**CITATION:** Harris v. Leikin Group Inc., 2013 ONSC 1525
**COURT FILE NO.:** 08-CL-7482
**DATE:** 20130312

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

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| **BETWEEN:** | |
| Adam Leikin Harris, Naomi Sara (Harris) Stanton, Sheira Rachel Harris, Zena Leah Harris, Hilliard Brian (Rick) Kesler and David Joseph Spieler<br><br>Plaintiffs | R. Bennett, S. Erskine and D. Barbaree, for the Plaintiffs |
| **– and –** | |
| Leikin Group Inc., Barbara Linda Farber, David Lawrence Katz, Andrew Mark Katz, Grant Jameson, Geoffrey Gilbert, Ogilvy Renault LLP, Ingrid Levitz, in her capacity as estate trustee with a will of the Estate of Gerald Levitz, Patricia Day, Ginsburg Gluzman Fage & Levitz LLP and First Capital Realty Inc.<br><br>Defendants | S. Victor, Q.C. and D. Cutler, for the Defendants, Barbara Linda Farber, David Lawrence Katz and Andrew Mark Katz<br><br>D. Scott, Q.C. and I. Mentina, for the Defendant, Leikin Group Inc.<br><br>B. Zarnett, J. Kimmel and S. Gotlieb, for the Defendants, Ogilvy Renault LLP, Grant Jameson and Geoffrey Gilbert<br><br>Alan D'Silva, L. Mercer and S. Clarke, for the Defendants, Ingrid Levitz, in her capacity as estate trustee with a will of the Estae of Gerald Levitz, Patricia Day and Ginsburg Gluzman Fage & Levitz LLP<br><br>**HEARD:** May 28, 29, 30, 31, June 1, 5, August 9 and 10, 2012 |

**REASONS FOR JUDGMENT**

**D. M. BROWN J.**



## I. Overview

[1] In 2005 eight of eleven cousins, who together constituted the owners of the common shares of a group of closely-held family companies, the Leikin Group, decided to monetize the value of their interests in the two core assets of those companies – shopping centres in the Ottawa area. They entered into a share redemption transaction with the family companies. In order to fund the share redemptions the non-selling cousins brought in an equity investor who purchased a 50% stake in the key asset – the College Square shopping centre. The equity investor was a public company which immediately made known the fact and the price of its acquisition. The selling cousins found out that the price paid by the equity investor reflected a much higher value attributed to College Square than the price on which the share redemption transaction had been negotiated.

[2] Some of the selling cousins – six of the eight to be precise - thought they had been hard done by their non-selling cousins. (Two of the eight did not, and they did not join in this lawsuit.) Nevertheless, the six cousins waited almost two years before commencing this action. They sued their non-selling cousins, the family companies' lawyers and accountants, as well as the public company which paid hard cash for its share of College Square. The selling cousins seek damages of $11 million for what they view as their share of the difference in value between the amount attributed to College Square in the share redemption transaction and that in the arm's-length sale to the public equity investor.

[3] For the reasons set out below, I dismiss the action.

## II. Procedural history

[4] In January, 2011, all defendants moved for summary judgment. I granted summary judgment in favour of the public equity investor, First Capital Realty Inc., and dismissed the action against it, while directing a trial of the claims against the other defendants.[1] The Court of

[1] 2011 ONSC 3556 ("SJ Reasons").

Appeal dismissed the plaintiffs' appeal from my order dismissing their action against First Capital Realty Inc.[2]

[5] Pursuant to directions which I gave in my Summary Judgment Reasons, the trial of this action adopted a hybrid form: (i) affidavits filed by witnesses on the motions served as part of their examination-in-chief at trial; (ii) transcripts of the examinations conducted for the motions – cross-examinations and Rule 39.03 examinations – served as part of the cross-examination of a witness at trial; and, (iii) the *viva voce* evidence led at trial, both during examinations-in-chief and cross-examinations, focused on the key issues in dispute.[3] I wish to compliment counsel on conducting an efficient, focused trial.



## III. The parties

### A. Harry and Zena Leikin

[6] The late Harry Leikin was a dairy farmer in the Ottawa area who, during the latter part of his life, assembled, developed and managed properties through a number of companies: Harry Leikin Holdings Limited ("HLH"), Harzena Holdings Limited ("Harzena"), Zena-Kinder Holdings Limited ("ZKH") and Zena's Fisher Heights Plaza Limited ("ZFHP"). The parties have referred to these corporations collectively as the Leikin Group of Companies. The Group's major asset was College Square, a "big box" retail shopping centre located in the west end of Ottawa. HLH and Harzena together owned College Square.

### B. Their offspring

[7] Harry and his wife, Zena Harris, had four daughters: Josephine Harris, Ethel Kesler, Goldie Spieler, and Libby Katz. Harry ultimately put in place a governance structure for the Leikin Group which saw each of his four daughters hold seats on the companies' boards of directors. In 1982 Harry enacted an estate freeze which set up trusts for each of his grandchildren who were issued the common shares in the Leikin Group of companies. In 1996 the trustees distributed those shares directly to each grandchild.

### C. Their grandchildren

[8] The pedigree of those grandchildren is as follows. Josephine Harris is the mother of the plaintiffs Adam Harris, Naomi Stanton, Sheira Harris and Zena Harris (the "Harris Plaintiffs").

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[2] 2011 ONCA 790.
[3] SJ Reasons, para. 404.

All four grandchildren were Selling Shareholders. Sheira Harris and Zena Harris gave evidence in this proceeding.

[9] Ethel Kesler has three sons: the plaintiff Rick Kesler, and Steven and Ivan Kesler. All sold their shares under the transaction in question in this action. However, neither Steven nor Ivan joined their brother, Rick, as plaintiffs. Rick Kesler gave evidence in the proceeding.

[10] The third daughter, Goldie, had one child, the plaintiff, David Spieler, who started off as a Non-Selling Shareholder, but ultimately participated in the transaction as a Selling Shareholder. He testified throughout the proceeding.

[11] The other daughter, Libby Katz, had three children: the defendants Barbara Farber, Andrew Katz and David Katz (the "Katz Defendants", the "Katz Siblings", or the "Non-Selling Shareholders"). All three gave evidence in this proceeding.

[12] In these Reasons I shall follow the lead of the parties and refer to the plaintiffs as the "Selling Shareholders", and to the Katz Defendants as the "Non-Selling Shareholders".

[13] Only partial information about the background of Harry Leikin's grand-children was put before me. Initially, Josephine Harris filed the evidence on behalf of her four children but, by the time of the trial, Sheira and Zena had filed affidavits. Zena is a medical doctor. At the time of the transaction the plaintiff, Rick Kesler, was a lawyer practising customs and excise tax law as a partner in the Toronto office of Fraser Milner Casgrain LLP; he retired from the practice of law a few months after the share redemption transaction closed. David Spieler lived in Barbados where he owned and operated a pottery factory.

[14] David Katz lived in Montreal. His business background was in commercial real estate and shopping centre development. He was the President of the Leikin Group from 2003 until May, 2004. Andrew Katz was the President of Skypoint Capital, an Ottawa-based venture capital company. Prior to that he had been a senior executive with a public technology company and a partner of Deloitte & Touche. Barbara Farber was the CEO of the Leikin Group and had been involved with the companies for all her career.

**D. The Leikin companies**

**D.1 Common shares and Barbara Farber's special voting shares**

[15] Harry Leikin created an ownership structure for his companies which contained three key elements: (i) his grand-daughter, Barbara Farber, was issued a special class of preferred shares in the companies which carried voting rights which, in effect, gave Barbara control over the Leikin

Group of companies; (ii) each of his four daughters owned an equal number of preferred shares in ZKH; and, (iii) each of his 11 grand-children owned an equal number of common shares in the various companies comprising the Leikin Group. After Harry's death in 1998, Barbara became the Chief Executive Officer of the Leikin Group.



**D.2 Restrictions on the transfer of the shares**

[16] Harry Leikin incorporated into his business structure the principle that the shareholders of HLH and Harzena could not sell or transfer their shares to anyone other than the issue of Harry Leikin. This restriction was designed to keep the shareholdings and management of the business within the family, and it also drove the form of corporate re-organization through which the Non-Selling Shareholders effectively purchased the shares of the Selling Shareholders.

**D.3 Directorships**

[17] Each of the four daughters enjoyed a seat on the board of directors of the Leikin Group, as did Barbara Farber. Ethel, Libby and Goldie stepped down as directors around 2000, and their places were taken by their children, Rick Kesler, Andrew Katz and David Spieler. By 2004, when the events surrounding this lawsuit unfolded, the board of directors of the Leikin Group of Companies consisted of Josephine Harris, Rick Kesler, Andrew Katz, David Spieler and Barbara Farber. The CEO for the Leikin Group was Barbara and, for a period of time in early 2004, David Katz was the President.

**E. The non-family defendants**

[18] The defendant, Grant Jameson, was a partner at the defendant, Ogilvy Renault LLP (now Norton Rose LLP), who practiced corporate law at its Ottawa office. Jameson had started acting as corporate counsel for the Leikin Group of Companies in early 2003. Geoffrey Gilbert was an associate at Ogilvy Renault who assisted Jameson on the share redemption transaction.

[19] The defendant, Ginsburg Gluzman Fage & Levitz LLP, had acted for many years as the corporate accountants for the Leikin Group, including performing the annual audits of their financial statements. Gerald Levitz was the partner who had a long-term association with the Leikin Group of companies. On the share redemption transaction he was assisted by Patricia Day, another partner who was a chartered accountant. Mr. Levitz passed away in October, 2009; his estate was the defendant at trial.

## IV. A summary timeline and the key elements of the dispute in this action

### A. Who has sued and who has not

[20] This action involves a dispute amongst some, but not all, of the grandchildren concerning the share redemption transaction in 2005 which saw a majority of the grandchildren (8 of the 11) have their shares redeemed in companies which owned two significant, or core, shopping centre assets – College Square and Zena's Fisher Heights Plaza. Six of those eight selling grandchildren have brought this action seeking damages in respect of that share redemption transaction. Two of the selling shareholders – Ivan Kesler and Steven Kesler, the brothers of Rick Kesler – have not joined this action as plaintiffs. Evidently they were content with the share redemption transaction.

### B. An overview of the chronology

[21] The share redemption transaction between the Selling and Non-Selling Shareholders used a negotiated price which reflected an attributed value for College Square of $60 million. The later sale of a 50% interest in College Square to First Capital Realty ("FCR") to finance the share redemption transaction was at a price which reflected an attributed value of $78.8 million. The plaintiffs/Selling Shareholders alleged, in essence, that they should be entitled to share in some of the enhanced value attributed to College Square on the sale to FCR as a result of various alleged breaches of fiduciary duties by the defendants.

[22] In February, 2004, Josephine Harris, on behalf of the Harris Family plaintiffs, informed the Company that they wanted to cash-out their interests. This then prompted several other shareholders to offer to sell their shares. At an April 15 meeting of the Board, David Katz raised the possibility of a strategic alliance with FCR; the Board did not pursue the matter.

[23] Pressure mounted from some family members to monetize their interests in the Company, especially that related to College Square. In June then counsel for the plaintiffs wrote indicating that a majority of the shareholders wanted to redeem their shares or wind up the Company. The possible sale of College Square was also mentioned.

[24] In July, 2004, Barbara Farber approached the CIBC to act as an advisor, and that month the Board engaged CIBC to prepare a report valuing the Company's core developed assets – College Square and Fisher Heights – and developing a structure under which the plaintiffs could sell their shares.

[25] The CIBC secured an appraisal report from the Altus Group which valued College Square at $55 million as of August 1, 2004. The CIBC then submitted its own report on

September 23 describing a possible share redemption transaction structure by which the Selling Shareholders could monetize their interests in the core assets. Later that month the Board reviewed the report, as well as a draft letter of intent ("LOI") amongst the shareholders prepared by Ogilvy Renault.

[26] On October 1, 2004, information was circulated to the holders of common shares, including a term sheet for a proposed share redemption transaction, as well as the draft letter of intent. The LOI proposed a reorganization of the Leikin Group and a share redemption transaction, rather than a share purchase transaction. Grandfather's restriction on the transfer of Leikin Group shares drove the choice of that deal structure.

[27] Rick Kesler thought that a further appraisal of College Square should be obtained, so the Board retained Grant Edwardh, who submitted a review report dated October 20, 2004 suggesting revisions to the Altus Report. That then led to Altus sending the Company a revised valuation report dated November 5 increasing the appraised value of College Square.

[28] Extensive negotiations then ensued amongst the shareholders. For a period of time the parties broke off negotiations. Rick Kesler, and his legal partner, Jules Lewy, acted as the principal negotiators for the Selling Shareholders. Ultimately on April 18, 2005 the shareholders executed a Letter of Intent for a share redemption transaction in which the negotiated transaction price used a value of $60 million for College Square. The LOI provided the Non-Selling Shareholders with a window of 120 days in which to secure financing for the share redemption and the method of financing was in their "sole discretion".

[29] Shortly after executing the LOI the Non-Selling Shareholders retained RBC Capital to run a marketing process for the sale of an interest in College Square to a third party equity investor. RBC circulated a Confidential Information Memorandum to interested parties and secured several letters expressing interest. After evaluating the expressions of interest RBC recommended the proposal by First Capital Realty as the superior one. On July 8 FCR formally offered to acquire a 50% interest in College Square for $39.4 million.

[30] On August 4, 2005 the share redemption transaction closed in escrow. On August 11 the Non-Selling Shareholders entered into an agreement of purchase and sale with FCR for a 50% interest in College Square. On September 29, the FCR transaction closed, and a few days later, on October 4, the Selling Shareholders received their proceeds from the share redemption transaction. Very shortly thereafter the Selling Shareholders learned of the FCR transaction when that company announced the completion of the deal in a press release. Almost two years passed before the plaintiffs/Selling Shareholders issued the Notice of Action for this proceeding on October 2, 2007, just a few days before the expiration of the limitation period.

## C. An overview of the claims advanced by the plaintiffs

[31] Before proceeding to review the key portions of the evidence and to make findings of fact, let me sketch the nature of the claims advanced by the plaintiffs so that a framework exists in which to understand the evidence.

[32] In this action the plaintiffs seek damages of $11 million from the defendants, which they contend was the "profit" earned by the Non-Selling Shareholders on their sale of an interest in College Square to FCR. In general terms the plaintiffs alleged against the defendants breaches of fiduciary duty or knowing assistance in breaching fiduciary duties owed to the plaintiffs, and against the Non-Selling Shareholders and the Leikin Group they also alleged oppression, breach of confidence, misuse of confidential information, and unjust enrichment.

[33] The essence of the plaintiffs' breach of fiduciary claims is that the defendants knew, before concluding the redemption of the Selling Shareholders' shares, that the true fair market value of College Square was significantly in excess of the value attributed by CIBC and its advisors which, the Selling Shareholders contend, formed the basis of the redemption transaction. Armed with that knowledge, it is alleged, the Non-Selling Shareholders were able to buy out the other family members at an unreasonably low price and then, immediately upon locking up the redemption of those shares, sell part of College Square to FCR based on a much higher value. The resulting "profit" earned by the Non-Selling Shareholders is what the plaintiffs seek to recover in this lawsuit.

### C.1 As against the Non-Selling Shareholders and the Leikin Group

[34] The plaintiffs claim against the Non-Selling Shareholders and the Leikin Group for damages for breach of fiduciary duty, oppression, breach of confidence, misuse of confidential information and unjust enrichment. The plaintiffs pleaded that the Non-Selling Shareholders owed duties to all shareholders. Specifically, they asserted that the individual Non-Selling Shareholders, in their capacities as directors, officers or, in the case of David Katz, a former officer of the Leikin Group, owed a fiduciary duty "to all of the shareholders, including the Selling Shareholders" (i) to act in their best interests, (ii) to refrain from utilizing confidential information for their personal gain to the detriment of the Selling Shareholders, and (iii) to refrain from diverting a corporate opportunity for their personal benefit.

[35] The plaintiffs' opening and closing statements identified the following key elements of their claims against the Non-Selling Shareholders:

(i) The Non-Selling Shareholders possessed material information about the potential value of College Square which they failed to disclose to the plaintiffs, specifically the

existence and nature of discussions regarding the sale of College Square held with FCR;

(ii) By July 14, 2004, the Non-Selling Shareholders were aware that (a) FCR had expressed a strong desire to purchase an interest in College Square, (b) FCR had the wherewithal to purchase such an interest, and (c) FCR had been involved in negotiations with David Katz which had assigned a value to College Square in excess of $70 million;

(iii) The information about the dealings with FCR was material from the start of 2004 or, as put by the plaintiffs in their opening statement:

> It was material when David Katz was President of the companies; it was material when he was employed as a consultant; it was material when he communicated this information to the other Defendants to this action; and it was material when these Defendants pressed the Plaintiffs in negotiations to accept a significantly lower value for College Square in the share redemption transaction.

(iv) The Non-Selling Defendants were under a duty to disclose that information to the plaintiffs. The Non-Selling Shareholders owed the plaintiffs an *ad hoc* fiduciary duty because:

(a) they had undertaken to act in the plaintiffs' best interests by representing that the share redemption would be based on fair market value, the process would be open and transparent, and the process would be in the interests of all shareholders;

(b) they possessed information which by its very nature caused the plaintiffs to be vulnerable;

(c) this vulnerability could only be addressed properly through the disclosure of the FCR negotiations;

(v) This fiduciary duty could not be discharged by suggesting that the plaintiffs obtain independent legal advice or by the give-and-take of a process of negotiation. The duty could only be discharged by the disclosure of the material information; and,

(vi) By failing to disclose that material information and by concealing the FCR negotiations, the Non-Selling Defendants were able to manufacture a significant benefit – effectively they increased their interest in College Square from 27% to 50% without any financial contribution from them, all at the expense of the Selling Shareholders. The Non-Selling Shareholders intended to use the spread between the

> values assigned to College Square in the share redemption transaction and the price fetched on the subsequent sale of an interest in that property to a third party to increase their equity share in College Square.

[36] In their factum on the Summary Judgment motion, on which they relied at trial, the plaintiffs identified two ways in which the Non-Selling Shareholders stood as fiduciaries in relationship to the Selling Shareholders: (i) as directors and officers of the Company with duties "to the board of directors that flowed to all the shareholders", and (ii) as agents to their principal by virtue of "their undertaking to devise a strategy and process for the Selling Shareholders to liquidate their interests in College Square."[4]

[37] The plaintiffs also pleaded that the Non-Selling Shareholders, as directors and officers (or former officer), owed a duty to the corporation not to divert a corporate opportunity for their personal benefit. Although the *Ontario Business Corporations Act* provides for shareholders to seek leave of the court to commence a proceeding against directors and officers for breach of a duty to the corporation, no such leave has been sought or received in respect of this element of the plaintiffs' claim, so I give no effect to it.[5]

[38] The Non-Selling Shareholders argued that they owed no fiduciary duty to the plaintiffs, largely for two reasons: (i) the level of mistrust between the two sides of the family militated against the creation of a fiduciary relationship; and, (ii) the share redemption transaction essentially placed one group of shareholders in a position opposite to the interests of the other – the transaction involved classic self-interested negotiations. Further, the Non-Selling Shareholders contended that they did not fail disclose any material facts.

### C.2 As against the lawyers, Grant Jameson, Geoffrey Gilbert and Ogilvy Renault LLP (the "Lawyer Defendants")

[39] In their opening and closing statements at trial the plaintiffs submitted that an *ad hoc* fiduciary relationship existed between the Lawyer Defendants and the plaintiffs, that the Lawyer Defendants owed them a duty to disclose material information, and that by failing to disclose the FCR negotiations, or assisting in its non-disclosure, they breached that duty. Specifically, the plaintiffs argued that by July 14, 2004, the Lawyer Defendants possessed information concerning the value of College Square, FCR's willingness to purchase an interest in the asset, and the goal

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[4] Plaintiffs' Summary Judgment Factum, para. 183.
[5] *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 246(1); *BCE Inc .v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, para. 43.

of the Non-Selling Shareholders in the share redemption transaction to gain an equity control over College Square which they did not have at the expense of the plaintiffs.

[40] In their Statement of Claim the plaintiffs alleged that because the Leikin Group was a closely-held family corporation and Jameson had acted as corporate secretary at board meetings, the Lawyer Defendants owed a fiduciary duty to both the corporation and its shareholders. The plaintiffs also pleaded that the Lawyer Defendants knowingly assisted the Non-Selling Shareholders in breaching their fiduciary duties to the plaintiffs and the corporation.

[41] In response, the Lawyer Defendants argued that they were the solicitors for the companies and owed no fiduciary obligation to the shareholders to look out for and protect their personal self-interests. Those personal interests, these defendants argued, were protected by the independent legal and financial advice the plaintiffs received concerning the reorganization and the share redemption transaction. The Lawyer Defendants also contended that they did not possess any material information about the dealings with FCR which they failed to disclose to the plaintiffs.

[42] At trial the plaintiffs disputed the suggestion made by the Lawyer Defendants that they were acting as mere conduits of information between the Selling and Non-Selling Shareholders. It was the plaintiffs' position that the Lawyer Defendants were acting on the instructions of the Non-Selling Shareholders, even when those instructions were to the detriment of the plaintiffs or the company itself.

### C.3 As against the accountants, Patricia Day, the estate of Gerald Levitz and Ginsburg Gluzman Fage & Levitz LLP (the "Accountant Defendants")

[43] In their opening and closing statements at trial the plaintiffs submitted that an *ad hoc* fiduciary relationship existed between the Accountant Defendants and the plaintiffs, that the Accountant Defendants owed them a duty to disclose material information, and that by failing to disclose the FCR negotiations, or assisting in its non-disclosure, they breached that duty. Specifically, the plaintiffs argued that by July 14, 2004, the Accountant Defendants possessed information concerning the value of College Square, FCR's willingness to purchase an interest in the asset, and the goal of the Non-Selling Shareholders in the share redemption transaction to gain an equity control over College Square which they did not have at the expense of the plaintiffs.

[44] The plaintiffs alleged that the Accountant Defendants "acted as the corporate accountants" for the Leikin Group and "in respect of the share redemption transaction, were providing professional accounting advice to the corporation, its Board of Directors and all of the shareholders." At the same time, the plaintiffs claimed that the Accountant Defendants "took

direction from some or all of the Non-Selling Shareholders exclusively in respect of the financial affairs of the company". The plaintiffs also pleaded that the Accountant Defendants knowingly assisted the Non-Selling Shareholders in breaching their fiduciary duties to the plaintiffs and the corporation. Further, the plaintiffs alleged that at certain points in the transaction Gerald Levitz provided them with advice concerning the transaction, on which they relied.

[45] The Accountant Defendants took the position that they owed no fiduciary duty to the individual shareholders, knew nothing of any deal with FCR until after the August, 2005 agreement was executed, prepared various calculations using numbers provided by the management of the Leikin Group and, as accountants for the corporation, appropriately released to the plaintiffs only those calculations which management had directed them to provide.

## V. How I intend to deal with the evidence

[46] As a result of the directions I gave when disposing of the summary judgment motions, the evidence at trial consisted of that adduced on the summary judgment motions, together with additional evidence tendered at the trial. My Summary Judgment Reasons contained a detailed review of the evidence led on those motions. In these Reasons I will recite most, but not all, of that evidence, but I do wish to emphasize that in preparing these trial Reasons I have reviewed and taken into account all of the evidence set out in my Summary Judgment Reasons, in particular the evidence found in paragraphs 42 to 273, 306 to 308, 346 to 364, and 384 to 390 of those Summary Judgment Reasons. As I proceed through the chronology of events in these trial Reasons, I will identify those portions of the Summary Judgment Reasons which contained evidence relating to the particular events which I have reviewed and considered.

[47] What I propose to do in these Reasons is to draw on all of that evidence in order to make the necessary findings of fact to determine the issues at trial. I will take into account the following findings of fact which I made at paragraph 274 of my Summary Judgment Reasons largely concerning the dealings between the Non-Selling Shareholders and FCR. Specifically, I made the following findings of fact:

(i) Prior to the commencement of negotiations amongst the shareholders in November, 2004, First Capital had not entered into any binding agreement to acquire an interest in College Square. First Capital had not even made an offer to the Leikin Group for such an interest. What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

(ii) At the time the shareholders executed the LOI on April 18, 2005, First Capital had not made any offer to acquire an interest in College Square, let alone enter into any binding agreement to do so. To the contrary, First Capital was told by the Leikin Group in October, 2004 that no further discussions could be held until the company had resolved its internal affairs;

(iii) First Capital made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005;

(iv) A binding agreement of purchase and sale for an interest in College Square was entered into between First Capital and the designated Leikin Group entity on August 11, 2005. No prior binding agreement had been entered into;

(v) David Katz commenced discussions with First Capital about the possibility of that company acquiring an interest in College Square in January, 2004. He continued those discussions in February, 2004, and from July until October, 2004. As was described in the engagement letter for RBC Capital, by October, 2004 those discussions had reached an "advanced" stage before they were terminated by the Leikin Group;

(vi) During their discussions in January and February, 2004, David Katz and Sylvie Lachance had talked about a possible acquisition price using a 100% value for College Square in the low 70 millions;

(vii) From the beginning of the discussions about the possible sale of shares by certain shareholders in early 2004, the relationship between the plaintiffs (except for David Spieler) and the Katz Siblings was marked by significant mistrust. By April or May, 2005, a similar lack of trust had emerged between David Spieler and the Katz Siblings;

(viii) Throughout their dealings with the Leikin Group and the Non-Selling Shareholders, the plaintiffs had access to, and availed themselves of, independent legal and accounting advice; and,

(ix) As a result of market commentary contained in the Edwardh Report and the updated Altus Group Report in September and October, 2004, the Selling Shareholders knew,

> or reasonably ought to have known, that the CIBC valuation of College Square had been undertaken in a hot, rising market where investors were aggressively pursuing opportunities to purchase assets such as College Square.[6]

In my Summary Judgment Reasons I concluded:

> The plaintiffs alleged and argued that some sort of deal existed with First Capital before negotiations on the LOI started in the fall of 2004 and before the LOI was executed. No evidence supported that allegation. Certainly First Capital expressed an interest in College Square to David Katz in early 2004, and the parties pursued their discussions in the late summer of 2004. But that is all they were – discussions. No agreement was reached; no commitment was made by First Capital.[7]

[48] With that by way of background, let me turn to a consideration of the evidence.

## VI. The state of family affairs at the beginning of 2004[8]

[49] Prior to the events of 2004 strained relationships had existed amongst the children of Harry Leikin and their children. Josephine Harris described the relationships amongst the Leikin sisters and the grandchildren in early 2004 as ones characterized by conflict and lack of trust. She recalled the relationships as "fractious" going back to at least 2002, and that as of 2004 the relationships amongst the grandchildren featured mistrust and disagreement. Rick Kesler deposed that Barbara Farber's style of management was causing tension within the family and he agreed that the board was emotional and polarized. David Spieler deposed that by 2002 tensions in the family business were very high, and he described his four Harris cousins and Stephen Kesler as "bugbears". Business relations amongst family members were so strained that in 2002 Barbara Farber had retained the KPMG Centre for Family Business in an effort to resolve family business issues.

[50] Jameson deposed that when he started providing legal services to the Leikin Group in 2003, the common shareholders were a fractious group and little trust or cooperation existed amongst them. He knew there was acrimony between the directors, as well as issues of trust.

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[6] SJ Reasons, para. 274.
[7] SJ Reasons, para. 311.
[8] The evidence which was before the court on the summary judgment motions was referenced at paragraphs 42 to 46 of the SJ Reasons.

[51] David Katz was involved formally in the affairs of the Leikin Group for some time before the transaction. From 2001 until 2003 he acted as a consultant to the Leikin Group. He then served as the President of the Leikin Group from June, 2003 until May, 2004, when some of the directors required him to resign.

[52] At the material times in 2004 and 2005 the boards of directors of the Leikin Group of companies consisted of Barbara Farber, Andrew Katz, Rick Kesler, David Spieler and Josephine Harris – i.e. the boards consisted of three Selling Shareholders (Kesler, Spieler and Harris) and two Non-Selling Shareholders (Farber and Andrew Katz).

## VII. January – April 15, 2004: The initiation of the share sale process[9]

[53] At a board meeting on February 6, 2004, Josephine Harris informed the other directors that the Harris Plaintiffs wanted to sell their shares in the Leikin Group and had retained a Chicago lawyer and accountant, James Mainzer, to advise them on the sale. Mainzer specialized in federal income tax and estate planning. The Harris Family did not like the management style of Barbara Farber or the involvement of David Katz in the business, and they wanted to liquidate the value of their interests in the business. As Harris testified: "My children needed to redeem or rescue their shareholdings which we felt were not in safe hands." Mainzer sought and obtained information from the Accountant Defendants so the Harris Plaintiffs could assess the value of the shares.

[54] David Spieler's initial reaction to the proposal of the Harris Family was not positive. He emailed Ms. Farber on February 10 querying why "our company should pay full value for redeemed shares to quitters and make it easy to go while we hold the bag".

[55] Farber circulated a letter to all shareholders on February 12, 2004 telling them of the decision of the Harris Plaintiffs and stating that because the companies lacked sufficient cash to fund the share purchase without incurring debt, undoubtedly the cost of servicing any debt required to buy-out the shares would have a material impact on the companies' ability to pay dividends. Farber also wrote that neither she, David Katz nor Andy Katz were interested in selling their shares and she requested any other shareholder interested in selling their shares to let her know by February 20, 2004 so that the companies could have a clear idea of the amount needed to buy the shares.

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[9] The evidence which was before the court on the summary judgment motions was referenced at paragraphs 47 to 55 of the SJ Reasons.

[56] Around this time the Katz Family shareholders discussed the possible retainer of CIBC Mid-Market Investment Banking to provide advice regarding the Harris Family's interest in selling their shares. No retainer with CIBC was entered into at that time.

[57] On February 24 Barbara Farber emailed all shareholders and directors a one-page memo setting out how a common shareholder could submit an offer to sell all of his or her shares. That elicited a February 25 memo from Rick Kesler to all shareholders, on the letterhead of Fraser Milner Casgrain, in which he observed that if a sufficient number of shareholders wanted to sell their shares, the corporation might have to purchase them and that, in turn, would require the consideration of various financing options. Mr. Kesler called for a directors' meeting to consider those issues. On February 27 Rick Kesler told Mainzer that at the next Board meeting he planned to propose the liquidation of all the entities rather than using a process under which shareholders could sell their shares.

[58] Mainzer asked Gerald Levitz, the accountant for the Leikin Group, to provide financial information about the company to assist his clients in selling their shares in the Leikin Group. Levitz did so on February 26, 2004. Harris deposed that the information was used by Mr. Mainzer, their advisor, to "attempt to figure out what a potential value of the shares would be." Based on information he had obtained from GGFL, Mainzer prepared a spreadsheet around March 29 on which he listed the gross value of College Square at $60 million. He passed that information along to Kesler, who in turn sent it to one of his FMC partners, Mr. Jules Lewy.

[59] On March 12 Steven Kesler sent Farber a letter offering to sell his shares in the Leikin Group for $5.3 million.

[60] On April 14 Mainzer sent Farber a letter containing an offer by the Harris Plaintiffs to sell their shares for $6.2 million for each interest (or $24.8 million in total). According to Mainzer had "put a value" on the shares based, he said, on the information which had been provided by GGFL. Harris testified that although the letter talked of a sale of the shares to the remaining shareholders, she always understood that the transaction would require a redemption of their shares by the corporation. At trial Mainzer described the expectations of his clients at the time of their offer as follows:

> Q. And it would be fair to say that with your experience and what you knew on April 14, 2004 that after your clients had sold their shares, the remaining shareholders, and the remaining corporate entities would've been free to do whatever they wanted with the properties?
>
> A. Yes.

> Q. And was there any consideration with the Harris family children that if they sold their shares, pursuant to the terms of the April 14th letter, and they found out later on that the properties had increased in value that they would – they would consider coming back and suing the selling shareholders?
>
> A. I have no idea.
>
> Q. That wasn't discussed?
>
> A. No.

[61] On May 12 Kesler offered to sell his shares for $6 million which reflected his best guess at the value of his shares. Combined, these offers would require the Leikin Group to fund buy-outs totaling $36 million.

[62] Although each offer to sell contained an expiration date, Farber did not respond to the offers by those dates because, she deposed, to purchase or redeem the proffered shareholdings would require over $36 million and "it was unclear as to whether such transactions would even be possible."

## VIII. The dealings between Katz and First Capital Realty prior to the April 15, 2004 Board meeting[10]

### A. The initial contact

[63] The Leikin Group held a Board meeting on April 15, 2004. Prior to that meeting David Katz had engaged in some discussions with FCR about entering into a development and acquisition arrangement for non-enclosed retail developments within the greater Ottawa area. Katz described this as discussing a possible "strategic alliance". Katz regarded the College Square development as an integral part of the strategic alliance he wished to discuss with FCR, including the sale of a partial interest to FCR.

[64] The contact between Katz and FCR came about in the following way. At the time Sylvie Lachance was the Executive Vice-President and Chief Operating Officer of First Capital. FCR focused on owning, developing and operating supermarket and drugstore-anchored shopping centres. Lachance's job was to search for new properties.

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[10] The evidence which was before the court on the summary judgment motion can be found in paragraphs 64 to 76 of the SJ Reasons.

[65] In December, 2003, as a result of a discussion at a trade conference, David Katz had sent FCR a list of some properties which might be of interest to it; College Square was not on the list. Lachance could not recall who next called whom, but in early 2004 she began to deal with Katz about a strategic alliance, including a co-tenancy arrangement for College Square. She dealt with David Katz because she understood that he was a representative for the shopping centre's owners which she knew were a group of family members. Lachance described Katz as a very reputable business person.

[66] Lachance testified that FCR generally used a multi-stage approach to acquiring properties: first pursuing exploratory discussions, followed by signing a non-binding letter of intent or expression of interest, then conducting due diligence, seeking senior management approval, and then executing a binding agreement of purchase and sale.

[67] FCR signed a confidential disclosure agreement dated February 9, 2004 which had been requested by David Katz in anticipation of the discussions in order to protect financial information regarding College Square which David Katz planned to disclose to FCR. Lachance regarded the request as "customary". The disclosure agreement described the confidential information to be disclosed as "general business opportunities" and stated that any information would be used only for the purpose of "evaluating for possible investment in the retail development known as College Square…" Lachance testified that FCR normally was interested in purchasing 100% of a shopping centre, but it was open to acquiring a partial interest in College Square. Katz confirmed at that trial that by that point in time FCR had indicated to him that it was interested in College Square.

[68] Katz sent FCR an analysis of the College Square 10-year projected rental income stream which led him to estimate the market value of College Square as of February 10, 2004 at $72 million calculated on a discounted cash flow basis. He also sent to FCR a site plan, lease summary, and rent roll for College Square. Katz acknowledged that he obtained that information about College Square at a time when he was the President of the Leikin Group. At trial Katz was asked how he had arrived at the $72 million number. He replied:

> Well the main purpose of sending this report was really to give Ms. LaChance an understanding of the tenant mix and the cash flow, and the net operating income that was generated by the tenant mix. The valuation number of $72 million is not a market supported valuation, it wasn't tied to an appraisal or any relevant market activity. For me it represented an inflated value of College Square which was intentional on my part to commence discussions with Sylvie LaChance.

[69] Katz did not receive any response from FCR to this $72 million DCF analysis. He did not disclose that communication with Lachance to Farber or any other director on the Board.

When asked why he had not, Katz stated that he did not think that it was relevant for them to see that information.

[70] Using that information FCR prepared an internal Pro Forma Analysis – what Lachance called a "blue package" - in February, 2004, disclosing that the vendor, the Leikin Group, would be looking for $72 million to sell College Square, whereas FCR had run numbers suggesting a $66 million price. FCR used its "blue package" to start "conversations with the vendor." The cap rate used in the analysis was selected by a FCR analyst who was not preparing a valuation, but a range of indicative numbers. Lachance described the "blue package" as "a working document that we use internally so that we can discuss the asset internally." David Katz did not see a copy of the pro forma at the time.

[71] Lachance recalled that at the time "cap rates and value of properties were climbing…the market was changing constantly and it had reached its peak around 2006." Lachance remembered that in 2004 she discussed numbers with David Katz "in the neighbourhood of low 70 million", but "the real discussion took place in 2005". Katz testified that during the first two months of 2004 he did not talk with Lachance about a possible acquisition price using a 100% value for College Square in the low $70 million. He said he had transmitted the $72 million number to Lachance, but she had not responded at that time.

[72] In my Summary Judgment Reasons I made the following findings of fact:

(i) What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

(ii) During their discussions in January and February, 2004, David Katz and Sylvie Lachance had talked about a possible acquisition price using a 100% value for College Square in the low 70 millions.

As referenced in the Summary Judgment Reasons, the latter finding was based on the evidence given by Lachance on her pre-trial cross-examination, specifically the following passage:

> Q. 130. Okay, but this was the numbers that you were using to frame your discussion with Mr. Katz.
>
> A. The numbers that I recall we were discussing with Mr. Katz were in the neighbourhood of low 70 million.

> Q. 131. Okay. Thank you. And that's the number you were discussing in February of 2004?
>
> A. That's the number that I – in that period of time with Mr. Katz you mean?
>
> Q. 132. Yes.
>
> A. Yes. Now, "discussing" is a big word. We never had a firm discussion about price with Mr. Katz because we didn't have at that time an agreement. We never concluded anything in 2004, as you know. The real discussion took place in 2005.

[73] Lachance's qualification that "discussing" was "a big word" was an apt one. When taken in context, Katz's early February transmittal to FCR of a $72 million DCF-derived value for College Square was in the nature of a trial balloon floated by him to gauge FCR's interest in College Square. While FCR was interested in continuing discussions with Katz about co-tenancy principles, both generally and as they could apply to College Square, Katz had not received any sort of response from FCR to the $72 million number prior to the April 15, 2004 Leikin Group Board meeting. By the time of that meeting the $72 million remained simply a trial balloon floated by Katz.

**B. The March discussions on co-tenancy principles**

[74] Katz met with Lachance in Montreal on March 4, 2004. He testified that it was at that time the "our discussions really commenced in earnest". He mooted the idea of the Leikin Group and FCR working together in furthering their interests within the Ottawa market through a strategic alliance by identifying and pursuing opportunities for the betterment of both companies. College Square was mentioned in the course of that discussion. Katz testified:

> I was well aware of the fact that First Capital would covet the College Square property, the College Square property represented a best of class property that their portfolio consisted of. First Capital was a company that acquired properties such as College Square which were not enclosed Shopping Centres, that were food anchored, and College Square represented the very best of that class of asset, so that I knew that it would have First Capital's interest and I intentionally discussed it with them as an integral part of the strategic alliance discussion.
>
> …
>
> Well College Square was discussed within the context of a strategic alliance and it involved First Capital participating in the ownership of College Square, which would've involved Leikin Group selling a partial interest of College Square to First Capital as part of the strategic alliance.

[75] On March 5, following their meeting, Katz sent Lachance a memorandum describing a possible strategic relationship between the Leikin Group and FCR in the Ottawa market. In the memo Katz described the purpose of a strategic alliance in the following terms:

> For First Capital Realty and the Leikin Group to work in a collaborative manner in acquiring retail/commercial redevelopment opportunities and/or acquiring property for retail/commercial development within the Greater Ottawa Market, with the intention of becoming the dominant non-enclosed retail centre developer/asset manager within the market.

Katz proposed that the parties would hold their respective interests in properties as undivided co-ownership interests in proportions to be determined, and he contemplated that the co-ownership venture by the two companies could include College Square. Katz wrote that if the co-ownership arrangement did not reach a stipulated level of net income by the end of its first 10 year term:

> [T]he Leikin Group shall have the right to repurchase the minority interest in the asset known as College Square that it is intending to sell to First Capital Realty Inc., at a price that is equal to the price paid by First Capital Realty in acquiring such minority interest.

[76] From this memo it is clear that Katz was contemplating that as part of a larger strategic alliance between the two companies in the Ottawa area, FCR would acquire a minority interest in College Square. On cross at trial Katz stated: "I was in effect using College Square as a bit of a carrot I would say to attract First Capital and attract their interest and hopefully maintain their interest in discussing a strategic alliance…"

[77] Lachance secured a memorandum dated March 9, 2004 from Ms. Rita de Santis, a lawyer at Davies Ward Phillips & Vineberg, FCR's counsel, addressing a number of issues surrounding a co-ownership arrangement with the Leikin Group for College Square – the "re" line on the memo referenced "College Square" - and she sent the memo to David Katz. He, in turn, sent Lachance a memo dated March 12, 2004 giving his views on FCR's lawyer's memo. In that memo Katz wrote about "the fundamental principles which must govern the co-ownership arrangement pertaining to College Square…" Katz's thinking at that time about the reason for talking with FCR about College Square was captured in the following portion of his memo to Lachance:

> [The Lekin Group's] interest in selling a minority interest in [College Square] to [FCR] would be strictly and solely for the purposes of encouraging and facilitating the parties in entering into a co-ownership based development and acquisition arrangement, for non-enclosed retail developments within the Greater Ottawa Market ("Ottawa Co-ownership Agreement"), which would be substantially based on the draft outline transmitted on March 5th.

There was no suggestion by Katz in that memo that his interest in discussing a co-ownership arrangement with FCR for College Square had anything to do with the need to find financing for a potential purchase of the shares of some of the Leikin Group's shareholders.

[78] On his cross-examination on the summary judgment motion Katz had disagreed with the suggestion that by that point of time he was negotiating with Lachance: "We were discussing a co-ownership outline...It's not a product of negotiating." He described his discussions with Lachance as "exploratory". As he put it during that cross-examination:

> Q.: And if you reached a consensus of opinion, as you have stated it, would that not be then reflected in a co-ownership agreement that both of you could accept?
>
> A. If it was the intention of the parties to ultimately create a definitive co-ownership agreement, I would agree with you but that wasn't the intention here. The intention here, as I've mentioned, was to determine if we could reach consensus of opinion on co-ownership issues, nothing more.
>
> …
>
> It's not a negotiation. First Capital transmitted basic terms of a co-ownership outline for my review and I commented on that co-ownership outline through my memo of March the 12th. That's what was taking place.

[79] At this point a long lull occurred in the discussions between David Katz and Lachance. Katz testified that Lachance did not respond to his memo of March 12, 2004, and he had no further contact with Lachance prior to the April 15, 2005 Leikin Group Board meeting about College Square. (Some contact took place between them about a potential offer by FCR for another property, Perth Mews.) They only resumed their discussions in earnest in August, 2004, and I will return to those events later in these reasons. I should note that Ms. Lachance testified that she was not aware that Mr. Katz had resigned as the President of the Leikin Group in May, 2004, but, as she stated: "why should I have been concerned at this early stage?"

[80] Barbara Farber testified at trial that prior to the April 15 Board meeting she had not been aware of any discussions between her brother and FCR, save for one occasion when her brother had brought Lachance through their offices.

[81] Harris and Kesler had not been aware of the contact between Katz and Lachance prior to the April 15 Board meeting. Harris deposed that from her perspective, the March memoranda passing between Katz and FCR showed that "David Katz had engaged in negotiations with First Capital Realty regarding its acquisition of an interest in College Square", and that neither she nor

her children had been aware of those negotiations at the time of the April, 2004 Board meeting. Rick Kesler stated that he, too, had not been aware of those discussions with FCR.

**C. Findings of fact**

[82] I make the following findings of fact regarding the nature of the discussions which took place between Katz and FCR in 2004 prior to the April 15, 2004 Leikin Group Board meeting:

(i) As the President of the Leikin Group, David Katz was interested in positioning the company as a significant player in the Ottawa region shopping centre development business. Given the modest size of the Leikin Group, he decided that the company had to link up with a larger, established player through some form of strategic alliance;

(ii) Katz viewed FCR as a company which fit the bill for a possible strategic alliance;

(iii) In his initial overture to Lachance in early February, 2004, Katz tried to whet FCR's appetite for an alliance by indicating it would include an interest in College Square;

(iv) The $72 million estimate of value generated by Katz and sent to FCR was not based on any appraised value for College Square. Using his own assumptions about internal rates of return and capitalization rates, Katz ventured a $72 million value for the property. That number was in the nature of a trial balloon designed to gauge FCR's willingness to pursue discussions about a strategic alliance;

(v) Prior to the April 15 Board meeting FCR did not respond to Katz's trial balloon of $72 million. That said, FCR did express its willingness to talk about the general principles which would surround a co-tenancy strategic alliance between the two companies for various properties, including College Square, and it engaged with Katz in discussing some co-tenancy principles in the first part of March. But, by the time of the April 15 Board meeting over a month had elapsed since Katz had sent FCR his March 12 memo, and Katz had heard nothing further from FCR about College Square; and,

(vi) I accept, as an accurate description of the nature of these initial discussions between Katz and Lachance, Katz's description of them as "exploratory".

## IX. The April 15, 2004 Board meeting[11]

[83] A meeting of the Board of the Leikin Group was held on April 15, 2004. Harris participated in the April 15 Leikin Group Board meeting by way of telephone. The directors received an agenda in advance of the meeting. Item 4 on the agenda was a "review and approval of short and medium term strategic objectives"; Item 5 involved a "report on Leimerk".

[84] For the meeting Katz had prepared a PowerPoint presentation entitled, "Short & Medium Term Strategic Objectives". The presentation contained a number of slides dealing with a possible "Leikin Group-First Capital Realty Strategic Alliance". The slides described the purpose of the proposed alliance as working "in a collaborative manner in acquiring retail/commercial redevelopment opportunities and/or acquiring property for retail/commercial development within the Greater Ottawa Market…" A copy of Mr. Katz's PowerPoint presentation had been circulated to most directors prior to the meeting, although Harris did not recall receiving a copy before the Board meeting.

[85] A dispute existed between the Leikin family parties as to what David Katz told the Board at that meeting about his discussions with FCR, specifically as those discussions had related to College Square. I will first set out the evidence of each witness, and then make findings of fact.

### A. The evidence

#### *Josephine Harris*

[86] In her pre-trial affidavit Ms. Harris had given the following evidence about her recollection of what transpired at the April 15 Board meeting:

> David Katz began to make a presentation to the Board with respect to his position that the Leikin Group of Companies should enter into a strategic alliance with an arm's length third-party, First Capital Realty. During the presentation and the discussions, it was disclosed that David Katz had brought First Capital Realty through the Leikin Group of Companies corporate office located at College Square and to the Perth Mews shopping centre.

In his pre-trial affidavit Rick Kesler had deposed in respect of that recounting by his aunt of the events at the Board meeting:

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[11] The evidence before the court on the summary judgment motion can be found at paragraphs 56 to 60 of the SJ Reasons.

> My recollection of those events accords with Jo's recollection; however, I also recall that at the meeting Grant Jameson advised the Board that David Katz' actions were highly inappropriate and that he had breached his fiduciary duty to the companies.

[87] At trial, in chief, Ms. Harris recalled that David Katz had started to talk about Leimerk (Agenda Item 5) when the meeting came to a screeching halt and Katz did not get to finish his presentation because of an issue respecting the interest of Loblaws in Leimerk's Perth Mews shopping mall. On cross she stated that she did not know how far David Katz got in the agenda, but he did talk separately about Perth Mews and a strategic alliance with FCR. Harris recalled that Katz informed the Board that he had taken business people from Montreal to look at the Perth Mews shopping centre, and, as well, he had brought them to College Park and the company's business office. Harris found that "shocking". At the meeting Katz had identified the business people as from FCR.

[88] As to whether there was any mention at the Board meeting of an interest by FCR in acquiring an interest in College Square, at trial, in chief, Harris testified:

> Q. Ms. Harris at the April 15th board meeting was there any discussion with respect to College Square?
>
> A. No.
>
> Q. At any time during the board meeting do you recall whether there was a mention of anyone buying College Square or College Square being sold?
>
> A. Oh, no, no, on my first answer did we talk about College Square, I think it was such a source of pride that we rarely gathered that we didn't say this is good, and that the - our offices were good, and so on. So in that very – in that very familial way we may have talked about College Square, but certainly the issue of it being sold to anyone was unthinkable.
>
> Q. There was no discussion at that meeting regarding selling College Square?
>
> A. No, no, no.

[89] By contrast, on cross-examination at trial, Harris testified:

> Q. Well we've already gone over it First Cap – David Katz had presented a strategic alliance with First Capital and it was a relation to the Leikin Group. We've established that already Ms. Harris, and I'm indicating to you within that discussion of a strategic alliance between the Leikin Group, and First Capital Realty he indicated that First Capital had an interest in College Square as part of that strategic alliance?

A. I'm not – I'm not disagreeing with you, the answer would be yes, he indicated that.

[90] At trial on cross-examination Harris also testified:

Q. And I suggest to you that when dealing with this strategic alliance Mr. Katz informed the board that he had significant discussions with First Capital?

A. As a matter of fact I don't recall that, I do recall saying at that meeting how long have you been dealing with these people, and I said it sounds to me as though you've been – you've known about them for quite a long time.

Q. Right.

A. When did all this start, that was the line of questioning from me. It just it sounded as though it had gone back further than I was aware.

Q. My question is did Mr. Katz inform the board that there were ongoing discussions with First Capital, you would agree with that?

A. Yes.

Q. And he proposed to the board that the Leikin Group and First Capital would work together to grow the assets of the Leikin Group and First Capital in the Ottawa market?

A. Yes.

Q. And he advised the board, did he not, that no commitment was made with First Capital, did he not?

A. No commitment was made with First Capital at the time?

Q. With respect to the strategic alliance?

A. Umm-hmm. No, I don't recall – I don't recall that there was anything definite about a strategic alliance and the Leikin Group. I think he wanted that, that - that was what he hoped to do.

Q. And did Mr. Katz not say that it was his duty to bring these opportunities forward to receive the directions from the board to pursue with First Capital or not pursue with First Capital?

A. I think he said that, something like that, yes.

Q. And that all management was putting forward a framework which would be financially lucrative to both the Leikin Group and to First Capital?

A. Well we would need to see more, know more, uh-huh -

Q. But he indicated that he would -

THE COURT: Let the witness finish please.

MR. VICTOR: Sorry.

THE COURT: You would need to see more?

MS. J. HARRIS: A. Yes, and know more about what had been the relationship between David Katz and First Capital, and how he wanted to involve the Leikin Group.

[91] Ms. Harris testified that she was satisfied that David Katz had not made any commitment to FCR. She also acknowledged that based upon what she had heard at the Board meeting, her family did not withdraw its April 14 offer to sell their shares.

***Rick Kesler***

[92] Kesler recalled that the meeting lasted no more than 30 minutes because it came to a conclusion when David Katz began to talk about a business opportunity that more properly belonged to Leimerk. In chief at trial Mr. Kesler stated that there was no disclosure of any expression of interest by FCR in College Square. On that point he disagreed with the evidence of his aunt, Ms. Harris, saying that she was mistaken in her recollection. He testified that what Katz had disclosed at the meeting was that he had met with Ms. Lachance of FCR.

[93] At trial, in chief, Mr. Kesler disagreed with his aunt that at the meeting they learned that David Katz had taken FCR people through the Leikin Group properties and office. That evidence directly contradicted the evidence he had given in his pre-trial affidavit which had adopted his aunt's evidence on that point. On cross, at trial, Kesler contended that he did not learn that information until after this action had commenced, and he refused to acknowledge that the evidence he had given in his pre-trial affidavit was mistaken, although he conceded the inconsistency between his two statements. When asked why he had not disclosed before trial his view that his aunt was mistaken in her recollection on this point, Kesler responded that "it was not a significant matter that was raised". That his recollection did not accord with hers was something that "didn't jump off the page at me".

[94] Kesler did admit on cross-examination that at the meeting David Katz made an overhead presentation about a possible strategic alliance between FCR and the Leikin Group, but he contended that it was in connection with the Perth Mews property. Kesler agreed that that David Katz used a PowerPoint, or overhead, presentation, entitled, "Short & Medium Term Strategic

Objectives", but disagreed that Katz presented to the Board a presentation which he had made in February to the Leimerk Executive Committee. (Katz testified that he had planned to hand out the Leimerk document at the Board meeting, but he did not have an opportunity to present it.)

[95] Kesler agreed that the matters recorded by Mr. Jameson in the notes of that meeting about David Katz's presentation were discussed.

***David Spieler***

[96] At trial Mr. Spieler testified that the Board meeting came to an end when David Katz raised the possibility of the Leikin Group acquiring a property at Perth Mews together with FCR. Mr. Spieler agreed that at the meeting Katz handed out a Leikin Group/FCR strategic alliance document, but one different from that identified by other participants. He did not recall Katz going through the ins and outs of the document because the meeting came to an end over the Leimerk issue. Spieler recalled no discussion about FCR having an interest in College Square.

***David Katz***

[97] Katz testified that the meeting went from about 9:30 a.m. until 3:00 p.m. Although at the April 15 Board meeting Katz informed the Board about discussions he was having with FCR concerning the Perth Mews property, he acknowledged that he had not included in his PowerPoint presentation to the Board any reference to College Square. On his pre-trial cross-examination Katz testified that he believed College Square was discussed at the meeting as part of the possible strategic alliance with FCR. Elsewhere in that cross-examination, however, when asked why he did not inform the Board of the Leikin Group at that time about his discussions with FCR, David Katz replied: "It would have been premature to review anything at this stage. It's very preliminary."

[98] Yet, at trial Katz testified as follows in chief:

> A. As I started to present the material … what I found was that I was being rushed through the presentation.
>
> Q. What do you mean being rushed through the presentation?
>
> A. Well this presentation was prepared to promote a lot of discussion, I expected to spend a couple of hours on the matters that were included in the presentation, I considered them to be important matters. I was excited about the idea of presenting these opportunities because in my view as president of the corporations they were truly opportunities that I felt were in the best interest of the corporations and it would enhance the value for shareholders, and I was expecting to present material, I was expecting to

have a lot of questions, provide a lot of answers, and I recognized having been in the real estate development business for 25 years that a strategic alliance opportunity is – can be, and in fact what I was attempting to present was a very sophisticated and complex opportunity, and my primary reason in presenting it at the April 15th meeting was to try to ensure that the board had a very good understanding as to what I was trying achieve with First Capital.

Q. Now when you were – did you inform the board about your discussions with First Capital Realty?

A. I informed them - as I was making the presentation I informed the board that I had discussions with First Capital, that I had exchanged memos with First Capital and that I had specifically discussed College Square with First Capital within the context of the strategic alliance opportunity.

Q. Now you had indicated before that you felt you were rushed through the – what did you mean by that?

A. It was made very clear to me that the three board members in particular Josephine Harris, who was on the phone, David Spieler, who was attending personally, and Rick Kesler, who was attending personally, were not much interested in what I had to say, they were more interested in getting through the slides and moving on to other things. So what I felt was going to be a opportunity that needed to be fully explored and reviewed and considered by the board, it was quite clear to me that these three directors had absolutely no interest in reviewing, discussing or even considering the opportunity, and the presentation lasted a very short time. *Essentially it lasted as long as it took me to flip through the slides and convey the preliminary information about my discussions with First Capital that took place in March, and First Capital's interest in College Square and in particular the exchange of memos that I had with First Capital in March.*

Q. And after – from the comments that were – from the comments that were made by Mrs. Harris, Mr. Spieler, and Mr. Kesler could you determine what their intention was at this meeting?

A. At the point of giving the strategic alliance presentation the only thing that I could determine is that they seemed to be rather anxious to get to the end of it to move on to something else. (emphasis added)

According to Katz, when he then moved to the next item on the agenda, Leimerk, and suggested that the Leikin Group and FCR pursue discussions to purchase Perth Mews, Jameson had cautioned him about the duty concerning corporate opportunities which he owed to Leimerk as a director, and Katz accepted the caution. He said there then was a lengthy discussion in which Josephine Harris, Kesler and Spieler requested his resignation "without specifying a particular reason".

[99] When asked on cross at trial why he had even raised a possible strategic alliance with the Board in light of FCR's lack of response to his memo of March 12, Katz testified:

> Well the fact that I hadn't received a response from First Capital didn't – it didn't dissuade me from wanting to pursue a strategic alliance with First Capital, but I felt that in order for me to attempt to further the discussion with First Capital it would've been an appropriate time for me to at least educate the board as to what a strategic alliance meant, and conceptually what I was trying to achieve with First Capital. So it was an opportune time for me to provide a high level overview to the board, and in the hope that I would get a positive response from the board and an indication from the board that they would like me to pursue those discussions with First Capital.

[100] When asked in chief at trial about why he had not advised the Board at that meeting about the $72 million DCF analysis he had sent to FCR a few weeks before Katz testified:

> Principally for two reasons, one, the estimated value was not supported by market data, it wasn't tied to an appraisal, it represented an inflated price that I intentionally provided First Capital. First Capital never responded to that number, so it was further unqualified, and I think most importantly the board and the three directors in particular Josephine Harris, David Spieler and Rick Kesler showed absolutely no interest in reviewing, considering, or thinking about the strategic alliance, so whatever discussions I was going to – I was intending to have further discussions and further information that I was intending to provide became irrelevant.

[101] Much of the language Katz used in his March 5 memo to Lachance to describe the opportunity of a strategic alliance found its way into his PowerPoint presentation to the Leikin Group Board on April 15, 2004. However, Katz did not include in the Board presentation his reference to FCR acquiring a minority interest in College Square. When asked on cross why he had left that information out of his PowerPoint presentation Katz testified:

> Well there was a good reason for leaving it out. The March 5th memo that I sent to Sylvie LaChance was responded to with their March 9th memo, and you'll note in the March 9th memo they didn't address the term of agreement provision that I had in my March 5th memo, and I guess in short I can tell you that there was no discussion that I had with First Capital pertaining to the term of the agreement as I'm sure you'll agree with me Mr. Bennett the term of the agreement provision that I put in there was a one-sided agreement, and it's not surprising that First Capital chose not to discuss that section with me, and in fact they did not. So it would've been inappropriate for me to include that in my presentation, include in my presentation something that I had received no response from First Capital on.

***Barbara Farber***

[102] Farber recalled that the meeting lasted a long time, from about 9:30 a.m. until mid to late afternoon. She recalled her brother's presentation about a strategic alliance taking place in a very tense atmosphere. Kesler and Spieler wanted Katz to just move on. As to what Katz said about FCR, Farber testified as follows:

> Q. During the course of the meeting did David inform the board about the discussions he had with First Capital Realty in the early part of the – that he had prior to the meeting?
>
> A. He only – no, he spoke about a strategic alliance with First Capital, that was part of the – that was part of what he was talking about, and if that's what you mean by discussions with it, yes.
>
> Q. And did he mention – was College Square discussed at the meeting?
>
> A. Absolutely, that was our contribution to the strategic alliance.

[103] She recalled that Harris, Kesler and Spieler jumped on Katz's remarks regarding Leimerk to suggest his resignation and the meeting "was pretty uncomfortable, pretty abusive". However, she denied evidence by Kesler that she had wanted to fire Katz as CEO of the Leikin Group – "at our lowest points in any of our relationship never did I ever dispute the fact that David's main interest was in the corporation."

***Andrew Katz***

[104] Andrew Katz attended the Board meeting. He knew that people from FCR had visited College Square in February and that David Katz had engaged in some co-ownership discussions with them.

[105] Andrew recalled that the meeting lasted from about 9:30 a.m. until the mid-afternoon. He recalled that David Katz started making a PowerPoint presentation about a possible strategic alliance with FCR, and he referred to FCR as a shopping centre developer who would have an interest in College Square. Andrew deposed that Harris, Kesler and Spieler repeatedly interrupted the presentation and demonstrated no interest in discussing a strategic alliance which might commit the corporation's financial resources; they wanted to monetize their interests in the Leikin Group.

***Grant Jameson***

[106] Grant Jameson recalled that the meeting had lasted all day and that David Katz had made a PowerPoint presentation about a strategic alliance with FCR at that meeting.

[107] Jameson made handwritten notes of the meeting which recorded a PowerPoint presentation by David Katz on short and medium-term objectives for the companies. His notes stated that David Katz informed the Board that he had held "significant + ongoing discussions with First Capital" and he proposed that the Leikin Group and First Capital work together "to grow the assets of [Leikin Group] + FCR in the Ott[awa] Mkt". At trial Jameson testified:

> I remember that David Katz was explaining the concept of a strategic alliance with First Capital Realty and he mentioned that he had conducted a – that he had shown First Capital Realty College Square. I believe he'd said that he'd given them a tour of College Square. He also referred to First Capital Realty in the context Leimerk Holdings, which the Leikin Group has an interest in.

Jameson testified that no discussion took place at the meeting about negotiations or discussions of value for College Square with FCR.

[108] The notes recorded a fair amount of discussion about Leimerk's Perth Mews shopping centre, an asset in which the Leikin Group indirectly held an interest. According to Jameson's notes, Josephine Harris posed a number of questions to David Katz which prompted this exchange:

> Numerous and ongoing discussions with First Capital about what we would do together. David purports to hold on discussions with First Realty. No commitment made with First Realty. Meetings and exchange of memos with First Capital. First Capital is aware that David Katz must refer to the Board. David Katz says it is his duty to bring these opportunities forward, to receive direction from the Board to pursue it with First Capital or not pursue it. Jo Harris got the impression that David Katz has already done business with First Capital. Clarify, most of his career reporting to a Board, won't happen. As a senior manager, must take discussion and meetings to a position where there is something to report to the Board. All that management has done is put forward a framework which would be financially lucrative for both companies.

[109] Although Jameson deposed that at the meeting David Katz presented the "concept that the Leikin Group and First Capital might enter into a co-ownership agreement in respect of the College Square property", he acknowledged on cross-examination that there was no specific reference to College Square in his notes of the meeting. He gave the following explanation for that statement he had made in his affidavit:

> Well, that was my recollection. That was what I remembered, and this is encompassed in – the notes, now that you have taken me back through them – because these are quick notes, things are happening fast, and I am not a shorthand reporter…

> When I think back about that meeting and David's presentation at the meeting, I recollect some discussion of College Square…No, it didn't find its way into my notes.

[110] On his cross-examination on the summary judgment motion Jameson testified that he did not remember whether at the Board meeting David Katz reported that he had been exchanging numbers with First Capital with respect to College Square or that he had entered into a non-disclosure agreement with FCR.

**B. Findings of fact**

[111] I make the following findings of fact regarding the April 15, 2004 Board meeting of the Leikin Group:

(i) The meeting lasted most of the day. Kesler's recollection on the length of the meeting was faulty: it was at odds with the recollection of the other participants and the length of the meeting as reflected in the contents of the agenda and Jameson's notes;

(ii) David Katz made a PowerPoint presentation which included slides about a possible strategic alliance between the Leikin Group and FCR. Whether the format was the one bearing a compass (as recalled by Speiler and Jameson)[12] or the one which did not[13] does not matter; the contents of both were identical;

(iii) David Katz told the Board that he was proposing a strategic alliance with FCR to acquire commercial redevelopment opportunities and acquire property in the Ottawa area to become the dominant non-enclosed retail centre developer/asset manager within the market;

(iv) In the course of that presentation David Katz told the Board that he had had discussions with FCR, exchanged some memos with them, and had brought FCR personnel through the College Square property. I reject Kesler's testimony at trial that Katz did not mention the latter point. In his initial affidavit Kesler had adopted his aunt's testimony on that point;

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[12] Ex. 2, Vol. 1, Tab 47.
[13] Ex. 2, Vol. 1, Tab 39.

(v) During the course of that presentation David Katz also suggested that a strategic alliance with FCR would involve FCR acquiring an interest in College Square. Farber, Andrew Katz and Jameson all recalled mention of that topic, as did Harris when cross-examined on the point. I discount Kesler's recollection of the meeting; it stands at odds with that of the other witnesses. I also do not accept the evidence given by Ms. Harris in chief at trial that the issue of College Square being sold to anyone was "unthinkable". With respect, that evidence made no sense, and I give it no credence. The Board meeting took place against the backdrop of the majority of the Leikin Group shareholders seeking to sell their shares and Kesler having told Mainzer on February 27 that he was going to propose that all Leikin Group entities should be liquidated. Further, on June 29, 2004, a lawyer, Ken Prehogan, wrote to Farber on behalf of the Kesler Family and the Harris Family to advise that his clients supported the sale of College Square. So much for the "unthinkable";

(vi) The reality of the matter was that by the time of the April 15 Board meeting the Harris Family and Kesler wanted to monetize their interests in the Leikin Group and were more than willing to see College Square sold if that was what was required for them to get their money out. By contrast, the Katz Family saw the College Square asset as a springboard from which to grow the Leikin Group. Simply put, one group wanted to cash out; the other group wanted to develop a business. Therein lay their differences in views about the future of the Leikin Group's core assets;

(vii) Therein also lay the reason for the different reactions to Katz's presentation on a strategic alliance with FCR. Harris and Kesler were indifferent; they simply wanted to get their families' money out. David Katz was disappointed because he saw an arrangement with FCR as a way to build the Leikin Group. In terms of their business objectives for the Leikin Group, the two family groups were like ships passing in the night; and,

(viii) Finally, at that meeting Katz did not tell the Board that as part of his exploratory discussions with FCR he had floated an estimated value of $72 million for College Square.

## X. The fall-out from the Board meeting: David Katz resigns as the President of the Leikin Group[14]

[112] The April 15 Board meeting ended on a sour note with Harris, Kesler and Spieler wanting to end David Katz's involvement in the management of the company. Kesler and Spieler proceeded to requisition a meeting of the Boards of the Leikin Group for May 3, 2004 to review the position of President held by David Katz. Although the meeting commenced on May 3, it came to an end when two directors - Andrew Katz and Barbara Farber - left, resulting in a loss of quorum, but the meeting resumed a few days later on May 7. At that time Barbara Farber advised that David Katz was prepared to resign as President provided he received fair and generous compensation for the completion of the services to the Leikin Group he had begun as a consultant. The Board accepted his resignation and authorized Farber to conclude the final arrangements with David Katz.

[113] One of the companies in the Leikin Group, Harzena Holdings Limited, then concluded a consulting agreement with David Katz dated May 11, 2004 under which Katz would provide consulting services, including advice on a leasing strategy for College Square. The agreement was to run until the end of 2004. One provision of the consulting agreement permitted Katz to utilize all information or documentation he had acquired during the course of his employment with the Leikin Group.

## XI. May and June, 2004: the relationship between the two family groups[15]

[114] By May, 2004, a clear division had emerged amongst the owners of the Leikin Group: most of the cousins wished to monetize their interests in the companies' core assets, while a minority – the Katz siblings and David Spieler – wished to continue their interests in the core assets on a going-concern basis. I think the following evidence given at trial by David Katz accurately captured the divisions within the group of cousins:

> My particular interest was in taking a business that my grandfather had created and built and taking it to a more sophisticated and more productive level.
>
> …

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[14] The evidence before the court on the summary judgment motion can be found at paragraphs 61 to 63 of the SJ Reasons.

[15] The evidence before the court on the summary judgment motion can be found at paragraphs 77 to 83 of the SJ Reasons.

> [I]t was difficult for me to reach consensus with my sister on those particular matters. She was accustomed to managing the assets in their existing state, and there was also the reality of knowing that I had several other shareholders, cousins of mine, that seemed to be just interested in money, and weren't much interested in creating value and in perpetuating the Leikin Group name for next generation, for our children, they were more interested in money that they could put in their pocket on an immediate basis. So there were a lot of conflicting interests, it wasn't just between myself and my sister, there were conflicting and competing interests.

[115] Those who wished to remain – the group ultimately known as the Non-Selling Shareholders – began to run numbers to ascertain the potential payouts to shareholders under various sale scenarios. For example, on May 28, 2004, Katz emailed his brother and sister inquiring how quickly they could obtain from GGFL payout information assuming a sale value for College Square of $70 million. Barbara Farber passed on the request to Gerry Levitz, and Patricia Day (and others at GGFL) began to run the numbers. Before completing their work they received a further request from Katz on June 3 who "asked that we present a third scenario for June 7 – namely selling a 50% interest in the property to Loblaws for $35,000,000." Day testified that GGFL completed "a number of calculations on hypothetical transactions", using various figures of the value of College Square provided by either Farber or Katz. GGFL did not have any discussions about how the numbers were arrived at:

> We were told – management of the company asked us to perform these calculations and provided us with figures to utilize.

Day thought that the numbers represented David Katz's estimate of the value for the property.

[116] GGFL sent the requested calculations to Ms. Farber on June 7. The calculations used an estimated market value of $70 million for College Square, a number provided by management of the Leikin Group. On June 8 and 9 GGFL sent further sets of calculations to Farber, this time using $62 million as the estimated market value of College Square.

[117] On June 9, 2004, Farber circulated an email to all Board members, including Rick Kesler, David Spieler and Josephine Harris, in advance of a June 16, 2004 Board meeting. She proposed reconstituting the Board to bring in independent directors. Farber attached two GGFL-prepared documents to her email: (i) a calculation of possible distributions to the common shareholders, and (ii) an analysis of the estimated proceeds on an assumed sale of College Square and Zena's Fisher Heights Plaza. That analysis disclosed that management was estimating the fair market value of College Square at $62 million; the other calculations performed by GGFL using higher estimates of College Square's fair market value were not circulated to the Board. Kesler deposed

that he was "shocked" by Farber's proposal to reconstitute the board with independent directors given the family nature of the Leikin Group.

[118] Andrew Katz had seen the June 7 GGFL calculations which had used the number of $70 million for one scenario, as well as the June 8 GGFL calculations which had used $62 million as the estimated value of College Square. At trial he was asked why he did not inform the other directors, at the June 16 Board, that he had seen GGFL calculations using the $70 million number. He replied:

> I can't see why I would've said something like that… I was – did I advise them? I don't think I did. I think what was presented was management's best estimate. I thought $62 – when I look back $62 seems to be a much more realistic number in light of the appraisals that were to follow, so I think management probably provided a pretty good estimate.
> ...
>
> Ms. Erskine this is a pretty normal process, that's why they were called scenarios, and at some point management, and particularly I would say David Katz who had a better feel for real estate values than clearly any of us on the board arrived at a number of $62, which I found to be a reasonable presentation. I've been involved in a lot of presentations to boards and you go through various scenarios. That's what these were various scenarios based on management's judgment.

[119] On June 15 Mr. Kenneth Prehogan, a Toronto litigation lawyer, wrote to Ms. Farber on behalf of Steven Kesler advising that a majority of the common shareholders and directors wished to liquidate their interests in the Leikin Group of Companies, objected to the proposed reorganization of the boards to include non-family members, and stated that "if the majority of the shareholders cannot liquidate their respective interests by a sale to other family members, or to third parties, the only alternative left is to wind up the companies". Prehogan stated that his client's preference was to work out a business solution.

[120] Mr. Prehogan wrote again on June 29, this time on behalf of seven of the shareholders who wanted to sell their shares, stating:

> Our clients support the sale of College Square and Fisher Heights Plaza, and distribution of the net proceeds to the shareholders. We understand that the concept of partial liquidation was discussed in the recent directors meeting.

Noting that Farber had not responded to his first letter, Prehogan wrote that if she did not reply by July 9, "we will assume that you intend to take the course of action you threatened, and institute legal proceedings against you without further notice or delay". Prehogan wrote to

Farber on July 16 re-iterating his clients' wishes to sell core assets of the companies, not shares, and opposing any change in the boards of directors.

[121] The College Square property was owned by Harry Leikin Holdings (40%) and Harzena Holdings (60%). Harzena also owned several farm lands. The Selling Shareholders' initial threat in Prehogan's June 15 letter that they wished to liquidate their interests in all the companies would have seen them forgo any participation in the future development of the farm lands. By Prehogan's June 29 letter they had limited their desire to monetize their interests to the two "core assets", College Square and Fisher Heights Plaza, but given Harzena's partial ownership interest in College Square, any transaction would have to find some way to separate the farm lands from that interest. In the result, the amalgamation/Newco structure proposed by CIBC enabled that to occur.

[122] At trial David Katz was quite candid about how he reacted to Prehogan's letters:

> A. … I didn't receive Mr. Prehogan's letter directly, but I received a copy of that letter dated June 16, 2004, wherein Mr. Prehogan advised that if the shareholders were unable to divest of their interest within the Leikin Group of Companies then the only logical alternative would be for an application to be made by them for the winding up of the corporations. So for me that was a very dramatic moment in the history of the Leikin Group, it was clearly a polarization of the shareholder groups into those that wanted to sell and those not wanting to sell, and the threat of the corporations being wound up was something that I took very seriously, and as a shareholder of the Leikin Group of Companies that was interested in perpetuating the business and perpetuating in particular the business that my grandfather had created, *I had decided that I would do everything that I could to ensure that the corporations weren't wound up and that a methodology and process could be developed that would enable those that wanted to sell their interest to sell their interest while providing the opportunity for those shareholders that were not interested in selling their interests and were interested in continuing with the business to be able to do that.*
>
> Q. And to that end what did you do?
>
> A. I made contact with CIBC representatives to commence discussions with them about the possibility of them acting as a financial advisor to the corporations because I felt at that time the corporations needed a financial advisor, and I requested the GGFL, the accountants and auditors of the corporation begin to exam a particular methodology and process that would allow selling shareholders to divest of their interest in the core assets under favourable tax conditions while enabling the non-selling shareholders to achieve their objectives of retaining their interests and not giving up control of assets that the selling shareholders were interested in divesting of their interest in that. (emphasis added)

[123] Farber described the relationship between the selling and non-selling shareholders following the Prehogan letters as "pretty toxic": "Those letters hit me like a thunderbolt, I mean this was everything I had worked for for years before, threatening to be brought to an end."

## XII. July, 2004: Initiating the formal process of buying-out the selling shareholders[16]

### A. CIBC retained as financial advisor

[124] Farber testified that by June, especially following the receipt of the letters from Prehogan, it had become clear that the Selling Shareholders wanted to effect a fundamental change in the operation and ownership of the Leikin Group and were also seeking a substantial payment for their shares. She concluded that as CEO of the Leikin Group she was obligated to investigate the mechanisms which might satisfy the plaintiffs' desires to monetize their interests in College Square while, at the same time, protecting the other shareholders' interests in the corporations. So, in early July, 2004, Farber, with David Katz's assistance, contacted CIBC Mid-Market Investment Banking for assistance in formulating an approach to the differences then manifest amongst the family shareholders.

[125] David Katz acknowledged that once CIBC had been retained, they would approach him on a day-to-day basis if they had questions, required input, or needed matters reviewed. Jameson regarded David Katz as the main point of contact between the CIBC and the Leikin Group.

[126] Jameson understood that since the reorganization would affect corporate structures, his role would be to document the transactions on behalf of the corporations. Farber instructed him, and she also told him that he could take instructions from David Katz.

[127] On June 30, 2004, prior to the formal retainer of the CIBC, David Katz had sent Eric Desrosiers an email attaching "the internally prepared valuation analysis of College Square as well as Gerry Levitz's analysis of the net after tax proceeds to the shareholders on the disposition of the two assets (College Square & Zena Plaza)." The GGFL analysis had been circulated at the June 16 Board meeting and showed that the management of the Leikin Group estimated the fair market value of College Square at $62 million and Fisher Heights Plaza at $5 million. Katz's internally prepared cash flow analysis of the leases at College Square estimated the June, 2004

[16] The evidence before the court on the summary judgment motion can be found at paragraphs 84 to 95 of the SJ Reasons.

market value of the pad leases and land leases at $71.4 million. Katz described both analyses as "hypothetical scenarios". Katz explained how he had come up with the $71.4 million number:

> The 71.5 was a fairly crude calculation that was done at the time, but essentially I took 7/11, there were 7 shareholders that had expressed an absolute interest and desire in selling their interest in College Square, 7/11, we were 11 shareholders, so 11 being the denominator of the fraction. I divided that by 50%, which is the fifth – represents the 50% ownership that the non-selling shareholders would have to retain, and I multiplied the product of that by $55 million, which I felt at the time would represent an appraised value of College Square bearing in mind that an appraised value hadn't been completed at the time, so it was my best guess as to what I felt an appraised value would be. So 7 divided by 11, taking that dividing that by 50 and then multiplying it by $55 million generated the value of $71.5 million. And once I had determined crudely, but nevertheless determined that $71.5 million appeared to be the correct value that would have to be ascribed in a funding transaction I then used valuation parameters to end up generating a value that closely approximated the $71.5 million. So as you will see from the estimate that I sent to CIBC the value is generated with $71,394,000 or approximately $71.5, very difficult to end up with an even number when you do this type of analysis, so that was as close as I felt I needed to bring it.

Josephine Harris and Rick Kesler deposed that they did not see the Katz internal, management valuation of College Square until after the litigation had started.

[128] Katz explained why he had sent CIBC his own internal discounted cash flow analysis:

> I sent – first I wanted CIBC to be informed of the information that the board had reviewed in the June meeting and in particular the analysis – the proceeds analysis on an assumed sale of College Square, and at the same time I wanted to present them with my discounted cash flow analysis because by that time, and we're talking about June 30, 2004, I had determined that in order for the selling shareholders to achieve their objectives, their stated objectives of monetizing their interest in the core assets, including College Square, and in looking at the non-selling shareholders objectives of retaining their interest and retaining controlling interest of College Square there would have to be a value ascribed to a third party funding transaction. It would have to be higher than the value ascribed in a redemption of share transaction in order to generate sufficient proceeds to cover the cost of redeeming the selling shareholders shares while at the same time enabling the non-selling shareholders to retain at least a 50% interest in College Square.

[129] Katz also explained why he did not share his $71.4 million analysis with the selling shareholders:

> Because this was a – this estimate of value $71,394,000 was not a market supported value, it wasn't tied to an appraisal, and it was created for the specific purposes of funding the buyout of the selling shareholders. So the funding side of the transaction and all matters relating to the funding side of the transaction I felt clearly was not information that was relevant or material to the selling shareholders.

Katz testified that he did not discuss this calculation with Farber or his brother, Andy. David Katz testified that he did not inform CIBC about the discussion he had held earlier in the year "with First Capital in reviewing co-ownership principles".

[130] Eric Desrosiers of CIBC had no specific recollection of those documents which were sent to him by Katz, and he stated that he did not recall discussing Katz's internal value estimate of $71 million with the Altus Group later that summer when they were preparing their formal appraisal of College Square. When asked why he did not think Katz's estimate relevant to the appraisal process Desrosiers testified:

> David Katz…was certainly not perceived as the third party objective group that was, you know, that was retained by us to provide a truly independent value for the assets…and what I can also tell you is that in my line of business I always deal with shareholders, CEOs, that think their company or their asset is worth whatever, very often much higher than it is actually worth, so I have a tendency to take this information, review it, but then rely on true facts and external sources to conclude on what the asset is actually worth.
>
> So, to me, this is an internally generated source. I'm not sure that David Katz is a real estate professional appraiser, so from that perspective it was not listed as an external document received…
>
> I don't call it an internal valuation, this is just a piece of paper with some views on value…if there were some third party offers that would have been relevant, but this was not a third party offer, and not evidence of a serious third party discussion, and that part was captured into our representation letter that was signed by the company CEO which, essentially, says that there were not, that there were no third party offers or serious discussions with third parties that they did not provide to us, those are the facts.

[131] Farber sent the directors a July 19, 2004 memorandum advising that she had been discussing the situation with CIBC "with a view to facilitating a mutually beneficial transaction between selling shareholders and the Leikin Group" and had retained them to provide advice, subject to board approval. She noted that CIBC "had been the principal banker to the Leikin Group for the last seven decades and has an intimate knowledge of our company structure and business activities". Farber asked for dates to hold a board meeting for the purpose of reviewing and approving the CIBC's mandate. In the memo Ms. Farber also addressed concerns voiced by

some shareholders about introducing independent directors on to the Board and the holding of the AGM.

[132] The July 9 retainer letter prepared by the CIBC indicated that the "Leikin Group is interested in exploring liquidity options for the shares of the Leikin Group owned by the Selling Shareholders", and it specified that CIBC would conduct a valuation estimate of the fair market value of the shares owned by the Selling Shareholders as well as the feasibility of financing the proposed transaction. The CIBC would also provide the companies with advice in negotiating the transaction with the selling shareholders. All Board members received this letter.

[133] Mr. Desrosiers, the lead banker for CIBC, testified that CIBC regarded the Leikin Group of Companies as its client and he took instructions on the matter from its CEO, Barbara Farber, or her consultant, David Katz. However, he did have many discussions with Rick Kesler during the engagement.

[134] The Board met on July 23, 2004. David Katz was not invited to attend this meeting. The Board authorized the Leikin Group to enter into the advisory agreement with the CIBC. The minutes of the meeting made it clear that the CIBC would be providing the corporation with advice about "liquidity options available for the shares of the Leikin Group owned by seven of the holders of common shares".

[135] Josephine Harris voted to approve the agreement with the CIBC. However, in her June, 2010 affidavit Ms. Harris deposed that at the time she was not aware that the Katz Defendants had approached the CIBC earlier in the year to act as their advisor in respect of the acquisition of shares of the Leikin Group from other family members. Although no agreement was reached between the Katz Defendants and the CIBC at that time, Harris deposed that had she known of those discussions in July, 2004, "I would not have agreed to ratify the CIBC mandate in the July 9, 2004 letter." Rick Kesler also took the position in his affidavit that by reason of its February discussions with the Katz Family the CIBC was not an independent advisor, and he would not have approved CIBC's retainer had he known at the time about the February discussions. David Spieler deposed that he, too, was not aware of the prior discussions with CIBC when he voted as a director to approve its appointment.

[136] I put no stock in those complaints by Harris and Kesler about the role of CIBC. I regard them as mere "colouring" by both witnesses: no agreement in fact was entered into with the CIBC back in early 2004; the CIBC had been the long-standing bank for the Leikin Group; and the Selling Shareholders enjoyed access to and used the services of independent legal advisors in respect of the resulting September CIBC Report. I should note that the plaintiffs made no legal

complaint about the work performed by the CIBC in respect of its reports; they did not sue the CIBC.

### B. GGFL on-going work on a transaction structure

[137] In early July GGFL continued to work on developing an appropriate structure to respond to the wish of a majority of the shareholders to sell their shares. Levitz prepared an internal memo dated July 8, 2004 setting out his thoughts. Day testified that in the end GGFL concluded that in order to ensure selling shareholders received capital dividends, it would be necessary to sell a portion of the properties to another entity – not a necessarily an arm's length third party – to trigger the income and capital gains. Thus arose the concept of a "Newco".

## XIII. The July 14, 2004 meeting[17]

### A. The purpose of the meeting

[138] A meeting took place on July 14, 2004 amongst Barbara Farber, David Katz and Grant Jameson. Gerry Levitz did not attend the meeting and his colleague, Patricia Day, arrived after the meeting had started.

[139] David Katz deposed that he arranged the meeting in order to meet with Day "to review the big picture and bring her up to speed on the agreement that I am concluding with CIBC to act as financial advisor to the Leikin Group." Katz also wanted Day to start assessing what proceeds would be available to selling shareholders on a share redemption transaction. Day understood that the purpose of the meeting was to allow GGFL and the company to understand the structure of the transaction.

[140] Grant Jameson attended the meeting. He understood its purpose was to discuss the form the proposed transaction might take. Between the April 15 Board meeting and the July 14 meeting Jameson had not received any updates from management about any discussions with First Capital.

### B. The state of dealings between David Katz and FCR prior to the meeting

[141] Katz testified that between March 12 and July 14, 2004, he did not have any discussions with FCR about College Square, and he did not re-connect with FCR on that property until the

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[17] The evidence before the court on the summary judgment motion can be found at paragraphs 96 to 109 of the SJ Reasons.

latter part of August. Lachance's evidence was to the same effect. I accept Katz's evidence on the point, and I find that between March 12 and July 14, 2004, Katz did not have any further discussions with FCR concerning College Square.

**C. What was discussed at the July 14 meeting**

[142] Jameson took notes at the meeting. The plaintiffs relied very heavily on entries in those notes to support their claims against all the defendants. I will turn to those notes in a moment, but first let me set out what Jameson recalled about that meeting. He testified that at the meeting David Katz described a structure which involved obtaining a market valuation for the core assets, which included College Square, and then financing the liquidation of the seven Selling Shareholders' interest in the subject properties by re-mortgaging the core assets. Katz also stated that another way to finance the transaction over the long term might be for the Non-Selling Shareholders (by then the sole shareholders of the corporation which would own College Square) to look for a third party equity investor to purchase a co-ownership interest in College Square within a short time after the closing of the transaction.

[143] Jameson's notes included the following entries:

> FCR First Capital Realty
>
> 71.5 MM College Square all cash
>
> 6.5MM FHP
>
> 78 MM

[144] As to his recollection of the portion of the discussion on July 14 concerning First Capital, David Katz testified as follows on his cross-examination at the summary judgment motion:

> I never ever presented a situation to his meeting, to the attendees of this meeting, that involved or confirmed that I had a transaction arrangement with First Capital pertaining to a partial interest of College Square. Never did I advise any of the attendees at the meeting that I had such an arrangement. There was no arrangement with First Capital and I never suggested it and I never advised any of the attendees that there was such an arrangement.
>
> …
>
> [I]n order for a share redemption transaction to take place, and in order for the objectives of the selling shareholders to be achieved and the non-selling shareholders to be achieved…it would be important and essential that a funding arrangement with a third party for a partial interest in College Square be transacted at a rate that, in my view, had

> to be in the vicinity of 71-and-a-half million dollars…to enable the non-selling shareholders to achieve their objectives of retaining at least a 50 percent interest in the property and generating sufficient proceeds to cover the costs of the share redemption transaction.

Mr. Katz testified that he made his reference to First Capital in the following context:

> And what I was attempting to convey at the meeting, and I think I conveyed it very clearly to all of the attendees, I used First Capital as an example of the type of corporation that the non-selling shareholders would have to attract in order to generate a transaction that would achieve their objectives…I could have easily said RioCan…I could have said a number of companies. But the type of company that had the most meaning for somebody like Grant Jameson within the context of the Leikin Group was First Capital, and I used them as an example. In no way did I suggest to the attendees of this meeting that there was a transaction that was either discussed or agreed to with First Capital.

At trial Katz testified:

> Q. And what did you say about First Capital Realty?
>
> A. I used First Capital – I referenced First Capital as an example of a real estate operating company that I felt would be inclined to want to purchase an interest in College Square. I thought that First Capital was a good example, represented a good example of the type of a third party that we would have to transact with and that was for a few reasons, but primarily because First Capital was the type of company that was purchasing assets such in the same class as College Square. As I mentioned quite a while back, First Capital was purchasing in the order of $500 million to $600 million of assets on an annual basis, the assets that they were purchasing primarily consisted of non-enclosed shopping centres that were food anchored, and College Square fit that description. There were several other companies that were also interested in acquiring this class of asset and I could have easily named several others that would have been interested as well, but I felt that First Capital was a good name to use, it was a good example to use because First Capital had been referenced in the April 15th meeting, it was known based on what I advised the board that First Capital had expressed an interest in College Square, and was a – represented a very good example of the type of company that would be – that would be interested in purchasing a partial interest, so they were used as an example.

[145] As to his discussion at the meeting of the $71.4 million calculation he had made Katz testified:

> I advised the attendees of the meeting that I had come to the conclusion that a – in terms of our funding objective that a value, a higher value would have to be ascribed in a third

> party funding transaction to generate sufficient proceeds to satisfy the selling shareholder requirements while at the same time enabling the non-selling shareholders to retain their interest in College Square. And I put forward the same analysis that I began to put forward with CIBC, which was informing the attendees of the meeting that in my view $71.5 million would have to be ascribed in a funding transaction and I indicated that that difference in – the difference in that ascribed funding value of $71.5 million, and what I felt the share redemption value would be that difference would assist and it would be – in fact would be required in order for the non-selling shareholders to retain their 50% interest. So if you recall the formulation that I had given you several minutes ago of 7 divided by 11, divided by 50, multiplied by 55, which generated the $71.5 million is what I presented to the meeting.

[146] David Katz saw nothing in Jameson's notes inconsistent with his recollection of what he had discussed at the July 14 meeting. Under cross-examination before trial he testified that the exchange of information he had undertaken with First Capital earlier in 2004 "had absolutely nothing to do with the information that I was presenting at this July 14th meeting."

[147] At his pre-trial cross-examination Jameson testified about his recollection of that portion of the discussion:

> What this is in my recollection are notes of a conversation David Katz was having with Barb and I'm sitting in the room and I'm writing things down. This conversation was in my recollection predicated on what might happen if they were to do this deal. In other words, what might the upside be, what's in it for them to do this deal, why would they do this?

At trial Jameson testified:

> Q. All right, what was your understanding of the context of him using the First Capital name and those corporate names?
>
> A. My understanding was that this – these names were used as an example of the type of investor who might come in and be interested in purchasing a co-ownership interest in the shopping plaza.
>
> Q. Okay, were there any references in the discussion as you understood it to any deal with First Capital?
>
> A. No.
>
> Q. To any ongoing discussions with First Capital?
>
> A. No.

Q. To any negotiations about these terms with First Capital that had taken place?

A. No, not at all.

[148] At a later part of his notes Jameson wrote: "Why - FCR paid a precedent setting number of $71.5 million" and "Co-ownership Agt. w FCR – as if it was a 50/50 split". He testified on pre-trial cross-examination:

> I understood this was an example of the type of transaction which the remaining shareholders might be able to do after they acquired the property. You know, in six months or some additional period of time, there might be an upside…[M]y recollection is that this was not a discussion of what was going to happen; this was a discussion of what might happen.
>
> …
>
> *I didn't really see this as the exploitation of a corporate opportunity, certainly not at that time I didn't see that, and I viewed the reference to First Capital as an example.*
>
> …
>
> I thought [David Katz] was saying that some time in the future it might be sold at $71.5 million…you know, whether David thought that he could sell the property for $71 million or $80 million or any other number to me was pie in the sky.
>
> You know, I looked at the transaction as being one of having a real live third party proper valuation for the property and that was the number which was going to be used. And that would be the relevant number, what happened in the future is in the future.
>
> …
>
> [I]t was very much framed as someone like First Capital. It was not framed in my recollection as First Capital. (emphasis added)

[149] At trial Jameson offered the following evidence on that notation:

> Q. And on page 520, it's about half way down the page, there's a note that says, begins with the word why?
>
> A. Yes.
>
> Q. All right, and tell us as well as you can recollect what that note was about?
>
> A. Well that note was about why would this – why would this take place, why would – why would First Capital pay $71.5 million for the property, and it would only take place

if it was a precedent setting number, it was expressed as if it would be something extraordinary in the circumstances of the day.

Q. And if you go further down the page, page 520, there's a note that says – it's the second last item, it starts with "Do Mez" and then someone has put in square brackets Mezzanine financing, do you see that?

A. Yes.

Q. All right so what – as well as you can recollect what led you to – what discussion led you to write that note?

A. Well my recollection is that David was explaining how the transaction might unfold with the purchase of 7/11 interest in College Square and the transaction would be one where the selling shareholders were sold out, were paid out, and the source of the funds to pay the selling shareholders would be through the use of a Mezzanine mortgage or interim financing by way of a mortgage, and the transaction would be closed on the basis of mortgage financing. And then at some point in the future the mortgage financing, the Mezzanine financing would have to be taken out by some sort of long term financing, and his expression of his – his expression of this First Capital Realty type transaction was an expression of one which might occur, and might provide the financing to take out the Mezzanine financing, so that was the reference to the Mezzanine mortgage.

[150] In his notes of that meeting Jameson also wrote: "First Capital Properties to have ability to deal with interest and assets so First Capital Properties has no public shareholder issues". David Katz had mentioned those names. That notation spawned the following exchange on the pre-trial cross-examination of Jameson:

Q. First Capital Properties is a subsidiary of First Capital Realty.

A. That's what I understood.

Q. That's a little more detailed than someone writing First Capital Realty, isn't it?

A. I agree and I was a little surprised with that level of detail at the time.

Q. Yes. That didn't trigger any alarm bells for you?

A. Well, it didn't say to me that there was a bought deal or that there a done deal. I mean, it didn't say that at all because the discussion was very much one of speculation.

You know, the line, "Why First Capital pays a precedent setting number of $71.5", I mean this to me again was something expressed as something which would be extraordinary and not something which was by any stretch of the imagination certain.

At trial Jameson testified about that portion of his notes:

> Q. And did you ask any questions as to how we're now talking hypothetically, but we're talking about how we're going to structure the deal to fit not just with FCR, but how their structure might work for them with one of their subsidiary companies?
>
> A. I did not ask that question, again because it was clear to me that this was discussions of what might be, it was in the nature of a wish list, something which might occur in the future. I attributed this level of detail to the fact that I'd known at that point that David Katz was a very detailed thinker. He was clearly thinking this scenario through to the ultimate end, and I recalled that First Capital Realty had been mentioned previously in April. So that's how I reconciled this statement in my own mind at that time.

[151] Elsewhere in his notes Jameson wrote: "Be sure the structure fits with and FCR needs". On his pre-trial cross-examination Jameson was asked:

> Q. Again, are you telling me this is just a hypothetical?
>
> A: I can't explain that.
>
> Q. I mean, this is a specific company being referred to.
>
> A: Correct.

[152] At trial on cross it was suggested to Jameson that he knew about FCR's interest in acquiring College Square because at the time of the July 14 he had in his possession two of the March memoranda containing the co-ownership discussion between Katz and FCR. Jameson testified:

> Q. Are two memoranda from or related to First Capital Realty and College Square?
>
> A. Yes.
>
> Q. One is from Davis Ward Philips and Vineberg.
>
> A. Yes.
>
> Q. Dated March 9, and one is from Mr. Katz to Sylvie LaChance dated March 12, 2004, correct?
>
> A. Correct, yes.
>
> Q. You had these in your possession obviously?
>
> A. I did.

Q. And is it possible that you had these in July 12th when you were being asked to set up the meeting in Montreal on July 20?

A. Yes, it is possible.

Q. All right, so you had these memoranda or it's possible you had these memoranda, you attend this meeting on July 14th, where there's a discussion about First Capital buying an interest?

A. Well sir on July 14th going into that meeting I had no knowledge of first - of any interest which could be purchased by First Capital, so I had the memoranda, I think because I think I may have picked them up certainly at or after the April meeting, but I wasn't aware of them at the July 14th meeting.

Q. I'm sorry you just go back there, did you say you got them at the April 15th board meeting?

A. Well I didn't – I don't know where they came from. I don't think I had them before the April meeting, I certainly had them at the time they were sent to Mr. Cohen in a file, so.

Q. So somewhere between April 15, and July 20 you came into the possession of these memoranda's?

A. Yes.

[153] Farber recalled Katz mentioning the $71.5 million as a "funding number":

A. It was a funding number that he had come up with in order to determine what it would take for us to maintain our 50% and enough money left over to be able to buy the remaining – the selling shareholders.

Q. And during the course of the meeting did David refer to First Capital Realty?

A. He did – it – the way David always spoke to me, always still does talk to me, is he makes sure that I understand, that's the way he spoke to me, and spoke to Grant or Pat. It would've been a name that I would've heard, obviously Grant would've heard, I'm not sure that it would've meant anything to Pat, I don't know whether she'd heard of them before, but it was by way of example, so that we would understand that there was someone actually out there who could in fact fund that kind of deal.

At trial in chief Farber testified:

Q. And did David refer to a figure of $71.5 million?

A. He did, it was –

Q. And did he expect –

A. I'm sorry, it was a funding number.

Q. I beg your pardon?

A. It was a funding number that he had come up with in order to determine what it would take for us to maintain our 50% and enough money left over to be able to buy the remaining – the selling shareholders.

Q. And during the course of the meeting did David refer to First Capital Realty?

A. He did – it – the way David always spoke to me, always still does talk to me, is he makes sure that I understand, that's the way he spoke to me, and spoke to Grant or Pat. It would've been a name that I would've heard, obviously Grant would've heard, I'm not sure that it would've meant anything to Pat, I don't know whether she'd heard of them before, but it was by way of example, so that we would understand that there was someone actually out there who could in fact fund that kind of deal.

On cross Farber acknowledged that on her examination for discovery she had stated that she did not remember specifically what had happened at that meeting and she could not remember whether information she now had about the July 14 meeting "is what I remember or what I've read or what I've heard." She affirmed that evidence at trial.

[154] Patricia Day of GGFL testified that she recalled no discussion regarding First Capital during the portion of the meeting she attended: "I do not believe First Capital was discussed in my presence at that meeting":

Q. You were present during the discussion regarding the amalgamation and needing the structure to fit with a purchase by a third party?

A. We had a discussion that a third party purchaser would likely need a high adjusted cost base on the property, and that we would try and do a structure that would allow that.

Q. And the structure needed to fit with what First Capital Property needed.

A. No.

I accept Ms. Day's evidence that FCR was not discussed in her presence at the portion of the meeting she attended.

[155] Andrew Katz, who did not attend the meeting, deposed that in June and July, 2004, he was not aware that David Katz had prepared his own analysis of the net operating income stream of College Square nor that GGFL had prepared a variety of calculations on hypothetical transactions involving the sale of College Square.



**D. The evidence from the plaintiffs about that meeting**

[156] Josephine Harris deposed as follows about what the plaintiffs took from the notes made by Mr. Jameson:

> I believe that at the time that Grant Jameson recommended the transaction, at a value of $55,000,000, to me and the other directors, he was in possession of information from David Katz regarding First Capital Realty's interest in College Square and the $72,000,000 valuation placed on that interest. Grant Jameson received this information on July 14, 2004…

Later in her affidavit Ms. Harris stated that this information indicated a proposed sale of an interest in College Square to FCR at a price in excess of $72 million. On cross-examination before trial Ms. Harris acknowledged that the assertions she had made in her affidavit were based solely on her reading of Jameson's notes of that meeting – she was not present at the meeting and had not asked Jameson what had transpired at the meeting.

[157] In his affidavit Mr. Kesler (who also was not present at the meeting) deposed as follows:

> At a meeting on July 14, 2004 attended by Barbara Farber, Grant Jameson, Gerry Levitz and Patricia Day, David Katz disclosed that First Capital Realty was interested in purchasing an interest in College Square at a value that exceeded $70 million.

[158] Kesler also agreed that his only source for this information was his interpretation of the notes prepared by Mr. Jameson of that meeting. At the same time, on cross before trial, Kesler stated that he and other directors "always disputed" the accuracy of the summaries Jameson prepared of Leikin Group board meetings.

[159] David Spieler deposed that even though in July, 2004, he had identified himself as a non-selling shareholder, David Katz did not tell him "that he was negotiating a co-ownership agreement with FCR with a potential value for Collge Square of more than $70,000,000". Had he been aware of that information, Spieler deposed, "I would have disclosed it to the selling shareholders and the Board." Spieler testified that he regarded Mr. Jameson's notes as revealing that two values for College Square were in play and that the deal with the Selling Shareholders "was known to be a fraudulent, illegal one".

**E. Findings of fact**

[160] At the July 14 meeting David Katz obviously did not pull FCR's name out of thin air. No doubt Katz mentioned FCR because earlier in the year he had engaged in some exploratory discussions with Lachance about College Square in which Lachance had shown sufficient interest that she was prepared to spend some time in March discussing co-ownership principles with Katz and also to engage her lawyer at the Davies firm in that process. That information had been disclosed by Katz to the Board at the April 15 meeting. That said, by the time of the July 14 meeting Katz had not received any response from FCR to his trial balloon of $72 million in his March memo. In fact, the trail with FCR had gone cold following the exchange of the co-tenancy memoranda in the early part of March. From his own internal DCF calculations Katz thought that $71 million was the amount needed to "break-even" on a buy-out of the Selling Shareholders which would leave the remaining members of the Leikin family in control of the College Square asset. From Katz's perspective, following the receipt of correspondence from Prehogan in June, his main focus had been on figuring out a way to finance the buy-out of his cousins who wished to sell their shares.

[161] On his cross-examination at trial it was suggested to Katz that by the time of the July 14 meeting, FCR was "the intended purchaser at that point of time". Katz disagreed with that suggestion. He testified:

> Well given the fact that I had had no discussions with First Capital between March the 12th, and this date I don't know how I could've put forward a scenario to the attendees at this meeting that would suggest that First Capital had expressed to me a desire to purchase a partial interest in College Square at $71.5 million. It's just – it just didn't happen, and for me to have communicated something that didn't happen to the attendees at that meeting would've been totally inappropriate.

I accept Katz's evidence on that point. The context in which the July 14 meeting took place was that the trail with FCR had gone cold. That was the backdrop against which Katz went over those numbers with the participants at the July 14 meeting. I find that Katz did not tell those at the July 14 meeting that he thought he could do a deal with FCR at that price. Katz would have had no reasonable basis for making that assertion, and Katz struck me as a sophisticated business person experienced in the real estate field who would not go out on a limb representing what he could achieve without some reasonable basis for so doing.

[162] I also accept the evidence of Jameson that he did not understand Katz's references to FCR as amounting to assertions that a deal probably could be done with FCR for an interest in College Park. That Jameson did not learn at the July 14 meeting that FCR had, or was willing to, cut a deal for an interest in College Square was apparent from a July 27 email Jameson sent to

one of his partners, John Naccarato, which described the developing shareholder buy-out transaction structure as one in which there might be an "as yet unknown equity investor". Also, the evidence disclosed that Jameson was a corporate counsel who was alive to the issue of the permissible pursuit of possible corporate opportunities. Back at the April 15 Board meeting Jameson had cautioned David Katz against pursuing discussions regarding a Leimerk property which could be perceived as exploiting a conflict of interest. At the July 14 meeting Jameson did not see a similar problem. I accept Jameson's evidence about this meeting.

## XIV. July 15 to September 1, 2004[18]

### A. The continuing work of the Lawyer Defendants

[163] On July 19 David Katz emailed Jameson: "I need to develop a co-ownership framework that would be suitable for me to propose to my 'white knight' candidates, with someone within your firm that is skilled in commercial real estate and co-ownership arrangements." Jameson testified that he did not know to what "white knight" candidates David Katz was referring. Katz testified that he was referring to eventual prospective purchasers who would assist in the financing of the share redemption transaction.

[164] On July 20 Jameson sent an email to one of his colleagues at another Ogilvy Renault office, Arnold Cohen. He attached "some documentation with respect to the Leikin Group of Companies". The attachments included Rita de Santis' memo to Sylvie Lachance dated March 9, 2004 discussing issues concerning a co-ownership with the Leikin Group for College Square, as well as David Katz's responding memo of March 12 dealing with the "fundamental principles" for a co-ownership arrangement with FCR for College Square.

[165] On July 21 Jameson attended part of a meeting amongst Cohen, Katz, Desrosiers and Farber to discuss a corporate transaction structure, but there was no mention at that meeting of any negotiations or agreement with FCR. In his notes of that meeting Cohen wrote:

> Potential spread between value for financing purposes which wd. potentially be more than the FMV to be determined
>
> …

[18] The evidence before the court on the summary judgment motion can be found at paragraphs 110 to 133 of the SJ Reasons.

> Transaxn will not permit a dragalong if there's a subsequent sale for a higher or lower value; transaxn will be for a fixed amt.

[166] On July 23 Jameson provided Farber with a memorandum summarizing the law respecting the winding-up of a company. He also sought to involve one of his tax partners, John Naccarato, to help structure the co-tenancy arrangements with an outside equity investor "once the dust settles on a proposed transaction with CIBC", an apparent reference to the proposed transaction with the Selling Shareholders.

[167] Jameson understood that Pat Day was organizing the transaction structure. On July 26 Pat Day sent Farber and David Katz an email, copied to Gerald Levitz and Jameson, which included an attachment detailing the funds required to do the proposed transaction. At trial Day explained the larger context in which she performed these and some subsequent calculations:

> When we had done the calculation at July 26th we had determined there was a net cash flow shortfall when we based the selling to a third party at $71.5 with an ascribed value of $62 million for College Square. So now he's asking the question what value would we have to ascribe to College Square and to Fisher Heights Plaza in order to get a break even on the cash flow.
> …
>
> Well these were just calculations as I said in order to determine the cash flow that would be needed.

[168] Schedule 1 to Day's July 26 email noted, "Buy-out of 7/11 Shareholders", based on a buy-out of the Selling Shareholders at a price of $62 million for College Square. Then, when calculating the tax on a sale to a third party, the schedule used a "total gross sales price" for College Square of $71.5 million. Elsewhere, on Appendix B, Ms. Day used $62 million for the proceeds of the disposition of College Square. Ms. Day testified that GGFL was asked to prepare calculations using those numbers. David Katz testified he provided Ms. Day with that number:

> If I believe that 71.5 was, represented probably the maximum that we could expect in a funding transaction.

[169] Jameson did not recall receiving this memorandum. At this point in his pre-trial cross-examination Jameson was asked whether he was really suggesting that a re-sale transaction of an interest in College Square was only speculative in July, 2004, and Mr. Jameson answered:

> Yes, that's what I knew. I didn't have any other knowledge other than what I said to you about my understanding of the reference to First Capital in that meeting of July the 14th.

> …
>
> I will presume that I received this e-mail, but I can tell you that for all matters relating to the value of the property, the numerical analysis, I was paying no attention to this material.
>
> I would not have reviewed this document. I would not have gone down and looked at this document and said, "There's something here that says $71.5 million"…I am not involved in financial analysis. I took comfort in the fact and I relied on the fact in this transition that the value of the property for the purpose of the transaction would be determined by a professional appraiser and to me, that was the closing element….

I accept that evidence. It reasonably reflected the role which Jameson was playing as counsel to the corporation, and it is consistent with what I have found to be the nature of the references made to FCR at the April 15 Board meeting and the July 14 advisors' meeting.

[170] In her July 26 email Day raised an issue about land transfer tax. Jameson sought advice on the point from one of his partners, John Naccarato. In his July 27 email to Naccarato explaining the background to the question, Jameson indicated that the Leikin Group of companies were trying to arrive at a structure which would distribute value to the Selling Shareholders "leaving the 4 remaining shareholders (plus *some as yet unknown equity participant*) to own the Core Assets after the transaction is complete".[19] He noted that the structure under discussion would see "the 4 remaining shareholders take the Core Assets in some form of Newco with an outside equity investor. The co-tenancy agreement would involve the outside equity investor".

[171] David Katz deposed that in late July, 2004 he began to investigate financing options under which funding could be secured to buy-out the interests of the Selling Shareholders while the Non-Selling Shareholders maintained control and management of College Square. GGFL provided him with analyses of how much money would be required to fund such a transaction.

[172] David Katz also retained Fredric Carsley, a veteran Montreal real estate lawyer, then at the Mendelsohn firm, to provide legal advice on co-ownership issues. A specialist in commercial real estate, Carsley learned that Katz had been engaged in discussions with FCR, and Katz wanted his advice on the business and legal aspects of a co-ownership agreement. From a memo to file which he had prepared based on his discussions with Katz in early August, Carsley understood that Katz had formed the view, based on his discussions with FCR to that point of

[19] Emphasis added.

time, that a possibility existed of purchasing his cousins' interest in College Square at a cap rate higher than that at which FCR might be prepared to purchase an undivided interest in that property. As Carsley recorded it:

> Owing to this spread, the two transactions are to remain independent of one another, but the FCR transaction clearly has to be made conditional upon the Cousins Group transaction being satisfactorily completed in favour of the Katz Group.

Jameson testified that prior to the initiation of this action, he had not heard of Carsley.

[173] On August 18, 2004 David Katz prepared a memo to file in which he wrote:

> Rick Kesler had a brief conversation with Gerry Levitz yesterday to obtain Gerry's opinion as to the benefits of the CIBC process. In addition, Rick asked Gerry what he thought would happen if the proposed transaction was unsuccessful.

That same day Carsley talked with David Katz and, according to the memo of the conversation which Carsley prepared the next day, Katz was of the view that FCR was looking to College Square "as a trophy property" and he thought FCR would be prepared to "aggressively invest" in such a property.

**B. The state of dealings between David Katz and FCR: July to October, 2004**

**B.1 Prior to the August 25 meeting with FCR**

[174] David Katz prepared a July 22 memo to Sylvie Lachance outlining his thoughts on key co-ownership issues. It was marked "Draft: not for circulation". No evidence was put before me that Katz ever sent the memo to Lachance.

**B.2 The August 25 meeting**

[175] A meeting was held on August 25, 2004 attended by David Katz, his lawyer, Fred Carsley, Sylvie Lachance, from FCR, and FCR's counsel, Rita de Santos.

[176] By this point of time Lachance had received approval from her superior, Mr. Dori Segal, to proceed with discussions concerning College Square. She called it an "exploratory process". Neither she nor Mr. Segal were authorized to transact on a specific price without going to senior management, and they did not approach senior management in 2004 about the College Square property. However, Lachance testified that she must have mentioned to Segal "at numerous occasions during the year that I was expecting low 70 million would be approximately the price that the asset would go for".

[177] Carsley's notes of the meeting disclosed that the parties discussed numerous issues relating to a co-ownership structure for College Square; according to his testimony, "that was the entire discussion." Carsley prepared a memo about the meeting the day after it was held. In that memo he wrote:

> Prior to the meeting, David and Sylvie had a private discussion which was then relayed privately between Sylvie and Rita with regard to certain matters involving the buy-out of existing shareholders with the ownership group and its effects. In a private discussion with David after the meeting, he expects the CBIC World Markets evaluation of the property to come in at somewhere around 55 million, whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share.

Carsley testified that he was not party to the conversations engaged in by Lachance, and the information he obtained about a value of $71 million came from a post-meeting discussion by the elevators with David Katz who had told him that Ms. Lachance "was amenable to that type of pricing in the event that a transaction could be structured." Carsley stated that he was not present for any discussions at which the value of the investment or prices that would be paid were talked about with FCR. Carsley understood from Katz that the non-selling shareholders needed to find a buyer willing to pay about $71 million if the Selling Shareholders were to be paid out with the Non-Selling Shareholders maintaining control.

[178] David Katz testified that the purpose of his private discussion with Ms. Lachance was "to bring her up to speed on the reasons why there might be a potential opportunity for First Capital to purchase a partial interest in College Square which was completely and fully predicated on a re-organization of the company for the purpose of enabling selling shareholders to redeem their interest in the corporations that own College Square." At trial Katz testified:

> A. The purpose of that discussion was for me to make sure that Sylvie LaChance understood why I had requested the meeting. She needed to understand that the conditions surrounding the meeting were very different than when we had first discussed co-ownership principles in March of 2004. March 2004 was a period of time where First Capital was being provided an exclusive opportunity to enter into a strategic alliance with Leikin Group for the purposes of pursuing development opportunities within greater Ottawa – the greater Ottawa area. Sylvie needed to understand that in August at this time we were looking to sell a partial interest in College Square because of our need to fund a share redemption transaction, and she needed to understand that this was no longer an exclusive opportunity that was being provided to First Capital, but conveying to her that we would absolutely have a need to sell a partial interest of College Square to a third party for the purposes of funding that transaction, but that we could not discuss or get involved in the negotiation of a purchase and sale at that time because the internal matters of Leikin Group needed to be regulated first. We needed to resolve and reach consensus

> amongst shareholders within the Leikin Group in order for us to then proceed to look for funding for the transaction. So at that time Sylvie LaChance understood that notwithstanding the fact that we were discussing co-ownership principles for College Square it was not a discussion that related in any way to a – to actual terms and conditions of a purchase or sale of College Square. It was to get back in to a discussion to understand if we could coexist within a co-ownership framework in the event that First Capital ended up being successful in acquiring an interest in College Square at some future date.
>
> Q. Did you discuss the amount of the funding required?
>
> A. Yes, I advised Sylvie that we would require $71.5 million, and I explained to her because I knew that that would come as a – as quite surprise that because $71.5 million was not representative of the prevailing market conditions and I advised Sylvie that the $71.5 million was not tied to an appraised value, it wasn't tied or supported by market data. It was nothing more than a value that I had determined we needed in order to assist us in covering the costs of the share redemption transaction while enabling the non-selling shareholders to retain a 50% interest. So it was important that she understood that, had I not told her that she wouldn't have been able to make any sense at all of $71.5 million.
>
> Q. After you gave that explanation or made that explanation to her did she have any reaction?
>
> A. No reaction at all, she took note of it, and we went back in to the general meeting.
>
> Q. Did she say anything to you?
>
> A. She didn't respond in any way.

[179] Lachance testified that First Capital had not agreed to buy College Square at this juncture, but was having discussions with David Katz with a price floating around the low 70s. Indeed, Ms. De Santis' notes of the meeting record: "property worth $70MM."

[180] In her notes of the meeting Ms. De Santis wrote: "4 shareholders are buying out 7 shareholders." De Santis understood that "there was going to be a prior transaction so that ultimately we would get a 48% interest in College Square":

> But there was a prior transaction whereby the family – I didn't know who the shareholders were, that we would be dealing with ultimately owned 4 of the 11 shareholders who owned the property.

Lachance knew a family reorganization would have to take place before the property could be sold to FCR, but she was not told about any of the details of the intra-family discussions, including the price of any sale. De Santis' evidence was to the same effect – she was never interested in knowing what David Katz was going to do with his family. Lachance was aware that any deal with FCR could not proceed until the family arrangements were finalized. She described the meeting as "an exploratory" one: "Rita De Santis had provided a general outline of principles guiding the partnership, and we sat to explore these issues".

[181] Ms. De Santis recalled that at the meeting they discussed a timeline under which an agreement amongst shareholders would be reached by the end of September or early October, and that agreement would be subject to David Katz arranging the financing to buy them out. David Katz stated on cross-examination that he might have been "too exuberant and maybe too optimistic in terms of timeline…Perhaps I was naïve enough to believe that the negotiations between the corporations and the selling shareholders would be wrapped up fairly quickly and I was wrong."

[182] On cross-examination before trial Carsley was questioned at some length about the portion of his August 26 memorandum where he wrote: "…whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share", information which he received from David Katz. The following exchange occurred:

> Q. And you put down here when you say "whereas First Capital has already agreed to a value of $71 million for which they would be purchasing a share", I suggest to you sir, that is not what he said to you and it was not part of that discussion?
>
> A. I can't tell you any more than what is here. I can tell you that what my understanding of what was being relayed was that given that Mr. Katz had done a financial analysis or had done at least some rough numbers.
>
> *And knew, and had a reasonable expectation of what he was going to have to pay to the departing shareholders. And he knew the debt levels of the property and the leveraging of the property at the time. And how much money he was going to have to raise in order to provide the liquidity necessary. That's if First Capital or anybody else who was going to look at this was not prepared to consider values at those levels, there was really nothing more to talk about.*
>
> *All of the discussions regarding co-ownership, buy, sells, and shotguns and carrying interest are all very interesting. But if you can't put the numbers together, you are basically wasting your time…*

> Q. And – so that he never would have said as you marked down here, that – and I'm sure you don't mean that First Capital had already agreed to a value of $71 million? There was no agreement as to the $71 million?
>
> A. What I said and as far as I'm concerned what he meant, is that a deal could not be made from what I understood at less than the value of $71 million.
>
> But having said that, there was no meeting of the minds so to speak as to an agreement where two parties were bound to one another or had any rights with respect to one another…If there was already an agreement, there would not be the necessity of an agreement in principle. To put it bluntly, we were far from there…So in my mind there was never an agreement at that point. (emphasis added)

Katz testified that he had not told Carsley that FCR had agreed to a value of $71 million for purchasing an interest in College Square. He said he could not have told Carsley that because "I had no indication from First Capital that that was the case".

[183] On cross-examination on the summary judgment motion it was suggested to David Katz that in August, 2004, he had discussed with Lachance an actual sale of an interest in College Square. Here is the ensuing exchange:

> Q. Well, you're discussing an actual sale of an interest in the property?
>
> A. No, I was not, Mr. Bennett. What I was discussing with First Capital in August 04 were co-ownership principles. And what First Capital was aware of at that time, was my need to be able to fund a share redemption transaction. And they were aware of the fact that I would need a value ascribed to College Square in a third party transaction that would be what I felt at the time, would be in the low 70 million range. That's what was known. There was no agreement being transacted with First Capital at that time, there was no contemplating that an agreement would be transacted at that time…It's inappropriate for anybody, you or anybody else to characterize that August timeframe as a timeframe that involved First Capital and myself and perhaps other non-seller shareholders being in a transaction mode. We were most certainly not in a transaction mode…
>
> …
>
> It's very important to understand that any discussions we had about co-ownership were not on the basis that there was a transaction that we were about to engage in, it was on the basis that at some point in time given certain circumstances and conditions precedent, there may have been an opportunity for First Capital to purchase an interest in it.

Later in the transcript of that cross-examination of David Katz the following exchange occurred:

> Q. You were discussing a co-ownership arrangement in October 2004 with First Capital?
>
> A. I was discussing co-ownership principles.
>
> Q. Okay.
>
> A. And co-ownership framework. That does not constitute a sale, Mr. Bennett.

[184] Katz testified that he did not tell Farber, Andy Katz, Jameson or Day about the August 25 meeting he had with FCR. When asked why he had not, he responded:

> Because this – the discussions that I was having with First Capital in my view were very preliminary, it didn't involve – it wasn't – we weren't in a transaction mode. I was trying to satisfy myself first and foremost that co-ownership principles could be arranged in a manner that both sides could live with. I needed to understand that a co-ownership framework could be developed, and until I satisfied myself there was certainly not much point in involving my brother or sister.

Farber confirmed that Katz had not told her about the August 25 discussions; so too did Andrew Katz.

### B.3 After the August 25 meeting

[185] Following the August 25 meeting Rita de Santis prepared a revised memorandum outlining various issues concerning any co-ownership structure between FCR and the Leikin Group both for College Square and other properties they might co-own. The memo was sent to David Katz on September 8, who returned a marked-up copy to Sylvie Lachance on September 20, offering to meet with her to discuss it. In late August and early September, the Leikin Group sent FCR some information on an environmental issue at College Park, as well as a summary of the terms of two key leases. Lachance testified that she "was expecting that we could finalize something during the fall, I started inquiring and asking for some summary of documents":

> At this preliminary stage, I deemed it important to know what were the issues in the main two leases. So this is the beginning of the due diligence.
>
> …
>
> This is all part of preliminary dealing towards concluding, if possible, a transaction that will be followed by a complete due diligence process…

[186] Discussions between FCR and the Leikin Group did not proceed any further at that time. In mid-October Rita de Santis received a call from Fred Carsley who informed her "that for

reasons relating to conflict of interest, this file is on hold for at least 1 month." Lachance explained:

> There was a point in time where the deal died, disappeared, it didn't get finalized…
>
> [A]t a point of time in the fall, the deal could not be finalized, the deal could not happen. It simply disappeared, and the deal was not there. It was my understanding that the family reorganization had not occurred, had not happened, and that was it. There was no transaction that could be made. So everything suddenly disappeared. We didn't have a deal any more, and, unfortunately, we didn't finalize a transaction that fall.

[187] Ms. De Santis did not recall the details of the call from Mr. Carsley; she simply understood that David Katz needed more time to settle with the selling shareholders. De Santis had no further involvement in the matter until the middle of May, 2005, when FCR learned about the RBC Capital-managed bid process for College Square. She had no discussions with the Leikin Group between October, 2004 and May, 2005.

[188] On his cross-examination on the summary judgment motion David Katz testified that he had not informed his fellow shareholders in the Leikin Group about his discussions with First Capital:

> Q. You didn't advise them that First Capital would – the co-ownership principles you were discussing related to co – to First Capital taking an ownership interest in College Square?
>
> A. That would have been terribly misleading.
>
> Q. …[Y]ou didn't disclose to the selling shareholders any of the discussions you had with First Capital from July 14th through October 12th, did you? You didn't disclose them to the selling shareholders?
>
> A. No, I did not.
>
> Q. …And you didn't disclose that First Capital had an interest in acquiring an ownership interest in College Square?
>
> A. There wouldn't have been a need to disclose something that the selling shareholders were already aware of.
>
> Q. Well, they weren't aware of it.
>
> A. Yes, they most certainly were, Mr. Bennett.
>
> Q. All right. Where did you make them aware of it?

A. April 15th, 2004 Board meeting.

**B.4 Findings of fact**

[189] Let me repeat some of the findings of fact which I made in my Summary Judgment Reasons about the dealings between FCR and Katz:

(i) What First Capital did, as early as January, 2004, was to express an interest in acquiring part of College Square and it engaged in some discussions with David Katz to that end in January and February, 2004, as well as in the August to October, 2004 time period;

(ii) At the time the shareholders executed the LOI on April 18, 2005, First Capital had not made any offer to acquire an interest in College Square, let alone enter into any binding agreement to do so. To the contrary, First Capital was told by the Leikin Group in October, 2004 that no further discussions could be held until the company had resolved its internal affairs;

(iii) First Capital made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005;

(iv) David Katz commenced discussions with First Capital about the possibility of that company acquiring an interest in College Square in January, 2004. He continued those discussions in February, 2004, and from July until October, 2004. As was described in the engagement letter for RBC Capital, by October, 2004 those discussions had reached an "advanced" stage before they were terminated by the Leikin Group.

[190] The discussions which Katz held with Lachance on August 25, 2004, were more advanced than those they had held back in February and March. FCR evidently was taking the discussions more seriously since by August Lachance had received approval from her superior to proceed with the discussions, although she had no authority to transact on a specific price without authorization from her seniors. The communications between FCR and Katz in August, September and October, 2004, did not involve FCR expressing a price at which it might be interested in acquiring College Square, let alone the making of an offer to purchase. It would be fair to say that Katz appreciated he had found in FCR an entity willing to continue discussions with him about College Square, but that is as far as matters had progressed by October when Katz terminated the discussions.

[191] I also accept Katz's evidence that the context in which the August discussions with FCR took place was very different than that in which the March discussions had taken place. Katz initiated discussions with FCR in early 2004 in an effort to find a partner for the Leikin Group which might be willing to consider a strategic alliance and which he could present to the Board as a potential co-venturer. Katz's efforts to interest the Board in a strategic alliance failed at the April 15 Board meeting – Harris, Kesler and Spieler showed no interest in any such alliance. Then came the Prehogan letters in June when it became clear that an unbridgeable divide over the core assets had emerged between two groups of shareholders, prompting the shareholders who wished to continue their ownership of College Square to search for ways to finance the buy-out of the other shareholders.

[192] As that search evolved through July and August, securing the involvement of an equity investor emerged as an increasingly attractive financing option. As an experienced businessman, and as a shareholder interested in continuing his ownership interest in College Square, Katz knew that he had to gain some understanding whether third party equity participation was even possible at a level which would enable the buy-out of the Selling Shareholders. I find that it was in that context in which Katz resumed his discussions with Lachance in August, 2004.

## XV. Barbara Farber's September 1, 2004 memo[20]

[193] As part of its mandate the CIBC retained the Altus Group, a real estate appraisal firm, to prepare a report. Mr. Richard Cyr, of Altus, prepared an August 16, 2004 Report which appraised the value of College Square at $55 million as of August 1, 2004. Altus described its report as a "current narrative appraisal report", the purpose of which was to provide an opinion "of the market value of the leased fee interest in [College Square] on an all-cash basis". CIBC transmitted the Altus Report to Ms. Farber on August 27, 2004.

[194] Josephine Harris testified that both she and Rick Kesler had concerns about the accuracy of the valuation by the Altus Group and wanted a peer review conducted. On his pre-trial cross-examination Kesler maintained that he had in fact suggested that another appraisal be conducted, not simply a peer review.

[195] It was against that background that on September 1, 2004, Ms. Farber emailed a memo to all shareholders. She opened her memo by describing what she perceived as the respective interests of the shareholders:

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[20] The evidence before the court on the summary judgment motion can be found at paragraphs 133 to 138 of the SJ Reasons.

> Those wishing to sell and those not wishing to sell must acknowledge that they have perspectives and interests that are now totally opposite, and which will preclude them from enjoying a satisfying and productive business relationship with respect to the ownership and management of the core assets [i.e. College Square and Zena's Fisher Heights Plaza], on a going forward basis. As such, it will be necessary for both sellers and non-sellers to make every effort possible to enable an appropriate liquidity opportunity to be completed.

Josephine Harris agreed with that description by Farber of the then state of affairs.

[196] Farber advised that CIBC had retained a real estate appraiser whose "mandate is to provide a fair market valuation for both College Square and Zena's Fisher Heights Plaza, to assist selling shareholders in exploring liquidity options." She wrote that CIBC "is available to speak to any shareholder who has questions about any aspect of [its] mandate, the process being followed or the form of the report [it] will deliver". (Rick Kesler acknowledged that from time to time he did speak to Mr. Desrosiers at CIBC about matters relating to the transaction.) Farber indicated that the CIBC report should be available by mid-September. She wrote:

> I am confident that with CIBC's assistance we will be able to give the selling shareholders an equitable offer, based on the fair market value of the core assets. In addition, the company will work on a best efforts basis to obtain satisfactory financing/funding to permit the proposed buy-out transaction to proceed.

[197] In her September 1 memo Farber endorsed Kesler's suggestion that the Selling Shareholders select a real estate appraiser to conduct a peer review for the purposes of validating the CIBC's valuation of the core assets. As to her own intentions, Ms. Farber wrote:

> The other three shareholders and I, who want to preserve the core assets and continue to realize the goals of the companies, want to continue to work to enhance the value of the core assets as well as the other assets of the Leikin Group….In fact the non-selling shareholders' desire to retain ownership and management of the core assets will most likely result in the maximization of the value of the non-core assets of the Leikin Group, which will be retained by all current shareholders.

Ms. Farber concluded her memo by writing:

> I am extremely confident that all shareholders will approach the CIBC shareholder liquidity process with the knowledge that a successful outcome can only be achieved if it is beneficial to all shareholders.

[198] As part of their submissions at trial the plaintiff s pointed to this concluding language by Ms. Farber as an undertaking by the Non-Selling Shareholders to protect the interests of all shareholders. I find that it was nothing of the sort, and such an argument by the plaintiffs sought

to twist certain of Farber's words out of their context. Read as a whole, Farber's September 1 memo highlighted the conflicting interests of the selling and non-selling shareholders and simply expressed a hope that all the shareholders would work through the sale share process in a way which would result in a transaction satisfactory to both sides. I will return to this point later in my analysis.

[199] Rick Kesler responded to Ms. Farber's email on September 8, 2004. He found her characterization of the overall situation "confrontational" – so much for the plaintiffs' assertion in this action that Farber had undertaken in this letter to protect their interests - and then made some pointed comments about the Altus Group Report, a draft of which he had reviewed:

a) He was opposed to the Altus Group preparing the report since it had performed an earlier valuation for mortgage financing purposes and he regarded their current report as a "re-cycling of the earlier valuation for mortgage financing purposes with little if any new input or consideration given to fair market value";

b) He could not imagine that "a full, fair market evaluation" could be done for the modest fee charged by the Altus Group;

c) He stated the Altus Group's "so called fair market value analysis is nothing more than a superficial review of their earlier work";

d) He proposed retaining "an independent evaluator for the purpose of preparing a report that provides us with an analysis of the fair market value of the core assets. Since this does not appear to be what the Altus Group has done, I am not suggesting a 'peer review'";

e) He argued that "we must establish the fair market value through an independent analysis"; and,

f) He recommended retaining David Atlin of Integris Real Estate "to perform a fair market value analysis in order to assure all shareholders that this exercise is open and transparent".

Kesler concluded by stating that he had communicated directly with Grant Jameson on an issue regarding share transfer provisions.

[200] On September 3, 2004, David Katz prepared a memo to file listing several matters requiring review. Item 5 was:

> Funding and Cash Flow analysis for the buy-side newcos based on the sale of a 61% undivided interest in College Square based on the appraised value of $55 million with 100% ownership of Plaza and purchase based on the appraised value of $6.7 million, with a $4 million mortgage. This analysis is for the purposes of demonstrating to the sell side that the proposed transaction is fundable and to discourage any of the sell side from moving over to the buy-side.

## XVI. The CIBC process: August – September, 2004[21]

### A. The critique of the Altus Report at trial

[201] As mentioned, the Altus Group provided CIBC with an appraisal report valuing the College Square property at $55 million as of August 1, 2004. Time was spent at trial by the plaintiffs in attempting to demonstrate that information material to the property appraisal process – i.e. David Katz's discussions with FCR in August, 2004 – should have been disclosed to the Altus Group. A battle of experts ensued over what sort of information was material to the property appraisal process.

[202] At trial the plaintiffs called Mr. Kenneth Stroud, a certified appraiser, to give expert evidence in relation to the Altus Report. Specifically, Mr. Stroud opined that:

(i) in conventional due diligence on the part of an appraiser in formulating an opinion of value, the appraiser should refer to ongoing negotiations and/or discussions with an interested third party for the acquisition of the property, if the appraiser knows of those negotiations; and,

(ii) if ongoing negotiations and/or discussions were referenced in an appraisal report, they might, but not necessarily, have an impact on the opined value for the property; it would depend on the particular circumstances.

[203] In his evidence in chief at trial, Mr. Stroud expanded on his opinions:

> A. … In addition the negotiations or discussions would have to be meaningful; they would have to be substantive. If they were extremely preliminary, if there was only a few phone calls or a meeting, very premature, then the answer would be no, they wouldn't be referenced in the report, however when I reviewed the various transcripts that are noted in my scope of work, I tried to formulate a critical path timeline of events that transpired,

[21] The evidence before the court on the summary judgment motion can be found at paragraphs 132, 133 and 139 to 146 of the SJ Reasons.

> and in my opinion those discussions or negotiations were substantive. Documentation exchanged hands, rent rolls, surveys, site plans, there a significant number of email exchanges, and in addition I would qualify it too by saying that if those discussions and negotiations were with someone on the street I would –
>
> THE COURT: What exactly do you mean by that?
>
> MR. STROUD: What I mean by that is First Capital is a very sophisticated player in the industry, they're highly informed, it's a very tight market out there in context of superior players that acquire property of this nature, and they are certainly one of them. So if they were stepping up to the plate I believe those negotiations or discussion would have traction.
>
> MR. BENNETT: Q. What do you mean have traction?
>
> A. There would be substance to them.

[204] In his report Stroud stated that the applicable standard for preparing appraisal reports in effect at the time of the Altus Report was that of the Canadian Standards of Professional Appraisal Practice ("CUSPAP") of the Appraisal Institute of Canada, in particular Lines 1695 to 1698 which provided:

> Agreement for Sale/Option/Listing
>
> - must be analyzed and reported if any agreement for sale, option or listing of the subject property occurred within one year prior to the date of valuation if such information is available to the appraiser in the normal course of business.

[205] On cross Stroud acknowledged that his inclusion of on-going negotiations or discussions in the conventional due diligence by an appraiser represented an "expansion" of the CUSPAP standard – "serious negotiations and discussions I believe fall into the category of the spirit and intent of that guideline". He conceded that each of the three events referred to in the standard – sale, option, listing – had a hard price number associated with it, whereas discussions did not. Stroud also agreed that nowhere in the CUSPAP standards do the words "negotiations" or "discussions" appear.

[206] Richard Cyr prepared the Altus Report. As part of his information-gathering efforts for preparing the report, Mr. Cyr sent CIBC an Information Request Form for College Square which inquired whether there were "any recent agreements or options to buy/sell the subject property" and whether the property was listed for sale. In chief at trial Cyr also testified that as part of preparing a valuation for a property he would investigate whether anyone had made a serious offer for the property. By that he meant:

> What I mean by offer is I mean it doesn't have to be finalized, it doesn't have to be necessarily concluded in order for me to report it. It has to move forward in the stage of the offer that it show seriousness between two parties where you have a willing vendor, and willing buyer that are at the table discussing in a serious manner about transacting a piece of real estate.

[207] Cyr testified that the existence of discussions about a piece of property might or might not affect its valuation:

> It may and it may not depending on the information I get from the - and how much, you know, it gives you one of the benchmarks. As an appraiser when you conclude based on facts you bring all those facts together being transactions, interviews, etcetera, and that piece of information would be an additional piece of information that would come as part of the puzzle. It doesn't mean that it would automatically influence the value or not.

In the case of his valuation of the College Square property, he did not make any inquiries as to whether there were any discussions or negotiations underway concerning the property.

[208] At trial the Katz Defendants called Wayne Crawford, a certified appraiser, to comment on Stroud's opinion. Crawford opined in his report that:

> Since negotiations or discussions are not specifically referenced under Lines 1695-1698 [of the CUSPAP], I have concluded that reference to them in the appraisal report or knowledge of their existence would only have been beneficial to the Altus appraiser had the talks reached a point where there was an agreed upon purchase price and a well-defined specified interest in the property was being acquired.

Crawford explained the rationale underlying the reporting requirement for agreements, options and listings in the CUSPAP:

> Q. Now why are agreements for sale, options and listings mandated under the standard as something that you are required to explore?
>
> A. The appraiser is typically being asked to evaluate the real property, and to provide a fixed number for that property. It is important for them to understand whether or not there is an existing or proposed Agreement of Purchase and Sale being worked, whether or not there is an option to purchase, because that option may or may not reflect market value but we would need to know of its existence, and a listing is very important because that is a number that is typically set by the vendor and its realtor, and it's basically their wish list. That's what they would like to achieve for the property and it's up to the market to work that number with the vendor.

> Q. And all three – am I correct all three of those categories of event, agreement, option, or listing disclose hard numbers for value?
>
> A. That's correct.

[209] As to the obligation of an appraiser to inquire into the existence of discussions or negotiations as part of a valuation process, Crawford testified that making such an inquiry would be "above and beyond the standard".

[210] I prefer Crawford's evidence on this issue since it reflects the actual language of the applicable CUSPAP standards.

**B. Leikin Group certificate to CIBC**

[211] Mr. Desrosiers of CIBC testified that as part of CIBC's mandate to prepare a report it obtained from Leikin a Form of Certificate signed by Barbara Farber on September 23, 2004. In that Form Barbara Leikin certified:

> To the best of my knowledge and belief, no verbal or written offers or serious negotiations for, at any one time, the Core Assets or all or a material part of the properties and assets owned by or the securities of the Leikin Group or any of its affiliates have been made or occurred within the two years preceding the date hereof which have not been disclosed to CIBC IB.

[212] According to Mr. Desrosiers, neither David Katz nor Barbara Farber advised CIBC that there had been negotiations with FCR or that numbers had been exchanged concerning College Square, although he had actually asked.

[213] Farber testified that she did not make any inquiries before she made that representation. When asked why she had not, given Katz's mention of a $71 million number and the name of FCR at the July 14 meeting, Farber testified:

> Q. And David Katz at this point was acting as a consultant to Harzena Holdings, correct?
>
> A. Yes.
>
> Q. And you'd given him permission or asked him to assist you with the CIBC transaction, the share redemption transaction, correct?
>
> A. Yes.
>
> Q. And he's talking about a way of funding the transaction, correct?

A. Yes.

Q. And you didn't make a single inquiry of Mr. Katz after having heard that presentation on July 14th to say have you engaged in any discussions because I've got to make a representation to CIBC?

A. No.

Q. Was it?

A. I knew that David had ideas of how we could fund the transaction, what kind of monies we were going to require to fund the transaction. He gave an example, and to the best of my knowledge and belief that was all I knew.

Q. But you made no inquiries of Mr. Katz at this point in time?

A. No, I didn't.

[214] Farber testified that in September, 2004, she had been unaware of the discussions which David Katz had held with FCR in August. I accept her evidence on that point; David Katz testified that he did not tell Farber or Andrew Katz about those discussions.

**C. The CIBC Report**

[215] On September 23, 2004, the CIBC sent its Report to the directors of the Leikin Group. The CIBC Report provided an estimate of the fair market value of the shares owned by the Selling Shareholders and presented a financing plan and term sheet for the proposed buy-out transaction. The CIBC Report, relying on the Altus Group Report, placed a fair market value of $55 million on College Square and proposed a transaction under which the shares of the Selling Shareholders would be bought for $2.96 million for each selling shareholder, subject to arranging financing for the proposed transaction.

[216] The Report described two possible financing scenarios for the proposed transaction. Each would involve some debt financing, and one would see the sale of a 52% co-tenancy interest in College Square, the other the sale of a 64% co-tenancy interest. CIBC contemplated an ownership structure under which the Non-Selling Shareholders would own a Newco which, in turn, would jointly own College Square with a third party investor. Appendix "F" to the CIBC Report, "Reorganization Flowchart", graphically showed that following the amalgamation of the two companies which owned the College Square property and the creation of a Newco to hold a 7/11 interest in College Square, the Selling Shareholders would be bought out by way of a redemption of their shares in the amalgamated company. Once that was done, "Newco sells to 3rd party an interest in College Square". The "Step 4" graphic showing this final step in the

transaction did not ascribe any percentage ownership in College Square to the Amalco, Newco or 3rd Party purchaser. The Report observed that a co-tenancy agreement between the Non-Selling Shareholders and the third party investors would have to be negotiated, and "[m]anagement of College Square may or may not be retained by NewCo" – i.e. by the Non-Selling Shareholders.

[217] The Appendix "F" graphic in the CIBC Report signaled to the directors, and later to the Selling Shareholders who received the CIBC Report, that the proposed transaction would see a third party investor brought in to participate in the ownership of the College Square property, with the extent of that third party's interest to be determined at a future date.

[218] When one reads the CIBC Report in its entirety, several key points emerge:

(i) The re-organization and transaction proposed by CIBC to buy-out the interests of the Selling Shareholders in College Square would result in some third party investor owning an interest in College Square;

(ii) The Report presented two scenarios of different levels of third party co-ownership, but it would be clear to any reader that the ownership levels were being presented for demonstration purposes only to make it possible to run financial numbers. Appendix "F" showed that the ultimate degree of co-ownership by a third party was not known at the time. As Appendix "F" noted: *"% Participation is contingent on Financing Scenario"*; and,

(iii) The Report made no representation about the price at which a third party would purchase a co-ownership interest in College Square. The Report ran two scenarios which, of necessity, had to assume – the word "assumption" was clearly used on page 36 of the Report – the amount of an equity placement, but those numbers were, as they were described, merely assumptions.

It would have been, or should have been, obvious to the reader of the CIBC Report that the monetary specifics of financing the proposed buy-out of the Selling Shareholders remained up in the air and would have to be addressed either in the contemplated negotiations between the two sides over the terms of the LOI or otherwise. In the result, as the evidence I will review below will disclose, the Selling Shareholders signed a LOI which ceded to the Non-Selling Shareholders complete discretion over how to secure the financing for the share buy-out, as well as the potential benefit of any such financing.

[219] Rick Kesler received the CIBC Report before the September 28 Board meeting, and he understood that the Report contemplated that "there would be a potential financing that would be

negotiated in the 120 day period after the letter of intent was signed" between the Selling and Non-Selling Shareholders.

[220] On the same day, September 23, Grant Jameson sent all directors (i) a memo containing recommendations regarding the obligations of directors when reviewing and considering the CIBC Report, (ii) a draft letter of intent for the sale of shares, and (iii) a resolution authorizing the distribution of the CIBC Report to all shareholders and the holding of a special meeting of the shareholders to consider the report. In his email Jameson wrote:

> I thought it would be useful to send this memorandum because in our view each director of the Leikin Group is in a conflict of interest in this situation. I will ask each director to declare the conflict at the commencement of the directors meeting next week so that the minutes show that the directors have followed proper procedure.

[221] In his memorandum describing the directors' duties to the Leikin Group in respect of the CIBC Report and the proposed transaction, Jameson stated: "The best interest of the Leikin Group include the interests of all of the Leikin Group's shareholders." The memo noted that all members of the board stood in a conflict of interest position with respect to the proposed transaction and, "as a result, the Board should not vote on or approve the Proposed Transactions." Jameson recommended that "the Board critically review and examine the CIBC Report as outlined above and call a meeting of the shareholders of the Leikin Group to approve the Proposed Transaction." Jameson testified that since all Board members had conflicts with respect to the transaction, his advice was that all of the shareholders had to approve it. Jameson noted that "the report makes it clear that CIBC is not making any recommendations and the Board will need to consider the Proposed Transactions and reach a conclusion on whether to move forward".

[222] At trial the plaintiffs submitted that Jameson's statement that the Board call a shareholders' meeting "to approve the Proposed Transaction" amounted to a recommendation by him that the shareholders should approve the transaction. I do not read Jameson's statement that way at all. I accept Jameson's evidence that the sentence simply meant that a shareholders' meeting was required to consider whether to approve the transaction. That was evident from the October 1, 2004 letter Jameson sent to each shareholder which made it crystal clear that the decision whether or not to sign the letter of intent was for each individual shareholder to make.

[223] Josephine Harris acknowledged that the directors had their own personal conflicts of interest in respect of the proposed transaction. Rick Kesler also agreed that by this point of time as a director he was in a conflict of interest situation. Harris also acknowledged that Jameson did not give them advice about the actual price for the sale of their shares and she agreed that it was Jameson's job to advise the directors and shareholders about corporate, not personal, matters.

## XVII. The September 28, 2004 Board meeting[22]

### A. What was discussed at the meeting

[224] The boards of the Leikin Group met on September 28, 2004. David Katz did not attend the meeting because he was not a director.

[225] The Boards received a presentation from CIBC on its Report. The boards approved its circulation, together with the draft LOI, to all shareholders, decided to retain another appraisal firm to review the Altus Report – Rick Kesler was to choose the appraiser from a list identified by CIBC – and decided to call a special meeting of shareholders to allow them access to the professional advisors so they could fully understand the CIBC Report and the form of the proposed share redemption transaction. At the meeting the directors declared their conflicts of interest. The draft minutes of the board meetings contained the following entry at Item J about discussion of the valuation issue:

> Several discussions ensued regarding valuation issues, including discrepancies between CIBC's valuation of $55 million and the $62 million valuation provided by Ginsberg Gluzman Fage & Levitz.
>
> > Barbara Farber advised that prior valuations were only best estimates by management.
> >
> > *Gerald Levitz indicated that prior estimates were not valuation opinions but that they were merely stating that a valuation of $60 million was possible and that it may be worth doing the calculations.*
> >
> > Rick Kesler asked whether prior management valuations were considered in the Altus valuation to which Richard Cyr [Altus Group] responded that they did not as they were not asked to. He indicated, however, that the valuation would not be different, regardless.
> >
> > Rick Kesler then asked Richard Cyr whether the valuation uncertainty could be as high as 15% to which Richard Cyr responded that a reasonable uncertainty would be no greater than approximately 5%, not 15%.
> >
> > Josephine Harris asked where the management estimate had come from. Barbara Farber responded and explained. A discussion ensued.

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[22] The evidence before the court on the summary judgment motion can be found at paragraphs 147 to 152 of the SJ Reasons.

> Eric Desrosiers [CIBC] clarified that the valuation report was not an opinion and that an opinion could be given at additional cost.

[226] The Minutes then went on to record a discussion about the financing of the transaction:

> James Brooks [CIBC] stated that CIBC could undertake the financing, marketing and completion of the transaction described in the report within 120 days. Rick Kesler asked whether preliminary discussions with potential investors had occurred to which Eric Desrosiers responded that since CIBC had not been retained to do so, the matter was kept internal and confidential. Calvin Younger [CIBC] indicated that he felt it would imprudent to enter into discussions with investors at this point.

Kesler accepted the accuracy of those Minutes. Kesler testified that at the meeting he had asked whether any third party had inquired about the financing or acquisition of College Square. He accepted that no such question was recorded in the Board's minutes, nor had he, prior to the trial, taken the position that the minutes of the meeting were inaccurate. Jameson testified that at that time he had no information about preliminary discussions with potential investors either conducted by CIBC or by anyone else. Farber, who was present at the meeting, testified that at that point of time she did not know about the discussions David Katz had held with FCR in August, and I have accepted her evidence on that point.

[227] At trial Patricia Day commented on the minute recording Levitz's statement that prior estimates performed by GGFL were not valuation opinions:

> Well I think there was concern about the $62 million and I think generally as it says in here that the $62 million was not a valuation, it was just a calculation we had done.

**B. The plaintiffs' allegations concerning the non-disclosure of material information at the September 28 Board meeting**

[228] Josephine Harris deposed that she gave her approval to the circulation of the CIBC and Altus Reports based on incomplete information:

> The information obtained by Grant Jameson in the July 14, 2004 meeting, as verified by his handwritten notes, with respect to the structure of the Proposed Transaction and the proposed sale of an interest in College Square to First Capital Realty at a price in excess of $70,000,000 was material information. It would have caused me to reject both the circulation of the CIBC Report and to instigate a further inquiry into how CIBC and or Altus had arrived at a valuation more than 20 per cent below that estimated by a former officer of the company, who had far more access to information than any of the Selling Shareholders or their director representatives on the Board. Further, I am advised by my four children and believe that this material information would have impacted on their decision on whether or not to approve the Proposed Transaction.

[229] On cross-examination, however, Ms. Harris agreed that she had not accepted the $55 million valuation figure reached by the Altus Group at face value and was concerned about the "sliding scale of the valuations."

[230] Rick Kesler deposed that Grant Jameson failed to disclose at the September 28 Board meeting the information he had obtained regarding FCR during the July 14, 2004 meeting. Kesler stated that during the meeting he was actively asking questions of the various professional advisors. At trial Kelser testified that he had asked the CIBC people and the other directors whether there had been any inquiries from third parties in connection with the financing or sale of College Square.

[231] Patricia Day acknowledged that there was no discussion at the Board meeting of the numerous calculations GGFL had performed; the calculations had been prepared for the company. Farber testified that she did not disclose the $71 million number which Katz had mentioned at the July 14 meeting because:

> Q. You did not disclose the $71 million figure referred to at the July 14th meeting, why not?
>
> A. There was nothing to disclose it was – it was a funding number, it wasn't a value that was put on anything, it wasn't – it was a funding number. There wasn't anything to disclose to anyone.

[232] Andrew Katz participated by phone in the Board meeting. He believed "that there was a clear knowledge and understanding on the part of all of the directors that a third party purchaser would become involved with the Non-Selling Shareholders in order to facilitate the transaction, once an agreement between the shareholders had been reached."

## XVIII. From the September 28 Board meeting to the start of the buy-out negotiations[23]

[233] Following the board meeting Ms. Farber asked CIBC to conduct an analysis of the Leikin Group's projected financial performance and its ability to pay dividends over the next two years. In June, 2004, Farber had circulated calculations projecting dividends of $200,000 for each shareholder in 2005 and 2006; the October analysis prepared by CIBC revised those projections downwards to $86,000 and $107,000 per shareholder for each of 2005 and 2006. In his affidavit Mr. Kesler characterized the revised projections as threats from Ms. Farber to reduce dividend

[23] The evidence before the court on the summary judgment motion can be found at paragraphs 153 to 184 of the SJ Reasons.

payments unless the Selling Shareholders proceeded with the share redemption transaction. I place no stock in that allegation. The CIBC process represented a good faith effort to find a transaction structure which could work. It is noteworthy that during the negotiations over the LOI that the plaintiffs' professional advisors did not propose an alternative structure.

[234] In a memo he sent to Barbara Farber, Grant Jameson, Gerald Levitz and Eric Desrosiers on September 30, 2004, David Katz wrote: "Rick [Kesler] is using the $62 million College Square value as the relevant benchmark, on the basis that management provided it and the auditor accepted it. The $62 million value was crudely arrived at by management…The $62 million value was transmitted by management to the auditors, on the basis that it would be used for illustrative purposes in determining an approximate and aggressive net proceeds analysis on the basis that 100% of the asset would be sold."

**A. The first draft Letter of Intent**

[235] On October 1, 2004, Jameson sent all shareholders a memorandum outlining "a form of proposed transaction', as well as a draft LOI. Mr. Jameson described the purpose of the transaction in the following terms:

> The transaction proposed in the CIBC Report is intended to give the seven shareholders who seek the sale of the Core Assets access to their share of the value of those Core Assets while at the same time, allowing the four shareholders who do not want to sell the Core Assets, a way to preserve their interests in the Core Assets while enabling all shareholders to continue to support the goals and objectives of the family business.

Jameson advised that a meeting of all shareholders would be held on October 25, 2004 to give shareholders an opportunity to review the CIBC Report and the proposed transaction with all the consultants who had been involved in the process. As events unfolded, no such meeting was held.

[236] At trial Jameson commented on the distinctive structure of the proposed transaction:

> The draft Letter of Intent really set out the structure, the legal structure of the transaction. This was a bit of a – perhaps an odd transaction in that there – it wasn't an agreement of purchase and sale between a buyer and a seller. It was a corporate transaction where the corporations were suggesting or were entering into an agreement with some of its common shareholders, but those common shareholders described as selling shareholders would be exchanging shares for a certain value, the value being the appraised value of the College Square assets in this case. So the Letter of Intent was between the corporations and the shareholders.

[237] The draft LOI set the purchase price of each shareholder's holdings at $2.96 million, the purchase price found in the CIBC's report. The LOI contemplated a closing date 120 days following its execution and stated, as a condition of closing, that "the Leikin Group shall have arranged satisfactory financing to complete the Pre-Closing Transactions and the Transaction contemplated by this letter". If that condition was not satisfied or waived, the LOI would terminate. More simply put, if satisfactory financing was not found, the share buy-out would not happen. That was the fundamental business reality surrounding the whole deal, a reality which I sensed during the trial that the plaintiffs had lost sight of.

**B. The plaintiffs' legal advisors**

[238] By this point of time the Selling Shareholders had retained some professional advisors. On October 6 Rick Kesler advised that Mr. Jules Lewy, his partner at the FMC firm, would "be reviewing the transaction on my behalf". Lewy practised corporate and tax law and, at that point of time, had been in practice just under 30 years. He testified that Kesler retained him to assist in "dealing with the shares of the various Leikin Companies". The Harris family also retained him to deal with Canadian tax law matters. Lewy also acted as a go-between "between the various members of the families to set out their views to the other side, to the Farber side".

[239] Mainzer, the Chicago lawyer and accountant, was already advising the Harris Plaintiffs, and he described his role in the following terms:

> I reviewed documents, I reviewed information I received from the accountant, I prepared a synopsis of what the accountants inform – the information the accountant gave me, and I discussed the matters with the Harris' on an ad-hoc basis.

Mainzer testified that the Harris family was trying to achieve the maximum value for their shares. According to Sheira Harris, the flow of transaction-related information within the Harris family usually involved her mother, Josephine, circulating reports or communications provided by Lewy or Mainzer.

[240] On her cross-examination on the summary judgment motion Josephine Harris acknowledged that throughout the course of the negotiations her family relied upon the advice of their own professional advisors – lawyers and real estate appraisers. Her daughter, Sheira Harris, testified that she had relied on her mother, Josephine, and Mainzer to protect her interests throughout the transaction.

[241] At trial Josephine Harris stated that she did not ask Jameson for advice on the redemption transaction. By contrast, she contended that she "absolutely" had sought advice from Mr. Levitz, at one meeting asking him to give her a course on "cap rates 110".

[242] Mr. Prehogan and William Ross of the Weir Foulds firm already had provided some advice to Steven Kesler and the other plaintiffs, and Prehogan had sent the demand letters back in June. Ivan Kesler was receiving independent legal advice from Greg Sanders, an Ottawa lawyer.

[243] Starting in February, 2005 David Spieler retained a lawyer at Davis LLP, Sandra Appel, to provide him with independent legal advice. Ms. Appel practiced in the area of commercial transactions.

[244] In his affidavit Rick Kesler asserted that he was dependent on the Katz siblings, Ogilvy Renault and GGFL "to provide me with all of the material information regarding the Proposed Transactions and the two properties so that I could make an informed decision on terms in the Letter of Intent drafted by Grant Jameson and the Ogilvy Renault LLP Defendants." On his pre-trial cross Kesler admitted that he had relied on the advice given to him by his professional advisors in signing the LOI. At trial, on cross, he disagreed that he was not relying on the Lawyer Defendants to represent his personal interests as a shareholder, although he conceded he could not point to a retainer letter with them to that effect. Kesler testified that he was relying on Jameson "to endorse the valuations that we were getting and the fairness of the overall transaction", and he was not prepared to agree that the only basis on which Jameson could assess the fairness of the price was the valuation of the property contained in the different appraisal reports.

[245] At trial Mr. Kesler was asked whether he thought that the interests of the selling shareholders diverged from those of the remaining shareholders. He testified that they did not:

> Q. Isn't it true sir that you acknowledged that there would have been points in the course of the negotiation where the interests of the selling shareholders were not the same as the corporation and the remaining shareholders?
>
> A. No, I disagree with that.
>
> Q. So when you say as we read at question 859 that your interest was in maximizing the price paid, and the company wanted to control or limit the amount that you would be paid, you don't consider that to be an opposing or conflicting interest?
>
> A. I don't regard it as opposing or conflicting, I regard it as two sides of a discussion.

I do not accept Mr. Kesler's evidence on this point. He was a lawyer specializing in one aspect of commercial tax law – customs and excise - who was practising at a national law firm. As such he would have been quite familiar with the concept of commercial conflicts of interest which are based on the existence of divergent interests held by different parties to a transaction. For Mr.

Kesler to testify that in a share buy-out transaction the interests of selling shareholders would not have differed from those of purchasing shareholders undermined his overall credibility.

**C. Plaintiffs' legal advisors seek information about the transaction**

[246] Some of the plaintiffs' professional advisors sought information from the advisors to the Leikin Corporation. For example, Patricia Day, of the GGFL accounting firm, sent Lewy and Rick Kesler an email on October 8 attaching a memorandum regarding the proposed share redemption transaction structure. She stated "if there is additional detail required please do not hesitate to contact me." Day enclosed a memorandum dated August 16, 2004 to Barbara Farber which set out the key principles underpinning the proposed redemption transaction. One of the principles regarding the College Square aspect of the proposed corporate structure Day described as follows:

> Assuming that a third party is brought in to own 50% of College Square, 11/22 of College Square will be sold to a third party by Newco. The third party will have a cost base in the property equal to the fair market value. A co-tenancy would now exist with Harry Leikin Holdings Limited, Newco, and the third party.

The calculations prepared by GGFL to accompany the memorandum estimated sale proceeds from College Square assuming a value of $55 million. Day acknowledged on cross that she did not provide Mr. Kesler with the calculations using the higher estimates of fair market value for College Square. Josephine Harris acknowledged that in October, 2004 she was aware of a possible structure under which a third party would own 50% of College Square.

[247] At trial time was spent comparing the August 16 memo which Day had sent to Lewy on October 8 with another, shorter version of the GGFL memo, also dated August 16, 2004, transmitted to Barbara Farber and David Katz back on August 16. Kesler testified that he had received the October 8 version of the memo, but not August 16 one sent to Farber and Katz. That earlier memo included the following bullet point:

> Assuming that at (sic) third party is brought in to own 50% of College Square, 11/22 of College Square will be sold to a third party by Newco. Newco will have a capital gain for the excess of the fair market value of the property as paid by the third party over that used to buy from the Selling Shareholders (if any). The third party will have a cost base in the property equal to the fair market value. A co-tenancy would now exist with Harry Leikin Holdings Limited, Newco, and the third party.

In the latter, October 8 version of the memo, the second sentence, underlined above, was not included, although that was only one of a number of differences between the two memos, and in

some cases the second version of the memo contained information not found in the first. Kesler expressed the plaintiffs' complaint with GGFL on this point as follows:

> Q. Are you suggesting to His Honour that Ms. Day did something dishonest in preparing two separate memos, both which on the face have an August 16, 2004 date?
>
> A. I'm suggesting that Ms. Day should have, as we asked her to, sent us all of the information that she was sending to all of the parties.
>
> Q. All right, so you're not suggesting she did something dishonest?
>
> A. I hesitate to use the word dishonest.
>
> Q. All right, are you suggesting she did something improper by having two memorandums dated August 16, 2004?
>
> A. Yes, I do.

Kesler was not prepared to accept, as a reasonable explanation for the two memos bearing the same date, Day's testimony that, when she had updated the memo in October, she had forgotten to change the August date.[24]

[248] Day gave the following testimony regarding the absence from the second version of the memo of the sentence about which Kesler expressed concerns:

> It's difficult for me to recall that now. Potentially I may have taken it out because I didn't think it was really part of the concerns of the selling shareholders. The capital gain in Newco would've been the responsibility of the remaining shareholders.

Day also testified that when she had prepared the August 16 memo, she did not have any knowledge of a third party agreement to acquire part or a whole interest in College Square.

[249] At trial, on cross, Kesler was asked questions about the implications of the portion of the GGFL memorandum which referred to a third party being brought in to own 50% of College Square:

> Q. Okay, well let me just try to keep it simple for the purposes of what I'm dealing with Mr. Kesler. Is it fair to say that this document, which you did receive on its face at bullet number 5 on page 2 reflects that there may be a sale of the interest in College Square to a

[24] Day produced a document (Ex. 51) which showed the last edit date for the August 16 memo as October 8, 2004.

> third party after the selling shareholders had sold their interest? Does that document not say that to you?
>
> A. No.

Mr. Kesler explained the reasoning underlying that position as follows:

> Q. Well we all know what it says, I'm just asking you with you background, your experience did you not – do you not take that as meaning that, and you can either agree or you can disagree?
>
> A. I disagree because we were proceeding on the basis of the CIBC report which contemplated that there might be for example a refinancing of College Square or indeed Fisher Heights Plaza or indeed the sale of Fisher Heights Plaza as part of raising the necessary funds.

[250] Those answers, coming from an experienced tax lawyer like Mr. Kesler, simply are not credible. First, the GGFL memo he received on October 8 clearly identified the possibility that a sale of an interest in College Square to a third party might be required to generate the funds to buy-out the shares of the Selling Shareholders. I would note that over a month later, on November 22, 2004, Greg Sanders, the lawyer acting for Ivan Kesler, circulated an email to the lawyers representing the other Selling Shareholders which clearly revealed that he understood the GGFL memorandum was referring to "a subsequent sale of a portion of those assets to a third party to finance the operation…" Second, Mr. Kesler engaged in a selective reading of the CIBC Report. As set out above, that Report, in its "Financing Plan" section, described two possible financing structures which would see the Non-Selling Shareholders bring in a third party investor with a 52% - 64% equity position in College Square in order to finance the buy-out, and Appendix "F" clearly stated that the percentage participation by a third party investor would be dependent on the financing scenario selected. Third, during this same part of his cross-examination, Kesler gave the following evidence which, with respect, can only be described as fantastical:

> Q. Okay, and you would agree with me Mr. Kesler that any first year lawyer in the tax group of Fraser Milner Casgrave in the years you were there would understand what a capital gain is and what a capital loss is, correct?
>
> A. I'm not sure, but I appreciate your point.
>
> Q. Sorry?
>
> A. I said I'm not sure the correctness of that answer, but I appreciate your point.

Q. Do you disagree with me?

A. Yes, I'm not sure every first year lawyer would understand that distinction.

Mr. Kesler's inability to admit the obvious very seriously eroded his overall credibility on contested matters.

[251] Kesler's testimony on this point also was seriously undermined by the much more commercially reasonable evidence given by his lawyer, Mr. Lewy. When asked what significance he attached to the reference in Day's memo to bringing a third party in to own 50% of College Square, Lewy gave the following evidence:

> Q. What, if any, significance for you is there for the first sentence assuming that a third party is brought in to own 50% of College Square?
>
> A. It just says one of the possibilities in terms of how they would be structuring their transaction.
>
> Q. At this point did you know how the transaction would be structured from the non-selling shareholder side?
>
> A. *No, that was the whole reason for the Letter of Intent that we were not told how it would be structured, and the purchasers would then have time to figure out how to structure it and get the funds*. (emphasis added)

Lewy continued by testifying that the selling shareholders had understood there were no deals going on at that time – "they were fine with a profit later on, but not when the Letter of Intent was entered into".

**D. The plaintiffs retain their own real estate appraiser: David Atlin**

[252] Unbeknownst to the Non-Selling Shareholders at the time, in September, 2004, Rick Kesler had approached David Atlin, of Integris Real Estate Counsellors, to provide the Selling Shareholders with professional real estate consulting services. Kesler's lawyer, Mr. Lewy, had introduced Mr. Atlin to Mr. Kesler.

[253] Josephine Harris testified that they had retained Atlin to provide them with advice about the value of College Square. The Selling Shareholders did not disclose their retainer of Atlin to the Non-Selling Shareholders because, according to Ms. Harris, at that point of time the atmosphere was full of mis-trust and the Selling Shareholders were looking after their own interests.

[254] Rick Kesler had developed concerns about the accuracy of the valuations secured through the CIBC process. As he put it in his affidavit:

> Even after the peer review of the valuation of College Square by MacKenzie, Ray Heron & Edwardh and the revised fair market value by CIBC of $58.9 million for College Square, I continued to have concerns that this was not the fair market value for College Square. I was concerned that the non-selling shareholders, and in particular David Katz, Barbara Farber and Andrew Katz had already negotiated a deal with a third party to purchase an interest in College Square at a value in excess of $58.9 million.

Kesler acted as the selling group's contact with Atlin. He provided Atlin with the Altus and Edwardh Reports.

[255] At trial Kesler and Atlin disagreed on what advice Atlin had provided to Kesler about the value of College Square. Atlin testified that he provided Kesler with advice both in the fall of 2004 and the spring of 2005. As to the former, Atlin testified that after reviewing the initial Altus Group Report he had told Kesler that his initial inclination, before doing any work, was that the value was too low because the market was moving rapidly and capitalization rates were more aggressive. Atlin testified that although he had some discussion with Kesler about conducting a formal appraisal report, in the end it was decided he would not, and at no time did he provide an opinion of value in the context of an appraisal.

[256] Atlin testified that after receiving the updated Altus Report, he had some further telephone conversations with Kesler:

> At that point it was very much restricted to my providing my market knowledge of how market values had been changing over time for reasons of, in my view, continued compression of interest rates. That was a period of time that values were changing quite rapidly in the marketplace, and the in-flow of money, European money, Middle Eastern money, Israel, Germany, the lower interest rate environment we were in were all driving values up, so our conversations from that point forward were quite, they were almost repetitive.
>
> …
>
> I'm just saying the conversations were my providing information about the market, how market values are going up for reasons of the compression of interest rates and Mr. Kesler was simply, you know, presumably accept what I was saying and advise me that he was focusing on the tax structure of the deal on behalf of the Canadian vendors. That was pretty the extent of our conversations.

[257] Finally, Atlin testified that in the March/April, 2005 time period he had performed some further sensitivity analysis on the value of College Square using the Altus cash flow numbers, and he had calculated a present value of College Square ranging from $64.59 to $66.76 million using discount rates from 8.5% to 8.0%, respectively. Although he did not sent Kesler the matrix table containing his analysis, Atlin testified that he had spoken with Kesler about the results. Atlin was then asked:

> Q. Did Mr. Kesler ever tell you at this period of time in mid April that the shareholders had arrived at a number of $60 million for the transaction?
>
> A. No.
>
> Q. Did he ever ask you whether $60 million was a good number?
>
> A. No.
>
> Q. Did you ever tell Mr. Kesler that $60 million sounds like a good number?
>
> A. No, I mean you can see that my file analysis, and I presume you're question is still referring to the same timeframe.
>
> Q. Yes.
>
> A. No, I don't know why I would say that. I didn't say that and I wouldn't have said that I've got an analysis of my file completely different.
>
> Q. Did Mr. Kesler ever tell you that the shareholders had signed a Letter of Intent?
>
> A. He did not.

[258] Kesler did acknowledge that in the September/October, 2004 time period Atlin provided him with comments about the prevailing cap rates, the compression of interest rates and market values. However, Kesler gave evidence on his summary judgment cross-examination denying that Atlin had told the Selling Shareholders that the value of these shopping centres was increasing.

[259] While Kesler did not testify about the sensitivity analysis Atlin contended he had performed in the Spring of 2005, Kesler did state that when, in April 2005, the Selling Shareholders had agreed on a $60 million share redemption price, Atlin told him it was a "good number and you can take it". Kesler said that the Selling Shareholders really did not have significant discussions with Atlin until they got close to the end and were prepared to accept the $60 million number:

> We relied on Mr. Atlin at the end of the process; we were clear with him what we expected from him. We wanted him to look over our shoulder when we got to the end of the process to add his advice to whether or not the number was a number that we could rely on as a good number.

As noted, Atlin denied giving any such advice on the adequacy of the final share redemption price.

[260] I prefer the evidence of Atlin over Kesler on these points. First, Kesler conceded that in the fall of 2004 Atlin had provided him with information about the compression of rates, which supports Atlin's evidence that he was telling Kesler that the value of shopping centres was rising. Further, Atlin's advice on those rising values echoed what all the shareholders learned later in October when the Edwardh Report came out anticipating "downward pressure on investment rates subsequent to the Appraisal date" and when the updated Altus Report described a "frenzy" in the continued downward pressure with compression on yield expectations. Second, at trial Kesler's evidence regarding Atlin's role contradicted that which he gave on a prior cross-examination, and even then it took Kesler some time to admit the obvious meaning of a string of mails. On his pre-trial cross-examination Kesler had testified that Atlin had not spoken with the appraiser, Grant Edwardh. When, at trial, Mr. Kesler was taken to a string of October 19, 2004, emails between David Atlin and himself, he ultimately conceded that Atlin in fact had talked to Edwardh and that his evidence on his prior cross-examination was a mistake, although it took substantial effort to extract that admission. Third, I find implausible Kesler's testimony that Atlin would have validated the share redemption price ultimately reached in April, 2005. Appraisers tend to be a cautious lot, and generally do not go around validating prices without performing some analysis. Moreover, the sensitivity analysis which Atlin performed in the Spring of 2005 suggested values higher than that used for the share redemption price. I accept Atlin's evidence that in the Spring of 2005 he told Kesler that his sensitivity analysis showed values for College Square in the range of $64.5 to $66.7 million.

**E. The Board seeks a review of the appraisal**

[261] On October 8, 2004, Barbara Farber received an unsolicited letter from GWL Realty Advisors advising that College Square "is of interest for addition to our existing real estate portfolio." GWL requested access to the current rent roll and operating statements in order "to determine a fair value to be submitted in a formal Letter of Intent". Farber did not respond to the overture. David Katz believed that Rick Kesler had prompted it.

[262] The Board agreed to retain another real estate appraiser to review the conclusions contained in the Altus Report. Rick Kesler advised the Boards his preferred choice was Mr. Grant Edwardh. Josephine Harris agreed with Kesler's recommendation. On October 12, 2004

the CIBC advised that it would contact Edwardh to conduct a review of the Altus Report. Edwardh testified that initially he was contacted by David Atlin to ascertain his availability to review an appraisal, and ultimately he was contacted by James Brooks at CIBC to formalize a retainer.



[263] By memo dated October 15, 2004, Farber informed the shareholders of the boards' decision to retain Mr. Edwardh and that his report was expected by October 22. She advised that the special meeting of the shareholders to discuss the proposed transaction, review the appraisal reports, and consider the timing for the closing of the proposed transaction would be held on October 25, 2004. She continued:

> The following consultants and advisors will be attending the meeting: Eric Desrosiers, Antonio Boggia, James Brooks, Larry Waters, Grant Jameson, Gerry Levitz and Pat Day. CIBC will make arrangements to have Grant Edwardh available either in person or by phone.
>
> All shareholders participating in the meeting are welcome to invite their professionals to participate either in person or by phone.
>
> It would be appreciated if you could confirm your and or your professional's intention to attend (either in person or via conference call) by no later than Wednesday, October 20, 2004, so that appropriate arrangements can be made.

The proposed shareholders' meeting did not take place.

**F. The Edwardh Report**

[264] On October 22, 2004, Ms. Farber circulated an October 20 draft of the Edwardh Appraisal Review to other board members, and the Review was sent to all shareholders a few days later on October 25.

[265] This draft of the Edwardh Report stated that it was based on a review of the Altus Group Report and did not involve a site inspection. The purpose of the report was "to evaluate the conclusions and the completeness of the [Altus] report." The Edwardh Report used a value date of August 1, 2004, the same date used by the Altus Report. The draft Edwardh Report expressed the following conclusion and recommendation:

> **Conclusion**
>
> Based on the evidence provided in the report, we are of the opinion that the capitalization and discount rates were reasonable at the time of the Appraisal Report; given the secure quality of the income and the evidence of modest income growth in the near term.

> Therefore, a review of the value analysis as presented in the Appraisal Report, causes us to conclude that the Appraisal reasonably reflects the value as of August 1, 2004 were there no purchase options in the Home Depot and Loblaws leases. *We have not considered any market activity subsequent to the valuation date of August 1, 2004.*
>
> **Recommendation**
>
> While we are of the opinion that our interpretation of the purchase clauses in the Home Depot and Loblaws leases is correct, we would strongly suggest that a legal opinion of the interpretation of these clauses and a defining of the Landlord's Adjoining Land (Loblaws) is warranted and would recommend that the Altus Group be directed to reconsider their value in light of the purchase clauses and said legal opinion. (emphasis added)

[266] Rick Kesler then contacted James Brook, at CIBC, to indicate that some shareholders would like Edwardh to include commentary regarding market developments since August 1, 2004. A subsequent iteration of the Edwardh Report amended its conclusion by deleting the sentence advising that Edwardh had not considered any market activity since August 1, 2004, and inserting the following language:

> Subsequent to the effective date of the subject appraisal, we are aware of the announcement made in the Toronto Globe and Mail, on October 7, 2004 of the joint venture between RioCan Real Estate Investment Trust and Canada Pension Plan Investment Board, to invest $1 Billion in shopping centres which feature big box stores. *They view these as the hottest growth segment in the retail sector…*
>
> *Given this information, we are of the opinion that the market for big-box retail is becoming more competitive with buyers more aggressively seeking this type of investment. As a result, we anticipate downward pressure on investment rates subsequent to the Appraisal date*. (emphasis added)

[267] Josephine Harris reviewed the Edwardh Report around this time. She testified that "the hot thing and frenzy thing certainly got our attention" and she was "absolutely" aware that big box retail centres were increasing in value at a dramatic rate. On his cross-examination on the summary judgment motion Kesler vigorously maintained that he thought Edwardh would prepare a second appraisal, not a peer review, notwithstanding CBIC's description of the Edwardh report as an appraisal review. Kesler assumed he received a copy of the Edwardh Report, and if he did he would have read it, but he resisted agreeing that at that time he knew these sorts of shopping centres were a hot growth segment in the market. Ultimately Mr. Kesler agreed that he would have known what was in the Altus and Edwardh reports. I regard this as another instance where Mr. Kesler was not prepared to admit the obvious.

**G. Updated Altus Group Report**

[268] The Altus Group updated its report in light of the recommendations in the Edwardh Report, and the CIBC circulated the update to all shareholders on October 29, 2004. The Altus Group maintained August 1, 2004 as the valuation date. It commented on changes witnessed in the market since that time:

> We have reviewed and discussed with market participants trends that have occurred in the marketplace since producing our original report. *Clearly, recent transactional evidence has confirmed that pricing continues its upward trend further to the aggressive stance beginning taken by investors when bidding on Tier One quality assets. This has resulted in continued downward pressure with compression on yield expectations since Second Quarter 2004. In fact, this frenzy has not been witnessed since the late 1980's and is, in part being fuelled by the imbalance in the marketplace, whereby demand for investment grade realty assets far outstrips supply.* (emphasis added)

The Update identified two major transactions which had been entered into over the past two months (although they had not yet closed) and noted that those transactions had used "aggressive valuation parameters". With respect to changes in market conditions the Update concluded:

> *Based on the foregoing market evidence, combined with the most recent Investment Trend Survey results has lead us to conclude that College Square would currently trade based on lower parameters than previously concluded in Summer 2004.* In our opinion, both the terminal capitalization rate used in the Discounted Cash Flow, as well as the Internal Rate of Return, must be reduced by approximately 50-basis point to properly capture and reflect current attitudes in the marketplace.
>
> Based on the foregoing, we refer the reader to the addenda section of our report where we conclude a revised value estimate by the discounted Cash Flow of $58,900,000. The result is based on a terminal capitalization rate of 8.25% and an internal rate of return of 9.05. (emphasis added)

[269] Kesler testified that Altus's comments about the state of the market did not hold any significant meaning at the time and did not cause him concerns that College Square might be undervalued in the reports. I do not accept Mr. Kesler's evidence on this point in light of his evidence that the whole reason he had retained Atlin in the first place was because of his belief that the initial Altus valuation was too low.

[270] Ms. Harris continued to have a concern that the Non-Selling Shareholders had already negotiated a deal with a third party to purchase an interest in College Square and that the Non-Selling Shareholders would receive an immediate monetary gain from the structuring of the

funding of the proposed transaction. Despite those concerns, her children proceeded to negotiate and conclude the LOI.

**H. CIBC revised financing analysis**

[271] On November 5 the CIBC circulated to all shareholders a revised financing analysis based on the updated Altus Group Report. The Introduction to the analysis noted that following the release of the updated Altus Group appraisal,

> *"CIBC received the following Non-Selling Shareholder feedback: Scenario II, which contemplated the sale of a 64% equity interest in College Square (in the event the conduit lender opposed a second mortgage), was dismissed as, under this arrangement, Newco would be left with no ability to influence major decisions pertaining to the ownership and management of the assets."* (emphasis added)

CIBC stated that it was asked to review the financing implications of an offer based on the Altus Group's revised appraisal for the consideration of the Non-Selling Shareholders, and it was making the analysis available to all shareholders.

[272] CIBC listed, as one of its "key findings", that "additional equity from a third party will have to be sought to make up the funding shortfall and will, likely result in Newco reducing its interest from 48% to 46%". That is to say, the CIBC revised its Scenario I, which envisaged using incremental debt to finance the share redemption, so that the sale of a co-ownership interest in College Square would increase from 52% to 54%. Its financial analysis used Altus' revised valuation of $58.9 million, and assessed the fair market value of the Selling Shareholders' interest in College Square "at approximately $19.7 million or $2.8 million for each Selling Shareholder".

[273] In his first affidavit David Katz deposed that "the Revised CIBC Report confirmed that Barbara, Andrew and I were unwilling to have our interests in College Square diluted to the extent that we would be giving up the control and management of the property that had been in the hands of the Leikin family for approximately 70 years." While that may not be precisely what the Revised CIBC Report stated, I accept Katz's evidence that the November 5 CIBC Report signaled to the Selling Shareholders that the Non-Selling Shareholders wanted the ability "to influence major decisions pertaining to the ownership and management" of College Square. Clearly the Non-Selling Shareholders were not looking to end up as the owners of a minority interest in College Square.

## XIX. Share sale negotiations and agreement[25]

[274] The negotiations over the terms of a Letter of Intent between the Selling and Non-Selling Shareholders began in earnest on November 23, 2004 and ended with the execution of a LOI dated April 15, 2005. A significant component of the plaintiffs' case consisted of their assertion that the transaction structure recommended in the CIBC Report shaped their understanding of how the deal for their shares would unfold. Mr. Kesler adverted to this point in his cross-examination at trial:

> Q. All right. Now I'm just going to deal with the first two sentences of Mr. Katz's memo, and the first one talks about you having a brief conversation with Gerry Levitz regarding the benefits of the CIBC process, do you see that?
>
> A. Yes, I do.
>
> Q. And I take it the CIBC process was – the valuation process of the CIBC was retained to conduct?
>
> A. Well the entire process, it was more than just a valuation process, it was the entire process.
>
> Q. So can we agree it's the valuation, and any other role the CIBC had in respect to this matter?
>
> A. Yes, it goes to the heart of the transaction how it would be structured, and how it would unfold, and how it would be financed, and –

[275] As the evidence below will reveal, the deal ultimately reached by the parties under which the plaintiffs were able to sell their shares was contained in the LOI dated April 15, 2005. That agreement was the product of hard bargaining, and while it tracked the share redemption structure proposed in the CIBC Report, the final terms of the bargain between the parties were reflected in the LOI, not in the CIBC Report. The scope of those negotiations and the self-interest pursued by the shareholders in those negotiations were described by Lewy in his evidence:

> Q. Yes, and during the period of time when the Letter of Intent was being finalized there were some open issues that were subject to negotiation, correct? One was, among others,

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[25] The evidence before the court on the summary judgment motion can be found at paragraphs 185 to 240 of the SJ Reasons.

price and the other broadly speaking was terms such as representations, warranties, those sorts of things, correct?

A. Yes.

Q. And in acting for Mr. Kesler I take it you considered him to be at liberty to attempt to maximize the benefits he would get from those aspects of the transaction?

A. Yes.

Q. And he could approach those matters in his own interest, fair enough?

A. Yes.

Q. And I take it you also considered that he was entitled in pursuing his interest to obtain information about the company's assets without sharing it, for example information from Mr. Atlin?

A. He was obtaining information, yes.

Q. And you were content that he could obtain information from Mr. Atlin that dealt with the value of the company's assets and not share it with the people with whom you were negotiating?

A. Yes.

**A. The negotiations**

***November***

[276] On November 23, 2004, Jules Lewy, Rick Kesler's partner at FMC, emailed a six-page memorandum to Grant Jameson commenting on the draft LOI on behalf of "all of the seven 'selling shareholders' and their counsel." The memo was copied to other advisors of the plaintiffs: Ken Prehogan and Bill Ross of the Weir Foulds firm, Jim Mainzer in Chicago, and Gregory Sanders, the lawyer for Ivan Kesler**.** Lewy's memorandum dealt with a number of transaction-related issues and questions concerning the post-transaction shareholdings amongst the family members for the remaining, or non-core, assets. Three portions of his memorandum touched upon issues relevant to this action. He wrote:

Grant, we have reviewed the draft offer letter and would comment as follows:

(i) The purchase price should be based on a sale price for College Square of $58.9 million…

> (vi) It is assumed that the Transactions and the Proposed transactions will only proceed once financing/purchase has been approved and that CIBC will be retained to find financing/purchaser as soon as possible. In this regard, it should be made clear that at the closing of the Transactions, the selling shareholders will receive cash and not promissory notes and that the financing/purchase will be for an amount required to complete the transactions. This should be clarified in the letter. In addition, *the letter should be clear that as soon as the letter is signed by the seven shareholders, the remaining shareholders will use their best efforts to find financing/purchaser and to consummate the transactions.*
>
> …
>
> (ix) The letter should include a representation from all the shareholders that they do not have any information or knowledge of any facts relating to the Pre-Closing Transactions or the Transactions which, if known to the other shareholders, might reasonably be expected to deter the parties from entering into the reorganization and completing the Pre-Closing Transactions and Transaction contemplated in the letter. Without limiting the generality of the foregoing, *the remaining shareholders should represent and warrant to the Vendors that they have no present intention of selling their interest in College Square and/or Fisher Heights Plaza. In addition, if the Transactions involves a sale to a new co-owner at a price greater than the price set out in (i), the selling shareholder should benefit from such increased price*. (emphasis added)

Lewy confirmed that the requests he was making in this memorandum were of the remaining, or non-selling, shareholders, and Lewy was expecting Jameson to obtain the position of the Non-Selling Shareholders and get back to him "in his capacity as being the conduit on the other side".

[277] Sheira Harris deposed that "during the negotiation of the share redemption transaction, I had concerns that the Non-Selling Shareholders were withholding material information that related to College Square." Zena Harris also deposed that she was "concerned that the Non-Selling Shareholders were withholding information from the Selling Shareholders". Mainzer stated that during the negotiations on the letter of intent the Selling Shareholders were "concerned that the Non-Selling Shareholders were withholding material information from them and that the Non-Selling Shareholders may have already arranged to sell an interest in College Square to a third party for a higher price."

[278] Zena Harris, one of the Selling Shareholders, testified on her cross-examination before trial that she was not aware that the Selling Shareholders had made a request to share in any greater price on a sale by the Non-Selling Shareholders and that their request had been rejected. Sheira's evidence was that she was aware of the request and its rejection by the Non-Selling Shareholders.

[279] In his affidavit David Katz described the role of Grant Jameson in these negotiations as counsel for the corporations, as well as a conduit for conveying the positions of the Non-Selling Shareholders to Lewy "on matters relating to the Agreement that affected their interests". Josephine Harris was aware that Mr. Jameson was communicating positions on behalf of the Non-Selling Shareholders.

[280] On November 23, 2004, David Katz sent Grant Jameson a memorandum setting out his comments on Lewy's memo of earlier in the day. In his memo Katz made it clear (through copious double-underlining) that CIBC would not be retained to source the financing or purchaser for the transaction and that it was not fair to seek representations from the Non-Selling Shareholders relating to information and knowledge of facts. In the course of dealing with the latter point David Katz wrote:

> At this time, I have no specific information relating to the final transaction and outcome. In my view, no such representation should be required as the transaction should be strictly based on the selling shareholders agreeing to sell their interest in the core assets based on being paid their pro rata share based on a value that closely approximates FMV, nothing more…nothing less.

He also stated:

> *The non selling shareholders will not agree to the selling shareholder benefitting through some form of convoluted "tag along" or "put" provision, generated from the potential sale of a co-ownership interest in the College Square at a price that exceeds the value agreed upon for the purposes of transacting with the selling shareholders.* (emphasis added)

[281] At a meeting the next day, November 24, amongst CIBC, David Katz, Gerry Levitz and Grant Jameson, Jameson noted that David Katz was not prepared to agree to the tag along, but "if there were a T.P. Offer in hand, a tag along wd be appropriate, we don't have this". The notes also state: "if necessary DK will rep that there is no T.P. in waiting". Jameson explained:

> [T]here was a discussion of those concerns, and David Katz said that, if necessary, he would make the representation to the selling shareholders that there was no third party in waiting. In other words, there was no such transaction waiting to be done.

[282] Jameson responded to Lewy by memorandum dated November 24, 2004, which he copied to the directors and the various counsel for the plaintiffs. Jameson indicated that the Non-Selling Shareholders wanted to review Lewy's email in more detail, but Jameson wrote to advise about "a few serious issues which arose immediately":

> The assumption made in paragraph (vi) that CIBC will be retained to source the financing/purchaser is erroneous. *The non selling shareholders intend to be extremely proactive in sourcing the financing/purchaser. Given the fact that the non selling shareholders will be required to enter into a long term co-ownership relationship with the financing/purchaser, the non selling shareholders must be the parties involved in directing the sourcing of and eventually transacting with the third party that they feel will possess compatible business goals, objectives and corporate culture, to ensure a harmonious and mutually beneficial long term relationship.* The non selling shareholders might require the services of CIBC or possibly of some other investment banker but that decision would be made by the non selling shareholders.
>
> …
>
> *The representation set out in paragraph (ix) and the provisions of the last sentence of paragraph (ix) relating to the sale to a new co-owner at a price greater than the price upon which the purchase price of the shares is based, are not acceptable.*
>
> Paragraph (ix) is a very broadly drafted representation inviting shareholder liability on all sides of the transaction. In any event, this is not the type of transaction in which such a representation is appropriate.
>
> The last sentence of paragraph (ix) ignores the reality of the risk and uncertainties being assumed by the non-selling shareholders on a going forward basis and does not provide an opportunity for the non selling shareholders to achieve potential equilibrium between risk and reward. Each non selling shareholder takes the risk of a reduction in the value of the property as much as any potential increase. On the other hand, each selling shareholder receives his or her payment in full, in cash, at closing. (emphasis added)

In terms of next steps Jameson wrote:

> Would you please confirm that each of the seven shareholders who I have referred to as the seven selling shareholders are prepared to enter into the reorganization and complete the pre-closing transactions and transactions based on the terms and conditions outlined in the November 23 Memorandum.
>
> The four non-selling shareholders will meet and then provide the seven selling shareholders with comments on the Memorandum as soon as reasonably possible once we have received a satisfactory response to the foregoing.

[283] In her affidavit Josephine Harris viewed the refusal by the Non-Selling Shareholders to give the requested representations and "tag along" provision as a "withholding of information" in the face of "direct and specific requests." Ms. Harris did acknowledge that by November, 2004 the Non-Selling Shareholders were not agreeable to sharing any greater price with the Selling Shareholders and were only interested in concluding a share redemption transaction based on a

fixed price. The Harris Family shareholders were prepared to proceed with a fixed price transaction.

[284] Lewy testified that he discussed the refusal of the Non-Selling Shareholders to share in any up-side on a resale of College Square with Kesler and the lawyers for the other selling shareholders. As a result of that discussion, they withdrew that specific request. As Lewy stated:

> Q. Okay and you would agree with Mr. Lewy that in any transaction like this after the sellers are gone, the selling shareholders, such as Mr. Kesler, there is always a possibility of a subsequent sale at a profit?
>
> A. That's what we tried to deal with in one of the clauses, correct.

[285] Mr. Spieler acknowledged that once the negotiations started a tension arose between the Selling Shareholders' interest in getting the most that they could and the non-selling shareholders' interest in not overpaying.

[286] The position of the Non-Selling Shareholders as set out in Jameson's memo raised some red flags for Rick Kesler: he was concerned "that the Letter of Intent was not being fairly negotiated by the non-selling shareholders." Kesler went so far as to tell Eric Desrosiers of CIBC on December 1 that he "believed that the non-selling shareholders were acting in bad faith and that they already had a deal with a third party based on a higher value than $58.9 million for College Square. I advised Eric that I felt that the non-selling shareholders were going to receive an immediate monetary gain from the structuring of the funding of the Proposed Transaction."

[287] Eric Desrosiers passed on to David Katz this comment from Rick Kesler. According to a memorandum of December 1 prepared by Mr. Katz following a discussion with Desrosiers, the Selling Shareholders were convinced that the "non selling shareholders are acting on a bad faith basis by arranging a 'bought deal' with a third party and based on a higher value than FMV. (Rick seems to be receiving advice that is suggesting that the third party transaction would be based on a value of $62-$64 MM)." He also wrote: "Rick believes that the non selling shareholders attempt to exclude CIBC from such involvement is an indication that the process is not clean and that we are concealing information that is favorable."

***December***

[288] In his December 1, 2004 memorandum David Katz requested Jameson approach Lewy and advise him as follows:

> I would like you to advise Lewy that the sell side's concerns that appear to be centered on the non selling shareholders having a bought deal and desire to generate immediate financial gain by way of commission, finder's fees etc as a result of the Proposed Transaction are off base and factually incorrect. If these are in fact the two principal concerns, then we should be able to allay these based on providing very specific representation that will confirm that: i) the non selling shareholders do not have any pre arranged deal with a third party purchaser or for that matter with a financial/lending institution; ii) the non selling shareholders have no intentions and will not receive any financial remuneration or gain by way of commissions, finder's fees etc resulting from the financing/purchaser arrangements that they would enter into to fund the Proposed transaction. *For clarity, however, the non selling shareholders will <u>not</u> provide representations that would preclude them from sourcing and finalizing the most financially attractive funding arrangement possible and it will be important and necessary for the selling shareholders to get their heads around this issue if we are to transact…We have made no attempt to conceal the fact that we will try to avail ourselves of the most favorable funding opportunities possible and based on the most optimal values that are possible.* In addition, we are very comfortable making the kind of representations necessary that will confirm to the sell side that we are not trying to 'pull a fast one'." (emphasis added)

[289] Lewy testified that he expressed to Jameson the sellers' concern that there would be a side deal which would affect the transaction price. Jameson left Jules Lewy a voice-mail message on December 2, 2004. Lewy transcribed the message in which Jameson said, in part:

> Rick I think expressed to Eric concerns about the reason why the so-called buy side and the non-sellers would not want to have CIBC retained and I've never seen any indication, I guess the report seems to be that Rick feels that maybe there's a deal or something being cooked up here. Again, it's more of the conspiracy theory coming from Rick and the so-called sell side that the buy side is trying to pull a fast one on them and I've just seen absolutely no indication of that and I think it's as clear as and as simple as I set out in the memo of November 24th to you where those who are not selling feel that they need to be able to get the right person, the right group coming in, the right corporation, whatever it's going to be to be an investor because they're going to be locked in for a long time and if we're forced to take CIBC who is simply going to find someone who has money in order to implement this transaction that it's not necessarily going to be in the best long-term interest of those who are the non-sellers and who are stuck in a long-term relationship with a party that they may not necessarily be happy with, so I can assure you to the extent that anyone shares views with me, and I think they're all very open with me, that there is no hidden agenda here…

Lewy understood Jameson to mean that there were no deals being made at the time.

[290] Rick Kesler regarded this message by Mr. Jameson as misleading because he did not disclose the information about he had learned at the July 14, 2004 meeting. Jameson acknowledged that the potential presence of a third party purchaser was an important issue to the Selling Shareholders, but he disagreed with Mr. Kesler's characterization of his message to Mr. Lewy:

> I wasn't thinking of the July 14th meeting at all. In fact, I had probably forgotten all about that meeting by the time November came along…
>
> [T]he July 14th meeting to me was purely speculative. It was something which might happen, not something which was going to happen.

[291] Jules Lewy spoke with Grant Jameson on December 6, 2004 concerning the November 24 memorandum. In a memo to file dated December 6, which he copied to the other counsel for the Selling Shareholders and to Rick Kesler, Lewy recorded that his conversation with Jameson had started with the latter "stating that he wanted to make clear that Barb and the other "Remaining Shareholders" did not have any prospective purchaser "lined-up". Two issues dominated the discussion: (i) whether the Non-Selling Shareholders would give a representation on the state of their knowledge and information and (ii) whether the Selling Shareholders would participate in the upside of any resale of an interest in College Park. Jameson indicated that the Non-Selling Shareholders were not prepared to agree to either, but that he would discuss the issues with them. Mr. Lewy and Mr. Jameson also discussed the latter's role in the negotiations:

> I concluded by stating that I just wanted to confirm that Grant was acting for the Leikin Group and not the Remaining Shareholders. Grant stated that his position has always been that he is acting for the Leikin Group. In respect of the memorandum he has sent to me, he stated that he was just relaying the concerns of the Remaining Shareholders but again repeated that he acts for the Leikin Group. He stated that, in the past, Barb has received independent legal advice when she considered it necessary to obtain independent legal advice and, if necessary, he would suggest that she obtain independent legal advice. Grant acknowledged that by setting out his views on the issue of price in his memorandum to me, it may appear that he is acting for the Remaining Shareholders but he wanted to make clear that he is merely relaying the position of the Remaining Shareholders.

[292] In early December Rick Kesler received a few calls from Eric Desrosiers asking to meet with Barbara Farber and himself to negotiate the final details of the share purchase transaction. That overture made Kesler feel "uncomfortable and I repeatedly told [Desrosiers] I would not negotiate in this fashion." This prompted Kesler to email Lewy and tell him about the conversations with Desrosiers, including the latter's communication that if such a negotiating meeting did not occur "Barbara Farber et al were going to 'pull the plug'". What ensued was a

telephone conference call on December 7 amongst Rick Kesler, Grant Jameson and Jules Lewy. Mr. Lewy's notes of that conversation indicated that Mr. Jameson conveyed the frustration of the Non-Selling Shareholders about the slow pace of negotiations, advised that the Non-Selling Shareholders were not prepared to negotiate price, and Ms. Farber wanted to meet with Mr. Kesler to discuss other issues including future governance.

[293] The correspondence within the Selling Shareholders' group following this memorandum from Jameson revealed that the Selling Shareholders clearly understood that the Non-Selling Shareholders were not prepared to share in any "up-side" benefit they might obtain on a sale of a co-ownership interest in College Park to a third party. For example, in a December 9, 2004 email Gregory Sanders, Ivan Kesler's lawyer, sent to Jules Lewy, he wrote:

> The content of your discussion with Grant strongly suggests that the remaining shareholders are interested in having a fixed price and do not want to have to justify a difference between the price they pay the selling shareholders and the amount they get from a third party. I believe that this issue is a fundamental one for the remaining shareholders and will cause a collapse of the negotiations if pursued in its current form by the selling shareholders.
>
> My client's position [i.e. Ivan Kesler] has always been more focused on the treatment of the remaining assets more than anything else. Although maximizing the price is important, my client needs to know that the ongoing relationship with the remaining shareholders and the balance of the assets is properly addressed and can give him sufficient comfort so that he will not have to monitor the future relationship with the level of scrutiny that is now required.
>
> Based on the above, I have recommended to my client as follows:
>
> 1) To accept a fixed price for the assets being sold, subject to a representation that he has all the available information to make that decision. That means that there is no other information available at the time of signing the letter of intent that would influence that decision. He will also need a mechanism of disclosure to allow confirmation that this representation has been met.

[294] An email sent by Ivan Kesler that same day to his fellow Selling Shareholders indicated that he was aware that by accepting a fixed price for the transaction, he might be giving up the ability to participate in any up-side on a sale of a co-ownership interest to a third party:

> This position is based on my lawyer's advice and my understanding that the 4 Buyers are set on a sell price of $58.9M and will not accept anything else. That makes it a deal breaker.

> The estimations which I have done (that I know are NOT 100% accurate, I could be wrong, but I think are likely ball park) lead me to believe that what is being given up, at the outside, is possibly $567,000 - $736K Cdn, pre-tax, based on a sell of $67M, with everything more than $58.9M being shared between all 11 shareholders. This amount decreases as the amount shared decreases; and decreases also with after tax.
>
> So, for the money involved, what is critical to me is clearly establishing the governance structure in Newco now (one person/one vote-shareholders vote on substantive issues, not directors on behalf of shareholders), to avoid future difficulties of all sorts.

[295] In a December 13 email Mr. Sanders wrote to Mr. Lewy: "The concept that you have to push forward is the idea that there is a belief that the value of the property could be in excess of the sale price and that we are only looking to share if it is substantially in excess of that price (more than 5%)." Mr. Lewy replied: "The responses from all of the Selling Shareholders are identical. I will relay their message to Grant today and request a written response."

[296] Lewy did email Jameson, on December 13, in which he communicated the position of the Selling Shareholders:

> I have spoken to the lawyers for all of the "Selling Shareholders" and each had confirmed to me that the minimum price that their clients are willing to accept for College Square is $58.9. As I explained to you last week, *the Selling Shareholders have always taken the position that if the value was higher (as represented by an actual transaction) they should share in such greater value. However, they have accepted the compromise that they would only share if the value was more than 5% higher*… (emphasis added)

[297] Less than an hour later on December 13 Jameson emailed Lewy the position of the Non-Selling Shareholders:

> The proposed formulation for determining selling price is completely rejected, as it is not based on the appraisal of fair market value analysis conducted by the Altus Group in August 2004 and updated in October 2004, ("FMV"), the whole as mandated by CIBC Mid-Market Investment Banking Group, in accordance with their agreement entered into with the Leikin Group on July 9, 2004 ("CIBC Agreement"). In addition to the foregoing and more particularly, the Remaining Shareholders have noted that the selling price formula proposed by the selling shareholders is based on the selling shareholder being rewarded for financing transaction(s) that are based on a higher valuation of College Square than FMV, with no acceptance of risk associated with financing transaction(s) that are based on a lower valuation of College Square than FMV and consider such formulation to be wholly unacceptable.

> As a result of the foregoing, the Remaining Shareholders have determined that they wish to terminate their participation effective immediately, in any and all further discussion and negotiations relating to the Proposed Transaction.

[298] Later that day Mr. Jameson sent an email to the directors, on behalf of Barbara Farber, advising that the Non-Selling Shareholders had advised the Selling Shareholders that they had terminated their participation in discussions regarding the proposed transaction.

[299] On December 13 Mr. Jameson had a telephone conversation with David Katz. According to Mr. Jameson's notes of that call, Mr. Katz told him: "No dealing to date with a third party. No idea what we would do."

[300] The next day, December 14, Sanders emailed Lewy asking him to contact Jameson "to ascertain what the real issues are." After setting out his understanding of the different perspectives taken by each side on the issue of price, Sanders wrote:

> While my client will not be happy if he knows that the remaining shareholders disproportionately benefitted from the buyout price, he is still prepared to accept the process adopted by CIBC and does not feel that it is necessary to terminate the negotiations solely on the basis of obtaining a few extra dollars.

[301] Later that day Lewy emailed Sanders and the other plaintiffs' legal advisors seeking the positions of the other Selling Shareholders. He communicated that Rick Kesler was of the view the Board should meet "to discuss the situation and ascertain whether there is a possible resolution" and, if there was not, "we should commence litigation".

[302] Lewy left a message with Jameson on December 16 requesting, on behalf of Rick Kesler and Harris, dates for a directors' meeting in early January. According to Jameson, the message continued:

> He also asked what the issue was which killed the deal. He thought that the non selling side had wanted to meet or at least would have sent a memo explaining why the sell side price requirements were not acceptable. There is therefore a way to restart the discussion in my view based on his comments.

[303] Farber advised Jameson that she was "not sure we should rush to respond to Lewy's call".

[304] On December 24 Mr. Jameson replied to Mr. Lewy. His email is an important one, and I shall reproduce a significant portion of it. Jameson indicated that although the Non-Selling Shareholders were prepared to meet on January 9, 2005, they wanted the "value ascribed to the

Core Assts for the purposes of the transaction" agreed upon prior to any meeting. Mr. Jameson then conveyed, at length, the position of the Non-Selling Shareholders on the sale transaction:

> I can confirm that the non-selling shareholders are agreeable to the value of the Core Assets being that set out in the revised CIBC report i.e. $58.9 Million for College Square and $6 Million for Zena's Fisher Heights Plaza. The non-sellers have affirmed their confidence in the CIBC process and the results which have lead to the values established in the revised CIBC report. Please confirm that the selling shareholders are content and agree to transact at these values. These values in turn establish the amount which each selling shareholder will receive at the end of the restructuring which constitutes the Proposed Transaction set out in the CIBC report. There must be agreement on these values before any meeting can take place. To do so otherwise would I believe simply lead to a non-productive meeting.
>
> You had asked that the non-selling shareholders advise the selling shareholders of the form of financing transaction they intend to utilize to be able to finance the reorganization transaction. The non-selling shareholders have told me, and I am authorized to advise you and the selling shareholders, that no form of financing transaction has been structured and/or finalized, as the non selling shareholders will not commence discussions with any third parties, including the College Square senior debt holders, that they do not have the ability to complete. As such, financing proposals cannot be started or advanced until an executed and irrevocable LOI is delivered by the selling shareholders. The non selling shareholders are in agreement with the CIBC team's view that the Proposed Transaction will require a disproportionate share of equity financing, due to the severe restrictions that exist on placing subordinated debt on College Square. Moreover, there is the suggestion that the non-selling shareholders have arranged, in effect, a bought deal to enable them to complete this transaction immediately following the execution of the LOI, which seems to have given rise to the request for an adjustment of the value of College Square at closing if the value for financing purposes is greater than the valuation used for the Proposed Transaction.
>
> *This would suggest and necessitate that the non selling shareholder i) have sought and obtained the requisite approvals from the College Square senior debt holders; ii) dealt satisfactorily with the anchor tenants purchase rights; iii) negotiated a co-tenancy agreement and sale of an undivided interest with a third party equity investor; based on the successful completion of the third party's due diligence. I can confirm that none of the above noted events have been arranged. <u>The non selling shareholders however have requested that I communicate their absolute intention to use their best efforts to finance the Proposed Transaction at the most favourable terms and conditions possible and will not allow financing terms and conditions to influence the price at which selling shareholders will be expected to sell.</u>*
>
> They expect to require the full 120 day financing period to assemble the necessary due diligence information, find parties interested in the transaction, negotiate financing and

> then arrange to close in conjunction with the closing of the Proposed Transaction. They have rejected an informal overture from CIBC to provide interim financing of the amount required to simply fund the Proposed Transaction as they do not have a pre-structured permanent financing arrangement in place to "takeout" such an interim financing arrangement. This provides further evidence to support the fact that there is no bought deal. (emphasis added)

Jameson requested Lewy to speak with the other parties on the "sell" side and give him their comments.

[305] This email, coupled with the previous positions of the Non-Selling Shareholders communicated by Jameson, clearly signaled to the Selling Shareholders that the Non-Selling Shareholders regarded the price for the share purchase transaction and the price on a financing as two different things.

[306] On December 31, 2004, Lewy, in a memorandum to Jameson, copied to the other lawyers for the plaintiffs, wrote, in response to Jameson's December 24 email:

> *Assuming that the governance issues can be dealt with satisfactorily, the Selling Shareholders reiterate that they are prepared to accept a fixed price even though this is different than their original understanding of how the reorganization was to be concluded.* (emphasis added)

Lewy advised that Rick Kessler and Jo Harris would be available for a meeting on January 9, 2005.

**January**

[307] Jameson sent the response of the Non-Selling Shareholders to Lewy on January 6, 2005. Most of his memorandum dealt with governance issues. Towards the end of it, however, Jameson returned to the issue of the redemption of shares transaction:

> Your memorandum to me of December 31, 2004 says that the Selling Shareholders are prepared to accept a fixed price for the Proposed Transaction but it does not confirm that the value is that set out in my memorandum to you of December 24, 2004, namely, $58.9MM for College Square. I would like to bring to your attention that the value identified for Zena's Fisher Heights Plaza of $6MM in my memo of December 24th was incorrectly stated and should have read $6.7MM. Confirmation of the fixed price based on the aforementioned values of $58.9 MM and $6.7 MM is essential to the completion of the proposed transaction.

[308] Rick Kesler then contacted Grant Jameson directly, prompting the latter to circulate an email to Rick Kesler, Jules Lewy, Barbara Farber, Gerald Levitz and the CIBC, summarizing their conversation:

> *I have passed on your advice to me of this morning about the sell side acceptance of the governance proposal made by Barb and on the fixed price issue, with a fixed price being determined with reference to a valuation of College Square at $62MM*. In order for the non-sellers to fully assess their position given the oral discussions and memorandum exchanges which have taken place since receipt of the Memorandum from Jules Lewy of November 23, 2004 and to ensure that they know the definitive position of the selling shareholders, the non selling shareholders need to have a written summary of the selling shareholders position on all issues. (emphasis added)

Jameson suggested that this take the form of a memorandum from Jules Lewy.

[309] On January 12 Jameson sent Lewy an email expressing concern about the possible prejudice to the proposed transaction presented by the passage of time.

[310] On January 21 Lewy sent Jameson, and the other plaintiffs' counsel, a memorandum setting out the position of all of the Selling Shareholders which "should provide the basis for the LOI." The memorandum dealt with several issues, including governance, the special shares, transferability of shares, and LOI provisions. On the issue of price the memorandum stated:

> The price that would be used for the real estate in connections with the transactions would be $62 million for College Square, and $6.7 million for Zena's Fisher Heights Plaza.

Lewy also wrote that:

> The LOI should state that: transactions will only proceed once financing/purchase has been finalized. In this regard, the Selling Shareholders recognize that the Remaining Shareholders can retain such advisor, if any, as they desire. However, the Selling Shareholders do not wish to be responsible for the fees of such advisor. In addition, the LOI should clearly state that the Remaining Shareholders will use their best efforts to find financing/purchaser to consummate the transactions.

[311] Jameson regarded this communication from the Selling Shareholders as "a change in a fundamental principle of the Transaction, when the Selling Shareholders began to 'negotiate' the value to be attributed to College Square rather than basing the 'purchase price' on the assessed market value of College Square, which the revised Altus valuation had indicated to be $58.9 million."

[312] David Spieler had been approached by an acquaintance in Barbados who had expressed an interest in purchasing an interest in College Square. In a January 17, 2005 email to Grant Jameson, Spieler queried whether he could "be part of the outside investor who buys the 52/56%".

[313] In January Sylvie Lachance contacted David Katz to find out what was happening on College Square. As she testified on the summary judgment motion:

> It is…very customary for me to follow up regularly on transactions that have died to check if they are for sale and to check if here is a possibility of concluding a transaction.

[314] At that point FCR was still interested in College Square. In response David Katz sent her an email dated January 27, 2005 attaching "relevant financial data" for College Square in which he, in a cash flow analysis, estimated the current market value of College Square at $76.589 million. When asked how he arrived at that number Katz testified:

> Well the $76.5 was the value that had to be ascribed in a third party transaction to generate sufficient proceeds to cover the cost of the share redemption transaction, and enable the non-selling shareholders to retain a 50% interest. And that calculation is confirmed by virtue of Pat Day's March the 6th analysis that we had reviewed just several minutes ago.

[315] Other than that exchange, Katz had no communications with FCR between mid-October, 2004 and May 4, 2005.

**February**

[316] The response of the Non-Selling Shareholders to Lewy's January 21 memo came through a memorandum from Jameson to Lewy dated February 2, 2005. The memorandum addressed several issues, spending much time on governance matters. On the issue of price Mr. Jameson responded:

> The value to be attributed to College Square in connection with the transactions is to be $58.9 Million and $6.7 Million for the overall value of Zena's Fisher Heights Plaza. It should be kept in mind so that there is no last minute misunderstanding that the Leikin Group is the owner of 90% of the equity of Zena's Fisher Heights Plaza therefore 90% of $6.7 Million would be the value of the Plaza attributable to the price paid per share to the Selling Shareholders in the proposed transaction.

[317] As to provisions of the LOI, Jameson wrote, in part:

> If the LOI is to contain an undertaking of the Remaining Shareholders to find financing, then that undertaking must be an undertaking to use reasonable efforts to find financing satisfactory to the Remaining Shareholders in their discretion. They must also be allowed to act in a manner which might be found by the Selling Shareholders or by an independent third party to be unreasonable in rejecting financing opportunities. Otherwise the Remaining Shareholders might be forced to agree to financing terms or to enter into arrangements which would not be in their own best interests going forward. This transaction will only work if it is a win/win situation for all shareholders. Neither group should be forced into a situation which is contrary to their best interests.
>
> …
>
> *The Selling Shareholders would not have the ability to review or to approve of the documentation or transactions relating to the financing of the proposed transaction or the structure of the arrangements with lenders or others which would take effect and relate to the Core Assets on or after closing. In short, whatever is implemented by all shareholders in order to achieve closing may be reviewed, whatever is entered into between Newco or the Remaining Shareholders and their lenders or others (such as co-tenants, if that form of structure is implemented) would not be reviewed or commented upon by the Selling Shareholders.* (emphasis added)

[318] On February 2 David Katz sent a memorandum to Barbara Farber, Andrew Katz and Grant Jameson outlining a methodology to obtain appropriate financing to fund the share redemption transaction. The first stage would involve identifying "the specific and required qualifications of the third party candidate." Katz then listed out seven factors to take into account in identifying such candidates, including: "Must be prepared to transact based on a valuation of College Square of not less than $67M (this seems to be Spieler's expectation)." Katz proposed that the other Non-Selling Shareholders give him a mandate to source pre-qualified investor candidates on the understanding that "he would carry out the mandate in a manner that would enable the shareholders to sell an undivided interest in College Square based on the highest achievable selling price, with due regard given to selecting an arms length 3rd party that would be considered highly compatible, so as to minimize the risks associated with co ownership arrangements". Jameson deposed:

> From this memo I understood that no such third party investor had been found and that David Katz was speaking about the process that he intended to follow once the LOI had been executed.

[319] I find that such an understanding by Jameson was a reasonable one. Katz's memorandum belied the existence of any "bought deal" and indicated that Katz, as a Non-Selling Shareholder, intended to work to achieve the highest possible selling price for an interest in College Square as part of the financing transaction.

[320] Lewy spoke with Jameson on February 17 about the latter's February 2 memo. In his memo recording that conversation Lewy wrote:

> In respect of transaction costs, I stated that it did not make sense for the Selling Shareholders to pay any portion of the transaction costs. The Selling Shareholders have no say in the transaction. Grant stated that they would benefit from the transaction and, therefore, they should share in the transaction costs. I stated that, although they would benefit from the transaction, they could not direct who the purchaser would be or direct any other aspect of it. *They recognize that the Non-Selling Shareholders should be able to determine the type of transaction and the partner that is chosen and/or the financing that is chosen.* But on this basis, the Non-Selling Shareholders should not be responsible for the transaction costs. I also stated that it would not be acceptable for any of the transaction costs to be paid to David Katz if the Selling Shareholder were contributing. Grant stated that he would relay the message to the Non-Selling Shareholders. He added that it was his understanding the David Katz was not receiving any fees.
>
> *The final point was price. I stated that Selling Shareholders believe $62 million was reasonable. This was based on Rick's discussion with Desrosiers. I also repeated that the initial LOI was based on a selling price which would be determined in the transaction and that it was the Non-Selling Shareholders who now wanted a <u>fixed</u> price. Accordingly, the Selling Shareholders wanted a fixed price of $62 million based on the discussion with Desrosiers. I agreed with Grant that obviously price is negotiable but I stated that in the Selling Shareholders views, $62 million was reasonable.* (emphasis added)

[321] FCR maintained its interest in College Square, at least internally, for on February 9 an in-house analyst, Denise Cantin, sent Sylvie Lachance an email:

> Je vous transmets un document révisé et simplifié qui, je crois, illustre plus facilement ce qui a changé en terme de revenue en 2005 vs 2004. J'ai aussi révisé le tableau de comparaison pour utiliser le même taux de cap que l'an dernier. J'attends votre appel pour en discuter plus amplement.

Ms. Lachance doubted that the capitalization rate shown by Ms. Cantin – 8.5% - originated with FCR because it was not the normal cap rate used by FCR at that time.

**March**

[322] As can be seen, the Non-Selling Shareholders were prepared for the company to buy the shares of the others using a value attributed to College Square of $58.9 million, while the Selling Shareholders wanted the transaction to use a price for College Square of $62 million. CIBC was asked to provide a supplement to its September Report showing the valuation of the shares of the

Leikin Group "based on a revised valuation of $60.0 million" for the College Square property. CIBC sent that revised calculation to David Katz on March 3, 2005.

[323] One of the plaintiffs, David Spieler, initially aligned his interests with the other Non-Selling Shareholders. By early 2005 he was unable to determine his position with respect to the proposed transaction and he retained his own counsel, Sandra Appel, to provide him with assistance on the shareholders' agreement to be entered into amongst the Non-Selling Shareholders, as well as with his rights on the redemption transaction. Ms. Appel's retainer ended in June, 2005, when Speiler decided to become a Selling Shareholder. Although at trial Ms. Appel recalled that she did not provide Speiler with advice on the letter of intent, her memory was refreshed when shown emails to which she was a party indicating that she was providing Speiler with some advice on aspects of the proposed transaction letter of intent.

[324] On March 3, 2005, Jameson sent a detailed memorandum to Lewy and Appel transmitting the position of the Katz Defendant Non-Selling Shareholders. Jameson advised that the memorandum set out "the full and final position of the Committed Non Selling Shareholders" on the acceptable terms of the proposed share sale transaction. The memorandum then dealt with issues concerning the proposed transaction, governance and shareholder matters. As to the price for the transaction, the Non-Selling Shareholders would consider:

> the value of College Square and the Plaza to be used in calculating the transaction price will be $60,000,000 and $6,700,00 respectively. As a result, the gross pre tax transaction price to be paid to each selling shareholder upon closing will be $3,410,000.00.

[325] The memorandum attached the form of LOI to be executed by the Selling Shareholders and set an outside date of March 11, 2005 for its execution by all seven Selling Shareholders. The memorandum stated that David Spieler could participate either as a Selling or Non-Selling Shareholder, as he chose.

[326] The LOI, which was signed by Barbara Farber in her capacity as CEO for the Leikin Group, stipulated that consummation of the proposed share transaction would be conditional upon several events, including:

> Newco and Newco 2 (as defined in Schedule B) shall have arranged financing satisfactory to Newco and Newco 2 in their sole discretion in order to complete the Pre-closing Transactions and the Transaction contemplated by this letter.

The LOI contemplated that the share sale transaction would close 120 days after its execution.

[327] Lewy responded on March 14, sending Mr. Jameson a memo which focused largely on governance issues. Paragraph 5 dealt with the transaction price:

> As we have discussed, Schedule "B" deals with the redemption of shares in the amount of $2,964,000 and $446,000. These amounts are reflected on the CIBC schedule which you provided to me, as the fair market value per Selling Shareholder and this should be made clear in Schedule "B".

[328] The $2,964,000 came from the CIBC's March 4, 2005 Supplement (initially sent to David Katz) which calculated the pay-out per shareholder using a revised valuation of $60 million for College Square. The governance issues had assumed a significant role in the discussions by this time, with Lewy stating that although "we are very close to agreeing on the terms of the transaction", the Selling Shareholders wanted to enter into a formal shareholders' agreement as soon as possible. From Lewy's memorandum sent on March 14, it was apparent that all shareholders were prepared to proceed with the share sale transaction based on a value attributed to College Square of $60 million.

[329] Jameson conveyed the Non-Selling Shareholders' response on March 16, 2005:

> Having received no executed LOI from the Selling Shareholders by the date and time set out in the LOI dated March 3, 2005, the LOI is now null and void and is fully withdrawn in accordance with its terms…
>
> The Committed Non-Selling Shareholders have no plans to conduct further discussions with the Selling Shareholders on matters relating to the Proposed Transaction. The committed Non-Selling Shareholders have withdrawn from the Proposed Transaction and as a consequence the Proposed Transaction should now be considered terminated.

[330] Notwithstanding this formal statement by the Non-Selling Shareholders, discussions continued between Rick Kesler and Barbara Farber, as well as between the lawyers, Grant Jameson and Jules Lewy.

[331] During February and March some discussions were held between David Katz and Eric Desrosiers about the possible involvement of CIBC to assist the Non-Selling Shareholders in locating a joint venture equity partner. A March 7, 2005 CIBC draft engagement letter stated that qualified offers by potential partners would have to be based on a minimum gross value of $77 million for College Square, with lesser values for smaller equity interests, and the draft recited that the non-selling shareholders had "had preliminary discussions with two potential JV Partners". No engagement with CBIC was concluded.

**April**

[332] On April 7, 2005, Lewy sent Jameson a revised LOI signed by all the Selling Shareholders. The purchase price of $3,416,564 per vendor reflected a fixed value for College

Square of $60 million. Lewy proposed a meeting of all shareholders to discuss the terms, instead of exchanging memoranda.

[333] Jameson responded by email to Lewy, and the other counsel for the Selling Shareholders, on April 12 with amendments sought by the Non-Selling Shareholders and confirmed counsel would talk the following day, which they did. Jameson's memo of that conference call indicated that price was not an issue by this stage of the negotiations.

[334] By April 13 Rick Kesler was becoming concerned about the positions being taken by Mainzer on behalf of the Harris Family plaintiffs. He emailed Lewy stating: "Jim [Mainzer] is not committed to closing, and I am beginning to feel that he is treating this as a forever file." Mr. Kesler commented: "I think that everyone is running out [of] steam and I fear that while some issues remain outstanding, particularly obtaining an asset list, there is a significant risk that either side may either walk from the deal or simply give in and withdraw, feeling that this is really a never ending negotiation." He concluded:

> I know you don't share all of my concerns but I have spoken with Barbara who is preparing an asset list and can tell you that the other side is very fragile and does not believe we can say yes. I think we could lose the deal and feel that we need to be able to say "yes" knowing that the essentials are there, otherwise I fear we are going to lose.

Kesler was concerned that the Non-Selling Shareholders would walk away from the deal and there would be no deal.

[335] Lewy sent Jameson a memo on April 14 with further comments about the proposed deal – his memo did not touch on the issue of the deal price.

**B. The conclusion of an agreement**

[336] A deal was finally reached on April 18, by which date all shareholders had signed a Letter of Intent. At this point of time the plaintiff, David Spieler, signed as a Non-Selling Shareholder. As agreed, the transaction would have two stages. First, an amalgamation reorganization would take place in which the ownership of the "principal assets" of the Leikin Group – i.e. College Square and Fisher Heights Plaza – would be separated from the ownership of the non-principal, or remaining assets. The LOI called this step the Pre-Closing Transactions. Second, the Newco owned by the Non-Selling Shareholders would acquire an interest in College Square proportionate to the Selling Shareholders`s interest, and then the sale proceeds would be used by the re-organized Amalcos to purchase, redeem or cancel the shares owned by the Selling Shareholders in Amalco – what the LOI termed the Transaction. The Selling Shareholders were

to receive approximately $3.398 million for their shares in Newco, subject to certain final adjustments. There were certain conditions of closing, including paragraph 7(d) which stated:

> Newco and Newco 2 (as defined in Schedule B) shall have arranged financing satisfactory to Newco and Newco 2 in their sole discretion in order to complete the Pre-Closing Transactions and the Transaction contemplated by this letter…

This was a key condition. As noted above, Rick Kesler attempted to paint the CIBC Report as setting the parameters for the financing phase of the transaction. It did not. As the LOI's financing condition provided, satisfactory financing lay within the sole discretion of the Non-Selling Shareholders.

[337] On cross-examination Josephine Harris acknowledged that the plaintiffs agreed to the LOI "with the benefit of independent legal and valuation advice", including Mainzer and Lewy. She agreed that her children had entered into the LOI voluntarily and freely. Ms. Harris also characterized the negotiations which led to the signing of the LOI as highly adversarial, difficult, fractious, infused with self-interest where each side sought to maximize the value of the transaction to themselves, and ones in which the Selling Shareholders mistrusted the Non-Selling Shareholders. The following extract from her cross-examination on the summary judgment motion captured the essence of the position of herself and, presumably, her plaintiff children:

> Q. And, really, that because of this mistrust of the non-selling shareholders, you really weren't relying upon the non-selling shareholders, were you?
>
> A. Impossible.
>
> Q. Impossible for what?
>
> A. Yes.
>
> Q. Impossible to rely on them?
>
> A. Yes.

[338] Ms. Harris agreed that the $60 million value attributed to College Square for the purpose of setting the share purchase price in the LOI was a price reached through negotiations, not one based on any appraisal of College Square or on its fair market value. Mr. Kesler's evidence was to the same effect, as was Mr. Lewy's. Ms. Day, of GGFL, testified that at the end of the day the value of the share redemption was based on the negotiated value attributed to College Square and Fisher Heights Plaza.

[339] According to Ms. Harris, at the time the plaintiffs entered into the LOI they knew that College Square might have a value greater than $60 million and that the value of College Square associated with any subsequent financing with a third party could be greater than $60 million. Having dropped their request during the negotiations to share in any upside of a subsequent transaction for College Square, Ms. Harris agreed that when they entered into the LOI the Selling Shareholders did not expect to receive anything more than the purchase price based on the negotiated $60 million.

[340] Josephine Harris acknowledged that financing of the proposed transaction was an essential ingredient of the share redemption transaction, and equity financing from a third party could reduce the Non-Selling Shareholders' interest in College Square to below 50%. She acknowledged that under the LOI it was the responsibility of the Non-Selling Shareholders to arrange the funding of the share redemption, and that the Selling Shareholders agreed that they would not be entitled to receive any information about the equity financing to be arranged by the Non-Selling Shareholders.

[341] Mr. Kesler also agreed that securing financing was an integral part of the share redemption transaction and that the Selling Shareholders were not entitled to receive information about any equity financing. Mr. Kesler stated that at the time he signed the LOI he was aware that College Square might have a value greater than $60 million "by a small percentage perhaps".

[342] Mr. Lewy testified that the Selling Shareholders understood that by agreeing to a fixed price for the LOI, there was always the risk that the property actually could be subject to a transaction at a later date which was at a different value. He testified: "Correct. And that was discussed with Mr. Kesler and the others and there are notes to that effect."

[343] Mr. Kesler agreed on cross-examination on the summary judgment motion that he believed it was the intention of the Non-Selling Shareholders only to sell a 50% interest in College Square in order to avoid losing control. Lewy stated that although there would be a 50% person coming in, the Selling Shareholders were not aware what financing arrangements would be put in place or whether all of the money needed to pay off the selling shareholders would come from the new person.

[344] Mr. Kesler had concerns right up to the time of signing the LOI that the Non-Selling Shareholders had already negotiated a deal with a third party to purchase an interest in College Square at a value in excess of $58.9 million. Lewy deposed that throughout the negotiations for the LOI "the selling shareholders were concerned that the non-selling shareholders were

withholding information from them and/or had already arranged to sell a partial interest in College Square to a third party at a price that was higher than the value in the Letter of Intent."

[345] Andrew Katz deposed that during the negotiations he was unaware that FCR or anyone else might have been interested in purchasing an interest in College Square based upon a vlue of $70 million, or any other value. Further, in his dealings during that period of time with his two siblings "the notion of First Capital or anyone else purchasing an interest in College Square based upon a value of $70 million was not discussed between us".

**C. GGFL's activities during the negotiations**

[346] GGFL was not involved in the negotiations between the Selling and Non-Selling Shareholders; that fact is not in dispute. However, during the course of the negotiations GGFL did, at the request of David Katz, run numbers with respect to various "hypothetical buy-out scenarios", as deposed by Ms. Day. Those calculations used estimates as high as $76.5 million (in the first quarter of 2005) for the sale of a 100% interest in College Square. Day deposed that she understood David Katz had full authority to ask her to provide such calculations to the Leikin Group. Some of the calculations involved cash flow analysis, others dealt with the amount of potential payouts to redeeming shareholders under various scenarios, transaction costs, and the sale of an interest in the properties to third parties. Day testified that when she performed those calculations she had not been aware of any actual sale agreement to a third party regarding an interest in College Square.

[347] Andrew Katz was asked at trial about an April 6, 2005 email he, David Katz and Farber had received from Ms. Day which included a number of spreadsheets. One spreadsheet performed calculations using a buyout of shareholders at a price of $60 million for College Square and a sale price to a third party at $76.5 million. Andrew Katz testified:

> You'll see that the objective of this exercise at plugging numbers in is to determine what number a third party would have to pay in order to fund the share redemption, and it turns out this time we had – the selling shareholders had agreed to a fixed price of $60 million, so when you run $76.5 million at that point and time there was a shortfall in the funding was about $1.2 million…

[348] GGFL was not involved in the sale transaction and Day did not become aware of the transaction with FCR until she read about it in a local newspaper.

## XX. Securing financing for the share redemption transaction[26]

[349] The LOI contemplated that the transactions would close within 120 days from the date of execution of LOI. David Katz initially had some discussions with CIBC in March, 2005, about CIBC World Markets acting as advisors to secure a joint equity partner. At that point of time CIBC learned that the Leikin Group had held some "preliminary discussions" with FCR. The negotiations with the CIBC broke down in a somewhat acrimonious way and, as matters transpired, CIBC was "taken out of the deal bunker", as put by Mr. Desrosiers, and ultimately had to resort to litigation to recover its fees for the work it had performed in 2004.

[350] The Non-Selling Shareholders, through Newco (6384099 Canada Inc.), retained RBC Capital Markets Realty Inc. on April 29, 2005 to advise Newco, which the Non-Selling Shareholders controlled, "to secure a joint venture equity partner" for College Square. RBC's mandate was to "identify and communicate with a pre-authorized and highly qualified short list of institutional investors, for the purposes of securing a Qualified JV Partner". The mandate letter of RBC contained several conditions precedent:

> It is agreed and understood that an offer presented to the Vendor by the Advisor will only be considered to be qualified, if it is executed by a Purchaser and based on the following terms and conditions:
>
> The 100% equivalent gross sale value of College Square must be calculated at no less than $78,778, 423…
>
> The maximum equity interest that the Purchaser may acquire in College Square is 47%.
>
> …
>
> The Advisor acknowledges that the Vendor has had *comprehensive discussions with First Capital Realty concerning the Proposed Transaction*. In consideration of such discussions with First Capital Realty they are to be considered as an excluded party for purposes of calculating the Sales Fee (the "Excluded Party").
>
> Any sale of an interest in College Square to First Capital would result in a reduced fee to RBC. (emphasis added)

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[26] The evidence before the court on the summary judgment motion can be found at paragraphs 241 to 249 of the SJ Reasons.

[351] On April 19, 2005, prior to signing the agreement with RBC Capital, David Katz had sent Grant Jameson a draft of the agreement for review and comment. Jameson did not respond immediately, which led David Katz to ask him only to comment on the proposed indemnification provision. Mr. Jameson did so. He deposed: "I do not believe that I reviewed the rest of the draft engagement, given the time pressures I was under, and I do not recall focusing on any of the other provisions contained in it."

[352] David Katz emailed Lachance on May 4, 2005 to update her on the intentions regarding College Square. He informed her about the execution of the April 18 LOI, advised that tax advisors had suggested a limited partnership structure for a partial interest in College Square "which I recognize may not be suitable to FCR and may be better suited to certain institutional investors", and informed Lachance of the retainer of RBC Capital for a proposed bid call process. He concluded: "The RBC engagement letter recognizes First Capital Realty as an excluded party to their mandate on the basis that I have had advanced discussions with FCR." At trial Katz explained his reference to "advanced discussions":

> Advanced discussions simply meant that First Capital was the only company that I had ever had discussions with pertaining to the partial sale of College Square in order to fund a share redemption transaction, and because of the fact that First Capital was the only third party that was aware of the particular situation the discussions I had with them obviously were advanced relative to any other third party that were privy to those discussions.

Lachance described the prior discussions as "long discussions": "we were discussing things in detail regarding the various points…"

[353] Katz explained why he had contacted Lachance at that point in time:

> Because I felt that it was appropriate for me to inform Ms. LaChance that we had in fact completed our internal arrangements that we had an executed LOI amongst all shareholders, and that it enabled us to proceed with pursuing funding opportunities, and given the fact that I had had previous discussions with Ms. LaChance dating back to August I felt that it was fair to inform her that we were going to move forward with a formalized process that would provide us the opportunity to expose College Square to the market to generate the most favourable financing that we could obtain.

[354] This email was put to Rick Kesler on his cross-examination on the summary judgment motion and he was asked to agree that as of May 4, 2005 no agreement had been concluded between the Leikin Group and FCR. Mr. Kesler, on the advice of counsel, refused to answer the question.

[355] After conducting due diligence on the property RBC Capital modeled an 11-year pro forma for College Square and created a Confidential Information Memorandum about the property for prospective purchasers. RBC Capital identified 12 prospective purchasers and secured the approval of the Non-Selling Shareholders to approach them. RBC commenced its marketing process on May 6, 2005 and requested interested purchasers to submit bids on May 20. Katz testified that the CIM contained an outline of the co-ownership principles important to the Leikin Group, and those principles largely had been created through Katz's discussions with FCR in August, 2004.

[356] Lachance testified that when she received David Katz's email she asked for a copy of the Confidential Information Memorandum. She deposed that there was no information in the CIM about a preliminary transaction amongst the Leikin Group shareholders or any valuations which might have been conducted on College Square. FCR remained interested in College Square. Around May 17 Ms. Lachance received approval from her superior, Mr. Segal, to pursue the property, and FCR's counsel requested further information from RBC Capital. In response Graham Hoey, a chartered accountant advising the Leikin Group, sent a May 25, 2005 letter to FCR's counsel describing the creation of a new amalgamated company to hold College Square, the transfer of part of the interest in College Square to a Newco, and a further transfer to a partnership. Mr. Hoey also described the resulting adjusted cost base for interests in College Square. In the result, FCR submitted a proposal to RBC Capital to purchase a 47% interest in College Square.

[357] By the end of May, 2005, RBC had received four offers: from Sun Life, Hydro Quebec, Canadian Real Estate Investment Trust and First Capital. Two offers were for a 50% interest in College Square; two were for 47%. The offered prices (on a 100% basis) ranged from a low of $68.5 million (Sun Life) to $78.8 million submitted by First Capital.

[358] RBC Capital sent the Non-Selling Shareholders (Newco) a memorandum dated June 8, 2005 summarizing its efforts to market College Square. In its memo RBC Capital made the following recommendation:

> It is RBC's recommendation that based on price, comments on the co-ownership and management agreements, familiarity with the asset, financial capacity to close and willingness to consider an alternative partnership structure, First Capital's offer of $37.036 million (based on 47% interest) is the superior offer and should be countered on terms to be determined appropriate by the Vendor.

[359] Although Ms. Harris in her pre-trial cross-examination had described the RBC process as a sham, at trial she clarified that what she meant to say was that the decision made to select FCR was based on a long standing relationship.

## XXI. David Spieler becomes a Selling Shareholder[27]

[360] David Spieler had started as a Non-Selling Shareholder in the process. It was his position that the Non-Selling Shareholders should retain at least a 50% interest in College Square; he did not want the remaining shareholders to give up control of that property.

[361] In his affidavit Spieler stated that the Katz Siblings treated him as an outsider during the negotiations of the LOI and they met with Ogilvy Renault, GGFL, and the CIBC to make decisions about the transaction without Spieler's knowledge. Spieler deposed that Jameson "delivered ultimatums and positions to the selling shareholders representing them as being on behalf of all of the non-selling shareholders without any consultation with me." However, on cross-examination on the summary judgment motion Spieler acknowledged that his criticism of Jameson might have been too broad, and he agreed that he had received numerous communications from Jameson. Spieler ultimately decided to retain Ms. Sandra Appel, a corporate lawyer at Davis LLP, to represent his interests.

[362] On March 11, 2005, David Spieler emailed Barbara Farber advising that he wanted to obtain information about the proposed refinancing of College Square. He had asked Mr. Jameson, who told him that he did not have such information. Jameson had sought such information from David Katz, who replied that "as a non selling shareholder of the Leikin Group, I believe that I am fully entitled to conduct my own analysis financial and otherwise, without being obligated to share such analysis with others." Mr. Spieler told Ms. Farber that David Katz had said he saw no need to share any financial analysis he had done, so Mr. Spieler turned to Ms. Farber for the information. Mr. Spieler did not receive any information in response to his request. David Katz testified that at that point of time the other Non-Selling Shareholders had good reason to mistrust David Spieler.

[363] Spieler passed on to Rick Kesler the email from David Katz refusing to share the financial analysis he had conducted, and Kesler transmitted the email to Lewy.[28] So, one month before signing the LOI, Kesler and Spieler clearly were aware that David Katz would not disclose to them his own financial analysis.

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[27] The evidence before the court on the summary judgment motion can be found at paragraphs 250 to 255 of the SJ Reasons.

[28] Ex. 2, Vol. 8, Tab 418.

[364] The day before, on March 10, Jameson had replied by email to Sandra Appel, in part on the issue of available financial calculations for the refinancing of College Square. Mr. Jameson wrote:

> I have not seen nor am I aware of any financial analysis of such a proposed refinancing transaction. The only information that I have seen as counsel to the Leikin Group of Companies with respect to the transaction at all is the CIBC report which I have sent to you. I have not seen nor am I aware of any figures that may have been run showing the costs of financing, the cash flow projections from College Square etc.

On cross-examination before trial Mr. Jameson was asked the following questions about this email:

> Q. When you wrote this, did you turn your mind back to the e-mail with the analysis you had received on July 26 from Pat Day.
>
> A: No.
>
> Q. And if you were to turn your mind back now, would you be able to make that statement if you looked at that memo again?
>
> A. I think it depends. I'd have to go back and really look at the Pat Day memo. I mean, when I wrote this statement, I was talking about the state of the world on March of 2005 when the Letter of Intent was about to be signed.

[365] On March 10 Jameson also sent Appel an email from Katz in which he cautioned that the "non selling shareholders refrain from making any overtures to the market" until the letter of intent was signed.

[366] Jameson evidently discussed Appel's request for information about the financing because on March 11 he emailed Appel to advise that he had spoken to David Katz "about your inquiry about numbers" and he told Appel to contact Katz directly. Appel testified that she believed she had at least one conversation with Katz.

[367] Then, in the middle of May, Jeremy Farr, a lawyer at Borden Ladner Gervais LLP who was representing the Katz Siblings on the financing of the share redemption, contacted Ms. Appel to propose a form of unanimous shareholders' agreement amongst the four Non-Selling Shareholders. There then followed correspondence on the terms of the USA, as well as the demand of the Katz Siblings that Spieler sign a confidentiality agreement before information about the financing was revealed to him. Those negotiations did not bear fruit. At the end of June David Spieler elected to become a Selling Shareholder, and he signed a comprehensive release of claims as against the remaining Non-Selling Shareholders.

[368] Spieler deposed that he had no knowledge that the value of College Square was more than $70 million and had he been aware of such information, he would not have agreed to the terms of the LOI. He also would have shared that information with his other cousins, including Rick Kesler.



## XXII. Agreement with First Capital[29]

[369] By letter dated July 8, 2005, First City offered to purchase, in effect, a 50% interest in College Square for a price of $39.4 million, subject to certain adjustments, which would reflect a 100% gross sale value for College Square of $78.8 million. The offer specifically contemplated the negotiation of a formal purchase agreement, followed by a 30 day due diligence period. Closing would occur 30 days following the expiration of the due diligence period. Any agreement resulting from an acceptance of the offer would be conditional on the successful completion of the preliminary transactions with the other shareholders of the Leikin Group. FCR's offer did not specify the terms of those preliminary transactions or the purchase price or valuation underlying them.

[370] FCR's management committee discussed the College Square opportunity at its July 15, 2005 meeting.

[371] According to David Katz, it was necessary to obtain a purchase price of $39.4 million for a 50% interest in College Square in order for the Non-Selling Shareholders to fund the approximately $25 million required to redeem the shares of the Selling Shareholders and, at the same time, not relinquish control of the College Square property.

[372] Grant Jameson was informed by an email from David Katz on July 8 that a LOI had been signed with FCR. A few days earlier Farber inadvertently had told him about the agreement, but Jameson deposed that "I had no information about the particulars of the transaction at that time, including the valuation of College Square for the purpose of this equity investment."

[373] A conversation took place on July 19, 2005 amongst David Katz, Grant Jameson, Rick Kesler and Jules Lewy. David Katz explained that the Non-Selling Shareholders were asking the corporation to defease the mortgage on College Square in order to facilitate a possible loan from Merrill Lynch to fund the share redemption transaction. Rick Kesler deposed that during the call

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[29] The evidence before the court on the summary judgment motion can be found at paragraphs 256 to 267 of the SJ Reasons.

David Katz did not reveal that the Non-Selling Shareholders had already entered into a LOI with FCR.

[374] The Leikin Group wished to retain Ogilvy Renault to deal with several issues on the proposed sale to FCR: an environmental matter, the negotiation of a waiver of the rights of first refusal enjoyed by two anchor tenants in College Square, and certain deliverable and title issues. The Leikin Group asked Ogilvy Renault to accept this retainer on the basis that the firm would not disclose the terms of the proposed sale to FCR to the Selling Shareholders. Jameson deposed:

> I told David Katz that I did not feel comfortable being provided with specific information about the Transaction that Ogilvy Renault would have to undertake (in advance of seeing it, without even knowing what it was) not to disclose to the Selling Shareholders, without their knowledge and consent.

[375] Around July 14 Ogilvy Renault received the consent of the Selling Shareholders, and their counsel, to accept the retainer and to have access to the third party information without disclosing it to the Selling Shareholders. Jameson deposed that he was not otherwise involved in the process by which third party financing was obtained.

[376] David Katz sent Jameson the executed letter of intent signed by FCR on July 18, 2005 which revealed that FCR would pay $39.4 million for its interest in College Square. Jameson deposed:

> I had the document printed, but to the best of my recollection I did not read it at the time...

[377] Later in July David Katz, by way of a July 25 email to Grant Jameson, and others, expressed concern about the release of information about the pending FCR transaction to the other directors of the re-organized board of the Leikin Group:

> If the above noted concerns are correct, it is quite conceivable that Spieler, Rick Kesler and/or Jo Harris as Amalco directors could insist on at least being informed as to the non selling shareholders' activities pertaining to the financing of the shareholder transaction. I am of the view, that the FCR transaction could be jeopardized if the terms and conditions of the sale of a partial interest in College Square to FCR are made available to the selling shareholder!

[378] Day deposed that she did not become aware that FCR was purchasing an interest in College Square until sometime after it had entered into the agreement of purchase and sale. She did not learn that the FCR transaction was based on a purchase price for College Square of $78.6

million until she read a newspaper article in early October reporting on First Capital's acquisition.

[379] Merrill Lynch Capital Canada Inc., evidently on behalf of FCR, secured an appraisal report for College Square dated July 26, 2005, which estimated the fair market of value of College Square at $73.9 million as at July 20, 2005.[30] Not much turns on that, however, because David Katz testified that he never saw the appraisal until long after the transaction had closed. Lachance was not concerned that the appraised value obtained by the lender was lower than the value underlying FCR's bid for an interest in College Square:

> I can tell you that, traditionally, the appraisal reports that we receive in support of financing are always a little bit inferior to what we end up buying the property for. It is very common.
>
> …we prepared the bid aggressively because we wanted to have the property…
>
> [W]e were acting in a market constantly changing and on the rise, and the cap rates for the properties at the time, in my humble opinion, and in the opinion of First Capital, was in the 6, 6%, 6.3. 6.5, 6.7, around that…

[380] Although neither the Selling Shareholders nor the Non-Selling Shareholders saw the July, 2005 appraisal for College Square, that appraisal put in very concrete terms the qualitative information known to both sides since October, 2004, that the value of big box shopping centres in the Ottawa area was increasing in an aggressive manner: from the $55 million Altus Group appraised value as of August 1, 2004 to the $73.9 million appraised value as of July 20, 2005.

[381] On August 11 a purchase and sale agreement with First Capital for an interest in College Square was executed. In her affidavit Lachance described several efforts by FCR to obtain more information during the due diligence process about the preliminary reorganization transaction taking place amongst the shareholders of the Leikin Group. Although FCR eventually received some information regarding the transfer of interests in College Square into new entities, it did not receive information about the valuation used in the preliminary transaction amongst the shareholders or other details of that transaction. Lachance deposed:

> First Capital was never made aware, before the commencement of this action, that the Preliminary Transaction was being conducted at a value of $60,000,000.00 for College Square. It was never provided with the details or the documents concerning the

[30] Ex. 2, Vol. 10, Tab 512.

Preliminary Transaction. I have seen no documents in the productions of any party to suggest otherwise.

## XXIII. Closing of the Share Redemption and First Capital transactions[31]

[382] The shareholder redemption transaction closed in escrow on August 4, 2005, pending completion of the FCR transaction. Final closings of both transactions were deferred to late September and early October.

[383] At a meeting on September 16, 2005, FCR's Board approved the acquisition of an interest in College Square, and the FCR transaction closed on September 29, 2005, with First Capital delivering its required payment of about $25 million.

[384] On October 3, 2005, FCR released a press announcement reporting that it had acquired a 50% interest in College Square for $39.3 million.

[385] On October 4, 2005, Ogilvy Renault sent the share redemption proceeds to the Selling Shareholders, each of whom received $3.395 million.

[386] Josephine Harris deposed that her family first learned about the FCR transaction in the fall of 2005 when the plaintiff, Sheira Harris, came across a FCR press release about its acquisition of a 50% interest in College Square for $39.3 million. In her affidavit Josephine Harris deposed that she was advised by her children, the Harris Family plaintiffs, that had they been told that FCR was interested in purchasing an interest in College Square at a value in excess of $70 million, they would not have signed the letter of intent.

[387] As will become apparent from the analysis below, I need not make any finding on this point. I would observe, however, that the evidence was far from clear as to what consequences would have flowed from the disclosure to the plaintiffs of information that the financing of the share redemption transaction would use a higher value for College Square than that negotiated in the LOI. Would the plaintiffs have not signed the LOI? Perhaps. But what next? The Non-Selling Shareholders did not want to be left with a stake in College Square of less than 50%? Further negotiations? Perhaps. A stand-off? Perhaps; no party was operating under financial pressures necessitating a sale of the assets, so both sides could have backed off. A compelled sale of assets under a winding-up? At the end of the day it is not possible to discern what would

[31] The evidence before the court on the summary judgment motion can be found at paragraphs 268 to 273 of the SJ Reasons.

have happened had, as Ms. Harris testified, she known the details of the financing. Perhaps today the cousins would still be where they were in early 2004. It is not possible to tell.

[388] Kesler stated, on cross-examination, that a few weeks after the transaction had closed he phoned Barbara Farber and complained that she and her brothers had not been truthful with the other shareholders. David Spieler also found out a few weeks after the transaction closed.

[389] Barbara Farber deposed that following the close of the transaction she did not receive any complaints about it from the plaintiffs until she was served with the Statement of Claim in November, 2007.

[390] Andrew Katz deposed that at a Board meeting in July, 2006, Kesler told Levitz and himself that he and the other Selling Shareholders were quite satisfied with the outcome of the share redemption transaction, and Kesler identified how the share redemption proceeds had facilitated certain of the Selling Shareholders retiring from their employment or purchasing homes.

## XXIV. Breach of fiduciary duty claims against the Leikin Group and the Leikin Family Defendants: The governing legal principles

### A. When a fiduciary relationship arises

[391] A fiduciary relationship is one which requires a party, the fiduciary, to act with absolute loyalty toward the other party, the beneficiary or *cestui que trust*, in managing the latter's affairs.[32] Fiduciary duties do not exist at large, but arise from, and relate to, the specific legal interests at stake. Consequently, the nature and scope of the fiduciary duty must be assessed in the legal framework governing the relationship out of which the fiduciary duty arises.[33]

[392] Canadian law distinguishes between *per se* fiduciary relationships and *ad hoc* ones. *Per se* fiduciary relationships attach to certain categories of relationships because of the inherent purpose or the presumed factual or legal incidents of those relationships. Relationships which the law historically has recognized as giving rise to fiduciary obligations include those between director/corporation, trustee/beneficiary, solicitor/client, partners, and principal/agent.[34] However, not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty. A claim for breach of fiduciary duty may only be founded

[32] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, para. 22.
[33] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, paras. 184 and 185.
[34] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, para. 30.

on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary.[35] As the Court of Appeal put it in the recent case of *Simkeslak Investments Ltd. v. Kolter Yonge LP Ltd.*:

> Not all actions taken by a person in a *per se* fiduciary relationship - that is, in a category of relationship in which a fiduciary relationship has been traditionally recognized - attract a fiduciary obligation. The presumption that in a *per se* fiduciary relationship one party has a duty to act in the best interests of the other is rebuttable.[36]

[393] By contrast, *ad hoc* fiduciary obligations may arise as a matter of fact out of the specific circumstances of a particular relationship.[37] In such a situation, fiduciary duties are imposed on a person because his relationship with another presumes the existence of fiduciary obligations.[38] In *Alberta v. Elder Advocates of Alberta Society* the Supreme Court summarized the current approach to identifying *ad hoc* fiduciary relationships in the following way:

> As useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Galambos* that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.
>
> First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, *per* La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."
>
> The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.

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[35] *Galambos v. Perez*, 2009 SCC 48, paras. 36 and 37.
[36] 2013 ONCA 116, para. 16.
[37] *Galambos*, para. 48.
[38] *Lac Minerals*, p. 648.

The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in *Galambos*, at para. 77:

> The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and ad hoc fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [Emphasis added.]

Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.

Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, *per* Wilson J., at p. 142.

In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame:* (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[39]

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[39] *Galambos*, paras. 29 to 36.

[394] The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific circumstances.[40] Whether an *ad hoc* fiduciary relationship exists therefore "demands a meticulous examination of the facts surrounding the legal and practical incidents of any particular relationship".[41]

[395] As Cromwell J. noted in *Galambos*, commentators have described the requirement that a fiduciary give an undertaking of responsibility to act in the best interests of a beneficiary in various fashions: a person had "bound himself in some way to protect and/or to advance the interest of another"; or a person had relinquished self-interest; or a person had undertaken "to act in the interest of another person."[42] He continued:

> This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.[43]

[396] It is often said as a general rule fiduciary relationships do not arise from a commercial contract or between arm's length independent parties in commercial transactions because such transactions usually derive their utility from the pursuit of self-interest.[44] Sopinka J., in his judgment in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, adopted the following passage from an academic article explaining why fiduciary duties rarely arise in arm's length commercial transactions:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the

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[40] *Galambos*, para. 48.
[41] *Waxman v. Waxman*, (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), para. 505.
[42] *Galambos*, para. 78.
[43] *Galambos*, para. 79.
[44] *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), para. 1210; affirmed (2004), 44 B.L.R. (3d) 165 (Ont. C.A.).

> ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.[45]

[397] Certainly some cases have demonstrated such a judicial reluctance. For example, in *Aronowicz v. Emtwo Properties* the Court of Appeal commented that it was hard to conceive of a corporate/commercial mechanism less likely to attract the operation of fiduciary obligations than a shotgun buy/sell provision in a unanimous shareholders agreement.[46]

[398] That said, there is no absolute rule precluding the finding of a fiduciary relationship in the context of a commercial transaction. By way of example, the Supreme Court of Canada, in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, upheld the trial judge's finding of the existence of fiduciary duties where a commercial contract was in place between the parties. The Court noted that the "fiduciary relationship in this case must therefore be circumscribed by the contractual bargain".[47] One must also recall the following comments by the Court of Appeal in *Waxman*:

> The appellants' second argument is that the fiduciary duty does not arise on the sale of shares by one shareholder to another, particularly where there has been no express undertaking by the selling shareholder to act in the other's interest.
>
> Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, *Tongue v. Vencap Equities Alberta Ltd.* (1994), 148 A.R. 321 (Q.B.), aff'd (1996), 184 A.R. 368 (C.A.); *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.).
>
> …
>
> Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship. He did not need to make any

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[45] [1989] 2 S.C.R. 574, para. 27.
[46] 2010 ONCA 96, para. 50; see also *Simkeslak, supra*.
[47] 2011 SCC 23, para. 143.

express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.[48]

**B. Nature of the fiduciary duties of directors and officers**

[399] The nature and scope of the fiduciary duties of directors of corporations were canvassed at length by the Supreme Court of Canada in the *BCE* case where the Court stated:

> The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear -- it is to the corporation: *Peoples Department Stores*.
>
> The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.
>
> …
>
> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp*. (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.[49]

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[48] *Waxman, OCA, supra*., paras. 510 to 512.
[49] *BCE*, paras. 37, 38 and 40.

[400] As a fiduciary of a corporation, a director owes the company duties of disclosure, honesty, loyalty, candour, and the duty to favour the company's interest over his own.[50] A director must disclose to the corporation facts which impact upon the business of the company.[51] The principles concerning the fiduciary duties of directors apply generally to any senior officer of a corporation who is authorized to act on its behalf in a managerial capacity.[52]



**C. Duties of directors to shareholders**

[401] Directors of a company do not owe a *general* fiduciary duty to shareholders.[53] As the Supreme Court of Canada stated in *BCE*:

> [T]he directors owe a fiduciary duty to the corporation, and only to the corporation. *People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.*[54] (emphasis added)

[402] Nontheless, it is well-recognized that directors may owe a fiduciary duty to specific shareholders in particular circumstances. The law on this point was summarized by Kevin McGuinness in his text, *Canadian Business Corporations Law, Second Edition,* at §11.194:

> Although the directors owe no general duty to individual shareholders of a corporation, such a duty may exist in the circumstances of a particular case. Stated another way, the mere status of corporate director imposes no fiduciary duty upon the directors with respect to the individual shareholder of the corporation, but such duties may arise with respect to a specific individual shareholder independently of the director-corporate relationship, because of circumstances of the dealing between the director and the shareholder concerned…These exceptions to the general rule seem to be limited to situations involving a family or other close special relationships of trust and dependency between the claimant and the defendant director, in which the director was seeking to

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[50] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), para. 123; affirmed (2004), 250 D.L.R. (4th) 526 (Ont. C.A.).
[51] *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 101 D.L.R. (4th) 15 (Ont. Gen. Div.), at 59; aff'd (1994), 15 O.R. (3d) 370 (C.A.); leave to appeal refused [1993] 3 S.C.R. vi.
[52] Kevin McGuiness, *Canadian Business Corporations Law, Second Edition* (Toronto: LexisNexis, 2007), §11.118.
[53] McGuiness, *supra.*, §11.192 and 11.193.
[54] *BCE*, para. 66.

> take advantage of that relationship for personal gain or profit. The standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholder. In the one case there may be a need to provide an explicit warning and a great deal of information concerning the proposed transaction. In another there may be no need to speak at all. There may be intermediate situations. For instance, the director will owe a fiduciary duty to a shareholder where the director acts as the agent of the shareholder, where the director buys shares from the shareholder, and where the director has been dishonest with or misled a minority shareholder…

**D. Duty to disclose material information**

[403] One issue in the Supreme Court of Canada decision in *Sharbern Holding* concerned whether a fiduciary had failed to disclose material information to beneficiaries in a circumstance where the fiduciary was acting for two parties whose interests differed. A fiduciary is obligated to disclose any material facts or information if there is a substantial risk that its fiduciary relationship with a party would be materially and adversely affected by its own interests or its duties to another.[55] In *Sharbern* the Court commented:

> A breach of fiduciary duty would occur if the undisclosed Compensation Differences were material or placed VAC into a conflict of interest to which Sharbern had not consented. This is because equity "forbids trustees and other fiduciaries from allowing themselves to be placed in ambiguous situations ... that is, in a situation where a conflict of interest and duty might occur" (D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 914). As M. Ng writes, in *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (loose-leaf), at p. 2-10:
>
> > Where fiduciaries put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they will be required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict.[56]

[404] The party seeking to establish the materiality of undisclosed facts or information must provide evidence upon which a finding of materiality can reasonably be made.[57] If it does, the onus then falls on the fiduciary to prove that it had received the informed consent of the

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[55] *Sharbern Holding Inv. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23.
[56] *Sharbern*, para. 148.
[57] *Sharbern*, para. 158.

beneficiary to act on or use the material information for its own interests or the interest of others.[58]

[405] In *Waxman v. Waxman* the trial judge cited the legal principle which requires partners who are negotiating a transaction to buy out the interest of the other to make full disclosure of information relevant to the value of the partnership shares unknown or not available to the other partner, as well as information regarding the nature and effect of the transaction.[59] Or, as put by the Alberta Court of Appeal in *Radford v. Stannard*, a fiduciary is bound to communicate to his beneficiary all the information he acquires in respect of a property which is the subject-matter of a transaction concerning the beneficiary.[60]

[406] In *DiFlorio v. Con Structural Steel Ltd.*,[61] J. Wilson J. considered the jurisprudence concerning whether the non-disclosure of material information by a fiduciary would have affected the beneficiary's decision to proceed with the transaction:

> The defence suggests that even if the facts had been known, Joseph's family would have purchased Roland's family interest in the businesses. This does not accord with Ida's evidence, and is speculative. The defence acknowledges that Roland was a fiduciary to Rocca. In *Brickenden v. London Loan & Savings Co. et al.*, [1934] 3 D.L.R. 465 (J.C.P.C.), Lord Thankerton, at p. 469, articulates a statement of principle relating to a fiduciary's duty to disclose material facts and the issue of speculation:
>
> > When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction ... Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.
>
> This passage has been re-affirmed and elaborated upon in *Commerce Capital Trust Co. v. Berk* (1989), 68 O.R. (2d) 257 at 262-2 (C.A.) in obiter comments by McKinlay J.A.:
>
> > I interpret Lord Thankerton's statement to place the onus on the [defendants] to prove that, despite the non-disclosure of material facts, the [plaintiff] would have proceeded with the transaction. However, proof in such a situation would undoubtedly be difficult, and "speculation" would not suffice ... Lord

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[58] *Sharbern*, para. 149.
[59] *Waxman v. Waxman*, SCJ, paras. 1268 to 1272.
[60] *Radford v. Stannard* (1914), 19 D.L.R. 768 (Alta. Sup. Ct., App. Div.), para. 17.
[61] [2000] O.J. No. 340 (S.C.J.).

> Thankerton's statement indicates that the test of materiality is not whether or not the transaction would have been proceeded with if all facts had been known. Applying such a test to determine materiality, would make Lord Thankerton's statement meaningless ... [T]he question of materiality must be determined on some objective basis. [Emphasis added.]

In *Raso v. Dionigi* (1993), 12 O.R. (3d) 580 (C.A.), Dubin C.J.O. confirmed that the passage from Lord Thankerton does not require "an inquiry into what would have transpired if full disclosure had been made". This recurring principle is confirmed by La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 76:

> where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach. Mere 'speculation' on the part of the defendant will not suffice.

The test of materiality therefore must not give way to speculation. It must be objectively based upon what extent of disclosure a reasonable person contemplating a particular transaction would require before completing it.[62]

As noted earlier in these Reasons, the Supreme Court of Canada, in its decision in *Sharbern Holding*, canvassed at some length the inquiry a court should make to determine the materiality of undisclosed information.

### E. Agent – Principal relationship

[407] At law a rebuttable presumption exists that in an agent-principal relationship the agent has a duty to act in the best interests of its principal.[63] Every agent labours under a duty to do the best he can for his principal.[64]

## XXV. Analysis of the breach of fiduciary duty claims against the Leikin Group and the Katz Defendants

### A. The plaintiffs' claims of breach of fiduciary duty by the Non-Selling Shareholders

[408] The plaintiffs submitted that the Non-Selling Shareholders possessed material information which they failed to disclose to the plaintiffs, specifically that (a) FCR had expressed a strong desire to purchase an interest in College Square, (b) FCR had the wherewithal

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[62] *Ibid*., paras. 106 to 109.
[63] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, para. 31.
[64] *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.J.), para. 25.

to purchase such an interest, and (c) FCR had been involved in negotiations with David Katz which had assigned a value to College Square in excess of $70 million.

[409] The plaintiffs argued that such information about the dealings with FCR was material (i) when David Katz was President of the companies in early 2004, (ii) when he was employed as a consultant, (iii) when he communicated this information to the other Defendants to this action, and (iv) when the Non-Selling Shareholders pressed the Plaintiffs in negotiations to accept a significantly lower value for College Square in the share redemption transaction.

[410] It was the plaintiff's position that the obligation of the Katz Defendants to disclose that material information to the plaintiffs arose both because David Katz owed them a fiduciary duty as an officer of, and then as consultant to, the companies and, as well, the Non-Selling Shareholders owed the plaintiffs an *ad hoc* fiduciary duty because:

(i) they had undertaken to act in the plaintiffs' best interests by representing that the share redemption would be based on fair market value, the process would be open and transparent, and the process would be in the interests of all shareholders;

(ii) they possessed information which by its very nature caused the plaintiffs to be vulnerable; and,

(iii) this vulnerability could only be addressed properly through the disclosure of the FCR negotiations.

[411] The plaintiffs contended that their reliance on their own independent legal advisors or the give-and-take of the negotiations between the two sides did not relieve the Non-Selling Shareholders of their fiduciary duty to the Selling Shareholders. The plaintiffs alleged that by failing to disclose that material information and by concealing the FCR negotiations, the Non-Selling Shareholders manufactured a significant personal benefit – in effect they increased their interest in College Square from 27% to 50% without any financial contribution from them, all at the expense of the Selling Shareholders. The Non-Selling Shareholders intended to use the spread between the values assigned to College Square in the share redemption transaction and the price fetched on the subsequent sale of an interest in that property to a third party to increase their equity share in College Square. (In their Closing Submissions the plaintiffs stated that they were not advancing a claim based on misrepresentation.)

[412] These allegations raise two important issues. First, there can be no doubt on the evidence that the April 15, 2005 Letter of Intent resulted from a process of self-interested dealing by both the Selling Shareholders and Non-Selling Shareholders during which the Selling Shareholders had access to, sought and received independent legal advice and real estate appraisal advice, and

I so find. At trial Lewy acknowledged the essential self-interestedness of both parties' dealing when he gave the following testimony:

> Q. And in that negotiation about the fixed price, and what the fixed price should be there was the normal what might be called deal tension, one side wanting a higher price, the sellers, and the non-selling side wanting a lower price, correct?
>
> A. I can speak at least for my side.
>
> Q. Sure, sure.
>
> A. Yes, they wanted as high a price as they could.
>
> Q. Sure, and it was coupled with some of the normal events of negotiation including negotiations being called off at certain points, that's it the deal is off, and then coming back on stream, correct?
>
> A. Correct.
>
> *Q. So I take it that from your perspective sir there was nothing in this negotiation that looked like one side negotiating in the other sides interest, both sides were negotiating in their own interest?*
>
> *A. Correct*. (emphasis added)

Notwithstanding the self-interest of both sides to the negotiations, one side now wishes to set aside part (but not all) of an agreement which was the product of hard, self-interested bargaining.

[413] Second, it was clear from the evidence that during those negotiations the Selling Shareholders did not trust the Non-Selling Shareholders – that was a constant theme of the evidence given by Josephine Harris and Rick Kesler. When the negotiations opened in earnest in November, 2004, the Selling Shareholders asked for two things from the Non-Selling Shareholders: (i) a tag-along which would allow them to share in any "upside" related to the financing transaction the Non-Selling Shareholders would put in place to finance the buy-out, and (ii) a representation regarding the information possessed by the Non-Selling Shareholders about the opportunities to finance the transaction. Notwithstanding repeated demands by the Selling Shareholders for those two items, the Non-Selling Shareholders refused to include them in the final LOI. The scope of informational disclosure and the sharing of an "upside" on the financing were not issues swept under the rug or never addressed. On the contrary, the parties specifically adverted to both issues in their negotiations, they were refused by the Non-Selling Shareholders, and the Selling Shareholders accepted that refusal and agreed to sell their shares in any event. The plaintiffs now ask this Court to ignore the fact of the negotiations on those two

points. That is a lot to ask after a deal has closed. Accordingly, the plaintiffs' claim must undergo careful scrutiny.

[414] In considering any claim for an alleged breach of a fiduciary duty, a court must examine the evidence to see whether it supports the finding of (i) the existence of a fiduciary duty, (ii) the breach of a duty, and (iii) the causation of an injury by reason of the breach, so let me turn to that analysis.

**B. The allegation regarding the existence and breach of a fiduciary duty by David Katz when he was President of the Leikin Group**

[415] As an officer of the Leikin Group until his resignation in May, 2004, David Katz owed the companies a duty to act honestly and in good faith with a view to the best interests of the corporations. Part of that obligation consisted of a duty to disclose to the corporations facts which impacted upon their business.[65] In the context of the business of the Leikin Group part of what Katz did was to identify and explore opportunities to develop the Group's business. As an officer he labored under an obligation to report periodically to the Board of Directors on the activities he was undertaking on behalf of the corporations and, when opportunities had reached a certain degree of ripeness, to seek direction from the Board on whether to pursue the opportunity and, if so, subject to what general parameters.

[416] The Leikin Group was a family-run corporation. Its governance possessed a degree of informality. No formal policies concerning the scope of the President's authority or his obligations to report to the Board were placed in evidence. In practice, therefore, the President enjoyed a degree of discretion about what opportunities to pursue and when to engage the Board in discussing those opportunities. Obviously Katz could not commit the Leikin Group to a significant business obligation without approval from the Board, and there is no suggestion made by the plaintiffs in this case that Katz attempted to do so in his early 2004 discussions with FCR.

[417] As Katz testified, his strategic vision for the future of the Leikin Group saw the companies using their core assets, and in particular the "crown jewel", the College Square property, to grow into a significant player in the development of large retail properties in the Ottawa market. Katz understood that the Leikin Group could not move up to the next level without linking-up with a more senior player in that market. Thus arose his overture to FCR in the latter part of 2003.

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[65] *PWA Corp. v. Gemini Group, supra.*, Ont. Gen. Div., p. 59a.

[418] Over the course of a little over a month, from early February until mid-March, 2004, Katz initiated talks with FCR about a possible strategic alliance which would involve jointly pursuing the acquisition of new properties, as well as securing FCR's participation in the College Square property. Recognizing that he would be sharing with FCR some confidential information of the Leikin Group, Katz secured a confidentiality agreement from FCR. The ensuing talks included the exchange by the parties of memoranda setting out their views on key governance principles concerning property investments they might take together, the so-called co-tenancy principles.

[419] David Katz reported on those discussions at the next meeting of the Leikin Group Boards on April 15, 2004. In so doing, he did what one would expect of a senior officer of a corporation. Katz hoped that he could persuade the Board to adopt the concept of the Leikin Group embarking on a strategic alliance, in particular one with FCR, but in that Katz was mistaken. A majority of the directors – Harris, Kesler and Spieler – had no interest in having the Leikin Group pursue such an alliance. At that point of time a majority of the shareholders had given notice of their wish to sell their shares in the companies, so they had no interest in using the core corporate assets as a springboard from which to grow the companies' business. Katz was unable to secure Board approval to pursue his discussions with FCR, and within the space of a few weeks he had been forced to resign as President of the Leikin Group.

[420] In terms of the scope of the information which David Katz presented to the Board at the April 15 meeting, I found above in paragraph 111 that at the April 15 meeting Katz (i) made a PowerPoint presentation which included slides about a possible strategic alliance between the Leikin Group and FCR, (ii) told the Board that he was proposing a strategic alliance with FCR to acquire commercial redevelopment opportunities and acquire property in the Ottawa area to become the dominant non-enclosed retail centre developer/asset manager within the market, (iii) explained that he had exchanged some memos with FCR and had brought FCR personnel through the College Square property, and (iv) also suggested that a strategic alliance with FCR would involve FCR acquiring an interest in College Square. What Katz did not tell the Board during that presentation was that as part of his exploratory discussions with FCR he had floated an estimated value of $72 million for College Square. As an officer of the Leikin Group, did David Katz breach his duty to the corporations to act in good faith by failing to place that information before the Boards?

[421] Counsel placed before me some cases which considered the issue of materiality in the context of the disclosure of information to investors. Care must be taken in transferring notions of materiality which apply in third party investor circumstances to cases where a corporate officer is presenting information to his Board. I say that because the context in which the officer makes that disclosure is all important and will affect the level of detail which the officer legally must make as part of his fiduciary duty to disclose material information. In the case at bar Katz

was broaching to the Board a new business approach – a strategic alliance with a third party – uncertain as to whether the Board would even be receptive to the new approach. Officers of a corporation sometimes must engage in a kind of advocacy with their Boards to persuade them to move in a new direction. Such advocacy may require persuasion to a course of action over a period of time, and the amount of information provided to the Board may change depending upon whether the Board is receptive to the new direction. If a board displays interest in a possible approach, more detailed investigation and reporting of the opportunity may be required.

[422] In the present case Katz pitched his Board on the new concept of a strategic alliance. A majority rejected it out of hand, based on the information he provided, in large part because by that point of time the "selling directors" were more focused on their families' interests as shareholders in the value locked up in the core assets than they were in the corporate development of those assets. I find that Katz did not breach his duty as an officer to disclose information to the Board by not mentioning the $72 million trial balloon he had floated with FCR. By the time of the April 15 Board meeting Katz did not know FCR's reaction to that number; FCR had not responded to it. All he could usefully tell the Board about FCR's response to his overture was that FCR had been prepared to engage in some discussions about co-tenancy principles.

[423] The plaintiff/directors' complaint about Katz not telling them that he had floated a trial balloon of $72 million for the value of College Square to FCR related not to information they would require to perform their duties as directors of the Leikin Group – they had no interest in a corporate strategic alliance with FCR or continuing their involvement in College Square as a going concern – but in their personal interests as shareholders of the Leikin Group looking to sell their shares. However, the purpose of Katz's presentation at the April 15 Board meeting, and the purpose of his discussions to that point with FCR, had not been to scout out a buyer for some of the shareholders' interests in the companies, but to develop a business opportunity for the corporations using their core asset of College Square. Accordingly, the legal adequacy of Katz's presentation to the Board on April 15 must be assessed in the context of his duties as an officer to the corporation, not to individual shareholders. No allegation was made by the plaintiffs that by that point of time Katz had made any undertaking to protect their interests *qua* shareholders. The plaintiffs relied on subsequent events to found that claim of an *ad hoc* fiduciary duty.

[424] Finally, on this issue of the required scope of Katz's disclosure of information to the Board on April 15, I re-iterate that by the time of that meeting FCR had not made any offer to purchase an interest in College Square. To the contrary, FCR had not responded to Katz's trial balloon concerning value.

## C. Allegations of breach of other *per se* fiduciary duties

[425] At all materials times Barbara Farber and Andrew Katz were directors of the Leikin Group. Although David Katz had ceased to serve as an officer in May, 2004, he did enter into a subsequent consultancy contract with one of the Leikin Group companies and throughout the negotiation process remained a paid consultant. The plaintiffs contended that David Katz's role as a paid consultant imposed a fiduciary obligation on him. It did not on a *per se* basis – the law has not extended *per se* fiduciary obligations to paid consultants of corporations; whether it did on an *ad hoc* basis I will consider later in these reasons.

[426] As I understand their submissions, the plaintiffs contended that Farber and Andrew Katz, as directors of the Leikin Group, breached their *per se* duties in two respects. First, they failed to disclose to the other directors information concerning the financing of the share redemption transaction thereby, in effect, failing to disclose that they planned to "flip" an interest in College Square upon the redemption of the plaintiffs' shares. Second, the plaintiffs argued that since all members of the Board were in a conflict of interest position in respect of the share redemption transaction, the transaction needed shareholder approval. Since the transaction needed shareholder approval, the plaintiffs argued, the duties which the directors would otherwise owe to the corporation in respect of the transaction became owed directly to each shareholder. From that the plaintiffs argued that Farber and Andrew Katz breached that duty to the shareholders by failing to disclose the financing-related information and by securing a personal profit from the transaction. Let me deal with each allegation in turn.

### C.1 The failure to disclose financing information to the other directors

[427] What became known as the share redemption transaction commenced with Farber's June 9, 2004, response to the sale notices delivered by a majority of the shareholders. In that memo to the Board, Farber proposed re-constituting the Board to include outside, professional directors. That elicited Prehogan's threat to sue a week later. Farber also stated that at the June 16 Board meeting one agenda item would deal with the "review of net proceeds analysis on sale of core assets". The GGFL calculations circulated for that agenda item "estimated" a FMV for College Square of $62 million.

[428] Prehogan, in his letter of June 15, wrote in respect of the offers to sell by the shareholders: "Unfortunately, any sale of their shares has been frustrated by the fact that according to the companies' constating documents, there is no market for them other than the issue of Harry Leikin." On behalf of his clients Prehogan proposed a winding-up of the companies.

[429] By about mid-June, Farber had contacted CIBC Mid-Market Investment Banking for assistance, and in its engagement letter of June 23, 2004, CIBC proposed to provide services to explore "liquidity options" that "would allow the [7] Selling Shareholder(s) to realize full or partial liquidity for their shares". CIBC proposed that it would conduct a valuation estimate of the fair market value of the shares owned by the Selling Shareholders, "as well as the feasibility of financing the Proposed Transaction". That latter matter would include reviewing "suitable financing structures for the Proposed Transaction".

[430] On July 6 Farber wrote Prehogan asking him to clarify whether his clients sought the disposition of College Square and Fisher Heights Plaza, or whether they wished to dispose entirely of their shareholdings in the Leikin Group. Farber proposed postponing the AGM to "permit The Leikin Group to fully examine the possibility and feasibility of shareholder divestiture scenarios". Prehogan responded on July 16 that his clients wished to "sell core assets, not shares" and repeated his clients' opposition to any change in the existing Board of Directors.

[431] On July 19 Farber wrote to the Board stating that "a definitive approach must be developed to enable the Leikin Group to act in a highly responsive, diligent and equitable manner in examining the feasibility of a transaction that addresses such liquidity needs." Farber reported on finalizing an engagement letter with CIBC, which she attached, and noted that the retainer required Board approval. Farber asked for dates for a Board meeting to approve the CIBC retainer "to permit the financial evaluation and analysis to commence as soon as possible".

[432] The Board met on July 21, 2004, at which time it approved the engagement of CIBC. Jameson's notes of that meeting recorded that four shareholders were not interested in selling their shares and wanted to continue to operate the core assets as a going concern. Jameson's notes also disclosed that the first phase of the analysis process would involve CIBC reporting on the feasibility of financing and a proposed transaction structure, which would be followed by the conclusion of a term sheet, then a further 90 days for the financing of the transaction.

[433] As reviewed above, the September 23 CIBC Phase I Report proposed a transaction structure under which Leikin Group core assets would be placed in re-organized corporations, an Amalco would redeem the shares of the Selling Shareholders, and the financing of the redemption would see a third party acquiring an interest in College Square.

[434] So, faced with demands by shareholders to sell their shares or liquidate the companies, Farber, as CEO and the controlling shareholder, engaged CIBC to explore liquidity and structure options, secured Board approval for that engagement, and CIBC reported its recommendations to the Board on a transaction structure and the feasibility of financing the transaction. That process of developing a method by which shareholders who wished to monetize their value in the core

assets could do so, while those who wished to remain could carry on the business of the core assets, took about three months.

[435] The evidence disclosed that the objective of that whole process was not corporate-oriented, but shareholder-oriented: i.e. by what means could a majority of the shareholders sell their shares in light of their grandfather's restriction on the sale of shares to non-family members? The form of solution found was to re-organize the ownership of the core assets of the corporations and then allow the Selling Shareholders to "sell" their shares by having the re-organized corporation redeem those shares. The money needed to redeem those shares would have to come from either placing debt on the core assets or bringing in third party equity financing, or both.

[436] I have reviewed that background to the share redemption transaction in some detail because it informs the consideration of the scope of directors' duties during that process. In its substance the share redemption transaction was a transaction between two sets of shareholders – those who wished to liquidate their interest in the companies' core assets and those who wished to retain their interests. The form of the transaction – a corporate redemption of shares – was required because of the restrictions placed by the company's founder on the transfer of shares. That restriction meant that only two sources of financing for the share buy-out existed – the personal resources of the remaining shareholders, which everyone acknowledged was a non-starter, or using the value of the core corporate assets to finance the share buy-out, either by saddling the assets with debt or by finding a third party equity investor.

[437] In those circumstances I have great difficulty in conceptualizing what duties the directors would owe *to the corporations* in respect of a transaction which, in its essence, involved one set of shareholders purchasing the shares of the other set. As Jameson wrote in his September 23, 2004, memo to the Board of Directors:

> Given the structure of the Proposed transactions and the fact that each member of the Board will have an interest in and derive a benefit from the Proposed Transactions (either as a "buyer", "seller" or "preservation of a continuing benefit") all of the Board members are in a conflict of interest position with respect to the Proposed transactions.

The Selling Shareholders initially wished to liquidate the companies' core assets; the Non-Selling Shareholders wished to preserve those assets. The compromise they reached was to agree that the remaining shareholders could use the corporate assets to secure debt or equity financing in order to fund the buy-out of the Selling Shareholders' shares.

[438] The plaintiffs seemed to argue that the "remaining" directors owed a duty to provide the "selling" directors with information about the financing of the share redemption transaction as

part of their duty to disclose information relevant to the business of the corporation. I do not follow that argument. To the extent that the corporations which owned the core assets had a business interest in the financial effects of the share buy-out transaction, that interest would be identical to the interest of the Non-Selling Shareholders in the continuation of the business. The Selling Shareholders would have no interest; they would have exited the business related to the core asset. Accordingly, where, from a practical matter, the post-redemption viability of the corporations would be a matter of interest only to the remaining shareholders (and the directors they might elect), I do not see the share redemption transaction as giving rise to a fiduciary duty of Farber and Andrew Katz – or any other of the directors – to the corporations which owned the core assets.



### C.2 The failure to disclose financing information to the shareholders

[439] Which brings me to the second argument advanced by the plaintiffs – i.e. because all the directors were in a conflict of interest position in respect of the share redemption transaction, the directors owed their duties to the shareholders in whose hands approval of the transaction rested. As noted above, directors of a company do not owe a general fiduciary duty to shareholders. That said, the particular circumstances of a case might give rise to such a fiduciary duty. Since the existence of any such duty would be fact-specific, I think it more appropriate to examine this claim by the plaintiffs under the rubric of *ad hoc* fiduciary duties.

## D. Plaintiffs' allegations against the Katz Defendants for breaches of *ad hoc* fiduciary duties

[440] The plaintiffs alleged that the Non-Selling Shareholders undertook to act in the best interests of all shareholders through express promises, admissions in their pleading, and by their conduct:

(i) The plaintiffs pointed to two memoranda as containing the express promises: (i) the July 19, 2004 memo which Farber sent to the directors; (ii) the September 1, 2004 memo which Farber sent to all shareolders;

(ii) The plaintiffs argued that in paragraphs 9 and 59 of their Statement of Defence the Non-Selling Shareholders had admitted that they undertook to act in the best interests of all shareholders; and,

(iii) As to conduct, the Non-Selling Shareholders were all officers or former officers of the Leikin Group and therefore owed a duty to the Leikin Group to act in its best interests and not divert a corporate opportunity for their own benefit.

[441] Before turning to examine the facts, I should note that in their Closing Submissions the plaintiffs did not argue that the nature of the *ad hoc* fiduciary relationship owed by the Non-Selling Shareholders to them was such that it required those defendants to subjugate entirely their interests to the plaintiffs. Instead, they argued, the *ad hoc* fiduciary duty was one under which the Non-Selling Shareholders undertook to act in the *joint* interests of the parties.

[442] In support of that submission the plaintiffs relied on the decision of the Nova Scotia Court of Appeal in *2475813 Nova Scotia Ltd. v. Rodgers*,[66] a case involving whether the owner of 80% of the units in a condominium owed a fiduciary duty to the remaining unit owners to act in the best interests of all unit owners. In the course of his decision holding that the majority owner did owe such a duty, Cromwell J.A. (as he then was) stated:

> Where, as here, it is alleged that the fiduciary obligation arises out of the specific circumstances of a particular relationship, the key consideration is whether, in all of the circumstances, one party could reasonably have expected that the other would act in the former's best interest with respect to the subject matter at issue…This does not preclude the fiduciary from acting in the joint interests of him or herself and those to whom the duty is owed. LaForest, J in Hodgkinson at 407 specifically approved the statement of Professor P. D. Finn in "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76 at 88 that the key consideration is whether "... the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests."[67]

Under this duty to act in the joint interests of all shareholders, the plaintiffs argued, the Non-Selling Shareholders were not precluded from making a personal profit from their decisions, but they could not profit at the expense of the Selling Shareholders.[68]

[443] As I understand the plaintiffs' argument regarding the existence of an *ad hoc* duty by the Non-Selling Shareholders, the key question boils down to whether, in all the circumstances, the Selling Shareholders could reasonably have expected that the Non-Selling Shareholders would act on the share redemption transaction both in the best interests of the Selling Shareholders, as well as in their own best interests? Based on my review of the evidence, for the following reasons I conclude that the Selling Shareholders could not reasonably have expected the Non-Selling Shareholders to act in their joint best interests.

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[66] 2001 NSCA 12
[67] *Ibid*., para. 61.
[68] *Ibid*., para. 87.

### D.1 The relationship of distrust between the two sides of the family

[444] The arguments of the plaintiffs about the existence of an *ad hoc* fiduciary duty on the part of the Non-Selling Shareholders in large part relied on selected sentences in a few documents, while at the same time ignoring the larger context in which the relationship between the two sides was carried on. Simply put, as the evidence I reviewed above disclosed, from the start of 2004 until the conclusion of the share redemption transaction in 2005, the Selling Shareholders never trusted the Non-Selling Shareholders. I accept the plaintiffs' submission, based on their reference to some case law, that a fiduciary relationship may arise even where the parties do not trust each other. But each case is fact specific, and based on my review of the evidence as a whole I conclude that no relationship of confidence existed between the two groups of cousins in respect of the share redemption transaction, and the Selling Shareholders did not place their interests in the hands of their cousins; they relied on their own advisors throughout the process.

[445] Josephine Harris described the relationships amongst the Leikin sisters and the grandchildren in early 2004 as ones characterized by conflict and lack of trust; they were "fractious". Rick Kesler thought that Farber's style of management was causing tension within the family and the Board was emotional and polarized. The Harris Family and Kesler wanted to sell their shares in the Leikin Group because they were concerned that the management of the company by Farber and David Katz might jeopardize the value of their investments.

[446] This lack of trust resulted in Harris, Kesler and Spieler forcing Katz's resignation as President in May, 2004. Then, in mid-June, Prehogan advised Farber that the majority of the shareholders wanted to liquidate their interests in the companies and threatened litigation to wind-up the companies. Prehogan's June 29 letter stated that if Farber exercised the control she possessed through her special shares, "legal action against you will be swiftly instituted and aggressively prosecuted".

[447] The plaintiffs pointed to memoranda from Farber dated July 19 and September 1, 2004 as containing express undertakings to protect their interests. I will consider those two memoranda shortly. But, Josephine Harris, Sheira Harris, Zena Harris and Rick Kesler testified that even after those memoranda were sent and the share negotiation process had begun, they did not trust the Non-Selling Shareholders. On the contrary, they were convinced that the Non-Selling Shareholders had arranged a bought deal with a third party and were hiding that information from them. Josephine Harris testified that it was "impossible" for the Selling Shareholders to

rely on the Non-Selling Shareholders.[69] I cannot reconcile that evidence from the plaintiffs with their submissions at trial that they expected the Non-Selling Shareholders to protect and look after their interests in the share redemption transaction.

[448] In *Waxman v. Waxman* the Court of Appeal stated that although a fiduciary relationship between parties may not always extend to a share sale between them, in that case one did because of the overwhelming evidence concerning the nature of the relationship between the two brothers. The Court of Appeal specifically referred to the following findings of fact of the trial judge in support of the existence of a fiduciary relationship:

> They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability.[70]

The dependent, special and close personal relationship which existed between the Waxman brothers was a far cry from the fractious, conflicted, self-interested and untrusting relationship amongst the two sets of cousins in the present case.

[449] Although I have not set out much of the evidence on this point, it is important to note that a large amount of time during the negotiation of the LOI was spent by the parties on thrashing out a new governance structure for the Leikin Group companies which would continue to own the non-core assets. Schedule "C" to the LOI contained the new governance principles all parties had agreed upon. That a new governance structure was vigorously negotiated by both sides during the LOI process reflected the discord which had grown up between both sides of the family and the need to re-calibrate the governance arrangement for the non-core assets business which they would carry on together, notwithstanding their parting of the ways on the core asset business.

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[69] *Supra*., para. 337.
[70] *Waxman v. Waxman*, OCA, para. 511.

### D.2 The nature of the negotiations in share redemption transaction

[450] I set out above in great detail the evidence concerning the negotiations between the two sides which culminated in the April 15, 2005 Letter of Intent. From that evidence the following findings of fact flow:

(i) The Selling Shareholders retained and relied upon their own legal and accounting advisors to protect their interests during the negotiation of the LOI;

(ii) The Selling Shareholders retained and sought some advice from their own real estate appraiser, David Atlin, during the course of the negotiations. It was always open to the Selling Shareholders to obtain from Atlin a more formal expression of views about the value of College Square. For their own reasons, the Selling Shareholders elected not to secure a formal, independent valuation opinion;

(iii) The negotiations were conducted over the course of almost half a year, with both sides strongly advancing their respective self-interests as shareholders in the Leikin Group companies. As the plaintiffs' own lawyer, Mr. Lewy, admitted at trial:

> Q. So I take it that from your perspective, sir, there was nothing in this negotiation that looked like one side negotiating in the other side's interest, both sides were negotiating in their own interest?
>
> A. Correct.

Negotiations containing those characteristics usually do not attract the imposition of a fiduciary duty on one of the negotiating sides, and the admission by Lewy that there was nothing in the negotiation that looked like one side was negotiating in the other side's interest severely undermines the plaintiffs' legal submission that the Non-Selling Shareholders owed a duty to protect the joint interests of the shareholders in that transaction.

### D.3 The nature of the share redemption transaction

[451] As I have found, in its substance the share redemption transaction was a transaction between two sets of shareholders – those who wished to liquidate their interests in the companies' core assets and those who wished to retain their interests. The form of the transaction – a corporate redemption of shares – was required because of the restrictions placed by the company's founder on the transfer of shares out of the family. The Selling Shareholders agreed that the remaining shareholders could use the corporate assets to secure debt or equity financing in order to fund the buy-out of their shares.

[452] The plaintiffs' legal advisors certainly recognized that the conflicting self-interests of the opposing parties and the nature of the transaction meant that each side was pursuing its own self-interest. Lewy conceded that Kesler was at liberty to attempt to maximize the benefits he could get from the transaction[71] and Mainzer acknowledged that after his clients had sold their shares, the remaining shareholders would have been free to do whatever they wanted with their properties.[72]

[453] A key characteristic of the transaction in this case was that the Selling Shareholders knew that the remaining shareholders would be using the core assets of the Leikin Group to finance the share buy-out. The Selling Shareholders also knew from the Edwardh Report and the Updated Altus Report that as the parties embarked upon their negotiations in November, 2004, a hot market existed for shopping centres like College Square – the Updated Altus Report went so far as to state that "this frenzy has not been witnessed since the late 1980's". I have found that the plaintiffs' own real estate appraiser, David Atlin, told Kesler in the fall of 2004 that market values for such assets were going up and that in March/April, 2005, he estimated the value of College Square as ranging from $64.59 to $66.76 million. It therefore follows, and I find, that during the course of the negotiations of the LOI the plaintiffs knew that the value of the asset which the Non-Selling Shareholders would be using to secure financing for the share buy-out was going up.

[454] The Selling Shareholders also knew, before they embarked in November, 2004, on the negotiations for a LOI, that the Non-Selling Shareholders did not intend to seek an equity investor who would end up with majority control of the College Square asset. Farber, in her September 1, 2004, memo to shareholders wrote:

> In fact the non-selling shareholders' *desire to retain ownership and management of the core assets* will most likely result in the maximization of the value of the non-core assets of the Leikin Group, which will be retained by all current shareholders. (emphasis added)

Appendix "F" to the September 23, 2004, CIBC Report clearly stated that the percentage participation by a third party investor would depend on the financing scenario selected. CIBC's November 5, 2004 revised financing analysis reported that the Non-Selling Shareholders had rejected a scenario under which a third party investor could acquire a 64% equity interest in College Square because "Newco would be left with no ability to influence major decisions pertaining to the ownership and management of the assets".

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[71] *Supra*., para. 275.
[72] *Supra*., para. 60.

[455] The figure of 64% was an important one because at that point of time 7 out of 11 of the shareholders, or 64% of the shareholders, wanted to sell their shares. So, before negotiations started, it was evident that the Non-Selling Shareholders were not prepared to "flow-through" to the Selling Shareholders a percentage of the equity financing equivalent to their shareholdings in the companies because the remaining shareholders wanted to be able to influence major decisions regarding College Square post-financing. The Selling Shareholders therefore were on notice that the Non-Selling Shareholders intended to retain something more than a 36% interest in College Square post-closing; indeed they intended to retain a sufficient interest to be able to influence major decisions. The signal to the Selling Shareholders at that point was clear: a spread most likely would exist between the appraised value of College Square and the price of the financing in order that the Non-Selling Shareholders could continue to influence decisions about that asset after the Selling Shareholders had left. More colloquially, the writing was on the wall for all to see, even before the negotiations on the LOI had started, that the Non-Selling Shareholders were not prepared to relinquish control over the core assets to a third party equity investor.

[456] That, no doubt, prompted Lewy's opening requests on November 23 in respect of the proposed LOI that the Non-Selling Shareholders (i) represent that they did not have any information about the financing transaction which, if known to the other shareholders, might deter them from entering into the share redemption transaction, (ii) represent that they had no present intention of selling their interest in College Square, and (iii) agree that the selling shareholders would share in the benefit of any difference in price between the share redemption transaction and the sale of the property to a new owner. The Non-Selling Shareholders refused each of those three requests, the Selling Shareholders accepted that refusal (all the while being advised by their own, independent legal advisors), and the share redemption transaction was concluded on that basis. The executed LOI contained a condition of closing that "Newco and Newco 2…shall have arranged financing satisfactory to Newco and Newco 2 *in their sole discretion* in order to complete the Pre-Closing Transactions and the Transaction…"; the Non-Selling Shareholders owned Newco and Newco 2.

[457] Where, during the course of negotiations issues are specifically raised – the disclosure of financing information and the sharing in the up-side of the financing transaction – discussed, and agreement is reached on the issues – i.e. no disclosure of financing information and no sharing in the up-side – I do not see how one party to the transaction can, following closing, take the position that it reasonably expected that the other side was looking out for their interests on those issues when, prior to closing, the other side specifically stated it would not, and the deal closed on that basis.

### D.4 Allegations of express undertakings to protect the plaintiffs' interests

[458] The nature of the relationship between the two groups of cousins, when combined with the nature of the share redemption transaction and the nature of the negotiations between the parties, offer no support for the existence of an *ad hoc* fiduciary owed by the Non-Selling Shareholders to the Selling Shareholders in the specific circumstances of this case. The plaintiffs submitted that, in any event, the Non-Selling Shareholders expressly undertook to protect their interests, and they pointed to July 19, 2004 memo from Farber to the Board of Directors and a September 1, 2004, memo from her to all shareholders in support of their assertion.

[459] I referred to the July 19 memo in paragraph 131 above. In that memo Farber also wrote to the directors:

> It is clear to me that to move such a process forward the board and selling shareholders will require a highly credible independent financial advisor, with specific skills and experience that are relevant to the Leikin Group environment, to provide comprehensive insight, analysis and recommendations with the view of facilitating a mutually beneficial transaction between selling shareholders and the Leikin Group.

[460] The plaintiffs argued that Farber's reference to a "mutually beneficial transaction" constituted an undertaking by the Non-Selling Shareholders to protect the interests of the Selling Shareholders. I disagree. I consider that phrase, when taken in the overall context of the memo, to constitute nothing more than an expression by Farber of her hope that the parties could work together through a process involving the CIBC to reach an agreement which would result in the Selling Shareholders achieving their liquidity needs.

[461] As to the September 1, 2004, memo Farber wrote to all shareholders, the plaintiffs submitted that the following portions of the memo amounted to assurances and undertakings by Farber:

> [This note] will bring you up to date on the process being followed to arrive at a fair market value based offer to the seven shareholders who have formally advised the Leikin Group, through their lawyer, that they want to sell the interests in the core assets…
>
> As we move toward the goal of satisfying the desires of the seven shareholders to liquidate their interests in the core assets, I would like all shareholders to be assured and satisfied that we are engaged in a business exercise, which is open and transparent, in an effort to satisfy all shareholders.
>
> …

> I believe that the process we have embarked upon is the best course of action for all shareholders and for the companies themselves.
>
> I am extremely confident that all shareholders will approach the CIBC shareholder liquidity process with the knowledge that a successful outcome can only be achieved if it is beneficial to all shareholders. I look forward to working together with all directors and shareholders that will ensure a favourable conclusion.

[462] As I mentioned above in paragraph 198, I do not read those passages, let alone the memo as a whole, as constituting an undertaking by the Non-Selling Shareholders to protect the interests of the Selling Shareholders. Farber indicated that the point of the exercise was to develop an offer for the Selling Shareholders to consider. Whether they accepted the offer was up to them. Farber simply stated the obvious that unless the process resulted in an outcome which both sides considered beneficial, no deal would be made, and she expressed the hope that the parties would work together to get a deal done. But Farber made it crystal clear, in the second paragraph of her memo, that the two sides of the family were opposite in their interests:

> Those wishing to sell and those not wishing to sell must acknowledge that they have perspectives and interests that are now totally opposite, and which will preclude them from enjoying a satisfying and productive business relationship with respect to the ownership and management of the core assets, on a going forward basis. As such, it will be necessary for both sellers and non-sellers to make every effort possible to enable an appropriate liquidity opportunity to be completed.

Hardly the language of undertaking to protect the interests of the opposite party. In my view, Farber's memo sent a simple message: "We cannot get along anymore. Our interests are opposed. We need to go our separate ways on the core assets. We'll work to make the sellers an offer. I hope we can get a deal done." I find that neither Farber's July 19 or September 1, 2004 memos contained express or implied undertakings that the Non-Selling Shareholders would protect the interests of the Selling Shareholders in the share redemption transaction.

[463] For the same reasons I find that Farber's September 1, 2004, memorandum did not constitute an undertaking by the Non-Selling Shareholders to act as the agents of the Selling Shareholders in the share redemption transaction.

[464] The plaintiffs also submitted that statements pleaded by the Katz Defendants in paragraphs 9 and 59 of their Statement of Defence acknowledged their obligation to act in the best interests of all shareholders. With respect, that submission distorted what was actually pleaded. In their Statement of Defence the Katz Defendants denied that they had owed any fiduciary duty to the Selling Shareholders. The statements made in paragraph 59 were a plea in

the alternative, and the statement made in paragraph 9 must be read in light of those defendants' denial of the existence of a fiduciary duty.

### D.5 A consideration of the jurisprudence

[465] Earlier in these Reasons I referred to a passage from Kevin McGuinness, *Canadian Business Corporations Law, Second Edition*, regarding fiduciary duties owed by directors to shareholders. For the principles contained in this passage Mr. McGuinness drew heavily on the judgment of Woodhouse J. of the New Zealand Court of Appeal in *Coleman v. Myers*. In considering what factors a court should take into account when examining whether a fiduciary duty existed between a director and the shareholders of a company, Woodhouse J. stated:

> [The factors] include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it.[73]

In a concurring judgment Cooke J. pointed to the following factors as leading him to conclude in that case that the directors owed fiduciary duties to the selling shareholders: "the family character of this company; the positions of [the father and son directors] in the company and the family; their high degree of inside knowledge; and the way in which they went about the take-over and the persuasion of shareholders."[74]

[466] The facts in *Coleman v. Myers* were quite different than those in the present case. Myers made a successful take-over bid for the shares of a company, C&E. Following the closing of the take-over bid, Myers sold the main asset of C&E at a significant gain. The selling shareholders sued, claiming that Myers had undervalued the worth of the company in the representations which he made during the bid. In reversing the trial judge, the New Zealand Court of Appeal found that during the take-over bid process Myers had represented to the target shareholders that he did not intend to use the assets of C&E – a piece of real estate and cash reserves – to fund his take-over bid, when, in fact, that is exactly what he had intended to do all along. The appellate court found that Myers had made fraudulent misrepresentations which were material and induced the shareholders to sell their shares. On the issue of fiduciary duty, the appellate court found that on the facts of that case the selling shareholders had reposed their confidence in Myers, due to his inside knowledge of the company, to provide them with a fair recommendation of the value

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[73] [1977] 2 NZLR 225, at 325.
[74] *Ibid*, at 330.

of their shares. By contrast, in the present case, I have found that great distrust existed between the Selling Shareholders and their cousins and, significantly, it was understood and agreed to by all, through the ultimate execution of the LOI, that the Non-Selling Shareholders enjoyed complete discretion to secure the financing of the share redemption transaction, including using the core assets to secure debt or equity financing.

[467] The plaintiffs also pointed to several Canadian decisions as illustrating the principle that a fiduciary duty may arise between a director and shareholder in specific circumstances. The decisions in *Tongue v. Vencap Equities Alberta Ltd.* [75] and *Gadsden v. Bennetto*[76] both involved one director, or a small committee of directors, acting *on behalf of* all shareholders to arrange for the sale of their shares, or the main asset of the company, and not disclosing to the shareholders that they had arranged a deal at a higher price with a third party. As McBain J. stated in his trial decision in *Tongue v. Vencap Equities Alberta Ltd.*, "the mere presence of the director-shareholder relationship does not prevent a fiduciary duty from arising", but for one to arise "something more must be present" than the mere director-shareholder relationship. *In Tongue* the trial judge found that a director owed a fiduciary relationship to shareholders, "outside of the scope of the duties of ordinary directors", when he acted to solicit and arrange for the disposition of the shareholders' shares in the company – in that case without disclosing that a major corporation had expressed interest in acquiring the company.[77] The trial judge also found that a fiduciary relationship arose between the directors who owned shares in the company, and those shareholders whose shares they bought pursuant to which the directors owed a duty to the selling shareholders to disclose the existence of an expression of interest to purchase the company by a major corporation and the price per share that purchaser was willing to pay[78].

[468] In the decision of the Manitoba Court of Appeal in *Gadsden v. Bennetto* a corporation's sole asset was a tract of land. A special committee of the Board was tasked with finding a purchaser of the lands or shares of the company. The committee did, but they failed to disclose to the shareholders that one director would receive a secret commission from the sale and that the price at which the shareholders transferred their shares did not reflect the real value of the sale to the third party. The Manitoba Court of Appeal held that any information received by the committee about the price of the land, or the shares, was received in a fiduciary capacity both for

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[75] [1994] A.J. No. 115 (Q.B.), para. 103. Although the judgment of McBain J. was affirmed on appeal, the Alberta Court of Appeal did not find it necessary to consider the findings about the existence of a fiduciary relationship: *Tongue v. Vencap Equities Alberta Ltd.*, [1996] A.J. No. 435 (C.A.), para. 31.
[76] (1913), 9 D.L.R. 719 (Man. C.A.).
[77] *Tongue*, Q.B., para. 108.
[78] *Tongue, Q.B., supra*., para. 113.

the company and for its shareholders, and the committee was obliged to disclose to the shareholders how much per share the purchaser was willing to give.[79] One member of the court described the members of the committee as the "confidential agents of the company and the shareholders" and, as such, bound to make full disclosure of the sales terms to the shareholders.[80]

[469] In *Hyatt v. Allen*[81] the directors of a company entered into an agreement with a party who wished to acquire all the company's shares and undertaking in order to merge the company into another one. The directors represented to the majority of the shareholders that their consent was necessary to the transaction and the directors, without disclosing the real price of the deal, induced the shareholders to give them options to purchase their shares at a value far below that which would be realized in the transaction. In upholding the judgment against the directors requiring them to disgorge their secret profits, the Privy Council stated that although the duty of directors was primarily one to the company itself, in the circumstances of the case the directors had "held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that is as agents".[82]

[470] Finally, the plaintiffs referred to the Alberta Court of Appeal decision in *Verma v. Zinner*[83] in which that court imposed a fiduciary duty on a real estate agent who had bought a shopping centre for himself and two other investors. His co-investors thought that their money was being used to acquire the property at a certain price, when in fact the real estate agent bought it at a lower price through a company he controlled and then flipped it to co-investors' company, earning a secret profit on the transaction.

[471] The facts I mentioned which distinguish the present case from the circumstances in *Coleman v. Myers* also distinguish it from the decisions in the *Tongue, Gadsden, Hyatt* and *Verma* cases. By way of further distinction, in the present case the Non-Selling Shareholders did not act as agents on behalf of the other shareholders to secure the sale of their shares. The directors accepted a transaction structure under which the parties would negotiate a price for the redeemed shares and the remaining shareholders would use the core assets to finance the purchase. The Non-Selling Shareholders rebuffed pre-LOI efforts by the Selling Shareholders to negotiate a share in any up-side in the financing transaction, and in the LOI the Non-Selling Shareholders were given the sole discretion to arrange the financing.

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[79] *Gadsden, supra*., para. 13.
[80] *Gadsden*, para. 14.
[81] (1914), 17 D.L.R. 7 (J.C.P.C.).
[82] *Hyatt, supra*., para. 7.
[83] (1994), 157 A.R. 279 (C.A.), paras. 25 to 31.

[472] It must also be recalled that the Altus Group's updated October 29, 2004 estimated market value of $58.9 million was circulated almost 6 months before the parties executed the LOI. Notwithstanding the passage of almost half a year and the knowledge that the market for big box shopping centres in Ottawa was hot, the Selling Shareholders did not seek or require an updated formal appraisal for College Square. The risk in not so doing can be seen from the opinion expressed in the appraisal obtained by Merrill Lynch Capital about a year later which valued College Square at $73.9 million as of July 20, 2005.

**D.6 Conclusion**

[473] By way of summary, for the reasons set out above, I find that the Non-Selling Shareholders did not owe a fiduciary duty to the Selling Shareholders to protect their financial interests in the share redemption transaction, nor did the Non-Selling Shareholders act as the sellers' agents in the share purchase transaction. It follows that I find that the Non-Selling Shareholders were not under any obligation to provide to the Selling Shareholders they information which they generated related to the financing they might or did secure in order to fund the share redemption transaction.

[474] Since I have found that the Non-Selling Shareholders did not owe an *ad hoc* fiduciary duty to the Selling Shareholders in the particular circumstances, the issue of the materiality of the information in the possession of the Non-Selling Shareholders does not arise. But, several points bear repeating on the nature of the information possessed by some or all of the Katz Defendants. First, as I found in my Summary Judgment Reasons, and as was upheld by the Court of Appeal, FCR made its first, and only, offer to purchase an interest in College Square by its LOI dated July 8, 2005. Put another way, during the negotiations between the two sets of cousins over their LOI, the Non-Selling Shareholders did not have a "bought deal" in their back pocket; there was no "secret flip". Second, the evidence which I set out above, when read in its context, showed that the various calculations performed by GGFL and David Katz which the plaintiffs pointed to as evidence of some bought deal with FCR in fact were efforts by those who wished to continue the business of College Square and Fisher Heights Plaza to get a handle on how much they would have to raise in any financing to buy-out their selling cousins, yet at the same time not relinquish control of the assets in whose management they wished to continue. Such calculations and information were reasonable and necessary in order for those who were going to assume responsibility for financing the buy-out of the selling shareholders to figure out whether the transaction was even feasible. Further, in the final deal cut between the two sides, the financing of the whole transaction remained solely in the discretion of Newco and Newco 2, companies owned by the Non-Selling Shareholders. Third, when Jameson in his December 24, 2004 email to Lewy wrote that the "non-selling shareholders have told me, and I am authorized to advise you and the selling shareholders, that no form of financing has been structured and/or finalized",

that was an accurate statement. The Non-Selling Shareholders did not begin their financing efforts until after the LOI had been executed, and then they employed a very formal bid process using RBC to solicit expressions of interest for the financing through an equity investment in College Square. In the result, they selected the highest bid, that of FCR.



## XXVI. Misuse of confidential information/unjust enrichment claims

[475] Although the plaintiffs pleaded claims sounding in misuse of confidential information and unjust enrichment, they were not pressed at trial, so I shall not deal with them to any extent save to state that (i) David Katz did secure a confidentiality agreement from FCR when he disclosed Leikin Group information to it in February, 2004, (ii) the LOI enabled the Non-Selling Shareholders to seek financing in their "sole discretion", which would include making use of confidential corporate information to secure that financing, and (iii) the only enrichment of the defendants resulted from the terms of the LOI negotiated and agreed to by the parties. I see no basis for either claim.

## XXVII. Oppression claims

### A. Elements of a claim for oppression under the *Business Corporations Act*

[476] The oppression remedy contained in section 248 of the *OBCA* is an equitable remedy which seeks to ensure fairness and which gives courts a broad, equitable jurisdiction to enforce not just what is legal, but what is fair. In considering oppression claims courts must look at business realities, not merely narrow legalities. At the same time the remedy is very fact-specific – what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.[84]

[477] In *BCE Inc. v. 1976 Debentureholders* the Supreme Court identified the two inquiries which a court must make in considering an oppression claim: (i) Does the evidence support the reasonable expectation asserted by the claimant? and (ii) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[85]

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[84] *BCE Inc. v. 1976 Debentureholders*, *supra*., paras. 58 and 59.
[85] *Ibid*., para. 68.

[478] The reasonable expectations of specified stakeholders is the cornerstone of the oppression remedy.[86] Fair treatment - the central theme running through the oppression jurisprudence - is most fundamentally what stakeholders are entitled to "reasonably expect".[87] The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive - the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.[88]

[479] The onus lies on the claimant to identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held.[89] Factors which a court may consider in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.[90]

[480] For the purposes of this motion it is worth recalling several of the comments made by the Supreme Court in the *BCE* case about these factors. First, reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation.[91] Second, in determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus, it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered.[92] Finally, the cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all

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[86] *Ibid*. para. 61.
[87] *Ibid*., para. 64.
[88] *Ibid*., para. 62.
[89] *Ibid*., para. 70.
[90] *Ibid*., para. 72.
[91] *Ibid*., para. 75.
[92] *Ibid*., para. 78.

relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[93]

[481] As the Supreme Court pointed out in *BCE*, not every unmet expectation gives rise to an oppression claim. Something more is required: the conduct complained of must amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. Finally, although the conduct most often complained of in an oppression action is that by a company's directors, "the conduct of other actors, such as shareholders, may also support a claim for oppression".[94]

[482] With that by way of summary of the legal principles placed before me by the parties, let me turn to consider the plaintiffs' oppression claim.

**B. Analysis**

[483] In their Statement of Claim the plaintiffs did not expressly identify the expectations that they claimed were violated by the conduct of the Katz Defendants. The plaintiffs pleaded, in paragraph 32 of their Statement of Claim, that the conduct of the Non-Selling Shareholders which they alleged amounted to breaches of their fiduciary duties to the plaintiffs also was oppressive. Those breaches of fiduciary duties, as particularized in paragraphs 29 and 31 of the Statement of Claim and paragraph 4 of the Reply, can be grouped as follows:

(i) The Non-Selling Shareholders withheld pertinent information about the value of College Square and potential purchasers for the property, including failing to disclose that the fair value of College Square was at least 30% higher than the price set out in the LOI;

(ii) The Non-Selling Shareholders utilized information about the College Square property to obtain offers for the property without authorization from the Board or other shareholders;

(iii) The Selling Shareholders reasonably expected that the share redemption transaction was to be based on the fair market value of the core assets;

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[93] *Ibid*., paras. 81 and 82.
[94] *Ibid*., para. 65.

(iv) The Non-Selling Shareholders made decisions likely to affect the Selling Shareholders' welfare without obtaining the informed consent of the Selling Shareholders; and,

(v) The Non-Selling Shareholders directed the accountants and lawyers for the company to withhold information from, or to distort information being provided to, the Selling Shareholders.

[484] In paragraph 65 of their written Closing Submissions the plaintiffs fleshed out these allegations, referring to specific events or documents, but the essence of the allegations remained unchanged from their pleading.

[485] Let me deal first with items (i) through (iv). In oppression claims context is all-important. The reasonableness of a party's expectations is framed by that context. At the risk of repeating myself, in early 2004 seven shareholders signaled that they wanted out. That position ultimately changed into wanting to monetize their interests in the companies' core assets. The Board of Directors was controlled by those who ultimately sold their shares, although one director, Farber, owned special shares which entitled her to control any vote, but she did not exercise that right. By June the sellers had threatened litigation against those who wished to continue to own and manage the core assets. A process run by CIBC unfolded to ascertain the feasibility of a buy-out and a transaction structure. A report opining on fair market value as of August 1, 2004 was obtained; it was updated in October. By early October a proposed LOI was put in the hands of all shareholders. Matters languished until late November when both sides started to negotiate the LOI, including the share redemption price. The Selling Shareholders were represented by their own legal advisors and they had access to their own real estate appraiser. Those negotiations started and stopped. Typical negotiating posturing characterized the process. The negotiations proceeded on the basis that the Non-Selling Shareholders would have to find the financing to buy-out the Selling Shareholders. During the negotiations the Selling Shareholders asked for certain reps and warranties concerning the financing transaction and sought to share in the "up-side" of the financing transaction. The Non-Selling Shareholders refused. The negotiations continued. It was not until over 6 months following the circulation of the initial draft LOI that the parties struck a deal for the share redemption.

[486] As I have already found, this was not a context in which the Non-Selling Shareholders undertook to look after or to protect the interests of the Selling Shareholders in the share redemption transaction. Accordingly, the Selling Shareholders could have no reasonable expectation that the Non-Selling Shareholders would do so.

[487] It was a context in which it became clear, through arm's-length negotiations, that the Non-Selling Shareholders were not prepared to share any "up-side" on the financing with the Selling Shareholders. The parties ultimately agreed that securing financing would be left to the "sole discretion" of the Non-Selling Shareholders. Under those circumstances the Selling Shareholders could have no reasonable expectation that they would receive information about the ultimate financing or that they would share in any "up-side" of that financing. They bargained those interests away, and the expectations which the Selling Shareholders reasonably could hold were shaped by that bargain.

[488] When David Katz first talked with FCR, he was President of the Leikin Group. I have set out above my findings as to what he disclosed about those initial discussions to the Board at the April 15, 2004 and the adequacy of that disclosure. His next talks with FCR took place in late August, 2004. By that time the context had changed, with two sets of opposing shareholders pursuing their own interests. David Katz did not disclose those discussions to either Farber or Andrew Katz; he was investigating whether equity investor financing was feasible. Given the division in shareholder interests at that time, and given that the parties ultimately agreed that the Non-Selling Shareholders would find the financing in their sole discretion, it was not reasonable for the plaintiffs to expect David Katz to disclose to them what he was doing to further his legitimate interest of finding financing to enable the transaction proceed. As was pointed out at trial during several of the cross-examinations of the plaintiffs, they did not disclose to the Non-Selling Shareholders that they had retained Atlin as their own real estate appraiser. Put another way, both buyers and sellers legitimately were entitled to secure information to assist them in their negotiations with the other side.

[489] One must also take into account the steps which the claimant plaintiffs could have taken to protect themselves against the prejudice they claim to have suffered. Much of the plaintiffs' complaint rested on their assertion that they had a reasonable expectation of receiving fair market value for their shares on the redemption. Let me make two points. First, in support of their argument that they possessed a reasonable expectation that their shares would be redeemed at fair market value, the plaintiffs pointed to an October 31, 2004 email from David Katz to the CIBC that "there must be a presumption that the sale of an undivided interest to a third party will also be based on such revised FMV". Reasonable expectations must be based, in part, on a party's understanding. That presumes some communication of a matter from one party to the other. Katz's email was not sent to the plaintiffs. I have difficulty understanding how a communication to which the plaintiffs were not privy could shape their reasonable expectations. Second, and more to the point, the deal which the plaintiffs struck in the April, 2005 LOI was not one in which the price equalled the fair market value of any asset. As described, part-way

through the negotiations the share redemption price was unlinked from appraised value and the parties concluded by negotiating a price.

[490] Further, following the estimate of value given by Altus as of August 1, 2004, the Selling Shareholders were put on notice by several sources that the value of power, or big box, shopping centres was rising: the Edwardh Report; the updated Altus Report; Atlin's comments to Kesler in the fall of 2004; Ivan Kesler's email of December 9, 2004; and, Atlin's sensitivity analysis comments to Kesler in March or April, 2004. All that information was put in the hands of the Selling Shareholders before they executed the LOI. Moreover, the Selling Shareholders had asked the Non-Selling Shareholders to share in any "up-side" on the financing, and they were refused. Notwithstanding all these *indicia* of a rising market for properties like College Square, and notwithstanding the somewhat stale nature of the Altus August 1, 2004 valuation by the time of the April 15, 2005 LOI, the Selling Shareholders took no steps to obtain a more current valuation of the core asset before they inked their deal even though ways were open to them to do so: at the time they had access to their own appraiser – Atlin – and at the time they still sat on the Boards of the Leikin Group.

[491] It also should be noted that the evidence did not disclose that the Selling Shareholders were subject to any economic compulsion to sell. Their choice to monetize their interests in the core assets was freely made, and they selected the time when they wanted to sell. This was not a situation where those who wanted to remain owners of the assets took advantage of some financial distress which prompted the other side to offer to sell their shares. The transaction was not a squeeze-out of the majority by the minority. Simply put, the Selling Shareholders could have held on to their shares if they were not satisfied with the way the negotiations were proceeding.

[492] Our law of commercial contracts has not reached the point where it is unlawful for one side in negotiations to drive a hard or better bargain than the other. Some people are better negotiators than others and can negotiate deals to their advantage. Often advantage flows from one side being prepared to accept greater future risks than the other. The law of commercial dealings permits such a result, and the law of oppression and fiduciary relationships does not stand in the way. However, the law of commercial dealings, including the law of oppression and fiduciary relationships, does lay down certain minimum standards for the conduct of commercial dealings, especially where one side to the negotiations reasonably looked to the other to protect some or all of its commercial interests in the negotiations. Where, however, each side, independently advised, acts only to protect its own interests in the negotiations, the law tends not to interfere with the resulting bargain even if, in retrospect, one side proved the more astute negotiator.

[493] For these reasons, I conclude that the expectations as generally articulated by the plaintiffs in Items (i) through (iv) in paragraph 483 above, were not reasonable when regard is had to the specific circumstances of this transaction.

[494] As to Item (v), I find that the Non-Selling Shareholders did not direct the accountants and lawyers for the company to withhold relevant information from, or to distort information being provided to, the Selling Shareholders. I repeat what I wrote earlier that it was reasonable for the remaining shareholders to use GGFL to run calculations on various financing scenarios. Simply put, if the financing was not feasible, the Selling Shareholders would not have been able to sell their shares. It is within that overall context that the issue of scenario calculations must be understood.

[495] Finally, the one request which David Katz made of the Lawyer Defendants – his October 19, 2004 email to Geoff Gilbert – not to circulate certain information to the Selling Shareholders concerned calculations which mentioned a potential capital gain on the transaction with a potential equity investor. I can only repeat the analysis I set out in paragraphs 453 to 457 above about the information available to the Selling Shareholders in the fall of 2004 which could only reasonably lead them to understand that a refinancing transaction with an equity investor would involve a capital gain.

[496] For these reasons, I conclude that the plaintiffs have not made out an oppression claim against the Katz Defendants. I therefore dismiss their action against the Katz Defendants and Leikin Group Inc.

## XXVIII. The knowing assistance claim against the Lawyer Defendants

[497] The plaintiffs advanced two claims against the Lawyer Defendants: (i) the Lawyer Defendants breached fiduciary duties which they owed to the plaintiffs; and (ii) they knowingly assisted the Katz Defendants in breaching their fiduciary duties to the plaintiffs. Let me consider the second claim first.

### A. The law of knowing assistance

[498] The grounds upon which a stranger to a trust, or a fiduciary relationship, may be held liable in the event of the breach of the trust or fiduciary duty were explained by the Supreme Court of Canada in *Gold v. Rosenberg*:

> A person who has not been appointed as a trustee may, under certain circumstances, attract the liabilities of trusteeship. In *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244, Lord Selborne L.C. explained that there are three situations in which a breach of trust may give

> rise to liability in a person who is a stranger to the trust. First, a person may be liable as a trustee de son tort. The facts of this case do not require consideration of this category of liability. Second, a person will be liable if he or she knowingly assisted in a fraudulent and dishonest breach of trust. This type of liability is referred to as "knowing assistance". And third, depending upon considerations of notice, equity may impose liability if the defendant received, in his or her own right, property obtained through breach of trust. This last category of liability is referred to as "knowing receipt".[95]

[499] The requirements for establishing a claim of knowing assistance were canvassed by the Supreme Court in *Air Canada v. M & L Travel Ltd.*,[96] and repeated in *Gold v. Rosenberg*:

> This Court reviewed the law of knowing assistance in *Air Canada*. In that case, we adopted the definition of "knowing assistance" given in *Barnes v. Addy*, where Lord Selborne L.C. stated that a stranger to the trust will be liable if he or she "assist[s] with knowledge in a dishonest and fraudulent design on the part of the trustees" (p. 252).
>
> A "dishonest and fraudulent design" includes "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary". As was said in Air Canada (at p. 826):
>
> > I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'."
>
> As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust. As stated in Air Canada (at p. 811):
>
> > The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice.[97]

[500] In *Air Canada* the Supreme Court dealt at greater length with the knowledge requirement:

> The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice…In [*Carl-Zeiss-Stiftung v. Herbert Smith & Co.* (No. 2), [1969] 2 All E.R. 367 (C.A.)] Sachs L.J. stated that to be held liable the stranger must have had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust -- though, of

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[95] [1997] 3 S.C.R. 767, para. 26.
[96] [1993] 3 S.C.R. 787.
[97] *Gold v. Rosenberg, supra*., paras. 30 to 32.

> course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.
>
> If the stranger received a benefit as a result of the breach of trust, this may ground an inference that the stranger knew of the breach… The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference.[98]

[501] Finally, as stated by the Court of Appeal in *Keeton v. Bank of Nova Scotia*:

> With respect to knowing assistance in a breach of fiduciary duty, to found liability, the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach.[99]

[502] In sum, to recover damages for knowingly assisting in a breach of a fiduciary duty, a claimant must demonstrate that:

(i) A fiduciary relationship existed;

(ii) the fiduciary perpetrated a dishonest and fraudulent breach of trust; and

(iii) the defendant stranger participated in and had actual knowledge of the trustee's dishonest and fraudulent breach of fiduciary duty.[100]

**B. Analysis**

[503] As I have found above, David Katz did not breach his fiduciary duty to the corporation when he was President of the Leikin Group, nor did Barber Farber or Andrew Katz breach their duties as directors. I also found that the Katz Defendants and the Leikin Group Inc. did not owe an *ad hoc* fiduciary duty to the plaintiffs. In light of those findings, the plaintiffs' knowing assistance claim against the Lawyer Defendants fails.

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[98] *Air Canada, supra*., paras. 38 and 39. See also: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, para. 22.
[99] 2009 ONCA 662, para. 82.
[100] *Gold, supra*., para. 34.

## XXIX. The breach of fiduciary duty claims against the Lawyer Defendants

### A. Some further legal principles

### A.1 The duties of a corporation's solicitors

[504] The Lawyer Defendants argued that the Leikin Group corporations were their clients and, as a result, their duty was to act solely in the best interests of those companies. The defendants pointed to Rule 2.01(1.1) of the *Rules of Professional Conduct* issued by the Law Society of Upper Canada, and the accompanying Commentary, which read:

> **Rule 2.01 (1.1)** Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.
>
> **Commentary**
>
> A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority. In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

[505] In considering the nature of the duties flowing from a professional relationship, courts may consider the scope of the duties imposed by rules of professional conduct. As noted by the Supreme Court in *Galambos v. Perez*:

> Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship…They are not,

> however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence…[101]

[506] To the same effect the Court of Appeal, in *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc*, stated:

> No doubt, the *Rules* are not binding on the courts: *MacDonald Estate* at p. 1245. The *Rules* are, however, a clear expression of the profession's concept of the duties owed to former clients. That expression must be given considerable weight by the courts.[102]

**A.2 The relationship between a corporation's solicitor and the company's directors and shareholders**

[507] At the heart of the fiduciary duty lies the duty of loyalty, which includes the duty to avoid conflicting interests.[103] The duty of a corporate solicitor is to the company. Since the best interests of the company are not necessarily those of the majority shareholders or directors, a corporate solicitor who seeks to represent both the company and the majority of its shareholders or directors stands in a conflict position.[104]

[508] A solicitor/client relationship does not arise between a corporate solicitor and a corporate officer merely because the officer had consulted or given instructions to the corporate solicitor. However:

> In certain circumstances a solicitor and client relationship with the individual shareholders or directors of a corporation may exist even where the solicitor purports to act on behalf of the corporation only and bills all his services to it. An example is a husband and wife who instruct their personal solicitor to incorporate their farm or business and to subsequently act for this new closely-held corporation of which they are the sole shareholders and directors. In such a case multiple solicitor and client relationships would exist. The one between the corporation and the solicitor would simply be an additional one to that which previously existed between the solicitor and the husband and wife.[105]

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[101] *Galambos, supra*., para. 29.
[102] 2010 ONCA 788, para. 24.
[103] *Waxman, OCA*, para. 646.
[104] *Mottershead v. Burdwood Bay Settlement Co.*, [1991] B.C.J. No. 2554 (S.C.), p. 2.
[105] *International Capital Corp. v. Schafer*, [1996] S.J. No. 799 (Q.B.), para. 32.

[509] Whether a solicitor-client relationship exists in any particular set of circumstances is a question of fact. A formal letter of retainer is not required to find a solicitor/client relationship, nor is it necessary that there be an account rendered by the lawyer to or paid by the complaining party.[106] Courts look to a number of factors to ascertain whether a solicitor/client relationship has arisen in particular circumstances:

> These indicia include: a contract or retainer; a file opened by the lawyer; meetings between the lawyer and the party; correspondence between the lawyer and the party; a bill rendered by the lawyer to the party; a bill paid by the party; instructions given by the party to the lawyer; the lawyer acting on the instructions given; statements made by the lawyer that the lawyer is acting for the party; a reasonable expectation by the party about the lawyer's role; legal advice given; and legal documents created for the party. Not all indicia need to be present. As Madam Justice Romaine stated in *Guardian Insurance, supra*, the question appears to be whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party.[107]

[510] Where a solicitor/client relationship arises between a law firm and two clients on a transaction, courts have imposed a high duty of disclosure on the solicitors. As put by the Court of Appeal in *Commerce Capital Trust Co. v. Berk*:

> There can be no doubt that the solicitors owed a fiduciary duty to their client, Commerce Capital, and, on the issues as raised in this case, the relevant duty of the solicitors as fiduciaries was to disclose to their client all "material" facts. The true question in this case is whether or not the undisclosed facts were material. Lord Thankerton's statement indicates that the test of materiality is not whether or not the transaction would have been proceeded with if all facts had been known. Applying such a test to determine materiality, would make Lord Thankerton's statement meaningless. In cases such as this, the question of materiality must be determined on some objective basis...[108]

[511] If a solicitor-client relationship does not exist, courts proceed carefully before imposing fiduciary duties on solicitors in respect of non-clients. As the Court of Appeal cautioned in *Filipovic v. Upshall*:

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[106] *Jeffers v. Calico Compression Systems*, [2002] A.J. No. 79 (Q.B.), para. 8.
[107] *Ibid.*
[108] (1989), 68 O.R. (2d) 257 (C.A.), para. 18.

> The courts should be careful in imposing fiduciary obligations on a solicitor outside the solicitor-client relationship if the solicitor is engaged in the delivery of legal services. The imposition of a fiduciary duty on a solicitor in relation to a non-client involved in a transaction with a client whom the solicitor is representing could give rise to a serious conflict of interest.[109]

[512] In the *Filipovic* case the trial judge had explained why no fiduciary obligation arose by the lawyers to those outside of their retainer:

> Snowdon was retained by the principals of the company with authority to act on its behalf. He took their specific instructions. It has not been shown that he had any scope for the unilateral exercise of discretion; nor if he had were the plaintiffs vulnerable to the exercise of any such discretion or power. None of the plaintiffs asked him for advice, gave him instructions, or conveyed their expectations to him. None was acting under a disability of any kind. No relationship was established displaying trust, reliance or confidence. This aspect of the plaintiffs' claim has not been proven.[110]

**B. Review of additional evidence**

**B.1 Mr. Jameson's description of the role played by Ogilvy Renault in the transactions**

[513] Mr. Jameson started acting for the Leikin Group of Companies in early 2003. As corporate counsel he attended all Board meetings where he served as recording secretary. Directors would call him periodically with questions. He deposed that Ogilvy Renault acted as corporate counsel throughout the transactions and their mandate was to put together the corporate documentation which would permit the redemption of the Selling Shareholders' shares. Since the LOI was the principal operating agreement governing the transaction and he had carriage of drafting the initial LOI, Mr. Jameson deposed that "I was often the conduit through which the Non-Selling Shareholders communicated their position to the selling Shareholders about various changes the Non-Selling Shareholders were proposing to the document…I was careful to make it clear that I did not represent the Non-Selling Shareholders and was not advocating for their position…" Mr. Jameson testified that he would have withdrawn "at any moment had there been a challenge to our role", but "no party raised that as an objection during the transaction."

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[109] [2000] O.J. No. 2291 (C.A.), para. 7.
[110] [1998] O.J. No. 2256 (Gen. Div.), para. 57.

[514] Jules Lewy, Kesler's lawyer, testified that it was not unusual in corporate transactions for one lawyer to gather the position of several persons and communicate them to the other side:

> Q. And I take it that in a corporate context where there is many people involved that's not an unusual situation where one lawyer will gather positions of both their own clients, and others and be the communicator, so to speak?
>
> A. That isn't unusual, correct.
>
> Q. And you understood that Ogilvy Renault were the lawyers for the Leikin Group Corporations, correct?
>
> A. Correct.
>
> Q. And I take it you also understood that they were conveying positions of the non-selling shareholders even though they were not acting for them?
>
> A. Correct.
>
> Q. And in fact you specifically raised with Mr. Jameson at one point, and sought his clarification as to whether he was acting for the non-selling shareholders or merely conveying their positions, and he clarified that it was the latter, correct?
>
> A. That's correct. I was concerned and confused exactly what – who Grant was acting for.
>
> Q. All right, and he clarified it for you, and you then continued to deal with him on that basis?
>
> A. Correct.

[515] Mr. Jameson testified that with respect to the buyout, or reorganization, transaction, his instructions came from Barbara Farber. Her instructions to him were to deal with David Katz for the basic structuring of the transaction. So, as corporate counsel, Ogilvy Renault put together the reorganization documentation based on input from the client, the Leikin Group, through Barbara Farber, its CEO, and David Katz, a consultant to the companies.

[516] Jameson also testified that Ogilvy Renault acted as a conduit between the Selling Shareholders and the Non-Selling Shareholders:

> Q. You are saying that your role was as conduit. Was that different from your role as counsel to the company?

> A. The role as conduit was – the fact that there ended up being – well, there clearly are two groups. There is the selling shareholders and the remaining shareholders.
>
> The transaction is a transaction – when we began to draft the documentation, we didn't know if it was a purchase and sale, so would there be an Agreement of Purchase and Sale, was there a buyer and a seller, and the answer to that was no, this is not a transaction of purchase and sale, this is a corporate reorganization transaction.
>
> Therefore, as company counsel, we were involved in putting together the corporate documentation which would result in the redemption of the shares that were held by the so-called selling – by the selling shareholders, which redemption proceeds represented their personal interest in the core assets of the company. So the original transaction – the concept of the transaction was quite simple.
>
> Q. On the reorganization.
>
> A. Yes, as counsel to the company, we were preparing a reorganization document.

[517] Jameson emphasized that the Non-Selling Shareholders were not his clients:

> What we are doing is putting together a draft [LOI], based on their input.
>
> And I am not providing them with any – I am not providing them with the legal advice that I might provide for my own client, in terms of, you know – if I was acting for a specific client on a purchase, I think I would be more involved with the actual analysis and things like that.

He thought that the interests of the Non-Selling Shareholders were separate from the company.

[518] At one point in April, 2005, David and Andy Katz asked Grant Jameson to relay a certain position to David Spieler, still at that point one of the Non-Selling Shareholders. Jameson demurred in an email to David Katz dated April 12, 2005:

> David, I am thinking that the position you and Andy want to take with Spieler puts me in a definite conflict of interest. I can coordinate responses to Lewy and look after the documentation of the transaction but in thinking about it the message you have asked me to take to Spieler today is definitely adversarial. I don't think that I can pass on the message to him as effectively as if you were separately represented on this issue. He is certainly still looking to me as representing him in the overall transaction. Even though he has Sandra Appel to represent him in his dealing with you and the others in Newco, he clearly still looks to me as being on the same side.

[519] Jameson deposed that all of the common shareholders were advised that since Ogilvy Renault was corporate counsel to the Leikin Group, it could not represent their personal interests

and they should secure independent counsel in respect of their own interests. As of March 10, 2005 he was not aware of any of the Katz Defendants having retained counsel. He testified that he believed Rick Kesler felt free to call him up during the transaction, just as he felt free to call him up. His dealings with Rick Kesler were not acrimonious.

[520] Jameson testified that throughout the negotiations David Katz sent him, most often unsolicited, memos detailing the strategy of the Non-Selling Shareholders. He read them, but did not act on them unless there was a specific action item or position to be communicated to the other side. Patricia Day gave evidence similar in effect about GGFL's treatment of communications it received from David Katz.

[521] In a March 3, 2005 email to David Spieler, following a telephone call with Sandra Appel, his lawyer, Jameson described his role as follows:

> As counsel for the companies I have worked under the direction of Barbara Farber, the CEO of the companies, in preparing a joint position for all the non-selling shareholders. I have also always recommended to you just as I have on several occasions with the other non-selling shareholders that they obtain independent legal advice for their own interests within the Proposed Transaction as well as in respect of the shareholder arrangements among the non-selling shareholders in "Newco".

[522] In a July 27, 2004 email to one of his partners, John Naccarato, Mr. Jameson described the nature of his mandate with respect to the Leikin Group:

> My mandate is to represent the corporations with a view to the interests of all shareholders but I cannot ignore the fact that Barb is the controlling shareholder.

[523] The defendant Geoffrey Gilbert, an associate with Ogilvy Renault at the time of the transactions, testified that the firm received instructions from the companies, either from Barbara Farber or David Katz, the consultant. Although they received lots of direction from Mr. Katz, Mr. Gilbert stated that "we were mindful of our obligation to the companies and…we would not necessarily follow all of this direction." He continued:

> You know, the ones that I was involved with, there were challenges. At times, there were personal comments that you didn't believe as counsel should necessarily be communicated. You knew at all times who your client was and your client was the companies.
>
> So we, Grant and I together, when I was involved with the communications would figure out what the appropriate thing for the company was, unless of course it was something to do with the conduit role we were having where we were this go between, this communicator of messages.

> We would have to make a distinction between those two and determine which instruction to proceed with.

### B.2 The plaintiffs' understanding of the nature of the retainer of the Ogilvy Renault Defendants

[524] On his pre-trial cross-examination Mr. Kesler acknowledged that he understood Jameson was communicating the positions of the Non-Selling Shareholders to the Selling Shareholders throughout the negotiations, acting as a conduit, and he knew that Jameson did not consider himself to be acting as counsel for the Non-Selling Shareholders. Kesler stated that he never retained Jameson to represent his personal interests in the transaction and he did not look to Jameson to provide him with an opinion as to the proper value of College Square. On cross-examination Jameson testified that he did not recall ever commenting on the appropriateness of the valuation to anybody, including Mr. Kesler.

[525] Spieler testified on the summary judgment motion that in his view Jameson knew at an early stage that FCR was buying College Square for $78 million. David Spieler regarded Grant Jameson as his own lawyer to whom he looked for advice; he did not view him only as the corporate lawyer whom he consulted from time to time as a director of the companies.

[526] Sheira Harris testified that she relied on her mother and Mainzer to protect her interests throughout the transaction. To the extent she received any information from the Lawyer Defendants or GGFL, she did so through her mother or Mainzer, not directly from the lawyers or accountants. Sheira had not direct contact with the Lawyer or Accountant Defendants before signing the LOI.

### B.3 The state of knowledge of the Mr. Gilbert

[527] Mr. Geoffrey Gilbert testified that he was not aware of any potential sale to an unrelated third party in October, 2004. Mr. Gilbert did receive an email from David Katz on October 19, 2004 in which Mr. Katz asked him not to circulate "the re-org files" previously sent "as two of the files make reference to a capital gain resulting from the potential sale from Newco to a third party based on the value that exceeds FMV." Mr. Gilbert transmitted this request to Mr. Jameson for his consideration and decision.

## C. Analysis

[528] The plaintiffs submitted that the fiduciary duty owed to them by the Lawyer Defendants arose both from a direct lawyer-client relationship with the shareholders, as well as by way of a context-specific fiduciary duty.

### C.1 A direct lawyer-client relationship

[529] The plaintiffs argued that as counsel to the Leikin Group of Companies, with knowledge of the family nature of the corporations, Ogilvy Renault not only owed a fiduciary duty to the boards of directors which managed those companies, but also to the shareholders of the families whom each director represented. I do not accept this argument.

[530] No party disputed that Ogilvy Renault had been retained by the Leikin Group a few years before the transaction in question ever arose to act as counsel for the corporations. As corporate counsel, Ogilvy Renault owed its duty of loyalty to the companies, and it was obliged to advise all directors of the companies so that the Boards could make informed decisions in the best interests of the companies.

[531] No plaintiff adduced evidence that he or she had retained Ogilvy Renault to represent his or her interests on the share redemption transaction. None of the typical *indicia* of the existence of a solicitor-client relationship between Ogilvy Renault and the plaintiffs could be found in the evidence: there were no retainer letters; no bills paid by the plaintiffs; no separate meetings attended only by a plaintiff and Jameson to discuss the plaintiff's personal interest in the share redemption transaction; no reporting letters or emails from Ogilvy Renault to the plaintiffs. In fact, the evidence overwhelmingly indicated the contrary: the Harris family plaintiffs had retained Mainzer; Rick Kesler retained Jules Lewy; and, David Spieler retained Sandra Appel. As set out in great detail above, the negotiations over the terms of the LOI saw Lewy communicate the position of the Selling Shareholders as a group, and Jameson communicate that of the Non-Selling Shareholders. During the course of those negotiations the Selling Shareholders did not seek advice from Jameson. True, Spieler, while still a Non-Selling Shareholder, approached Jameson for advice, but Jameson counseled him to secure independent legal representation, and Spieler ended up retaining Appel.

[532] Although none of those facts support finding the existence of a solicitor-client relationship between Ogilvy Renault and the plaintiffs, as I understand their argument the plaintiffs contend, in effect, that the nature of the share redemption transaction meant that by operation of law such a solicitor-client relationship existed. Thus, the plaintiffs argued that with all directors of the corporations in a conflict of interest position regarding the transaction, the duties owed by corporate counsel to the corporation, acting through its board of directors, became transferred to the shareholders.

[533] I do not accept that line of argument. The duty of corporate counsel remained a duty to the corporation. I suppose, as a matter of theory, where all directors are conflicted, the directors and shareholders could agree that corporate counsel act for all parties, but as a matter of fact that

did not happen in the present case. The plaintiffs retained their own independent counsel to represent their personal interests in the share redemption transaction. Accordingly, there was no "devolution" of duty by corporate counsel down to the shareholder level because of the conflicts of interest in respect of this transaction which existed at the Board level and, significantly, the plaintiffs did not act as one had – they retained their own separate counsel.

[534] As I pointed out during my analysis of the claims against the Katz Defendants, although the form of the share purchase transaction involved a corporate redemption of issued shares, in essence the transaction involved the majority group of shareholders selling their shares to the minority group, with an agreement that the minority could use the core assets to secure financing for the share buy-out or redemption. In such a circumstance, what was left for "corporate" counsel to do? Jameson testified that he played two roles. First, since the transaction involved corporate re-organizations followed by a share redemption, Ogilvy Renault needed to paper those transactions. That was standard fare for corporate counsel.

[535] Second, Jameson testified that he acted as a "conduit" between the Non-Selling Shareholders and the Selling Shareholders, passing information back and forth between one side and the other. In their closing submissions the plaintiffs took issue with that characterization, submitting that no legal authority had been provided to support the legality of a "conduit" role, and it was a "novel concept without any defined legal test". While counsel did not refer me to any cases dealing with a lawyer acting as a conduit, as the evidence of Lewy reproduced above in paragraph 514 indicated, the concept certainly is known to those who practice in the area of corporate transactions. Lewy testified that he had played the role of conduit for all of the Selling Shareholders, even though he had not been retained by all of them.

[536] Of course, care must be taken by any corporate counsel acting as a conduit so that counsel's role is clearly understood and counsel does not transgress the proper boundaries of that role and begin to act as counsel to a party other than the corporation. When looked at as a whole, I conclude that the evidence disclosed that Jameson was alive to both issues and took care to limit his role to that of a conduit. In the early stages of the negotiations Lewy specifically queried Jameson about the role he was playing; Jameson explained; Lewy accepted that explanation. Jameson provided a similar explanation to Appel when Spieler retained her.[111] Rick Kesler acknowledged that Jameson was acting as a conduit. Jameson testified that he would have withdrawn at any moment had a party challenged his role. I accept his evidence on that point.

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[111] See Ex. 2, Vol. 8, Tabs 378, 379 and 382.

[537] Based upon my review of the evidence as a whole, I also conclude that Jameson did not stray from acting as a conduit to acting as counsel for the personal interests of the Non-Selling Shareholders. I should observe that in light of a transaction in which the Non-Selling Shareholders would end up as the owners of the core corporate assets it becomes difficult, at street level, to separate their financial interests from the financial interests of the corporations which owned the assets. Nevertheless, I am satisfied that Jameson sought, at all material times, to confine his role to that of conduit, not as advisor to the personal financial interests of the Non-Selling Shareholders. First, when read as a whole, Jameson's emails to Lewy, and the other counsel, during the negotiations reflected that he was transmitting the position of the Non-Selling Shareholders. Second, Jameson's April 12, 2005 email to David Katz refusing to transmit information to Spieler while he was still on the non-selling side demonstrated that Jameson was alive to, and sought to work within, the proper boundaries of a conduit. Third, Jameson's conduct must be assessed by what he did, not, as the plaintiffs sought to argue, by reference to the content of emails he received from David Katz. As Jameson testified, he had no control over what David Katz wrote to him:

> A. … Mr. Katz would, as I've said in previous evidence, would send me emails saying things often that I didn't agree to or agree with characterizing, this is one characterization.
>
> Q. All right.
>
> A. I mean I would not characterize myself as part of the buy side team ever.
>
> Q. But those are the emails that got sent to you?
>
> A. I can't control or could not control the emails that Mr. Katz would send to me.
>
> Q. I never saw any that went back from you saying David please don't refer to me as the buy side team.
>
> A. That's true, I don't know how often or when he did that, but I could not control - and could not control the emails that Mr. Katz sent to me.
>
> Q. All right.
>
> A. Some of which were rather embarrassing.

I accept Jameson's evidence that he ignored a number of the emails which David Katz had sent to him and, instead, tried to act in accordance with his retainer as corporate counsel and his *de facto* role as a conduit in the share redemption transaction.

[538] For these reasons, I conclude that no direct solicitor-client relationship existed between the Lawyer Defendants and the plaintiffs. A reasonable person in the position of a party with knowledge of all the facts would not reasonably form the belief that Ogilvy Renault was acting for the Selling Shareholders.



### C.2 An *ad hoc* fiduciary relationship

[539] The plaintiffs submitted that *an hoc*, context-specific, fiduciary relationship existed between the Lawyer Defendants and the plaintiffs. In support of that position the plaintiffs argued that "such a context-specific fiduciary duty is most easily considered through the analysis applied to a "near client" relationship".[112] I disagree that the "near client" cases provide much, if any, assistance in the inquiry into the existence of an *ad hoc* fiduciary relationship between a lawyer and non-clients.

[540] As I read those cases, the issue of "near client" has arisen in the context of motions to remove a lawyer or law firm as the solicitor of record. As Sopinka J. noted in *Martin v. Gray*, the Canadian Bar Association's *Code of Professional Conduct*, in its commentary on Impartiality and Conflict of Interest, provided:

> A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. (my emphasis)[113]

[541] In *UCB Sidac International Ltd. v. Lancaster Packaging Inc.*, Blair J. (as he then was) considered, on a motion to remove the plaintiff's solicitors of record, the "overriding question: 'Is there a disqualifying conflict of interest?'". In addressing that question Blair J. stated:

> In addressing this question one should look to see whether there is "a previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter, "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.[114]

He concluded:

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[112] Plaintiffs' Summary Judgment Factum, para. 228.
[113] *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 (S.C.C.).
[114] [1993] O.J. No. 2775 (Gen. Div.), para. 13.

> I am satisfied that "there existed a previous relationship" between the law firm and the Defendants Lancaster and Mulholland "which is sufficiently related to the retainer from which it is sought to remove the solicitor[s]" that the inference regarding the imparting of confidential information arises. On the conflicting evidence before me the law firm has not discharged the "difficult burden" of displacing that inference. In the interests of ensuring, in the eyes of the reasonably informed member of the public who is possessed of all the facts, "that even an appearance of impropriety should be avoided" the law firm should cease to act in the action.[115]

[542] As can be seen from these extracts, in *UCB Sidac International* the court did not conclude that the law firm owed fiduciary duties to those who were not its clients. What the court did was to conclude that the relationship between the law firm and the non-clients was sufficiently related to the retainer at issue so that the inference regarding the transmission of confidential information arose, thereby placing on the law firm the burden of displacing the inference. Although some cases have used the term "near client" to describe a situation where "an individual has a commonality of interest or a close association with a client of a solicitor", they do so in the context of identifying a relationship with a law firm characterized by confidentiality which would invoke the protection afforded by the conflict of interest rules regarding legal representation.[116]

[543] The proper inquiry into the existence of an *ad hoc* fiduciary relationship is that articulated by the Supreme Court of Canada in the *Elder Advocates of Alberta Society* case, set out earlier in these Reasons. Applying that analysis, I conclude that no *ad hoc* fiduciary relationship existed between the plaintiffs and the Lawyer Defendants. From the time the Harris family gave notice in February, 2004, of their intention to sell their shares, they were represented by their own counsel, Mainzer. Rick Kesler retained Jules Lewy; other sellers retained other counsel, as noted above. In sum, Jameson was faced with a transaction in which all the sellers were separately represented. Even Spieler retained his own counsel before signing the LOI as a Non-Selling Shareholder. Hardly a situation of vulnerable sellers to whom an undertaking to protect their interests was given.

[544] Josephine Harris ultimately admitted that she was relying on her own counsel to protect his interests, as did Sheira and Zena who obtained their information through their mother. Rick

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[115] *Ibid*., para. 15.
[116] *Milverton Capital Corp. v. Thermo Tech Technologies Inc.*, 2002 BCSC 773 (S.C.), paras. 50 and 68; *Stanley v. Advertising Directory Solutions Inc*., 2007 BCSC 1125, para. 35.

Kesler admitted he did not retain Jameson to represent his personal interests. Spieler did seek personal advice from Jameson in early 2005, but Jameson told him to retain his own counsel.

[545] The evidence adduced by Harris and Kesler to support the plaintiffs' contention of the existence of an *ad hoc* relationship boiled down to the following. Ms. Harris testified on the summary judgment motion that she thought Mr. Jameson was representing all the interests of all the shareholders, all eleven shareholders. However, Ms. Harris conceded that she did not discuss points of negotiation with Mr. Jameson. She also acknowledged that Mr. Jameson did not act for her children as selling shareholders; he had advised them to retain their own counsel, which they did. In her affidavit Josephine Harris also deposed as follows:

> I recall asking both Gerry Levitz and Grant Jameson, separately, their opinions as to whether the transaction was a fair one which would result in my children receiving the contemplated fair market value for their shares in the company. Each of them assured me that this was indeed the case. Neither of them told me of the meetings they were having with David Katz or his siblings. Similarly neither advised me about the additional information they had learned from those meetings indicating that the asset value, and consequently the share value, was significantly higher.

On the summary judgment motion Ms. Harris was cross-examined at length on this portion of her affidavit. At one point she testified that she took from a shake of Jameson's head at a meeting that he was approving of the Selling Shareholders going ahead with the transaction at a value of $55 million, although when pressed she could not identify the particular meeting. However, upon further cross-examination she explained that what she meant was that Mr. Jameson never dissuaded the Harris Family from entering a share redemption transaction at that price. Yet, she also acknowledged that none of her children who were the shareholder-parties to the LOI had ever met Mr. Jameson. Mr. Jameson testified that he did not recall "ever being contacted by any of the so-called 'Harris parties'".

[546] In his affidavit Rick Kesler also asserted that he had received assurances from Grant Jameson about the soundness and fairness of the LOI transaction:

> 61. [O]n many occasions I had the opportunity to discuss the Proposed Transaction with Grant. On each occasion he assured me that this was the right transaction for the companies and both "good" and "fair" for the shareholders. He understood at all times that the purpose of the transaction was to give each shareholder their "fair market value" of the core assets, and achieve what our grandfather had always endorsed and advocated – a "fair and even" allocation of the assets of the family business. At no time did he ever advise me of the information that he had received on July 14, 2004 from David Katz regarding First Capital Realty purchasing an interest at a value in excess of $70 million.

> If I had known of this information I would not have agreed to the Proposed Transaction or executed the Letter of Intent.
>
> …
>
> 68. Throughout the negotiation process I was always concerned that the non-selling shareholders had an arrangement to sell College Square at a value higher than the purported fair market value that was set out in the Letter of Intent. If I had known that First Capital Realty was prepared to purchase a 50% interest in College Square at a value in excess of $70,000,000 I would not have agreed to sign the Letter of Intent.

However, when on cross-examination on the summary judgment motion he was asked to identify the particular instances of such conversations with Mr. Jameson, Mr. Kesler was unable to do so. Kesler acknowledged that he never had a separate retainer agreement with Mr. Jameson regarding the advice he contended he had received.

[547] On his cross-examination on the summary judgment motion Mr. Jameson stated that he did not recall ever commenting on the valuation to anybody:

> A: I don't know anything about valuations, I never pretended to know anything about valuations. My view of valuations was that there was a professional company engaged to value the property and it did that and that was peer reviewed and I was not going to impose my view; I had none on the appropriate value.
>
> Q. Do you recall Mr. Kesler asking you about the deal and whether you thought it was a good deal?
>
> A. I don't recall him asking that.
>
> Q. Is that something that you would have felt comfortable discussing with Mr. Kesler?
>
> A. If I discussed that with Mr. Kesler, it would not have been on the basis that the price which had been agreed upon for the valuation of the core assets was a good deal…

[548] The evidence given on this point by Harris and Kesler was vague and lacked particularity. As plaintiffs they bore the onus of demonstrating the existence of an *ad hoc* fiduciary relationship, and their evidence came nowhere near so doing. In the negotiations over the terms of the LOI they were represented by their own counsel who dealt with Jameson, not on the basis that he was a lawyer jointly representing the interests of the sellers, but on the basis that Jameson, as corporate counsel, was communicating the responses of the non-sellers to the positions of the sellers. In a circumstance where self-interested parties were represented by their own counsel, I do not see how an *ad hoc* fiduciary relationship can arise on the part of another

counsel in the absence of a clear undertaking by that counsel to protect those already-represented interests. Ogilvy Renault gave no such undertaking in the present case.

[549] I also reject the plaintiffs' argument that Jameson induced them to enter into the share redemption transaction. As I stated in paragraphs 221 and 222 above**,** in his September 23 and October 1, 2004 communications with the directors and shareholders, Jameson made it clear that the decision whether to accept or reject the proposed transaction rested with the shareholders and he made no recommendation on the proposal.

### C.3 Conclusion on the existence of a fiduciary relationship between the Lawyer Defendants and the plaintiffs

[550] For these reasons, I find that no fiduciary relationship existed between the Lawyer Defendants and the plaintiffs.

### C.4 The information in the possession of the Lawyer Defendants

[551] Although that conclusion is sufficient to dispose of the plaintiffs' claim against the Lawyer Defendants, I wish to make two comments on the plaintiffs' allegations that the Lawyer Defendants hid material information to which the plaintiffs were entitled.

[552] First, in their closing submissions the plaintiffs argued that Jameson was not credible when he asserted that had understood the references to FCR made by David Katz at the July 14, 2004 meeting as examples or hypotheticals. I disagree, for the reasons given in paragraph 162 above.

[553] Second, I also accepted, in paragraph 169 above, Jameson's evidence that when he received certain buy-out calculations from GGFL in late July, 2004, he would not have paid attention to the numerical analysis. His job was to focus on the deal structure, not the financial analysis.

## D. Summary

[554] For these reasons, I dismiss the plaintiffs' claim against Ogilvy Renault LLP, Grant Jameson and Geoffrey Gilbert.

## XXX. The knowing assistance claims against the Accountant Defendants

[555] As I have found above, David Katz did not breach his fiduciary duty to the corporation when he was President of the Leikin Group, nor did Barber Farber or Andrew Katz breach their duties as directors. I also found that the Katz Defendants and the Leikin Group Inc. did not owe

an *ad hoc* fiduciary duty to the plaintiffs. In light of those findings, the plaintiffs' knowing assistance claim against the Accountant Defendants fails.

## XXXI. The breach of fiduciary duty claim against the Accountant Defendants

### A. Some further legal principles concerning the duties of corporate accountants

[556] In *Waxman v. Waxman*, Sanderson J. summarized the law surrounding the existence of a fiduciary duty by a company's accountants – in that case its auditors – to the company's shareholders:

> As with the ordinary duty of care, it is a matter of law that any fiduciary duties owed by auditors are generally owed to the corporation and not to the individual shareholders.
>
> Farley J. said in *Roman Corp. Ltd. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Gen. Div.)"
>
> > It seems clear that the auditors have a relationship with their client. That client is the corporation ... it would be the corporation which would be able to complain about any breach of fiduciary duty ...
>
> In order for a fiduciary duty to be owed to an individual shareholder, there must be a clear expansion of the auditors' mandate to specifically protect the individual shareholder's personal interests in addition to those of the corporate client.[117]

In that case the Court of Appeal stated:

> [W]e see no basis for an independent fiduciary duty. Simply because Taylor Leibow is a firm of professional accountants and gave advice to Morris personally from time to time does not automatically give rise to a fiduciary relationship between them: see Brant Investments Ltd. v. Keep Rite Inc., (1991) 80 D.L.R. (4th) 161 at 172 (Ont. C.A.); Roman Corp. v. Peat Marwick Thorne, (1994) 12 B.L.R. (2d) 10 at 28 (Ont. G.D.). Nor do Morris' assertions, largely self-serving, that he "trusted" and "relied on" Taylor Leibow create a fiduciary duty. We must consider whether their relationship is characterized by the accepted badges of a fiduciary relationship: whether Taylor Leibow had scope to exercise some discretion or power; if so, whether it could exercise that discretion or power unilaterally to affect Morris' legal or practical interests; and whether Morris was vulnerable to the exercise of that discretion or power.[118]

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[117] *Waxman, SCJ, supra*., paras. 2461 to 2463.
[118] *Waxman, OCA, supra*., para. 720.

[557] In *Roman Corp. v. Peat Marwick Thorne*, Farley J. stated, albeit in the context of a motion to strike out a statement of claim as disclosing no reasonable cause of action, that no contractual relationship arises between specific shareholders of a corporation and its auditors by virtue of the shareholders' resolution appoint the auditors. Turning to the issue of the existence of a fiduciary duty to specific shareholders, he stated:

> The statement of claim does not suggest vis-à-vis these specific shareholders that the defendants had scope for the exercise of some discretion of power nor that the defendants could unilaterally exercise that power or discretion so as to their specific practical or legal interest. Then it may be questioned as to how the plaintiffs could show that they are peculiarly vulnerable to or at the mercy of the defendants. See *McGauley v. British Columbia (No. 1), supra*, at pp. 238-43 and particularly at p. 242 where Cumming J.A. said:
>
> > But the focus must be on the facts and deeds which are relied upon to give rise to these special relationships and, in order to maintain an action based upon alleged breach of breaches of the duties said to flow from the special relationship asserted to exist, it seems elemental to say that it is necessary they be pleaded. It is in this respect that, in my view, the statement of claim before us is deficient.
> >
> > I have read and reread the statement of claim and nowhere in it can I find any pleading of facts, of anything done or said by the defendants to the plaintiffs, of any inquiries directed by the plaintiffs to the defendants or any of them, of any representations, oral or written, made by any of the defendants to any of the plaintiffs affecting the individual plaintiffs in their personal capacity, nor the provision of any particulars which could lend substance to any of the foregoing, which could be said to carry the defendants' obligations and duties to the plaintiffs individually beyond the scope of those they already owed to the T.I.H.C. or to establish any direct nexus or relationship between them and the plaintiffs independent of the cooperative.
>
> It seems clear that the auditors have a relationship with their client. That client is the corporation. And as presently pleaded it would be the corporation which would be able to complain about any breach of fiduciary duty (or, as pointed out, a shareholder in a derivative action since it appears that there is a flow through from the corporation per se to the body of shareholders generally). In my view even in argument the plaintiffs were not able to explain how a fiduciary duty was owed by the auditors to them as control shareholders.[119]

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[119] (1992), 11 O.R. (3d) 248 (Gen. Div.), at 262-263.

[558] The plaintiffs referred to the decision of this Court in *DiFlorio v. Con Structural Steel Ltd.*,[120] a case involving a very closely-held family company where one brother, having sold his half interest in the business to the other side of the family, proceeded to set up immediately a competing business and hire a key employee away from the family company. J. Wilson J. was very troubled by the conduct of the accountant who had acted for the two sides of the family and the company for years and yet had failed to disclose to the buying side of the family that the selling brother intended to run a competing business once the purchase and sale agreement had closed. Since the accountant was not a party to that action, the judge was not required to make any finding of liability about the accountant.



**B. Review of additional evidence**

[559] Over the years GGFL had provided regular accounting services to the Leikin Group, including the preparation of financial statements and the completion of income tax returns. In terms of the share redemption transaction, Ms. Day deposed that GGFL was retained by the Leikin Group of Companies to provide accounting and tax advice, including advice on a tax-efficient structure for the redemption, preparing calculations on possible cash flows and distributions which might result from the transaction, tax related services, and net asset listings. GGFL also completed the personal income tax returns for all of the non-resident shareholders, including some of the plaintiffs, which work was paid for by the Leikin Group. GGFL did not provide accounting or audit services to the plaintiffs or to the Katz Defendants.

[560] Ms. Harris testified that GGFL did not act as her family's personal accountants with respect to the share redemption transaction.

[561] Ms. Day deposed, and her evidence was uncontradicted on these points, that:

i/ GGFL did not perform any appraisal of College Square for the purposes of the share redemption transaction;

ii/ neither Mr. Levitz nor herself were involved in the negotiation of the LOI or its purchase price; and,

iii/ GGFL was not retained to provide, and did not provide, any services with respect to the Leikin Group's search for third party financing or the First Capital transaction.

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[120] [2000] O.J. No. 340 (S.C.J.).

[562] During the share redemption transaction GGFL took its instructions from Barbara Farber, as CEO of the Leikin Group, who, in turn, told GGFL that they also could act on instructions from David Katz and provide him with information, including calculations. According to Ms. Day, GGFL did not provide calculations to other shareholders, unless directed to do so by Ms. Farber, "because we were engaged by the company". As to requests from members of the Board of Directors, Day testified that "we're engaged by the company, so we would have to get the permission of Barbara Farber as the CEO to provide any information."

[563] The plaintiffs' belief regarding the information Ms. Day learned at the July 14, 2004 meeting came solely from their interpretation of the contents of Mr. Jameson's notes of that meeting.

**C. Analysis**

[564] GGFL were the accountants for the Leikin Group of companies, and the firm was retained by the corporations to provide accounting and tax services in connection with the share redemption transaction. Was there an expansion of those accountants' mandate to specifically protect the individual shareholders' personal interests, in addition to those of the corporate client? The evidence showed that there was none.

[565] Quite apart from the expansion of a mandate, did an *ad hoc* fiduciary duty arise between GGFL and the Selling Shareholders? For several reasons, I conclude that one did not.

[566] First, GGFL did not give an express undertaking to the Selling Shareholders, either through Levitz or Day, that they would protect the personal financial interests of those shareholders.

[567] Second, no such undertaking can be implied from the evidence. The evidence the plaintiffs relied on was as follows. Josephine Harris deposed that she recalled asking Gerry Levitz his opinion as to whether the transaction was a fair one which would result in her children receiving the contemplated fair market value for their shares in the company and he assured her that this was indeed the case. When asked when she had these discussions with Mr. Levitz, Ms. Harris stated that she spoke with him "numerous times for reassurance about whether…the shareholders were being fairly dealt with", during breaks at board meetings and sometimes by telephone at his home. However, she had no notes of such discussions, never confirmed to Mr. Levitz her understanding of the advice she had given him, and could not be any more specific about times or occasions.

[568] As well, Rick Kesler deposed that he had received assurances from Gerry Levitz about the soundness and fairness of the LOI transaction:

62. Similarly, I had a number of opportunities to privately discuss with Gerry Levitz the nature of the Proposed Transaction, both after reviewing the CIBC Report and during the preparation of the Letter of Intent. I also specifically recall expressing to Gerry my concern that the property would be sold immediately by the non-selling shareholders at a higher value. On each occasion Gerry Levitz assured me that we were receiving the fair market value of College Square and highest and best price for our shares. He advised me that I should proceed with the Proposed Transaction. At no time during these discussion with Gerry Levitz did he advise me of the information that he had obtained on July 14, 2004 regarding First Capital Realty purchasing an interest in College Square at a value in excess of $70 million.

[569] During his cross-examination at trial Mr. Kesler expanded on this evidence:

Q. And I think you've told us in your previous evidence that you don't have a written record of these discussions, correct?

A. Correct.

Q. And you weren't able to tell us exactly the dates, correct?

A. Well in fact let me retrace that for a moment. Mr. Levitz, of course, came to all of our board meetings, and Mr. Levitz was a cigar smoker, and we'd often take breaks in our board meetings, and as a smoker I would step out of our offices with Mr. Levitz on all of those occasions, and the dates that I would've had these discussions with him were, what I would characterize, as close intimate discussions with Mr. Levitz in the course of our board meetings, and that happened on many occasions.

Q. Right, now –

A. He and I would step outside, and we had the kind of relationship where I could turn to him and say Gerry –

Q. Mr. Kesler I haven't asked you about any of this, I just asked you –

A. I'm trying to answer your question.

Q. I simply asked, and I'm not sure where you're going, but I simply asked that your previous evidence was that you weren't able to tell us the dates in which these discussions took place, and that's still the case, you can't tell us the exact dates, right?

A. I told you that the answer to that question was they would've been the dates of our board meetings, which is when I would have been together with Mr. Levitz.

[570] Day testified that she was aware Rick Kesler and David Spieler had called Mr. Levitz during the transaction, but she did not know the result of the conversations.

[571] During his cross-examination at trial Mr. Kesler was pressed on his allegation that Mr. Levitz had not advised him about information he had obtained at the July 14 meeting regarding FCR purchasing an interest in College Square. When it was pointed out to Kesler that Levitz did not attend the July 14 meeting, this exchange occurred:

> Q. …and what you said at paragraph 62, and what you said at paragraph 62, we've agreed, is that you said Mr. Levitz was at this meeting, that he got information about First Capital, and he misled you, correct?
>
> A. I think that Mr. Levitz did get information about First Capital, and if he wasn't at the meeting it would've come from Ms. Day. And he would've had that information…
>
> Mr. Levitz would've known the information that flowed from any of these meetings…

[572] On his cross-examination on the summary judgment motion Mr. Kesler undertook to advise whether he recalled a specific incident where he had asked Ms. Day or Mr. Levitz for specific information and they had refused to give him the information. Mr. Kesler responded as follows:

> Mr. Kesler recalls many discussions with Mr. Levitz both in the period of time prior to the CIBC report being released and during the negotiation of the LOI when he asked Mr. Levitz for his opinion on whether it was a fair transaction and whether he had all of the information he needed. These discussions generally took place during or after board meetings that Mr. Kesler and Mr. Levitz attended together in Ottawa.
>
> Mr. Kesler also recalls speaking with Mr. Levitz over the telephone to ask Mr. Levitz his opinion regarding the CIBC process, the negotiations and whether Mr. Kesler had the information he needed to make a decision on whether to enter into the transaction. In each instance, Mr. Levitz advised Mr. Kesler that he had all of the information and that the transaction was a fair transaction for the selling shareholders…
>
> Mr. Kesler also spoke with Ms. Day on October 8, 2004 wherein he requested information regarding the proposed transaction. Ms. Day prepared a package of information for Mr. Kesler…The materials provided to Mr. Kesler do not contain the information or calculations prepared by Ms. Day concerning the sale of an interest to a third party at a price of $71.5 million.

In his undertaking response Mr. Kesler pointed to several documents in the productions to support his recollection including:

(a) An August 18, 2004 memo to file by David Katz stating: "Rick Kesler had a brief conversation with Gerry Levitz yesterday to obtain Gerry's opinion as to the benefits of the CIBC process. In addition, Rick asked Gerry what he thought would happen if the proposed transaction was unsuccessful";

(b) One page of GGFL docket entries for the period June 3, 2004 through August 31, 2004 supporting an invoice of that date. Mr. Kesler did not identify any particular docket entry to support his answer. There appears to be one entry by Mr. Levitz regarding some contact with Rick Kesler on August 17, 2004. It read: "RK/BF".

[573] Gerald Levitz died after this action was commenced, but before the summary judgment motion was heard. Section 13 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23 states:

> 13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Recently, in *Brisco Estate v. Canadian Premier Life Insurance Co.*, the Court of Appeal held that given the "anomalous" place of that section in the modern law of evidence, there is no reason to give section 13 a broad interpretation when considering its application, nor a narrow one when considering the scope of evidence capable of corroborating the evidence of the interested party.[121] In *Sands Estate v. Sonnwald*, the court stated that "corroboration should be such as to enhance the probability of truth of the suspect witness' evidence upon a substantive part of the case raised by the pleadings", and "several pieces of circumstantial evidence, taken together, may potentially corroborate the evidence of an opposite or interested party, notwithstanding that each item or piece of evidence viewed in isolation may not be so capable…"[122]

[574] In the present case both Josephine Harris and Rick Kesler testified that they had received assurances from Mr. Levitz about the soundness and fairness of the LOI transactions. Both rested their allegations on two forms of contact they allegedly had with Levitz: (i) un-particularized telephone conversations with Levitz, and (ii) discussions with him during breaks at Board meetings. As to the first form of contact, although the GGFL dockets were produced – Kesler mentioned one entry in his undertaking response – the plaintiffs could not point to any

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[121] (2012), 113 O.R. (3d) 161 (C.A.), para. 61.
[122] Quoted in *Brisco Estate*, *supra*., at para. 65.

entries recording telephone conversations with Levitz in which he allegedly gave them advice about the fairness or reasonableness of the transaction, nor did they adduce any of their own phone records in support of that assertion. Nor could they produce any notes of those conversations, any emails to Levitz confirming the conversations, or any emails to their own lawyers and accountant, Mainzer, letting them know about the advice or assurance they allegedly had received from Levitz.

[575] As to the Board meetings, the Boards of the Leikin Group confirmed the retainer of CIBC Mid-Markets at their July 23, 2004 meeting. The first meeting held by the Boards following the delivery of the CIBC Report was the one on September 28, 2004. The parties did not file in evidence the agenda or minutes for any Board meeting held thereafter and prior to the signing of the April 15, 2005 LOI. I was left with the distinct impression from the witnesses' evidence that no Board meeting was held during that period time, and while I have referred to the Lewy message to Jameson of December 16, 2004 requesting a Board meeting, there was no suggestion in the evidence that one was held.

[576] In the absence of evidence that Board meetings were held between September 29, 2004, after the delivery of the CIBC Report, and April 18, 2005, when the LOI was signed, the plaintiffs have failed to establish the opportunity for their get-togethers with Levitz at which he allegedly gave them assurances. Those assurances could not have been given prior to the September 28 Board meeting, because that was the first meeting at which the CIBC Report was considered. Further, those assurances could not have been given at the September 28 Board meeting because the Board decided at that meeting to obtain a peer review of the Altus Group Report – i.e. it would be difficult for Mr. Levitz to give assurances about the soundness and fairness of an appraisal process when the process had not yet ended.

[577] No other witness offered evidence which would corroborate the assertions made by Harris and Kesler about advice they had received from Mr. Levitz.

[578] At common law, the evidence of one witness is capable of meeting the burden of proof in civil proceedings.[123] Section 13 of the *Evidence Act* stands as a statutory exception to that principle. In the present case, putting to one side the requirements of section 13, I find that Harris and Kesler have not established that Mr. Levitz gave them assurances and advice about the soundness and fairness of the LOI transaction. Their evidence simply was far too vague and lacking in particulars to surmount the threshold of proof on the balance of probabilities, and I

[123] *Brisco Estate, supra.*, para. 59.

have commented elsewhere in these Reasons about Mr. Rick Kesler's poor credibility. Further, the requirements of section 13 of the *Evidence Act* do apply to their evidence against Mr. Levitz, and for the reasons I have identified above, their evidence lacks corroboration. Consequently, I find that the plaintiffs have not established that Mr. Levitz gave assurances or advice to Harris or Kesler about the soundness or fairness of the LOI transaction, including the fair value of College Square, and I find that no undertaking by Mr. Levitz to protect their interests in the share redemption transaction can be implied from the evidence.

[579] Further, I find that the plaintiffs have not demonstrated that GGFL, Levitz or Day exercised a power which could affect the legal or substantial practical interests of the Selling Shareholders. I repeat what I have already said: the plaintiffs had retained their own professionals, including Mainzer who was an accountant, to protect their interests in the share redemption transaction, and the GGFL defendants were not involved in the negotiation of the LOI or its share price.

[580] I do wish to make one final set of comments about the allegations the plaintiffs made against the Accountant Defendants regarding the disclosure of financial information. First, in paragraph 239 of their Factum on the summary judgment motion the plaintiffs argued: "The GGFL Defendants seek to hide behind the semantics of "hypotheticals" and "calculations" in arguing that they owed no fiduciary duty." I reviewed in some detail earlier in these Reasons the various calculations run by Ms. Day, in large part from June through to October, with some thereafter, at the direction of the management of the Leikin Group. I accept Ms. Day's evidence that those calculations were designed to show the outcomes under various scenarios, whether pay-outs to shareholders or the calculation of a financing number. Second, I accepted Ms. Day's evidence that FCR was not discussed in her presence at the portion of the July 14 meeting she attended. Third, it follows that there is no basis for the plaintiffs' contention, found in paragraph 46(d) of their Closing Submissions at trial, that the GGFL advisors "sat silently" at the September 28 Board meeting and, by so doing, condoned the share redemption transaction in the eyes of the Selling Shareholders. It is clear on the evidence that the only information either Mr. Levitz or Ms. Day had about Katz's dealings with FCR by that point of time is what Levitz would have heard at the April 15 Board meeting. Further, as noted in the portion of the minutes of the September 28 Board meeting reproduced in paragraph 225 above, Levitz specifically explained the significance of the calculations which GGFL had made prior to the meeting:

> Gerald Levitz indicated that prior estimates were not valuation opinions but that they were merely stating that a valuation of $60 million was possible and that it may be worth doing the calculations.

In sum, I see no basis for the allegations asserted by the plaintiffs concerning the disclosure of information by the Accountant Defendants.

[581] For these reasons, I conclude that the plaintiffs have not established that the Accountant Defendants owed them a fiduciary duty in respect of the share redemption transaction, and I dismiss their action against Ginsburg Gluzman Fage & Levitz LLP, Patricia Day and Ingrid Levitz, in her capacity as Estate Trustee with a will of the Estate of Gerald Levitz.

## XXXII. Conclusion and costs

[582] For the reasons set out above, I dismiss the plaintiffs' action.

[583] I would encourage the parties to try to settle the costs of this action. If they cannot, the defendants may serve and file with my office written cost submissions, together with Bills of Costs, by April 3, 2013. The plaintiffs may serve and file with my office responding written cost submissions by April 26, 2013. The defendants may serve and file reply written cost submissions, if required, by May 8, 2013.

[584] Responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[124]

## XXXIII. In memoriam

[585] Some months following the conclusion of this trial Mr. Randy Bennett, one of the plaintiffs' counsel, unexpectedly passed away. I wish to express formally my condolences to his family. His passing was a great loss to our legal community.

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[124] (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.

_____(original signed by)_____
D. M. Brown J.

**Released**: March 12, 2013

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Adam Leikin Harris, Naomi Sara (Harris) Stanton, Sheira Rachel Harris, Zena Leah Harris, Hilliard Brian (Rick) Kesler and David Joseph Spieler

Plaintiffs

**– and –**

Leikin Group Inc., Barbara Linda Farber, David Lawrence Katz, Andrew Mark Katz, Grant Jameson, Geoffrey Gilbert, Ogilvy Renault LLP, Ingrid Levitz, in her capacity as estate trustee with a will of the Estate of Gerald Levitz, Patricia Day, Ginsburg Gluzman Fage & Levitz LLP and First Capital Realty Inc.

Defendants

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**REASONS FOR JUDGMENT**

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D. M. Brown J.

**Released:** March 12, 2013