

CANADA / JUDGMENT

Ansari v. Messier

2011 BCSC 655

COURT

Supreme Court of British Columbia

DECIDED

19 May 2011

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2011 BCSC 655 Ansari v. Messier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ansari v. Messier,

2011 BCSC 655

Date: 20110519

Docket: S61015

Registry: New Westminster

Between:

Zia Ansari & Yasmeen Ansari

Plaintiffs

And

Rene Lawrence Messier

and Arthur Wayne Skagen

Defendants

And

Arthur Wayne Skagen

Third Party

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Plaintiffs:

Thomas Harding

The Defendant, Rene Lawrence Messier:

Appeared on his own behalf

Counsel for Arthur Wayne Skagen:

Patrice Abrioux

& Timothy Wong

Place and Date of Trial:

New Westminster, B.C.

January 12-16, 19-23, 26-30,

August 24-28, September 1-4, 8-11,

and December 14-18, 2009

Place and Date of Judgment:

New Westminster, B.C.

May 19, 2011

BRIEF SUMMARY OF THE CLAIMS

- [1] Until May 4, 2000, the defendant Rene Messier was the owner of all of the shares of Connaissance Marketing Research Systems Inc. ("CMR"). CMR operated a Maaco-franchised painting, repair and auto body shop in Delta, British Columbia.
- [2] On May 4, 2000, Zia Ansari and his wife Yasmeen Ansari (collectively referred to in these Reasons as "the Ansaris") purchased the shares of CMR from Mr. Messier. Arthur Skagen was a practicing lawyer at the time and he acted on behalf of the Ansaris in relation to the share purchase transaction. He prepared the closing documents that were executed by the parties on May 4, 2000, including a Share Purchase Agreement ("the SPA") and an Addendum to the SPA ("the Addendum").
- [3] In this action, the Ansaris allege that prior to the closing date Mr. Messier made representations to the Ansaris about CMR's financial situation that were false. In particular, the Ansaris allege that Mr. Messier provided them with a document - referred to by the parties as "the Budget" and marked Exhibit 3 at trial - on which they say they relied in deciding to agree to purchase the shares and enter into the SPA. The plaintiffs allege that the information in the Budget was false and that Mr. Messier intentionally deceived them. The plaintiffs also allege that Mr. Messier breached certain warranties included in the SPA. They seek rescission of the Share Purchase Agreement and a return to them of the purchase

monies paid to Mr. Messier; or in the alternative, damages.

- [4] Mr. Messier has counterclaimed against the Ansaris for the balance owing on a \$90,000 vendor's take-back loan ("the take-back loan") and for \$50,000 he paid to CMR's bank, the Canadian Imperial Bank of Commerce ("CIBC") to satisfy a claim against him on his personal guarantee of CMR's operating line of credit ("the LOC").
- [5] As against Mr. Skagen, the plaintiffs have alleged breach of contract and negligence. They also allege that in agreeing to act on behalf of the Ansaris, Mr. Skagen placed himself in a conflict of interest arising from his past and ongoing business dealings with Mr. Messier.
- [6] Mr. Messier has brought Third Party proceedings against Mr. Skagen. He was given leave to amend his Third Party Notice during the trial. He alleges that Mr. Skagen provided legal advice to him about his guarantee of the LOC and that the advice provided was negligent or in breach of a fiduciary duty owed by Mr. Skagen. Mr. Messier alleges that Mr. Skagen advised Mr. Messier to leave his guarantee in place so that the share sale would proceed and Mr. Messier would have funds available to invest in a venture referred to by the parties as "Modern Groove Entertainment ("MG)". Mr. Messier also alleges that Mr. Skagen breached an agreement to compensate Mr. Messier by paying to him \$75,000, the sum Mr. Messier had invested in shares of MG.
- [7] Mr. Messier denies having made false representations to the Ansaris in the form of the Budget and denies that the Ansaris relied on the Budget in agreeing to enter into the SPA. Mr. Messier also denies the breach of any warranty in the SPA. Mr. Messier says that if he did breach any of his obligations, the Ansaris failed to mitigate their damages and by their own volition or negligence caused or contributed to their loss.
- [8] Mr. Skagen says that he fulfilled the terms of his oral retainer contract with the Ansaris and provided legal services to them that met the standard required of a reasonably skilled and competent solicitor. Like Mr. Messier, Mr. Skagen says that the Ansaris failed to mitigate their damages by declining to accept an offer from Mr. Messier to forfeit a \$50,000 deposit and thereafter be released from the contract to purchase the shares. Mr. Skagen also alleges that by their actions, the Ansaris intentionally or negligently caused the business of CMR to fail and thereby caused or contributed to their loss.
- [9] Mr. Skagen denies having provided legal advice to Mr. Messier in relation to the SPA and in particular, denies having advised Mr. Messier to leave in place a personal guarantee of CMR's LOC. Mr. Skagen denies that he gave advice to Mr. Messier to proceed with the transaction with an ulterior motive relating to a possible investment by Mr. Messier in MG. Mr. Skagen denies having agreed to repay to Mr. Messier any part of Mr. Messier's investment in MG. He says that if Mr. Messier suffered any loss, it was caused or contributed to by his own negligence.

CREDIBILITY

- [10] In this case, the parties have provided conflicting testimony about many events. It has been necessary to resolve at least some of these conflicts in order to make findings of fact on issues raised by the pleadings. Resolving the conflicts makes it necessary to assess the credibility of the respective parties; and as the trial progressed, problems with the credibility of all parties became evident. Each party gave lengthy direct testimony and was thoroughly cross-examined, providing the court with the opportunity to see, hear and assess the witnesses. There are also documents in evidence that assist in assessing the reliability and consistency of the oral testimony.
- [11] Nearly nine years had passed between the events about which the parties gave evidence and the start of this trial. Such a long passage of time would inevitably affect the ability of witnesses to recall events with precision; even if as in this case, they were aware at the time, or very shortly thereafter, that the events would be the subject of litigation.
- [12] Mr. and Mrs. Ansari demonstrated an inability to recall many relevant events as well as selective recall. Both gave vague or unresponsive testimony in relation to many matters they might be expected to recall with some clarity, while purporting to recall in exacting detail a few events that they perceived to be helpful to their claim.
- [13] Mr. Ansari claimed, when confronted with apparent inconsistencies between his evidence at trial and earlier testimony on his examination for discovery, that his brain is not in compartments; that he has trouble distinguishing among things he knew in 2000, or 2003 or 2007; and that he has difficulty remembering dates. He testified that he could not remember things that had happened in 1999 and 2000 because it was so long ago. Mrs. Ansari's explanation for different versions of events given on examination for discovery at trial was simply that she recalled different things at different times.
- [14] The plaintiffs' ability to recall was not assisted by the manner in which their evidence was elicited in direct examination. In the case of Mr. Ansari, for example, direct examination focused his attention on an Agreement of Purchase and Sale of a Business dated March 27, 2000 ("the second Agreement") as if it was the first contract between Mr. Ansari and Mr. Messier, even though there had been an earlier Agreement of Purchase and Sale of a Business ("the first Agreement") signed on March 18, 2000. Mr. Ansari was not asked in chief about many matters relevant to the issues in the pleadings. It was not until Mr. Ansari was cross-examined that he was referred to numerous relevant documents he had signed between March 17 and 27, and after March 27 but prior to April 12, 2000.
- [15] The Statement of Claim in these proceedings was filed on June 28, 2000, less than two months after Mr. and Mrs. Ansari signed the closing documents to complete their purchase of the shares of CMR. In the Statement of Claim the plaintiffs alleged that "On or about 01 February ... they retained Mr. Skagen."

- [16] It is difficult to believe that Mr. and Mrs. Ansari could have believed that assertion to be true at the time the Statement of Claim was filed. The evidence establishes beyond doubt that Mr. Ansari had never even met Mr. Skagen until near the end of March 2000 and that Mr. Skagen was not retained by Mr. and Mrs. Ansari until the second week of April 2000.
- [17] In the Statement of Claim, the Ansaris also alleged that at the time they retained Mr. Skagen they had had only preliminary discussions with Mr. Messier about buying the CMR shares. There is undisputed evidence that before Mr. and Mrs. Ansari hired Mr. Skagen, Mr. Ansari had already signed the first Agreement and the second Agreement; and had already removed most of the "subject-to" clauses included for his benefit.
- [18] Counsel for Mr. Skagen attached two appendices to his written closing submission setting out examples of apparent inconsistencies in the testimony of Mr. and Mrs. Ansari and Mr. Messier - inconsistencies in testimony given at trial and between testimony given at trial and their examination for discovery evidence. I do not propose to reproduce the lengthy list of examples or to comment on all of them. I am satisfied, however, that with few exceptions, the examples provided by counsel have validity.
- [19] Mr. Ansari testified that he was not given any CMR financial statements until after he paid a \$50,000 deposit. Later in his testimony, he conceded that the deposit was not paid until April 12, 2000, almost a month after he had received copies of CMR's financial statements.
- [20] This is only one of the many instances in which the testimony of one or both of the Ansaris was contradicted by documentary evidence; was internally inconsistent; or was inherently improbable. Some of their testimony was contradicted by that of Mr. Morrison, a lawyer from whom they sought advice prior to completing the purchase of the shares of CMR. Mr. Morrison was called to testify in the plaintiffs' case. Mr. Morrison struck me as a careful witness with no motive to deceive.
- [21] I am satisfied that Mr. and Mrs. Ansari deliberately refrained from complying with their obligation to produce all relevant documents in their possession or control prior to trial. During trial, they produced for the first time numerous documents without an adequate explanation for the failure to comply with their obligations to make disclosure prior to trial. I am satisfied that the Ansaris' omission to produce the documents earlier was remedied at trial only because the plaintiffs came to believe that the documents would assist them; in particular, would assist them in an attempt to provide a factual foundation for the evidence of an accounting witness on whose opinions they hoped to rely.
- [22] I am satisfied that Mr. Ansari provided false or intentionally misleading information about the plaintiffs' financial situation in a financial statement he provided to CIBC; and in a financial statement he and Mrs. Ansari both signed in support of their application to be approved as Maaco franchisees. Mr. Ansari agreed in cross-examination that he had put false information in his financial statement because he wanted to make the application look good.

- [23] Mr. Ansari swore an affidavit in support of an application to this court for indigent status in which he stated that the couple had paid all of their money to Mr. Messier for the purchase of the CMR shares in May 2000. This evidence contradicts the information in the financial statements referred to above. In addition, Mr. Ansari agreed in cross-examination that after he and Mrs. Ansari closed the doors of CMR's business in September 2000 he spent \$10,000 on a pilot's training course, and the family continued to live off their savings for a time. Mr. Ansari said in cross-examination that he had between \$15,000 and \$30,000 left after the business was abandoned.
- [24] In general, I found Mr. and Mrs. Ansari to be unreliable witnesses both by reason of poor recall - particularly in the case of Mr. Ansari; and a demonstrated willingness to distort and exaggerate their testimony.
- [25] There were also problems with Mr. Messier's credibility. Mr. Messier testified about business practices - altering the names of customers whose accounts payable were long overdue in order to "re-age" the accounts in reports provided to CMR's bank - that he claimed to be legitimate but which I am satisfied he knew to be a questionable practice.
- [26] Mr. Messier changed his testimony during the trial when problems in his earlier version of events were demonstrated in cross-examination. One example relates to his day-book and whether the entries in it were made contemporaneously or after the fact. Although he initially testified that all of the entries had been made at the time the events occurred, it became obvious that that was not so; and eventually he agreed that some entries were likely made weeks or even months after the events recorded.
- [27] When confronted with inconsistencies or errors in his testimony Mr. Messier sometimes resorted to attempts to distract attention from his behaviour; or appealed for sympathy from the court.
- [28] Mr. Messier testified that he had been deliberately evasive when testifying under oath at his first examination for discovery and that some of the answers and claimed that he had given incomplete or false answers to some of the questions asked on discovery. There were significant discrepancies between answers given by Mr. Messier on his examinations for discovery; and testimony he gave at trial. The fact that Mr. Messier was prepared to lie under oath, and then attempt to justify his deceit by blaming his actions on another, must cause the court to scrutinize his testimony very carefully.
- [29] Mr. Skagen's testimony revealed fewer inconsistencies and a greater degree of inherent probability than that of the Ansaris or Mr. Messier. This may in part be because he readily agreed he had limited recall of many of his interactions with the Ansaris in 2000 and by time of trial was relying on the documents he prepared at the time; his appointment book; his law firm's statement of account; and his recall of his usual practice when handling similar transactions. Mr. Skagen could recall more clearly some of his dealings with Mr. Messier.

- [30] However, there were matters made known to the court about events subsequent to the transaction in issue that must make the court cautious about accepting Mr. Skagen's testimony, in particular events that led to Mr. Skagen losing his status as a lawyer in British Columbia.
- [31] Mr. Skagen was called to the British Columbia bar in 1989. In March 2003, the Law Society of British Columbia commenced an investigation into Mr. Skagen's practice. A citation alleging unprofessional conduct was issued in September 2003 and a second citation followed in December 2003. Mr. Skagen stopped practising law on September 8, 2003 when he provided an undertaking to the Law Society of British Columbia to refrain from practicing pending disposition of the citations.
- [32] On April 6, 2005, Mr. Skagen provided an undertaking to the Law Society never to apply for reinstatement. He signed an Agreed Statement of Facts in which he admitted misappropriation of client trust funds. The Agreed Statement of Facts does not specifically refer to Mr. Skagen stealing clients' money and Mr. Skagen denied having done so in testimony at this trial. He testified that he used funds held in trust for some clients for the benefit of other clients. However, in agreeing to compensate clients whose trust funds had been misappropriated by Mr. Skagen, the Law Society's Special Compensation Committee found there had been an intention to deceive on the part of Mr. Skagen.
- [33] Mr. Skagen testified that he had been suffering from depression resulting from significant financial and professional reverses in his life and I accept that testimony. However, the rest of the explanation Mr. Skagen offered for his conduct was unsatisfactory. He claimed a burglary at his office and the theft of a large amount of cash belonging to an underworld client from his office safe led him to resort to the misappropriation of trust funds. However, at least some of the misappropriations referred to in the Law Society Agreed Statements of Facts pre-dated the date on which Mr. Skagen testified the burglary occurred.
- [34] Given the unreliability of the testimony of Mr. and Mrs. Ansari and the problems with the credibility of all of the parties as witnesses, the court must do its best to resolve the testimonial disputes and weigh the evidence. In doing so, the comments of the Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 152, at paras. 9 to 11 are of assistance, and in particular, the following passage from para. 11:

In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

FACTS

- [35] Zia Ansari was born in 1951 and grew up in Pakistan. At trial, Mr. Ansari testified that he completed a university degree in avionics in 1973 after which he joined the Pakistan Air Force as a fighter pilot. In 1981 and 1982, he spent a year in the USA training to become a commercial pilot and qualifying for an air transport licence. After completing his training, Mr. Ansari flew as a commercial pilot in Pakistan for some years and then accepted a job with United Arab Emirates Airline, based in Dubai.
- [36] Yasmeen Ansari was also born and grew up in Pakistan. She completed a university degree in microbiology and chemistry, after which she trained with the International Civil Aviation Organization and qualified to work as an air traffic controller. She worked as an air traffic controller for the Pakistan Civil Aviation Authority for about 5 years.
- [37] I am satisfied that the problems with the testimony given by Mr. and Mrs. Ansari I commented about in relation to the credibility of the witnesses are not due to unfamiliarity with the language in which both testified. During trial, Mr. and Mrs. Ansari demonstrated fluency in the English language. Mrs. Ansari testified that from elementary school through her training as an air traffic controller, all of her schooling was in English and that the primary working language of air traffic controllers is English. Mr. Ansari testified that much of his schooling was in English; that he has spoken English a good part of his life and that in 2000, at the time the events that feature in this lawsuit occurred, he was comfortable reading, writing and speaking English.
- [38] Zia and Yasmeen Ansari have two children – their daughter was born in 1980 and their son in 1987. In 1987, Mrs. Ansari and the children moved with Mr. Ansari to Dubai. Mrs. Ansari was not employed outside the home after this move. She managed the family's household finances; Mr. Ansari took care of the banking. Mr. Ansari testified that he and Mrs. Ansari jointly purchased real estate in Pakistan.
- [39] Between 1993 and 1996, while living in Dubai, the Ansaris and their children made several extended visits to Canada - a month or two at a time – and found they liked the country very much. Mrs. Ansari wanted to leave United Arab Emirates before the couple's oldest child finished high school, because there was no university in Dubai and their daughter would have to leave the country. The family applied to immigrate to Canada and arrived in Canada as landed immigrants in September 1996.
- [40] The family had accumulated savings while living in Dubai and lived on those savings after they arrived in Canada. Mr. Ansari investigated the prospects for employment as a pilot in Canada. He said that he would have to take further training to get a Canadian pilot's licence and that he thought that some of the things he would have to learn were irrelevant; for example, navigating by the stars. He said he did not want to put his head down and study so hard to learn things he would never use and that in any event, it would be hard to find a job as a pilot in Canada. Mr. Ansari decided to go into business instead.

- [41] Mr. and Mrs. Ansari were vague about the assets and savings they had accumulated before they came to Canada in 1996. Mr. Ansari initially testified in cross-examination that the family had approximately \$250,000 in savings when they came to Canada. When questioned in some detail about how the family could have lived on those savings for four years and still have \$200,000 left to purchase a business in 2000, he said that perhaps they had had \$300,000 in savings when they came to Canada.
- [42] Mr. and Mrs. Ansari attempted to portray themselves as having been entirely ignorant of all matters financial and legal in 2000. However, Mr. Ansari's educational attainment, history and professional background indicate he is an intelligent and not unsophisticated individual. At trial, he said that he did not know in the spring of 2000 what a "line of credit" was, although at his examination for discovery he had testified that he "had some idea" about what a line of credit was before the spring of 2000. He also claimed at trial that he did not know what a personal guarantee was, but on discovery had said that perhaps he had given a personal guarantee prior to the spring of 2000; perhaps not.
- [43] Mr. Ansari testified that in 2000 he did not know what shares in a company were; but admitted that shortly after arriving in Canada in 1996 he had incorporated, without the assistance of a lawyer, WITO Canada Ltd.; a company through which he set up and attempted to market internet-based training modules. Mr. Ansari called this business Surrey Technical Training School. He developed a software program for use in the business.
- [44] Mr. Ansari testified at trial that WITO Canada Ltd. was not successful and that the business generated no income. He completed two separate financial statements in 2000, however, in which he described himself as the "manager" of WITO Canada Ltd.; and reported that he had been paid a salary of \$24,000 annually.
- [45] Mrs. Ansari testified that after coming to Canada in 1996, she did not work outside the home. She volunteered at her children's schools and helped raise funds for a community centre.
- [46] Mr. and Mrs. Ansari testified that in 1999 they decided they had to purchase a business while they still had some savings left. Although at his Examination for discovery, Mr. Ansari had testified that he had no idea in 2000 how much money the couple had to invest in a business; that he could not even say if they had a million dollars to invest; he testified at trial that they had about \$200,000 available in 1999.
- [47] Mr. and Mrs. Ansari testified that their plan was to purchase a business in which they could both be actively employed. Mrs. Ansari testified that she and her husband knew that with training and 100% effort, they could do anything.
- [48] While Mrs. Ansari was involved in the search for a likely business to purchase and at times took a very active part in negotiations, it is clear that with her blessing, Mr. Ansari took the lead role. Mrs. Ansari said she trusted her husband completely in this regard.

- [49] Mr. and Mrs. Ansari first worked with a broker from Sutton Realty. Eventually - Mr. Ansari was vague about the timing - the plaintiffs retained the services of real estate broker Michael Doherty of HomeLife Benchmark (Fleetwood) Realty Corp. ("HomeLife") to act as their agent and to assist them in finding a business to purchase. A copy of a document titled "Exclusive Buyer's Agent Contract" was entered into evidence. It is dated February 18, 2000 and signed by Mr. Doherty and Mr. Ansari. The agent's remuneration is stated to be "Nil" but Mr. Ansari testified that he agreed to pay Mr. Doherty a fee of \$10,000 if the couple purchased a business that he found for them. Mr. Doherty was assisted by William (Bill) Godwin, who was a business broker at HomeLife. Mr. Ansari said he understood that Mr. Godwin was an accountant and that his role was to assist the Ansaris in assessing the financial aspects of businesses.
- [50] Neither Mr. Doherty nor Mr. Godwin was called as a witness by the plaintiffs; although I am satisfied that both of these witnesses had relevant testimony to offer the court on many of the disputed issues of fact. Mr. Ansari testified that during the relevant period in the spring of 2000, he met or spoke with Mr. Doherty and Mr. Godwin daily.
- [51] Plaintiffs' counsel provided no satisfactory explanation for the plaintiffs' decision to refrain from calling these witnesses; his submission was that the other parties could have called Mr. Doherty or Mr. Godwin as witnesses if they wished to do so. Mr. Ansari said in his testimony that he came to believe that Mr. Doherty switched sides near the end of the share purchase transaction and joined in a conspiracy with Mr. Messier and Mr. Skagen but he offered no evidence of anything said or done by Mr. Doherty to justify his belief. Mr. Ansari said nothing about Mr. Godwin having been part of a conspiracy.
- [52] The evidence is that Mr. Doherty and Mr. Godwin were the Ansaris' agents throughout the relevant period. Mr. Ansari agreed in cross-examination that he had relied on Mr. Doherty for business advice, including whether CMR's business was a good business, and that Mr. Doherty gave him advice about the price he offered to pay for the shares of CMR. Mr. Doherty prepared the first and second Agreements and most of addenda to remove the "subject-to" clauses. He witnessed the signatures of the parties on most of the documents signed before the closing date.
- [53] In *Catalyst Paper Corp. v. Companhia de Navegacao Norsul*, [2007] B.C.J. No. 919, 2007 BCSC 610, a decision involving entitlement to a deposit, the issues before the court were whether a contract had been entered into and if so, whether it had been repudiated by the purchaser. At paras. 61 and 62, Justice Masuhara commented on the defendant purchaser's failure to call as witnesses two persons who had represented the defendant in negotiations with the plaintiff vendor, as follows:
61. The two key persons who represented Norsul in the subject negotiations were not called as witnesses by Norsul. Mr. Baroncini was listed on the defendant's witness list and attended each day of trial until his day to appear, his absence was not explained. As well, Mr. Roberts, who conducted a significant amount of the negotiations on behalf of Norsul, was also not

called by Norsul. No reasons were provided for his lack of appearance. It is clear that both men had personal knowledge of key facts in issue and would have been able to give material evidence on the issues in question.

62. In this case, it is appropriate to draw an adverse inference that the evidence of Mr. Baroncini and Mr. Roberts would have adversely affected Norsul's case with respect to the key questions in this action. I also add that the strength of Mr. Smith's arguments were diluted by the absence of the testimony of these two men.
- [54] The comments of Justice Masuhara are apt in this case. I consider it appropriate to draw an adverse inference that the evidence of Messrs. Doherty and Godwin would have contradicted that of the plaintiffs in relation to several key issues in this action. Those issues include whether the Ansaris relied on Mr. Skagen to provide them with advice about the financial viability of CMR and business aspects of the share purchase transaction; the circumstances of the preparation and delivery to Messrs. Doherty and Ansari of the Budget (Exhibit 3), what Mr. Ansari was told about that document by Mr. Messier and by Mr. Doherty, and whether the plaintiffs relied on the Budget in deciding to proceed with the purchase of the CMR shares. Mr. Doherty and Mr. Godwin also had potentially important evidence to give about discussions they had with Mr. and Mrs. Ansari in the period April 25 to 27; and why Mr. and Mrs. Ansari decided to proceed with the purchase of the shares despite the misgivings they had expressed to Mr. Messier, Mr. Skagen and a lawyer, Murray Morrison, from whom they sought legal advice on April 26. I conclude that the evidence of Mr. Doherty and Mr. Godwin on at least some of these issues would not corroborate the testimony of Mr. and Mrs. Ansari or support the claims made by the plaintiffs.
- [55] In the nine to twelve months prior to February 2000, with the assistance of one broker or another, the Ansaris investigated several potential businesses, including a Dairy Queen restaurant and two Petro-Canada gas stations. Mr. Ansari could not recall why they did not purchase the Dairy Queen. After investigating the Petro-Canada stations, the couple testified they had concerns about possible liability for soil contamination caused by fuel leaks from the underground storage tanks.
- [56] Their investigation of the gas stations caused the Ansaris to become interested in the possibility of purchasing an auto repair business. One day they drove by a Maaco Auto Painting and Bodyworks business. That prompted Mr. Ansari to research Maaco franchise operations on the Internet. He decided a Maaco franchise business looked promising.
- [57] As part of his research, Mr. Ansari visited a web-site set up by Lloyd Shears for his Vancouver-based business called "FranNet". Mr. Shears' letterhead describes FranNet as "The Franchise Connection". Mr. Shears had information on his web-site about the Maaco business in Delta owned by CMR.

- [58] Mr. Messier testified at trial that he had been preparing to sell his business for several years. On February 15, 2000, Mr. Messier entered into a "consulting agreement" with Mr. Shears and agreed to pay a consulting fee of \$40,000 to FranNet if a client referred to Mr. Messier by FranNet purchased Mr. Messier's business.
- [59] Mr. Ansari said he could not recall his dealings with Mr. Shears.
- [60] I conclude that after reading information about CMR's business on FranNet, Mr. Ansari contacted Mr. Shears by telephone or e-mail and asked for more information. On February 26, 2000, Mr. Shears sent Mr. Ansari some documents about CMR.
- [61] Mr. Shears did not testify at trial and the communications from him to Mr. Ansari are not admissible for the truth of the statements made. They are, however, admissible for other purposes, including assessing the credibility of Mr. Ansari's testimony that in 2000 he did not understand the differences between an asset purchase and a share purchase; did not understand financial statements; did not know what a personal guarantee was; and did not know what a line of credit was.
- [62] The documents sent by Mr. Shears to Mr. Ansari on February 26, 2000 are not in evidence, but the "Fax Cover Sheet" states:
- Here is the Confidential Questionnaire which I mentioned. The #1 Maaco franchise in Canada is for sale. Last year it showed net profit (before tax) of \$194,000. The asking price is \$473,000. There is up to \$250,000 in financing available for this business. Please let me know if you would like to follow-up on this.
- [63] Mr. Ansari wrote the words "Report from Qualified CGA" on a copy of Mr. Shears' February 26, 2000 facsimile message. He could not recall why he wrote the words.
- [64] On February 28, 2000, Mr. Shears again responded by e-mail to inquiries from Mr. Ansari. The response indicates that Mr. Ansari had asked Mr. Shear if the quoted asking price was likely to be negotiable; the details of financing that might be available including a reference to bank financing to be "guaranteed" by the "Government" and the purchaser. Mr. Shears' response indicates that Mr. Ansari had told him that the Ansaris had \$200,000 of their own money available for the purchase. Mr. Shears suggested that Mr. Ansari could apply for a "line of credit" and/or the vendor could be asked to provide some of the financing.
- [65] Mr. Shears also responded to an inquiry from Mr. Ansari about an asset sale versus a sale of shares. Mr. Shears stated that the sale price could be lower for a share sale, but that the bank would require Mr. Ansari to use a house or other asset to "guarantee" the entire purchase price. He also stated that with a share sale, the bank would want security for any loan and would not consider the business' equipment as collateral.

[66] Mr. Ansari and Mr. Shears communicated again on February 29, 2000 about environmental studies and health and safety issues. It appears from Mr. Shears' response that Mr. Ansari had, by this time, had access to some information about CMR's sales and profits in past years. Mr. Shears stated in his February 29, 2000 e-mail:

As to the reason for the change in sales and profits in the last years. First of all, as sales go up in a business, so do the profit margins. He was probably able to do more sales with the same staff, therefore more of the dollars fell to the bottom line. However, you ask a very important question, and it is necessary that this be answered to your satisfaction. And before you buy any business, you should have your own accountant go over the information.

All of the financial records are up to date, and the last 3 years or more, if you wish, can certainly be viewed by any potential buyer. However to do this, the owner will want an agreement of purchase and sale in place, as well as a deposit. This deposit of course would be held with his lawyer, "in trust", and refunded to you should you decide not to buy the business. If you do buy the business, the deposit would become part of the purchase price. I hope this answers your questions.

[67] Mr. Ansari agreed in cross-examination that he understood that Mr. Shears was recommending that he hire an accountant to review the financial information in relation to any business that he was considering purchasing. He said he could not recall whether Mr. Doherty also advised him to hire an accountant. He said he did not know why he did not hire an accountant. I conclude that Mr. and Mrs. Ansari did not want to incur the expense of hiring an accountant and were satisfied that they had sufficient financial acumen to evaluate the business themselves, with the assistance provided by Mr. Doherty and Mr. Godwin.

[68] I infer that Mr. Ansari told Mr. Doherty about the information he had received from Mr. Shears and asked Mr. Doherty to investigate CMR's Maaco franchise to see if it was a viable business. Mr. Ansari could not recall what Mr. Doherty told him about the business, but recalled that Mr. Doherty suggested meeting with the owner. He recalled that Mr. Doherty went alone to the first meeting with Mr. Messier and brought back some "papers" which he gave to Mr. Ansari. Mr. Ansari could not recall what the papers were.

[69] Based on his investigations on the Internet, and presumably his exchanges with Mr. Shears, Mr. Ansari told Mrs. Ansari that the Maaco franchise was an "awesome" franchise; that the two of them could work together in the business; that it would be quite simple to learn to operate the business; and that they could generate income to pay for household expenses and their children's education.

[70] Before beginning to relate the meetings and negotiations that took place, I shall provide background information about Mr. Messier. Mr. Messier grew up in a small town in Alberta. He left school after Grade 10 and took training to be a mechanic. He lived in Calgary for some years and while there worked in real estate development and also owned a business that did coupon marketing. He testified that after the events that feature in this lawsuit he became a "neuro-linguistic programmer" and hypnotherapist and has patented equipment

for hypnotherapy. Mr. Messier also testified about his earlier involvement in bringing a "pre-paid law" business into British Columbia. Mr. Skagen testified that he was not involved in that business; his evidence is uncontradicted and I accept it.

- [71] The coupon marketing business Mr. Messier was operating in the late 1980s involved a lot of travelling, which Mr. Messier said placed a strain on his family life. One of his marketing clients owned a Maaco shop so Mr. Messier knew a little about the business. He learned there was a Maaco franchised-business in Delta, B.C. for sale and he and his wife decided to buy it. Mr. Messier moved to Surrey, B.C. in May 1987 and through CMR purchased the franchise for the Maaco auto repair, painting and body work shop at 11947 95th Avenue in Delta.
- [72] From the documents included in the materials entered into evidence by Mr. Messier I conclude that the head office of Maaco is in the USA, but there is a Canadian company or subsidiary -Maaco Systems Canada Inc. ("Maaco Canada") that has the right to licence franchises in Canada. Each Maaco-franchised shop operates out of premises owned or leased by the franchisee, but approved by the franchisor. A franchise agreement permits the franchisee to use the Maaco name and trademarks; and permits and obliges the franchisees to purchase and utilize Maaco equipment, including auto paint spray booths; and other products and methods in their business operations. Initial franchise fees are paid; as well as ongoing royalties based on volume of sales; and a separate fee as a contribution to the cost of centralized marketing activities.
- [73] Mr. Messier testified that under his management, CMR's business thrived - within three years the shop in Delta was the top Maaco franchise in Canada; and by the fifth year, it was the top Maaco franchise in North America. In his Opening Statement, Mr. Messier referred to the business as a "jewel of a shop".
- [74] I assume that the Maaco designations referred to by Mr. Messier were based on gross sales revenues rather than net profits. The first financial statements for CMR in evidence are for the year ending July 31, 1996. All of the financial statements are unaudited. The statement of operations for the year ended July 31, 1996 records that in the previous year (1995), CMR reported a net loss of \$4,042. In 1996, the company reported net income of \$15,212. The company reported a net loss of \$20,248 in 1997; a net loss of \$526 in 1998; and a net loss of \$6,942 in 1999. Even disregarding depreciation expenses and something referred to in the unaudited statements as "amortization" expenses, the financial statements indicate that the company had income from operations of \$9,576 in 1995; \$43,061 in 1996; \$15,523 in 1997; and \$35,276 in 1998. The 1999 Financial Statement did not segregate income from operations and income from other sources.
- [75] According to the financial statements, the company paid a salary to Mr. Messier as "owner" during the years 1995 to 1998, in the range of \$30,000 to \$32,000. The 1999 Financial Statement did not segregate out salary paid to "owner" so it is not possible to ascertain what the company paid to Mr. Messier in 1999.

- [76] All of the Financial Statements disclose bank indebtedness. At year end in 1999 (July 31), CMR owed \$69,990 to its bank and had, in addition, trade accounts payable in excess of \$90,000 and wages payable in excess of \$48,000. Notes to the financial statements in years prior to 1999 indicate that the bank debt was a demand loan. Mr. Messier testified that the bank indebtedness was the operating line of credit from the CIBC (previously designated as "the LOC"). A review of the financial statements indicates that the bank debt had increased significantly in 1998 and 1999 over prior years.
- [77] Mr. Messier testified that he had been making preparations to sell his business for several years prior to 2000. He testified that he was bored with the business. Mr. Messier knew the man who owned the rights to establish Maaco franchises in Canada and that in 2000, Mr. Messier had an opportunity to purchase those rights or the western Canada rights, but would need to sell his own business in order to raise the necessary capital.
- [78] Mr. Messier discussed a potential sale with CMR's accountant at the time - Eric Vanderluit. Mr. Messier anticipated that a purchaser would likely be interested in an asset purchase, because he understood that a small business loan, guaranteed by the federal government, would be available to an asset purchaser. Mr. Messier testified that throughout his dealings with the Ansaris he attempted to persuade them that they should purchase the assets rather than the shares; but they could not be persuaded to accept his advice and insisted on a share purchase.
- [79] Although Mr. Messier maintained that the business under his management was successful and profitable and had a bright future, it is clear from other testimony he gave; the testimony of Violetta Mecham, the CMR employee who handled the day to day-bookkeeping for CMR; and CMR's unaudited financial statements; that managing cash flow required constant vigilance. Mr. Messier conceded that CMR was having a challenging year, in terms of profitability, in 2000. Ms. Mecham testified that at times cheques payable to suppliers had to be held back until there was enough money in the bank to cover the cheques; Mr. Messier testified that he used credit cards to assist with cash flow for the business.
- [80] In 1999 or 2000, Mr. Messier prepared several binders of information to be given to prospective purchasers. The binders contained newsletters and other Maaco publications and editions of or excerpts from industry magazines discussing the Maaco franchise network. The binder also included copies of CMR's unaudited financial statements for the years ending July 31, 1995, 1996, 1997, 1998 and 1999.
- [81] The "Notice to Reader" provided by Mr. Vanderluit in the 1999 Financial Statement states:
- I have compiled the balance sheet of CMR Marketing Research Systems Inc. (dba Maaco Auto Painting & Bodywork) as at July 31, 1999 and the statement of operations and retained earnings for the year then ended from information provided by management. I have not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information. Readers are cautioned that these statements may not be appropriate for their purposes.

[82] In addition to the unaudited financial statements for the years 1995 through 1999, Mr. Messier included in each binder a "Profit and Loss Statement Summarized by Division and Department Current, YTD ("year to date"), and Ratios" for 12 periods ending July 31, 1999. In notes written on this document and in his testimony, Mr. Messier referred to this document as a "normalized" statement. In the binder it is also referred to as "Adjusted Financials". Mr. Vanderluit testified he had some involvement in the preparation of these documents. Mr. Messier included in the information package handwritten notes and explanations of many of the documents, including, in relation to the "normalized" statement, the following notes:

The following is a summary of what the business actually yields to the owner at the present time. A 4 yr. analysis is also shown along with an informal estimate of value as calculated by my accountant! Also included are copies of in house weekly sales summaries and T.O. Head Office analysis of our sales. You will note the harmony in #'s from all 3 items - accountants, W.S.B.R's and T.O. Head Office.

[83] The normalized statements were produced from the accounting software used at CMR's premises; in other words, printed from a computer at the Maaco shop. Several versions of these sorts of statements are in evidence; produced at different times and for different periods.

[84] Mr. Messier said that the normalized statement of profit and loss included in the information package he prepared for potential purchasers is an indication of income that could potentially be realized if cost savings could also be realized. It is clear that "normalizing" the statement in the way Mr. Messier did results in a profit projection that significantly exceeds the historical level of profit recorded in the company's unaudited financial statements. Mr. Messier testified, for example, that the net profit - the disposable income left for an owner/operator of the business - could be \$170,000 to \$175,000 if certain efficiencies were implemented.

[85] On copies of some statements included in the binder - apparently produced by Maaco Canada and titled "P. and L. Analysis for Shop 1101 for Period Ending March 31, 1997 and December 31, 1998 - Mr. Messier highlighted certain items and added a footnote that states "These are the areas a new hands-on and excited attitude of a new owner will make real gains." and "These are our areas of cushion - consistent with my normalized financials".

[86] Mr. Messier testified, and reference is made in the documents, that part of the "normalizing" process is to remove from the expense side of the calculations "perks" such as expenses for a vehicle, for gas, for entertainment and for travel for Mr. Messier that had routinely been paid for by CMR and treated in the financial statements as business expenses.

[87] Around the end of February 2000, Mr. Shears told Mr. Messier that he had been in contact with a prospective purchaser, whom he did not name, who was asking questions and wanted to see CMR's financial statements. Mr. Shears asked Mr. Messier about variations in sales figures from year to year. Mr. Messier testified that he and Mr. Shears had several telephone conversations between February 26 and March 1. Mr. Shears asked Mr. Messier if he could

release the financial statements included in the binder to the interested buyer who was in contact with Mr. Shears. Mr. Messier said he wanted to meet the buyer first.

- [88] Mr. Messier testified that on March 13, 2000 he received a telephone call from Mr. Shears in which Mr. Shears said the buyer did not want to deal with FranNet. He told Mr. Messier that Michael Doherty of HomeLife would be contacting Mr. Messier.
- [89] Mr. Messier received a call from Michael Doherty on March 14. Mr. Messier testified that Mr. Doherty told him that the buyer he was representing did not want to pay a deposit as a condition of seeing the financial statements. Mr. Messier asked to meet with Mr. Doherty. Mr. Doherty went to the Maaco shop and succeeded in convincing Mr. Messier that Mr. Ansari was a serious potential buyer. Mr. Messier understood that Mr. Doherty was the purchaser's agent but agreed that if a sale proceeded, he would pay Mr. Doherty a 3% commission.
- [90] The next day, March 15, Mr. Messier met with Mr. Doherty and Mr. Ansari at the Maaco shop in Delta for about 90 minutes. Mr. Ansari testified that he could not recall his first meeting with Mr. Messier. He recalled quite a few meetings with Mr. Messier at which Mr. Doherty was also present but had little specific recall of any of the meetings. He said that he had only visited CMR's premises once before making his first offer to purchase the CMR shares.
- [91] Mr. Messier testified in some detail about the meeting at the shop on March 15 with Mr. Ansari and Mr. Doherty. Mr. Messier recalled that he was impressed with Mr. Ansari's professional background; and also the information Mr. Ansari gave him about Mrs. Ansari's educational and professional achievements. He recalled being told that Mrs. Ansari had bookkeeping or accounting experience. Mr. and Mrs. Ansari both testified that Mrs. Ansari did not have any bookkeeping experience or training.
- [92] Mr. Ansari told Mr. Messier that he owned and operated an internet business and he gave Mr. Messier a business card for Surrey Technical Training School. Mr. Messier understood that Mr. Ansari and his wife were both planning to work in the Maaco business if they purchased it. Mr. Messier was concerned that Mr. and Mrs. Ansari might not be prepared to get their hands dirty working in the Maaco business - a requirement for a successful franchise, in Mr. Messier's opinion - but Mr. Ansari said he had done hands-on work with aircraft when he was a pilot.
- [93] Mr. Messier testified that at the meeting on March 15, Mr. Ansari said he wanted to purchase the shares of CMR rather than the assets, because he understood the purchase price would be less for shares than for assets. Mr. Messier told Mr. Ansari that in addition to the purchase price for the business, the purchaser would need to have working capital to operate the business. Mr. Ansari told Mr. Messier that in addition to the money he had available for the share purchase, he had additional funds in Canadian and offshore bank accounts and owned real estate in Lahore, Pakistan.

- [94] Mr. Messier testified that although he had not intended to provide financial statements to prospective buyers without the payment of a deposit, he was sufficiently impressed with Mr. Ansari that he gave a copy of the binder of information including the financial statements to Mr. Doherty and Mr. Ansari at the meeting on March 15. I accept this testimony.
- [95] At one point during his testimony at trial, Mr. Ansari asserted that he did not see any financial statements or other accounting information about the business until after he had delivered a deposit cheque in the amount of \$50,000 to Mr. Skagen's law firm.
- [96] In cross-examination, Mr. Ansari agreed that he had probably received the binder including the financial statements before he made his first offer to purchase the shares, although he could not recall if the financial statements he saw were copies of the ones included in the information binder entered as an exhibit at trial. Richard Pallen, a chartered accountant at a firm retained by plaintiffs' counsel in June 2000 testified that he and his associate had been given a copy of the binder, including the financial statements in June 2000.
- [97] Within an hour after Messrs. Doherty and Ansari left the meeting with Mr. Messier on March 15, 2000, Mr. Doherty returned to the shop and told Mr. Messier that Mr. Ansari wanted to buy CMR's business and asked how quickly the deal the deal could be concluded.
- [98] I am satisfied that Mr. Ansari was very excited at the prospect of acquiring the business. Mrs. Ansari testified that her husband described the business as "awesome". She said she asked her husband a lot of questions about why he thought it would be a good business and he said he thought it would be small enough, and simple to learn, and that they could learn to do hands-on work and that it would make money so they could survive and pay for their children's education and be content. I am satisfied that Mr. Ansari was also anxious to proceed with the purchase as quickly as possible.
- [99] On March 15, Mr. Doherty invited Mr. Messier to meet with him and Mr. Ansari for lunch at Ricky's restaurant on March 17. Mr. Ansari recalled very little about this meeting, but he did recall that one of his meetings with Mr. Messier took place at a restaurant.
- [100] Mr. Messier testified that he took with him to the meeting at the restaurant a print-out of internal operating statements for the period ending February 29, 2000 and a list of problem accounts receivable. Mr. Messier said he took the accounts receivable report to the meeting because he understood Mr. Ansari wanted to purchase the shares of the company, so he wanted Mr. Ansari to be aware of the situation with some of the overdue accounts. He expected that Mr. Ansari would be having an accountant review the financial information.
- [101] For some time - at least since July 1997 and probably for some years prior to that - CMR had had an operating line of credit with the CIBC. The most recent set of terms and conditions relating to the credit facility were set out in a letter sent by CIBC to CMR dated January 12, 2000. According to the document, the terms were accepted by Mr. Messier on behalf of CMR on February 17, 2000. Both the January 12, 2000 letter and an earlier document refer to an unlimited personal guarantee from Mr. Messier held by CIBC as part of the security for

CMR's debt.

- [102] The agreement in relation to the LOC specified that the credit facility was limited to the lesser of \$75,000 and the total of 70% of trade accounts receivable, minus unremitted source deductions, taxes and other amounts owing to governments or governmental bodies in priority to the bank's security. The January 12, 2000 letter specified that in calculating the upper limit of the line of credit, CIBC would take into account only receivables outstanding less than 90 days. The letter specified that CMR was required to provide CIBC with an aged list of receivables monthly.
- [103] In practice, CIBC did not insist on receiving lists monthly, but CMR did provide reports when requested to do so by the bank. Ms. Mecham prepared the reports under the direction of Mr. Messier. Both Mr. Messier and Ms. Mecham testified about a practice followed at CMR of "re-aging" certain accounts receivable when preparing reports for the bank. Mr. Messier testified that the bank officer with whom he dealt on behalf of CMR - Peter Car - was aware of this practice and had approved of it. I was told that sometime after 2000, Peter Car had been transferred to an offshore branch of the CIBC and was no longer living in North America and that was the reason he was not called as a witness at trial.
- [104] As the "re-aging" process is obvious when sequential accounts receivable statements are compared, and CMR had maintained its CIBC LOC for some years prior to 2000, it appears that bank employees either did not scrutinize the accounts receivable reports submitted by CMR or at the very least turned a blind eye to the "re-aging" process I am about to describe.
- [105] The re-aging process involved reclassifying some accounts that were outstanding for 90 days or more as current. These accounts would be assigned new account numbers. Ms. Mecham testified that the computer software used at CMR would not permit the "re-aging" of an account under an existing account number. So, for example, account number 54437 in the name of Kelly Holden with a balance owing of \$3,477 appears under the "over 120 days" column on a print-out of aged accounts receivable as of 05-05-00. On a statement as of 05-30-00, a new account number - 54941- has been assigned to a customer called "Miss Kelly Holden" and the same debt is listed under the "current" column.
- [106] Similarly a debt owed by Sedens Business Systems that had been outstanding for over 120 days appears as a current receivable under a new account number and the name "Debbie Sedens". An account owed by "Laye, Allan" for \$5,685.86 that had been outstanding for over 120 days appears as a current receivable under a new account number and the name "Mr. A. Laye".
- [107] Mr. Messier testified that he only moved accounts from the over 90 days category if he was satisfied that the outstanding debt could and would eventually be paid; either because he was holding security for the debt - still had possession of the vehicle on which the work had been done, for example - or had an arrangement with the customer to set-off the bill against future services to be provided by the customer. In the case of customer Tim Skagen for example, who is the brother of the defendant Arthur Skagen; the agreement was that Tim

Skagen, who was also a lawyer, would provide legal services to off-set the debt he owed to CMR.

- [108] As I said earlier, Mr. Messier testified that he discussed the problem accounts receivable with Mr. Ansari and Mr. Doherty during their meeting at Ricky's restaurant on March 17. At trial, Mr. Messier identified several pages of notes about topics that he testified were brought to or written during and discussed at the meeting on March 17. One of the pages of notes was written on a Ricky's napkin. While most of the writing on the notes is that of Mr. Messier, some notations have been added by Mr. Ansari.
- [109] The first three items were initially titled "Conditions"; that word was stroked out and the words "Subject To's" written over it. The three items are "Finance", "Lease 5yr Term" and "View Franchise Agreement & Qualify". Subsequent notes refer to shareholder loans; accounts receivable margin in relation to payables; "payroll is transferred as is with 'No Layoff'"; and a "guarantee against negligence for one year". A second page of notes lists certain items of furniture and equipment titled "Not Included in Sale".
- [110] Mr. Messier testified that on March 17, he told Mr. Ansari that the next Maaco franchisee school would start on May 1. Mr. Ansari said he would like to complete the purchase of the shares a couple of weeks before May 1 so that he could get some experience operating the business before he went for training. On the Ricky's napkin, Mr. Messier made various notes including the words "Commission", "Legal", and "Adjustments" as well as various calculations that appear to refer to a purchase price of \$419,000. Mr. Messier says that at this meeting on March 17, he and Mr. Ansari agreed on \$419,000 as the price for the shares of CMR. He testified that Mr. Doherty mentioned a possible source of financing he knew about - referred to as "Paramount".
- [111] Mr. Messier testified that the three men talked about getting a lawyer to draw up the necessary papers to document the sale. Mr. Doherty said that he could recommend two or three lawyers and that one had already been involved at the time Mr. Ansari was considering buying a Petro-Canada station. Mr. Ansari expressed concern about that lawyer's fee estimate of \$10,000 to \$12,000.
- [112] Mr. Messier testified that he told Messrs. Doherty and Ansari that CMR's lawyer was Arthur Skagen and that Mr. Skagen's fees were really reasonable. Mr. Messier said that he would not be having any lawyer act on his behalf in the sale of the business; that he had not had a lawyer act for him in relation to previous sales and that he had no intention of paying legal fees or hiring a lawyer for himself. Mr. Messier testified that Mr. Doherty appeared to know or know of Mr. Skagen, and that Mr. Doherty recommended that Mr. Skagen be asked to prepare the closing documents on behalf of Mr. Ansari. Mr. Ansari could not recall whether it was Mr. Messier or Mr. Doherty who said that Arthur Skagen was a "top-notch" lawyer.
- [113] Mr. Ansari testified that before he and Mrs. Ansari retained Mr. Skagen and during the time he was handling the share purchase transaction on their behalf they had no idea that he was the corporate lawyer for CMR or that he had done legal work for Mr. Messier. I consider

it more probable than not that Mr. Skagen did give Mr. and Mrs. Ansari this information. In any event, I am satisfied that Mr. Messier told Mr. Ansari at the meeting on May 17 that Mr. Skagen was CMR's corporate lawyer and also that Mr. Skagen had also done legal work for Mr. Messier.

[114] On the evening of March 18 - the day after the lunch meeting - Mr. Doherty went to Mr. Messier's home and presented Mr. Messier with an Agreement of Purchase and Sale of Business (the first Agreement) on a form bearing the crest and letterhead of the Fraser Valley Real Estate Board. The form had already been signed by Mr. Ansari and his signature was witnessed by Mr. Doherty. Mr. Ansari is stated to be the purchaser and the subject matter of the agreement is stated to be "100% of the shares of Connaissance Marketing Research Systems Inc." Most of the handwriting on the document is that of Mr. Doherty, but Mr. Messier added two clauses which were subsequently accepted by Mr. Ansari and those two clauses are in Mr. Messier's handwriting.

[115] The purchase price is \$419,000, with a deposit of \$50,000. Mr. Messier testified that he insisted on adding the words "To go into trust with Art Skagen upon removal of subject to finance". He said he had had bad experiences in the past with deposits going to brokers. The completion date and possession date are both specified as April 17, 2000.

[116] In relation to receivables and payables, the first Agreement states:

The sale includes the receivables and payables as of the closing date. The seller agrees that the receivables will be a minimum of 10% higher than the payables and the receivables will have no accounts aged more than 90 days other than as of March 17, 2000.

[117] There are several "subject to" clauses for the purchaser's benefit. One of the subject-to clauses provides for the purchaser to obtain financing in the amount of \$250,000 at a rate acceptable to the purchaser by March 29, 2000. Mr. Messier said he was surprised that Mr. Ansari had given himself such a short time to arrange financing.

[118] Other subject clauses refer to the purchaser receiving a lease with a five-year term (Mr. Messier testified that the term of CMR's current lease had come to an end) and the purchaser being approved as a franchisee by Maaco on or before April 7, 2000. A further subject clause, added by Mr. Messier, provides for the purchaser to view and approve the accounts payable, accounts receivable and equipment on or before April 7, 2000. Mr. Messier also wrote in a clause providing that he would be allowed to adjust certain loans to reduce the shareholders' loan to approximately \$60,000.

[119] There is a clause in the first Agreement relating to preparation of a buy-sell agreement, as follows:

This agreement will be an integral part of a buy-sell agreement to be drawn up by the lawyer for the company. This buy-sell agreement must be approved by both buyer and seller or all deposit moneys will be returned to the purchaser. The parties agree to share the legal costs.

[120] The first Agreement refers to the arrangements with HomeLife as follows:

The buyer has an agency relationship with HomeLife/Benchmark Realty and Michael Doherty, salesperson. The seller acknowledges no agency relationship but agrees to pay HomeLife/Benchmark (Fleetwood) Corp. a commission of 3% upon completion.

[121] Mr. Ansari testified that Mr. Doherty told Mr. Ansari that he wouldn't have to pay Mr. Doherty because Mr. Messier would pay a commission to HomeLife. Mr. Ansari said he told Mr. Doherty that he wanted to pay him; that Mr. Doherty was working for him. He said Mr. Doherty assured him that he would be looking after Mr. Ansari's interests.

[122] Mr. Ansari agreed in cross-examination that when he signed the first Agreement he knew that he was offering to buy the shares of the company; and not the assets; and that he knew there was a difference. He said that he knew that he would pay less to purchase the shares than to purchase the assets; but claimed that he did not understand that with a share purchase he would be acquiring the company's liabilities - its debts and accounts payable - as well as its assets. I conclude Mr. Ansari is being disingenuous in relation to this issue. He had made inquiries of Mr. Shears about purchasing shares versus assets. A subject clause in the first Agreement, reproduced above, includes a reference to "accounts payable". Mr. Messier testified, and Mr. Ansari did not dispute, that Mr. Messier attempted to convince Mr. Ansari to consider an asset purchase because although the price would be higher, it would be easier to get financing and there was a government program to assist small businesses. There are notes in evidence that corroborate Mr. Messier's testimony on this issue. Mr. Messier testified that Mr. Ansari and later both of the plaintiffs insisted on a share purchase.

[123] Mr. Ansari testified he had little or no recollection of the efforts he made to obtain financing. He believes that he must have talked with Mr. Doherty and Mr. Godwin about financing, but could not recall the content of any of the discussions. He thought he went to see his own bank, the Bank of Montreal. He recalled that he went with Mr. Messier to a bank, perhaps Western Bank, but was not successful there. I am satisfied that he also accompanied Mr. Messier to a meeting with Peter Car at CIBC to discuss financing.

[124] After the first Agreement was signed, with Mr. Messier's encouragement, Mr. Ansari began spending time at the Maaco shop, meeting the employees, observing the operations and discussing the business with Mr. Messier.

[125] CMR's landlord was Stanjean Holdings Ltd. ("Stanjean"). On March 21, Mr. Messier contacted Stan Hrescak, the owner of Stanjean, to discuss a new lease. Mr. Messier told Mr. Hrescak he would be selling the business.

[126] Mr. Messier testified that on March 22 Michael Doherty asked whether Mr. Messier could assist Mr. Ansari to get financing. Mr. Messier testified that on that day, he produced a 36 page print-out of financial information from CMR's accounting system and gave it to Mr. Doherty and Mr. Ansari. The first three pages of the 36 is the document that was marked

Exhibit 3 at trial and referred to in the pleadings, and by the parties for purposes of identification as "the Budget". Mr. Messier testified that Mr. Doherty and Mr. Ansari said they wanted a cash flow statement to show to potential lenders.

- [127] Mr. Messier testified at trial that he told Mr. Doherty and Mr. Ansari that he could give them a budget with raw data, utilizing an average of the company's expenses spread out over 12 months. He said that in the first year under a new owner he expected sales would drop by 10%. Mr. Messier said he pointed out to Mr. Doherty and Mr. Ansari areas of expenditure where he believed savings could be made, such as management salaries. He said he gave the documents to Mr. Ansari and Mr. Doherty and said words to the effect of "Do what you want with it".
- [128] Mr. Messier testified that he produced Exhibit 3 as a cash flow budget; that it is totally theoretical and could be any 12-month period and that it was intended to be a projection of what could be done if the Ansaris had a 10% drop in sales but also made significant reductions in expenses. He said some of the numbers he used were actual expenses and some were projections.
- [129] It is this document - the Budget - that forms the foundation of the allegation of pre-contractual misrepresentation and deceit in the Statement of Claim. The document was created in a format produced by CMR's computer software system. It is titled "CMR Marketing Research Systems Inc.- Profit and Loss Statement Summarized by Division and Department - Budget Spread Sheet - 12 Period(s) Ending July 31, 2000.
- [130] The first page of the document has figures relating to Sales Income and Direct Costs. There are two columns of figures - above the first someone has hand-written "YTD", meaning, as I understand it, "Year to Date"; above the second column a type-written date - 08-31-99 appears; and directly beneath it, someone has handwritten "1st MOS". There are other handwritten notations on the document - some added by Mr. Messier; others by Mr. Ansari. The second page of the document contains a listing of expenses. There is no reference to rent for the premises under the list of expenses, but Mr. Messier testified that an item referred to on the list as "Rent-Equipment" amounting to \$60,000 is actually a reference to rent for the premises.
- [131] Exhibit 3 purports to project net operating income to July 31, 2000 of \$132,124.76 or "without inefficiencies" \$139,874.60. Some of Mr. Messier's handwriting appears to refer to a \$70,000 operating line of credit; accounts receivable of \$90,000; and accounts payable of \$55,000.
- [132] Notations written on the document by Mr. Ansari indicate that at some point, he used this document to estimate the amount of money that he would be able to "take home" on a monthly basis. I do not believe, however, that he made these calculations or notations on March 22.

- [133] On Exhibit 3, Mr. Ansari wrote, for example "Inst \$6000.96". He testified that that was a reference to the total of the monthly payments he would have to make to Mr. Messier and to Mr. Hrescak, on a vendor's take-back loan from Mr. Messier ("the take-back loan") and the loan Mr. Hrescak eventually agreed to make to the Ansaris ("the Hrescak loan"). The discussion about the take-back loan did not occur until later in March; and it was not until April that Mr. Hrescak emerged as a potential lender, so at least some of the notes added to the Budget by Mr. Ansari were added in April.
- [134] Based on Mr. Ansari's calculations, one can deduce that assuming the monthly profit that could be realized would be \$11,120.14 and deducting from that figure the \$6,000.96 Mr. Ansari would have to pay to Mr. Messier and Mr. Hrescak, Mr. Ansari projected his "take home" would be \$5,800 a month.
- [135] It does not take an expert in accounting to see that the figures used in Exhibit 3 differ significantly and obviously from the actual financial results in previous years, as revealed in the unaudited CMR financial statements that were included in the binder of information Mr. Messier had provided to Mr. Ansari and Mr. Doherty at their first meeting. The figures also differed from the monthly statements of profit and loss that Mr. Messier provided to Mr. Ansari in March and April 2000 for the months of February and March. Among the previously undisclosed documents produced by Mrs. Ansari during the trial was a "Profit and Loss Statement, Summarized by Division and Department, Current, YTD and 8 Ratios, 8 Periods Ending March 31, 2000." This document reported the year to date profit as only \$16,233. It is difficult to believe that a reasonable person comparing the Budget to the actual reported results in the two current periods for which statements were provided; or to CMR's financial statements for prior years could have believed the Budget document to be a representation of fact.
- [136] When Exhibit 3 was produced, there were only 4 months remaining before CMR's July 31, 2000 year end. CMR's Direct Costs" for the year ending July 31, 1998 were reported on the company's unaudited financial statements as \$612,856; on the 1999 statements Direct Costs were \$566,632. Exhibit 3 assumed Direct Costs of only \$491,250, a reduction from the previous year's result of \$75,000. The biggest difference in the assumption used for Direct Costs was the projection of shop labour costs. In 1998, Shop Wages and Benefits were reported at \$308,666; in 1999 at \$285,586. Exhibit 3 used the figure \$240,750 for shop labour costs.
- [137] The other assumed savings appear in a reduction in the cost of parts, towing and sublets from just over \$153,000 actual in 2008 and \$156,000 in 2009 to \$126,000 in the 2000 year.
- [138] Non-direct costs - all other expenses - were reported at \$565,000 in 1998 and \$621,909 in 1999. These expenses were projected in Exhibit 3 to be only \$407,000. Major differences are found in the figures for advertising (actual in 1998 was \$76,425; and \$71,899 in 1999) to a projected \$47,250 in Exhibit 3. Salaries and benefits were projected at \$130,000 in Exhibit 3 compared to actual salaries and benefits in 1998 of \$172,000 and \$205,000 in 1999. In

addition, the 1998 and 1999 financial statements reported a category of "Professional Fees" in amounts of \$76,000 and \$82,000 respectively. No similar category is included in the listing of expenses in Exhibit 3.

- [139] Mr. Messier's day-book contains numerous entries about Mr. Ansari being in the shop; and also about various print-outs of financial information provided to Mr. Ansari. Mr. Messier eventually conceded in cross-examination that not all of the entries in his day-book had been made contemporaneously. Nevertheless, I am satisfied that on various occasions when Mr. Ansari was on the premises and at meetings held among Messrs. Messier, Ansari and Doherty, Mr. Messier gave Mr. Ansari and/or Mr. Doherty print-outs of various kinds and a number of these were admitted into evidence.
- [140] On March 24, Michael Doherty called Mr. Messier and said that Mr. Ansari's financing applications had fallen through and it appeared the deal could not proceed. Mr. Messier agreed to meet with Mr. Ansari and Mr. Doherty the next day at Mr. Doherty's office.
- [141] Mr. Messier telephoned Mr. Vanderluit, his accountant, and with Mr. Vanderluit's assistance prepared a document that he intended to use to try to persuade Mr. Ansari to reconsider an asset purchase. Mr. Messier took this document with him to the meeting at HomeLife's offices on March 25 but Mr. Ansari was not interested in buying the assets; he wanted to buy the shares. Mr. Ansari and Mr. Doherty asked Mr. Messier if he would be prepared to provide a vendor's take-back loan for \$100,000 or \$105,000. It was agreed that If Mr. Messier would agree to provide financing the purchase price would be increased to \$450,000. Mr. Ansari had \$200,000 and felt confident he could come up with \$125,000 or perhaps more from some other source to make up the sale price.
- [142] Mr. Messier agreed to consider the new proposal. Mr. Doherty agreed to prepare a new agreement of purchase and sale and, in the meantime, Mr. Doherty and Mr. Ansari would continue to look for sources of funds to finance the rest of the purchase price.
- [143] A meeting was scheduled for March 27 at 2:00 p.m. at the Maaco shop. For the first time, Mrs. Ansari was scheduled to attend. As it turned out, Mr. and Mrs. Ansari arrived early, and Mr. Doherty did not show up for the meeting. It was at this meeting on March 27 that Mrs. Ansari and Mr. Messier met for the first time. It is also at this point that Mrs. Ansari began to take an active role in the negotiations.
- [144] Mrs. Ansari testified that when she first met with Mr. Messier she did not ask a lot of questions and instead tried to observe Mr. Messier. Mrs. Ansari testified that Mr. Messier was very persuasive and made it sound like the business was magical; that it would be a golden egg and you could make a million dollars. Mr. Ansari testified that Mr. Messier described the business as a gold mine. Mrs. Ansari testified that after meeting Mr. Messier, she was concerned and sceptical. She said she encouraged Mr. Ansari to check out the business' operations himself and not rely on statements made to him by Mr. Messier.

- [145] Mr. Messier testified that Mrs. Ansari did not sit back but instead was very active and assertive during the discussions that took place on March 27. He said he was very impressed with her. He said that Mrs. Ansari "beat him up" and persuaded him to reduce the purchase price to \$440,000 from the \$450,000 figure that he, Mr. Doherty and Mr. Ansari had earlier agreed. Mr. Messier recorded in his day-book that during this meeting he strongly recommended that Mrs. Ansari attend Maaco franchisee training with her husband.
- [146] Mr. Messier prepared handwritten notes of 15 items in advance of the meeting on March 27. One of the items was wages to be paid to Mr. Messier to work at the business while Mr. Ansari attended franchisee school; "severance situations" for Violy and Pat", a reference to Ms. Mecham and Patrick Dickey, two CMR employees that Mr. Messier understood would be let go once Mr. and Mrs. Ansari took over. There is also a reference to accounts receivable, as follows: "Accept A/R with Questionables as Detailed 12K to 6.5K." Mr. Messier testified that he went over all of these items with Mr. and Mrs. Ansari on March 27 and also gave them a copy of his notes to give to Mr. Doherty.
- [147] Mr. Messier testified that that evening - March 27 - Mr. and Mrs. Ansari came to his home. Mrs. Ansari recalled being at the Messier home and being introduced to Mr. Messier's wife. Mr. Doherty arrived and had with him a new Agreement of Purchase and Sale of Business ("the second Agreement") that was dated March 27, 2000. The handwriting on this document is the same as most of the handwriting on the first Agreement and I am satisfied that Mr. Doherty wrote the second Agreement. Mr. Messier and Mr. Ansari signed the second Agreement. Many of the subject clauses contained in the first Agreement are reproduced in the second Agreement.
- [148] The clause relating to financing was changed to provide that the second Agreement was subject to Mr. Ansari obtaining financing in the amount of \$150,000 by April 6.
- [149] The following clause was added to the second Agreement:
- Subject to a vendor take back loan to a maximum of \$105,000 to be finalized upon closing.
- [150] Like the first Agreement, the second Agreement contained a statement that while Mr. Doherty and HomeLife had an agency agreement with Mr. Ansari and no agency relationship with Mr. Messier, Mr. Messier agreed to pay HomeLife a 3% commission.
- [151] Mr. Ansari testified that he and Mr. Messier discussed the commission to be paid to HomeLife. He said he also talked to Mr. Doherty. He asked Mr. Doherty if he would still be looking after Mr. Ansari's interests and Mr. Doherty said he would. I conclude that Mr. Ansari accepted this assurance and continued to regard Mr. Doherty and Mr. Godwin as his agents.

- [152] While the first Agreement provided that the parties would share legal expenses for the buy-sell agreement to be drawn up by the lawyer for the company, the second Agreement provided that Mr. Ansari would pay all the legal expenses. Mr. Ansari testified that Mr. Messier said that he did not need a lawyer and Mr. Ansari did, so Mr. Ansari would have to pay all of the legal fees.
- [153] A possession date and an adjustment date of April 17, 2000 were inserted in the second Agreement. No date for payment of the balance of the purchase price ("closing date") was specified. I consider it probable that the parties intended the closing date to be the same as the possession and adjustment date. I am satisfied that while both Mr. Messier and Mr. Ansari were anxious to complete the transaction as soon as possible and intended that Mr. Ansari attend Maaco franchisee school in early May; time was not specified to be of the essence.
- [154] Probably on March 27, 2000, utilizing an "Addendum" form from the Fraser Valley Real Estate Board, Mr. Messier wrote out an agreement for a "vendor take back" loan that both he and Mr. Ansari signed. The Addendum provided for Mr. Messier to finance \$105,000 of the purchase price with interest at 12.5% payable weekly in instalments of \$806.97; and for the loan to be personally guaranteed by Mr. and Mrs. Ansari.
- [155] Mr. Ansari testified that after March 27 and up to the closing date, he and Mr. Doherty and Mr. Messier were constantly discussing and making changes to the deal. Mr. Ansari testified that he could not recall what efforts he made after signing the second Agreement to find financing, but he was unsuccessful in finding a bank to lend him the rest of the money needed to purchase the shares.
- [156] In retrospect, this was unsurprising. Mr. and Mrs. Ansari were planning to use almost all of their savings to purchase the CMR shares; neither had experience running a business; they did not own a home or other assets in Canada that could be used to secure a loan; Mr. Ansari had earned only \$24,000 a year in his previous job (according to his financial statement); and Mrs. Ansari had not worked outside the home since coming to Canada four years earlier.
- [157] Mr. Doherty and Mr. Ansari communicated to Mr. Messier that Mr. Ansari had been unable to find a lender. Mr. Messier testified that on April 6, 2000 he met with Stan Hrescak of Stanjean at a local restaurant to discuss the terms of a new lease for CMR's premises. During this meeting, Mr. Messier told Mr. Hrescak that he had agreed to a take-back loan to assist the Ansaris with the purchase of the shares. He told Mr. Hrescak that he was frustrated that the Ansaris had been unable to convince a financial institution to finance the balance of the purchase price. Mr. Hrescak asked questions about the Ansaris and Mr. Messier assured him that the Ansaris were desirable purchasers. Mr. Hrescak said he might consider lending the Ansaris the rest of the money they needed.

- [158] Mr. Messier arranged a meeting with Mr. Doherty, Mr. Ansari and Mr. Hrescak on April 10 for Mr. Hrescak to meet Mr. Ansari and discuss loaning money to him.
- [159] Mr. Messier recalled that at the meeting, Mr. Hrescak asked Mr. Ansari if he knew how hard he would have to work to make the business successful. Mr. Ansari said he was confident about his ability to run the business; and that Mrs. Ansari would be working with him. By the end of the meeting, Mr. Hrescak had agreed to lend the necessary funds to Mr. Ansari to complete the purchase of the CMR shares. Mr. Hrescak and Mr. Ansari signed a handwritten memorandum titled "Loan Agreement" ("the Hrescak Loan") confirming that Mr. Hrescak would lend Mr. Ansari \$150,000 for a maximum of seven years, with interest at 10% a year, calculated semi-annually. The memorandum provided that the shares of CMR would be held in escrow as security for the Hrescak loan. Although the memorandum is dated April 11, I consider it more probable than not that the terms were agreed at the meeting on April 10.
- [160] On April 10, 2000, the "subject to" clause in the second Agreement relating to the purchaser obtaining financing in the amount of \$150,000 was removed by an addendum to the second Agreement signed by Mr. Ansari and witnessed by Mr. Doherty.
- [161] Probably on the same day, Mr. Ansari and Mr. Messier signed an undated handwritten memorandum titled "Vendor Take-Back Loan" confirming that upon completion of a buy-sell agreement between the two men, Mr. Messier would agree to finance \$90,000 of the purchase price on condition that the shares of CMR be held in escrow as security for that loan. The term of the loan was stated to be a maximum of 3 years, with interest at 10% per year, repayable in blended payments on a weekly basis. Mr. Messier testified that although he had earlier planned to charge 12.5% interest on the take-back loan, and Mr. Ansari had agreed to that rate, Mr. Hrescak insisted that Mr. Messier reduce the interest rate to 10% to accord with the rate of interest payable on the Hrescak loan.
- [162] Mr. Skagen had been in London, U.K. on business from April 3 to 10. At 9:56 p.m. on April 10, 2000, Mr. Messier sent an e-mail message to Greig, Skagen and Company intended for Mr. Skagen. The e-mail commented on Mr. Skagen having been to London; reported that Mr. Messier had been able to arrange financing through his landlord; and stated:

So we need you to draft up the deal, the loans to Stan Hrescak and me and the new lease that is tied to the loan.

- [163] The e-mail stated that the buyer is "Zia Ansir" and that he was buying all the shares of CMR for \$440,000, with a non-refundable deposit of \$50,000 to be paid into Mr. Skagen's trust account "ASAP"; a loan of \$150,000 from Mr. Hrescak; and a \$90,000 vendor take-back loan from Mr. Messier. The deal was to close May 5 or earlier depending on the removal of subject to clauses.
- [164] Mr. Messier concluded his e-mail with the following statements:

CALL ME SO THAT WE CAN GET ALL THREE PARTIES TOGETHER TO MEET. Buyer Seller and you. I would like to have first draft done for Friday AM. Please Tell me if doable.

- [165] On April 12, 2000, Mr. Messier sent a facsimile to Mr. Car of the CIBC attaching an undated copy of a "Customer's Financial Statement and Information Sheet" ("CIBC Financial Statement") completed by Mr. Ansari. The evidence is unclear, but I conclude that Mr. Messier and Mr. Ansari were probably asked by Mr. Car to provide this information because he had been made aware that Mr. Ansari had got the necessary financing and the purchase of the CMR shares was going ahead.
- [166] I commented earlier in these Reasons about the inconsistencies in information provided by Mr. Ansari about his and Mrs. Ansari's financial situation. If the information Mr. Ansari provided to CIBC in the Financial Statement is accurate, then his evidence at trial is inaccurate. If his evidence at trial is accurate, then the information provided to the CIBC was false or, at the very least, intentionally misleading.
- [167] Mr. Ansari testified at trial that his internet business had not generated any income. On the CIBC Financial Statement he reported that his employer's name was WITO Canada; that he held the position of "Manager"; that he had been employed for four years with WITO Canada; and that his gross annual salary was \$24,000. He reported that he had cash deposits at a specific branch of the Bank of Montreal in Edmonton, Alberta of \$215,000; that he had \$18,000 in U.S. funds (\$26,500 CDN) at SeaFirst Bank; owned a vehicle worth \$5,000; and that he had "Real Estate" in "Lahore & Karachi" valued by him at \$200,000, for a total of \$446,000 in assets. He reported zero liabilities.
- [168] On the second page of the CIBC Financial Statement, Mr. Ansari provided "particulars" of the real estate he said he owned. He reported that the property was all registered in his name; that he had a house in Lahore, Pakistan worth \$60,000; four lots in Lahore worth \$110,000 in total; and one lot in Karachi, Pakistan worth \$30,000.
- [169] Above Mr. Ansari's signature on the second page of this document the following statement appears:
- The Information above and on the obverse hereof is provided to the Bank as a factual statement of my affairs. I certify that my real estate, merchandise, chattels, etc. are entered therein at a fair valuation ...
- [170] Mr. Ansari testified that the values he provided for the real estate in Pakistan on the CIBC Financial Statement were not in Canadian dollars; although that is the clear impression created by the way in which the document was completed.
- [171] I turn now to the evidence about how and when Mr. and Mrs. Ansari retained Mr. Skagen to act for them on the share purchase transaction.

- [172] Mr. Messier testified that he introduced Mr. Ansari to Mr. Skagen sometime in March 2000. He recalled that he and Mr. Ansari had been to a meeting at a bank and that on the way back to the Maaco shop he went into the office of Greig, Skagen and Company (Mr. Skagen's law firm) to pick up some papers relating to a small claims lawsuit. Mr. Ansari testified that he was never at the law firm in March, or that if he was, he stayed in the car in the parking lot and did not go into the office with Mr. Messier, but his evidence on this point was unconvincing. I believe the testimony of Mr. Messier and Mr. Skagen that Mr. Ansari accompanied Mr. Messier and that Mr. Skagen was introduced to Mr. Ansari as CMR's corporate lawyer.
- [173] Mr. Skagen testified that he had known for some time that Mr. Messier was hoping to sell his business. Mr. Messier had told Mr. Skagen that he was tired of the retail business - dust and dirt and dealing with customers - and was interested in getting into property development.
- [174] During the brief encounter at the law firm, Mr. Messier told Mr. Skagen that Mr. Ansari was going to buy the business and that he and Mr. Ansari wanted Mr. Skagen to act for both of them on the eventual sale. Mr. Skagen testified that he told Mr. Ansari and Mr. Messier that he could not act for both sides and the three men agreed that Mr. Skagen would act only for the purchaser.
- [175] Mr. Skagen testified he could not recall how long Mr. Messier or CMR had been his clients. He believed it had been several years at least and that Greig, Skagen and Company was the registered and records office for CMR and for another company Mr. Messier owned, CMR Business Systems Inc. Mr. Skagen had handled the sale of Mr. Messier's condominium and the purchase by Mr. and Mrs. Messier of a home.
- [176] Mr. Messier testified at his examination for discovery that when he had sold businesses he owned before he acquired the Maaco shop, he had handled the transactions himself and had not used a lawyer. Mr. Messier testified that in order to avoid paying legal fees he had been handling most of CMR's legal work - mostly repossessions, collections and small claims lawsuits - himself and that in the five years before 2000, Mr. Messier had seldom sought legal advice from Greig, Skagen and Company. He said the law firm had never defended his companies in a lawsuit. He says he got some verbal advice from the law firm, for which he was not charged.
- [177] Mr. Skagen agreed in cross-examination that he and Mr. Messier were friendly, but Mr. Skagen said he considered Mr. Messier to be a "business friend", rather than a personal friend and he denied the existence of a "special" or close relationship with Mr. Messier. Mr. Skagen and his wife did not see Mr. and Mrs. Messier socially. He said he did attend Mr. Messier's wedding; was asked to make some remarks on the occasion, and did so. He did not recall having gone to Mr. Messier's home to get documents signed on an occasion when Mrs. Messier was ill; but said it was possible he had done so, because he did provide that kind of service to clients. Mr. Skagen said that he understood that Mr. Messier was friendly

with Mr. Skagen's brother Tim; that Tim Skagen was interested in working on cars as a hobby and had done some work on his cars at Mr. Messier's shop.

- [178] Aside from his brief introduction to Mr. Ansari in March, I am satisfied that Mr. Skagen had no involvement in the share purchase transaction until April 12, 2000, after both the first Agreement and the second Agreement had been signed; and after most, but not all of the "subject to" clauses in the second Agreement had been removed by Mr. Ansari. By the time Mr. Skagen met with Mr. and Mrs. Ansari on April 12, Mr. Ansari had already agreed on the terms of the take-back loan from Mr. Messier and the terms of the Hrescak loan and had removed the subject-to financing condition included in the second Agreement. On April 12, Mr. Ansari removed the subject to clause relating to viewing and approving accounts payable, accounts receivable and inventory of equipment. I am satisfied that Mr. Ansari did not seek or receive legal advice from Mr. Skagen before removing any of these subject-to clauses. Mr. Doherty witnessed Mr. Ansari's signature on all of the addenda removing subject-to clauses.
- [179] As I said earlier, Mr. Skagen had been in London, U.K. on a business trip the first 10 days of April. His first day back in the office was either Monday April 10 or Tuesday April 11. I related earlier the contents of an e-mail Mr. Messier sent to Greig, Skagen and Company on the evening of April 10. It is likely Mr. Skagen first saw this e-mail on the morning of April 11.
- [180] Michael Doherty sent a facsimile message to Mr. Skagen at 9:45 a.m. on April 11 attaching a copy of the Second Agreement and informing Mr. Skagen that Mr. Ansari would be calling to set up an appointment.
- [181] Mr. Skagen's appointment book records an appointment for Rene Messier at 11:00 am on April 12, and an appointment recorded as "Zia Ansari - 583-0534 re: Rene Messier" for 2:00 the same day. Mr. Skagen testified that these entries were generally made by one of his two legal assistants and the entries were made in advance of the event recorded - in other words, that this is a record of appointments rather than a diary of events that occurred.
- [182] Mr. Skagen recalled that Mr. Messier said he wanted to meet with Mr. Skagen together with the Ansaris. Mr. Skagen told Mr. Messier that he could not do that and that Mrs. Ansari had already made an appointment for her and her husband to meet with Mr. Skagen later on the 12th. I understood by this testimony that Mr. Skagen was reminding Mr. Messier that he would be not be acting for both purchaser and seller on the transaction.
- [183] An accounting record produced from the records of Mr. Skagen's former firm records that a file was opened on April 12, 2000 in the name of CMR Marketing Research, with Arthur Skagen as the "responsible lawyer" and Rene Messier as the contact person. Mr. Skagen testified that he would not have been involved in the file opening process; that it was probably done by Ann White, who was one of his two secretaries at the time. He said that although Ms. White listed Mr. Messier as the contact person - consistent, I infer, with the way in which previous CMR files had been opened at the law firm Mr. Skagen considered

Mr. and Mrs. Ansari to be his clients. I accept this testimony.

- [184] The record of disbursements shows that a file opening fee was charged against the file on April 12 and a number of searches - social service tax application for clearance, B.C. corporate tax application for clearance, Ministry of Skills, Training and Labour check for unpaid wages, Revenue Canada inquiry for employer remittances, Revenue Canada inquiry for federal corporate tax, WCB for assessments, collections and prevention; Revenue Canada for GST and Excise taxes - were ordered, as well as an inquiry to the municipality regarding zoning. Notes on this record appear to indicate that responses were received.
- [185] Greig, Skagen and Company's trust ledger shows a deposit of \$50,000 into trust in respect of the new CMR file on April 12, 2000 and a cheque drawn on an account in the name of Mr. and Mrs. Ansari is in evidence. I conclude that this was the deposit required by the second Agreement and that either the plaintiffs brought the cheque with them to the meeting with Mr. Skagen on April 12 or Mr. Doherty had the cheque delivered to the law firm.
- [186] Mr. Skagen testified that it was his general practice to refrain from making notes of meetings with his clients; an inadvisable practice for a lawyer, to say the least. Mr. Skagen did not provide the Ansaris with a retainer agreement or require them to sign a retainer agreement. He did not obtain a written waiver from Mr. and Mrs. Ansari in relation to a real or potential conflict of interest in view of his prior representation of Mr. Messier and Mr. Messier's two companies. Mr. Skagen said it was also not his practice to record time spent working on a file; or to make a record of work done on a file. He said he generally set fees at the completion of an assignment by looking at the file and deciding how much work had been involved.
- [187] Mr. Skagen testified that by time of trial he had no specific recollection of the first meeting with Mr. and Mrs. Ansari, although in answering questions in direct and cross-examination he did seem to have some memory of some discussions. He said his usual practice was to review the contract with his clients to determine what documents he needed to prepare for the closing process. He noted that the contract was for the purchase of shares. He said his usual practice was to discuss with clients things that needed to be done, and that he would also have discussed legal fees. Mr. Skagen recalled that there was some urgency to get the deal done because Mr. Ansari wanted to go to the next Maaco franchisee school.
- [188] Mr. Skagen testified that in his practice, and in relation to this transaction, he did not see it as his role to give business advice. He said that he is not an accountant or a business adviser. He understood that Michael Doherty was giving the Ansaris business advice. Mrs. Ansari testified that Mr. Skagen gave them no advice about CMR's financial statements. She said he did tell them that he knew the business and that it was a "good business".
- [189] Mr. Skagen testified, relying on his usual practice, that he would have explained that buying a business is not like buying a house and that he could not quote a fixed fee. He said he would have explained the relationship between levels of service and fees. He said he would usually give clients an estimated range of fees; that if he was investigating all business

issues and doing "due diligence" the fees could be as high as \$15,000. He recalled that Mr. and Mrs. Ansari were concerned about legal fees; that they said they had already done a lot of the work themselves and were prepared to do more. He believes on that basis he quoted a fee of \$3,500. Mr. Ansari recalled that the fee quoted was \$3,000 or \$3,200. Mrs. Ansari recalled that Mr. Skagen used the figure \$3,500.

- [190] Mr. and Mrs. Ansari both testified at trial that they repeatedly told Mr. Skagen they were relying on him to get them a "perfect deal" or a "100% flawless deal" with no risk and that he promised to get them a perfect deal. Mr. Skagen said that he gave no such assurance, and that it is not possible to do a flawless deal.
- [191] I consider it highly improbable that any lawyer would promise clients a perfect or flawless or risk-free transaction particularly in circumstances where the clients had already signed an agreement without benefit of legal advice. I consider it more probable that such a request or demand would send off warning bells that would result in a lawyer actively disclaiming such assurances. I do not believe the testimony of Mr. and Mrs. Ansari that Mr. Skagen, in effect, guaranteed that there would be no risk to them as a result of the transaction.
- [192] Mr. Skagen testified that the essential terms of the contract had already been agreed before the Ansaris came to see him. In cross-examination at trial, Mr. Skagen testified that he did not believe that the reference to preparation of a buy-sell agreement in the second Agreement made it an agreement to agree; or unenforceable.
- [193] Mr. Skagen agreed that on his examination for discovery he had initially testified that he believed all of the "subject to" clauses had been removed by the time he met with the Ansaris on April 12. After being shown some addenda relating to the removal of subject-to clauses dated after April 12, he agreed that some conditions had been removed after April 12. He maintained, however, that the essential terms of the bargain had been agreed before the Ansaris consulted him, and that the Ansaris did not ask for his advice about whether to remove any of the subject to clauses, even after he had been retained.
- [194] The outcome of the meeting on April 12 was that Mr. Skagen agreed to prepare the necessary documents to effect the share purchase; to do the necessary "due diligence" inquiries; and to make sure that the Ansaris purchased the shares free of encumbrances. Notes from the law firm's file relating to the transaction indicate someone had noted that a letter was needed from the CIBC to confirm the status of the first charge registered in the Personal Property Registry. Mr. Skagen recalled that he contacted Peter Car at the CIBC and was told that CMR's operating line of credit was in good standing. He believed that he had also received a letter from CIBC to that effect; and a letter is referred to in the statement of account delivered to the Ansaris by the law firm, but the letter was not found.

- [195] Eventually Mr. Skagen prepared several drafts - at least two prior to the final documents - of a share purchase agreement; and other documents to which I shall refer later in these Reasons.
- [196] Mr. Skagen agreed in cross-examination that the second Agreement referred to Mr. Ansari alone as the purchaser. He agreed that Mrs. Ansari was not a party to the second Agreement. He essentially conceded that he assumed that Mrs. Ansari would be a co-purchaser of the CMR shares when he learned that Maaco had specified that she had to be a co-franchisee and that Mrs. Ansari had agreed to that condition. He said he was not consulted about whether she should agree to be a co-franchisee and could not recall if there had been any discussion with the Ansaris about her being a co-purchaser.
- [197] Mr. and Mrs. Ansari testified that both of them were present at all of their meetings with Mr. Skagen. Mr. Ansari gave varying accounts of the numbers of times he and Mrs. Ansari met with Mr. Skagen; in direct he said that he thought there were four or five meetings, each meeting about an hour, except for the last meeting when the closing documents were signed, which Mr. Ansari initially claimed had lasted only two minutes or five minutes. Later he said that perhaps the meeting lasted 15 or 20 minutes. Later he said that this meeting might have lasted an hour or even two hours. In cross-examination he demonstrated considerable uncertainty about the number and length of meetings. Mrs. Ansari said at trial that there had been 5 meetings with Mr. Skagen but at her examination for discovery had testified there were 4 meetings.
- [198] Mr. Skagen testified that 3 meetings were noted on his appointment calendar - the initial meeting on April 12, a second meeting on April 27, and a final meeting on the day the closing documents were signed - Mr. Skagen was not sure whether that was on May 3 or 4. He also had some recollection, however, of another meeting or conversation about life insurance. He recalled that Mr. and Mrs. Ansari asked him if they had to take out life insurance, as Mr. Messier was asking them to do. Mr. Skagen recalled advising the Ansaris that as there was no term in the contract they had signed requiring them to purchase life insurance they were not required to do so.
- [199] Mrs. Ansari testified at trial that after the couple retained Mr. Skagen, she spoke to Mr. Skagen many times on the phone and sent numerous facsimiles to him - she estimated 20 phone calls and faxes - from her home telephone/facsimile machine. She said that when anything new came to her she phoned Mr. Skagen or sent him a facsimile. Mrs. Ansari also testified that she called Mr. Skagen on the phone or sent him a facsimile message about everything that happened and every doubt that she had. She said that Mr. Skagen never sent facsimile messages back to her but sometimes returned her phone calls. She testified his response was always the same - "Believe me, this is a good business and you are in good hands". She said he said those two things every time she spoke to him.

- [200] At her examination for discovery, however, Mrs. Ansari had made no mention of these phone calls and faxes and had testified that she and Mr. Ansari had no contact with Mr. Skagen from the time they asked him about having to provide life insurance to a meeting they had with Mr. Skagen after they had met with lawyer Murray Morrison.
- [201] Mrs. Ansari did not produce any record of any of the facsimile messages she testified she had sent to Mr. Skagen. Mr. Skagen denied having received facsimile communications from Mrs. Ansari and said that if such communications had been sent they would have been placed in the Ansaris' client file at Greig, Skagen and Company and none were found when the law firm produced its file. He had no recollection of having had telephone conversations with Mrs. Ansari. Mr. Ansari did not corroborate Mrs. Ansari's testimony on this point. Mrs. Ansari's evidence about these communications was unconvincing and I reject it.
- [202] On April 14, 2000, Mr. Messier, on behalf of CMR and Mr. Hrescak, on behalf of Stanjean signed a "Lease Renewal Agreement" for the Maaco shop premises providing for a renewal of lease for a period of 10 years, made up of two five-year terms. On April 17, 2000, Mr. Ansari signed a "Subject Release" in relation to the clause in the second Agreement relating to obtaining a satisfactory lease.
- [203] Between April 12 and April 17, Mr. Ansari and Mr. Messier had, I conclude, submitted an application to Maaco Canada asking that Mr. Ansari be approved as a franchisee. On April 17, 2000 Maaco Canada sent a letter by facsimile to CMR's address, to the attention of Mr. Messier, advising that Mr. Ansari had been approved as a franchisee if he agreed to certain conditions. The first condition was that Mr. Ansari had to successfully complete the Maaco franchisee training course.
- [204] The second and third conditions imposed by Maaco related to Mrs. Ansari becoming a co-applicant and co-franchisee. Maaco specified that as Mr. Ansari appeared to have no assets other than the funds he was using to purchase the business, Maaco required Mrs. Ansari to complete the "Co-Applicant" section of the "Qualification Report" and would be required to sign and be a party, along with her husband, to a new 15 year franchise agreement. Maaco did not, however, require her to be an owner of the business.
- [205] Mrs. Ansari testified that she sought advice from Mr. Skagen about whether she should agree to be a co-franchisee. Mr. Skagen did not believe he had been consulted and I think it is unlikely that he was. I do not believe Mrs. Ansari's testimony that she talked to Mr. Skagen about whether she should agree to be a co-franchisee.
- [206] On April 17, 2000, the same day the Maaco letter with conditional approval of Mr. Ansari was sent by facsimile to CMR, Mr. and Mrs. Ansari wrote "We accept" on a copy of the letter; both of them signed it; and it was returned to Maaco along with an amended copy of a financial statement that Mr. Ansari had submitted to Maaco with his original application.

- [207] On April 17, Mr. Ansari signed an addendum to the second Agreement removing the subject-to clause relating to approval by Maaco as a franchisee; and a second addendum removing the clause relating to receiving a five-year lease with satisfactory conditions. Mr. Ansari's signatures on both of these addenda were witnessed by Michael Doherty.
- [208] Mr. and Mrs. Ansari both signed the "Start-Up Franchise Confidential Qualification Report" form on Maaco letterhead that was sent to Maaco on April 17, 2000. On the first page of this document, Mrs. Ansari's name, social insurance number and other personal details are included in a section titled "Co-Applicant Personal Data".
- [209] Like the CIBC financial statement I described earlier in these Reasons, the financial statement submitted to Maaco included information about bank accounts in Edmonton, and Surrey, B.C. Under employment history, Mr. Ansari reported that he had been an instructor and fighter pilot with the Pakistan Air Force from 1971 to 1981; chief flying instructor with "Quetta Flying Club" from 1982 to 1985; a pilot and squadron instructor with Dubai Air Force in UAE from 1985 to 1996; and the manager of WITO Canada from 1996 to 2000, earning \$24,000 a year. Mrs. Ansari's employment history is given as "air traffic controller" with the Pakistan Civil Aviation Authority from 1980 to 1985. Mr. and Mrs. Ansari reported savings of \$220,000. They also reported owning a house in Lahore, four lots in Lahore, one lot in Karachi and one lot (in Mrs. Ansari's name) at the Karachi Marina Club. The combined market value of the foreign real estate is stated to be 220,000. The currency used is not noted, but in contrast, on the previous page the parties had noted the currency used in relation to their salaries. I am satisfied that the Ansaris hoped to leave Maaco with the impression that the foreign real estate they owned was worth \$220,000 Canadian.
- [210] Mr. and Mrs. Ansari reported to Maaco that they would use \$200,000 of their savings to purchase the business; borrow \$90,000 from Mr. Messier; and \$150,000 from Mr. Hrescak. The terms of the two loans are set out in the financial statement and the monthly debt service payment is specified as \$5,394.
- [211] Above the signatures of Mr. and Mrs. Ansari on the financial statement appears the following statement:
- I certify that the information contained herein is accurate and complete to the best of my knowledge.
- [212] On April 17, 2000, Mr. Messier sent a communication to Mr. Skagen, probably by facsimile, attaching the letter from Maaco specifying that both Mr. and Mrs. Ansari had to be franchisees with Mr. and Mrs. Ansari's signatures accepting the terms; a copy of the lease terms signed by Mr. Messier and Mr. Hrescak; and, I conclude, copies of the addenda removing the subject-to clauses that had been signed on April 17. Mr. Messier's note accompanying these documents stated that all "subjects" had been removed; that the lease agreement would be done by the landlord's lawyers and that when Mr. Messier learned the name and address of the landlord's lawyers, he would pass it on.

- [213] I consider it likely that Mr. Doherty also sent copies of the addenda relating to the removal of the subject clauses to Mr. Skagen. On April 17, 2000, an office administrator at HomeLife wrote to Mr. Skagen regarding the purchase of the shares confirming that they held no funds in trust; that their selling commission would be \$13,449.90. A "Conveyancer's Instruction Report" attached to the administrator's letter listed Greig, Skagen & Wilson as both the seller's lawyer and the buyer's lawyer, and listed Bill Godwin and Michael Doherty as the sales agents.
- [214] Mr. Messier testified that it was sometime between April 17 and April 23, (on Examination for discovery he said it was on April 17) that he gave Mr. Ansari a copy of the March profit and loss statement for CMR. Mr. Messier said Mr. Ansari reviewed the profit and loss statement and asked Mr. Messier why it differed from the Budget. Mr. Messier said he reminded Mr. Ansari that the Budget had been a projection provided to assist Mr. Ansari to apply for financing; and that the profit and loss statement was a record of CMR's actual performance in the month of March. Mr. Ansari did not contradict this testimony.
- [215] On April 20, Mr. Messier and Mr. Ansari met with Peter Car of the CIBC to discuss CMR's operating loan. Mr. Messier put a note in his day-book for April 20 that says: "Applied for Operating Line with Peter". I am satisfied, however, that Mr. Ansari was not applying for a personal line of credit; the issue was whether the CIBC would continue CMR's existing credit facility after the Ansaris purchased the shares of the company and took over the operation of the business.
- [216] I conclude that it was around this time that Mr. Messier realized that he had, in effect, painted himself into a corner in relation to his personal guarantee of CMR's LOC. The CIBC held Mr. Messier's unlimited personal guarantee of the indebtedness of CMR as part of the bank's security for the operating line of credit. With the removal of the last subject-to clauses from the second Agreement on April 17, Mr. Messier had, he believed, a binding agreement for the sale of the CMR shares to the Ansaris. I am satisfied that Mr. Messier thought that the price the Ansaris had agreed to pay was a good price; and for that reason, as well as his desire to free up capital for other business opportunities, he was anxious for the deal to go ahead.
- [217] Mr. Messier attempted to give the impression at trial that he really did not care if the Ansaris went ahead with the share purchase; and that he would have been pleased if they had backed out because he was confident he would be entitled to retain their deposit and he had other interested purchasers waiting in line. I did not find Mr. Messier's evidence convincing. Mr. Skagen testified that Mr. Messier had been saying for some time that he wanted to sell his business.
- [218] I do not believe that Mr. Messier would have agreed to the take-back loan to assist the Ansaris to purchase the CMR shares if he did not believe that the purchase price the Ansaris had agreed to pay was a good price; or it he actually did have other buyers waiting in the wings ready and willing to make a competitive offer. The fact that he agreed to extend

the dates in the first Agreement; and then entered into the second Agreement despite the difficulty the Ansaris were having in finding financing, also indicates that Mr. Messier wanted the sale to go ahead.

- [219] Following the meeting with Peter Car on April 20, Mr. Messier realized that unless the CIBC agreed to release his personal guarantee, he would remain exposed to liability on the guarantee of CMR's LOC after the Ansaris took over the operations of the business. He also realized, I conclude, that if CIBC felt its security to be at risk as a result of the pending sale of Mr. Messier's shares to the Ansaris, or if Mr. Messier attempted to unilaterally withdraw his guarantee, the loan would be called, and either the business or the sale of the shares, or both, would collapse.
- [220] Mr. Messier had not included anything in the second Agreement that obliged the Ansaris to obtain a release of his personal guarantee, or even to indemnify him in the event that the guarantee remained in place and CIBC made demand on Mr. Messier or sued him on the guarantee. Mr. Messier had failed to protect himself from any of these negative contingencies.
- [221] In his testimony, Mr. Ansari referred to CMR's line of credit as Mr. Messier's line of credit. Mr. Ansari attempted to convey the impression that he had no understanding of what a line of credit was in 2000 or even in 2009. He testified that at the meeting he attended with Mr. Messier at Mr. Car's office, he was merely an observer and that he took no part in the discussions.
- [222] I find this evidence to be unconvincing. Mr. Ansari completed the "Customer's Financial Statement and Information Sheet" that Mr. Messier sent by facsimile to Peter Car on April 12, 2000. Mr. Ansari knew on April 12 that he had the financing in place that he needed to complete the share purchase - those funds were coming from the take-back loan and the Hrescak loan. He must have realized, I infer, that the information he was providing to CIBC had to do with CMR's LOC.
- [223] The unaudited financial statements that Mr. Ansari had received before offering to buy the shares of CMR documented the debt owed by CMR to its bank. I consider it more probable than not that Mr. Ansari had had discussions with Messrs. Doherty and Godwin about the financial statements, and that the debt owed to the bank was taken into account in arriving at the price Mr. Ansari offered for the shares.
- [224] Although Mr. Ansari testified that he did not know or care about the line of credit, he also testified that prior to the closing date he asked Mr. Skagen about the line of credit. He says that Mr. Skagen said that Mr. Messier was doing the Ansaris a favour; that the LOC was a bonus to the Ansaris, "... why worry about it?" He testified that Mr. Skagen told him to he could get money if he needed it, but it was Mr. Messier's loan. I do not believe this testimony or Mr. Ansari's testimony about the LOC in general. In my view, his evidence is internally inconsistent and inherently improbable. I conclude that Mr. Ansari knew that CMR had a LOC and that the company would continue to require the loan facility after he

was the owner of the business.

- [225] Neither Mr. Messier nor Mr. Ansari testified about the outcome of the meeting with Peter Car on April 20. I conclude, based on later events that Mr. Car indicated that the bank would need to consider the matter and that he would let Mr. Messier and Mr. Ansari know the bank's position at a later date.
- [226] In the last two weeks of April, Mr. Ansari was frequently at the Maaco shop, observing and learning how the business operated. Mr. Messier's calendar notes that Mr. Ansari was at the shop for part of each day April 17, 18 and 19. Mr. Ansari recalled being in the shop for a week near the end of April.
- [227] An event happened on April 21 that made Mr. and Mrs. Ansari annoyed with Mr. Messier. On that day, Mr. Messier set up a meeting for the Ansaris with an insurance agent, Anne Crozier, in the boardroom at the Maaco premises. Mr. and Mrs. Ansari testified they weren't really sure why this meeting was arranged, but that the agent began asking questions about their family and their finances. They eventually realized that Mr. Messier wanted them to purchase life insurance policies - he called it "key man insurance" - and make Mr. Messier and Mr. Hrescak the beneficiaries. The Ansaris became upset and they cut the meeting short.
- [228] Sometime that day, in the next couple of days, Mr. and Mrs. Ansari contacted Mr. Skagen - either by telephone or in person - and asked him whether they were obliged to provide the life insurance Mr. Messier was asking for. Mr. Skagen told them that as they had not agreed to this in the second Agreement, they did not have to provide it. The Ansaris told Mr. Messier they were not willing to purchase key man insurance.
- [229] Mr. and Mrs. Ansari both testified that near the end of April, they became concerned that information Mr. Messier had provided about the business was not accurate. Mr. Ansari testified that his analysis of the Budget indicated that the shop would have to paint 20 cars a day in order to meet the revenue projections, but after observing the operations on the shop floor, he concluded that it was not possible to paint 20 cars in a day. Mrs. Ansari testified that Mr. Ansari told her that the business that was actually being done in the shop did not match up with the projections. Mr. Ansari testified that he realized that the Budget was not accurate. He said he did not, however, confront Mr. Messier.
- [230] Mr. Messier testified that on April 25 the Ansaris told him that the CIBC had refused to give them a LOC. Mr. Messier testified that he spoke directly to Peter Car on April 26 and that Mr. Car said the CIBC would leave CMR's LOC in place but would continue to require Mr. Messier's personal guarantee for the debt.
- [231] Mr. Messier testified at trial that after learning that the CIBC would not continue to offer credit to CMR without his guarantee, he talked to Mr. Skagen and that Mr. Skagen advised him that he should agree to leave his personal guarantee in place.

- [232] Mr. Messier agreed that up to this point, he did not consider Mr. Skagen to have been acting for him or advising him in relation to the share purchase transaction.
- [233] Mr. Messier testified that he called Mr. Skagen to say that he believed the Ansaris were not going to complete and that he wanted Mr. Skagen to give him the Ansaris' \$50,000 deposit. Mr. Skagen told him he could not do that. Mr. Messier testified that Mr. Skagen told him that if he agreed to stay on as a "co-signer" of the LOC he would have delivered an operating line to the Ansaris; which was a condition of the purchase agreement, and then Mr. Messier would be able to keep the \$50,000 deposit and the shares.
- [234] Mr. Messier testified that Mr. Skagen dictated to him the wording to be used in a letter and that Mr. Messier had Ms. Mecham type the letter on Maaco letterhead and send it to Mr. Skagen on April 26, 2000.
- [235] The letter written by Mr. Messier is directed to Mr. Skagen's attention and states:
- Please hereby be advised that the issue of operating line has been resolved and accepted by the CIBC.
- The remedy has been accepted by my guarantee on the operating line, thus, the company will maintain its operating line at time of closing.
- [236] Mr. Skagen denied having given Mr. Messier advice about whether or not to leave his personal guarantee in place. He denied having dictated the language used in the letter written by Mr. Messier, copies of which were marked as Exhibits 83 and 84 at trial. I do not believe Mr. Skagen suggested that Mr. Messier write a letter that included the phrase "The remedy has been accepted by my guarantee ..." since that sentence makes no sense from a legal or grammatical perspective. Drawing on my experience with Mr. Messier's style of written and oral communications during the trial, I conclude that Mr. Messier composed the letter himself and that the words used are his own.
- [237] Mr. Skagen did recall that he was made aware that there was a problem with the LOC but could not recall if it was Mr. Messier or the Ansaris who first told him about it. He said he had earlier checked with Peter Car at the CIBC and was told the loan was in good standing. He thought that he had obtained a letter from CIBC to that effect.
- [238] Mr. Skagen testified that he believes he did read the letter dated April 25 faxed to his office by Mr. Messier and that he may have asked Mr. Messier to send him a letter about the LOC. He had no recollection of having met with Mr. Messier on April 25 although his appointment calendar refers to an appointment for that day.

- [239] I accept Mr. Skagen's testimony that he did not advise Mr. Messier to leave his personal guarantee in place, although I accept that he likely discussed the situation with Mr. Messier. I do not believe that Mr. Skagen told Mr. Messier that if he left his guarantee in place, there could be no dispute about his entitlement to the \$50,000 deposit paid by the Ansaris. In any event, I am satisfied that Mr. Messier did not rely on any advice given by Mr. Skagen because there was no useful legal advice that could be given.
- [240] The CIBC had Mr. Messier's personal guarantee. CIBC had communicated to Mr. Messier and to the Ansaris that the bank would not agree to release Mr. Messier's personal guarantee and accept personal guarantees from Mr. and Mrs. Ansari in place of Mr. Messier's guarantee, although the bank was asking to have the Ansaris' personal guarantees in addition to that of Mr. Messier. Mr. Messier knew better than anyone that CMR could not operate without a LOC. The CIBC would not continue to provide the credit facility to CMR if Mr. Messier withdrew his personal guarantee. If Mr. Messier attempted to withdraw his guarantee before the closing date, assuming, (although there is no evidence to this effect) that he had the right to unilaterally withdraw or cancel the guarantee, the CIBC would, more probably than not, have demanded payment of CMR's loan and realized on its security, which included personal property security over the assets of CMR.
- [241] I have little doubt that the CIBC would simultaneously have made demand on Mr. Messier to honour his personal guarantee. That is what the bank did do in July 2000 when it demanded payment of the loan from CMR. Mr. Messier owned a home and possibly other assets to which the bank could look to recover the debt. If Mr. Messier left his guarantee in place and proceeded with the sale of the shares, he was going to be exposed to risks over which he would have little control. If the CIBC called the loan before the share purchase transaction closed, the Ansaris would demand their deposit back and at the very least Mr. Messier would be in a dispute over the deposit and possibly face a claim for damages. I conclude that Mr. Messier decided that he wanted the sale to proceed - or at the very least wanted to retain the Ansaris' deposit if the sale did not proceed - and would have to make the best of the difficult situation in which he found himself.
- [242] I have already said that after April 21, Mr. and Mrs. Ansari began to have concerns about the deal they had made to purchase the CMR shares. I related earlier that Mr. Ansari became convinced that the revenue projections in the Budget were unrealistic. Mrs. Ansari was concerned because, she said, every time they met with Mr. Messier, he would ask for something else - he wanted to have the right to paint two cars; wanted to put a sticker on a car; wanted air conditioning fixed. She said one day she and Mr. Ansari went to the Maaco shop and Ms. Mecham said that Mr. Messier was in a meeting with an old customer but that when the meeting ended, Mr. Messier said he had been meeting with another potential buyer for the business.

- [243] The Ansaris had also been put off by Mr. Messier's attempt to convince them to take out "key man" insurance following the meeting on April 21. I consider it likely the Ansaris were also discouraged by the lack of faith the CIBC had displayed in CMR's prospects under their management.
- [244] Mr. and Mrs. Ansari did not confirm Mr. Messier's testimony that they told him they did not want to proceed and that he said he would let them walk away but would not return their deposit; but I am satisfied that Mr. and Mrs. Ansari had realized, by April 26 at the latest, that if they did not complete there would be a dispute over the deposit.
- [245] The Ansaris were in an unenviable position. They had become disenchanted with Mr. Messier and their prospects as owners of the business. However, they were not prepared to forfeit the \$50,000 deposit. They were well aware by this time that they were not considered good credit risks by the several financial institutions they had approached for financing - Mr. Ansari testified he stopped approaching lenders because he knew nobody was going to lend them any money. They realized, I conclude, that if they lost the \$50,000 they might not have enough money left to purchase any other business.
- [246] I am satisfied that by this time the Ansaris had also become concerned that Mr. Skagen might have divided loyalties because of his history with Mr. Messier. On April 26, 2000, Mr. and Mrs. Ansari went to see Murray Morrison, a lawyer in Surrey, to seek advice from him about whether they could get out of the contract to purchase the CMR shares. Mr. Morrison's office was only a few blocks from the Ansaris' home. Mr. Morrison testified at trial that he offered a service similar to the Lawyer Referral Service offered through the Canadian Bar Association. Mr. Morrison would meet with individuals who were not already his clients for a half hour consultation for a nominal fee.
- [247] The testimony of the Ansaris about what they told Mr. Morrison and what he told them differs in material ways from the testimony of Mr. Morrison who was called as a plaintiff's witness at trial. Where the evidence of Mr. and Mrs. Ansari conflicts with that of Mr. Morrison, I prefer and accept the evidence of Mr. Morrison.
- [248] Mr. Ansari gave inconsistent testimony about whether he and Mrs. Ansari met with Mr. Skagen to discuss concerns they had about going ahead with the share purchase transaction before they met with Mr. Morrison on April 26, 2000. On examination for discovery, Mr. Ansari testified that he was not sure whether they had met with Mr. Skagen before they met with Mr. Morrison. In his direct testimony at trial he said he was sure that he and Mrs. Ansari had met with Mr. Skagen first and that they had told Mr. Skagen their concerns about the Budget (Exhibit 3) at that meeting.
- [249] Mr. Ansari testified that he and Mrs. Ansari went to see Mr. Morrison because they were unhappy with Mr. Skagen's response to their concerns. In cross-examination, Mr. Ansari was referred to the answer he gave at his Examination for discovery which was that he could not recall what had motivated him to go to see Mr. Morrison.

- [250] Later in cross-examination, Mr. Ansari said that he saw Mr. Skagen and talked to him about the Budget both before and after the meeting with Mr. Morrison. I place no weight on Mr. Ansari's testimony on this point.
- [251] Mrs. Ansari appeared to recall a meeting with Mr. Skagen that took place before she and Mr. Ansari met with Mr. Morrison. She said this was the third meeting she and Mr. Ansari had had with Mr. Skagen. If she is correct, then it is likely that this was same meeting at which the topic of life insurance was discussed.
- [252] Mrs. Ansari's recollection was that when she and Mr. Ansari asked Mr. Skagen about Mr. Messier's request that they provide life insurance Mr. Skagen said you do not have to do it if you do not want to. She recalled that at this meeting she and Mr. Ansari told Mr. Skagen they were having doubts about buying the business but that Mr. Skagen said it was a good business and it was too late to back out. She said that Mr. Skagen said that Mr. Messier wanted to send Mr. Ansari to Maaco franchisee school. Mrs. Ansari testified that she told Mr. Skagen words to the effect of "You're my lawyer, not Mr. Rene's lawyer - you should be talking about me and my protection" and that Mr. Skagen became very angry and stood up in front of her face and was very aggressive and said, "Are you accusing me that I am not your lawyer?" She said she was intimidated but that she said words to the effect of "Why does Rene talk to you; you're our lawyer; you have to listen to us and do what we tell you." Mrs. Ansari testified that by the end of this meeting she was no longer intimidated by Mr. Skagen and instead was angry. Mrs. Ansari said that it was Mr. Skagen's behaviour at this meeting that led her and her husband to decide to seek advice from another lawyer and they went to see Mr. Morrison.
- [253] Mr. Skagen does not recall having had two meetings with Mr. and Mrs. Ansari between April 12 and the closing date and his appointment calendar does not refer to two meetings. He did recall a meeting with Mr. and Mrs. Ansari in late April at which, in his terms, they were having "buyer's blues". He said they expressed concern that representations made to them by Mr. Messier might not turn out to be true. Mr. Skagen could not recall whether the Ansaris told him they wanted to get out of the deal but he was prepared to concede they might have said that. He said he discussed with them their options and the rights and remedies they or Mr. Messier would have if either breached the contract. He said he told them about damages, and specific performance, and about a possible lawsuit over the deposit. He did not recall them specifically asking him to return the \$50,000 deposit to them but said he would not have done so if they had asked. He said that by the end of the meeting they seemed satisfied with what he'd told them, although he could not say they seemed "content"; and that when they left his office the deal was still on.
- [254] Mr. Skagen denied that Mrs. Ansari ever accused him of acting like he was "Rene's lawyer" and he also disagreed Mrs. Ansari burst into tears. He says that did not happen.

- [255] Mr. Morrison testified that he had not kept notes of his meeting with Mr. and Mrs. Ansari but was assisted in his recall of the April 26, 2000 meeting by the contents of a letter he had written to plaintiff's counsel on October 11, 2000 in which, at counsel's request, Mr. Morrison had set out his recollections of the April 26 meeting. Summarizing the contents of his letter and Mr. Morrison's testimony at trial, I conclude Mr. and Mrs. Ansari went to Mr. Morrison's office at 10:30 a.m. on Wednesday April 26, 2000. In accordance with his policy of offering summary advice at a nominal fee, Mr. Morrison charged the Ansaris \$20 for the time he spent with them, which he believed was about 30 minutes.
- [256] Mr. Morrison recalled that the Ansaris had some documents with them relating to their purchase of the shares of a business, but could not recall specifically what the documents were. The documents struck Mr. Morrison as "primitive". It is clear from a note written by Mr. Morrison and given to the Ansaris on April 26 that one of the documents they showed him was a version of the second Agreement that had a possession date of April 25 written on it.
- [257] Mrs. Ansari testified that they told Mr. Morrison that Mr. Ansari had seen that the business was not doing as well as they thought and that it was not what the seller had said it was. She also testified that they told Mr. Morrison that they had a corporate lawyer but that they had doubts about him; that he was trying to intimidate them.
- [258] Mr. Morrison testified that the Ansaris did not tell him that they already had a lawyer acting for them on the transaction or that they had come to see him for a second opinion. I consider it more probable than not that Mr. and Mrs. Ansari did not tell Mr. Morrison that they already had a lawyer. I believe that if they had done so, Mr. Morrison would have asked them for the name of their lawyer, and about the advice that lawyer had given them.
- [259] Mr. Morrison recalled that the Ansaris expressed concerns about the "lack of information they had received" (from the vendor, I conclude) and asked Mr. Morrison if they could "get out of the deal". Mr. Morrison said he thought that getting out of the deal was an available option, as it appeared that possession was a condition precedent to completion of the contract and possession had not been granted on April 25, and also no completion date had been specified in the contract.
- [260] Mr. Morrison said that he must have known about the Ansaris having paid a deposit because he referred to the return of the deposit in a note he hand-wrote and gave to the Ansaris before they left his office on April 26. He testified that he probably told Mr. and Mrs. Ansari that even if they could get out of the deal they might have to forfeit the deposit and that there could be a lawsuit if the vendor did not agree that they could walk away.
- [261] This testimony contrasts with that of Mrs. Ansari. She testified that Mr. Morrison read every word of the documents they showed him - even the small print on the back of the documents, and said words to the effect of "oh yes, you can just walk out and get your money back and that's it - no problem".

[262] Mr. Morrison testified that he likely advised Mr. and Mrs. Ansari that they should hire a lawyer. He says he likely did not offer to act for them but that in any event Mr. and Mrs. Ansari did not ask to retain him.

[263] At the conclusion of the brief meeting, Mr. Morrison hand wrote some wording on a scrap piece of paper and gave it to the Ansaris with the suggestion that they compose a letter setting out the information in the note and give it to the vendor and the realtor.

[264] Mr. Morrison's note was written on a small sheet of paper that has Michael Doherty's photograph and an advertisement for HomeLife at the top. The note reads:

We did not receive possession on April 25, 2000, nor have we received any buy-sell agreement. Therefore we are terminating the agreement and require the return of our deposit. Also we note that there is no completion date on the agreement and are of the view that the contract is void for uncertainty.

[265] As I said earlier, Mr. Skagen has an appointment with the Ansaris recorded on his appointment book for April 27 and believes he did meet with them on that date. His appointment book has a note of the meeting being scheduled for 1:00 to 2:00 p.m. Mr. Messier's calendar refers to a meeting at Michael Doherty's office at 1:00 p.m. on April 27 with Mr. and Mrs. Ansari and Mr. Doherty and Bill Godwin and Mr. Messier in attendance. I am satisfied that both of these meetings took place but obviously the timing of one of the meetings has not been recorded accurately.

[266] Mrs. Ansari testified that she and Mr. Ansari met with Mr. Skagen after they had met with Mr. Morrison. She gave a very colourful but, I am satisfied, improbable account of this meeting. Mrs. Ansari testified that they showed Mr. Skagen the note Mr. Morrison had written and that Mr. Skagen "became all violent", threw the note away and said "This is all bullshit, it's too late, you can't do this." One of the reasons I find Mrs. Ansari's testimony to be improbable is the fact that the Ansaris still had the note written by Mr. Morrison in their possession after they met with Mr. Skagen. A copy of the note was entered as an exhibit at trial.

[267] Mrs. Ansari testified that Mr. Skagen stood up and she thought he was going to punch her and her husband or "bang them down". She said Mr. Skagen said that if they did not buy the business he would sue them, and Rene (Mr. Messier) would sue them and Mr. Skagen's insurance company would sue them. She said he told them that they would lose all of their money and the business and they would be on the street. She testified that Mr. Skagen picked up his phone and said "I am going to call my insurance lawyer right now and I am going to sue you, should I do it?" She testified that Mr. Skagen said that they had to go ahead with the purchase; that he was shouting and screaming at them and she and Mr. Ansari were both frightened.

- [268] Mr. Ansari testified at trial that he was 100% sure that he told Mr. Skagen that he had been to see another lawyer, although he was not sure if he gave Mr. Skagen Mr. Morrison's name. On examination for discovery in 2003, however, Mr. Ansari said he was not sure that he had told Mr. Skagen they had consulted another lawyer; he said he thought Mr. Skagen would have realized that they had seen another lawyer. After being cross-examined about this inconsistency, Mr. Ansari said he could not recall what he said to Mr. Skagen and could not recall if he mentioned any of the specific points that Mr. Morrison had included on the note.
- [269] As I said earlier, Mr. Skagen did recall a meeting at which, as I said earlier, Mr. and Mrs. Ansari were having "buyers' blues". Mr. Skagen testified that the Ansaris did not tell him they had consulted another lawyer and he did not know that the Ansaris had met with Mr. Morrison until after this lawsuit started. He said that he saw the handwritten note attributed to Mr. Morrison for the first time when it was shown to him during preparation for trial.
- [270] Mr. Skagen testified that he did not threaten to sue Mr. and Mrs. Ansari or threaten that his insurance company would sue them. He could not conceive of any cause of action that he or his insurance company might have against the Ansaris. He said that he might have been forceful and pointed in his comments to the Ansaris but was not angry. As I said earlier, he recalled that he discussed the rights and remedies that the Ansaris or Mr. Messier would have in the event that either breached the contract. I consider it probable that he also told them that if they did not proceed they would still be obliged to pay him for the work he had done to that point. I shall discuss later the specific allegations in the Statement of Claim relating to the advice the plaintiffs say Mr. Skagen should have given them about their options.
- [271] It is not inconceivable that Mr. Skagen raised his voice and expressed his views in a forceful way at this meeting. There is evidence indicating that Mr. Skagen has on occasion lost his temper, raised his voice and behaved inappropriately - one of these occasions was at an examination for discovery conducted by Mr. Harding in 2007. In mitigation, it can be said that Mr. Skagen considered Mr. Harding to be attempting to insult and provoke him.
- [272] I am satisfied that when the Ansaris expressed reservations about completing the share purchase transaction, Mr. Skagen realized the unenviable situation he would be placed in if the share purchase did not proceed and a dispute arose between the Ansaris and Mr. Messier. Nevertheless, I am not persuaded that Mr. Skagen threatened the Ansaris with three lawsuits; or that the Ansaris believed that Mr. Skagen would physically assault them. I do not believe that Mr. Skagen told the Ansaris that they had no choice but to proceed with the purchase of the shares. I am not persuaded that Mr. and Mrs. Ansari believed they had no legal options - Mr. Morrison had advised them that in his opinion they did. I conclude that Mr. Skagen did tell them that if they did not go ahead Mr. Messier might sue them for the deposit if not for specific performance or damages. I also accept Mr. Skagen's testimony that he probably told them about the kinds of remedies they would have if Mr. Messier

breached his obligations under the second Agreement.

- [273] As I stated earlier, the court did not have the benefit of testimony from Mr. Doherty and/or Mr. Godwin. Mr. Ansari testified that he did not tell Mr. Doherty about the advice provided by Mr. Morrison, but I consider that unlikely. I consider it more probable than not that the Ansaris did talk to one or both HomeLife agents about their concerns and about the advice they had received from Messrs. Morrison and Skagen; and that the Ansaris also sought advice from their agents about their options.
- [274] Mr. Messier's testimony about the meeting on April 27 at the offices of HomeLife leads me to conclude that after meeting with Mr. Morrison and with Mr. Skagen; and discussions with Messrs. Doherty and/or Godwin, the Ansaris considered their options. The testimony of Mr. and Mrs. Ansari at trial demonstrates that they were alarmed at the prospect of becoming involved in a lawsuit with Mr. Messier. They also did not want to risk the loss of the \$50,000 deposit. They considered all of these factors and decided to proceed with the purchase.
- [275] Mr. Messier testified that on April 27 he received a call from Michael Doherty asking him to meet with the Ansaris at Mr. Doherty's office. Mr. Messier went to the meeting; Mr. Godwin and Mr. Doherty were there with the plaintiffs.
- [276] Mr. Messier testified that between April 24 and April 27 the Ansaris had indicated to him that they might not go ahead with the share purchase. Mr. Messier had told them he would release them from their obligations but he would keep the deposit.
- [277] Mr. Messier said he thought that at the meeting on the 27th he would be informed that the deal was off. He said he was prepared to agree to let the Ansaris back out, but intended to insist on retaining the deposit. He was surprised to find that the Ansaris seemed to have a new attitude. They were now determined to go ahead with the share purchase. Mr. Doherty asked Mr. Messier if he would agree to lower the purchase price. Mr. Messier refused, but did agree to extend the term of his take-back loan from three years to five, which resulted in much lower monthly payments.
- [278] In evidence, and marked Exhibit 8, is an addendum to the second Agreement that is dated March 27, 2000, but which I am satisfied was actually signed on April 27 during the meeting at HomeLife's offices.
- [279] The second paragraph of Exhibit 8 reiterates Mr. Messier's agreement to provide the \$90,000 take-back loan but extends the term to 60 months, with monthly payments of \$1,903.75. The first and third paragraphs of Exhibit 8 read as follows:

Vendor agrees to maintain the personal guarantee held by CIBC in order to secure the operating line of credit, for a maximum of 12 months.

It is the intention of the purchaser to obtain an operating loan without the vendor's personal guarantee at the earliest possible moment.

- [280] Mr. Messier insisted that while his guarantee remained in place, he wanted to co-sign all cheques written on CMR's account at the CIBC. This term was included in an Addendum to the SPA that was signed on May 4.
- [281] At some earlier date, the second Agreement had been amended to substitute April 25 for the April 17 possession date that had been agreed on March 27. It is logical to assume that that had been done before April 25 because Mr. Morrison's said the version of the contract that Mr. and Mrs. Ansari showed him had a possession date of April 25. At the meeting at HomeLife's office on April 27, the possession date was amended to May 5, and then to May 3. Mr. Messier and Mr. Ansari initialled these changes. May 3 was written in as the closing date. Although the intention had been for Mr. Ansari to go to Maaco franchise school on May 1, it was decided that he would spend the month of May working with Mr. Messier to learn more about the business, and then go to Maaco franchisee school in June.
- [282] Mr. Messier testified that the following day - April 28 - Mr. Ansari came into the Maaco shop on April 28 and spent most of the day there, working with CMR employee Jeff Green. Mr. Messier recalled that on April 29 he and Mr. Ansari had another discussion about Exhibit 3 and the differences between that document and the actual operating statements for March. Mr. Messier asked whether Mr. Ansari had had his accountant look at the financial records and Mr. Ansari said that he did not need an accountant.
- [283] Mr. Skagen testified that he sent a draft of the closing documents to the Ansaris and to Mr. Messier for their review prior to the closing date. Mr. Messier testified that he received a copy of the draft documents on May 2 and that he and Mr. Ansari met and reviewed the documents together and discussed further changes. Mr. Messier sent some handwritten notes to Mr. Skagen requesting further additions and changes; Mr. Skagen incorporated some but not all of these into the closing documents.
- [284] Mr. Skagen testified that his usual practice was also to have his assistant send a copy of the statement of adjustments to clients the day before the closing date so that they would know the amount of funds required for the closing, including his legal fees. In this case, it is likely that he also sent a copy of a statement of account he had received from the lawyer representing Mr. Hrescak and Stanjean on May 3, 2000; as Mr. and Mrs. Ansari were to pay these legal fees as well. The fees for the landlord's lawyer were \$3,402.98. The bill from Greig, Skagen & Company, which included a description of the legal services provided, totalled \$7,255.00 including fees of \$5,900.
- [285] A copy of a cheque dated May 3, 2000 in the amount of \$146,597.01 is in evidence. The cheque is drawn on the account of the law firm representing Mr. Hrescak and Stanjean. This was the amount of the loan advanced by Mr. Hrescak to the Ansaris. It is stamped as having been received on May 5, 2000.
- [286] I conclude that Mr. Skagen had had discussions with Mr. Messier and with Mr. Hrescak's lawyers about the nature of the security that would be provided for their respective loans. Mr. Messier and Mr. Hrescak had proposed and the Ansaris had agreed to have the CMR

shares held in escrow. This agreement was reached before Mr. Skagen was retained. Mr. Skagen had concluded that arrangement was unworkable. Instead, he prepared general security agreements to be granted by CMR to Mr. Messier and to Mr. Hrescak; and by Mr. and Mrs. Ansari to Mr. Messier, charging all of the property owned by or located on the premises of CMR. He also prepared promissory notes evidencing the two loans.

- [287] Surprisingly, the parties spent little time at trial and virtually no time in submissions referencing the documents the parties executed to complete the transaction. The plaintiffs were shown some of the documents by their counsel but only to give them the opportunity to testify that Mr. Skagen did not explain any of the documents to them.
- [288] As I noted earlier, the Ansaris' recollection of many events was vague and inconsistent. Mr. Ansari said that at the meeting on May 4, Mr. Skagen simply ordered them to "sign, sign, sign ...". Later, however, Mr. Ansari testified that they did ask Mr. Skagen about some of the documents they were signing - he could not recall which ones or how many - and that Mr. Skagen's answer was always the same; that the documents were "standard forms"; or that "it's normal" and that it was the way things are done in Canada. Mr. Ansari said that he and his wife did not sign the documents because they trusted Mr. Skagen; but because Mr. Skagen had threatened three lawsuits and they were "saving their skins".
- [289] Mr. Skagen's appointment book records an appointment scheduled for the Ansaris on May 3 from 4:30 to 6:30 p.m. and an appointment for Mr. Messier from 9:30 to 10:30 a.m. on May 4. Mr. Messier testified that he believes that both he and the Ansaris went to Mr. Skagen's office on May 4. A date has been handwritten at the top of the first page of several of the documents and on some of the signature pages and it is May 4. I conclude that it is likely that for some reason the appointment for May 3 was cancelled and the documents were not signed by the Ansaris or Mr. Messier until May 4. One of the reasons may have been that the funds from the Hrescak loan had not been received by May 3.
- [290] Mr. Skagen could not specifically recall his meeting with the Ansaris when the documents were signed and could not recall how long he actually spent with them on that day, but he said his usual practice was to take his clients to each document and each section of each document and explain what the document was, answer any questions asked; and then move on. He said that he has no reason to believe he did not follow that practice with Mr. and Mrs. Ansari. Mr. Skagen could not recall whether he met with Mr. and Mrs. Ansari in his office or in the law firm's boardroom but based on Mr. Messier's testimony, I conclude the meeting took place in a boardroom.
- [291] I conclude that it is more probable than not that Mr. Skagen did follow his usual practice of reviewing the closing documents with his clients and did provide a brief explanation of each of the documents Mr. and Mrs. Ansari signed. I do not believe that the Ansaris had no opportunity to ask questions.

- [292] In a set of the closing documents produced by Mr. Skagen in response to a demand for discovery of documents, counsel found a copy of the Budget (Exhibit 3). There is no reference to the Budget in the closing documents and it does not appear to have been incorporated by reference. Mr. Skagen said he did not know why a copy of Exhibit 3 was found in his office copy of the closing documents.
- [293] Although Mr. and Mrs. Ansari testified they did not have any discussion with Mr. Skagen about the documents they signed on the closing date; they also testified that they gave Mr. Skagen a copy of Exhibit 3 and that he said he would include it in the Purchase Agreement and took it from them and stapled it to another document.
- [294] I am unable to reach a conclusion about why Mr. Skagen attached a copy of Exhibit 3 to one of the closing documents, if he did do so. The vendor's warranties contained in the SPA do not include a representation or warranty in relation to Exhibit 3. I am confident that if asked, Mr. Messier would have refused to provide such a warranty.
- [295] At closing, the following documents were signed by Mr. and/or Mrs. Ansari in their personal capacity; or by Mr. Ansari on behalf of CMR, that specifically relate to Mr. Messier:
1. Security Agreement in favour of Rene Messier granted by Mr. and Mrs. Ansari charging all of the chattels and intangibles, including accounts receivable, belonging to the Ansaris and located at the Maaco premises.
 2. General Security Agreement in favour of Rene Messier granted by CMR charging all of the chattels and intangibles, including accounts receivable, belonging to CMR and located at the Maaco premises.
 3. Guarantee of CMR of debts owed to Mr. Messier by Mr. and Mrs. Ansari.
 4. Purchaser's Statement of Adjustments
 5. Promissory Note for \$90,000 evidencing the debt owed to Mr. Messier by Mr. and Mrs. Ansari for the vendor's take-back loan.
 6. Share Purchase Agreement ("Share Purchase Agreement") between Mr. and Mrs. Ansari as purchaser and Mr. Messier as vendor.
 7. Share Purchase Agreement Addendum.
- [296] There were also a number of documents executed in relation to the Lease with Stanjean and the Loan from Mr. Hrescak including an Order to Pay; an "Agreement to Finance" signed by the Ansaris setting out the terms of the loan from Mr. Hrescak; a promissory note signed by Mr. and Mrs. Ansari evidencing the loan from Mr. Hrescak; a mortgage amortization chart in relation to the Hrescak loan; a guarantee by CMR of the loan from Mr. Hrescak to the Ansaris; a General Security Agreement granted by CMR in favour of Mr. Hrescak and a copy of the Commercial Lease between Stanjean and CMR, including a

guarantee by Mr. and Mrs. Ansari of CMR's obligations under the Lease.

- [297] Mr. Skagen testified that after the documents were reviewed with the Ansaris and signed by them, he discovered that Mr. and Mrs. Ansari had brought in a cheque drawn on their account at the Bank of Montreal in Guildford for exactly \$150,000, the amount they had agreed to pay for the shares in addition to the \$50,000 deposit; but had not brought cheques to pay the legal fees and disbursements owed to Greig, Skagen and Company or Stanjean's lawyer. The Ansaris told Mr. Skagen they wanted to defer paying the legal fees and that they wanted to pay the fees in instalments.
- [298] Mr. Skagen admitted he became upset and angry when he found out the Ansaris had not brought with them sufficient funds to pay his firm's legal bill or the fees payable to Stanjean's lawyer. He denied that he shouted or swore at the Ansaris, as both they and Mr. Messier testified that he did; but he agreed he did raise his voice and that he expressed his anger for a couple of minutes. I conclude that Mr. Skagen was very angry; that he did speak in an inappropriate and insulting manner to the Ansaris, and that he spoke loudly enough that Mr. Messier could hear some of his comments from outside the boardroom.
- [299] Mr. Messier had arrived at the law firm while Mr. Skagen was still meeting with the Ansaris. He interrupted the meeting and he and Mr. Skagen went to Mr. Skagen's office to discuss the legal fees. Mr. Messier eventually agreed that he would persuade the Ansaris to bring in a cheque for the fees for Stanjean's lawyer and that Mr. Skagen could hold back part of the sales proceeds from Mr. Messier until Mr. Skagen's firm's legal fees were paid.
- [300] Mr. Messier then spoke to the Ansaris. He convinced them they had to pay the legal fees for the landlord's lawyers right away. He told them about the arrangement he had made with Mr. Skagen and that Mr. Skagen's legal fees could be paid in two instalments.
- [301] Among the documents signed both by the Ansaris and by Mr. Messier on May 4 is a letter dated May 3 on Greig, Skagen and Company letterhead addressed to Mr. Messier. The letter confirms that the law firm was acting for the Ansaris on the transaction; that the firm had recommended to Mr. Messier that he obtain independent legal representation but that he had declined to do so; and that at Mr. Messier's request, the law firm was attending to witnessing Mr. Messier's execution of the documents only. The letter includes the statement:

Please note that in agreeing to this limited engagement we have not and do not in any way represent that we have provided you with legal advice. Please indicate your acceptance of the terms of this correspondence by signing where indicated below. Please note that we have also made provision for execution of this document by our clients who by their signatures acknowledge their acceptance of our limited retainer for you in this matter.

- [302] Mr. and Mrs. Ansari left the law firm and later returned with a cheque drawn on their account at the Bank of Montreal in Guildford Town Centre. The cheque is dated May 4, 2000, in the amount \$3,402.98; the fees and disbursements payable to Stanjean's lawyer.

- [303] In a letter dated May 5, 2000 Mr. Skagen informed Mr. Messier that all documentation relating to the sale of the CMR shares had been finalized and executed and that two trust cheques totalling \$327,889.55 had been forwarded to Peter Car at the CIBC. The letter further confirmed that the law firm was holding two post dated cheques from CMR payable to Mr. Skagen's law firm, the first dated May 19, 2000 and the second June 4, 2000 in the amount of \$3,627.50 each; and that when the cheques had cleared, Mr. Messier would be paid the holdback amount of \$7,255. This letter was signed by Mr. Messier and by Mr. and Mrs. Ansari.
- [304] Mr. Skagen sent a letter to the attention of Peter Car at the CIBC enclosing copies of the SPA, the lease and two promissory notes; as well as two cheques payable to Mr. Messier totalling \$327,889.55 with the comment "... which we understand you will deposit on his behalf".
- [305] Mr. Skagen also delivered a bill to Mr. Messier dated May 10, 2000. This bill is said to be for professional services rendered including attending to execution of all documentation, all telephone calls, correspondence and "other matters incidental hereto". The bill is in the amount of \$1140, including PST and GST and states that the account was from funds held in trust. Mr. Skagen testified at trial that the bill took into account incessant phone calls from Mr. Messier.
- [306] Mr. Skagen testified that he had no further dealings with the Ansaris after they signed the closing documents and delivered the cheque for the landlord's legal fees. On May 11, a complete set of the executed closing documents, (without a copy of Exhibit 3 included) was sent to Mr. and Mrs. Ansari at their home address in Surrey.
- [307] Mr. Messier had agreed that for a fee, he would continue to come to the Maaco shop in May to help the Ansaris learn the business; and in June would assist Mrs. Ansari to run the business while Mr. Ansari was away at Maaco franchisee school. He had also obtained the agreement of the Ansaris to have the use of an office at the Maaco premises.
- [308] Mr. and Mrs. Ansari both testified that they knew before they signed the closing documents that Mr. Messier was a liar and a cheat and that the business was not what he had represented it to be. Mr. Ansari testified that although they became even more convinced of this within three or four days after taking over the business, they still did not confront Mr. Messier but continued to have him come to the shop to assist them. Mr. Ansari testified that he needed Mr. Messier to continue to work at the business because he was going to be away at franchisee school in June. Mr. Ansari said he also needed Mr. Messier to help run the business because in May Mr. Ansari was spending time every day looking for a lawyer to assist the plaintiffs to pursue claims against Mr. Messier and Mr. Skagen. Mr. Ansari was asked in cross-examination, but could not explain why he and Mrs. Ansari did not hire Mr. Morrison, the lawyer they had consulted on April 26.

- [309] Mr. Messier had emphasized to Mr. and Mrs. Ansari that in order to realize "efficiencies" and increase the profitability of the operations, the couple would both have to be working actively in the business; but neither of the plaintiffs seemed inclined to follow his advice. Mr. Messier said that the Ansaris antagonized the shop employees by their superior manner.
- [310] Mr. Messier also testified that the Ansaris ignored his advice to apply for a credit card that they could use to ease periodic cash flow problems. Mr. and Mrs. Ansari testified that Mr. Messier urged them to invest more of their own resources in the business; but they were unwilling to do so. He told them the wages they planned to pay themselves were too high to be sustainable.
- [311] Ms. Mecham testified that although she had expected Mrs. Ansari to be anxious to learn everything about CMR's computerized accounting system because she understood that Mrs. Ansari would be taking over the bookkeeping functions and Ms. Mecham's employment would be terminated, she was surprised that Mrs. Ansari demonstrated little interest. Mrs. Ansari did take over responsibility for depositing cash and cheques into CMR's bank account.
- [312] On May 26, at the bank's request, I conclude, Ms. Mecham faxed copies of CMR's balance sheet, a statement of profit and loss and a listing of accounts receivable, to the CIBC. The first list of aged accounts receivable had not been "re-aged" and listed several accounts under the "over 120 days" category. Following a call from CIBC, the listing of aged accounts receivable was adjusted in the manner Mr. Messier and Ms. Mecham described at this trial; to return several of the accounts to the current column. The "re-aged" list of accounts receivable was faxed to CIBC on May 31, 2000. No complaint was received from CIBC after the second list was provided and the bank did not cancel or reduce CMR's line of credit in May or June 2000.
- [313] By the end of May 2000, the Ansaris had retained Thomas Harding, their current counsel. Mr. Harding hired chartered accounting firm PricewaterhouseCoopers LLP (referred to in these Reasons as "PWC") to conduct a financial investigation on behalf of the Ansaris. Mr. Harding provided PWC with an engagement letter on June 1, 2000. He asked them to report on whether the "Budget Spread Sheet" - I conclude that was the Budget (Exhibit 3) - was inaccurate when produced and whether Mr. Messier knew it to be inaccurate on or before May 4, 2000. In addition, PWC was asked to report any "concerns" they had regarding the accuracy of the July 31, 1999 year-end and monthly fiscal 2000 financial statements; and whether CMR was in breach of its lending agreement.
- [314] PWC agreed with Mr. Harding and the Ansaris to engage in a subterfuge in order to carry out investigations at CMR's premises; and get cooperation from CMR employees, in particular, Ms. Mecham; and CMR's outside accountant, Mr. Vanderluit. When PWC employee Darren Morson went to CMR's premises on June 7, 8 and 20, 1999, CMR employees were told that PWC were on secondment to Canada Immigration to perform

certain procedures to ensure the legitimacy of the business purchased by Mr. and Mrs. Ansari under the Immigrant Investor Program. The subterfuge used by PWC later came to the attention of the Institute of Chartered Accountants, who took disciplinary action against the PWC employees involved in the ruse.

- [315] Although the evidence is not entirely clear, I conclude that Mr. Ansari was away at Maaco franchisee school during the time Mr. Morson of PWC was at the Maaco shop in early June 2000. The SPA Addendum signed by Mr. Messier and the Ansaris on May 4, 2000 refers to Mr. Ansari attending Maaco franchisee training from June 5 to June 24, 2000. In his absence, Mr. Morson's liaison at the business was Mrs. Ansari.
- [316] PWC provided Mr. Harding with a brief report and some attachments on June 26, and a letter on June 27, 2000.
- [317] On June 28, 2000, Mr. Harding caused the Writ of Summons and Statement of Claim in this action to be filed, but not served.
- [318] At trial, the plaintiffs sought to tender the report prepared by PWC as expert opinion evidence. Soon after receiving a copy of the report in 2001, counsel for Mr. Skagen notified counsel for the plaintiffs that the defendant would object to the admission of the report at trial on the basis that it did not comply with the requirements for an expert report. Despite obvious shortcomings in the report, and the fact that counsel for the defendant had warned of the position he would take at trial, no attempt was made to have the report amended to address the defects.
- [319] After hearing submissions at trial, I ruled that the report was inadmissible. As an expert report, the document was seriously flawed. Some of the opinions purported to be given were legal opinions rather than accounting opinions; for example, whether CMR was in breach of the terms of its lending agreement with the CIBC. PWC's opinion about whether Mr. Messier knew or must have known that Exhibit 3 was inaccurate before May 4, 2000 is not an opinion within the expertise of PWC; it is a matter for this court to determine; and comes perilously close to an opinion about the credibility of Mr. Messier's testimony. Other comments made by the author(s) of the report about Mr. Messier and Ms. Mecham are also comments on credibility.
- [320] The report did not identify with sufficient particularity the facts or assumptions on which opinions expressed were based. Sources of information and "understanding" were relied on that were not identified; for example, the author of the report repeated the phrase "As a matter of policy" without identifying which or whose policy he was referencing. In another instance, the author stated "We were informed ..." without identifying the source of the information or who "we" is. Only Darren Morson of PWC had actually been to CMR's premises and spoken with CMR employees, but Mr. Morson did not testify at trial. The witness who was presented at trial - Richard Pallen - was unable to identify or verify the source documents from which information referred to in the report had been derived. In her testimony, Mrs. Ansari did not identify the specific records provided to Mr. Morson.

Ms. Mecham was not asked in cross-examination to confirm information attributed to her in the PWC report.

- [321] In the report, PWC frankly expressed limitations in relation to their ability to find and verify the facts on which they had been asked to express opinions. Given the limitations expressed in the report, it could have been accorded little weight even if had been admissible.
- [322] To be fair to the PWC employee or employees who wrote the report, it should be said that PWC was not retained in June 2000 to provide independent expert opinion evidence for use at a trial; the purpose of their retainer was quite different. They were hired to conduct a covert investigation.
- [323] I did admit into evidence a spread sheet prepared by Mr. Morson titled "Analysis of Actual Results compared to Budget Spread Sheet for Fiscal 2000". Mr. Pallen was able to confirm that the information used to prepare this analysis came from documents that could be identified and were marked as exhibits in the trial.
- [324] During the month of May, CMR's cash-flow situation was not dire, but the company's debt to the CIBC did increase. A print-out of the CIBC statement for CMR's current account dated May 31, 2000 indicates that on April 30, CMR was indebted to the bank in the amount of \$44,492. By May 23, the debt had increased to \$73,050 before being reduced to \$67,750 by the end of May. Ms. Mecham testified that managing cash flow was always a challenge for CMR; that on Mr. Messier's instructions she would sometimes hold cheques payable to suppliers until she and Mr. Messier were satisfied that the cheques would clear; and part of Ms. Mecham's job was fending off inquiries from suppliers in the interim.
- [325] Mr. Messier had been ordered off the premises by Mr. Ansari in the third week of May but then was asked to return. Within a day or two after Mr. Ansari returned from Maaco franchisee training in June, however, he told Mr. Messier that he was no longer welcome at the shop. Once Mr. Messier was no longer assisting the Ansaris, other CMR employees became increasingly concerned about the prospects for the survival of the business.
- [326] Ms. Mecham observed that Mr. Ansari did not take a hands-on approach to the business and did not seem to be making any effort to find new customers.
- [327] Patrick Dickey was CMR's production manager. He had worked for CMR for five years and had worked at another Maaco franchise prior to that. Like Ms. Mecham, Mr. Dickey became concerned that Mr. Ansari stood back and watched rather than becoming directly involved in the operations of the business. Mr. Ansari told Mr. Dickey to work up front with customers, but then Mr. Dickey was not able to supervise the shop - the area where he usually worked - and tools started to go missing. Mr. Ansari did not do work in the shop such as sanding cars in preparation for painting, which Mr. Messier had done. Mr. Dickey said employees were anxious; Mr. Dickey encouraged them to be patient.

- [328] In June, CMR began to default on its obligations. Mrs. Ansari instructed Ms. Mecham to pay only the bills for parts, supplies and services incurred after the Ansaris took over the business; and that earlier payables were Mr. Messier's responsibility. Mr. Dickey overheard Mr. Ansari telling a supplier, on the telephone, that he wouldn't be paying any bills for parts supplied prior to the purchase of the shares. Mr. Dickey said he spoke to Mr. Ansari and warned him that he would be out of business if he did not pay the suppliers. Mr. Ansari told Mr. Dickey that he was acting on his lawyer's advice. Mr. Dickey tried to persuade Mr. Ansari to reconsider, without success. Mr. Dickey was so concerned that he called Mr. Dohring - the President of Maaco Canada in Toronto - and explained the situation to him. Mr. Dohring said he would come to Delta to speak with Mr. Ansari.
- [329] It did not take long before suppliers with unpaid invoices put CMR on a cash on delivery basis. One unpaid supplier eventually garnished CMR's bank account to collect on an unpaid invoice. Without the ability to purchase parts, Mr. Dickey testified, they could carry on painting vehicles, but had to turn away customers who wanted collision repairs and historically collision repairs made up 40% of CMR's business.
- [330] The rent payment due from CMR to Stanjean on May 1, 2000 was paid on May 7; but Mr. and Mrs. Ansari failed to pay the loan payment they owed to Mr. Hrescak on May 15, 2000 in the amount of \$2,474.53. The rent for June was paid on June 7, 2000, but the Ansaris' loan payment due June 15 was not paid until June 20. The rent due on July 1 was paid on July 13, but the Ansaris' loan payment due July 15 was not paid.
- [331] Mr. Ansari testified that despite numerous contacts from Mr. Car of the CIBC, he and Mrs. Ansari refused Mr. Car's request that they provide the bank with personal guarantees for CMR's LOC; and essentially refused to even talk to Mr. Car about the credit facility. Mr. Ansari testified that around the end of June, Mr. Car came to the Maaco shop with documents for Mr. and Mrs. Ansari to sign; but they refused to sign the documents and Mr. Car became quite upset and left with the documents.
- [332] On July 5, 2000, lawyers representing the CIBC made demand on CMR for payment of \$65,680.82 - the balance outstanding on the line of credit at that date. The demand letter does not allege a breach of any of the terms and conditions of the lending agreement between CIBC and CMR. It simply states that "The Loan is payable on demand at the option of the Bank." and that payment is being demanded in full. A Notice of Intention to Enforce Security under Section 244(1) of the Bankruptcy and Insolvency Act was enclosed with the letter of demand. Both were copied to Mr. Messier in his capacity as guarantor of CMR's line of credit.
- [333] Mr. Ansari testified that he ignored the demand letter from the CIBC.
- [334] After receiving a copy of the CIBC demand letter, Mr. Messier went to see Mr. and Mrs. Ansari and then wrote a letter to them dated July 18, 2000. Statements made in the letter indicate that prior to July 18, 2000, Mr. Messier had been served with a copy of the Writ of Summons and Statement of Claim issued by the plaintiffs in this action. Mr. Messier

retained the law firm of Harper Grey Easton who filed a Statement of Defence on his behalf on July 19, 2000. An amended Statement of Defence was filed by the same firm on January 12, 2001 and a Counterclaim followed on February 12, 2001.

[335] In his July 18, 2000 letter to Mr. and Mrs. Ansari, in which Mr. Messier referred to himself and his wife as "we", Mr. Messier referred to the Ansaris having asked him to take the business back. He wrote:

... I must reiterate my statements of our brief meeting, "We do not want this business back. We want you folks to succeed! I want to start my new business life as soon as possible".

[336] Mr. Messier said it was crucial for Mr. and Mrs. Ansari "... to get the bank off your throat" because if the bank appointed a receiver, Mr. Messier and Mr. Hrescak would have to take steps to protect their interests. Mr. Messier offered to loan the Ansaris \$32,500 without interest or payments for five years if the Ansaris would match that amount and use the money to pay the CIBC. He offered to negotiate with the bank to get an extension. Mr. and Mrs. Ansari did not accept this proposal and no reply to it is in evidence.

[337] Mr. Hrescak spoke and wrote to the Ansaris in July about the rent arrears and the missing loan payments. He asked them to give him a plan. There is no evidence of any reply.

[338] After the CIBC demanded payment of its loan, the bank began taking money out of CMR's account when deposits were made and, I infer, began enforcing its security by notifying CMR's creditors. After a large payment due to CMR from ICBC was collected by the CIBC, Mr. and Mrs. Ansari went to the Royal Bank and opened a new bank account for CMR ("the RBC account"). As soon as money went into the RBC account, Mr. and Mrs. Ansari withdrew it in cash.

[339] Mr. Dickey testified he was told by Mr. Ansari in August that "this is your last day". He said that for the two previous pay periods the Ansaris had paid him and the other employees in cash. Mr. Dickey did not receive severance pay until after Mr. Messier resumed operating the business. Mr. Dickey testified that some other employees had already left by the time his employment was terminated.

[340] On August 11, 2000, the President of Maaco Systems Canada Inc. wrote to Mr. and Mrs. Ansari stating that they had failed to respond to several requests to provide corporate banking information in order to allow Maaco to collect franchise royalty fees electronically. The letter stated that there were franchise fees outstanding in excess of \$4,800; and a further \$2,100 was owed for group and yellow pages advertising.

[341] Mr. Ansari testified that on September 4, 2000 he paid all the employees, took CMR's computer, closed the shop down and went home with no intention of doing any further business at CMR's premises. He told Mr. Hrescak that he could not take it anymore and he was leaving.

- [342] Attached to the RBC account statement for the month ending October 6, 2000 - the only RBC account statement in evidence - are three cheques made out to "cash" dated September 2, 12 and 14, 2000 totalling \$4,950 with the word "Parts" written on the "re:" line of each cheque. Mr. Messier suggested to Mr. Ansari in cross-examination that these cash withdrawals were done by the Ansaris to strip out any money CMR had after they abandoned the business and that the cash had been retained by the Ansaris. Mr. Ansari denied these suggestions - he said the money had been used to pay for parts and supplies.
- [343] Mr. Ansari testified the day after he shut the business down in September, he got a call from Mr. Dohring of Maaco telling him that all vehicles that had been accepted at CMR's shop either had to be repaired; or delivered to other Maaco locations. He says Mr. Dohring called him again the day after that, so he went back to the shop. Mr. Messier testified that Mr. Hrescak had asked him to run the business on Stanjean's behalf until it could be sold. He was at the shop when Mr. Ansari arrived.
- [344] Mr. Ansari told Mr. Messier to leave. Mr. Ansari said he called some former CMR employees and asked them to come to the shop and they began working on some of the cars. Other vehicles were delivered to other Maaco locations as Mr. Dohring had requested. No new work was accepted. Soon after, Mr. Ansari closed the business a final time.
- [345] Although the notice itself is not in evidence, I am satisfied that Maaco Systems Canada Ltd. sent a "Default Notice" to the Ansaris on September 20, 2000. On October 4, 2000, Maaco sent a "Notice of Termination" stating that the Ansaris had failed to comply with the terms of their Franchise Agreement and the Default Notice, and that the Franchise Agreement was therefore cancelled.
- [346] Ms. Mecham testified that her last day of work at CMR under the direction of the Ansaris was September 12, 2000. In January and February 2001, she returned to the premises to assist Mr. Messier to get the business ready to re-open. She recalled that within a short time after re-opening, the business was doing \$10,000 to \$15,000 a week in sales and that within three months after re-opening the business it was back to regular sales volumes.
- [347] Mr. Messier testified on examination for discovery that he understood that he was running the business in 2001 as a receiver for Stanjean; and also on behalf of Maaco Canada. He said the franchise was sold by Maaco to a new franchisee in September 2001.
- [348] On September 10, 2001, CIBC assigned the debt owed by CMR and all of its security over the assets of CMR to R.L. Messier Holdings Inc. The Assignment Agreement states that the assignee had paid to the bank the sum of \$50,000. Mr. Messier testified that R.L. Messier Holdings Inc. was formerly CMR Business Systems Inc. and that he is the owner of that company.

MR. MESSIER'S CLAIM AGAINST MR. SKAGEN

- [349] I turn now to the evidence relating to Mr. Messier's Third Party claim against Mr. Skagen. I stated earlier that in these Reasons that Mr. Messier, who was represented by counsel at the time, filed a Statement of Defence in this action on July 19, 2000; an amended Statement of Defence on January 12, 2001 and a Counterclaim against Mr. and Mrs. Ansari on February 12, 2001. Mr. Messier was represented by counsel on October 10, 2000 when he was examined for discovery by counsel for the plaintiffs; on the first continuation of the examination for discovery on February 22, 2001 and by new counsel on the second continuation of his examination for discovery on April 19, 2007. Mr. Messier testified that he was present when Mr. Skagen was examined for discovery by counsel for the plaintiffs on October 4, 2000. The transcript indicates Mr. Messier was accompanied by counsel and that his counsel, on his behalf, waived solicitor client privilege in relation to legal services provided to Mr. Messier (and presumably his companies) by Mr. Skagen so that Mr. Skagen could answer questions about those legal services.
- [350] Mr. Messier did not issue a Third Party Notice naming Mr. Skagen as Third Party until January 3, 2007. By that time, Mr. Messier was aware that Mr. Skagen had been disciplined by the Law Society and had ceased practising law. Mr. Messier was represented by counsel when the Third Party Notice was issued; but later began to represent himself in this action. Mr. Messier applied for and was granted leave to amend his Third Party Notice during the trial.
- [351] The essence of the claim advanced by Mr. Messier in the third party proceedings is an allegation that Mr. Skagen provided legal advice to Mr. Messier to "... guarantee CMR's bank line in order to facilitate ..." the sale of the CMR shares to the Ansaris. Mr. Messier alleges that Mr. Skagen advised him to proceed with the sale of the shares in order to generate funds to invest in an enterprise the parties referred to in their testimony as "Modern Groove Entertainment" ("MG"), in which, Mr. Messier alleges, Mr. Skagen had an interest.
- [352] In his original Third Party Notice, Mr. Messier alleged that Mr. Skagen was negligent in respect of the legal advice provided to Mr. Messier and he claimed damages for money he alleges he paid to CIBC in respect of his guarantee of CMR's indebtedness; damages for money invested in MG and not recovered; and damages equal to the unpaid balance of the take-back loan to the Ansaris.
- [353] As part of his Third Party Claim, Mr. Messier alleges that he had a "special relationship" with Mr. Skagen, arising out of Mr. Skagen's earlier representation of Mr. Messier and his companies; and Mr. Messier's alleged friendship with Mr. Skagen. Although it is not entirely clear, I interpret this to mean that Mr. Messier alleges that Mr. Skagen owed him a fiduciary duty.

- [354] In his Statement of Defence to the Third Party Notice, Mr. Skagen has denied the existence of a "special relationship" between himself and Mr. Messier and denies having provided legal advice to Mr. Messier in relation to the CIBC LOC; Mr. Messier's personal guarantee; the sale of CMR shares to the Ansaris; or Mr. Messier's investment in MG.
- [355] A brief recitation of additional relevant facts follows: In 1998 or 1999, Mr. Skagen was invited by a former client, who was then residing in Utah, to attend a meeting about an investment opportunity in a company called Invest America Inc., or "INVT". Mr. Skagen was acquainted with a businessman, William Macklem, who was associated with the real estate firm ReMax, and Mr. Macklem was an INVT investor. Through Mr. Macklem, Mr. Skagen was introduced to stockbroker, Milt Hatcher.
- [356] Utilizing Mr. Hatcher as his broker, Mr. Skagen used \$90,000 from his Registered Retirement Savings Plan to purchase shares of INVT at a price just under \$.20 a share. In the fall of 1999, the share price of INVT fell to \$.25 a share, but then rose rapidly, eventually trading for as much as \$11 a share. In the spring of 2000, through Mr. Hatcher, Mr. Skagen sold his INVT shares, realizing \$8 a share. Mr. Skagen testified that although his INVT shares may have reached a value of \$8 million "on paper" at some point; he realized an actual profit of \$2.9 million from the sale of his shares.
- [357] Mr. Messier testified that Mr. Skagen told him about the money he had made through his investment in INVT, although the two men disagree about how much money that was. Mr. Skagen agreed that he likely did tell Mr. Messier about the huge profit he had made on the INVT shares because he was so excited that he told everyone he knew about his good fortune. He said he was ecstatic; that it felt like winning the lottery.
- [358] The evidence about the MG investment referred to in Mr. Messier's Third Party Notice is complex and vague, but simplifying it as much as possible, I conclude that early in 2000 Mr. Hatcher and Mr. Macklem, inspired by the success of the INVT venture, approached Mr. Skagen about a new investment opportunity - MG. The proposed arrangement was that Mr. Hatcher, Mr. Macklem, Mr. Skagen and a fourth man would each invest \$90,000 in a B.C. company. A public offering would follow involving a Nevada company. The money raised by the public offering would be used to finance the development of games for Sony Play Station, which I understand to be an electronic games system. An individual with a reputation in the development of electronic games - John Stroppa - was responsible for heading up the research and development team.
- [359] Mr. Skagen used a numbered shelf company incorporated by his law firm as an investment vehicle and holding company for Canadian investors. Because the shares of MG were not yet publicly traded, the arrangement was that investors would lend money and that the loans would later be converted into equity in the public company. Mr. Skagen established a trust account at his firm to receive and account for money received from investors. Mr. Skagen said he was not acting as legal counsel for MG, however.

- [360] The role of Mr. Hatcher and Mr. Macklem was to find investors; but Mr. Skagen agreed to provide Mr. Macklem with the names of people he knew who might be interested in the investment. Mr. Skagen subscribed for shares in his own name and in the name of a family trust. He also arranged for shares to be issued to his law partners.
- [361] As stated earlier, Mr. Skagen testified that he personally made an initial investment of \$90,000 in MG and soon after invested a further \$90,000. Over the next couple of years, Mr. Skagen testified, he cashed in everything he could, and invested more money in MG in the belief that the venture was going to be very successful. He testified that he believes he ultimately invested \$2.8 million - all of the money he had realized on the sale of the INVT shares.
- [362] The MG enterprise proved to be a failure. Mr. Skagen testified that he did not recover any of the money he had invested and was left in difficult financial circumstances. His partners expelled him from the law firm. He suffered from severe depression for which he was eventually treated by a psychiatrist.
- [363] A trust record from Greig, Skagen and Company records an investment by Mr. Messier in MG of \$50,000 deposited into trust on June 6, 2000. There is a handwritten memo in evidence; sent by Mr. Messier to Mr. Skagen's attention, dated August 1, 2000, instructing Mr. Skagen to allocate the MG shares 60% to Mr. Messier and 40% to his wife.
- [364] Mr. Messier did receive shares in MG once the company went public. He testified that he spent \$25,000 more to buy more shares in MG in December 2002 and January 2003. At that time, Mr. Messier testified, he understood that there would be a "reverse take-over" of MG by a company called Immediatek, Inc. There is no dispute that Mr. Messier's shares in MG, which were eventually exchanged by Mr. Messier for shares in Immediatek, Inc., have no value and there is no prospect that either Mr. Skagen or Mr. Messier will recoup their losses in the stock market.
- [365] William Macklem testified that he recalled having been given Mr. Messier's name as a potential MG investor by Mr. Skagen. Mr. Skagen believed that he had first referred Mr. Messier to Mr. Macklem because Mr. Messier was looking for financing to buy a home. However, he agreed he may also have referred Mr. Messier as a potential MG investor as he had referred other clients to Mr. Macklem.
- [366] Mr. Messier recalled having attended a meeting at the White Rock offices of brokerage firm Nesbitt Burns at which presentations were made to potential investors about MG. Mr. Messier testified this meeting took place in March 2000 or April 2000; that Mr. Skagen did not attend the meeting; and that people at the meeting were told that the information provided was to be kept confidential.
- [367] Mr. Skagen agreed that there was a meeting at Nesbitt Burns, but recalled the meeting took place in late May, after the purchase by the Ansaris of the CMR shares had completed. He said that the meeting at Nesbitt Burns was initiated by him and organized by Marcel De

Leeuw, who was Mr. Skagen's own financial advisor at Nesbitt Burns. Mr. Skagen testified that he did attend the meeting; that it was not a "secret" meeting" and that the main objective of the meeting was to introduce Nesbitt Burns analysts and brokers to the proposed investment in MG. A presentation was made at the meeting by John Stroppa, the individual leading the research team developing the electronic games system. Mr. Skagen hoped that Nesbitt Burns would promote the stock once MG shares were available in a public offering. Mr. Skagen said some private investors, like Mr. Messier, were invited to attend. Mr. Messier was accompanied by his friend, Mr. Joe Singh.

- [368] Mr. Singh, a long -time friend of Mr. Messier, was called as a witness by Mr. Messier. Mr. Singh was not able to assist the court on the timing of the meeting at Nesbitt Burns, which he said he attended at Mr. Messier's invitation.
- [369] Mr. Singh said he was not impressed by the presentation at the meeting and initially thought MG would not be successful; but after MG shares were being publicly traded he did buy some shares on Mr. Messier's recommendation. He said that although his broker advised him against buying more MG shares, he did increase his MG shareholdings later because Mr. Messier told him that Immediatek was taking over the company.
- [370] Mr. Messier's day-book does not record a meeting at Nesbitt Burns or contain any reference to MG. Although the pages of Mr. Skagen's calendar from January 28, 2000 to May 17, 2000 contain numerous references to MG, and meetings with Messrs. Macklem, Hatcher, Stroppa and De Leeuw, it does not contain a record of a meeting at Nesbitt Burns. There is a reference to a "Modern Groove meeting" from 6:30 to 8:30 p.m. on Monday May 15 but the location is not specified.
- [371] As I stated earlier, Mr. Skagen denied having advised Mr. Messier to agree to leave his guarantee of the CIBC LOC in place. He said that he did not give Mr. Messier any legal advice in connection with the CMR share sale; but in particular did not advise Mr. Messier to proceed with the sale of the shares in order to get money to invest in MG. Mr. Skagen agreed that he likely talked to Mr. Messier in an enthusiastic way about MG but denied having advised Mr. Messier to invest. He testified that he did not benefit personally in any way from Mr. Messier's investment in MG.
- [372] Mr. Messier agrees that Mr. Skagen was representing the Ansaris in relation to their purchase of the CMR shares. He confirmed at his examination for discovery that when Mr. Messier suggested in March 2000 that Mr. Skagen could represent both the seller and the buyer, Mr. Skagen said he could not do that; and that Mr. Messier agreed that Mr. Skagen would represent the Ansaris only. He says, however, that that situation changed on April 25 and that Mr. Skagen then gave him advice to leave his CIBC guarantee in place.
- [373] This testimony is contradicted by the letter Mr. Messier signed on May 4 in which he acknowledged that Mr. Skagen had not given him legal advice in connection with the sale of his shares.

- [374] Although Mr. Messier now claims that the discussions that led to his investment in MG took place while Mr. Skagen was acting for the Ansaris on the CMR share purchase, in paragraph 10 of Mr. Messier's Amended Statement of Defence to the plaintiffs' claim, Mr. Messier denied that he was "in business with" Mr. Skagen at the relevant time. In paragraph 7 of his Amended Statement of Defence, Mr. Messier pleaded that he understood that Mr. Skagen was acting on behalf of the purchaser.
- [375] At his examination for discovery on October 10, 2000 by counsel for the plaintiffs, Mr. Messier testified that Mr. Skagen did not act for him or provide legal advice in connection with the sale of the CMR shares. He did not change his position in that regard at the continuation of the examination on February 22, 2001.
- [376] On July 14, 2003, Mr. Messier wrote a letter to Mr. Skagen in which he stated that Mr. Skagen had reneged on a commitment to "repurchase" Mr. Messier's MG shares.
- [377] Mr. Messier testified at trial that earlier in 2003 Mr. Skagen had promised to pay to Mr. Messier the money that Mr. Messier had invested in MG shares. Mr. Messier initially suggested that Mr. Skagen had guaranteed the return of his investment; in cross-examination he agreed that the word guarantee had never been used and that Mr. Skagen hadn't given a guarantee; but claimed that Mr. Skagen said that Mr. Messier would be treated in the same way as Mr. Skagen was treated in relation to his MG investments.
- [378] Mr. Skagen denies having given any assurance to that effect and Mr. Messier did not identify any consideration for the alleged bargain. I am not persuaded that Mr. Skagen gave an undertaking or assumed any personal liability for the repayment of Mr. Messier's investment. Mr. Skagen testified he did not receive any better treatment than Mr. Messier and lost his entire investment in MG.
- [379] Mr. Messier's letter dated July 14, 2003 is relevant because Mr. Messier did not make any reference in the letter to any connection between his investment in MG and any legal advice provided by Mr. Skagen in relation to the sale of CMR shares or Mr. Messier's CIBC guarantee.
- [380] The July 14, 2003 letter does not cast Mr. Messier in a good light. The letter contains less than subtle threats, including:
- I do not think that it would be in your best interest for you to have me begin an aggressive action to regain our funds with what was told by you.
- I have been advised by several solid sources that the consequences for you would far out weigh the cost to follow through on your commitment - Law Society, White Collar Crime Investigation, Securities Commissions Investigation and of course Personal legal action.
- [381] Mr. Messier stated in the letter that he had "... documented most of what you did tell me He agreed at trial that he had no documentation. The "several solid sources" he says had advised him turned out to be one legal secretary who was the wife of a personal friend.

- [382] Although the letter indicates that by July 2003 Mr. Messier was extremely angry with Mr. Skagen; Mr. Messier did not file a Third Party Notice at that time. It was not until the second continuation of Mr. Messier's Examination for Discovery by counsel for the plaintiffs in April 2007 that Mr. Messier first asserted that Mr. Skagen had given him legal advice about his guarantee of the CIBC LOC.
- [383] The evidence establishes that Mr. Messier and Mr. Skagen did discuss the LOC and Mr. Messier's guarantee - Mr. Skagen agreed that he received the letter from Mr. Messier indicating he would leave his guarantee in place; and that he might have asked Mr. Messier to send him a letter; although he denied having dictated the contents of the letter. I have already said that I do not believe that Mr. Skagen did compose the letter and Mr. Messier's insistence that the letter was dictated by Mr. Skagen casts doubt on his credibility.
- [384] I am not persuaded that Mr. Skagen gave Mr. Messier legal advice in relation to his guarantee. I do not believe Mr. Messier's testimony on this issue. I am not persuaded that Mr. Messier relied on advice from Mr. Skagen. Mr. Messier has not established that the advice he alleges he was given was negligent advice. I have already said that if Mr. Messier had not agreed to leave his guarantee in place his actions could well have precipitated a demand for payment by the bank; a collapse of the share sale; and litigation with the Ansaris over the deposit.
- [385] I am also not persuaded that the information Mr. Skagen had provided to Mr. Messier about MG caused Mr. Messier to act any differently than he otherwise would have. The sale of the shares closed on May 4 and all of the proceeds were delivered to the CIBC, on Mr. Messier's direction. It was not until June 5 that Mr. Messier invested in MG. Before investing in MG, Mr. Messier attended a meeting at Nesbitt Burns to learn more about the investment. Mr. Messier's evidence is that Mr. Skagen was not even present at that meeting.
- [386] Mr. Messier has failed to prove the allegations in the Third Party Notice and his claims against Mr. Skagen are dismissed.

THE ANSARIS' CLAIM AGAINST MR. MESSIER

- [387] The facts alleged and the claims asserted by the plaintiffs against Mr. Messier are found in paragraphs 41 through 61 of the Statement of Claim. Several of these claims were not pursued at trial, although not expressly abandoned. As against Mr. Messier, the plaintiffs seek rescission of the SPA; or in the alternative, damages for breach of contract.
- [388] Before reviewing the allegations relating to breach of warranties included in the SPA, I propose to deal with the claim as pleaded by the Ansaris that the Budget was a fraudulent misrepresentation by Mr. Messier and that the plaintiffs relied on the Budget "for purposes of assessing the Share Purchase Agreement".

- [389] In my recitation of the facts, I set out the evidence relating to the production of the Budget; the purpose for its production and the discussions that took place at the time. In summary, Mr. Messier's evidence was that the Budget was part of a 36 page bundle of financial information he gave to Mr. Ansari and Mr. Doherty at the request of Mr. Doherty and that it was prepared for the purpose of assisting Mr. Ansari to persuade a lender to finance the purchase of the CMR shares. Mr. Messier testified that he did not represent the Budget as a record of actual results and that he reinforced the theoretical nature of the document in two discussions he had with Mr. Ansari before the closing date. The authors of the PWC report concluded that the 12-month figures used in the Budget were arrived at by taking the figures in the one-month column and multiplying them by 12.
- [390] Mr. Ansari did not directly contradict Mr. Messier's testimony about the circumstances in which the Budget was produced and provided to him; and did not contradict Mr. Messier's testimony that in two discussions that took place prior to the closing date Mr. Messier explained the limitations of the Budget.
- [391] I found Mr. Messier's testimony about what he told Mr. Ansari and Mr. Doherty about this document to be persuasive. Mr. Messier knew or reasonably expected that Mr. Ansari was getting advice from Mr. Doherty and Mr. Godwin and would possibly be having an accountant check out the financial status of the business. He had earlier provided Mr. Doherty and Mr. Ansari with CMR's annual financial statements including the statements for 1999. I also accept Mr. Messier's testimony that he provided Mr. Ansari with a profit and loss statement for the months of February and March, as well as lists of accounts receivable and payable.
- [392] As I outlined earlier in these Reasons, even a cursory comparison of the Budget to the financial statements would reveal the inadequacies of the Budget. I do not believe that Mr. Messier would have risked a misrepresentation that could be so easily detected.
- [393] The issue of what was said about the Budget at the time it was provided to Mr. Ansari by Mr. Messier, and what Mr. Ansari was told by Mr. Doherty and possibly Mr. Godwin, are issues on which it is reasonable to conclude that Mr. Doherty and Mr. Godwin could have provided relevant and valuable testimony. It is true that any of the parties to this lawsuit could have issued a subpoena to require Mr. Doherty and Mr. Godwin to come to trial to testify but that does not preclude the court, in my view, from drawing the inference that the plaintiffs did not call their agents to testify because they knew or expected that the two men would have given evidence unfavourable to the plaintiffs on these issues.
- [394] In respect of this issue, however, it is not necessary to resolve the conflict between the testimony of Mr. Messier and Mr. Ansari only by the drawing of an adverse inference. I am satisfied that the Budget was not a representation of fact; it was a projection or optimistic speculation about what might be achieved if certain events came to pass. Those events would be out of Mr. Messier's control once he was no longer running the company.

- [395] I am also not persuaded that the Ansaris relied on the Budget in deciding to purchase the shares of CMR. Mr. Ansari made his offer to purchase the shares of CMR and entered into the first Agreement before he and Mr. Doherty received the Budget. After receiving the Budget, Mr. Ansari was provided with the profit and loss statements for the months of February and March 2000, and I accept the testimony of Mr. Messier that he explained to Mr. Ansari why the actual results were different from the projected results in the Budget.
- [396] In any event, Mr. Ansari testified that he drew his own conclusions about the Budget based on his observations of the business being done in the Maaco shop in April, and that he knew before the closing date that the Budget was not accurate.
- [397] The claim for rescission or damages based on fraudulent misrepresentation must be dismissed.
- [398] I turn now to the allegations in the Statement of Claim that Mr. Messier breached warranties and representations provided in the Share Purchase Agreement.
- [399] Earlier in these Reasons I set out the list of documents executed by Mr. and Mrs. Ansari on the closing date, including the Share Purchase Agreement. There are several "schedules" attached to the SPA, including CMR's unaudited Financial Statements for the year ended July 31, 1999; a schedule of "encumbered assets"; an unexecuted copy of CMR's lease dated May 1, 2000; an unexecuted copy of the Maaco Franchise Agreement; a schedule of bank accounts used by CMR; and a copy of CMR's business licence from the Corporation of Delta.
- [400] The SPA itself, however, is not lengthy and consists of only nine pages. The plaintiffs rely on four vendor's warranties found in the SPA, which may be summarized as follows: that CMR's unaudited financial statements were prepared in accordance with generally accepted accounting principles; that there are no liabilities of the company arising or incurred between July 31, 1999 to the closing date except liabilities incurred in the ordinary course of business; that there had been no material adverse change in the financial condition or position of the company after July 31, 1999 other than in the normal course of business; and that CMR had conducted its business in its usual and normal manner.
- [401] The plaintiffs have not proved a breach of any of these warranties. Mr. Vanderluit, who prepared the unaudited 1999 Financial Statements, testified at trial as a witness in Mr. Messier's case. It was never suggested to him in cross-examination that the 1999 unaudited Financial Statements were not prepared in accordance with generally accepted accounting principles and he gave no evidence that would lead to that conclusion.
- [402] The PWC report was entered as an exhibit, but as stated earlier in these Reasons, the opinions in the report were not admitted. In any event, the report does not contain an opinion about whether the 1999 Financial Statements were prepared in accordance with generally accepted accounting principles.

- [403] At trial and in submissions, the plaintiffs focused on the allegations related to the CIBC LOC. They allege that CMR was in breach of the terms of the CIBC lending agreement prior to the closing date. Although I have doubts about Mr. Messier's assertion that Mr. Car expressly approved of Mr. Messier's practice of "re-aging" accounts receivable that Mr. Messier believed would eventually be paid; the evidence that the practice had been going on for some time without complaint from the bank was not contradicted at trial. I also accept Mr. Messier's testimony that he told Mr. Ansari about the doubtful accounts at one of their first meetings.
- [404] The evidence does not establish that the manner in which CMR had been reporting to the CIBC changed between July 31, 1999 and the closing date; that the "re-aging" of accounts receivable was a new practice; or that the CIBC was concerned about the frequency or adequacy of reports being provided by CMR. Ms. Mecham testified that when the bank asked for reports they were provided.
- [405] Mr. Skagen testified that as part of the "due diligence" he conducted on behalf of Mr. and Mrs. Ansari, he spoke to Mr. Car about the line of credit and was told it was in good standing. He believed he had also obtained a letter to that effect and there is a reference to a letter in the statement of account provided to Mr. and Mrs. Ansari, but no copy of a letter was located. Mr. Skagen's testimony about what he was told by Mr. Car is not admissible for its truth, but in the absence of any evidence that the bank considered CMR to be in breach of the terms of the line of credit, it is reasonable to infer that the bank considered the line of credit to be in good standing at the closing date.
- [406] Mr. Ansari attended at least one and probably two meetings with Mr. Car prior to the closing date. He did not testify about any concerns expressed by Mr. Car about CMR's compliance with the terms of the credit facility. The inference that the CIBC was satisfied with CMR's reporting practices may also be drawn from the evidence that as recently as January 12, 2000 the CIBC had offered to continue CMR's line of credit. Mr. Messier signed the acceptance of the offer on behalf of CMR on February 17, 2000.
- [407] Even if it had been shown that CMR had failed to comply with some conditions imposed by the CIBC, the plaintiffs have failed to establish that any loss or damages flowed from that failure. The demand letter from the CIBC did not allege a breach of any term of the lending agreement and the plaintiffs have not established that the CIBC demanded payment of the loan because of a breach of any condition.
- [408] It is reasonable to conclude, and I do, that the CIBC demanded payment of the debt in July 2000 not because of any breach of the reporting conditions or the margin requirements, but because Mr. and Mrs. Ansari refused to provide the personal guarantees the bank had requested from them; and refused to even discuss the loan with Mr. Car.

- [409] Had I concluded that the Ansaris had proved a breach of warranty by Mr. Messier in relation to the line of credit, it would have been necessary to consider the issue of mitigation of damages.
- [410] I am satisfied that Mr. and Mrs. Ansari caused or contributed to the failure of the business after May 4, 2000 and accordingly, caused or contributed to their loss. Mr. Ansari failed to concentrate his efforts on learning the business and running the company; instead, based on his own testimony, he went out every day in May looking for a lawyer to assist the plaintiffs to sue Mr. Messier and Mr. Skagen. The plaintiffs ignored the advice provided by Mr. Messier about managing cash flow. Mr. Messier had agreed to continue to work with the Ansaris to assist them in learning to operate the business and he kept his part of the bargain until Mr. Ansari ordered him off the premises in June.
- [411] Despite advice from Mr. Dickey about the probable consequences, Mr. and Mrs. Ansari stopped paying suppliers' accounts for parts and services provided to CMR before May 4, and told the creditors these accounts would not be paid. Several suppliers responded by placing CMR on a cash on delivery basis, exacerbating the cash flow problem; and eventually making it impossible for the business to continue to do vehicle repairs. These actions, I conclude, brought about or, at the very least, significantly accelerated the failure of the business.
- [412] On the issue of mitigation it is also important to note that Mr. Messier testified that on two occasions - probably on April 24 and again on April 25, 2000 - he offered to release the plaintiffs from their obligations under the second Agreement on the condition that he retain the \$50,000 deposit; and that he remained willing to do so on April 27. As the plaintiffs could reasonably have avoided any subsequent loss by accepting Mr. Messier's offer, their damages must be limited to the sum of \$50,000. I have already said that I do not believe the Ansaris' explanation that they proceeded to close the deal and complete the share purchase because they had been threatened by Mr. Skagen. If I had found that the Ansaris' had established liability on the part of Mr. Messier and/or Mr. Skagen, the damages awarded would not have exceeded \$50,000.
- [413] The Ansaris had a third opportunity to mitigate their damages, but failed to take advantage of it. On July 18, 2000, Mr. Messier offered to pay one-half of the \$65,000 balance outstanding on the CIBC line of credit, the payment to be treated as a loan to the Ansaris without interest or payments for five years, if Mr. and Mrs. Ansari agreed to pay the other half. This offer was not accepted and neither Mr. nor Mrs. Ansari provided an explanation. There is no evidence that Mr. and Mrs. Ansari attempted to negotiate reinstatement of the line of credit; or that they made any effort to sell assets or borrow money in order to pay CMR's debt to the CIBC.

[414] Mr. and Mrs. Ansari testified they had no money to pay the bank and other creditors in May, June and July 2000, but the personal financial statements they provided to CIBC and Maaco Canada in April 2000; and their testimony about the savings they retained after they abandoned the business in September 2000 contradicts that testimony. Mr. Messier also demonstrated, through his cross-examination of Mr. Ansari, that CMR was generating revenues in May and June.

[415] Despite the findings of fact and conclusions set out in these Reasons, I doubt that any person made aware of the situation of Mr. and Mrs. Ansari after the failure of the business in 2000 would not feel sympathy for them. Their dreams of owning and working together in a business were dashed and most of their savings were lost. The emotional impact the experience had on each of them was still evident at trial, nine years after the events. This court cannot, however, act on sympathy. The plaintiffs have failed to prove, on a balance of probabilities, fraudulent misrepresentation by Mr. Messier; or a breach of the vendor's warranties in the SPA. It follows that the plaintiffs' claims against Mr. Messier must be dismissed.

MR. MESSIER'S COUNTERCLAIM

[416] There is no dispute that the plaintiffs failed to repay the \$90,000 take-back loan owed to Mr. Messier. The Counterclaim admits one payment of \$1,903.75 made by the Ansaris on June 7, 2000, consisting of \$1,500 principal and \$403.75 interest. Mr. Messier is entitled to judgment against Mr. and Mrs. Ansari for \$88,500 plus interest at 10% per annum calculated semi-annually from and after July 7, 2000 to today's date. If the parties are unable to agree on the calculation of interest, there shall be a reference to the Registrar to conduct an accounting.

[417] Mr. Messier is also seeking judgment against Mr. and Mrs. Ansari for the sum of \$50,000 which he testified he paid to the CIBC to settle the bank's claim against him pursuant to his guarantee.

[418] Clause 4.1 of the SPA is under the heading "OBLIGATIONS AND COVENANTS OF THE VENDOR" and states:

The Vendor will maintain his personal guarantee granted to CIBC as security for the operating loan of the Company for a period of up to twelve months from the Closing Date PROVIDED HOWEVER the Purchaser shall maintain the said operating loan in good standing at all times.

[419] The Addendum to Share Purchase Agreement dated May 4, 2000 contains a clause relating to Mr. Messier's CIBC guarantee. Clause (17(i) states:

The chequing account will require a combination of signatures of the Vendor and either/or Zia Ansari or Yasmeen Ansari until Vendor is removed from guaranteeing Operating Line. The Vendor will pre-endorse a reasonable number of cheques.

- [420] Mr. Messier did not prove at this trial that Mr. and Mrs. Ansari did not maintain the operating loan in good standing at all relevant times. As I said earlier, the evidence does not establish a breach of the conditions or terms of the loan. In the demand letter sent to CMR and copied to Mr. Messier, the bank's lawyer referred only to the fact that the loan was a demand loan.
- [421] The language used in Clause 4.1 indicates that the remedy available to Mr. Messier if the loan was not maintained in good standing was to revoke or withdraw his personal guarantee of the CIBC debt. There is no express provision that the Ansaris were required to indemnify Mr. Messier in the event the bank demanded payment from him pursuant to his guarantee. As guarantor, Mr. Messier may be entitled to claim over against the principal debtor - CMR - but no claim against CMR is made in this action.
- [422] Mr. Messier's claim for damages for the \$50,000 paid to the CIBC is dismissed. Mr. Messier failed to provide pre-trial disclosure of documents that he said would establish other losses he had suffered. Those damages have not been proved.

THE ANSARIS' CLAIM AGAINST MR. SKAGEN

- [423] In paragraph 2 of the Summary of Argument of the Defendant Skagen submitted by counsel for Mr. Skagen, his counsel summarized the allegations made against Mr. Skagen in the Statement of Claim in a helpful manner and I reproduce the summary here:
- (a) when the Plaintiffs retained Mr. Skagen, they "had not made any contractual obligations to Messier"
 - (b) they looked to Mr. Skagen to ensure that "all contractual obligations to be imposed on Messier were fully enforceable"
 - (c) he failed to conduct adequate due diligence inquiries
 - (d) he owed them a duty to perform or to recommend that an accountant perform certain investigations pertaining to CMR
 - (e) he owed a duty to do all acts set out in the Law Society of British Columbia Practice Checklist Manual
 - (f) he owed the Plaintiffs the duty to represent their interests only, without permitting his personal interests or those of Mr. Messier to conflict with theirs
 - (g) he did not draft the Share Purchase Agreement (the "SPA" so as to protect the Plaintiffs' interests
 - (h) he made threats to the Plaintiffs regarding legal proceedings

- (i) he advised them that by attaching the Budget (Exhibit 3) to the SPA, without any express mention of the document in terms of the SPA, that the projections would become contractual terms and enforceable against Mr. Messier
- (j) he knew or ought to have known the Budget (Exhibit 3) was false
- (k) he did not provide proper advice regarding payment of the landlord's legal expenses
- (l) he received personal financial rewards from Mr. Messier and was "in business" with him and, accordingly, was in a conflict of interest.

[424] During his opening statement at the start of trial in January 2009, counsel for the plaintiffs commented on issues not pleaded in the Statement of Claim. In response to an objection by counsel for the defendant Skagen, the court reminded counsel for the plaintiffs that only issues raised by the pleadings would be considered. No application was made to amend the Statement of Claim at that time, or at any time during the trial, despite a lengthy adjournment between January and the reconvening of the trial in September; and two subsequent adjournments. During closing submissions, counsel for the plaintiffs made submissions about issues not included in the Statement of Claim but still made no application to amend the pleadings, although the lack of reference to these issues in the Statement of Claim was the subject of both oral and written submissions by counsel for Mr. Skagen.

[425] In these circumstances, I agree with the defendant that certain issues about which plaintiffs' counsel made submissions are not properly before the court. These include whether the SPA was unenforceable because no closing date had been specified and the specified possession date had passed; that a clause relating to a buy-sell agreement acceptable to the parties was a condition precedent that was never removed or satisfied; that Mr. Skagen had and failed in a duty to advise Mrs. Ansari to obtain independent legal advice; that Mr. Skagen included Mrs. Ansari as a party to the SPA and other agreements without express instructions from her to do so; and that each and every request by Mr. Messier to add to or change the SPA or other closing documents constituted counter-offers and had the effect of revoking all previous contracts. I shall refer only briefly to some of these issues.

[426] Counsel for the defendant Skagen also submitted that the plaintiffs did not plead that Mr. Skagen owed or breached a fiduciary duty and should not be permitted to advance that claim. However, in paragraphs 12 and 13 of Mr. Skagen's Statement of Defence, the defendant expressly denied "... breach of fiduciary duty as alleged or at all..." It does appear, therefore, that the defendant understood the plaintiff to be advancing that claim and the parties joined issue.

THE STANDARD OF CARE

[427] There are numerous judicial pronouncements regarding the obligations of solicitors in contract and/or tort. A leading authority on the point is *Central Trust Co. v. Rafuse*, [1986] S.C.J. No. 52.

[428] In *Chaster (Guardian ad Litem of) v. LeBlanc*, [2007] B.C.J. No. 1872 (S.C.), Justice Hinkson decided allegations of breach of contract and negligence against a lawyer who had represented the plaintiff in a personal injury action. At paragraph 97 of his Reasons, Justice Hinkson concluded that the terms that should be implied from the retainer contract are the same as the obligations of a lawyer arising out of the duty of care owed by a lawyer in the law of tort. With the respect to the duty of care, he said the following, at para. 98:

[98] The requisite duty of care expected of a lawyer stated in *Tiffin Holdings v. Millican* (1964), 49 D.L.R. (2d) 216 (A.B.S.C.); *Reversed* 53 D.L.R. (2d) 674 (A.B.S.C.A.D.); *Restored* 60 D.L.R. (2d) 469 (S.C.C.) was adopted by Kirkpatrick J. (as she then was) in *Startup v. Blake*, 2001 BCSC 8:

"The obligations of a lawyer are, I think, the following:

- (1) To be skilful and careful.
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
- (3) To protect the interests of his client.
- (4) To carry out his instructions by all proper means.
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) To keep his client informed to such an extent as may be reasonably necessary according to the same criteria."

[429] Justice Hinkson pointed out, in para. 102 of his Reasons, that the standard of care of a reasonably competent and diligent lawyer (counsel in that case, solicitor here) is not be judged with the benefit of hindsight, but in light of the knowledge the lawyer had or reasonably ought to have had at the time the acts or omissions complained of took place. As well, a lawyer is not liable for errors of judgment so long as the error was not made negligently. In other words, it must be shown not only that the lawyer made a mistake, but that the mistake was such that an ordinarily competent lawyer would not have made it.

[430] That the standard is not a standard of perfection is illustrated by the following passage from *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER 571 (Ch.D.) at p. 583:

Now, no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, *Griffiths v. Evans* and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

[431] In this case, the defendant did not call expert opinion evidence about the standard of care. The plaintiffs put into evidence the August 8, 2001 report of solicitor David Allard. Mr. Allard also testified at trial.

[432] It is important to note that Mr. Allard was not asked to provide and did not provide opinion evidence in relation to whether the SPA was drafted in accordance with the standard of care or whether the SPA should have contained the terms set out in paragraph 23 of the Statement of Claim. There is no opinion evidence about the standard of care in relation to those allegations.

[433] Mr. Allard was asked by the plaintiff to comment on three specific issues: whether Mr. Skagen had met the standard of care in relation to advice about removal of the "subject-to" clauses relating to acceptance as a Maaco franchisee, and receiving a five-year lease with satisfactory terms; whether Mr. Skagen failed to meet the standard of care by failing to review the terms and conditions of CMR's CIBC line of credit; and whether Mr. Skagen failed to meet the standard of care by omitting to recommend that the Ansaris obtain independent legal advice about whether it was appropriate for Mr. Skagen to represent them.

[434] Mr. Allard's opinion on the first of the three issues set out above is of no assistance to the court because the evidence at trial disproved the assumed facts on which the opinion is based. Mr. Allard assumed that prior to the removal of subject clauses on April 17, the Ansaris consulted Mr. Skagen about whether to remove the conditions; and also expressed to him significant concerns regarding the completion of the transaction. Neither of those assumptions is borne out by the evidence.

[435] Mr. Allard's comments about a "cross default" provision in the lease and the advice Mr. Skagen could have provided about this provision relate to an allegation of negligence that was not pleaded and also assumes that Mr. Skagen was asked for advice before Mr. Ansari approved the terms of the lease, which I have concluded did not happen.

[436] Mr. Allard's opinion is that Mr. Skagen should have obtained from the CIBC a copy of the terms and conditions of CMR's LOC; should have reviewed the terms and should have obtained "... a full understanding of its status at closing ..." Mr. Allard's opinion is that Mr.

Skagen should also have obtained a copy of Mr. Messier's guarantee of the debts of CIBC. In relation to this, he stated that "...it appears Messier gave no contractual commitment ... as to ... the maintenance of the guarantee". The latter assertion is incorrect, as the SPA does contain a promise by Mr. Messier to leave his personal guarantee in place for one year.

- [437] Mr. Allard opined that if Mr. Skagen "... was not or should not reasonably have been aware of ... inaccuracies ..." in the documents Mr. Messier had provided to the CIBC, "... he cannot be faulted".
- [438] I am satisfied that Mr. Skagen did not obtain a copy of the terms and conditions relating to CMR's LOC. I am also satisfied, however, that his failure to do so did not cause the plaintiffs to suffer a loss. Mr. Skagen did make inquiries of the CIBC and was told that the line of credit was in good standing. Mr. and Mrs. Ansari knew they needed a credit facility; Mr. Messier's testimony is that he and Mr. Ansari met with Mr. Car to discuss obtaining what Mr. Messier characterized as the Ansaris' line of credit and Mr. Ansari filled out a financial statement for the CIBC.
- [439] The Ansaris knew, because Mr. Car told them, that the CIBC was agreeable to leaving CMR's existing LOC in place, but required Mr. Messier's guarantee to remain as part of the security for the debt.
- [440] Mr. Skagen did not undertake to review the financial statements of CMR or to provide accounting advice. I consider it to have been outside the scope of his retainer to investigate whether CMR had been providing inaccurate reports to CIBC in relation to the margin requirements set out in the lending agreement.
- [441] Mr. Allard's opinion that Mr. Skagen was obliged to recommend to Mr. and Mrs. Ansari that they seek independent legal advice about whether Mr. Skagen should represent them on the transaction is not supported by reference to any standard of practice. The Law Society of B.C.'s Practice Checklist Manual on Share Purchase Procedure recommends only that the lawyer "Determine and assess actual and potential conflicts of interest".
- [442] For another lawyer to provide meaningful advice to the Ansaris about whether Mr. Skagen was in a conflict of interest, he or she would, presumably, need to have an understanding of the nature of the work Greig, Skagen and Company had performed for Mr. Messier and his companies in the past and in April 2000; and an understanding of the nature of the transaction that the Ansaris wished Mr. Skagen to handle on their behalf. Obtaining an independent opinion could be costly. I consider it unlikely the Ansaris would have been willing to incur that cost.

- [443] I have already said that I do not believe the testimony of Mr. and Mrs. Ansari that they did not know that Mr. Skagen and his law firm were CMR's lawyers or that Mr. Skagen had previously done legal work for Mr. Messier. As stated earlier, I also concluded that Mr. Skagen did not act for both vendor and purchaser on the share purchase transaction and did not provide legal advice to Mr. Messier in relation to the SPA or the CIBC line or credit or Mr. Messier's guarantee.
- [444] Mr. Ansari had been alerted to the fact that it would be a conflict of interest for Mr. Skagen to act for both purchaser and vendor on the transaction. When Mr. Skagen was introduced to Mr. Ansari in March when Mr. Messier and Mr. Ansari dropped into the law firm's offices, Mr. Skagen was told by Mr. Messier that "they" wanted him to prepare the closing documents. Mr. Skagen told the two men he could act for either purchaser or vendor, but not both. It was agreed that he would act for the purchaser.
- [445] I am not persuaded that Mr. Skagen was "prohibited from purporting to act for the Plaintiffs" as pleaded in paragraph 40 of the Statement of Claim. The source of the alleged "prohibition" remains unclear. During submissions, counsel for the plaintiff initially asserted that the Law Society's Professional Conduct Handbook is a statute or regulation having the force of law. He eventually conceded this was not so. The Handbook, like other documents adopted by self-governing professions, is an influential but not definitive source when a court is determining the standard of care or conduct expected of a member of that profession.
- [446] While I am not persuaded that Mr. Skagen was "prohibited" from acting for Mr. and Mrs. Ansari, it was inadvisable, in my view, for Mr. Skagen to agree to represent Mr. and Mrs. Ansari on the share purchase transaction. Although the evidence does not establish that Greig, Skagen and Company were handling any legal matters for Mr. Messier personally in April or May 2000, the firm had provided legal services to Mr. Messier in the past; in particular, in relation to the purchase and sale of a townhome and a house. The law firm continued to be the registered and records office for another company owned by Mr. Messier.
- [447] Although Mr. Skagen testified that Mr. Messier was no more than a "business friend", his use of that expression is still an admission that Mr. Messier and he were friendly. Mr. Skagen testified that the firm did not do much work for Mr. Messier or his companies, and that Mr. Messier was not a source of large billings; and Mr. Messier confirmed that testimony. Despite this, Mr. Skagen and Mr. Messier went out for lunch together; Mr. Messier dropped into the law firm on occasion to chat with Mr. Skagen; Mr. Skagen was invited to and attended Mr. Messier's wedding and felt comfortable enough to make some remarks on the occasion when invited to do so; and Mr. Skagen shared with Mr. Messier information about the huge profit he had made on the INVT investment. Mr. Skagen also knew that his brother, Tim Skagen, had done some hobby work on cars at the Maaco shop; although he may not have been aware that Tim Skagen was indebted to CMR. It would be objectively reasonable for another client of Mr. Skagen's who became involved in a dispute

with Mr. Messier, to perceive Mr. Skagen to have divided loyalties.

- [448] Before agreeing to act for Mr. and Mrs. Ansari on the share purchase transaction, Mr. Skagen ought to have disclosed to Mr. and Mrs. Ansari (with Mr. Messier's permission, of course) the nature of the relationship the law firm had at that time, or in the past, with Mr. Messier and his companies; and ought to have obtained a written waiver from the Ansaris before agreeing to prepare the documents for the share purchase transaction.
- [449] I am satisfied however that had Mr. Skagen followed this procedure when he met with Mr. and Mrs. Ansari on April 12, 2000, the Ansaris would have readily signed such a waiver and would have retained Mr. Skagen. Mr. and Mrs. Ansari knew, I have already said, that Mr. Skagen was CMR's corporate lawyer and Mr. Messier had represented that as a good thing - that Mr. Skagen was familiar with the business. Mr. Ansari was concerned about high legal fees quoted by another lawyer; Mr. Messier had assured him that Mr. Skagen's fees were reasonable. Mr. Doherty also knew, or knew of, Mr. Skagen and expressed a positive opinion of him to Mr. Ansari.
- [450] On April 12, Mr. Ansari at least (and Mrs. Ansari agreed she followed his lead) was still very enthusiastic about acquiring the Maaco business and, I conclude, were at that time still well-disposed towards Mr. Messier. At the time, Mr. Ansari hoped to attend Maaco franchisee school in early May. Mr. Ansari's continuing excitement and optimism - demonstrated by his decision to make an offer to buy the business within two hours after his first meeting with Mr. Messier - was confirmed later in March. Mr. Ansari could have withdrawn from the contract to purchase the shares when he was unable to find financing by the date specified in the "subject-to financing" clause included in the first Agreement. Instead, he entered into the second Agreement. When he failed to find financing by April 6 as the subject-to financing clause in the first version of the second Agreement specified, Mr. Ansari extended that date to April 10.
- [451] On March 27, Mr. Ansari had even agreed to increase the purchase price - to \$450,000 before Mr. Messier agreed to reduce it to \$440,000 at Mrs. Ansari's insistence. There is no evidence of any bad feelings or loss of trust between the Ansaris and Mr. Messier on or before April 12.
- [452] It was not until the third week of April - after April 21 and the meeting with the insurance agent, I conclude - that cracks started to appear in the relationship between the Ansaris and Mr. Messier. Either on April 21 or soon after, Mr. Skagen met with Mr. and Mrs. Ansari, or had a telephone conversation with them in which they asked whether they had to provide the key man life insurance that Mr. Messier had asked them to purchase. Mr. Skagen told them that as they had not agreed to such a term in the second Agreement they were not obliged to provide insurance. Mr. Messier attempted to re-introduce this requirement in amendments he proposed to the promissory note prior to closing. On behalf of the Ansaris, Mr. Skagen rejected Mr. Messier's proposal.

- [453] It was not until April 24 or 25 that Mr. and Mrs. Ansari indicated to Mr. Messier that they might not go ahead with the deal. I think it is unlikely that Mr. Skagen met with Mr. and Mrs. Ansari on both April 25 and April 27 as Mrs. Ansari testified; and more probable that he met with them on April 27 only; but whether there was one meeting or two, Mr. Skagen did not know until April 25 at the earliest that the Ansaris were having, as he characterized it - "buyers' blues" or that they had concerns about the adequacy and reliability of information they had been given by Mr. Messier. At about the same date, Mr. Messier asked Mr. Skagen if he would pay the deposit to Mr. Messier if the deal fell through. Mr. Skagen said no.
- [454] Although Mr. Skagen testified that when Mr. and Mrs. Ansari left his office on April 27 the deal was still on; I conclude he knew that there was at least the potential for one or both sides of the transaction to back out and for a dispute to arise over entitlement to the deposit.
- [455] Given Mr. Skagen's "business friendship" with Mr. Messier, the fact that Mr. Messier's other company continued to be a client of Greig, Skagen and Company, and the potential for a reasonably perceived if not actual conflict of interest, I conclude that Mr. Skagen should have recommended to the Ansaris that they seek independent legal advice once Mr. Skagen became aware that the Ansaris had reservations about proceeding with the transaction. If either the Messiers or the plaintiffs had decided not to proceed, Mr. Skagen would have had a duty to recommend to the Ansaris that they seek independent legal advice.
- [456] I am not persuaded, however, that the outcome would have been different if Mr. Skagen had recommended, on April 25 or 27, that the Ansaris see another lawyer for advice. Mr. and Mrs. Ansari did obtain independent legal advice from lawyer Murray Morrison on April 26, 2000.
- [457] Mr. Skagen did, I have concluded, advise Mr. and Mrs. Ansari about the potential consequences if either they or Mr. Messier did not fulfill the bargain they had concluded at his office on April 27. I am satisfied that he did not threaten them with physical violence; did not threaten to sue them personally, and did not tell them that his insurance company would sue them. I accept his testimony, based on his usual practice, that he did tell them that Mr. Messier could sue for specific performance or damages and that at the very least there would be a dispute over entitlement to the deposit. His advice in that regard was sound. I have no doubt that Mr. Messier would have resorted to litigation to attempt to retain the deposit.
- [458] Mr. Skagen had also, I conclude, told them that if Mr. Messier had misled them or did not live up to his obligations, they could sue Mr. Messier for specific performance or damages.

[459] Mr. and Mrs. Ansari decided to go ahead with the share purchase because they were not willing to risk loss of their \$50,000 deposit or a lawsuit brought by Mr. Messier. Mr. Morrison had told them that they could back out of the deal but might have to forfeit the deposit. Mr. Skagen had told them, prudently in my opinion, that they could be sued by Mr. Messier for specific performance or damages. The plaintiffs were unwilling to run that risk.

[460] I turn now to the allegations that Mr. Skagen failed to meet the standard of care in relation to the advice he provided to the Ansaris. Most of the allegations that are pleaded in the Statement of Claim are based on the premises pleaded in paragraphs 7 and 8 of the Statement of Claim that the plaintiffs retained Mr. Skagen to "... advise and represent them in all matters related to the purchase ..." of the shares; (para. 7) and:

At the time the Plaintiffs retained Skagen, they had had preliminary discussions with Messier regarding buying Messier's shares in CMR. The Plaintiffs had not made any contractual obligations to Messier. (para.8)

[461] The evidence at trial clearly disproved these claims. In submissions, Counsel for the plaintiffs submitted that if the Ansaris had made "contractual obligations" to Mr. Messier before they retained Mr. Skagen on April 12, the contract was clearly unenforceable and that Mr. Skagen was negligent in not advising the Ansaris to that effect. He also submitted that Mr. Skagen breached the standard of care by failing to return the Ansaris' deposit to them on April 27.

[462] As these claims are not pleaded, I do not propose to deal with them at length. It is sufficient to say that I am not persuaded that the omission of a closing date in the second Agreement or the fact that the Ansaris had not been given possession of the shares on April 25 - the two suggestions Mr. Morrison made to the Ansaris - made the contract unenforceable. Time was not specified to be of the essence in either the first or the second Agreement; the parties had previously extended the closing date and there was evidence from which the court could determine that it was the intention of the parties to conclude the transaction on or before May 5.

[463] The parties intended and agreed that the purchasers would be responsible for the preparation of the SPA and other closing documents. The Ansaris had not tendered the closing documents or the purchase price on April 25. The Ansaris did not demand possession on that date.

[464] Had the Ansaris decided not to proceed with the purchase of the shares, there were arguments that could have been made in defence of a claim by Mr. Messier for specific performance or damages, as mentioned above. Although not pleaded, counsel for Mr. and Mrs. Ansari also made submissions about the clause in both the first and second Agreements that reads:

- [465] This agreement will be an integral part of a buy-sell agreement to be drawn up by the lawyer for the company. This buy-sell agreement must be approved by both buy and seller or all deposit monies will be returned to the purchaser.
- [466] Counsel submits that the second Agreement was not a binding and enforceable contract because of this clause. Until the SPA was approved, he submits, the Ansaris could walk away from the deal. The plaintiffs made submissions that Mr. Skagen's failure to advise the plaintiffs that there was no enforceable contract is both a breach of the standard of care and breach of the contract for the provision of legal services.
- [467] The clause quoted above was inserted in the first and second Agreements by Mr. Doherty. As he did not testify, we do not have the benefit of knowing what he thought the clause meant or why it was included. Mr. Skagen testified that he did not believe this clause meant that there was no binding contract.
- [468] Counsel for the plaintiffs relies on authorities including *Block Bros. Realty v. Occidental Hotel*, [1971] B.C.J. No. 663 (C.A.) and *Indotan Inc. v. Invincible Resources Corp.*, [2009] B.C.J. No. 2157. These cases illustrate, however, that determining whether a contract is binding and enforceable, although it contemplates that the obligations will be embodied in more formal language on closing; or whether the parties have merely agreed to agree. In *Block Bros. Realty*, cited above, the Court said, at para. 7:

Essentially what is before us is a problem of construction. In *Calvan Consolidated Oil & Gas Co. Ltd. v. Manning*, 17 D.L.R. (2d) 1 at pp. 6-7, [1959] S.C.R. 253, Judson, J., in giving the judgment of the Supreme Court, said: "Whether the parties intend to hold themselves bound until the execution of a formal judgment is a question of construction and I have no doubt in this case. The principle is well stated by Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 294 at pp. 288-9, in these terms: 'It appears to be well settled by the authorities that if documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

- [469] As the Court of Appeal stated in *Block Bros. Realty*, the line is often a narrow one. Counsel for the defendant Skagen provided the court with several authorities in which the issue has been resolved by a determination that the contract was binding and enforceable although it contemplated the preparation of formal closing documents. The defendant provided authorities holding that where there are conditions in a contract, there are also implied obligations on the parties to use their best efforts to bring about the fulfillment of the conditions. See, for example, *BEM Enterprises Ltd. v. Campeau Corp.*, [1980] B.C.J. No. 115. In my view, it might well have been negligence had Mr. Skagen provided the Ansaris with

an assurance that the contract was unenforceable; and it would have been imprudent, if not foolhardy, to have surrendered the deposit to them.

- [470] I turn now to the allegations that Mr. Skagen owed a duty or was contractually obliged to conduct financial investigations as alleged in paragraphs 13, 14 and 15 of the Statement of Claim. I have already commented on Mr. Allard's opinion in relation to the LOC. The more general allegations of a failure to investigate and advise the Ansaris about the assets and liabilities of CMR and Messier are found in paragraph 13 and 15. These allegations are premised on the facts alleged in paragraphs 11 and 12 which are that in March 2000 Mr. Messier made a proposal to the plaintiffs to sell them his shares in CMR; and that the plaintiffs took Mr. Messier's proposal to Mr. Skagen and sought his advice on it. Those facts have been disproved.
- [471] Mr. Skagen did not expressly undertake to assess the commercial viability of the company; or to advise Mr. and Mrs. Ansari in relation to accounting and financial aspects of the transaction; he testified that he was not competent to do so. By the time he was retained, Mr. Ansari had signed the second Agreement and had already removed most of the subject-to clauses included for his protection. Without consultation with Mr. Skagen, I conclude, Mr. Ansari removed the rest of the subject-to clauses on about April 17.
- [472] Even if Mr. Skagen had advised Mr. and Mrs. Ansari to have an accountant perform the investigations specified in paragraph 15 of the Statement of Claim, I consider it probable that Mr. and Mrs. Ansari would have declined to do so. Mr. Ansari had been advised by Mr. Shears to have an accountant review the financial statements; Mr. Messier had advised him to do so and Mr. Ansari did not disagree that Mr. Doherty may also have given him this advice. Mr. Ansari ignored the advice.
- [473] In the circumstances, I am not persuaded that the court should imply a term of the contract between Mr. Skagen and the Ansaris obliging Mr. Skagen to investigate the financial affairs of Mr. Messier or CMR.
- [474] Counsel for Mr. and Mrs. Ansari referred the court to a version of the Share Practice Procedure Checklist from the Law Society of British Columbia Practice Checklists Manual. Mr. Allard referred to the Checklist in relation to his opinion about conflict of interest and independent legal advice.
- [475] Mr. Allard did not testify at trial that all of the procedures set out in the Checklist are to be followed in every share purchase transaction. He said that the Checklist was a comprehensive list of things for a solicitor to consider when deciding which procedures might be applicable to a particular transaction. Mr. Allard agreed in cross-examination that the amount of due diligence required would vary depending on the nature of the transaction. In my view, it would also vary depending on the nature of the retainer - express and implied.

- [476] In paragraph 23 of the Statement of Claim, the plaintiffs allege three specific breaches of the duty of care in relation to the content of the SPA. No evidence was led to establish the standard of care in relation to items 23(a) and (c). The failure of the plaintiffs to establish liability on Mr. Messier's part in this lawsuit is not because certain representations were recitals rather than contractual terms; or because the SPA did not include a term that a breach of any representation, warranty or financing agreement would make the SPA voidable at the plaintiffs' option. The claims failed because the plaintiffs have failed to prove that Mr. Messier made the misrepresentations alleged or that any loss they suffered resulted from a pre-closing breach of the terms and conditions of the line of credit.
- [477] The plaintiffs have failed to make out the allegations in the Statement of Claim and the claim against Mr. Skagen is dismissed.
- [478] In the event that I had found Mr. Skagen liable to the plaintiffs, the findings on the issue of mitigation of damages included in relation to the claims against Mr. Messier would be equally applicable. Mr. and Mrs. Ansari could reasonably have limited their loss to \$50,000 if they had accepted Mr. Messier's offer in late April 2000 to be released from their obligations by forfeiting the deposit.

SUMMARY

- [479] The plaintiffs' claims against Mr. Messier and Mr. Skagen are dismissed. Mr. Messier is granted judgment against the plaintiffs for \$88,500 together with contractual interest. The balance of Mr. Messier's claim against the plaintiff is dismissed. Mr. Messier's third party claim against Mr. Skagen is dismissed.

COSTS

- [480] The parties asked to defer submissions about costs until these Reasons were delivered. If the parties are unable to agree on costs they make arrangements with the Registry to appear before me to make oral submissions or may deliver written submissions about costs.

"W.G. Baker J."

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