Howard v. Madill, [2010] B.C.J. No. 698

British Columbia and Yukon Judgments

British Columbia Supreme Court

New Westminster, British Columbia

C.J. Bruce J.

Heard: March 15-18, 2010.

Judgment: April 20, 2010.

Docket: S16396

Registry: Chilliwack

[2010] B.C.J. No. 698 | 2010 BCSC 525

Between Peter Howard, Plaintiff, and Ronald Madill and Randall Albert Flikkema, Defendants

(121 paras.)

Case Summary

Civil litigation — Civil procedure — Costs — Particular orders — Special orders — For reprehensible or inefficient conduct — Application by plaintiff for special costs allowed in part — Plaintiff substantially successful in being awarded $$23,023 for loss of salary and $40,000 for mental distress against the defendants, the plaintiff's employee and son-in-law — Employee's conduct in convincing son-in-law to sign over plaintiff's shares and then accusing plaintiff of fraud was reprehensible and he was ordered to pay half plaintiff's special costs — Son-in-law made no allegations and expressed regret so ordered to pay half plaintiff's costs on Scale B.

Damages — For torts — Affecting property — Personal property — Trespass or conversion — Breach of fiduciary duty — Relationship between parties — Business — Action by plaintiff for damages for loss of salary, loss of use, mental distress, expenses and damages to well-being allowed in part — Plaintiff owned company and transferred shares to defendant son-in-law in order to obtain licenses — Defendant employee convinced son-in-law to transfer shares to him, leading to litigation and 84-day injunction — Defendants already found liable — Plaintiff awarded $23,023 for lost salary during injunction period but failed to prove expenses incurred in securing alternate employment or return of shares — Defendants inflicted intentional wrong that froze plaintiff's company and caused mental distress — Plaintiff awarded $40,000 damages.

Damages — Types of damages — Categories of — Emotional and mental distress — Loss of income — Action by plaintiff for damages for loss of salary, loss of use, mental distress, expenses and damages to well-being allowed in part — Plaintiff owned company and transferred shares to defendant son-in-law in order to obtain licenses — Defendant employee convinced son-in-law to transfer shares to him, leading to litigation and 84-day injunction — Defendants already found liable — Plaintiff awarded $23,023 for lost salary during injunction period but failed to prove expenses incurred in securing alternate employment or return of shares — Defendants inflicted intentional wrong that froze plaintiff's company and caused mental distress — Plaintiff awarded $40,000 damages.

Action by the plaintiff for damages for expenses, loss of self-esteem and mental distress, loss of use of shares and loss of salary. The defendants, the plaintiff's employee and the plaintiff's son-in-law had already been found

liable in a previous ruling. The plaintiff founded a trucking company and hired the employee to work for him, eventually promoting him to a position of trust. The son-in-law became involved when the plaintiff had problems renewing trucking licenses because of previous accidents. The plaintiff transferred his shares in the company to the son-in-law and had him obtain the licenses. No money was paid for the transfer and business proceeded as usual, with the son-in-law not at all involved in the company. The son-in-law separated from the plaintiff's daughter and the plaintiff became worried and directed his employee to have the shares transferred back to the plaintiff by special resolution. The employee prepared the paperwork and the son-in-law signed it, but the employee never provided the plaintiff with a copy to register. The plaintiff went on vacation and the employee used the opportunity to convince the son-in-law to sign new paperwork, transferring all shares to the employee, which the employee registered. The employee then told the plaintiff what he had done and attempted to negotiate better working conditions. This led to litigation and an 84-day injunction effectively freezing company operations. The employee was found to have committed breach of trust and conversion and the son-in-law breached the trust agreement. The plaintiff sought $20,023 for loss of salary and $50,000 in additional damages and special costs.

HELD: Action allowed in part.

The plaintiff had been having licensing issues and was behind on the company's taxes, but the company was thriving and had many customers. During the injunction, the plaintiff had to borrow money from family members, cash in insurance policies and remortgage his home. The plaintiff's health was adversely affected as he was humiliated and worried about the consequences to his business. The son-in-law could have stopped the litigation, but instead continued to claim he had owned the shares. The defendants had committed and intentional tort against the plaintiff and he could personally claim coincidental harm to his company as a result. There was no difference in circumstances so the defendants were jointly and severally liable for the damages. The plaintiff proved his loss of salary claim and was awarded $23,023, grossed up for taxes. The plaintiff failed to prove any expenses for his attempts to secure alternate employment or have the shares returned to him. The plaintiff's stress and loss of self-esteem for foreseeable consequences of the defendants' intentional wrong, as the defendants knew they could cause harm to the plaintiff's business. The plaintiff was awarded $40,000 damages. There was no failure to mitigate since the plaintiff had not been allowed to carry on his business or access his office during the injunction. The employee's conduct was reprehensible and he continued to accuse the plaintiff of fraud during trial. He was ordered to pay half the plaintiff's special costs. The son-in-law made no allegations and expressed regret, so he was ordered to pay half the plaintiff's Scale B costs.

Statutes, Regulations and Rules Cited

Rules of Court, Rule 18A

Counsel

Counsel for the Plaintiff: D. Sliman, D. Sorensen.

Counsel for the Defendant, Madill: S.G. Price.

Counsel for the Defendant, Flikkema: In Person.

Reasons for Judgment

C.J. BRUCE J.

1 This is a continuation of a trial that commenced before Mr. Justice Groves in February 2006. As a consequence of illness, Mr. Justice Groves was unable to continue the trial and I was appointed by the Chief Justice to complete it by assessing damages for breach of trust and conversion as found by Groves J.

2 Mr. Justice Groves heard this matter under Rule 18A, *Rules of Court* and findings of liability were made against both defendants. The parties agree that I may consider the affidavit evidence filed in connection with the Rule 18A application when determining the quantum of damages.

BACKGROUND

3 The facts underlying Mr. Howard's claim for damages are described in the oral decision of Mr. Justice Groves dated February 10, 2006. These facts may be summarized as follows. Mr. Howard founded a company entitled Super H Holdings Ltd. in 1984. For over twenty years this company was involved in the trucking business, both as a freight carrier and as a freight broker, for a large number of clients in North America. Mr. Madill was originally hired in 2000 as a truck driver and his wife, Shannon Madill, was hired as a bookkeeper in 2001. In 2001 Mr. Madill was promoted to the position of claims and safety officer and his duties included supervising the contracted drivers as well as handling certain paralegal matters.

4 Between 2001 and 2003 Mr. Howard's business encountered some legal problems as a result of accidents involving the independent contractors who either were operating trucks owned by Super H Holdings Ltd. or using the licences held by this company. As a result of these legal problems, Mr. Howard had difficulty renewing his vehicle licences. This situation led to discussions among Mr. Flikkema, who was Mr. Howard's son-in-law, Mr. Madill and the company's accountant concerning a transfer of shares in the company to avoid the licence issue. In April 2003 this transfer was completed and Mr. Flikkema became the sole shareholder of Super H Holdings Ltd. No money changed hands in connection with this transfer of shares.

5 After this share transfer, business proceeded as usual. Mr. Howard remained the sole operating mind of Super H Holdings Ltd. and directed its day to day operations. Mr. Flikkema did not begin working for the company after the share transfer; he continued to work as an electrician. Nor did Mr. Flikkema begin to make decisions about the business. Mr. Madill and Ms. Madill continued to work for Super H Holdings Ltd. as they had done before.

6 Between April 2003 and November 2004 Mr. Howard transferred into Super H Holdings Ltd. certain assets owned by a company he solely owned entitled Super Truck Inc. and a second company he owned entitled Southern Interior Holdings Ltd. After these assets were merged within Super H Holdings Ltd., the companies all acted as one entity.

7 In November 2004 Mr. Flikkema separated from his wife, Mr. Howard's daughter. This event caused Mr. Howard great concern because Mr. Flikkema was on paper the sole shareholder of his company. Mr. Howard directed Mr. Madill to prepare the documents necessary to transfer the shares from Mr. Flikkema back to himself and Mr. Madill complied with this request and obtained the necessary signatures. Essentially, Mr. Flikkema signed a special resolution dated November 15, 2004 that indicated he had relinquished all his shares and control over Super H Holdings Ltd. to Mr. Howard.

8 Mr. Howard did not instruct Mr. Madill to register the special resolution immediately; however, on several occasions he asked for a copy of the resolution and Mr. Madill failed to comply with this request. Eventually Mr. Howard found a copy of the signed resolution and kept it for himself. This went on for about a year. In November 2005 Mr. Howard and his family went away on vacation. While Mr. Howard was away, Mr. Madill approached Mr.

Flikkema and asked him to execute a new special resolution that transferred his shares in Super H Holdings Ltd. to Mr. Madill. As a result of the privileges Mr. Madill enjoyed as an employee of Super H Holdings Ltd., he registered the transfer of shares to himself in Victoria by using an online registration system. Sometime after the transfer of shares was registered in Victoria, Ms. Madill wrote a letter to Mr. Howard that described several complaints against him, including the failure to raise their salaries and the changing of their status to independent contractors leading to demands against them by the Canada Revenue Agency. Groves J. found that this letter was an attempt to negotiate the return of the shares in exchange for better treatment by Mr. Howard.

9 Based upon these facts, Groves J. concluded that Mr. Madill committed a breach of trust bordering on fraud. As he said at para. 38 of the judgment:

> [38] Madill knows of the transfer by Flikkema to Howard. He knows of Flikkema's difficulty relationship-wise with Howard's daughter and potentially with Howard. He knows that Howard is out of the country. Does he act as an employee in this point? Is he acting as an employee when he approaches Flikkema and has Flikkema sign over the shares to him? Is he acting as an employee when he uses a benefit of his employment, the authority on behalf of the company to register transfers online with the Registrar of Companies? Does he act as an employee once this transfer takes place and attempts to access the company books and the company's accounts for funds in excess of $300,000? The answer to those questions [is] clearly no. If anyone has committed a fraud here it is, in my view, Madill.

10 Further, Groves J. found that Mr. Howard was entitled to sole ownership of the shares and that Mr. Flikkema had committed a breach of trust. His reasoning is contained in paras. 40, 41, and 43 as follows:

> [40] ...I am, however, satisfied that there is a resulting trust. A resulting trust arises whenever a legal title to a property in one party's name is transferred to another and the party to whom it has transferred has given no value for the property. It is a condition of a resulting trust that the trustee is obliged to return the original title to the settler of the trust when called upon to do so. A person requesting relief from an alleged resulting trust has the burden to show the court that they in fact advanced monies for the purchase or owned the property.
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> [41] I am satisfied on the evidence before me that clearly the plaintiff Howard, who started the company in 1984, who owned a number of assets which were transferred into the company both before and after the transfer to Flikkema, has in fact established that he has the rightful ownership to the company. One can rebut a resulting trust if one can show that the transfer of ownership was made as a gift or for consideration, in other words payment. Flikkema has not suggested that this was a gift and he has agreed there was no payment.
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> ...
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> [43] ... I find the defendant Flikkema breached the trust agreement between himself and the plaintiff when he transferred the shares of Super H to the defendant Madill. He had, under the resulting trust, an obligation to act with the shares in a manner in which Howard required him to do so. He did not have the authority under that trust to transfer the shares to anyone, including Madill.

11 Lastly, Groves J. concluded that Mr. Madill had unlawfully converted the shares of Super H Holdings Ltd. After quoting from John Salmond, *Salmond on the Law of Torts,* 14th ed., (London: Sweet & Maswell, 1965) Groves J. says at para. 48:

> [48] Here clearly Howard has been deprived of the use and possession of the shares of Super H. I find that the defendant Madill has, without lawful reason and by wilful interference, interfered with Howard's use and operation of the shares of Super H in a manner that is inconsistent with the rights of Howard and by doing so, Madill has deprived Howard of the use and possession of Super H and its shares. The plaintiff Howard is entitled to damages to be assessed for conversion.

ORDERS IN THE PROCEEDING

12 On December 2, 2005, Mr. Howard obtained an *ex parte* injunction restraining Mr. Madill from interfering with the operations of Super H Holdings Ltd. or representing himself as an owner of the company. This interim injunction remained in effect until December 5, 2005, when the matter was heard with notice to all parties.

13 On December 5, 2005, Mr. Justice Joyce granted an interlocutory injunction that restrained Mr. Howard and Mr. Madill from operating Super H Holdings Ltd. without the written consent of the other. This order stated as follows:

1. The Plaintiff and the Defendant, Ronald Madill, by themselves or by their employees, agents or otherwise, be and are hereby restrained from:
   (a) in any way disposing of the assets of Super H Holdings Ltd., subject to the written consent of the two parties (the Plaintiff and the Defendant Ronald Madill) or further order of the court. This provision is in no way to restrict any party to this action from cooperating with or providing access to records in the possession of the Plaintiff and the Defendant Ronald Madill or Super H Holdings Ltd. to any official agency investigating the affairs of Super H Holdings Ltd. or the parties to this action.
   (b) removing the assets of Super H Holdings Ltd. from the offices located at 555 Sumas Way, Abbotsford, British Columbia, subject to the written consent of the two parties (the Plaintiff and the Defendant Ronald Madill) or further order of the court.
   (c) in any way representing themselves as owner, legal or beneficial, or otherwise, of Super H Holdings Ltd., subject to the written consent of the two parties (the Plaintiff and the Defendant Ronald Madill) or further order of the court.
   (d) collecting mail addressed to Super H Holdings Ltd. or Peter Howard, from the mailbox of Super H Holdings Ltd. located at PO Box 959, Sumas, Washington, USA, or 555 Sumas Way, Abbotsford, British Columbia, subject to the written consent of the two parties (the Plaintiff and the Defendant Ronald Madill) or further order of the court.
   (e) attending at the offices of Super H Holdings Ltd., at 555 Sumas Way, Abbotsford, British Columbia, subject to the consent of the two parties (the Plaintiff and the Defendant Ronald Madill) or further order of the court.

14 On January 5, 2006, Joyce J. dismissed an application by Mr. Howard for an order setting aside the interlocutory injunction granted on December 5, 2005. In regard to this application, Mr. Madill was awarded costs at scale 3 in any event of the cause.

15 On March 7, 2006, an order reflecting the judgment of Groves J. was entered in the Chilliwack Registry. This order provided as follows:

1. The plaintiff, Peter Howard, is the legal and beneficial sole owner of all issued and outstanding shares in the capital of Super H Holdings Ltd.
2. The Order of the Honourable Mr. Justice Joyce granted December 5, 2005 be set aside.
3. All issued and outstanding shares in Super H Holdings Ltd. be transferred to the plaintiff forthwith.
4. Damages payable by the defendant Ronald Madill for conversion to assessed at a later date.
5. Damages payable by the defendant Randal Albert Flikkema for breach of trust to be assessed at a later date.

ISSUES

16 The primary issue to be determined is the quantum of damages for conversion and breach of trust to be

awarded to Mr. Howard, in his personal capacity, and apart from any losses incurred by Super H Holdings Ltd. In addition, the court must address whether this is an appropriate case to award special costs.

SUMMARY OF THE VIVA VOCE EVIDENCE

17 Mr. Howard has been in the trucking and freight forwarding/brokerage business since 1972. His business includes carrying or arranging for the carriage of freight for customers in Canada and the US. Before 2002, his primary operating company was Super Truck Inc., which had both trucking and brokerage divisions. As a result of several accidents by owner operators in the trucking division, Mr. Howard's motor carrier licences in Ontario came under review and were suspended for a time. In addition, Super Truck Inc. faced the prospect of a very large action for damages arising out of a trucking accident in which an MRI was destroyed. As a result of these events, Mr. Howard decided to make a proposal in bankruptcy that he ultimately hoped would protect the business he had built up over the years. Trustees were appointed to manage the affairs of Super Truck Inc. and to supervise its reorganization in a manner that protected creditors as well as the underlying good will of the business.

18 While Super Truck Inc. was under trusteeship, Mr. Howard needed another means of operating his trucking business and servicing his freight forwarding/ brokerage clients. To address these problems, Mr. Howard attempted to use another company he owned, Super H Holdings Ltd., to acquire a new motor carrier licence. Unfortunately, Super H Holdings Ltd. was unable to secure an operating licence because the National Safety Board would not issue a license to any corporate entity whose principal was involved with a company whose other licences were suspended. As a consequence, Mr. Howard approached his son-in-law, Mr. Flikkema, and asked him to act as the nominal owner of the shares and sole director of Super H Holdings Ltd. in order to permit this company to hold motor carrier licences. Mr. Flikkema agreed to this arrangement without any compensation except for a vague promise of some form of remuneration in the future as payment for the use of his name. Mr. Madill prepared a special resolution indicating that Mr. Howard had sold his shares to Mr. Flikkema and Mr. Howard signed this document on November 13, 2002. Thereafter the special resolution was registered with the Registrar of Companies and Mr. Flikkema became a director of Super H Holdings Ltd. At that time Mr. Howard planned to have the shares returned to him when the reorganization of Super Truck Ltd. was complete and the lawsuit over the MRI was resolved.

19 In 2002 Mr. Madill was employed by Super Truck Inc. as operations manager and safety officer. He had originally been employed as a truck driver; however, after successfully taking over the role of safety officer during the 2001 accident concerning the MRI, Mr. Howard gradually increased his responsibilities and promoted him to operations manager. Mr. Madill handled all the corporate matters, hired truck drivers, dealt with creditors and oversaw the litigation involving Super Truck Inc. and third parties. Also in 2001, Mr. Madill's wife, Shannon Madill, was hired by Super Truck Inc. as a bookkeeper and administrative assistant. Their work permitted Mr. Howard to concentrate exclusively on sales, including the dispatch of drivers, contract negotiations with customers, and arranging for freight carriage by other companies. He trusted Mr. and Ms. Madill and gave them a great deal of authority to act independently on behalf of Super Truck Inc.

20 Super H Holdings Ltd. made a proposal to the National Safety Board for a motor carrier licence sometime in late 2002. However, due to the pre-conditions demanded by the National Safety Board, Mr. Howard decided not to pursue the application. Because Mr. Howard still needed a trucking division, he made an arrangement with Spruce Hollow Haulage Ltd., which was owned and operated by Mr. James Weber, to act as Super H Holdings Ltd.'s trucking division. Spruce Hollow already had an operating licence and it began to do business out of Super H Holdings Ltd.'s offices. Mr. Madill became the supervisor for this part of the business, including ensuring drivers and owner/operators were conforming to all the safety regulations.

21 While it is apparent that both Mr. and Ms. Madill worked for Super H Holdings Ltd., the parties have never agreed whether they were independent contractors or employees. This issue developed into a substantial dispute between Mr. and Ms. Madill and Mr. Howard sometime in 2005 when Mr. and Ms. Madill discovered that Super H Holdings Ltd. was not making remittances on their behalf to the Canada Revenue Agency.

22 For reasons that are not entirely evident, Mr. Howard did not take steps to have Mr. Flikkema return the shares in Super H Holdings Ltd. when he decided against securing a motor carrier licence for the company. However, it is not disputed that Mr. Flikkema remained on the record as the owner of shares until sometime in November 2004. At that time, Mr. Flikkema separated from his wife and Mr. Howard became concerned that he now had a very strained relationship with a person who on paper owned all the shares in his company. As a consequence of this situation, Mr. Howard asked Mr. Madill to prepare a special resolution for Mr. Flikkema to sign that returned the shares to him.

23 Mr. Madill met with Mr. Flikkema in November 2004 and Mr. Flikkema signed the special resolution transferring the shares back to Mr. Howard. There were two original signed copies of this document. While there is a dispute about what happened to these documents, I have concluded on the balance of probabilities that Mr. Madill took one signed copy of the resolution to his home and kept the other copy in his office. Further, I have concluded that on several occasions Mr. Howard asked to have a copy of the resolution and Mr. Madill failed to comply with his requests. I reject Mr. Madill's evidence that he kept the resolution in the safe located at the offices of Super H Holdings Ltd. as this is contrary to what is deposed to in the affidavits he filed in connection with the Rule 18A application. Mr. Howard discovered the signed copy of the resolution Mr. Madill kept in his office and took it without advising Mr. Madill. Mr. Howard did not register the resolution and merely kept it in his possession for safekeeping.

24 Although Mr. Flikkema deposed in the affidavits filed in connection with the Rule 18A application that he placed conditions on the transfer of shares to Mr. Howard, this evidence was rejected by Groves J. It is also apparent that Mr. Flikkema did not directly advise Mr. Howard of these conditions. Nor were these conditions relayed to Mr. Howard through Mr. Madill. I thus reject Mr. Madill's evidence that he was holding this resolution in trust for Mr. Flikkema.

25 In or about November 2005 the Canada Revenue Agency made a demand for the production of documents by Super H Holdings Ltd. due to its failure to file income tax returns for 2002, 2003, and 2004. Mr. Howard entrusted his accountants, KPMG LLP ("KPMG"), with the task of satisfying the Canada Revenue Agency's demands; however, KPMG was having difficulty securing the company's financial records from Ms. Madill. It was also at this time that Mr. and Ms. Madill continued to be involved in a dispute with Mr. Howard in regard to their status as employees versus independent contractors. The Canada Revenue Agency had written to Mr. and Ms. Madill asking why they had not made remittances or filed their tax returns. Mr. Howard continued to put them off and had not addressed this problem to their satisfaction.

26 In November 2005 Mr. Howard planned to take a week-long vacation with his family in the Dominican Republic and felt that he would be able to leave the company's income tax matters in abeyance until he returned. Mr. Madill was left in charge of the business. While Mr. Howard had sole signing authority for the cheques issued by Super H Holdings Ltd., he left in the safe several signed, blank cheques that Mr. and Ms. Madill could use to pay the company's expenses while he was away. Mr. Howard left for the Dominican Republic on November 17, 2005.

27 Mr. Madill does not dispute that the day after Mr. Howard left on vacation he met with Mr. Flikkema and presented him with a special resolution that transferred the shares in Super H Holdings Ltd. to Mr. Madill and caused him to resign as a director. Mr. Flikkema signed this special resolution on November 18, 2005. Mr. Madill testified that this meeting was requested by Mr. Flikkema because he had been served with a lawsuit against Super H Holdings Ltd. that also named him as a defendant. Mr. Flikkema, on the other hand, testified that it was Mr. Madill who telephoned him to advise him of this lawsuit and suggested that signing his shares over to Mr. Madill would be the solution to this dilemma. I find Mr. Flikkema's evidence is to be preferred on this point. Mr. Madill's affidavit dated December 4, 2005, says at para. 13 that he made Mr. Flikkema aware of the "Banks lawsuit" and this led to Mr. Flikkema's desire to divest himself of the company's shares.

28 Further, there is no dispute that Mr. Madill immediately registered this transfer of shares with the Registrar of Companies and filed a notice of change of directors appointing himself as the sole director of Super H Holdings Ltd. and that this occurred prior to Mr. Howard's return from vacation. While Mr. Madill testified that he took these steps

to meet the Canada Revenue Agency's demand that only a corporate representative could act as a spokesperson for Super H Holdings Ltd. in connection with its investigation, and in that sense save the company from disaster, I find this explanation is not credible. When Mr. Howard filed this action for conversion and breach of trust, Mr. Madill responded to the application for an interlocutory injunction by filing an affidavit dated December 4, 2005. In that affidavit he deposed that he and Ms. Madill had been investing their own funds in Super H Holdings Ltd. and in return they had been promised an interest in the company. When they discovered that Mr. Howard was using the profits of Super H Holdings Ltd. to pay his personal debts and expenses, they became concerned about the safety of their interest in the company particularly because Mr. Howard was the only one with signing authority at the credit union where Super H Holdings Ltd. held its funds. It was in this context that Mr. Madill secured the share transfer documents from Mr. Flikkema. Nowhere in this affidavit does Mr. Madill depose that it was the demands made by the Canada Revenue Agency before Mr. Howard left on vacation that led to his decision to have the shares transferred into his own name.

29 Moreover, Mr. Madill's explanation for not contacting Mr. Howard during his vacation to provide him with an opportunity to address the Canada Revenue Agency's demands is incredulous. Mr. Madill knew where Mr. Howard could be reached. He maintained the Canada Revenue Agency's actions represented a serious threat to the continued existence of Super H Holdings Ltd. as a going concern. Yet, he made no attempts to contact Mr. Howard for his advice or his permission to have the shares transferred into his name in order to deal with the Canada Revenue Agency issues. Mr. Madill's explanation is also inconsistent with the finding of Groves J. that it was the perception and belief held by the Mr. and Ms. Madill, that they had been treated badly by Mr. Howard, which underlay Mr. Madill's decision to secure the shares in his own name. Lastly, given Mr. Madill's subsequent actions in changing the locks on the premises of Super H Holdings Ltd., and attending at the credit union to attempt to have Mr. Howard removed as the signing authority for the company's accounts, I find this innocent explanation is completely incredible.

30 Mr. Howard returned to his office on Friday, November 25, 2005, and Mr. Madill advised him of the share transfer and its registration. He also advised Mr. Howard that he had appointed himself as the company's director. Mr. Madill raised the taxes owed by Super H Holdings Ltd. as an issue and Mr. Howard responded that KPMG was in the process of preparing the financial statements and would soon be filing its income tax returns. Although Mr. Howard was shocked by what Mr. Madill had done, he left the office without asking for the return of his shares with the intention of discussing with KPMG what Mr. Madill's intentions might be.

31 On Monday, November 28, 2005, Mr. Howard went to his office and Ms. Madill presented him with a letter that set out her complaints about how he had treated her and her husband since they joined the company. In this letter Ms. Madill made several demands and threatened to quit if they were not met. Although Mr. Howard advised Ms. Madill that he would address her demands, he immediately left the office and went to KPMG for advice. He was very concerned about the security of his business given the complaints from Ms. Madill and in light of Mr. Madill's actions. While at KPMG's offices, Mr. Howard contacted the credit union and the manager advised him that there was over $200,000 in the accounts of Super H Holdings Ltd. He asked the credit union to freeze these accounts out of a concern that Mr. Madill may attempt to have himself designated as the signing officer for Super H Holdings Ltd.

32 On November 29, 2005 Mr. Howard went to the office and Mr. Madill confronted again him about the company's finances and taxes. Mr. Madill's research showed that Mr. Howard had taken $96,230 in wages during 2005 and there was an additional $285,111.09 that Mr. Madill believed was paid to Mr. Howard for his personal benefit. Mr. Madill complained that Mr. Howard was taking all the company's assets and not paying its creditors. He demanded that Mr. Howard address these problems. Mr. Howard angrily confronted Mr. Madill and accused him of stealing the company. Their argument continued for some time. In the end Mr. Howard shouted angrily that Mr. Madill could take the company and then he left.

33 After Mr. Howard left the office, Mr. Madill called a locksmith to arrange for the locks on the yard gate and the premises to be changed. He next went the credit union and attempted to have Mr. Howard removed as signing officer based upon his ownership of the shares and his position as the sole director. Mr. Madill testified that he went to the credit union simply to notify them of the change in directors. However, this explanation is clearly contrary to

Mr. Madill's affidavit of December 4, 2005, which contains an admission that he attended the credit union to remove Mr. Howard's name from the company's accounts. Because the account had been frozen at Mr. Howard's request, the credit union manager could not carry out this request. While Mr. Madill testified that he did not ask to be designated a signing officer for the company, I find this must have been his intention. Without a signing officer, Super H Holdings Ltd. could not carry on its business.

34 On November 30, 2005, and after Mr. Howard learned of Mr. Madill's attendance at the credit union, he attended the offices of Super H Holdings Ltd. with his wife and his son and took the primary computer containing the Maddock software used to record all of the company's transactions. They also took some of the company's records and cheques payable to Super H Holdings Ltd. and Spruce Hollow Haulage Inc. jointly. Mr. Madill arrived with the police to stop Mr. Howard from removing the company's property from the office and to have him ejected from the premises; however, the police declined to intervene in this civil dispute notwithstanding Mr. Madill advised the police that he was the owner of the business.

35 On that same day Mr. Madill removed the computer in his office along with certain corporate files and records, filing cabinets and the photocopier. Ms. Madill removed her computer from the office as well as her accounting files. It was also on this day that Mr. Howard presented letters of termination to Mr. and Ms. Madill. This was the last day that Mr. Howard attended the office until after the shares were transferred to him and the injunction set aside.

36 At the same time as Mr. and Ms. Madill were terminated, Mr. Howard advised the principal of Spruce Hollow Haulage Inc., Mr. Weber, that he was no longer welcome in the office. Mr. Weber set up his business at Mr. Madill's home and Mr. Madill became his operations manager.

37 On December 2, 2005, Mr. Howard obtained an interim *ex parte* injunction restraining Mr. Madill from disposing of the assets of Super H Holdings Ltd., removing assets from their offices, attending at these offices, and representing himself as the owner of Super H Holdings Ltd. By consent, this became a mutual interlocutory injunction effective December 5, 2005 and until further order of the court. The intention of the injunction was to permit the parties to continue operating Super H Holdings Ltd. as best they could until a trial could be held to address the question of ownership.

38 Mr. Madill testified that it was around this time that he offered to return the shares to Mr. Howard. He could not recall whether the offer had any conditions attached but admitted in cross-examination that he had made demands of Mr. Howard in connection with any potential voluntary return of the shares. In particular, Mr. Madill acknowledged that the offer was conditional upon him receiving the compensation he had been promised during his employment with Super H Holdings Ltd. It became apparent during the trial that an offer was made on a without prejudice basis as part of the parties' settlement discussions. Mr. Madill refused to waive privilege and thus there was no evidence of the terms of the offer before the court. As a consequence, Mr. Madill's evidence that he made such an offer cannot be given any weight.

39 Unfortunately, for a variety of reasons the company could not continue to operate under the terms of the injunction. First, both parties interpreted the injunction as requiring all decisions to be made with the consent of Mr. Madill and Mr. Howard. In light of the events that led to Mr. Howard's civil action, and the injunction, there was little trust left between the parties. The animosity between these former colleagues was palpable. Mr. Howard had already served Mr. and Ms. Madill with termination notices. Mr. Madill had effectively ousted Mr. Howard from the business he had built up for over thirty years. It was impossible to cooperatively manage Super H Holdings Ltd. in this hostile environment. Although Mr. Madill testified that he would have been willing to "patch things up" had Mr. Howard agreed to make changes in the way he managed the business, this is clearly contrary to the sentiments Mr. Madill expressed in an affidavit sworn on January 2, 2006. At para. 10 of this affidavit Mr. Madill deposed that he had completely lost confidence in Mr. Howard and wanted nothing more to do with him.

40 Second, the parties were not to attend the offices of Super H Holdings Ltd. pursuant to the terms of the injunction unless they had the consent of the other party. The yard was locked and the trucks were not going in and

out. Thus whatever business the parties could do together had to be done at joint meetings held at KPMG's offices. Mr. Madill had the new keys to the company's premises; however, he did not provide Mr. Howard with a copy.

41 Third, both Mr. Madill and Mr. Howard had taken their computers and the corporate records they felt would be necessary to prove their respective positions in regard to ownership of the shares in Super H Holdings Ltd. Mr. Howard had also taken the computer that contained the primary record keeping system used by the company to carry on business. Without this Maddock system, all of the transactions would have to be recorded and tracked manually. This system also contained customer lists that Mr. Howard believed would be misused by Mr. Madill if he was permitted access to the data. Thus he was not willing to return it to the office.

42 As a consequence of the limitations imposed by the injunction, and the animosity between Mr. Madill and Mr. Howard, there was no new business conducted between December 5, 2005 and February 10, 2006 when Groves J. ordered Mr. Madill to transfer the shares in Super H Holdings Ltd. to Mr. Howard. While the parties jointly agreed to pay some of the creditors, there were disputes about many of the accounts. Some of the cheques to creditors with Mr. Howard's name on them were not honoured during the injunction period.

43 The parties also failed to agree upon the payment of wages. Mr. Madill refused to permit Mr. Howard to receive his usual monthly salary of $8,500 net of taxes and Mr. Howard denied the requests for salary continuation made by Mr. and Ms. Madill. Mr. Madill would not consent to the payment of rent for the offices occupied by Super H Holdings Ltd. or the payment of other services such as the telephone. The parties also disputed whether certain truckers should be paid and what monies, if any, were owing to Spruce Hollow Haulage Inc. While monies were deposited to the credit of Super H Holdings Ltd. during the injunction period, these funds were in payment of transactions completed before this period of time. Neither Mr. Howard nor Super H Holdings Ltd. earned any income during the period between December 5, 2005, and February 10, 2006.

44 On January 5, 2006, Mr. Howard applied to vary the injunction because it was impossible to carry on business under its terms. Mr. Justice Joyce denied this application. Mr. Madill did not seek an order that Mr. Howard return the Maddock computer program so that it could be used to operate the business. He maintained the terms of the injunction should not be varied.

45 During the period of the injunction, Mr. Howard was prohibited from contacting his customers to explain why Super H Holdings Ltd. was not doing business and why there was no one answering the telephone when they called. The creditors of Super H Holdings Ltd. were also issuing demand letters due to the failure to pay their accounts and Mr. Howard was unable to explain the situation without the consent of Mr. Madill. The parties were able to agree upon a joint letter to be sent to creditors; however, this did not occur until December 28, 2005. There was no agreement with respect to a similar letter for customers.

46 Super H Holdings Ltd. was synonymous with Mr. Howard. He personally dealt with the customers; he negotiated the contracts and took responsibility for customer satisfaction in every case. Thus when the company could not meet the customers' expectations it was Mr. Howard's business reputation that suffered. When the injunction was set aside in February 2006, Mr. Howard re-entered his offices and telephoned all of his customers to apologize for the hiatus in the business, to explain what had occurred, and to attempt to secure their confidence for the future so that Super H Holdings Ltd. could rebuild its reputation in the industry. He testified that it took between eight and nine months of hard work on his part before the company began to generate the same level of profits as it had before the events giving rise to this action.

47 Prior to the events giving rise to this action, Mr. Howard clearly had outstanding licensing issues with the regulatory authorities that undermined his reputation for safe operations. He was unable to secure operating permits for vehicles owned by any company in which he was a principal due to the historical accident record of Super Truck Inc. and its owner/operators. It was this impediment that led to the transfer of shares in Super H Holdings Ltd. to Mr. Flikkema. Mr. Howard was also behind in his income tax filings and the Canada Revenue Agency was investigating this matter. Although Mr. Madill suggested that Mr. Howard transferred the assets of Super Truck Inc. to Super H Holdings Ltd. to avoid creditors, I am satisfied that there were arrangements made with

the creditors through the receiver and that Super H Holdings Ltd. continued to pay the debts incurred by Super Truck Inc. There is no evidence that the transfer of the shares to Mr. Flikkema was designed to avoid creditors of Super Truck Inc. Lastly, there was evidence that Super Truck Inc. was a party to an action commenced by Siemens in respect of an accident involving an MRI. While Mr. Howard agreed that the share transfer to Mr. Flikkema was partly designed to insulate him from any potential liability as a director in this lawsuit, there is no evidence of any fraudulent conduct in connection with this transaction. The lawsuit was ultimately resolved without any finding of liability on the part of Super Truck Inc.

48 While Mr. Howard was without any income source during the injunction period, he had to look for other ways to meet his living expenses and that of his family's. His daughter and her children were living with Mr. Howard and he felt responsible for their needs as well as his own. If the business was lost, the Howard family may have been forced to sell their home and liquidate other assets for living expenses. Mr. Howard borrowed $20,000 from his brother-in-law and cashed in a life insurance policy with a surrender value of $20,000. He also remortgaged the family home. Mr. Howard testified that he was angry at Mr. Madill for putting him in this position and he felt betrayed by this trusted employee. Having to seek loans from friends and family members was humiliating for Mr. Howard. When the shares were transferred back to him in February 2006, Mr. Howard was unable to reinstate his insurance policy.

49 In cross examination, Mr. Howard agreed that in 2000 and 2001, when Super Truck Inc. was in financial trouble, he borrowed money from friends. He also agreed that Mr. and Ms. Madill used their credit cards to make purchases for Super H Holdings Ltd. and that he reimbursed them in cash. They also used their credit cards to pay for Mr. Howard's vacation in November 2005 and were reimbursed immediately thereafter. While Mr. Howard testified he did this to permit Mr. Madill to collect more travel points, it is apparent that he also had a limited ability to obtain short term credit.

50 These events also had an adverse impact on Mr. Howard's health. Mr. Howard felt powerless and ineffectual. Throughout his career Mr. Howard was always in control of his business - he made all the decisions. Now he was facing the loss of the business he had built up over the years and it was a very stressful situation for him to be so helpless. Mr. Howard became fearful of losing his home and disappointing his family; he was frantic about the uncertainty of the situation. While the trucking business had been stressful in the past, and on occasion, Mr. Howard had used Prozac to calm himself, he had not used this drug for some time. In December 2005 he was again prescribed Prozac for stress related symptoms and, because he could not sleep, his physician also prescribed a sleeping pill. Mr. Howard also sought counselling through the pastor of his church. This was humiliating for Mr. Howard because before these events he had been engaged in counselling other members of his church. Mr. Howard testified that he has not regained his trust of others that was lost due to Mr. Madill's actions. He now only employs family members in his business and has a difficult time making business decisions because he does not trust other people.

51 The injunction also caused some minor problems for Mr. Howard. Because the vehicle he drove was registered in the name of Super H Holdings Ltd., he was not able to renew the insurance without Mr. Madill's approval. Mr. Madill refused his request to renew the insurance. Thus during this period Mr. Howard used other family vehicles and borrowed a friend's car. Mr. Howard's daughter also had a vehicle in the company's yard that Mr. Madill would not permit her to take. There is some dispute as to whether this vehicle was roadworthy at the time.

52 The tax returns and notices of assessment produced in this action on behalf of Mr. Howard disclose an income of $95,918 for 2004. Mr. Howard's original tax assessment for 2005 indicated an income of $8,704; however, this figure was increased on a re-assessment similar to the one in 2004. The reassessment notice was not produced in evidence and Mr. Howard did not recall how much of an increase there was that year. In 2006 Mr. Howard had employment earnings of $77,000 and dividends from Super H Holdings Ltd. of $375,781. In 2007 his employment earnings were $172,905.

53 Mr. Flikkema acknowledged that what he had done was wrong in hindsight; however, at the time he did not consider his actions to be unlawful. At the time, Mr. Flikkema was concerned about his potential liability for the

debts of Super H Holdings Ltd. and he believed a solution to this problem was to transfer the shares to Mr. Madill. He did not wish to harm Mr. Howard but acknowledges that his actions caused Mr. Howard and his family many problems. Mr. Flikkema testified that he did not seek any monetary compensation for the transfer of the shares and he was not involved in attempting to run the business during the injunction period.

54 In cross examination, Mr. Flikkema admitted that he never had any involvement in the day to day business of Super H Holdings Ltd.; however, this is not the impression created in the affidavits he swore in connection with the trial of this matter. Mr. Flikkema also acknowledged that when he signed over the shares to Mr. Madill, he was aware that he had already transferred the shares to Mr. Howard by way of an earlier special resolution. Mr. Flikkema testified that Mr. Madill did not advise him that he could simply resign as a director at any time and that a shareholder cannot be made liable for corporate debts. While Mr. Flikkema's affidavits depose that he had beneficial ownership of the shares, he acknowledged that he knew that his title was in name only and that Mr. Howard was the real owner of the shares.

55 Knowing that a simple retraction of his affidavits may have stopped the litigation, Mr. Flikkema continued to take the position that he owned the shares until the order of Groves J. was issued. He knew that the business was not operating and that the injunction was causing harm to Mr. Howard and his family. Mr. Flikkema agreed that he was upset with Mr. Howard at the time he transferred the shares to Mr. Madill.

ARGUMENT

56 Mr. Howard argues the measure of damages for conversion is the value of the property at the time of the conversion, together with any consequential damages flowing from the conversion that are not too remote to be recoverable: see *MacDonald v. Hauer* (1976), [1977] 1 W.W.R. 51 at 71, 72 D.L.R. (3d) 110 (Sask. C.A.) [*MacDonald*]. Further, Mr. Howard argues that a defendant is liable for all damage that legitimately flows from an intentional tort whether or not the damage was foreseeable: see *Blue-Moon Logging Ltd. v. Finning Ltd.*, [1995] 9 W.W.R. 85, 8 B.C.L.R. (3d) 293 (S.C.) at para. 8 and *Cash v. Georgia Pacific Securities Corp.*, [1990] B.C.J. No. 1315, 1990 CarswellBC 1821 (S.C.) [*Cash*].

57 Mr. Howard argues that the damages for breach of trust are the same as those awarded for conversion: see *Cash* at para. 132 and *Bronson v. Hewitt,* 2010 BCSC 169, [2010] B.C.J. No. 211 [*Bronson*] at para. 534-535.

58 While the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch.) prevents a shareholder from suing for wrongs done to a company, Mr. Howard maintains that this rule does not apply where the shareholder has a relationship with the wrongdoer and there is a loss independent of the wrong to the company: see *Robak Industries Ltd. v. Gardner,* 2006 BCSC 1538, 152 A.C.W.S. (3d) 1052 [*Robak Industries*], aff'd 2007 BCCA 61, 236 B.C.A.C. 237. Mr. Howard argues that in this case there is an independent relationship between him and the defendants created by the conversion of his shares and the breach of trust. Further, he argues that he has suffered damages that are independent of those occasioned to the company. The defendants' actions have affected Mr. Howard, independent of the company, as follows:

1. Mr. Howard was unable to exercise the rights associated with his shares between December 5, 2005 and February 10, 2006;
2. Mr. Howard was prevented from operating Super H Holdings Ltd. during this period and deprived of the means of earning income from his shares;
3. Mr. Howard incurred expenses to obtain other sources of income during this period;
4. Mr. Howard incurred expenses to restore his ownership of the shares; and
5. Mr. Howard was caused harm to his reputation, self-esteem, and emotional well being as a result of the defendants' wrongdoing.

59 As a consequence of these wrongful acts, Mr. Howard claims damages at large in the amount of $50,000 to

$60,000. Based upon the principles articulated in *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2007 ABQB 717, 434 A.R. 261 [*Polar Ice Express*], and *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 2001 MBCA 40, 198 D.L.R. (4th) 577 [*Uni-Jet*], Mr. Howard argues that harm to reputation and self esteem caused by an intentional tort are compensated by an award of damages at large which consists of non-economic loss and exemplary damages in appropriate cases. Calculation of such damages is more a matter of judicial discretion than exact measurement: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1994) 54 C.P.R. (3d) 1, [1994] 5 W.W.R. 473 (Alta. Q.B.) and *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533, 69 O.R. (2d) 65 (C.A.).

60 In addition to damages at large, Mr. Howard claims the loss of salary he incurred in the three months he was not able to operate his business. He calculates this loss to be $23,023 net of income taxes.

61 Mr. Howard argues there is no evidence that he has failed to mitigate his loss. He proceeded to court immediately and agreed to a speedy trial to expedite a determination of the issue of ownership. He attempted to run the business during the injunction period; however, the parties were unable to work within the restrictive terms of the order. In support of his argument, Mr. Howard relies upon *Cash* at paras. 47-49 and 56.

62 Lastly, Mr. Howard claims the conduct of the defendants prior to the commencement of this litigation was reprehensible and gives rise to an award of special costs. Mr. Flikkema took his revenge on Mr. Howard after his separation from his daughter. Mr. Madill wilfully interfered with Mr. Howard's use and possession of his shares in Super H Holdings Ltd. In support of this claim, Mr. Howard relies upon *Stiles v. Workers' Compensation Board of British Columbia* (1989), 38 B.C.L.R. (2d) 307, 39 C.P.C. (2d) 74 (C.A.), *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (C.A.) [*Garcia* cited to B.C.L.R.], and *Golden Capital Services Ltd. v. Holmes*, 2003 BCSC 1265, 22 B.C.L.R. (4th) 171 [*Golden Capital Services*].

63 Mr. Howard argues that a relevant factor in granting an order for special costs is the unsuccessful party's allegation of fraud or criminal misconduct during the litigation: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 70 B.C.A.C. 76, 17 B.C.L.R. (3d) 197 [*Kurtakis* cited to B.C.L.R.]. Here Mr. Madill alleged that Mr. Howard was not the rightful owner of the shares and that he had committed fraudulent acts.

64 Mr. Madill argues that he had no intention of stealing Super H Holdings Ltd. from Mr. Howard. While he could easily have obtained signing authority at the bank and taken all of the funds held by the company, he did not do so. Mr. Madill also maintains that he offered the shares back as soon as Mr. Howard returned from his vacation; however, Mr. Howard at no time asked him to return the shares.

65 Mr. Madill argues the consent injunction did not preclude the parties from operating Super H Holdings Ltd. It was only due to the actions of Mr. Howard, in refusing to return the Maddock software system and failing to cooperate with respect to the operation of the business, that there was a stalemate during the injunction period.

66 Mr. Madill argues that Mr. Howard did not suffer a permanent loss of wages as a result of the action. At the conclusion of the injunction period Mr. Howard was free to repay himself wages for the previous three months. Moreover, Mr. Madill argues that Mr. Howard's evidence of his usual salary does not accord with his income tax returns.

67 Mr. Madill maintains there is no evidence of any damage to Mr. Howard's reputation in the trucking industry. His evidence alone is not sufficient to establish such a claim. Further, Mr. Madill argues that Mr. Howard's reputation was already tarnished by a history of difficulties with licensing authorities, creditors, and the Canada Revenue Agency. Mr. Madill also argues there is no evidence to substantiate Mr. Howard's claims that his health suffered as a result of the events giving rise to this action. In particular, there is no medical evidence to support the claim and Mr. Howard did not call his pastor as a witness.

68 While Mr. Madill acknowledges the court may award damages at large in the circumstances of this case, he argues there are no grounds for a substantial award. In particular, he points to the lack of any permanent loss of

use or deprivation and the lack of evidence that he intentionally tried to sabotage the business. He argues that an award of $10,000 is warranted in these circumstances.

69 In regard to the application for special costs, Mr. Madill argues that the substantial delay in completing this trial was caused solely by Mr. Howard. He failed to disclose relevant documents, ignored the issue of Mr. Flikkema's bankruptcy, and negligently failed to serve Mr. Flikkema with an expert report. He also argues that Mr. Madill's conduct was not egregious and thus does not merit an order for special costs. In this regard, Mr. Madill maintains that while his brain injury in 2004 may adversely affect his recollection of events at times, he has not intentionally misled the court. He also argues that it was Mr. Howard's actions that prevented the company from operating during the injunction period and thus he has failed to mitigate.

70 Mr. Flikkema argues that in hindsight he committed a wrongful act; however, at the time he viewed it as lawful and did not act maliciously to harm Mr. Howard. His sole objective was to be free of any liability as a director of the company and he was unaware at the time that this could be done without a transfer of the shares to Mr. Madill. Mr. Flikkema says he was not involved in the operations of the company during the injunction period and thus cannot be responsible for any further damages caused to Mr. Howard.

DECISION

A. The Rule in Foss v. Harbottle

71 The rule in *Foss v. Harbottle* establishes the well known principle that only a company, and not its shareholders, can sue for wrongs done to the company. There are, however, limited circumstances in which a shareholder may claim damages against a defendant whose actions coincidentally cause harm to the company. Where the shareholder suffers a loss independent of the company's loss and demonstrates there is a legal or equitable relationship or duty between himself and the wrongdoer that is independent of that derived from his interest in the company as a shareholder, the rule in *Foss v. Harbottle* does not apply. This principle is articulated by Satanove J. in *Robak Industries;* upheld on appeal: see *2007 BCCA 61* at para. 38.

72 In this case, Mr. Howard has an independent relationship with both Mr. Flikkema and Mr. Madill. Mr. Flikkema was a trustee of Mr. Howard's shares in Super H Holdings Ltd. and as such owed fiduciary duties to him. Mr. Madill used his position as the operations manager for Super H Holdings Ltd. to convert property owned by Mr. Howard, namely, his shares in the company, to his own use. In doing so, he committed an intentional tort in respect of property owned by Mr. Howard in addition to violating the duty of loyalty he owed to Super H Holdings Ltd. Both Mr. Flikkema's breach of trust and Mr. Madill's conversion of the shares caused damage and loss to Mr. Howard that is independent of the losses suffered by Super H Holdings Ltd.

73 I find the losses that Mr. Howard may potentially claim which are beyond the rule in *Foss v. Harbottle* include the loss of salary during the period of the injunction; loss of the ability to exercise his right to operate Super H Holdings Ltd. by virtue of his ownership of the shares; the expenses incurred in securing other sources of income during the injunction period; the expenses incurred to restore his ownership of the shares; and damages at large for loss of reputation, self-esteem and emotional well-being.

74 Mr. Howard has failed to lead evidence of the expenses incurred to secure alternate sources of income during the injunction period. He has also failed to lead evidence of the expenses he incurred to secure the return of his shares. Thus the court is unable to award damages under these headings. There is, however, evidence of a loss of wages and a loss of the use of the shares; there is also evidence of a loss of reputation, self-esteem and well-being to support an award of damages at large.

B. What is the Measure of Damages for Conversion and Breach of Trust?

75 In *Cash*, Prowse J. (as she then was) reviewed the authorities addressing damages for conversion of corporate shareholdings and concluded at para. 44 that, subject to the duty to mitigate, the measure of damages was "the

value of the shares at the date of conversion, together with all consequential losses which flowed from the conversion, which are not too remote in law." Mr. Howard does not claim a decline in the value of the shares or any permanent loss of the shares. Thus it is only consequential losses that are at issue.

76 In *Bronson*, Goepel J. addresses the principles governing damages for breach of trust at paras. 534 and 535:

> [534] The basic principle of compensation for breach of trust is that a beneficiary is entitled to be compensated for the loss caused by the trustee's breach and that the measure of damages is the actual loss to the estate. The trust should be put in the position it would have been had the breach not occurred: *Waters* at 1215; *Smith Estate (Trustee of) v. Smith Estate,* 2000 BCSC 1842, 37 E.T.R. (2d) 151.
>
> [535] ... The plaintiff beneficiaries are entitled to be placed in the same position so far as possible as if there had been no breach of trust. The beneficiaries' actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight: *Canson Enterprises v. Boughton & Co.,* [1991] 3 S.C.R. 534 at 555.

77 In Mr. Howard's case, I find there is essentially no difference between the damages that may be awarded for breach of trust and conversion. Neither of the defendants has argued that there is any difference in the circumstances of this case. Mr. Flikkema is liable for the actual consequential losses that stem from the breach of trust.

C. Loss of Wages

78 Mr. Howard claims for the loss of his usual salary during the period in which the injunction was in place. It is apparent that the parties refused to authorize any payment of wages or salary during the period of the injunction. Mr. Howard testified that in 2005 he received a salary of $8,500 per month, net of income taxes. While Mr. Madill argues Mr. Howard's tax returns for 2005 do not reflect this monthly salary, he deposed that the corporate records he examined indicated that as of mid-November 2005, Mr. Howard had paid himself approximately $96,600 in salary in addition to other payments for personal expenses. This sum correlates with Mr. Howard's evidence concerning his monthly salary. Thus I reject any suggestion that the amount of salary paid to Mr. Howard prior to the events giving rise to this action is uncertain.

79 Mr. Madill also argues that Mr. Howard did not suffer any permanent loss of salary because, once the shares were returned and his ownership of the company restored, he was free to reimburse himself for the lost wages. While this argument is initially appealing, it does not take into account the fact that Super H Holdings Ltd. did not earn income during the injunction period. Thus past wages would have to come from retained earnings or future profits made by the company. Moreover, there is no evidence that Mr. Howard reimbursed himself for this past wage loss or that Super H Holdings Ltd. was financially able to make up this loss from profits made either before or after the injunction period. Thus, subject to any duty to mitigate, I find that Mr. Howard is entitled to damages for lost salary in the amount of $23,023, grossed up for income taxes.

D. Damages for Loss of Reputation, Emotional Distress, and Loss of Self-Esteem

80 General damages may be awarded for loss of reputation, injured feelings, emotional distress and loss of self-esteem where the defendant has committed an intentional tort. While it does not appear that the question of damages at large for the tort of conversion has been squarely addressed in any Canadian authority, there are many examples of analogous situations where the court has not hesitated to award compensatory damages for this type of non-pecuniary loss. In *Polar Ice Express*, the Alberta Court of Queen's Bench awarded $50,000 to the plaintiff for loss of business reputation and injured feelings as a consequence of the defendant's intentional interference with economic relations. In *Kotch v. Casino St. Albert Inc.,* 2005 ABQB 649, 142 A.C.W.S. (3d) 199, Greckol J. held at para. 200 that damages for the tort of intentional interference with economic relations should reflect the harm caused to the plaintiffs professionally, socially and financially so as to restore them to the position they would have been had the wrong not been committed.

81 In *Uni-Jet*, the Manitoba Court of Appeal awarded damages at large in the amount of $30,000 for loss of self-esteem, wellbeing and reputation in a case where the defendant committed the intentional tort of abuse of public office. In that case, Kroft J.A., writing for the court, says at paras. 65-66:

> [65] My initial focus will be on the individual plaintiff Baziuk. How is he personally to be compensated for the damage to his feelings, self-esteem, reputation and emotional wellbeing which were caused by the misfeasance committed against him?
>
> [66] As a principle, it can be safely stated that the general damages awarded for intentional torts resulting in this kind of injury are damages "at large." Unlike damages caused by negligence, precise measurement or limits should not be expected.

82 In *Timberland Forest Products (1996) Ltd. v. Pattar Cedar Products Ltd.*, 2008 BCSC 641, 167 A.C.W.S. (3d) 796, Meiklem J. held at paras. 65-66 that the defendant had committed the tort of conversion, but refused to award the corporate plaintiff damages for intangible loss such as emotional distress based on the premise that a company cannot suffer "hurt feelings". However, he went on to award punitive damages for the high-handed conduct that caused turmoil to the principals of the plaintiff corporation during and after the unlawful interference with the plaintiff's property rights.

83 In *Wolf v. Advance Fur Dressers Ltd.,* 2005 BCSC 1097, 141 A.C.W.S. (3d) 426, Blair J., following the authority of *Jarvis v. Swans Tours Ltd.,* [1972] 3 W.L.R. 954, 1 All E.R. 71 (C.A.), concluded that damages for mental distress can be recovered in an action for breach of contract where peace of mind was the very matter contracted for. In addition to the breach of contract, Blair J. found that the defendants had converted monies belonging to the plaintiffs and this led to an award of punitive damages.

84 In *Climans v. Toronto Dominion Bank*, [1987] O.J. No. 1454 (Ont. Dist. Ct.) Gotlib D.C.J. found that the defendant bank had unlawfully converted monies of the plaintiff. While he awarded nominal damages for conversion and concluded the plaintiff had failed to prove mental distress stemming from the wrongful actions of the defendant, it is apparent from the reasoning that such damages could in theory be recovered for the tort of conversion.

85 Lastly, general damages compensating for hurt feelings and mental distress have also been awarded outside of Canada. In *Jamieson's Tow & Salvage Ltd. v. Murray* (1983), [1984] 2 N.Z.L.R. 144 (H.C.), a driver brought a successful action in trespass to chattels, conversion and negligence against a towing company for the towing of his car and the resulting damage to the vehicle. In addition to these claims, the driver was awarded general damages for the inconvenience to the vehicle owners in having it repaired, as well as for the "upset and distress" caused to the driver in having the car towed despite his protestations. Likewise, in *Graham v. Voight* (1989), 89 A.C.T.R. 11 (S.C.), the plaintiff brought a successful claim for conversion of his stamp collection and, in addition to being awarded the value of the stamp collection, the court awarded him general damages for distress at the loss of his hobby. Relying on *Jarvis v. Swans Tours Ltd.*, the court reasoned that if general damages were applicable in the context of breach of contract, there was no reason not to apply this general approach to damages in tort.

86 Damages for mental and emotional distress have also been awarded for a breach of fiduciary duty in a trust relationship where the underlying premise is that the tort-feasor is liable for all losses occasioned by the breach: *MacDonald* at 71-72.

87 In my view, recovery for mental distress, loss of reputation and self-esteem as a result of an unlawful conversion is consistent with the general principles underlying damage awards for intentional torts. Compensatory damages in tort are meant to reimburse a victim of wrongdoing for any losses suffered, both pecuniary and non-pecuniary. There is also support for the proposition that responsibility for harmful consequences is greater in the case of an intentional wrong than in an action based on negligence. In *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21, 41 O.R. (3d) 222 (C.A.), the Ontario Court of Appeal stated the following at para. 46:

[46] I refer also to *Prosser and Keeton on the Law of Torts*, 5th ed. (1984) at pp. 76-77 and to the *Second Restatement of the Law - Torts,* section 435(b). The comment to the section in the *Restatement* includes, at p. 456, the following:

> The rule stated in this Section affects only the measure of damages for a tort, but is based on the principle ... that responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault. *The rule applies not merely to physical harm* to the person but also harm to the feelings, to reputation, and *to business*. Its principle applies not only to permit a jury to award punitive damages but also to cause an intentionally wrongful tort feasor to respond for compensatory damages in cases where, were he merely negligent, he would not be required to pay damages. [Emphasis added by Ont. C.A.]

88 Thus I am satisfied the court has jurisdiction to award damages for loss of reputation, self-esteem, emotional distress and hurt feelings to Mr. Howard as a consequence of Mr. Madill's conversion of the shares and Mr. Flikkema's breach of trust.

89 An award under this heading is generally regarded as damages at large. An accurate summary of the law with respect to the assessment of damages at large, and the circumstances in which such an award may be made, is contained in *Uni-Jet* at paras. 66 to 73. I summarize these principles as follows:

1. Damages other than for pecuniary loss are "damages at large" and generally include compensation for loss of reputation, injured feelings, bad or good conduct by either party, or punishment.
2. Damages at large are compensatory for loss that can be foreseen but cannot be readily quantified.
3. Damages at large are a matter of discretion for the trial judge and are more a "matter of impression and not addition."
4. Where damages at large are imposed for intentional torts, the assessment of damages provides an opportunity to condemn flagrant abuses of the legal process.
5. Damages at large involve a consideration of many factors including, the position, status and prior reputation of the plaintiff and the motives of the defendants as well as their knowledge of the risk of harm.

90 Turning to the circumstances of this case, I am satisfied that the wrongful and intentional acts of the defendants caused Mr. Howard to suffer emotional and mental distress while the issue of his ownership of the shares was in dispute. Upon return from his vacation, Mr. Howard was faced with a mutiny by his most trusted and valued employee. Mr. Madill's actions threatened Mr. Howard's ownership of a business that he had built up over a period of more than thirty years. Not only did Mr. Madill claim beneficial ownership of the shares in Super H Holdings Ltd., but he also took steps to cement his control over the business and prevent Mr. Howard from exercising any authority over its operations. In particular, Mr. Madill immediately changed the locks on the business premises and the yard and took possession of the office equipment owned by Super H Holdings Ltd. as well as its corporate and client records. In addition, Mr. Madill attempted to have Mr. Howard removed as a signing officer for the company's accounts at the credit union.

91 While Mr. Howard's situation improved temporarily by the imposition of an *ex parte* injunction, this momentary reprieve gave way to an interlocutory order that required Mr. Howard to surrender exclusive control over his business to a regime of mutual decision-making with Mr. Madill. For 84 days Mr. Howard was forced to carry on business with a person who was essentially trying to "steal" his livelihood. There was obviously a lack of trust between the parties and a state of open hostility prevailed during the injunction period. Working in this atmosphere was extremely stressful for Mr. Howard; he could not sleep at night and sought medication to calm his nerves and help him rest. Mr. Howard also sought counselling from his pastor.

92 In addition to the obvious difficulties in operating Super H Holdings Ltd. in these circumstances, Mr. Howard suffered emotional distress because he could not contact customers to explain what was happening to the business. The offices of Super H Holdings Ltd. were closed and no one was answering the telephone. Customers, suppliers, and creditors were left to wonder what had happened to Mr. Howard and his business. The injunction precluded Mr. Howard from representing to customers that he continued to be the owner of the company. Thus he was unable to contact them during the injunction period to explain why no one was answering their calls to Super H Holdings Ltd. This understandably led Mr. Howard to believe that many of his customers would go elsewhere with their business. While Mr. Madill argued the injunction did not preclude Mr. Howard from contacting customers, it is difficult to imagine what he could have said to them that would have assuaged their concerns about Super H Holdings Ltd. and been consistent with the injunction. Indeed, Mr. Madill's affidavits contain allegations that Mr. Howard contacted customers in violation of the order.

93 I am also satisfied that Mr. Howard suffered a loss of self esteem while the injunction continued to interfere with his business operations and as a result of the allegations made by Mr. Madill during the Rule 18A proceedings. Mr. Madill's affidavits contained many allegations of serious wrongdoing on the part of Mr. Howard that were ultimately dismissed by Groves J. as unsupportable. In particular, Mr. Madill accused Mr. Howard of engaging in fraudulent business practices. In addition, Mr. Howard was forced to seek loans from friends and family members in the most embarrassing circumstances. How could an experienced businessman like Mr. Howard have let an employee essentially steal his company? All of these events caused Mr. Howard to lose respect for himself.

94 In addition, I am satisfied that it is reasonable to infer from the evidence led by Mr. Howard that he suffered a loss of business reputation as a result of the defendants' actions. While there is no direct evidence of a loss of customers or a loss of respect for Mr. Howard among the creditors, suppliers, and drivers doing business with Super H Holdings Ltd., I find it is reasonable to infer from the circumstances that some loss of reputation occurred as a result of the hiatus in business for 84 days. Mr. Howard was synonymous with Super H Holdings Ltd. He was the sole owner and directing mind of the business and personally dealt with all of his customers. Thus when the company essentially disappeared for three months, it would have been natural for the customers to associate Mr. Howard with the failure to meet their contractual needs. Further, Mr. Howard testified that, due to the inability of the parties to operate Super H Holdings Ltd. by mutual agreement, cheques that he had signed to pay the company's creditors were not honoured. It is reasonable to infer that creditors would blame Mr. Howard for the dishonoured cheques in light of his all-encompassing role in the company's operations. Mr. Howard also testified that it took several months of hard work to rebuild the business to the pre-injunction level. This evidence supports a loss of business reputation as a result of the defendants' actions.

95 Mr. Madill argues that Mr. Howard's business reputation was tarnished long before the events giving rise to these proceedings. In evidence, Mr. Madill referred to Mr. Howard's failure to pay creditors on time, his schemes to circumvent the requirements imposed by the various licensing authorities and his deliberate malfeasance in respect of the filing of income tax returns and the payment of taxes. Overall, I found Mr. Madill's evidence lacked credibility. Not only did he inconsistently assert difficulties with his recollection of the events due to a head injury when it suited his purposes, he also deliberately misled the court in an effort to minimize the gravity of his own actions. He was not a forthright witness and much of his evidence at trial was inconsistent with the affidavits sworn in the Rule 18A proceedings. In my view, it would be unsafe to prefer Mr. Madill's evidence over Mr. Howard's testimony in these circumstances.

96 While Mr. Howard may have had a less than stellar reputation among the regulatory and licensing authorities, it is apparent that Super H Holdings Ltd. was a thriving business. Mr. Howard was clearly making a good living up until the events giving rise to this action. He withdrew about $385,000 from the company in 2005 according to Mr. Madill's affidavit evidence. Similarly, while Mr. Howard may have had short term credit issues, he immediately reimbursed Mr. and Ms. Madill for any payments made to creditors or to other third parties with their credit cards. Thus it is reasonable to infer that Mr. Howard's business reputation with customers and suppliers remained strong in the period preceding the takeover by Mr. Madill.

97 Lastly, I am satisfied that the defendants knew or ought to have known that their actions would cause Mr. Howard emotional distress, as well as a loss of business reputation and self-esteem. Mr. Flikkema ought to have known that his actions would harm Mr. Howard. He ultimately admitted what he had done was wrong and regretted his actions. While Mr. Madill did not acknowledge any wrongdoing, I find it must have been foreseeable that his actions, in taking possession of the shares and locking Mr. Howard out of the business, would cause him substantial emotional stress and lead to a loss of reputation. Further, while Mr. Flikkema's actions were obviously motivated by a desire to protect his own financial interests, Mr. Madill's motives were either to obtain sole ownership of Mr. Howard's business without any consideration, or to use the shares to obtain concessions from Mr. Howard with respect to how the business would be operated in future and how he would be remunerated.

98 Weighing these factors as a whole, and bearing in mind the relatively short time in which Mr. Howard was subjected to this emotional distress, loss of self-esteem and loss of reputation, I find an award of damages in the amount of $40,000 is appropriate. Damages at large are not a precise calculation. Instead, this amount reflects my estimation of the harm caused to Mr. Howard by the deliberate and high handed conduct of the defendants in light of all of the circumstances.

E. Mitigation

99 The onus rests with the defendants to show that Mr. Howard failed to mitigate his loss. There is no doubt that Mr. Howard acted immediately to protect his legal rights. He first sought an *ex parte* injunction to restrain Mr. Madill from interfering with his business within days of becoming aware of the share transfer. After the mutual injunction order, Mr. Howard diligently proceeded to have the matter determined in a Rule 18A proceeding.

100 The issue is whether Mr. Howard's actions during the injunction period were such that he has failed to mitigate his loss. Mr. Madill argues that Mr. Howard's refusal to return the Maddock computer system made it impossible to operate the business during the injunction period. Further, Mr. Madill argues that while he was cooperative during this period, it was Mr. Howard who obstructed the continued operation of the business.

101 I am not satisfied that the defendants have proven on a balance of probabilities that Mr. Howard failed to mitigate his loss by obstructing the continued operation of Super H Holdings Ltd. while the terms of the injunction governed the parties' relationship. In my view, the terms of the injunction created a situation in which it was nearly impossible for the parties to carry on business.

102 The injunction precluded either party from attending the offices of the company without the consent of the other. Mr. Madill had keys to the office and the yard and at no time did he offer to provide Mr. Howard with a set of keys. It was also clear from Mr. Madill's evidence that he did not approve of Mr. Howard attending the offices alone and without supervision. Thus any business that was conducted during the injunction period was carried out at the accountant's offices.

103 In addition, the terms of the injunction prohibited the parties from disposing of any assets of the company without the consent of the other and from representing themselves as the owner of Super H Holdings Ltd. The parties interpreted these prohibitions as precluding any business decision that was not agreeable to both sides. Neither party could pay a creditor, enter into a contract with a customer, or pay a driver without the express permission of the other party. Given the hostility between the parties it was a foregone conclusion that decision-making would be tortuous and slow, if it was possible at all. There was a complete lack of trust between the parties.

104 Further, there is no cogent evidence that the failure to come to agreements with respect to the business was one sided. Mr. Howard refused to consent to certain payments requested by Mr. Madill and Mr. Madill rejected many of Mr. Howard's requests.

105 I am also not satisfied that Mr. Howard's decision to retain the Maddock computer system effectively meant the business could not operate. First, it is apparent that because of the restrictive terms of the injunction, Super H

Holdings Ltd. would at best be in a holding pattern; there could be no new business due to the closure of the yard and its offices. No trucks were permitted in or out of the yard while the injunction remained in force. The parties could not agree on payments to existing creditors let alone come to terms on how to approach customers in this tense period of time. Thus even if the computer system had been restored, it is highly unlikely that the company could have carried on business as usual.

106 Second, I am not satisfied that the loss of the Maddock system precluded any continuation of business by Super H Holdings Ltd. This record keeping system would obviously have made it easier to keep track of contracts and customers; however, there is no evidence that this record keeping function could not have been done by hand for a short period of time. Super H Holdings Ltd. used a non-computerized record keeping function before the Maddock system was installed.

107 Lastly, I find it was not unreasonable for Mr. Howard to retain the computer software during the period in which the ownership of the company was in dispute. This system contained a record of every customer that Mr. Howard had worked hard to acquire over his thirty years in business. Mr. Madill had shown that he was untrustworthy; he had unilaterally taken possession of the shares in Super H Holdings Ltd. and claimed beneficial ownership; removed property belonging to the company from the offices; locked Mr. Howard out of the offices and the yard; and attempted to have Mr. Howard removed as a signing officer for the company's credit union accounts. In these circumstances, I find it was reasonable for Mr. Howard to believe that, if given access to the computer system, Mr. Madill would likely use the stored data to secure Mr. Howard's customers for himself. Retention of the Maddock system was not a violation of the injunction's terms and Mr. Madill did not seek an order for its return.

108 Mr. Madill also argues that Mr. Howard failed to mitigate by refusing to accept his offer to return the shares and by failing to request that the shares be returned to him. Addressing the latter argument, it is preposterous to suggest that the action commenced by Mr. Howard was not a demand for the immediate return of beneficial and legal title to the shares. As to an offer by Mr. Madill to return the shares, I find there is no evidence of an unconditional offer made at any time prior to the judgment of Groves J. and the order requiring Mr. Madill to transfer the shares to Mr. Howard. Mr. Madill's evidence concerning offers made on a without prejudice basis cannot be given any weight as he refused to waive privilege. Moreover, Mr. Madill admitted that any offers he made to Mr. Howard were subject to a condition that he receive some monetary compensation.

109 Accordingly, in all of the circumstances, I find the defendants have not proven that Mr. Howard has failed to mitigate his loss.

F. Special Costs

110 There two issues to address in respect of Mr. Howard's claim for special costs: (1) what are the circumstances in which such an order can be made? and (2) what is the nature of the misconduct that gives rise to an order for special costs?

111 Turning to the first question, there is some controversy about whether special costs may be awarded for the conduct of a party leading to the litigation or whether it is solely misconduct during the proceedings that gives rise to a claim for special costs. In *Garcia* at para. 12, the Court of Appeal adopts the description of the circumstances in which special costs may be awarded set out in *Stiles v. British Columbia (Workers' Compensation Board*) (1989), 38 B.C.L.R. (2d) 307 at 311, 39 C.P.C. (2d) 74 (C.A.) by Lambert J.A. as follows:

> ... solicitor and client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.

112 While Lambert J.A. appears to conclude that conduct prior to and during litigation may attract an order of special costs, subsequent authorities have taken a more restrictive view of when such costs may be awarded. In *Nygard International Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 at 106, 21 A.C.W.S. (3d) 70 (C.A.), Macdonald

J.A. says:

> ... Our general rule is that costs on a solicitor-and-client scale are given only with respect to or in situations of misbehaviour in the conduct of the litigation.

113 The conflicting authorities addressing this issue were reviewed by Edwards J. in *Golden Capital Securities.* Edwards J. concluded that generally special costs are only awarded for misconduct during the litigation unless the party's conduct involves one of the limited exceptions to this general rule. One such exception is misconduct in the nature of fraud or unconscionability giving rise to the litigation: *Golden Capital Securities* at para. 166. In addition, Edwards J. quotes with approval the following passage from *Sun Life Assurance Co. of Canada v. Ritchie*, 2000 BCCA 231, 184 D.L.R. (4th) 635 at para. 54:

> [54] Special costs are usually awarded only in relation to misconduct in the course of the litigation itself. However, there may arise circumstances where special costs may be awarded because of reprehensible conduct giving rise to the litigation, particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct.

114 Turning to the second issue, the nature of the misconduct giving rise to special costs has been described as "reprehensible, scandalous, or outrageous." In further explanation of these terms, Lambert J.A. says in *Garcia* at para. 17:

> [17] ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, *[1993] B.C.J. No. 2909*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

115 An unproven allegation of criminal misconduct or fraud against a party can support a finding of reprehensible conduct: *Kurtakis* at para. 9.

116 Turning to the facts of this case, during the Rule 18A proceedings Mr. Madill made allegations of misconduct on the part of Mr. Howard, including allegations of fraud. He argued that the transfer of the shares to Mr. Flikkema was intended to defraud creditors and the regulatory authorities. As a consequence, Mr. Madill argued Mr. Howard could not maintain an action against him for return of the shares. Groves J. dismissed this allegation concluding there was no evidence that Mr. Howard committed a fraudulent act in transferring the shares in trust to Mr. Flikkema. Further, he concluded that it was Mr. Madill's actions that were fraudulent.

117 Despite the findings of Groves J., Mr. Madill continued to allege fraudulent acts and other serious misconduct by Mr. Howard during the proceedings before me as justification for his decision to orchestrate a transfer of the shares into his name. Mr. Howard denied these allegations and I rejected Mr. Madill's evidence in light of the substantial inconsistencies between his affidavit evidence and his *viva voce* testimony. Moreover, Mr. Madill clearly misled the court when he testified that his actions were motivated by a desire to protect the company's interests at a time when it was being threatened with an investigation by the Canada Revenue Agency. His motives were obviously self-serving. Mr. Madill acted to protect the financial interest he asserted in Super H Holdings Ltd.

118 There is no doubt that Mr. Madill's actions in securing possession of the shares and the steps he took to gain control over Super H Holdings Ltd. were reprehensible. Without colour of right, he fraudulently assumed beneficial ownership of Mr. Howard's property. Knowing that he had no legal right to retain the shares, he changed the locks on the premises of the company and attempted to remove Mr. Howard as the corporate signing authority. Lastly, Mr. Madill forced Mr. Howard to commence this action to secure the return of his shares. For almost three months Mr. Madill kept up the pretence that he had some legal right to the beneficial ownership of the shares while the parties struggled unsuccessfully to manage the business and keep it operating.

119 In my view, this is clearly a case where special costs should be awarded. Mr. Madill's conduct, both leading to the litigation and during the proceedings, is worthy of rebuke by the court. I am unable to accept Mr. Madill's argument that the delay caused by Mr. Howard between the date of judgement and the resumption of the trial to assess damages should relieve him from having to pay special costs. In my view, there is no connection between this delay and Mr. Madill's misconduct prior to and during the litigation. I thus award special costs against Mr. Madill.

120 Mr. Flikkema's conduct is of a different nature. There is no evidence that during the litigation he made allegations of fraud against Mr. Howard or otherwise made unfounded allegations of criminal or quasi-criminal misconduct. Moreover, during the proceedings before me, Mr. Flikkema expressed regret for his actions and the harm he caused Mr. Howard and his family. He accepted the decision of Groves J. and cooperated fully in the assessment of damages. While Mr. Flikkema committed a serious breach of trust when he transferred the shares to Mr. Howard, his conduct overall cannot be regarded as "reprehensible" as that term has been interpreted by the authorities cited above. Thus Mr. Howard is entitled to costs against Mr. Flikkema based on scale B.

CONCLUSION

121 The defendants are jointly and severally liable to Mr. Howard for damages at large in the amount of $40,000 and damages for loss of salary in the amount of $23,023, grossed up for taxes. Mr. Howard is entitled to prejudgment interest on the award for loss of salary. Mr. Howard is awarded one half of his special costs against Mr. Madill and one half of his costs against Mr. Flikkema based on scale B. Mr. Madill is entitled to the costs of the application before Joyce J. on January 6, 2006 at Scale A.

C.J. BRUCE J.

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