property is at the very least speculative.

[97] In summary, I see no basis for concluding that Southcott acted unreasonably in failing to mitigate its loss, assuming that opportunities to do so were available.

V. Conclusion

[98] I see no basis upon which to set aside the trial judge's conclusion that the defendant did not prove that the plaintiff unreasonably failed to mitigate its loss. His conclusions find support in the evidence and the law.

[99] I would allow the appeal and restore the judgment of the trial judge.

Appeal dismissed with costs. Cross-appeal dismissed without costs, McLachlin C.J. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: Lenczner Slaght Royce Smith Griffin, Toronto; Davis Moldaver, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Miller Thomson, Toronto.

acquis et mis en valeur une propriété de substitution, en supposant qu'une telle propriété ait été disponible. Southcott n'avait pas la capacité financière d'acheter sur le marché un terrain de substitution. Cette société à but unique avait pour seuls actifs les 344 000 $ avancés par le groupe Ballantry pour verser le dépôt en vue de l'achat du terrain du conseil scolaire (jugement de première instance, par. 137). La question de savoir si elle aurait pu obtenir le financement pour l'achat d'un terrain différent reste à tout le moins conjecturale.

[97] En résumé, je ne vois aucune raison de conclure que Southcott a agi de façon injustifiée en faisant défaut de mitiger sa perte, en supposant qu'elle ait eu des possibilités de le faire.

V. Conclusion

[98] Je ne vois rien qui m'autorise à écarter la conclusion du juge de première instance selon laquelle le défendeur n'a pas prouvé que le défaut de la demanderesse de mitiger sa perte était injustifié. La preuve et la jurisprudence étayent ses conclusions.

[99] Je suis d'avis d'accueillir le pourvoi et de rétablir le jugement du juge de première instance.

Pourvoi rejeté avec dépens. Pourvoi incident rejeté sans dépens, la juge en chef McLachlin *est dissidente.*

Procureurs de l'appelante/intimée au pourvoi incident : Lenczner Slaght Royce Smith Griffin, Toronto; Davis Moldaver, Toronto.

Procureurs de l'intimé/appelant au pourvoi incident : Miller Thomson, Toronto.

» **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

REPLY 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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