

CANADA / JUDGMENT

McKnight v. Hutchison

2019 BCSC 944

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 944 McKnight v. Hutchison IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: McKnight v. Hutchison, 2019 BCSC 944 Date: 20190612 Docket: S063172 Registry: Victoria

Between: Donald Dale McKnight Plaintiff And John Michael Hutchison and 574316 B.C. Ltd.

Defendants Before: The Honourable Chief Justice Hinkson Supplementary Reasons for Judgment

The Plaintiff, appearing in person: D.D. McKnight Counsel for the Defendants: J.M. Hutchison,

Q.C. Place and Date of Trial: Victoria, B.C. May 25-29, June 1-4, 8-11, 15-16, 2015 January 28-31,

February 1 and February 26, 2019 Place and Date of Judgment: Victoria, B.C. June 12, 2019 I.

Introduction

- [1] The plaintiff, Donald Dale McKnight, is a lawyer licensed to practise in the province of British Columbia. The personal defendant, John Michael Hutchison, is similarly licensed. The plaintiff and the personal defendant were partners in a law firm in the 1990s (the "partnership"). The corporate defendant is a company created and controlled by the personal defendant.
- [2] On November 8, 1999, when Mr. McKnight discerned that Mr. Hutchison had withheld firm income from their partnership, he left the office space that the parties had shared and created his own firm, while Mr. Hutchison continued to practice in his new firm at the same premises.
- [3] Litigation between the parties ensued and has dragged on to the present. At this stage of the litigation, the plaintiff seeks equitable compensation for the defendant's alleged breach of fiduciary duties, damages for alleged conversion, as well as punitive damages. He also seeks an order that any awards made be reduced by any amounts that he is found to owe the partnership, after taking into account advances made by the plaintiff for the benefit of the partnership, including payments of interest on the U.S. dollar ("USD") loan and income tax paid on monies held in trust for the partnership. In addition, Mr. McKnight seeks an order that the defendants may set off certain expenses, specified in paragraph 12 of my order entered on September 12, 2016.
- [4] Given the protracted nature of this litigation, I will now summarize some salient aspects of the decisions in the litigation between the parties. II. The Litigation Background

1. Mr. Justice Grist's 2002 decision
- [5] In 2002 BCSC 1373 ("2002 Reasons"), Justice Grist summarized the factual background between the parties as follows:
- [1] The parties were partners in a law firm for a period of nine years. Their partnership ended when the plaintiff, Mr. McKnight, learned of the defendant, Mr. Hutchison's, receipt of earnings resulting from part ownership in a private company. The company and the individuals that operated it were clients of the firm. While acting for them Mr. Hutchison agreed to become director of the company and accepted company shares that subsequently returned substantial dividends. Mr. McKnight contends that Mr. Hutchison breached a fiduciary duty to disclose the activities giving rise to these and other subsequently revealed privately retained earnings. An order is sought requiring that the undisclosed profits be accounted for as accruing to the partnership.
- [6] Grist J. summarized the obligation of disclosure between partners at paras. 63-67 as follows:
- [63] The obligation of full disclosure is common to relationships characterized by a duty of utmost fairness and good faith. *Aero Services Ltd. v. O'Mally et al.* (1973), 4 D.L.R. (2d) 371; *McMillan Bloedel Ltd. v. Binstead* [1983] B.C.J. No. 802. The authorities emphasize that the purpose served by the requirement of disclosure is to allow the informed party to exercise an independent will and take any position that party might adopt as appropriate. *Morrison v. Coast Finance Ltd.* (1965), 54 W.W.R. 257. And to be aware of any risk that the other might be tempted to fall short of their requisite duty. *Hitchcock v. Sykes*, [1914] S.C.R. 403.
- [64] In the case of partnerships, the institution requires there be trust. In the usual case the firm enterprise requires contribution from each partner and proportionate division is made of the profits or losses. There is no limitation from firm liability and each partner potentially has the power to expose the full worth of every other partner.
- [65] Where relationships are marked by the obligation of utmost fairness and good faith, the remedy for breach extends beyond damages. *McMillan Bloedel Ltd. v. Binstead*, *supra*, was a case of an employee profiting privately from sales arranged through his position with his employer. In the circumstances of the case the employer itself would not have been able to realise on the profits. In commenting on the consequences flowing from the employee's actions Dohm, J. said at para. 60: Where there has been a breach of a fiduciary duty the law calls on the defendants to account to the plaintiff for any profit made or benefit received as a result of the breach of duty. This is not the same as damages, which are compensatory in nature. The purpose of damages is to put the plaintiff in the same position it would have been if not for the wrongdoing. Here the plaintiff suffered little damage and will be in a better position than it would have been if not for the wrongful act of the defendants.
- [66] If there is any doubt that this principle applies to non-disclosure of matters affecting a professional partnership, it is settled in *Rochweg v. Truster*, *supra*. That was a case where an accountant did not inform of benefits by way of share options associated with his

position as a director of a company that was also a client of his accounting firm. In this case, Cronk, J.A. said at para. 115: The remedy for breach of a fiduciary duty by the realization of secret profits or benefits requires that the fiduciary be prevented from retaining any gain from the activity which arose from the breach of duty. The assessment for such a breach focuses on the wrongdoer's gain and not the beneficiary's loss.

- [67] The remedy here is of the same nature. The earnings from the sources indicated shall be accounted for as partnership income and dealt with in accordance with the terms of the partnership agreement applicable at the times the payments were received. In the case of trustee fees that were received after dissolution, that portion attributable to services performed during the partnership shall also be taken into account. Any further payments attributable to the shares held in the company controlled by the T. Family trust shall be treated as partnership revenue.
- [7] Ultimately, Grist J. ordered that Mr. Hutchison account to the partnership for the "secret profits". He concluded, at paras. 4 and 70, that:
- [4] My conclusion is that Mr. Hutchison did not satisfy his obligation to make full disclosure to his partner of matters affecting the partnership. In six of the seven cases complained of the non-disclosed earnings came as fees from positions held in corporations or trusts created for firm clients, or from share holdings in the companies themselves. In the other matter, his partners knew that he had taken a position with a government board and that an honorarium was likely being paid, but he did not reveal he was retaining the honorarium privately. The remedy for these breaches of partnership obligation is to require the earnings to be accounted for as partnership income.
- [70] A determination of what might follow from any imbalance in the capital accounts likely requires completion of the accounting indicated in respect of the funds retained by Mr. Hutchison personally and which will now be accounted for as firm revenues.
2. Mr. Justice Grist's 2004 decision
- [8] In 2004 BCSC 1184 ("2004 Reasons"), Grist J. reviewed the Registrar's report on an accounting of Mr. Hutchison's profits, which concluded that the funds retained by the defendant amounted to \$777,803.42 prior to the dissolution of the partnership, with a further \$85,580.68 received after dissolution, together totalling \$863,384.10.
- [9] Grist J. concluded that Mr. Hutchison had received total income of \$863,384.10 which should have been (but was not) reported as partnership income. Of this total amount, the sum of \$773,303.42 was received before November 8, 1999, and income of \$72,291.66 plus interest of \$8,039.02 were received after November 8, 1999.

- [10] Grist J. then appointed Mr. Jackson, of the firm of Trenholme Jackson and Eade, chartered accountants, as a special referee to calculate the parties' respective capital accounts leading to their capital accounts at dissolution, after taking into account the monies which should have been received by the partnership, treating the defendant's receipt of these funds as drawings taken from the partnership's assets.
- [11] The special referee found a disparity of some \$523,000 in the parties' capital accounts. He found that Mr. McKnight had \$473,252 in his capital account, whereas Mr. Hutchison had a deficit of \$50,615. His report was certified by Grist J. in February 2006, but there remained further adjustments to be made before the partnership could be wound up.
- [12] In May 2011, Grist J. declared that this "first action" had come to an end and ordered Mr. Hutchison to pay costs in accordance with the order, dated April 14, 2003, and to pay special costs of the accounting before Registrar Bouck (as she then was): [2003] B.C.J. No. 848 (S.C.).
3. Mr. Justice Halfyard's 2011 decision
- [13] The trial and post-trial judgments of Grist J. did not result in a resolution of the issues remaining between the parties. Mr. McKnight had commenced a second action on July 14, 2006, against Mr. Hutchison and the company owned and controlled by him. In this action, Mr. McKnight claimed a further accounting by the defendant for unbilled work in progress ("WIP"), dissolution and winding up of the partnership, and personal judgment against the defendant for the amount required to pay any deficiency remaining in the plaintiff's capital account in full, with interest, after dissolution and winding up.
- [14] The plaintiff claimed that, as of November 8, 1999, the value of accounts receivable from the defendant's clients was about \$184,000, and the value of the unbilled WIP for the defendant's clients was about \$410,000. He continued to allege, among other things, that the defendant had failed to make reasonable efforts to recover accounts receivable or to render accounts for WIP; and that the defendant obstructed the plaintiff's efforts to collect accounts receivable, to sell a condominium in Winnipeg, and sell the "FS shares" held by the defendant company.
- [15] In 2011 BCSC 36 ("2011 Reasons"), Mr. Justice Halfyard dismissed the counterclaim that had been brought by Mr. Hutchison in the plaintiff's second action. Halfyard J. found that the plaintiff established that the defendant had failed to bill his clients for a substantial part of his WIP as it existed at the time the parties ended their partnership. However, he was unable to determine the value of the defendant's unbilled work on the evidence before him.
- [16] At para. 62, Halfyard J. found that Mr. Hutchison had failed to make reasonable efforts to collect the accounts receivable relating to work that he performed for clients of the former partnership before November 8, 1999, relating to unpaid bills that the defendant rendered both before and after November 8, 1999. After the dissolution of their partnership, Halfyard J. further found at para. 72 that Mr. Hutchison received money from clients of the former partnership on at least three occasions, in payment for work he performed before

November 8, 1999, but failed to credit these payments to the former partnership: at para. 72.

- [17] At para. 86, Halfyard J. also concluded that Mr. Hutchison had unreasonably failed to comply with Mr. McKnight's requests for disclosure, and production of documents and information. At para. 104, Halfyard J. found that: The evidence establishes that the defendant repeatedly promised to do specific things, and then failed to keep his promises. I have discussed the absence of satisfactory explanations for these failures and, in one instance, the assertion of an explanation that was false. I am left wondering why he would keep on making these promises over the years. It was not until November 30, 2009, (in his Outline) that Mr. Hutchison first suggested that it was too late to send out any more bills for the work in progress. The defendant's conduct seems to invite the inference that, until that point in time, he believed that it would be worthwhile to render accounts for his unbilled work in progress. His conduct also creates suspicion about the honesty of his several statements that he intended to do what he had accepted responsibility to do.
- [18] Halfyard J. concluded at para. 121 that the false statements made by Mr. Hutchison, and his failure to disclose material facts relating to the commencement of an action on one file, demonstrated a high degree of carelessness on his part, and called into question the reliability of some of his statements made in letters to the plaintiff and on his examination for discovery. In particular, Halfyard J. found that the evidence indicated that his statements of intention and his statements as to the conditions of his accounts could not safely be relied upon.
4. The appeal of the first action
- [19] In 2013, Mr. Hutchison appealed Grist J.'s 2002 decision. Mr. McKnight's second action was held in abeyance pending the disposition of the appeal.
- [20] In her reasons for judgment on the appeal, indexed at 2013 BCCA 340 (the "Appeal"), at para. 1, Madam Justice Newbury described Mr. Hutchison's appeal as "the latest chapter in a protracted and unseemly dispute between two lawyers who practised law in partnership between 1990 and 1999".
- [21] The court of appeal unanimously dismissed Mr. Hutchison's appeal.
5. My 2015 decision and 2016 supplementary reasons
- [22] In May and June 2015, Mr. McKnight's second action came on for hearing before me. In reasons indexed at 2015 BCSC 1886 ("2015 Reasons"), I dismissed the plaintiff's claim against the corporate defendant. I will refer to Mr. Hutchison hereafter as either the defendant or by his name.
- [23] As of October 31, 1999, approximately a week before the parties agreed to dissolve the partnership, the accumulated WIP for clients for whom the personal defendant was solely or primarily responsible was recorded as \$367,000.42 for unbilled fees and \$43,248.93 for unbilled disbursements (2011 Reasons at para. 39). As of the same date, the outstanding

accounts receivable for accounts that had been rendered to clients for whom the personal defendant was solely or primarily responsible was recorded as \$155,972.16 for fees and \$28,025.67 for disbursements, and those rendered by the plaintiff were \$3,049.16 (2011 Reasons at para. 50).

[24] Although I found that the partnership terminated on November 8, 1999, I accepted that there should be an order winding up the affairs of the partnership following the settlement of its accounts and affairs. At the time the partnership dissolved, the partnership owed its bank roughly \$280,000.

[25] I found that:

- a) the partnership between the personal parties terminated on November 8, 1999 (at para. 34);
- b) the personal parties each bear 50% responsibility for the partnership's financial obligations and are equally entitled to the partnership earnings (at para. 38);
- c) the plaintiff's claim for payment by the defendants, with interest of his capital account was dismissed (at para. 44);
- d) the payment priorities for the windup of the partnership were:
 - i. outstanding obligations of the partnership to third parties; ii. repayment for advances made by the parties for partnership obligations; iii. repayment of the plaintiff's capital account; and iv. the balance, if any, to the personal parties, based on their partnership interests; (at para. 47)
- e) the personal defendant was to pay any funds in his possession into the trust account maintained by the plaintiff and he was to be personally responsible for all fees associated with the creation and maintenance of the corporate defendant (at para. 49);
- f) the personal defendant was held to have received \$10,000 from an accounting firm client on behalf of the partnership, with credit for the expenses of attempting to realize on the account, and the personal defendant was not responsible for the balance of balance of the bills to the accounting firm client (at para. 74);
- g) the personal defendant was responsible to the partnership for the account to a medical doctor client for \$15,699.60 (at para. 79);
- h) once the obligations of the partnership to third parties are met, the personal defendant is entitled to set off against the legitimate expenses of the partnership the advances by him for partnership obligations (at para. 89); and
- i) the personal defendant owed nothing to the plaintiff for work on the estate files after dissolution (at para. 93).

[26] I also ordered the defendant to pay his capital account deficit as determined by Grist J. to the partnership, together with interest thereon, from February 28, 2006 (at para. 40).

- [27] I declined to order that, if there were insufficient monies remaining upon the winding up of the partnership to pay the capital account of the plaintiff, the defendants should pay the balance owing with interest (at paras. 42-43).
- [28] I enjoined the parties from using or disposing of any remaining assets of the original partnership or the continuing partnership without further order, and confirmed the priority for payments from the partnership assets: at paras. 45, 47.
- [29] I also ordered that Mr. Hutchison pay any funds in the possession of the corporate defendant into the trust account of the plaintiff, as well as \$15,699.60 to the firm for fees that he had failed to bill to a client identified as "Dr. R."
- [30] I also dismissed the plaintiff's claim for damages for the loss of the firm's goodwill.
- [31] In my reasons for judgment, I referred to the figure of \$773,187, net of reimbursements from recovered partnership funds claimed by the personal defendant for advances made to the firm. In supplemental reasons for judgment indexed at 2016 BCSC 137, I corrected that figure to take into account the recovery of GST, which reduced the figure, net of reimbursements from recovered partnership funds, to \$742,437.72. Of that figure, I dismissed \$365,062.21 of the claim of set off by Mr. Hutchison leaving a net owing to the partnership by Mr. Hutchison of \$377,375.51, pending the reference to the Registrar of the accounting charges of Trenholme Jackson Eade.
- [32] At para. 81 of my initial reasons for judgment, I found: 81 In some cases, the personal defendant sent bills to clients for work performed after the dissolution of the partnership, without billing or collecting for work performed during the life of the partnership. The personal defendant gave evidence that pursuant to the order of Halfyard J., of the files he billed following the dissolution, he recovered \$102,608.54 which he paid to the plaintiff, together with some \$64,000 attributable to proceeds from a shareholding that Grist J. found to be a partnership asset. I am satisfied that at least some portion of the work billed by the personal defendant following the dissolution was not credited as it should have been, to the partnership, but I am unable to determine the extent of this failure. This account now holds approximately \$171,000, the breakdown of which is unclear.
- [33] Insofar as the WIP of the partnership at the time of the termination of the partnership, I directed a further reference to the Registrar, at para. 9:
9. The Registrar is directed to determine the following:
- (a) To determine the amounts that the personal defendant should have billed for work performed prior to the dissolution of the partnership, but did not.
- (b) To determine the amounts that the personal defendant did bill for work performed prior to the dissolution of the partnership, including, but not limited to, client file nos. 12407, 12294, 12358, 12296, 12431, and 12314.

- (c) If the personal defendant is unable or unwilling to tender evidence as to his recovery of any amount billed for work performed prior to the dissolution of the partnership, the Registrar shall find that the recovery occurred. If the personal defendant is unable or unwilling to tender evidence as to his use of the funds recovered for partnership expenses, the Registrar shall find that such expenditures did not occur.
 - (d) To determine the value of the partnership assets taken by both the plaintiff and the personal defendant, as of the date of dissolution of the partnership.
 - (e) To determine the calculation of the plaintiff's recovery of any amount billed for work performed prior to the dissolution of the partnership, other than those already determined by Grist J. and the plaintiff's use of those assets.
 - (f) To determine what amounts, if any were paid by the plaintiff for partnership obligations following the dissolution of the partnership.
 - (g) If the plaintiff is unable or unwilling to tender evidence as to his recovery of any amount billed for work performed prior to the dissolution of the partnership, the Registrar shall find that the recovery occurred. If the plaintiff is unable or unwilling to tender evidence as to his use of the funds recovered for partnership expenses, the Registrar shall find that such expenditures did not occur.
- [34] I adjourned the question of damages payable to the plaintiff by the personal defendant for breach of fiduciary duty and for punitive damages and costs until the Registrar's report was available to me. III. Discussion
1. Unbilled work in progress and disbursements A. The Registrar's determination of work in progress and disbursements
- [35] A reference report was authored by a master of the Court, sitting as Registrar, and was dated May 30, 2018 (the "Report"). The parties agreed before the Master that the defendant only needed to account for the unbilled WIP and unbilled disbursements that cumulatively exceeded \$100.00.
- [36] The reference report came before me pursuant to Rule 18-1(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [37] In her Report, the Master observed that, "In many instances, it appeared that the parties were attempting to re-try their respective cases". Unenlightened by that comment, the parties, and in particular the plaintiff, continue to attempt to reargue issues and findings that have already been made by me and by other judges. The most egregious example is the plaintiff's assertion that: unfortunately, inasmuch as Your Lordship adopted those false statements almost verbatim in paragraph 146 of the Reasons, it appears that, at least for now, the Personal Defendant has succeeded in his deception, to the considerable detriment of the Plaintiff's professional and personal reputation.

- [38] The defendant supplied the Master with a document prepared by his wife and bookkeeper, Mrs. Hutchison, which she referred to as "Spreadsheet 5", as will I. The Master described the contents of the spreadsheet as follows:
- [18] Columns C and D on the Spreadsheet show the WIP fees and disbursements as at the date of dissolution. Columns E and F show the account receivables on the bills issued prior to the dates of dissolution.
- [19] Columns G and H in Spreadsheet 5 reflect bills issued on behalf of the partnership on Mr. Hutchison's files under the direction of Mr. McKnight's new firm. Columns I and J reflect entries from the trust ledger for file 13060, being billings and issued by the New Firm on partnership files for which Mr. Hutchison was the responsible lawyer, and receipts on those billings.
- [20] Columns K through R reflect information on the New Firm's client summary report as at September 18, 2017 for post-dissolution WIP, billings and account receivable balances.
- [21] The figures in Spreadsheet 5 shown as a debit or "negative" reflect anticipated disbursement(s).
- [22] Spreadsheet 5 also delineates between three categories of files: the first group (up to page 8) represent files carried over to the New Firm; the second group represent files or matters not carried over to the New Firm; and the third group represent files that were opened in the partnership in the name of Gilbert J. Smith.
- [23] Finally, all of the figures found in Spreadsheet 5 are taken from accounting documents reviewed by Mrs. Hutchison, with the exception of line 122. That entry relates to a bill issued by Mr. McKnight on behalf of the partnership to Mrs. Hutchison personally. Mrs. Hutchison's payment on that account was applied partnership debts. Mrs. Hutchison testified that while the file associated with the legal work and bill appears on the client summary sheet provided by Mr. McKnight, she has no independent accounting record supporting the bill or the payment she made on that account. It appears that the monies came to Mr. McKnight directly from another solicitor's trust account.
- [24] Mrs. Hutchison noted the following corrections to be made to Spreadsheet 5: • The amount shown as received with respect to file 12468 (line 177 under Column J) is misstated. The amount received is \$1,347.75. The balance of \$1,190.45 should show as a receipt to the New Firm on behalf of the partnership in line 33. In other words, the client on file 12468 fully paid the account billed post-dissolution. The error appears to be an innocent juxtaposition of the final two numbers in the respective files, with all monies coming from the same trust account (13060); • Line 215 is a duplication of the information found at line 49 (this WIP was not billed); • The amount billed in line 65 (file 12181) should be attributed to file 11720 at line 64. As can be seen from exhibit 64, both files involve the same client; • On line 52, the amount received (Column H) should be stated as \$2,500; • Line 80 should not be included in the Spreadsheet (solely a Gilbert Smith file before and after dissolution); • Lines 45 and 140

were Gilbert Smith files in the partnership but carried over to the New Firm by Mr. Hutchison.

- [39] Unfortunately, the Master did not determine the amounts that the personal defendant should have billed for work performed prior to the dissolution of the partnership, as set out in direction 9(a). On this aspect of the reference, she reported only that:
- [63] Accordingly, subject to the trial judge's findings with respect to the personal defendant's obligations as a fiduciary in his billing practices, I recommend to the court that the amount the personal defendant should have billed in fees is at minimum \$10,829.39 and at maximum \$112,093.50.
- [64] In addition, the court might include the anticipated billing of file 6393 (\$7,181.25 in fees and \$1,078.36 in disbursements) in this aspect of the parties' final accounting.
- [40] In the result, it is necessary for me to determine what should have been billed by the personal defendant. Before doing so, I will discuss the directions in 9(b) to (g).
- [41] With respect to direction 9(b), I now have the benefit of the detailed accounting of the composition of the funds held in trust from billings rendered on behalf of the parties' partnership. It is in the form of a document entitled "Donald D. McKnight - Royal Bank Account in trust for Smith Hutchison" and discloses that funds in the amount of \$12,522.29 were deposited in that account on February 10, 2011, attributed to J. Michael Hutchison as "Funds held on behalf of partnership". A second entry for the same date records the sum of \$27,284.32 attributed to J. Michael Hutchison as "Funds held on behalf of 574316 B.C. Ltd." The third entry on the document records the sum of \$12,500 attributed to Tees Kiddle Spencer for the settlement of a case on May 24, 2011. The fourth entry records the sum or \$46,750 attributed to Marwest Management for the "Ashbury Place distributions" on October 4, 2011, and the fifth and final entry records the sum or \$65,000 attributed to Maryland Enterprises for the "Sale of Ashbury Pl." on November 2, 2011.
- [42] It is clear from this document and Mr. McKnight's evidence that the \$171,000 referred to in para. 81 of my initial reasons (the amount the partnership account held at the time of those reasons) was from the sources described in that document.
- [43] This conclusion is reinforced by the personal defendant's concession in para. 59 of his respondent's factum, filed on the appeal of my decision, wherein he stated, in part, "The evidence was that the Personal Respondent had recovered the sum of \$201,608.54 of partnership monies and accounted to the Appellant for its application, entirely on behalf of the Partnership. However, this finding on the part of the Chief Justice cannot be shown to be material as it would not have affected the outcome in any way "
- [44] In answer to direction 9(b), the determination of the amount the personal defendant did bill for work performed prior to the dissolution of the firm, the Master reported:

- [65] Spreadsheet 5 addresses this term of the Order. The total amount billed as of the date of the reference is \$238,629.32 (Columns G + I).
- [45] I am prepared to accept that figure for the defendant's billings as accurate with the exception of six files. While the Master found that the personal defendant conceded that he did not bill files 12407, 12294, 12358, 12296, 12431, and 12314 at the trial before me, I accept the defendant's submission that he made no such concession and that he did bill these files. Therefore, he billed an additional \$10,667.11, although, as discussed at paras. 152 and 153 below, files 12296 and 12407 were not billed for all of the WIP and disbursements recorded and the shortfall must be taken into account in direction 9(a).
- [46] In answer to direction 9(c), the Master reported that:
- [66] The personal defendant has tendered evidence as to his recovery on partnership files, as set out in Spreadsheet 5 and further described in paragraphs 35 to 38 of his Affidavit #7. The amount recovered on these billings is \$223,163.95 (Columns H + J with corrections noted above).
- [47] I accept the Master's conclusion on direction 9(c), and do not find it necessary to comment on it, as the Master found that the defendant accounted for all but billings on files taken over by the defendant from a former partner, and I find that the fees on files taken over from the former partner need not be accounted for to the partnership by the defendant, as discussed at para. 93 of my initial reasons for judgment.
- [48] In her Report, the Master advised that the parties reached a settlement with respect to direction 9(d), the value of the partnership assets taken by both the plaintiff and the defendant, as of the date of dissolution of the partnership, and so refrained from doing her own assessment of the value of such assets. The Master did not mention the value attributed to these assets by the parties.
- [49] Mr. McKnight addressed the information required in answer to direction 9(e) in his affidavit sworn September 26, 2017, which he relied upon before the Master.
- [50] The defendant disagreed with the conclusions of the Master with respect to direction 9(e). He contended that she noted that I found, in para. 85 of my reasons, that the evidence supplied by the plaintiff at trial did not permit a determination of exactly what the plaintiff had done with monies, or, for that matter, exactly what monies he had received, on behalf of the partnership.
- [51] While this is indeed what I found, it was without the benefit of the plaintiff's affidavit sworn September 26, 2017, which was before the Master and subsequently before me. I am satisfied that it provides the detail to the Master that was lacking before me in 2015.

- [52] The Master quantified the amount to be determined pursuant to direction 9(e) at \$123,436.40, as at July 15, 2005. The defendant contends that the Master "simply got it wrong when she stated in para. 46 that he did not dispute the plaintiff's evidence with respect to the direction 9(e)."
- [53] What the Master determined with respect to the plaintiff's wife, Mrs. McKnight's evidence regarding directions 9(e) and (f) was: To reiterate, the evidence with respect to these two issues is contained in the affidavits of the plaintiff and Stacey McKnight. As such, there is not need to report on item 9(g) of the Order. In my view, Mrs. McKnight's evidence was not seriously challenged on cross-examination and ought to be accepted. However because the plaintiff's evidence requires the registrar to revisit or reconsider both the evidence presented at trial as well as findings made by the trial judge on that evidence, I am unable to make any conclusive recommendations with respect to these terms of the Order.
- [54] The defendant contended that by commenting that Mrs. McKnight's evidence was not seriously challenged in cross-examination, she failed to appreciate how that cross-examination established the substantial limits in Mrs. McKnight's evidence and what it can be relied on for.
- [55] I disagree. While I might not have chosen the adjective "seriously" to describe the challenge to Mrs. McKnight's evidence, I find that in the context that it was used by the Master, it was intended to convey that the cross-examination of Mrs. McKnight did not establish any compelling reason to reject her evidence. Having reviewed that cross-examination, I agree.
- [56] The Master's findings with respect to direction 9(f) was, as noted above, that she accepted the figures from Mrs. McKnight's affidavit. I accept this finding. As a result, the total amount paid by the plaintiff for partnership obligations following the dissolution of the partnership is \$108,404.82.
- [57] While the parties have minor complaints with the figure arrived at by the Master, and having rejected the contention that Mrs. McKnight was not effectively challenged in cross-examination, I accept the Master's findings on directions 9(e) and (f), and therefore do not find it necessary to comment on direction 9(g), as I accept that the plaintiff accounted to the Master for his billings.
- [58] As I have accepted the Master's findings with respect to directions 9(b), (c), (e), and (f), and directions 9(d) and (g) do not require further comment, the only accounting left to be done is that under direction 9(a).
- [59] I turn now to consider the appropriate amount that the defendant must reimburse the partnership for unbilled WIP and disbursements. B. How much must Mr. Hutchison reimburse the partnership for unbilled work and disbursements?
- i. Work in progress

- [60] The determination of the appropriate account to be rendered by a lawyer to a client is more a matter of discretion than an accounting exercise. Determining the appropriate fees charged by lawyers is done with reference to s. 71(4) of the Legal Profession Act, S.B.C. 1998, c. 9, and the principles laid down in *Yule v. Saskatoon (City)* [No. 4] (1995), 17 W.W.R. 305 at paras. 19-20 (Sask. Ct. Q.B.). Section 71(4) provides: 71(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including:
- (a) the complexity, difficulty or novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the lawyer,
 - (c) the lawyer's character and standing in the profession,
 - (d) the amount involved,
 - (e) the time reasonably spent,
 - (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
 - (g) the importance of the matter to the client whose bill is being reviewed, and
 - (h) the result obtained.
- [61] Similarly, Mr. Justice Thomson commented in *Yule* that: 21 In fixing the remuneration of the plaintiff in this case all factors essential to justice and fair play must be taken into account: *Re Solicitor* (1920) 47 O.L.R. 522, affirmed on appeal, 48 O.L.R. 363. The circumstances to be considered in arriving at the proper amount are the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation in which the services were rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in his profession of the counsel; the results secured, and to some extent at least the ability of the client to pay: *Murphy v. Corry* (1906) 7 O.W.R. 363.
- [62] More recently, for other than contingency fee retainers, lawyers have evolved to a more slavish reliance on timesheet recordings of the time that they devote to a particular client file as the principle basis for their accounts. In my view, timesheet entries alone cannot overshadow the other factors identified in *Yule* that must be considered in the determination of an appropriate account.
- [63] The realities of modern practice can and often do oblige lawyers to consider reducing their accounts despite recorded time for such things as client development, goodwill, and the recognition that, for some clients who have recurring needs for legal assistance, some matters simply should not result in an account based on the time spent, or perhaps no account should be rendered at all.

- [64] When lawyers practice on their own, they are free to discount their accounts for whatever reasons they deem appropriate. By contrast, when a lawyer is responsible to partners or employers for his or her billings there may be less discretion to be exercised.
- [65] In this case, two lawyers practised together and, for some time, with other lawyers. Their differences have resulted in the need to determine what recorded time for WIP ought to have been billed by the defendant. The plaintiff's work was largely based upon contingency fee arrangements which rendered his time recording to be of limited importance. The defendant's work was largely more traditional corporate work at fixed rates for certain activities, or other types of work that was billed more or less on the basis of his recorded time on those client files.
- [66] The defendant gave evidence that it was his invariable practice to write off some or all of his recorded time for some matters and some clients. To the extent that this practice was agreed to or acquiesced in by the plaintiff, it could excuse the fact that significant amounts of the personal defendant's WIP were never billed.
- [67] However, the defendant also gave evidence that it was only billable work that went to the firm's billing department, and that the firm's practice throughout the years of the partnership was to review the partnership's WIP each summer and to assign some work-in-progress and accounts receivable to the "doubtful" file list. The defendant said that the capital account of the parties did not contain receivables that were deemed to be uncollectible.
- [68] But to what extent was this practice agreed to or acquiesced in by the plaintiff, and to what extent should it apply to the recorded WIP?
- [69] The defendant noted that the plaintiff identified some 36 files for which he was responsible, where the plaintiff exercised his discretion to reduce or refrain from billing with respect to his files for the partnership. The defendant does not suggest that the plaintiff was wrong to have exercised that discretion, but states that it is corroborative evidence of the existence of the discretion which became part of the terms and conditions of the partnership agreement, and there is no reason nor any legal basis, therefore, to now impose a different standard.
- [70] I find that not all of the recorded time and disbursements recorded in the partnership's accounting records was expected to be billed to the clients, and that each of the personal parties could exercise some discretion as to when and how much the partnership's clients would be billed.
- [71] I do note, however, that there was a factor that would benefit the defendant if his WIP was significantly greater than that of the other lawyers with whom he practiced in partnership, and that related to the capital accounts of the partners. The capital accounts were determined in part by the WIP that remained after write-offs.

- [72] Mr. Jackson is a chartered accountant with the firm of Trenholme Jackson Eade. That firm were the accountants for the partnership. He was asked and explained that: Q: what was the process that you followed for the purposes of preparing financial statements for the firm? A: Well, we would receive the accounting records from the bookkeeper after the year-end date had passed. We would take those records and we would look at them and obtain supporting documentation to support the amounts reflected in the records and then we would put together the financial statements and we would review them with the partners and ask for their comments of any further details that we required to finalize them. Q: And for matters including figures related to work in progress and accounts receivable did you follow any practice in that regard? A: We would obtain a listing of accounts receivable for the firm by partner and that would be considered accounts receivable, and also for work from progress, I believe, and we would then review it and ask for the partners of the firm to identify any accounts that were doubtful of collection or any work in progress that was doubtful of being fully billed. Q: Did you see any consistent pattern about who might have significant write-offs on a regular annual basis? A: There was a consistent pattern that went on for a period of time, and that was - - Mr. Hutchison's write-offs were significantly higher than the other partners on a consistent basis.
- [73] The net WIP figures were one asset of the partnership, and each partner would receive interest on his share of the net WIP. If the WIP for a partner was exaggerated, it would result in greater interest than warranted.
- [74] What amounts should Mr. Hutchison have billed for work performed prior to the dissolution of the partnership that he did not bill?
- [75] The Master explained in her Report that columns H and J from Spreadsheet 5 showed the amounts received on bills issued by the defendant totalling \$223,163.95, and reported that:
- [40] Although possibly beyond the scope of this report, Mr. Hutchison testified to having sent out the 20 bills on or about June 1, 2005 for work performed prior to the dissolution of the partnership. The amount billed and the recovery on those bills was as follows: • #12539 (line 264) - \$417.17 billed and no recovery. The file was not carried over to the New Firm; • #12626 (line 27) - \$481 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; • #12515 (line 31) - \$596.20 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred; • #12402 (line 108) - \$767.75 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; • #12361 (line 8) - \$54.26 billed and recovered; • #12538 (line 99) - \$4,691.65 billed with no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; • #12356 (line 71) - \$666.90 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; • #12322 (line 67) - \$508.23 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred; • #12296 - (line 89) - \$798.00 billed (discounted)

and no recovery to date. However, the client has been in contact with Mr. Hutchison and has apparently promised to pay the account upon the completion of a particular real estate transaction. Mr. Hutchison is confident that the bill will be paid; · #12265 (line 23) - \$314.87 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; · #12254 (line 66) - \$544.20 billed and no recovery. The file was carried over the New Firm but no WIP has accumulated nor disbursements incurred; · #12181 (line 65) - two bills were issued on the same day under the same file number but referenced two separate matters: \$30,436.61 billed and no recovery, and \$328.84 was billed with no recovery. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred; · #12403 (line 22) - \$82.32 billed and no recovery. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred; · #12000 (line 107) - \$369.07 billed and no recovery to date. Mr. Hutchison is confident that this bill will be paid as it is the same client who has promised to pay the bill on #12296 above. The file was carried over to the New Firm but no WIP has accumulated nor disbursements incurred; · #11999 (line 227) - \$216.60 billed and no recovery. The file was not carried over to the New Firm; · #11744 (line 70) - \$29.44 billed and no recovery. The file was carried over to the New Firm with the New Firm's subsequently billed fees and disbursements being paid in full; · #12361 (line 8) - \$474.10 billed and no recovery; · #11108 (line 113) - \$5,297.51 billed and no recovery; · #10665 (line 183) - \$3,734.77 billed and no recovery. [Footnotes omitted.]

- [76] Although these bills were sent out by Mr. Hutchison, he advised the Master that he made little or no effort to collect the accounts. I must therefore determine what amount should have been recovered from the bills that were rendered by the personal defendant.
- [77] In para. 23 of her Report, the Master stated that the file recorded at line 122 of Spreadsheet 5, and the bill that was on the client summary sheet provided by the plaintiff, involved Mrs. Hutchison (this being her file with the firm), who had no independent accounting record supporting the bill or the payment she made.
- [78] In fact, Mrs. Hutchison testified that she had received a bill and that she had paid it, but there was no record of that in the client ledger or the client listing that was produced after those payments had been made.
- [79] At para. 23 of the Master's Report, she noted that the funds for the full amount of the account had been applied directly in payment of partnership expenses, as the plaintiff had been informed, rather than in payment to him from her solicitors.
- [80] At para. 26, the Master found, and I accept, that Mr. Hutchison conceded in his oral evidence before her that certain matters should have been billed, albeit in some cases with reductions. She listed those as follows: · line 48, #12512 - \$180.39 in fees and \$25.00 in disbursements; · line 257, #11551 - \$503.75 in fees, no disbursements recorded; · line 110, #11190 - \$1,525.25 in fees and \$62.80 in disbursements; · line 151, #12022 - \$926.25 in fees and \$366.30 in disbursements; · line 153, #12505 - \$1,276.25 in fees and \$33.50 in

disbursements; · line 157, #12503 - \$300 in fees and \$26.80 in disbursements; · line 306, #12511 - \$500 in fees and \$48.50 in disbursements; · line 163, #12156 - \$900 in fees and \$128.56 in disbursements; · line 165, #12177 - \$500 in fees and \$53.50 in disbursements; · line 172, #11998 - \$750 in fees and \$17.50 in disbursements; · line 182, #12103 - \$600 in fees and \$36.10 in disbursements; · line 190, #10683 - no fees but disbursements of \$101.93; · line 198, #12529 - \$200 in fees and \$25.60 in disbursements; · line 104, #12514 - \$130 in fees and \$328.90 in disbursements; · line 207, #12531 - \$502.50 in fees and \$31.00 in disbursements · line 206, #12528 - \$800 in fees and \$40.00 in disbursements; · line 348, #12418 - \$308.75 in fees and \$34.53 in disbursements; · line 208, #11691 - no fees but disbursements of \$519.96; · line 210, #12443 - \$926.25 in fees plus \$366.30 in disbursements. TOTAL FEES: \$10,829.39 TOTAL DISBURSEMENTS: \$2,246.78 COMBINED FEES AND DISBURSEMENTS: \$13,076.17 [Footnotes omitted.]

- [81] In addition to the files listed in para. 80 above, Mr. Hutchison also acknowledged to the Master that he is likely to issue a bill sometime in the future on partnership file 6393 with WIP of \$7,181.25 and disbursements of \$1,078.36. Mr. Hutchison said that the subject matter on this file was not yet complete but the matter was not carried over into his new firm. I agree with the Master, and I see no reason why the file could not and should not have been billed when the partnership dissolved, and find that the unbilled fees and disbursements of \$8,259.61 should have been billed by the personal defendant.
- [82] Likewise, I reject Mr. Hutchison's contention that these accounts should be reduced in some fashion, as it is too convenient for him to now shave off parts of this WIP and incurred disbursements. I disallow his proposed reductions in these accounts, with the exception of files 12418 and 11691, discussed at para. 84-85 below.
- [83] I accept the Master's findings with respect to these bills with the following exceptions.
- [84] First, while the Master found that some reductions were warranted, I disagree with respect to the following files:
- a) Mr. Hutchison characterized file 12512 as one for a prospective client, and did not bill the fees and disbursements of \$268.75 recorded on the file. He later sent a substantial bill to this client from his new firm, and in my view, ought to have billed for his time at his old firm at that time, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for the entire bill instead of, as the Master found, \$180.39 in fees and \$25.00 in disbursements.
 - b) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of \$731.00 on file 12511 and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.

- c) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of \$1,493.56 on file 12156. I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.
 - d) Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of \$1,203.75 on file 11998. Mr. Hutchison did bill the client once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.
 - e) Mr. Hutchison said that he did not bill the fees and disbursements of \$681.93 on file 10683 because it was a diary file for a family trust. The Master would have only found that he should have billed the disbursements of \$101.93. I find Mr. Hutchison's explanation inconsistent with the fact that he previously billed that family, and I reject his explanation for not billing this time and these disbursements and find that he should have done so.
 - f) File 12529, and closely related file 12527, are files that Mr. Hutchison said he would not bill because of his close relationship with the clients and the minor nature of the work done. I am skeptical of this explanation, as Mr. Hutchison continued to record time for these clients at his new firm. In any event do not regard it as a suitable excuse for his failure to bill the combined \$548.35 in fees and disbursements recorded on these files. Although the Master found that Mr. Hutchison should have billed \$200 in fees and \$25.60 in disbursements for file 12529, I find that he should have billed the total amount for these two files.
 - g) Mr. Hutchison took file 12514 to his new firm and, once there, billed only one sixth of his fees and disbursements. He did not bill for any of the recorded fees or disbursements of \$1,368.90 for the partnership. Fairness, in my view, warrants that he is responsible for one sixth of those fees and disbursements to the partnership, or the sum of \$228.15.
 - h) With respect to file 12528, the Master reduced the fees to \$800 and disbursements to \$40. I disagree. Mr. Hutchison says that he should have only billed a portion of the total fees and disbursements of \$1,063.75 on that file 12528. I do not agree, and find that he should have billed the entire amount.
- [85] By contrast, while the Master found that bill 12418 should have been billed at \$308.75 in fees and \$34.53 in disbursements, Mr. Hutchison conceded that file 12418 should have been billed, but discounted from \$308.75 to \$300, which the plaintiff did not dispute. I therefore find that the file should have been billed at \$300.

- [86] Finally, with respect to file 11691, which the Master found that Mr. Hutchison should have only billed for disbursements of \$519.96, Mr. Hutchison explained that he had agreed with the client on file 11691 not to send her an account due to the client's abandonment of her claim due to concerns about the risks she faced going ahead. Mr. McKnight conceded that he was not pressing the billing of this file and in the circumstances, I agree that it ought not to have been billed.
- [87] This brings the total for fees and disbursements for the files identified by the Master (in para. 80 of these reasons) to a total of \$14,692.25. Of this figure, only \$6,976.43 was collected.
- [88] Mr. Hutchison listed 102 other files in Spreadsheet 5 as files that were not billed even though the recorded WIP and disbursements were in excess of \$100. Given Mr. Hutchison's concessions in front of the Master, and the findings of the Master and myself in respect of those files, the number of files that were in dispute before me was further winnowed to 64.
- [89] For his part, Mr. McKnight submits that the files and amounts that should have been billed by Mr. Hutchison, but were not, amounted to \$112,093.50 in fees, and \$13,751.82 in disbursements, for a total of \$125,845.32.
- [90] The files and the unbilled fees (and the disbursements related to them) not otherwise dealt with above were identified as follows: Tab File No. Client Initials WIP Disbursements
12423 JW 549.25 28.00 12 12384 JW 404.50 31.60 23 10665 DAR 3,591.25 753.65 24 10785 DAR 835.75 49.32 26 12406 ANR 308.75 26.20 29 11634 AAL 422.50 34.93 30 11793 AAL 292.50 12 31 12470 BCE 130.00 25.00 32 12435 BEL 438.75 33.75 43 7594 MB 2,616.00 273.88 71 11443 BHL 499.00 61.74 75 11917 PB 1,868.50 207.46 76 11478 PB 406.25 82.03 77 11275 TB 682.50 39.00 80 11983 CTEW 81.25 71.93 86 11556 MC 500.00 82.80 87 12501 SC 211.25 25.00 89 11767 DC 250.00 28.00 93 6047 CBA 3,680.75 0 102 12508 CSC 113.75 25.00 108 12251 LC 17,299.75 1,938.65 116 12490 BD 585.00 25.90 127 10567 EPS 195.00 9.50 128 11087 EPS 304.00 176.30 129 12411 ET 568.75 39.80 130 11957 EE 260.00 0 162 11204 HGT 276.25 25.00 163 7270 HGT 487.50 0 164 10496 HGT 1,990.25 593.20 165 12209 HGT 178.75 46.36 167 11937 JH 253.50 153.28 171 11757 RH 390.00 40.06 177 12482 ICL 682.50 32.80 178 12055 ICL 1,170.00 28.16 179 12262 ICL 995.00 79.40 180 12246 ICT 130.00 6.13 183 11157 IPBC 910.00 47.65 186 11025 ISHS 97.50 46.00 200 12318 L 682.50 33.45 205 12313 LTL 260.00 32.73 211 8357 AMM 25,484.75 3,637.70 214 11974 GM 243.75 25.00 220 12488 MM 715.00 26.80 234 12532 DM 292.50 25.00 237 12398 AM 500.00 53.30 266 10301 RPO 471.25 23.29 267 12370 GR 243.75 22.00 271 12113 TEE 1,166.75 45.40 275 11815 ELR 455.00 21.09 278 12363 RJHL 97.50 16.86 291 11358 MS 211.25 11.43 292 12020 MS 633.75 56.50 294 11266 HS 567.25 27.30 299 12275 GCT 390.00 25.00 309 8905 UoV 2,331.75 755.90 311 12487 UoV 162.50 28.00 319 7640 UAE 4,587.00 433.70 320 10545 VIBC 292.50 0 326 8881 WSC 1,045.50 61.09 332 12519 WSI 487.50 32.73 335 12394 JW 1,235.00 170.46 338 12524 WLHL 487.50 51.30 340 9450 YAWA 357.50 0 TOTAL: \$88,058.00 10,795.51
GRAND TOTAL: \$98,853.51

- [91] With respect to files 12423, 12384, 12411, and 12394, Mr. Hutchison gave evidence that he could not bill these files, as the principal of the client had left the jurisdiction. I find that had Mr. Hutchison billed the file in November of 1999, as he said he would, these bills could have been pursued for the entire amount of the fees and disbursements of respectively \$577.25, \$436.10, \$608.55, and \$1,405.46.
- [92] Mr. Hutchison asserts that file 10785 was billed. I do not accept his submission in that regard. The recorded fees and disbursements on that file amount to a total of \$885.07, and I find that they should have been billed.
- [93] Mr. Hutchison contends that the recorded time and disbursements of \$334.95 for file 12406 represented time that would only be billed in the event that future corporate drafting services were provided. I find that this is inconsistent with other evidence given by Mr. Hutchison, and reject his explanation for the time and disbursements on this file, and find that they ought to have been billed.
- [94] Files 11634 and 11793 appear to relate to the same client. Mr. Hutchison offered no reason why the recorded time and disbursements on these files in the amount of \$761.93 could not have been billed, and indeed an account was sent to this client for work done by Mr. Hutchison at his new firm. I find that these amounts ought to have been billed by Mr. Hutchison.
- [95] Files 12470 and 12435 relate to the same clients, who were the clients for whom Mr. Hutchison took \$50,000 from his trust account. He contended that they were incapable of paying any account. Given that the personal defendant ended up covering the \$50,000 he took from his trust account, without recovering any funds from these clients, I accept that it would have been pointless to submit these accounts.
- [96] File 7594 had work recorded prior to 1992. While it should have been written off, as part of the annual write-offs, I am prepared to accept that by 1999, it was too late to bill this file.
- [97] Mr. Hutchison gave evidence that file 11443 had been billed twice in 1997, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time and disbursements of \$560.74 should have been billed.
- [98] Files 11917 and 11478 relate to the same client. I do not accept Mr. Hutchison's convoluted explanation for his failure to bill these two files, and find that he ought to have billed this client the recorded time and disbursements of \$2,564.24.
- [99] Although the client on file 11275 was billed by Mr. Hutchison, the file recorded \$721.50 in unbilled fees and disbursements. I find that this client should have been billed for this amount.

- [100] File 11983 had recorded fees and disbursements of \$153.18. The client was billed by Mr. Hutchison at his new firm. As with file 12512, in my view, Mr. Hutchison ought to have billed for his time at his old firm, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for these fees and disbursements.
- [101] Mr. Hutchison described the work he had done on file 11556 as work for a close friend of a minimal nature. Of the recorded fees and disbursements on this file of \$1,086.05, the plaintiff seeks only \$500, and I am satisfied that that amount would have been reasonable to bill the client and hold that a bill in that amount should have been rendered.
- [102] Mr. Hutchison gave evidence that the time recorded on file 12501 was treated as non-billable because the file did not go anywhere. I accept his explanation and find that this file should not have been billed.
- [103] Mr. Hutchison described the work he had done on file 11767 as work of a minimal nature for a close friend. Of the recorded fees and disbursements on this file of \$503.75, the plaintiff seeks only \$250, and I am satisfied that that amount would have been reasonable to bill the client and hold that a bill in that amount should have been rendered.
- [104] Mr. Hutchison described the work he had done on file 6047 as work done as a courtesy donation because of his connections with his rugby club. Although he did bill this client for a small amount when at his new firm, I accept that the work done could properly be viewed as a donation, but find that what was billed at Mr. Hutchison's new firm should have been credited to the partnership and find that the sum of \$326.70 should be taken as what should have been billed for the partnership.
- [105] Mr. Hutchison excused his failure to bill file 12508 on the basis that the client had "gone under". While this may be so, it was not the case when the partnership dissolved, and I find that the client should have been billed for the fees and disbursements recorded on the file of \$138.75.
- [106] File 12251 relates to the same clients as files 12470 and 12435 and I reach the same conclusion with respect to this file as I did with those files: that they were incapable of paying any account and it would have been pointless to submit these accounts.
- [107] File 12490 relates to a woman who had worked for the parties as a student. Although Mr. Hutchison continued to record time on the file at his new firm, the matter was not pursued, and I accept Mr. Hutchison's explanation that the file could not be billed.

- [108] Files 10567 and 11087 both relate to the same client who Mr. Hutchison described as a close friend. He said that for that reason, and because the file was a general file for a corporate client, he did not bill the recorded time and disbursements of \$685.30. I reject this excuse, as Mr. Hutchison did bill the client for a modest amount for work done at his new firm. I find that the client should have been billed for the recorded time and disbursements on these two files.
- [109] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 11957 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of \$260 should have been billed.
- [110] Mr. Hutchison offered no satisfactory explanation for his failure to bill the unbilled fees and disbursements of \$301.25 on file 11204, and I find that he should have done so.
- [111] There were unbilled fees and disbursements of \$487.50 on file 7270, and the file was billed by Mr. Hutchison, albeit for a lesser amount from his subsequent firm. I see no reason why the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.
- [112] Files 10496 and 12209 were files for a client from whom Mr. Hutchison took some of the secret profits identified by Grist J. Mr. Hutchison described the first file as a "diary file", but did not provide a satisfactory explanation for his failure to bill the unbilled fees and disbursements of \$2,808.56 on these files. I find that he should have done so.
- [113] File 11937 related to a criminal matter that was billed when the matter concluded. I accept that in such a case, the likelihood of subsequent billings being recoverable is remote, and accept that it was appropriate not to bill the unbilled fees and disbursements on this file.
- [114] File 11757 was a file for the possible sale of an interest that Mr. Hutchison's brother had in a company. Mr. Hutchison said that he would not send a bill to his brother, but in fact that is untrue. He previously billed his brother for attending a meeting in London, England, including the time to fly back and forth from the meeting. It would appear that he also charged his brother's associate for the same flying time. Therefore, I reject as false Mr. Hutchison's evidence that he would not bill his brother for legal work done for him, but on this file, I am prepared to accept that it was appropriate to refrain from billing for the limited work done and disbursements incurred.
- [115] Mr. Hutchison provided no acceptable excuse for his failure to bill file 12482, and I find that he should have billed the fees and disbursements of \$715.30 on this file.
- [116] Mr. Hutchison conceded in his evidence before the Master that he should have billed some amount on file 12055, but not the entire amount of recorded fees and disbursements of \$1,198.16. I reject his contention that the entire amount of the unbilled fees and disbursements should not have been billed.

- [117] As with file 12055, Mr. Hutchison conceded that he could have billed file 12262, but not the entire amount of the unbilled fees and disbursements of \$1,034.40 recorded for the file. Mr. Hutchison did bill the client for another matter once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.
- [118] Mr. Hutchison said that, because file 12246 was a general file for a corporate client, he did not bill the recorded time and disbursements of \$136.13. I reject this excuse, and find that the client should have been billed for the recorded time and disbursements on this file.
- [119] Mr. Hutchison said that file 11157 was a corporate miscellaneous file or diary record, and that only a portion of the accumulated unbilled fees and disbursements of \$957.65 should have been billed. I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.
- [120] Mr. Hutchison said that file 11025 recorded time and disbursements for diary purpose, but had earlier said that the recorded and unbilled fees and disbursements of \$143.50 would have routinely been written off. Mr. Hutchison did bill the client for another matter once he established his new firm, and I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed at that time and find that they should have been.
- [121] Despite the contrary submission of the plaintiff, it would appear that Mr. Hutchison billed more than the recorded fees and disbursements on file 11368 once he was at his new firm, and I do not think it fair to expect his file to be included under direction 9(a), and I will not do so.
- [122] Files 12318 and 12313 relate to the same client. Mr. Hutchison was unable to give a satisfactory answer as to the unbilled fees and disbursements of \$715.95 on file 12318, and \$292.73 on file 12313, and I find that these fees and disbursements should have been billed by him.
- [123] File 8357 is one of a number of files that Mr. Hutchison had for what he described as a professional association that he billed both on behalf of the partnership, and on behalf of his new firm. He was questioned extensively about these files by the plaintiff, and gave what I conclude were obfuscating, evasive, and unconvincing explanations for his failure to render an account for the unbilled fees and disbursements on this file in the amount of \$29,122.45.
- [124] Mr. Hutchison did bill this client some \$89,000 from his new firm. I am unable to discern from his evidence if some of the unbilled time and disbursements in the partnership records were captured in bills rendered by Mr. Hutchison from his new firm, but I find that he has failed to adduce satisfactory evidence why he did not bill for these fees and disbursements and find that he even if he did bill for them from his new firm, he must account to the partnership for not billing them on the partnership's behalf.

- [125] File 11974 was a file opened for a woman whose claim, according to Mr. Hutchison, "never went anywhere". Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements was properly unbilled.
- [126] Mr. Hutchison conceded that he ought to have billed a part of the unbilled fees and disbursements of \$741.80 on file 12488. I see no reason why all of the unbilled fees and disbursements from the partnership could not have been billed and find that they should have been.
- [127] The unbilled fees and disbursements for file 12532 were not billed, and the personal defendant elected to write off time recorded for this client at his new firm. Given that the client was an individual, and the fact that the amount was small, I accept that this was another file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements was properly unbilled.
- [128] The plaintiff conceded that the personal defendant need not have billed all of the recorded time and disbursements on file 12398. He accepted that only \$500.00 needed to be billed by the personal defendant on this file, and I find that that amount is what should have been billed by the personal defendant.
- [129] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 10301 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of \$494.54 should have been billed.
- [130] File 12370 was a file with respect to a potential real estate transaction that did not proceed. Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements were properly unbilled.
- [131] Mr. Hutchison explained his failure to bill the fees and disbursements of \$1,212.15 on file 12113 on the basis that he did not render bills for his services as the trustee, and did not ever consider that it was appropriate to do so, but that is clearly incorrect. In *Hutchison v. Ridyard*, 2013 BCSC 671, based upon Mr. Hutchison's evidence, Madam Justice MacNaughton found at para. 31 that: 31 Mr. Hutchison testified that he told Dr. Ridyard that he would not bill him for the cleanup work until Dr. Ridyard had been discharged from bankruptcy and the issues with respect to liability for property transfer tax on the family home repurchase were resolved. In describing their agreement, Mr. Hutchison testified that "at a minimum they had an understanding" but he felt that he and Dr. Ridyard had an agreement that he would not bill until Dr. Ridyard paid off the mortgage he obtained to repurchase his interest in the family home. That did not occur until October 2007, when the property was sold. Mr. Hutchison testified that, pursuant to his agreement with Dr. Ridyard, it was then open to him to render the Accounts. He prepared the accounts in April 2008 but

did not send them to Dr. Ridyard until on or about May 24, 2011.

- [132] I find that Mr. Hutchison was deliberately dishonest in his effort to avoid the consequences of his failure to bill this file, and find that he should have billed the file.
- [133] Mr. Hutchison gave evidence that file 11815 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of \$476.09 should have been billed.
- [134] Mr. Hutchison said that he did not bill fees and disbursements of \$114.36 on file 12363 because the client went to Mexico, and nothing further proceeded on the file. I am not satisfied that the file could not have been billed and find that it should have been billed.
- [135] As with some of the other files discussed above, Mr. Hutchison gave evidence that file 11358 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of \$222.68 should have been billed.
- [136] File 12020 involved the same client as file 11358. Mr. Hutchison explained his failure to bill this file on the basis that the file did not proceed, and said that if he had rendered any account, it would not have been for all of the recorded fees and disbursements of \$690.25. I do not accept his explanation for his failure to bill this time, and find that the recorded fees and disbursements should have been billed.
- [137] Mr. Hutchison gave evidence that file 11266 had been billed, and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time of \$594.55 should have been billed.
- [138] File 12275 was a file with respect to a potential real estate transaction that did not proceed. Given that the client was an individual, and the fact that the amount was small, I accept that this was a file where Mr. Hutchison could properly elect not to bill the recorded time and disbursements, and accept that this time and disbursements were properly unbilled.
- [139] Mr. Hutchison sent a number of bills to the longstanding client on files 8905, and conceded that he could offer no clear explanation for his failure to bill the accumulated fees and disbursements of \$3,087.65 on the file. I find that he should have billed this amount.
- [140] Mr. Hutchison had no reasonable explanation for his failure to bill the same client for the outstanding fees and disbursements of \$190.50 on file 12487, and I find that he should have done so.
- [141] Mr. Hutchison explained his failure to bill file 7640 on the basis that it had been billed a number of times, and no recent work had been done on the file by November of 1999. He then changed tack and blamed his failure to bill, after the client instructed him to close the file on a lack of diligence. I do not accept that this excuses his failure to bill the fees and disbursements of \$5,020.70 on this file, and find that he should have done so.

- [142] Mr. Hutchison claimed that he did not bill the outstanding fees and disbursements of \$292.50 on file 10545 because it had been billed previously and the only unbilled time recorded was for "follow-up" work. I do not accept his explanation for his failure to bill this time, and find that the unbilled recorded time and disbursements should have been billed.
- [143] Mr. Hutchison's failure to bill file 8881 was first explained on the basis that it was going nowhere and was just recordings of clean up work. However, because he did pursue the client on behalf of his new firm for other work, I see no reason why he could not have included the recorded time and disbursements in that bill, and find that the unbilled fees and disbursements of \$1,106.59 should have been billed by Mr. Hutchison.
- [144] File 12519 was a file for a group of clients who owned certain enterprises that Mr. Hutchison assisted with managing, amongst other things. Mr. Hutchison purported to justify his failure to bill the outstanding fees and disbursements of \$520.23 on the basis that the file did not develop into the proceedings that had been contemplated. I reject this as a valid excuse for his failure to bill this file, and find that the client should have been billed on this file for \$520.23.
- [145] Mr. Hutchison described the client on file 12524 as a close friend. He said that for that reason, and because the file was opened on a preliminary basis. He did not bill the recorded time and disbursements of \$538.80. I reject this excuse, and find that the client should have been billed for the recorded time and disbursements.
- [146] Mr. Hutchison offered the explanation that the time and disbursements of \$357.50 recorded on file 9450 must have been "mis-entered". I do not accept that that was the case, and find that the amount should have been billed by Mr. Hutchison.
- [147] In addition to the files listed at para. 90 above, the plaintiff argues that files 12526, 12525, and 12356 should also have been billed.
- [148] File 12526 was billed, but only in the amount of \$481.00, rather than the total fees and disbursements recorded of \$626.25. The client has been subsequently billed by Mr. Hutchison at his new firm, and I see no reason why the entire amount recorded for this client for the former firm should not have been billed. I find that a further \$145.25 should have been billed to this client.
- [149] File 12525 was billed, but only in the amount of \$596.20, rather than the total fees and disbursements recorded of \$784.95. The client has been subsequently billed by Mr. Hutchison at his new firm, and I see no reason why the entire amount recorded for this client should not have been billed. I find that a further \$188.75 should have been billed to this client.

[150] The recorded unbilled time and disbursements for file 12356 is \$569.10. Mr. Hutchison billed this client from his new firm for work done there, and ought to have billed for his time at his old firm, or credited the old firm with the recovery of the unbilled fees and disbursements. He did neither, and I find that he must account to the partnership for these fees and disbursements.

[151] Finally, with respect to files 12296, 12431, 12407, 12358, 12314, and 12294, the plaintiff contends, and I agree that:

- a) while file number 12296 listed on line 89 of the spreadsheet was billed at \$798.00 it should have been billed out at \$946.05;
- b) while file number 12431 listed on line 90 of the spreadsheet was billed at \$2,038.90 it should have been billed out at \$1,415.94;
- c) while file number 12407 listed on line 91 of the spreadsheet was billed at \$2,378.43 it should have been billed out at \$2,401.09; and
- d) while file number 12358 listed on line 99 of the spreadsheet was billed at \$4,691.65 it should have been billed out at \$4,129.42.

[152] In para. 12 of her Report, the Master stated that the defendant admitted the six files identified in direction 9(b) should have been billed. The personal defendant argued that the evidence before the Master was not to that effect. He contended that the files numbered 12358, 12296, 12431, 12314 and 12407 were in fact already billed. I accept that the defendant is correct that these files were in fact billed, although file 12296 was not billed for all of the WIP and disbursements recorded, as noted at para. 75 above. There was a shortfall in the billing of this file of \$148.05, which I find should have been billed. Likewise, there was a shortfall of \$22.66 on file 12407. The other files were billed in excess of the recorded WIP and disbursements.

[153] Therefore, Mr. Hutchison should have billed an additional \$170.71 on these files.

[154] I am satisfied that file number 12294 was not billed but there was no record of WIP identified to be billed, and only \$.30 in disbursements, so I will ignore this file.

[155] The total amount of fees and disbursements that should have been billed by Mr. Hutchison under direction 9(a) is therefore the sum of \$88,472.05. That number is based on:

- a) The total number of files that Mr. Hutchison conceded should have been billed, taking into account reductions accepted by myself and the Master, of \$14,692.25.
- b) The amount Mr. Hutchison should have billed for fees and disbursements on the remaining disputed files at paras. 91-146 of these reasons, being \$64,591.63.
- c) The amount Mr. Hutchison should have billed for file 6393, at para. 81 of these reasons, being \$8,259.61.

- d) What should have been billed for the three additional files discussed at paras. 147-150 of these reasons, and the shortfall from the files discussed at paras. 151-152 of these reasons, being \$928.56.

[156] The defendant did collect the sum of \$6,976.43 on the accounts that he did render. This reduces the figure for direction 9(a) to \$81,495.62.

[157] Of the files that I have found Mr. Hutchison should have billed, I am satisfied that not all of them could have realistically been recovered upon. Some discount should be applied to those amounts that should have been billed. I have concluded that the discount should be 20%. This leaves the sum for which the defendant must reimburse the partnership for unbilled WIP and disbursements at \$65,196.50.

[158] Therefore, in summary:

- a) The amount that Mr. Hutchison should have billed for work performed prior to the dissolution of the firm is \$88,472.05 (direction 9(a)).
- b) The amount that Mr. Hutchison did bill for work performed prior to the dissolution of the partnership is \$238,629.32 (direction 9(b)).
- c) Direction 9(c) is satisfied.
- d) Direction 9(d) is also satisfied, as the parties reached a settlement during the Registrar's hearing with respect to the value of the partnership assets taken by each of them at the date of the dissolution of the partnership.
- e) The amount that Mr. McKnight recovered from work completed before dissolution is \$123,436.40 (direction 9(e)).
- f) The amount that Mr. McKnight paid for partnership obligations following the dissolution of the partnership is \$108,404.82
- g) Direction 9(g) is satisfied. C. Breach of fiduciary duty

[159] Mr. McKnight seeks equitable compensation for Mr. Hutchison's breaches of fiduciary duty. Specifically, for neglecting, failing, or delaying billing his WIP, which caused losses to the partnership, and for failing to pay the plaintiff the "secret profits".

[160] Throughout the litigation, Mr. Hutchison has already been found to have breached his fiduciary duties. In his 2002 Reasons, Grist J. ordered the defendant to account for his "secret profits", finding Mr. Hutchison's duties to Mr. McKnight fiduciary in nature: at paras. 64-66.

- [161] In his 2011 Reasons, Halfyard J. considered the plaintiff's claim that Mr. Hutchison had committed acts, and failed to do acts, which were "inconsistent with the duties owed by one partner to another". At para. 49 he concluded that the defendant failed to bill his clients for a "substantial part of his work in progress as it existed at the time the parties ended their partnership practice together", but was unable to determine, on the evidence before him, the amount that Mr. Hutchison had to account to the partnership.
- [162] In addition to these breaches, the plaintiff claims damages for various breaches by the defendant of his fiduciary duties to the partnership. Specifically, for the losses occasioned to the partnership as a result of the personal defendant's neglect, failure, or delay in billing his work-in-progress and the amount that the personal defendant ought to have paid to the plaintiff from the secret profits determined by Grist J. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 73, Mr. Justice La Forest wrote: It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well as all consequential losses, minus the amount the appellant saved on income tax due to the investments.
- [163] The plaintiff contends that the partnership should be granted equitable compensation for the personal defendant's breach of fiduciary duty, and I agree.
- [164] I assess that compensation as follows:
- a) \$476,258.59 share of secret profits; and
 - b) \$88,472.05 in damages for the total amount that the personal defendant should have billed in fees and disbursements but did not.
- [165] As the accounts of the partnership have now been settled, the partnership should be wound up pursuant to the Partnership Act, R.S.B.C. 1996, c. 348.
2. Tort of conversion
- [166] The tort of conversion involves the wrongful interference with the goods of another: *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51 at para. 3. In *Ask v. Mikolas*, 2010 BCSC 127, Mr. Justice Cullen (as he then was), described the tort of conversion as follows, at paras. 125-126:
- [125] The tort of conversion involves the wrongful interference with another person's chattels such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods. See: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31.

[126] The elements that must be proven to establish the tort of conversion are:

- (a) a wrongful act by the defendant involving the goods of the plaintiff;
- (b) the act must consist of handling, disposing, or destroying the goods; and
- (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

[167] The defendant's wrongful act must be a deliberate act of interference or dealing with the property that is inconsistent with, or repudiates, the plaintiff's right to it: *Insurance Corp. of British Columbia v. Suska*, 2011 BCCA 51. The defendant's conduct must be intentional. Negligent dealing with goods does not constitute conversion: *Lewis N. Klar, Remedies in Tort* (Toronto: Thomson Reuters, 2019).

[168] Funds and money can be the subject of a conversion claim: *Columbere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248; *Reliable Mortgages Investment Corp. v. Chan*, 2016 BCSC 405

[169] The plaintiff seeks the following amounts for conversion:

- a) \$8,426.10 for seven interest payments on the loan to address the trust fund deficiency;
- b) \$9,000.00 paid for the personal defendant's legal fees;
- c) \$3,557.08 paid for legal fees for the corporate defendant;
- d) \$7,363.66 for personal accounting fees; and
- e) \$6,304.88 for other unidentified payments made by the personal defendant from partnership funds.

[170] In his 2011 Reasons, Halfyard J. dealt with one aspect of this claim. At para. 128, he found that Mr. Hutchison misused partnership money on one occasion, when he rendered a bill for \$2,397.06 for legal fees for the corporate defendant. Therefore, that amount must be deducted from (c) above, as it has already been determined.

[171] In addition to his findings, I find that these various payments totalling \$32,255.66 were wrongly made by the personal defendant from partnership funds, and I find that conversion has been established.

[172] The remedy for conversion is that the defendant pay the value of the property at the time that it was wrongfully taken, together with the consequential loss: *Kostiuk, Re*, 2002 BCCA 410 at paras. 34, 66. Therefore, I find that Mr. Hutchison must pay \$32,255.66 plus the consequential loss of these funds to the partnership.

3. Punitive damages

- [173] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, Mr. Justice Binnie discussed the purpose of punitive damages at para. 36: Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).
- [174] The objectives of such damages were described by Binnie J. as retribution, deterrence, and denunciation.
- [175] As Mr. Justice Goepel observed at para. 79 in *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2009 BCSC 400: The award for punitive damages must be proportionate to blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff, the potential harm directed specifically at the plaintiff and the need for deterrence.
- [176] In *Huff v. Price*, 25 B.C.L.R. (2d) 364 (S.C.), aff'd 76 D.L.R. (4th) 138 (B.C.C.A.), Mr. Justice Taylor gave a punitive damage award in addition to the award for losses experienced by investors due to the breach of his fiduciary duty by a chartered accountant engaged in stock promotion. At page 367-69 Taylor J. wrote: I find that the defendant Leslie Price was in breach of his fiduciary duty to each plaintiff from the time he first invested her funds in Cumo stock. I find that each is entitled to receive as damages the full value of her account at that date increased at 20 per-cent per annum compounded annually for four years, in the case of Mrs. Huff from June 15, 1979, and in the case of Mrs. Donnelly from November 16, 1979, as a reasonable increase in value of a properly-managed portfolio up to the date when they could reasonably have been expected to re-assert control over their investments. They are entitled also to simple interest on the whole sum thereafter to this date at the pre-judgment interest rates allowed from time to time during that period by the district registrar on default judgments. Because Mr. Price committed gross breaches of trust in his frauds against the plaintiffs, and encouraged them to make expenditures they would not otherwise have made, and because no other penalty appears to have resulted from his conduct, nor has he sought to explain, apologize or make amends for it, the case is one in which substantial punitive damages are warranted. I assess punitive damages in favour of Mrs. Huff at \$150,000 and in favour of Mrs. Donnelly at \$100,000.
- [177] The conduct of the personal defendant before and after the dissolution of the partnership has been reprehensible. It is hard to envisage how one partner could take such advantage of another, and the scope of the secret profits withheld by the personal defendant cannot be overstated. Caught out in this nefarious conduct, the personal defendant failed to do what he said he would, and what he was obliged to do: submit accounts for work done for the partnership. Since then he has been at considerable pains to delay his judgment day, withholding information from the plaintiff and dragging the litigation out to lengths that

cannot be condoned.

[178] I have previously criticized the plaintiff who has failed to approach the litigation in a manner that might have ended it much sooner, but the sad fact is that the plaintiff was greatly wronged by the personal defendant, and is entitled to damages for the wrongs done to him.

[179] Despite the passage of time since it was decided, I find that the upper end of the range of punitive damages awarded in Huff is a suitable award for the conduct that the personal defendant engaged in, and I award to the plaintiff in this case the sum of \$150,000 for punitive damages.

4. Interest claims

[180] I will address court order interest below, but in addition thereto, the plaintiff seeks interest for monies borrowed to meet his business expenses that he would not have had to borrow if Mr. Hutchison had accounted for his secret profits when he was ordered to do so. I find that the delays in the resolution of the plaintiff's claims are more the fault of the defendant than the plaintiff, but do not find that the plaintiff is blameless in the delays. While he incurred interest charges, so too did the defendant, and I have refused to take these into account in determining damages. For this reason I have concluded that I must treat the plaintiff's claim for interest costs in the same manner, and therefore decline to award him compensation for the interest charges he has incurred. The plaintiff is entitled to court order interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[181] For the amount withheld from the partnership, net of the set off that I determined, the interest will run from the date of the termination of the partnership that I have determined: November 8, 1999.

[182] On the fees and disbursements that I have determined should have been billed and collected, but were not, the interest will run from May 8, 2000, which is six months following the termination of the partnership.

[183] The plaintiff's claim for conversion was not pleaded until December 11, 2018. In the result, interest will not run on this head of damages until the date that the claim was made.

[184] These awards are awards that must be paid by the defendant to the credit of the partnership. From these funds, together with the monies held in trust by the plaintiff discussed at para. 42 above, the obligations of the partnership must be addressed in the order of priority set out at para. 25(d) above.

[185] My award for punitive damages is an award that is personal to the plaintiff and is to be paid to him by the defendant and will not form a part of the funds that are available for payment of the partnership's obligations. This award is to address the conduct of the defendant during and following the termination of the partnership. Interest will run on this award from November 8, 2009, which is roughly halfway through the period of conduct it is

intended to address because the basis for the award is Mr. Hutchison's ongoing conduct, after the law suit was initiated. IV. Conclusion

[186] In summary:

- a) Pursuant to Grist J.'s finding that Mr. Hutchison must account for his secret profits, the amount Mr. Hutchison owes the partnership is \$476,258.59.
 - b) Mr. Hutchison should have billed \$88,472.05 for work performed prior to the dissolution of the firm. By failing to bill this work, and delaying in collecting the accounts he did bill, he breached his fiduciary duties to the partnership.
 - c) Mr. Hutchison is liable under the tort of conversion for the wrongful interference of Mr. McKnight's funds. Mr. Hutchison must pay \$32,255.66 plus the consequential loss of these funds to the partnership.
 - d) I award to the plaintiff in this case the sum of \$150,000 for punitive damages.
 - e) With respect to interest:
 - i. For the amount withheld from the partnership, net of the set off that I determined, the interest will run from the date of the termination of the partnership that I have determined; November 8, 1999; ii. On the fees and disbursements that I have determined should have been billed and collected, but were not, the interest will run from May 8, 2000, which is six months following the termination of the partnership; iii. The plaintiff's claim for conversion was not pleaded until December 11, 2018. In the result, interest will not run on this head of damages until the date that the claim was made; and iv. On the punitive damages award, interest will run on this award from November 8, 2009.
 - f) With respect to costs, the plaintiff proposed, and I agree that the entitlement of the parties to costs should await these reasons for judgment. Now that they are available, I will permit the plaintiff two weeks to file written submissions, not to exceed 15 pages in length, with respect to costs, and the defendants will have two weeks thereafter to file their submissions with the same 15 page limit. The plaintiff will have one week thereafter to file any written reply, not to exceed five pages in length. The parties need not file briefs of authorities, but must include full citations and paragraph references for any authorities that they rely upon.
- The Honourable Chief Justice Hinkson

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