
CANADA / JUDGMENT

McKnight v. Hutchison

2022 BCCA 27

COURT

British Columbia Court of Appeal

DECIDED

27 January 2022

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2022 BCCA 27 McKnight v. Hutchison

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McKnight v. Hutchison,

2022 BCCA 27

Date: 20220127

Docket: CA46222

Between:

Donald Dale McKnight

Respondent

(Plaintiff)

And

John Michael Hutchison and 574316 B.C. Ltd.

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated June 12, 2019 (McKnight v. Hutchison, 2019 BCSC 944, Victoria Docket S063172).

The Appellant, appearing in person:

J.M. Hutchison, Q.C.

Counsel for the Respondent:

A.M. Gunn, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2021

Written Submissions Received:

October 4, 22, and 28, 2021

November 3, 5, 8, 12, and 22, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 27, 2022

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Voith

Summary:

Mr. Hutchison's appeal arises from two orders of Chief Justice Hinkson. The underlying dispute, spanning over two decades, involves the dissolution of a law firm partnership in 1999 resulting from Mr. McKnight's discovery of secret profits withheld from the partnership by Mr. Hutchison. Mr. Hutchison alleges multiple grounds of appeal that can be summarized as alleging error in (1) ordering him to pay roughly \$476,000 as equitable compensation to the partnership for the secret profits; (2) by not allowing certain expenditures to be credited toward him; (3) in ordering him to pay the partnership for certain work in progress performed before the dissolution of the partnership but not billed; (4) by allowing the conversion claim of \$32,255.56; (5) for awarding \$150,000 in punitive damages.

Held: Appeal allowed in part. The remedy for the secret profits was dealt with in a prior action, and thus the order for equitable compensation is set aside. Other than \$5,903.03, in relation to accounting charges there was no discernable error in the Chief Justice's findings in respect of the expenses for which Mr. Hutchison seeks reimbursement. Likewise, there was no error in the amount determined to be unbilled work in progress. There are errors in the conversion award and a revision of the award to \$21,427.02 is appropriate. Finally, the punitive damage award is not commensurate with the conduct for such an award, and an award of \$50,000 is appropriate.

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Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] Donald McKnight and Michael Hutchison, together with Robert Smith, became partners in the practice of law in Victoria on February 1, 1990. Mr. Smith withdrew from the partnership on August 31, 1994. Mr. McKnight and Mr. Hutchison dissolved the practice on November 8, 1999, after Mr. McKnight discovered evidence which led him to believe that Mr. Hutchison had received money from clients of the firm which he did not report as partnership income (the "Secret Profits"). Twenty-two years later, the affairs of the partnership have yet to be finalized.
- [2] The litigation arising from the dissolution of the firm has been Dickensian in scope. It has sparked two actions, three trials, three appeals and numerous applications. There have been 22 written judgments, together with two registrar's reports and a special referee's report. Justice Grist has written five decisions, Justice Halfyard, four decisions, Chief Justice Hinkson, four decisions, and Master Bouck, five decisions. Other than the initial trial before Justice Grist, the parties have been self-represented throughout, save and except on the appeals, in which Mr. McKnight has been represented by outside counsel. The parties have spent more than 100 days in court.
- [3] Due to the number of judgments, it is necessary to refer to them by the name of the individual judges. This appeal arises out of two decisions of Chief Justice Hinkson. Those decisions are indexed at 2015 BCSC 1886 ("Hinkson #1") and 2019 BCSC 944 ("Hinkson #3"). Mr. Hutchison has raised numerous grounds of appeal. The most significant concern an order that he pay the partnership \$476,258.59, together with interest from November 8,

1999, as his share of the Secret Profits, and that he shall pay directly to Mr. McKnight punitive damages in the sum of \$150,000. Two of the other grounds of appeal concern decisions made in Hinkson #1. In regards to those grounds, Mr. McKnight submits that Mr. Hutchison did not appeal Hinkson #1 and that it is too late for him to now raise those issues.

- [4] The backdrop of this litigation is the dissolution and winding up of a partnership. To give context to many of the issues raised in the litigation it is necessary to first explain the legal framework that governs the dissolution and winding up of a partnership. I will then turn to the history of this dispute. While much of that history has already been set out in great detail in the various judgments that have gone before, it will unfortunately be necessary to repeat much of that history because the outcome of this appeal in part turns on what issues were before which judges, when, and to what extent it was open to Chief Justice Hinkson to make certain of the orders he did. I will next review the judgments under appeal and then consider and resolve the numerous grounds of appeal. Finally, I will complete the final accounting necessary to wind-up the partnership.

LEGAL FRAMEWORK -THE WINDING UP OF A PARTNERSHIP

- [5] A dissolved partnership must be wound up. The winding up of a partnership is subject to the provisions of the Partnership Act, R.S.B.C. 1996 c. 348 (the "Act"). The principles governing the winding up of a partnership are explained in detail in chapter 25 of the authoritative partnership text R.C. I'Anson Banks, Lindley & Banks on Partnership, 20th ed. (London: Sweet & Maxwell, 2017) ("LB").
- [6] Section 41(1) of the Act, sets out that the rights and obligations of the partners continue despite the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.
- [7] Before the winding up of a partnership can be concluded, it is necessary to complete the partnership accounts by incorporating any adjustments which may be required to reflect the respective rights, entitlements and obligations of each partner. (LB 25-46).
- [8] The rules which govern the final settlement of a partnership account and dissolution are found in s. 47 the Act:

47 Subject to any agreement, in settling accounts between the partners after a dissolution of partnership, the following rules must be observed:

- (a) losses, including losses and deficiencies of capital, must be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;
- (b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, must be applied in the following manner and order:

- (i) in paying the debts and liabilities of the firm to persons who are not partners;
 - (ii) in paying to each partner rateably what is due from the firm to that partner for advances as distinguished from capital;
 - (iii) in paying to each partner rateably what is due from the firm to that partner in respect of capital;
 - (iv) the ultimate residue, if any, must be divided among the partners in the proportion in which profits are divisible.
- [9] Section 47(b) of the Act requires the partners to proceed through each of the four stages in turn, and to identify whether there is a deficiency of assets at any of the first three stages. If there is, that deficiency must be treated as a loss and borne by the partners as such. If there is a deficiency at stage one, the overall loss formed by the partners will be that amount together with any sums that would be otherwise payable to them at stages two and three. If the insufficiency occurs at stage two, the loss will comprise of that amount together with any sum otherwise payable at stage three. (LB 25-48).
- [10] Partners must share any loss in the same manner in which they share profits. Where the partners have contributed capital in unequal amounts, but share profits and loss equally, any loss of capital must be shared equally, in the same way as any other loss (LB 25-51).
- [11] All of the above are necessary steps to complete the winding up. It is only after the individual partner's respective rights, entitlements and obligations are determined that the accounting can be finalized and the court can determine whether any amounts are due from one partner to the other (LB 23-120).

BACKGROUND

A. Operation of the Partnership

- [12] In the early years of the partnership, profits were not equally divided between the partners. In the first year of the partnership, the division between Mr. Hutchison, Mr. McKnight and Mr. Smith was 45-25-30. This division continued until Mr. Smith's withdrawal from the partnership on August 31, 1994. Income thereafter was divided on a 60-40 basis in Mr. Hutchison's favour until the year end January 31, 1997. Thereafter, the profit division between Mr. Hutchison and Mr. McKnight was on a 50-50 basis.
- [13] Similarly, the partnership capital accounts were not maintained on an equal basis. For example, at the end of the partnership's first fiscal year, January 31, 1991, Mr. Hutchison's capital account was \$244,911, while Mr. McKnight's capital account was but \$27,915. At the time of the dissolution of the partnership, before the Secret Profits were taken into account, Mr. Hutchison's capital account was \$437,987, while Mr. McKnight's capital account was \$63,414.

B. The First Action

[14] Mr. McKnight commenced an action against Mr. Hutchison on April 27, 2000 (Action #002093, Victoria Registry) (the "First Action"). The main thrust of the First Action was the Secret Profits. In his statement of claim, Mr. McKnight alleged that Mr. Hutchison had received money and other benefits from clients which he failed to report as partnership income or property, in breach of the partnership agreement. He alleged the diversion of the profits was a breach of Mr. Hutchison's fiduciary duty. He pled the conduct of Mr. Hutchison was morally reprehensible and committed with callous disregard for the plaintiff in respect of which conduct Mr. McKnight claimed punitive damages. In his prayer for relief, Mr. McKnight sought:

- a) an accounting of all Secret Profits received by the defendant and payment by the defendant of all sums due on the accounting, with interest at the rates determined under the partnership agreement;
- b) a declaration that the defendant holds all Secret Profits received in trust for the partnership;
- c) an order enjoining the use or disposal or alternatively, an order for the retention and preservation of all Secret Profits, including shares and monies already received or to be received by the defendant prior to trial, pursuant to Rules 45 and 46 of the Rules of Court;
- d) damages; and
- e) punitive damages.

[15] In the statement of claim Mr. McKnight did not seek a personal judgment in his favour.

[16] In his defence, Mr. Hutchison pled that it was a term or practice of the partnership that partners of the law firm were not required and did not need to account to the other partners for any monies paid or benefits provided to them for acting as director of a company or society, trustee, executor or for their involvement with other boards, commissions, or institutions. He pled in particular paragraph 2.8 of the parties' partnership agreement that provided:

Partners may conduct business, other than the practice of law, upon notice to the other partners, and receive remuneration separately therefrom, provided that such activity shall not compromise the practice of law within the partnership by the partner or of the partnership, and provided further that such activity shall not prevent the full contribution of such partner to the business of the partnership. Without limiting the generality of the foregoing, such activities may include:

- a) holding of share interest in operating companies;
- b) holding of directorships of corporate boards or other institutions;

- c) acting as executor of an estate, except in circumstances where the appointment has occurred by reason of succeeding another partner or previous partner due to membership in the partnership;
- d) holding and administering private investments; or
- e) providing legal or other business services to family members or to family businesses.

[17] Mr. Hutchison filed a counterclaim. The counterclaim included the following in its prayer for relief:

- 1) The assistance of the court, where necessary, to wind up the business and affairs of the partnership, and to direct the order of the retirement of the liabilities of the partnership from partnership receipts;
- 2) An accounting;
- 3) An order fixing and adjusting the capital accounts of the partners to their proper amounts and proportions;
- 4)
- 5)
- 6) An order requiring the plaintiff to pay to and indemnify the defendant his portion of the liabilities to the firm paid, since the dissolution of the firm, by the defendant.

C. The First Trial

[18] The first trial was heard by Justice Grist. It commenced on February 11, 2002 and lasted some 19 days. On September 27, 2002, he released his reasons for judgment. Those reasons are indexed at 2002 BCSC 1373 ("Grist #1").

[19] Justice Grist concluded that Mr. Hutchison had not satisfied his obligation to make full disclosure to his partner of matters affecting the partnership. He declared that money received by Mr. Hutchison from six different sources was partnership income and ordered the defendant to account for the money received from those six sources. Justice Grist held that the remedy for these breaches of partnership obligation was to require the earnings to 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 (para. 67). If the parties were unable to agree as to amounts, there was to be a reference to the registrar.

[20] Justice Grist made no finding that the conduct of Mr. Hutchison was morally reprehensible or committed with callous disregard for the plaintiff. He did not order punitive damages. He did not order Mr. Hutchison to hold the Secret Profits in trust for the partnership, or pay the Secret Profits to the partnership.

- [21] Justice Grist recognized that a determination of what may follow from any imbalance in the capital accounts would require completion of the accounting of the funds retained by Mr. Hutchison personally, and which would now be accounted for as firm revenues (para. 70).
- [22] The order of Justice Grist was settled. It set out that the earnings from certain specific sources were partnership income. It also included the following provisions:
3. The defendant shall account for the earnings from the sources indicated in paragraphs 1(a) through (f) of this Order as partnership income and that partnership income shall be dealt with in accordance with the terms of the partnership agreement applicable at the times the payments were or are received.
 6. There shall be an accounting in respect of funds retained by the Defendant personally, including rentals from the Winnipeg condominium, and that the accounting shall be in such form as may be agreed to or, if the parties cannot agree, by reference to the Registrar who shall prepare a report and recommendation to the court.
 7. The parties shall be at liberty to apply in respect to further terms of reference for the accounting and in respect of issues relating to their capital accounts.
- [23] On October 25, 2002, Mr. Hutchison filed an appeal (the First Appeal). The First Appeal was held in abeyance while matters continued before Justice Grist.
- [24] The accounting took place before Registrar Bouck (as she then was). It commenced on February 10, 2003 and took place over the course of six days. Registrar Bouck made the following recommendations:
- 1) Pursuant to para. 6 of the Order, the defendant account as partnership income those earnings and/or funds retained by the defendant from the sources indicated in paras. 1(a) through (f) of the order. The total amount of funds or earnings is calculated at:
 - (i) pre-dissolution: \$777,803.42
 - (ii) post-dissolution \$85,580.68
- TOTAL: \$863,384.10.
- 2) A determination of how this income should be dealt with under the partnership agreement and/or issues relating to capital accounts is left to the parties, or to a further direction of the court.
- [25] The parties then appeared again before Justice Grist on the question of certification of the registrar's recommendations. This hearing lasted four days in April 2004. On September 13, 2004, Justice Grist released his reasons. They are indexed at 2004 BCSC 1184 ("Grist #3). Justice Grist, with some small adjustments, accepted the registrar's recommendations. He found the Secret Profits to be \$853,634.10. He held that Mr. Hutchison must account for fees of \$773,303.42 arising pre-dissolution, and \$72,291.66 post-dissolution, being a total of \$845,595.08. An additional \$8039.02 of interest was considered to be a partnership interest,

as yet undistributed between the partners.

[26] In Grist #3, with the consent of the parties, Justice Grist appointed an accountant, Mr. Jackson, whose firm had been involved in the presentation of the partnership accounts for a number of years before dissolution, as a special referee. His terms of reference were to determine the parties' revised capital accounts at dissolution, after taking into account the monies that should have been received by the partnership and treating the defendant's receipt of these funds as drawings taken from partnership assets.

[27] As between partners, there is a fiduciary duty to account for profits arising out of partnership business. Where one partner agrees to an equal division of profits with the other, he is entitled to have that agreement fulfilled, including an accounting for any secret profits which the other partner attempted to pocket for himself. But the claiming partner is not entitled to the entire profit for himself to the exclusion of the dishonest or dishonourable partner. Rather, the profit becomes a partnership asset shareable between the partners in accordance with their agreement. The partner who earned the secret profit does not forfeit his entitlement to share in the profit: *Olson v. Gullo*, (1994) 17 O.R. (3d) 790 (C.A.), leave to appeal ref'd [1994] 3 S.C.R. xi [Olson]; *Rochwerg v. Truster*, (2002) 58 O.R. (3d) 687 (C.A.); *MacDonald Estate v. Martin* (1994) 95 Man. R. (2d) 123 (C.A.). In *Olson*, Morden A.C.J.O. at 802 explained the rationale as follows:

I do not, however, think that it can accurately be said that the defaulting partner does profit from his wrong when he receives his pre-ordained share of the profit. With respect to this share, the partner's conduct in the impugned transaction does not involve any breach of duty. Under the terms of the relationship, with respect to this share, it was expected that the partner would act in his own interest. To the extent that there is a dilemma, I resolve the issue, in accordance with what I consider to be the more appropriate principles and authorities, against the forfeiture of the wrongdoing partner's interest in the profit.

[28] In the circumstances of this case, given the uneven division of profits that existed throughout much of the partnership, the parties' individual entitlement to the Secret Profits per the calculations of the special referee are as follows:

- a) Hutchison: \$424,462;
- b) McKnight: \$350,372;
- c) Smith: \$70,762.

[29] The special referee submitted his report to the court on February 25, 2005. As directed by Justice Grist, the special referee recalculated the partners' capital accounts to reflect the Secret Profits as partnership income that had been withdrawn by Mr. Hutchison. These changes had the effect of altering the partners' capital accounts on a year-to-year basis. The special referee also recalculated interest credits to the partners based on their annual revised capital account balances.

- [30] The special referee concluded the revised partnership capital accounts as of November 8, 1999 were:
- a) Mr. Hutchison: (\$50,615.00);
 - b) Mr. McKnight: \$473,252.00; and
 - c) Mr. Smith: \$78,764.00.
- [31] Mr. McKnight's new capital account of \$473,252.00 was made up of his original capital account of \$63,414, his \$350,372 share of the Secret profits and an interest adjustment of \$59,466. Mr. Hutchison's revised capital account of (\$50,615.00) reflected that his deemed drawings of the Secret Profits had completely drained his exiting capital account (\$437,987.00) and his share of the Secret profits (\$424,462.00) leaving him with a negative balance in his capital account.
- [32] I would at this point note, because it will later become a matter of some import, that if Justice Grist had ordered Mr. Hutchison to repay the Secret Profits, his capital account would have increased to approximately \$1,000,000 (his pre-existing capital account, his undrawn share of the secret profit and an interest adjustment), while Mr. McKnight's account would be unchanged from the calculations made by the special referee. The reason for this is that if Mr. Hutchison had been ordered to pay back the Secret Profits to the partnership, Mr. Hutchison's deemed drawings would have to be reversed and his pre-existing capital account would have remained intact.
- [33] On June 7, 2005, the parties again appeared before Justice Grist. At the hearing, Mr. McKnight brought three applications. The first was for acceptance and certification of the special referee's report, the second was for an order under Rule 18(6), dismissing all or part of the defendant's counterclaim, and the third was for judgment under Rule 18(1) in favour of Mr. McKnight in the amount of \$523,867, being the difference between the deficit balance in the defendant's capital account and the credit to the plaintiff in his.
- [34] Justice Grist released his reasons on the applications on February 27, 2006. Those reasons are indexed at 2006 BCSC 322 ("Grist #4"). Justice Grist found that the special referee's report was in accordance with the instructions that he had given. He certified the report and held that it accorded with the terms of reference, adjusting the firm capital accounts to show the parties' capital accounts to the date of dissolution, taking into account the sums the defendant wrongfully retained.
- [35] Justice Grist dismissed the plaintiff's application for summary judgment in the sum of \$523,867 on the ground that it was premature and could only be granted after all proper adjustments were made on a winding up of the partnership. He found that the special referee's report did not entitle the plaintiff to personal judgment to equalize any disparity of the capital accounts without first settling a winding up of the partnership. He noted that the plaintiff's claim for relief did not ask for personal judgment against the defendant on the winding up of the partnership, which he presumed was the ultimate objective of the action.

- [36] With respect to the plaintiff's application to dismiss the counterclaim in whole or in part, Justice Grist dismissed the claims for relief described in paragraphs 4 and 6 of the prayer for relief in the counterclaim, but allowed the remaining claims to stand. He held that the remainder of the counterclaim raised one or more triable issues on the merits, including the defendant's alleged payments of partnership expenses. He rejected the plaintiff's argument that the defendant's failure to bill and collect client accounts with due diligence, negated his entitlement to any credit or set off for payments of firm liabilities that he may have made after dissolution. He noted there was substance to Mr. Hutchison's position that he had satisfied firm liabilities at dissolution, and those advances by Mr. Hutchison had to be taken into account in the final winding up. Justice Grist's conclusions are consistent with the legal framework set out at paras. 5-11 above.
- [37] On July 14, 2006, Mr. McKnight commenced a second action against the defendant and 574316 B.C. Ltd., a company Mr. Hutchison owns and controls. (Action No. 063172, Victoria Registry) (the "Second Action"). The thrust of the Second Action, the details of which are set out below, concerns events that took place subsequent to the November 8, 1999 dissolution of the partnership.
- [38] On March 2, 2009, the plaintiff applied to Justice Halfyard, who had been appointed to case manage the Second Action, for an order to dismiss the defendant's counterclaim in the First Action. Justice Halfyard acceded to the application. He found that the pleadings in the new action seemed suitable for resolving all essential issues which remained outstanding between the parties, including those set out in the original counterclaim. He concluded that in the somewhat unusual circumstances of this case, that the interests of justice favoured the dismissal of the counterclaim. Justice Halfyard's reasons are indexed at 2009 BCSC 347 ("Halfyard #2").
- [39] On May 25, 2010, Mr. McKnight applied to Justice Grist for an order confirming that the First Action had concluded. Justice Grist took note that Justice Halfyard had dismissed the counterclaim. He held that as the plaintiff did not advance any further claims under the First Action, that the counterclaim had been dismissed and that the First Action was at an end. A formal order entered following the application includes the following:
- THIS COURT DECLARES that:
1. This action has concluded.
- [40] Justice Grist's reasons are indexed at 2011 BCSC 642 ("Grist #5").

D. The First Appeal

- [41] On October 25, 2002, shortly after the release of the reasons in Grist #1, Mr. Hutchison filed a notice of appeal (the First Appeal). On January 17, 2003, the matter came before Justice Prowse in Court of Appeal chambers, who noted that proceedings in the Supreme Court were still ongoing. She opined that the appeal should not be heard until all outstanding matters between the parties were resolved in the Supreme Court. Factums were filed in the summer of 2003.
- [42] Thereafter, the appeal languished while proceedings continued in the First Action and Second Action. Subsequent to Justice Grist's reasons in Grist #5 declaring that the First Action had concluded, the parties agreed that the First Appeal ought to proceed before the commencement of the trial in the Second Action.
- [43] The First Appeal was ultimately heard on May 21 and 22, 2013. Mr. Hutchison raised several grounds of appeal, all ultimately going to the question as to whether Justice Grist had erred in ordering that he account for the Secret Profits. In reasons dated July 25, 2013, this Court dismissed the First Appeal with reasons indexed at 2013 BCCA 340.
- [44] On the First Appeal, Mr. McKnight did not cross-appeal. He did not seek punitive damages. He did not challenge Justice Grist's remedy. Indeed, in his factum, he argued that the accounting ordered by Justice Grist was the proper remedy for the breach.

E. The Second Action

- [45] The Second Action was commenced on July 14, 2006. In the Second Action, Mr. McKnight claims a further accounting, dissolution and winding up of the partnership, and personal judgment against Mr. Hutchison for the amount required to pay any deficiencies remaining in his capital account with full interest after dissolution and winding up. The pleadings include allegations that Mr. Hutchison failed to make reasonable efforts to recover accounts receivable or to render accounts for work in progress. Also named as a defendant in the second action was 574316 B.C. Ltd. a company incorporated by Mr. Hutchison to process amounts recovered for work performed prior to the dissolution of the partnership.
- [46] In the first statement of claim filed in the Second Action, Mr. McKnight alleged that certain actions of Mr. Hutchison were malicious, high-handed, and reprehensible, and called for an award of punitive damages. The particulars alleged concerned events that post dated the dissolution of the partnership. In the statement of claim, there was no allegation concerning Mr. Hutchison's failure to pay to Mr. McKnight his rightful and proper share of the Secret Profits. Similarly, there was no allegation that Mr. Hutchison had converted to his own use the plaintiff's share of the Secret Profits.

[47] Justice Halfyard, in the course of case managing the Second Action, heard numerous applications in the proceedings. One of the most contentious was in relation to an application brought by Mr. McKnight for the appointment of a receiver. The application lasted six days. In reasons released on January 13, 2011 and indexed at 2011 BCSC 36, Justice Halfyard refused the appointment of a receiver (Halfyard #3). In the course of his reasons he made several findings critical of Mr. Hutchison, including the following:

- 1) Mr. Hutchison had 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;
- 2) Mr. Hutchison had failed to make reasonable efforts to collect accounts receivable relating to work that he performed for clients of the former partnership before dissolution;
- 3) Mr. Hutchison had on at least three occasions received payment for work performed before dissolution of the partnership but had failed to credit these payments to the former partnership;
- 4) Mr. Hutchison had unreasonably failed to comply with the plaintiff's request for disclosure and production of documents and information;
- 5) Several false statements made by Mr. Hutchison in the course of the proceedings and his failure to disclose certain material facts 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; and
- 6) Mr. Hutchison on at least one occasion misused partnership money.

Justice Halfyard was unable to resolve disputes in the evidence on whether there had been other misappropriation of partnership income.

[48] In the end result, Justice Halfyard determined that the appointment of a receiver would add unnecessary and expensive complexity to the action. He did order that Mr. Hutchison and his company be restrained from disposing of or dealing with any partnership property pending trial. He also ordered that Mr. Hutchison should forthwith deliver up to Mr. McKnight all monies in his possession or control which consists of partnership income, which Mr. McKnight should hold in trust pending trial of the action or further order of the court. Similarly, in the event that further partnership income was received by Mr. Hutchison or the defendant company in the future, it would immediately be delivered to Mr. McKnight to be held in trust.

F. The Second Trial

[49] The second trial was heard by Chief Justice Hinkson. It commenced on May 25, 2015, and lasted some 15 days. The reasons for judgment were released on October 16, 2015 ("Hinkson #1"). Supplemental reasons for judgment after the receipt of written submissions were released on January 29, 2016: 2016 BCSC 137 ("Hinkson #2").

- [50] The Chief Justice commenced his reasons by summarizing the issues before him:
- [3] The plaintiff seeks a variety of orders against the defendants which can be summarized as follows:
- a) A decree to dissolve the partnership and wind it up;
 - b) Payment by the personal defendant of his capital account deficit in the amount of \$50,615.00, and payment of the plaintiff's capital accounts by the defendants in the event that there are insufficient funds on the winding up of the partnership;
 - c) An order enjoining the defendants from using or disposing of any remaining assets of the partnership;
 - d) An order that the personal defendant account to the partnership for the net fee revenues received from certain clients of the partnership from November 8, 1999, to the date that the partnership is wound up;
 - e) The appointment of a receiver to inventory and dispose of assets, among other things, and the allocation of monies by the receiver;
 - f) An order that the personal defendant reimburse the partnership US \$50,000 in respect of a trust deficiency; and
 - g) Damages, punitive damages, and special costs.
- [4] In his statement of defence, the personal defendant denies any deliberate wrongdoing in failing to report income as being partnership income and denies the plaintiff's allegation that he has failed to make reasonable efforts to render bills or to collect accounts receivable.
- [5] The personal defendant contends that as the partnership was terminated in 1999, an order to wind the partnership up is unnecessary. He also alleges that he has paid the far greater share of partnership debts after November 8, 1999, for which he claims a set off. The personal defendant says that he has accounted to the plaintiff for all partnership money that he has received and paid since November 8, 1999. The personal defendant also alleges that the plaintiff has failed to diligently pursue accounts receivable and work in progress, which the personal defendant says was a joint and equal obligation.
- [6] Finally, the defendants contend that the report of a special referee appointed to determine the capital accounts of the partners as of the date of the dissolution of the partnership, by order of and certified by this Court, requires recalculation and hence, reconsideration by the special referee.
- [51] The Chief Justice next reviewed in some detail the background events and the various previous proceedings (paras. 7-30).

- [52] The Chief Justice then turned to discuss the issues before him. He referenced the plaintiff's request in the statement of claim for a decree that the continuing partnership had been dissolved, and an order that the affairs of the continuing partnership be wound up. The Chief Justice held that the partnership had terminated on November 8, 1999, and that in the circumstances, a decree that the partnership be dissolved is unnecessary. He did agree, however, that there ought to be an order winding up the affairs of the partnership following the settlement of the partnership accounts and affairs (para. 34).
- [53] The Chief Justice next considered the partners' capital accounts and Mr. McKnight's submissions that Mr. Hutchison pay his capital account deficit in the amount of \$50,615 into court to the credit of the continuing partnership and that, in the event there were insufficient monies remaining upon the final dissolution of the continuing partnership to pay his capital account in full, he be awarded judgment for any balance owing on his capital account plus interest.
- [54] The Chief Justice held that Mr. Hutchison should pay his capital account deficit to the partnership. In this regard, he said:
- [40] Despite this failure, it is my view that the personal defendant cannot re-litigate the value of the capital accounts of the partners as of the date of the dissolution of the partnership. This matter was determined by the special referee, whose report was certified by Grist J., and the personal defendant's appeal of that certification was dismissed as abandoned by Madam Justice Bennett in reasons for judgment indexed at 2012 BCCA 264. I consider that the matter is *res judicata*. I order that the personal defendant should pay his capital account deficit to the partnership.
- [41] As the partnership agreement required the annual determination of each partner's capital account ratio, the personal defendant's failure to rectify his capital account once the special referee determined his deficit position entitles the partnership to interest on his deficit. I order that the personal defendant pay to the credit of the partnership the amount of his deficit of \$50,615.00 together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from February 28, 2006, until that payment is made.
- [55] The Chief Justice rejected Mr. McKnight's contention that, in the event there were insufficient monies remaining upon winding up the partnership to pay the capital account of the plaintiff in full, the defendant should pay the balance owing on the plaintiff's capital account. In this regard, he said:
- [43] I am not persuaded that the plaintiff is entitled to this relief. Both he and the personal defendant created the disastrous financial situation in which they found themselves in 1999 by overdrawing their monthly draws, failing to properly service their bank loans, and failing to generate sufficient income to warrant their draws and expenditures.

- [44] The plaintiff's claim for payment of his capital account by the defendants, with interest, is dismissed. The personal defendant must account to the partnership for the deficit in his capital account, but given the financial difficulties experienced by the partnership before its dissolution, and the plaintiff's overdrawing on monthly draw payments, the plaintiff's capital account may well have been unrecoverable, and this difficulty should not be visited upon the defendants in the manner sought by the plaintiff. In my view, that result is one of the risks that the partners in this case courted, and it should not be the responsibility of only one of the partners.
- [56] The Chief Justice then turned to the accounting and allocation of partnership assets. First, he referenced s. 47 of the Act, and then held pursuant to that section, that the assets must be applied first to pay third party obligations; second, to indemnify a partner for advances; third, to balance capital accounts; and ultimately divide any residue or provide for contribution to any loss proportionally.
- [57] Next the Chief Justice considered the allegations that Mr. Hutchison had failed post-dissolution to bill or collect outstanding work (para. 48-89). He concluded he was unable on the evidence to determine the amounts that should have been billed but were not, or the amounts that were billed and not collected. He referred that and certain other matters to the registrar. In that regard he directed the registrar to determine the following at para. 161:
- 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, I direct that the Registrar find that the recovery occurred. If the personal defendant is unable or unwilling to tender evidence as to his use of any funds recovered for partnership expenses, I direct that the Registrar 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;

- 9) 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, I direct that the Registrar find that the recovery occurred. If the plaintiff is unable or unwilling to tender evidence as to his use of any funds recovered for partnership expenses, I direct that the Registrar shall find that such expenditures did not occur.
- [58] The Chief Justice did find that there was one account in the amount of \$15,699.60 that was rendered after it became time barred. He ordered that Mr. Hutchison repay this amount to the partnership.
- [59] The Chief Justice then turned to allegations concerning work done post dissolution for ongoing clients and goodwill. He found that Mr. Hutchison owed nothing to the plaintiff for the work performed on such files after the dissolution of the partnership and dismissed the plaintiff's claim for damages for the loss of goodwill.
- [60] The next issue concerned a cheque for \$50,000 USD that had been paid into the firm's trust account to finance a client's investment opportunity. Before the cheque cleared, Mr. Hutchison issued a cheque from the partnership's pool trust account for that amount in order to save the investment opportunity. The original cheque subsequently bounced and, despite the institution of legal proceedings, the funds were never recovered. Ultimately, Mr. Hutchison personally reimbursed the trust account and claimed he was entitled to be reimbursed for this expense. The Chief Justice rejected this position and held that Mr. McKnight bore no responsibility to the personal defendant for any portion of this expense (paras. 102-107).
- [61] The Chief Justice then turned to Mr. Hutchison's claim for other expenses which he submitted he had paid on behalf of the partnership. His net claim for advances was \$773,187. The Chief Justice reviewed the expenses in detail. He ultimately concluded that the partnership owed Mr. Hutchison \$377,375.51. The Chief Justice adjourned the claim for certain accounting expenses pending determination of the registrar (paras. 108-137).
- [62] The Chief Justice then wrote in some detail about the legal principles governing damages for breach of fiduciary duty (paras. 138-148) and punitive damages (paras. 149-153). He held that he would make no finding in regards to either of those matters until receiving the registrar's report. Similarly, he held it was premature for him to resolve the claim for costs, again preferring to await the report of the registrar.
- [63] The Chief Justice dismissed the claim against the corporate defendant, but ordered any funds in its possession be paid into Mr. McKnight's trust account. He further ordered that Mr. Hutchison would be personally responsible for all fees associated with the creation and maintenance of the corporate defendant.

- [64] Mr. Hutchison subsequently sought reconsideration of certain parts of the reasons. In particular in this regard, he challenged the Chief Justice's refusal to credit Mr. Hutchison for the monies he had paid to cover the bank overdraft, and his failure to accept a portion of the defendant's claim for storage costs. In Hinkson #2, the Chief Justice refused to reconsider his reasons in relation to either of these matters.

G. The Second Appeal

- [65] Following the release of Hinkson #1 on October 16, 2015, Mr. McKnight on November 12, 2015, filed a notice of appeal (the Second Appeal). Mr. McKnight filed his factum on February 9, 2016. Mr. Hutchison's responsive factum was filed March 10, 2016, with Mr. McKnight's reply filed March 17, 2016.
- [66] In his factum, Mr. McKnight alleged the Chief Justice had made some 16 errors. The most significant error was that the Chief Justice erred by not requiring Mr. Hutchison to equalize his capital account. The thrust of the submission was that to order Mr. Hutchison to pay his capital deficit, but not order him to pay the more than \$423,000 necessary to equal his capital account with that of the appellant's capital account was irreconcilable. In his factum, Mr. McKnight stated that in the First Action he had elected to pursue an accounting instead of suing for damages for the Secret Profits.
- [67] Subsequent to the filing of factums, the parties agreed to hold the Second Appeal in abeyance pending completion of the balance of the trial of the Second Action. Pursuant to a consent order dated October 17, 2017, all proceedings in the Second Appeal were stayed until 60 days after final disposition of the Second Action.
- [68] On August 9, 2021, Mr. McKnight filed a notice of abandonment of the Second Appeal.

H. The Third Trial

- [69] In advance of the third trial, Master Bouck over 10 days heard the reference directed by the Chief Justice. She released her report and recommendations on May 30, 2018.
- [70] The third trial, which was in fact a continuation of the second trial, commenced on January 28, 2019, and lasted some six days. The reasons were released on June 12, 2019 ("Hinkson #3"). In advance of the third trial, Mr. McKnight on December 11, 2018, filed his Further Further Further Amended Statement of Claim (the "Final Pleading"). Pursuant to paragraph 59 (e) of that pleading, Mr. McKnight claimed damages for losses suffered by the continued partnership as a result of Mr. Hutchison's failure to pay the plaintiff his rightful and proper share of the Secret Profits. He further alleged that the taking of the Secret Profits was conduct committed with callous disregard for the plaintiff in respect of which he claimed punitive damages. His new pleadings also made claims of conversion against Mr. Hutchison. In his response, Mr. Hutchison alleged that, pursuant to the orders of Justice Grist, he had accounted for the Secret Profits and the new allegations made in the Final Pleading were res judicata.

- [71] In the introduction to his reasons, which he entitled Supplementary Reasons for Judgment, the Chief Justice described the present allegations as follows:
- [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.
- [72] The Chief Justice again reviewed in detail the history of the litigation and summarized the various findings he had made at the second trial (paras. 5-34). He then reviewed the report of the master, which had been done following the second trial, and accepted her findings with respect to directions (9) b, c, and f (paras. 35-59).
- [73] A question the master did not determine was the amount that Mr. Hutchison should have billed for work performed prior to the dissolution of the partnership. The Chief Justice then undertook that task, which required the examination of more than 60 accounts, and ultimately concluded that the amount of fees and disbursements that should have been billed was the sum of \$88,472.05. He recognized that not all of the billings would have been recovered and accordingly applied a discount of 20 percent, which left the sum for which the defendant must reimburse the partnership for unbilled work in progress and disbursements to be \$65,196.50 (paras. 60-157).
- [74] The judge then summarized at para. 158, the answers to the matters referred to the registrar:
- 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.

[75] The judge next turned to the issue of damages for breach of fiduciary duty. In this regard, he noted that Mr. McKnight was seeking equitable compensation for Mr. Hutchison's breaches, which caused a loss to the partnership, and for failing to pay the plaintiff the Secret Profits. The judge assessed the compensation as follows (at para. 164):

a) \$476,258.59 share of Secret Profits; and

b) \$88,472.05 in damages for the amount the personal defendant should have billed in fees and disbursements but did not.

[76] The award of \$476,258.59 was determined by setting off from the Secret Profits determined by Justice Grist, \$853,634.10, the \$377,375.51 that Mr. Hutchison was found in Hinkson #1 to be owed for advances made to the partnership (\$853,634.10 - \$377,375.51 = \$476,258.59).

[77] The parties agreed that the damage award of \$88,472.05 must be reduced to \$65,196.50 to conform to the Chief Justice's finding. The entered order reflected this change.

[78] The Chief Justice then turned to the tort of conversion. He accepted Mr. Hutchison had wrongly paid to himself certain sums from the partnership and awarded under this head \$32,255.66.

[79] Next, the Chief Justice turned to the issue of punitive damages. He referred to *Huff v. Price* (1988), 25 B.C.L.R. (2d) 364 (S.C.), aff'd (1990) 76 D.L.R. (4th) 138 (B.C.C.A.) [*Huff*] in which Mr. Justice Taylor, as he was then, awarded punitive damages of \$150,000 against an accountant engaged in stock promotion who had breached his fiduciary duty to an investor. He concluded that a punitive damage award of \$150,000 was also appropriate in this case. He reasoned as follows:

[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.

[80] The judge then went on to make certain interest awards. He summarized his findings at para. 186:

- 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.

[81] Following the release of Hinkson #3, the parties made written submissions on the question of costs. The Chief Justice concluded that although Mr. McKnight did not enjoy the recovery of all of the claims he advanced, he did achieve substantial success in the case, entitling him to an order for costs. He refused Mr. McKnight's request for special costs or costs at Scale C and ordered the plaintiff's costs be paid at Scale B. The cost reasons are indexed at 2019 BCSC 1405 ("Hinkson #4").

- [82] Subsequent to the hearing of this appeal, the division became aware of a consent order of August 30, 2019 that provided that the monies Mr. McKnight held in trust for the partnership be released to Mr. McKnight in partial satisfaction of his capital account. The division requested counsel to advise what amounts had been paid to Mr. McKnight under this order, and what was the current balance of Mr. McKnight's capital account in light of the monies paid out of trust under that order.
- [83] There appears to be a small disagreement between the parties as to the amount paid. Mr. Hutchison, in his memorandum, advised that the sum of \$178,545.14 was paid under the order leaving a capital account balance for Mr. McKnight of \$294,706.86. Mr. McKnight's figures were slightly different. They indicated a payment of \$178,393.63, leaving a capital account balance of \$294,858.37. The difference is but \$151.51. As the amount of the payment is a matter of record, I am confident the parties will be able to resolve the difference. In the interim, I will operate on the basis that the correct number is that set by Mr. McKnight and his present capital account balance is \$294,858.37.

ON APPEAL

[84] Mr. Hutchison alleges the following nine errors:

- 1) The learned trial judge erred in mixed fact and law in dismissing the claim of the appellant for the off-site storage charges for files of the partnership paid by the appellant to Access Records, and for the related costs, totalling at the time of trial \$61,029.91, which costs are ongoing. (Storage Charges)
- 2) The learned trial judge erred in mixed fact and law in dismissing the claim of the appellant for the sum of \$100,000.00 paid in respect of partnership bank loan obligations, for the purposes of meeting a trust account deficiency. (Bank Loan)
- 3) The learned trial judge erred in failing to adjudicate the claim of the appellant for payment of accounting charges on behalf of the partnership. (Accounting Charges)
- 4) The learned trial judge erred in mixed fact and law in ordering the appellant to pay to the partnership the sum of \$476,258.59. (Equitable Compensation for Secret Profits)
- 5) The learned trial judge erred in fact in assessing damages payable by the appellant to the partnership in the amount of \$88,472.05 in respect of work performed before the dissolution of the partnership but not billed. (Unbilled Work).
- 6) The learned trial judge erred in fact in asserting that the sum of \$377,375.51 was owed by the appellant to the partnership.
- 7) The learned trial judge erred in fact and law in finding that the respondent paid the sum of \$108,404.82 on behalf of the partnership, and not determining that all of the said funds were paid from partnership monies not personally by the respondent. Further, the learned trial judge erred in failing to determine that of the said sum of \$108,404.82, the amount of \$28,917.75 were partnership trust monies paid by the respondent for his own expenses, not

for partnership expenses, and failing to require the respondent to pay the said sum together with interest to the partnership. (McKnight Failure to Account)

8) The learned trial judge erred in fact and in law in finding the appellant liable in conversion for the sum of \$32,255.66. (Conversion)

9) The learned trial judge erred in fact and in law in ordering the appellant to pay punitive damages to the respondent, or, in the alternative, in awarding an excessive amount of such damages. (Punitive Damages)

[85] In response, Mr. McKnight submits that the issues on appeal can be organized in five categories, albeit certain of the issues overlap:

1. The first category embraces issues that are time-barred and are not properly before this court. (Issues 1 & 2)
2. The second category embraces issues that were previously adjudicated and are therefore res judicata. As these issues are no longer live in the litigation, the appeal in respect of them should be dismissed. (Issue 3).
3. The third category embraces issues on which the Chief Justice misspoke and on which the entered Order made the necessary correction. Since an appeal is from the Order rather than the reasons, no appealable point arises on these issues. (Issues 5 & 6)
4. The fourth category embraces issues involving pure questions of fact. Mr. Hutchison has not established reversible error on any of these issues and the appeal in respect of them should be dismissed. (Issues 4, 5, 6, 7, & 8)
5. The fifth and final category embraces issues involving pure or mixed questions of law. Mr. Hutchison has not established reversible error on any of these issues and the appeal in respect of them should be dismissed. (Issues 4, 8, & 9)

[86] Mr. McKnight does acknowledge, in regard to the third ground of appeal, that Chief Justice Hinkson overlooked certain amounts paid by Mr. Hutchison for accounting services to the partnership. He submits that amount has not been determined and should be the subject of a referral to the registrar of the Supreme Court.

[87] In regard to the 6th ground of appeal, it is common ground that the Chief Justice at para. 31 of Hinkson #3 misspoke when he asserted that Mr. Hutchison owed the partnership \$377,375.51, when in fact that sum was owed to Mr. Hutchison for advances he had made to cover partnership expenses. That error was captured and corrected in the entered order. As an appeal is from the entered order, rather the reasons for judgment, no appeal arises from the error in the reasons and nothing further need be said about this alleged error.

DISCUSSION

A. Overview

- [88] Before turning to the individual grounds of appeal, it is important to return to the legal framework discussed at the commencement of these reasons. The focus of this litigation is the winding up of the partnership. Winding up requires the determination of the respective rights, entitlements and obligations of each partner, which in turn requires the court to resolve numerous individual issues, several of which remain contested in this appeal. The resolution of the individual issues in turn allows the court to determine the amounts that each partner is owed and to the extent there is a shortfall, the amounts that may be due from one partner to the other. The determination of that amount is the ultimate question for resolution.
- [89] In the discussion section, I will deal with each of the individual grounds of appeal. This in turn will lead to findings as to the amounts of money that each partner is owed by the partnership, the money available to pay those amounts, and if there is a loss, how that loss should be assessed.

B. Time to Appeal

- [90] Before considering the individual grounds of appeal, it is first necessary to determine whether it is open to Mr. Hutchison on this appeal to challenge findings made in Hinkson #1 and Hinkson #2. It is Mr. McKnight's position that Mr. Hutchison's failure to file a notice of appeal or cross appeal after the release of either of those decisions bars him from raising matters decided in those decisions in this appeal. Mr. Hutchison submits otherwise. He says in the unique circumstances of this case the time to appeal did not commence to run until the pronouncement of Hinkson #3. Alternatively, if the division determines the time to appeal matters arising in Hinkson #1 had expired prior to filing his notice of appeal, he applies to extend the time to appeal.
- [91] Section 14(1) of the Court of Appeal Act, RSBC 1996 c. 77 [Court of Appeal Act], sets out the time limit in which an appeal must be brought. The section reads:
- 14 (1) The time limit for bringing an appeal or an application for leave to appeal is
- (a) 30 days, commencing on the day after the order appealed from is pronounced,
- [92] The question in this case is, given the multiple decisions, did Mr. Hutchison's right to appeal matters arising in Hinkson #1 and #2 remained extant, notwithstanding that he did not file a notice of appeal until after the release of the reasons in Hinkson #3.
- [93] To put this issue in context, it is important to note that in Hinkson #1 all issues were raised and argued. The Chief Justice in preparing his reasons came to the conclusion that he needed to refer certain matters to the registrar for assessment. In Hinkson #1, he discussed in some detail the law concerning fiduciary duty and punitive damages, but decided that both of those issues should be deferred pending receipt of the report from the registrar.

[94] In the result, the Chief Justice decided certain of the issues before him, but the others were held in abeyance and only dealt with in Hinkson #3. Hinkson #3 was released on June 12, 2019, and Mr. Hutchison's notice of appeal was filed on July 11, 2019. The notice of appeal made reference to certain of the matters decided in Hinkson #1:

Matters in issue at the trial of the action not adjudicated be determined, that the order disallowing claimed advances by the appellant be set aside and that the claimed advances be allowed, that the finding of breach of fiduciary duty by the appellant be set aside, and the order for damages in respect thereof be set aside, and that the awarded punitive damages be set aside, or, in the alternative, be reduced.

[95] Mr. Hutchison filed his original factum on October 10, 2019. He raised as grounds of appeal certain matters contained in Hinkson #1. Mr. McKnight did not, upon receipt of either the notice of appeal or factum, challenge Mr. Hutchison's right to appeal those matters. He first questioned Mr. Hutchison's right to appeal matters found in Hinkson #1 in the factum that he filed on September 1, 2021, some nine days prior to the hearing of the appeal.

[96] I should note at this stage that Mr. McKnight of course did appeal Hinkson #1. The fact that he did so is, however, not determinative as to whether or not Mr. Hutchison was required to file a notice of appeal or cross-appeal if he wished to challenge any of the findings. Similarly, the fact that the parties entered an order subsequent to the release of Hinkson #1 is of no import. The order was not entered until September 2016. This was almost a year after the release of Hinkson #1.

[97] While the parties have cited numerous cases in regards to this issue, those cases are not, from my reading of them, determinative. The authorities have dealt with two situations. The first is the case of a split trial, while the second concerns situations in which there remain after the pronouncement of the judgment, ancillary matters that require further adjudication.

[98] The Supreme Court Civil Rules authorize split trials. Rule 12-5(67) reads as follows:

(67) The court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[99] The classic example of a split trial is when an order is made to determine liability in advance of damages. In those circumstances, the time to appeal the liability decision begins to run on pronouncement of the liability judgment notwithstanding that the damage assessment has yet to occur: *Radke v. S.(M.)* (Guardian ad litem of) 2006 BCCA 12; *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 142. In *Radke*, a consent order directed that liability be tried separately and in advance of damages. In *Le Soleil Hospitality*, the trial judge directed that the trial would be held in three separate installments.

- [100] This case was not a split trial. The judge did not order that certain questions of fact or law be decided and determined before others. The parties at trial led evidence and made submissions on all issues. The judge, having reserved judgment, subsequently determined that he required the assistance of the registrar before he could complete the proceedings. The split trial cases are distinguishable from this case.
- [101] This case is one in which the judge did not deal with all the issues in his initial reasons. If all that remains after the initial reasons are ancillary matters, the time limit begins to run from pronouncement of the initial reasons. Justice Donald summarized the governing authorities in *Romfo v. 1216393 Ontario, Inc.*, 2008 BCCA 106:
- [22] The time limit for bringing an appeal is provided for in section 14(1) of the Court of Appeal Act, the relevant portion of which reads:
- 14 (1) The time limit for bringing an appeal or an application for leave to appeal is
- (a) 30 days, commencing on the day after the order appealed from is pronounced, ...
- [23] The meaning of this provision was discussed by Mr. Justice Cumming, in chambers, in *Burlington Northern Railroad Co. v. Baseline Industries Ltd.* (1992), 15 B.C.A.C. 172, 20 C.P.C. (3d) 90. He said:
- [16] I recognize that there are decisions of this court related to the calculation of the time for appeal where written reasons are given. Those cases, however, relate to circumstances in which judgment has been reserved and the question relates to the dates upon which notice of the reasons for judgment can be said to have been given to counsel. It is clear from those decisions that the date of filing of the reasons for judgment is the date from which the time commences to run. However, it is equally clear that communication of the judgment is the key factor to be considered. As stated by Mr. Justice Macfarlane in *Lloyd, DeBeck & Partners Ltd. v. Cumis Life Insurance Co.* (1984), 51 B.C.L.R. 168 (C.A.), at p. 171:

The essence of that reasoning is that the judgment is not pronounced until the judge has communicated his judgment to the parties.

- [17] It is equally the case that even where ancillary matters may be dealt with subsequent in time to the pronouncement of the order, the time for appealing from the order is the time when the order is pronounced. Thus in *Baart v. Kumar* (1983), 46 B.C.L.R. 166 (C.A.) Mr. Justice Hutcheon stated, at p. 169:

The word "pronounced" in s. 14(1)(a) should be given the same meaning that it had in s. 15(2). Notwithstanding that there may be incidental matters such as prejudgment interest or costs to be settled before the formal judgment is perfected, the time limit for bringing an appeal against an order made on a major issue such as liability or damages runs from the making of that order. I find nothing impractical or harsh in this result, since the Court of Appeal has the power to extend that time in a proper case.

[Emphasis added.]

- [102] The corollary to the proposition that if all that remains after the initial reasons are ancillary matters, the time limit begins to run from pronouncement of the initial reasons, is that if matters of substance remain outstanding after the pronouncement of the initial reasons, the time to appeal does not begin to run until after judgment is pronounced on those matters. In this case, what remained outstanding after the release of Hinkson #1 were not merely ancillary matters. There were fundamental issues in the lawsuit concerning Mr. Hutchison's obligation to account, fiduciary duty and punitive damages. Until the decision on those matters was communicated to the parties, the time to appeal did not commence.
- [103] If the Chief Justice had delivered but one set of reasons, Mr. Hutchison would be entitled to appeal all matters. I do not see why, in the circumstances of this case, it should be different. Until all substantive matters were adjudicated, Mr. Hutchison would not know whether or not it was in his interest to appeal. The parties' agreement to stay the Second Appeal until 60 days after final disposition of the Second Action clearly recognized that important matters remained outstanding. Indeed, the importance of the remaining issues is made obvious by the parties' reaction to them. Mr. McKnight appealed the original reasons alleging some 16 separate errors, but, having had significant success in the second set of reasons, abandoned his appeal. Mr. Hutchison's reaction was the opposite. He had been relatively content with the first set of reasons, but appealed when the second set of reasons, which were much less favourable to him, were released.
- [104] In the circumstances of this case, I find the time to appeal did not begin to run until the release of Hinkson #3. Accordingly, I would dismiss the preliminary objection that this Court cannot consider on this appeal issues that arise from Hinkson #1 and #2.

C. Equitable Compensation for Secret Profits

- [105] The most contentious issue on the appeal is the order that Mr. Hutchison should pay to the partnership \$476,258.59 in equitable compensation for the Secret Profits. Although not spelled out in the reasons, the sum of \$476,258.59 was clearly arrived at by setting off against the Secret Profits determined by Justice Grist (\$853,634.10), the amount that Mr. Hutchison was found in Hinkson #1 to be owed for advances made to the partnership (\$377,375.51). Mr. Hutchison challenges the order. He submits the remedy for the Secret Profits was determined by Justice Grist, and it was not open to the Chief Justice to make the order that he did.
- [106] Determination of this issue requires examining the issues that were raised in the First Action. The First Action is reviewed in detail at paras. 12-40 of these reasons. In the First Action, Mr. McKnight sought an accounting of the Secret Profits and an order that Mr. Hutchison pay all sums due on the accounting. Alternatively, he sought a declaration that Mr. Hutchison held the Secret Profits in trust for the partnership.

- [107] Justice Grist did not grant those remedies. Rather, he held that Mr. Hutchison had to account for the earnings as partnership income, and the income would be dealt with in accordance with the terms of the partnership agreement. Mr. Jackson was appointed special referee to determine the parties' revised capital accounts after taking into account the Secret Profits that should have been received by the partnership and treating the defendant's receipt of the funds as drawings taken from partnership assets.
- [108] The special referee concluded the revised partnership capital accounts as of November 8, 1999 were:
- a) Mr. Hutchison: \$50,615.00;
 - b) Mr. McKnight: \$473,252.00; and
 - c) Mr. Smith: \$78,764.00.
- [109] As set out at para. 31 of these reasons, the new capital accounts took into account the partners' original capital accounts and their respective share of the Secret Profits. As noted at para. 32 of these reasons, if Justice Grist had ordered Mr. Hutchison to repay the Secret Profits, his capital account would have increased to approximately \$1,000,000, while Mr. McKnight's account would be unchanged from the calculations made by the special referee.
- [110] Mr. McKnight subsequently applied for acceptance and certification of the special referee's report. In Grist #4, Justice Grist found the special referee's report was in accordance with the instructions he had given, and certified the special referee's report.
- [111] Mr. McKnight at the time also sought summary judgment in the sum of \$523,867, being the difference between the deficit balance in the defendant's capital account, and that credit balance in his own. Justice Grist dismissed that application on the grounds it was premature and could only be granted after all proper adjustments were made on a winding up of the partnership. This would include determination of the amounts owed to Mr. Hutchison for advances.
- [112] I stop here to note Mr. McKnight's application for summary judgment was, with respect, entirely misconceived. In the course of the winding up, Mr. McKnight is not entitled to have Mr. Hutchison make whole his capital account. As set out in the legal framework at the commencement of these reasons, if, at the end of an accounting there is a deficiency of assets, that deficiency is treated as a loss, and must be borne by the partners' equally. In this case, if, at the end of the accounting, the only deficiency would be the balance of Mr. McKnight's capital account of \$473,252.00, that deficiency would be shared equally between Mr. McKnight and Mr. Hutchison. Each would be responsible for one half of the deficiency, being \$238,126.00 (\$476,252.00 divided by two). Mr. Hutchison would, in that scenario, have to pay that sum to the partnership, and the sum in turn would be paid to Mr. McKnight, thus leaving both Mr. McKnight and Mr. Hutchison with unrecoverable capital accounts of \$238,126.00.

- [113] Mr. McKnight did not appeal Justice Grist's decision. Indeed, in his factum in the First Appeal, he argued the accounting ordered by Justice Grist was the proper remedy for the breach. In his factum in the Second Appeal he stated he had elected to pursue an accounting as opposed to a claim for damages.
- [114] In Hinkson #1, Mr. Hutchison attempted to relitigate the value of the capital accounts. Justice Hinkson held he could not. He found the matter had been determined by the special referee and the issue was *res judicata*. In that regard, he said:
- [40] Despite this failure, it is my view that the personal defendant cannot re-litigate the value of the capital accounts of the partners as of the date of the dissolution of the partnership. This matter was determined by the special referee, whose report was certified by Grist J., and the personal defendant's appeal of that certification was dismissed as abandoned by Madam Justice Bennett in reasons for judgment indexed at 2012 BCCA 264. I consider that the matter is *res judicata*. I order that the personal defendant should pay his capital account deficit to the partnership.
- [115] In Hinkson #1, Mr. McKnight again sought an order that if there were insufficient monies remaining from the winding up of the partnership to pay his capital account in full, Mr. Hutchison should pay the balance owing on his capital account. Justice Hinkson rejected that submission. In that regard, he said:
- [43] I am not persuaded that the plaintiff is entitled to this relief. Both he and the personal defendant created the disastrous financial situation in which they found themselves in 1999 by overdrawing their monthly draws, failing to properly service their bank loans, and failing to generate sufficient income to warrant their draws and expenditures.
- [44] The plaintiff's claim for payment of his capital account by the defendants, with interest, is dismissed. The personal defendant must account to the partnership for the deficit in his capital account, but given the financial difficulties experienced by the partnership before its dissolution, and the plaintiff's overdrawing on monthly draw payments, the plaintiff's capital account may well have been unrecoverable, and this difficulty should not be visited upon the defendants in the manner sought by the plaintiff. In my view, that result is one of the risks that the partners in this case courted, and it should not be the responsibility of only one of the partners.
- [116] The judge's refusal in Hinkson #1 to order repayment of Mr. McKnight's capital account was a major issue in the Second Appeal. In his factum, Mr. McKnight acknowledged that when he learned of the Secret Profits, he elected to make a claim for a share of those profits by bringing an action for an accounting as opposed to suing for damages.
- [117] Mr. McKnight's application for an order that, in the event there were insufficient monies remaining upon the final dissolution of the continuing partnership to pay his capital account in full, he be awarded judgment for any balance owing on his capital account plus interest was, with respect, also misconceived. The shortfall in his capital account did not

arise from the Secret Profits. The source of the shortfall as noted by the Chief Justice were the financial difficulties experienced by the partnership before its dissolution. To the extent Mr. McKnight suffers a shortfall in his capital account, the remedy is a matter to be resolved in the final stage of the winding up accounting.

[118] In Hinkson #1, the trial judge discussed at some length damages for breach of fiduciary duty. He described the plaintiff's claim as follows:

[143] The plaintiff contends that the personal defendant failed to bill his clients for a substantial part of his work in progress as at November 8, 1999, and failed to make reasonable efforts to collect the bills that he did render to clients of the former partnership. The plaintiff also alleges that since November 8, 1999, the personal defendant has rendered bills for some of the work he performed for clients of the partnership before November 8, 1999, and has received payment for such work, but has wrongly failed to credit the partnership for that work or has failed to credit the partnership for the payments he received for that work. I have dealt with these allegations above.

[144] The plaintiff also contends that he is entitled to damages due to the personal defendant's failure to comply with court orders and requests for disclosure and production of documents and information and to disclose and produce all documents and information relating to his claim of set off. He also alleges that the personal defendant gave false or inadequate statements.

Those allegations were consistent with the pleadings as they then existed. The claim for breach of fiduciary duty did not include any claims arising from the Secret Profits.

[119] It was only on December 11, 2018, just prior to the commencement of the third trial, that Mr. McKnight amended his pleadings to claim damages for losses suffered as a result of Mr. Hutchison's failure to pay the plaintiff his rightful and proper share of the Secret Profits. In Hinkson #3, the claim for damages for breach of fiduciary duty was now described as follows:

[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".

[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 .

[120] After describing the claim, the Chief Justice then went on to say:

[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

[121] In making this award, the Chief Justice appears to have overlooked the impact of the order on the certified capital accounts and his finding in Hinkson #1, that the certification of the capital accounts was *res judicata*. The certified capital accounts were premised on the Secret Profits being assigned to Mr. Hutchison as draws. If Mr. Hutchison must pay the Secret Profits back to the firm, his capital account would have to be recalculated. As noted in para. 32 above, that recalculation would increase Mr. Hutchison's capital account to approximately \$1 million, more than double that of Mr. McKnight whose capital account would be unchanged from the calculations made by the special referee.

[122] Mr. McKnight argues that the certification of the special referee's report is not an impediment to the award of equitable compensation. He submits that no judge has ordered the partnership be wound up on the basis of the certified capital accounts and there is nothing to prevent the capital accounts now being readjusted to take into account the order for equitable compensation.

[123] With respect, that submission mischaracterizes the remedy granted in the First Action. The determination of the capital accounts was a necessary step in the winding up. Justice Grist, when he certified the capital accounts, recognized that there may be further issues to be resolved which could affect the ultimate equities between the parties (Grist #4 at para. 9). Indeed, the entire Second Action was dedicated to resolving those issues. What was resolved in the First Action was the capital accounts. The certification of the special referee's report was intended to conclusively fix the amounts of those accounts to bind the parties going forward. Mr. McKnight's various attempts to obtain a judgment against Mr. Hutchison were premised on the certified accounts. The Chief Justice finding in Hinkson #1 that the capital accounts were *res judicata* and could not be revisited is fatal to the award of equitable compensation.

[124] While it might have been open to Justice Grist to order Mr. Hutchison repay the Secret Profits to the firm, he chose a different remedy. Mr. McKnight did not appeal that decision and indeed, argued in the First Appeal that the accounting ordered by Justice Grist was the proper remedy for the breach.

[125] A litigant must bring all available arguments and evidence it wishes to advance to the original hearing of an issue. If a litigant fails to do so, the general rule is that it is not permitted to come back another time to revisit the issue.

[126] The concept of issue estoppel was explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, and held at paras. 18, 24:

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

24 The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[127] The remedy for the Secret Profits was decided by Justice Grist in the First Action. It could not be re-visited in the Second Action. It was not open to the Chief Justice in the Second Action to adopt a different remedy. I would allow this ground of appeal and set aside the order that Mr. Hutchison pay to the partnership the sum of \$476,258.59.

[128] While that is sufficient to deal with this ground of appeal, I would add that if it had been open to the Chief Justice to order that Mr. Hutchison repay the Secret Profits, it was an error to do so by way of set off. At this stage of the of the winding up process, advances a partner made to the partnership should not be intermingled with capital accounts. This follows from the provisions of s. 47 of the Act that directs that advances are paid in priority to capital accounts. Later in the process after all the individual accounts are settled, if there is a shortfall, such a set off may occur in the final step of the winding up. At this stage, had it been appropriate to order repayment of the Secret Profits, they should have been ordered to be repaid in full. This in turn would have led to Mr. Hutchison's capital account being replenished to take into account the payment and left untouched the amounts that Mr. Hutchison was entitled to recover for advances he had made to the partnership.

D. Partnership Expenses

i. Overview

[129] At the second trial, Mr. Hutchison sought to be reimbursed for payments he made on behalf of the partnership from his own resources. His claim for advances totalled \$742,437.72. In Hinkson #1, the Chief Justice dealt with these claims at paras. 108-137. After reviewing the expenses in detail, he concluded that the partnership owed Mr. Hutchison \$377,375.51.

[130] Mr. Hutchison now challenges the dismissal of his claim for certain off-site storage charges, certain monies paid in respect of a partnership bank loan, and the Chief Justice's failure to adjudicate the claim for payment of certain accounting charges. These items form Mr. Hutchison's first, second, and third ground of appeal.

[131] In response, Mr. McKnight submits that the appeal of the storage charge and bank interest are without merit and should be dismissed. He agrees the judge overlooked the accounting charges, and submits that matter should be submitted to the registrar for determination. I will deal with each ground in turn.

ii. Storage Charges

[132] There were three components to Mr. Hutchison's claim to set off the costs of storage against his obligations to the partnership:

- (a) October Mansion: an offsite storage facility in Victoria that had been leased by various iterations of the partnership originally founded by Gilbert J. Smith in the 1950s. Mr. Hutchison sought to offset \$7,318.94 in storage expenses with October Mansion.
- (b) The Broughton Basement: when the parties moved their firm to 823 Broughton Street, Victoria, in 1993, they rented an unoccupied space located in the basement of the building for storage. Mr. Hutchison sought to offset \$9,800 in storage expenses with the Broughton Basement.
- (c) Access Records & Media Management: another offsite storage facility in Victoria to which in 2003 Mr. Hutchison moved various client files and other contents in previously stored at October Mansion after the latter space was to be transitioned to residential suites. Mr. Hutchison sought to offset \$59,168.29 in monthly storage costs, a further \$4,277.53 in "start up costs", and a further \$1,104.35 paid to access files with Access Records.

[133] The Chief Justice allowed Mr. Hutchison to offset the full storage costs of the October Mansion and the Broughton Basement. He denied the Access Records claim.

[134] Evidence at trial disclosed that 716 boxes of material had been moved from October Mansion to Access Records in 2003. At trial, Mr. McKnight advanced three grounds for resisting Mr. Hutchison's argument that the Access Records storage costs should be offset against his obligations to the partnership. First, Mr. McKnight maintained that once the partnership files moved from October Mansion to Access Records in 2003, he had no access to them. Second, Mr. McKnight asserted that the bulk of the material being stored related not to the parties' law partnership, but to Mr. Hutchison and his successor partnership. He submitted that many of the items stored were dated or were not partnership files, and could simply have been destroyed. He submitted the burden of proving the necessity of storing all of the materials relocated to Access Records rested on Mr. Hutchison and that burden had not been discharged. Third, Mr. McKnight resisted the Access Records set off claim on the grounds that the expense was a business expense to which Mr. Hutchison and his current partnership would have been credited for income tax purposes.

[135] In dealing with the storage claim, the Chief Justice said as follows:

- [113] The personal defendant also claims a set off for the cost of storage at the October Mansion. It was at this facility that many of the records that remain the subject of controversy in these proceedings were stored. It is my view that it would have been foolhardy for the personal defendant to dispose of these records until this litigation concluded, and I allow the entire cost of this expense as a set off against the personal defendant's obligations to the partnership.
- [117] Items 9, 10, and 11 relate to the cost of storage of file materials to permit the personal defendant to access them during the litigation between the parties. I make no finding as to whether these expenses might be recoverable as costs in the action. I find that they cannot be claimed as a set off against the personal defendant's obligations to the partnership.
- [136] Following receipt of the reasons, Mr. Hutchison sought reconsideration of the rejection of the Access storage fees. The Chief Justice rejected the request. In that regard, in Hinkson #2, he said:
- [9] At para. 117 of my reasons for judgment I considered the defendants' claim for a set off for the cost of storage of file materials to permit the personal defendant to access them during the litigation between the parties. I made no finding as to whether these expenses might be recoverable as costs in the action, but found that they could not be claimed as a set off against the personal defendant's obligations to the partnership.
- [10] The defendants contend that my characterization of the items discussed in para. 117 is mistaken. I did not consider the claims for storage to be proper advances made by the defendants on behalf of the partnership and have concluded that the defendants' submissions regarding this paragraph amount to no more than an attempt to reargue a matter that was argued at trial. Such a submission is not permitted even if a trial is reopened: *Moradkhan v. Modifi*, 2013 BCCA 132 at para. 31.
- [137] On the appeal, Mr. Hutchison again seeks to recover the expenses incurred for storage at Access Records. He puts particular emphasis on the Chief Justice's comments at para. 113 of Hinkson #1 that "it would have been foolhardy for the personal defendant to dispose of these records until this litigation concluded". Mr. Hutchison submits that the amounts paid up to the date of the trial were in excess of \$60,000 and continue to accrue.
- [138] The Chief Justice was clearly aware of the basis of the storage record claim. He allowed certain storage fees but not others. When he was asked to reconsider the decision, he again refused the Access Records fees. The question as to whether the Access Records fees were an appropriate deduction is a question of fact to be reviewed on a standard of palpable and overriding error. No such error has been shown. I would not accede to this ground of appeal.

iii. Bank Loan

- [139] The circumstances giving rise to this issue was that Mr. Hutchison received an uncertified cheque from a third party for a firm's client. That cheque was deposited in the firm's trust account, and before it cleared, a firm's trust account cheque was issued to the firm's client. The original cheque did not clear, and the funds were never recovered. Mr. Hutchison ultimately obtained a bank loan for \$149,166.70 to cover firm expenses. \$100,000 of this amount was used to reimburse the partnership for the losses caused by the uncertified cheque. Justice Hinkson held that the \$100,000 was not reimbursable. In that regard, he said:
- [123] Insofar as the claim for set off of the \$149,166.70 partnership bank loan is concerned, \$100,000 of this amount was ultimately used to finance repayment of the US \$50,000 improperly advanced by the personal defendant, and I will not permit that portion of that loan to be set off against the personal defendant's obligations to the partnership. I accept that the balance was probably used by the personal defendant to service partnership obligations, and will permit that part of the loan payments to be used by the personal defendant to set off his other obligations to the partnership.
- [140] On the appeal, Mr. Hutchison submits that the evidence does not support a conclusion that this indebtedness arose because of conduct outside the practice of the business of the partnership. He submits that in order for the trial judge to have been correct, it would require that any mistake made by a partner, as distinct from deliberate misconduct, would make that partner liable separately from his partnership. He submits that is not the law.
- [141] I can find no error in the Chief Justice conclusion that Mr. Hutchison is not entitled to recover the \$100,000. While at first instance there is no limitation from firm liability and each partner potentially has the power to expose the full worth of every other partner, the Chief Justice's finding that the use of trust funds by the personal defendant could not be seen in any way to be the ordinary and proper conduct of the business of the partnership is unassailable. While Mr. Hutchison may not have intended by his conduct to cause the firm to suffer a loss, his conduct clearly caused the loss. He cannot expect in such circumstances that Mr. McKnight would share in the loss. Mr. Hutchison caused the loss and is responsible for the financial consequences. I would not accede to this ground of appeal.

iv. Accounting Charges

- [142] Mr. Hutchison sought reimbursement for various accounting charges paid to Trenholm Jackson Eade. In Hinkson #1, the Chief Justice explained there were two sets of accounts rendered by Trenholm Jackson Eade:

[118] Although he used partnership monies to satisfy the accounting charges of Trenholme Jackson Eade, the personal defendant has included these payments as a set off. As I have directed a reference to the Registrar to determine what was received and spent from partnership assets, I have concluded that the personal defendant cannot claim this amount as a set off, and anticipate that it will be addressed by the Registrar when the reference I have directed takes place. This claim for set off is therefore dismissed.

[119] The defendants have also claimed a further set off for fees paid to Trenholme Jackson Eade for accounting charges to the corporate defendant, and for the cost of corporate legal accounts and annual filings and records for the corporate defendant. I am not persuaded that the creation and maintenance of the corporate defendant was necessary for reasons other than those attributable to the personal defendant's efforts to enjoy what were found to be secret profits, and I reject the claims listed as 12, 13, and 14 for set off.

In Hinkson #1, the Chief Justice went on to discuss the accounting charges further at paras. 137 and 165:

[137] The claim for the accounting charges of Trenholme Jackson Eade are adjourned pending the determination of the Registrar. The remainder of the requested expenses for set off are dismissed.

[165] The accounting charges of Trenholme Jackson Eade are dismissed pending the determination of the Registrar. The remainder of the requested expenses for set off were not allowed.

[143] In Hinkson #2, the Chief Justice acknowledged that paras. 137 and 165 were inconsistent and required clarification. In that regard, he said:

[13] While it was my intention for para. 137 to address the claim described in para. 118, and for para. 165 to address the claim set out in para. 119, I accept that I was not as clear as I had hoped to be in my treatment of these two claims. I trust that these supplemental reasons for judgment will clarify what I had intended with respect to the accounting charges of Trenholme Jackson Eade.

[144] In the subsequent hearing before the registrar, Mr. Hutchison provided evidence of \$5903.03 in accounting charges to the partnership that he had personally paid. Mr. Hutchison was not challenged on those expenses, and the registrar implicitly appears to have accepted those expenses as claimed. When the matter returned before the Chief Justice, however, the accounting charges were overlooked and the Chief Justice made no specific findings concerning them.

[145] In his submissions on the appeal, Mr. McKnight acknowledges that the accounting expenses were overlooked, and suggests they should be the subject of a referral to the registrar. With respect, in this case, there have already been too many referrals to the registrar. Given the lack of challenge to Mr. Hutchison's claim, I am prepared to allow, as additional expenses, the sum of \$5,903.03.

[146] In his factum, Mr. Hutchison indicates that he intended to seek leave on the appeal to enter into evidence additional payments, totalling a further \$4,907.47. In my respectful view, it is too late to add evidence to this case. I would not allow that part of the claim.

E. Unbilled Work

[147] A major issue in the Second Action was Mr. Hutchison's alleged failure to bill his outstanding work in progress as at the date of the dissolution of the partnership. Mr. Hutchison's failure to bill his outstanding work in progress figured prominently in the application before Justice Halfyard for the appointment of a receiver. Although Justice Halfyard ultimately determined that the appointment of a receiver was not necessary, he found Mr. Hutchison had failed to bill his clients for a substantial part of his work in progress as it existed at the time that the parties ended their partnership practice together (Halfyard #3 at para. 49).

[148] In Hinkson #1 the Chief Justice reviewed the allegations concerning the failure to bill work in progress at paras. 50-89. In his review of the issue, he noted the history of the personal defendant's billing and collection practice involved a consistent practice of writing down the value of his work in progress and writing off considerable portions of his billed accounts after they were recorded. He rejected the submission that Mr. Hutchison should indemnify the partnership for all work in progress recorded at the time of dissolution. In this regard he said:

[80] Finally, the plaintiff argued that the personal defendant should indemnify the partnership for all work in progress recorded by November 8, 1999, and all accounts rendered by the personal defendant after the dissolution of the partnership. I find that this submission is representative of the plaintiff's approach to this litigation. It is a grasping and unreasonable attempt to maximize whatever he might claim, and ignores the reality of the personal defendant's practise of recording time and billings that offered no real prospect of recovery. The plaintiff was well aware of this reality during the existence of his partnership with the personal defendant and could not reasonably have expected the recovery of all recorded time and billings by the personal defendant.

[149] While rejecting the proposition Mr. Hutchison should indemnify the partnership for all work in progress, the Chief Justice found that some amounts should have been billed but were not. He held he was unable to determine those amounts and ordered a reference to the registrar to determine the amounts that Mr. Hutchison should have billed for work performed prior to the dissolution of the partnership but did not.

- [150] As noted by the Chief Justice in Hinkson #3, Master Bouck in her report did not determine the amounts that the personal defendant should have billed for work performed prior to the dissolution of the partnership. In that regard he said:
- [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.
- [151] In the result, it became necessary for the Chief Justice to determine what should have been billed by the individual defendant. He made those findings at paras. 60-158 of Hinkson #3.
- [152] The Chief Justice started his discussion by pointing out that the determination of the appropriate account to be rendered by a lawyer is more a matter of discretion than an accounting exercise. He noted there may be circumstances in which lawyers must consider reducing their accounts despite recorded time. He also recognized Mr. Hutchison's evidence that it was his invariable practice to write off some or all of his recorded time for some matters and some clients. He found that not all of his recorded time and disbursements recorded in the partnership accounting was expected to be billed and that each of the parties could exercise some discretion as to when and how much the partnership's clients would be billed.
- [153] To carry out his task, the Chief Justice had to review approximately 120 individual files. Mr. McKnight's position was that the amounts that should have been billed by Mr. Hutchison, but were not, amounted to \$112,093.50 in fees and \$13,051.82 in disbursements, for a total of \$125,145.32.
- [154] The Chief Justice reviewed all of the individual files and dealt with each of them on a summary basis. He ultimately concluded that the fees and disbursements that should have been billed in the sum of \$88,472.05 (para. 155). He went on to find that of the files Mr. Hutchison should have been billed, he was satisfied that not all the bills would have realistically been recovered and a 20% discount should be applied to the amounts that should have been billed. This left the sum for which the defendant must reimburse the partnership for unbilled work in progress and disbursements at \$65,196.50.

- [155] Mr. Hutchison now challenges that amount. He submits his not billing the work in progress was consistent with his past practices. Further, he submits the evidence supports that only \$21,335.78 should have been billed, and applying the 20% discount of the trial judge that should be further reduced to \$17,068.63. Further, he says that the trial judge failed to provide reasons for his various findings that the accounts should have been billed.
- [156] With respect, I do not agree. Mr. Hutchison bore the burden of establishing why it was appropriate for him not to bill any specific account. The Chief Justice gave detailed reasons for rejecting Mr. Hutchison's explanations. He explained his findings and the pathways that led into his conclusions. An evidentiary foundation exists for the amounts awarded. Mr. Hutchison has not shown any errors in the Chief Justice's analysis. I would not accede to this ground of appeal. Pursuant to the judge's finding, Mr. Hutchison must account for unbilled fees and disbursements of \$65,196.50.

F. Punitive Damages

- [157] In Hinkson #3, the Chief Justice commenced his discussion on punitive damages by quoting Justice Binnie in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18:
- [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).

- [158] The Chief Justice then quoted from the trial decision in *Huff*, in which the trial judge awarded punitive damages of \$150,000 to one client and \$100,000 to another against an investment adviser who had committed gross breaches of trust in frauds against his clients.
- [159] The Chief Justice then turned to the facts of this case and said:
- [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.
- [160] The Chief Justice concluded that the upper end of the range of punitive damages awarded in Huff was a suitable award for the conduct that Mr. Hutchison had engaged in and awarded Mr. McKnight \$150,000 for punitive damages.
- [161] Whiten remains the seminal authority. In Ojanen v. Acumen Law Corporation, 2021 BCCA 189, this Court summarized the governing principles:
- [77] The three objectives of punitive damages are retribution, deterrence, and denunciation. Punitive damages awards should be approached with caution and restraint and resorted to only in exceptional circumstances: Whiten at para. 69. Punitive damages awards are rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation: Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19 at para. 87.
- [78] In Whiten at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages. The factors include:
- a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
 - b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
 - c) Punitive damages are awarded only if compensatory damages
(which to some extent are punitive in nature) are
insufficient to accomplish these objectives, and the amount
awarded is no greater than necessary to rationally
accomplish their purpose;
 - d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;

- e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
- f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[162] There are, with respect, three errors in the Chief Justice's punitive damages analysis. At para. 178, the Chief Justice says the plaintiff was greatly wronged by the personal defendant, and is entitled to damages for the wrongs done to him. This finding is contrary to the principle that the purpose of punitive damages is not to compensate the plaintiff, but to punish the defendant, deter the defendant and others from similar conduct, and mark the community's collective condemnation of what has happened.

[163] The second error concerns reliance of the decision in *Huff*. *Huff* predated *Whiten* by some six years. The case concerned gross breaches of an investment advisor in handling the investments of his clients. Further, and importantly, on appeal, the awards of punitive damages were reduced to \$20,000 for each client.

[164] *Huff* is clearly distinguishable on its facts from this case. In *Huff*, the investment advisor systematically defrauded his clients through acts of deceit and forgery, misapplication of their funds and theft of their stock certificates. There was no possible justification for his actions. In this case, Mr. Hutchison's position throughout has been that the terms of the partnership agreement entitled him to retain the Secret Profits. Although his position was rejected in the First Action, Justice Grist made no findings that the conduct of Mr. Hutchison was morally reprehensible or committed with callous disregard for the plaintiff. Notwithstanding the plea for punitive damages, he did not find Mr. Hutchison's conduct represented a marked departure from ordinary standards of decent behaviour.

[165] This takes us to the third error in the Chief Justice's analysis. It is clear from his reasons that he considered the taking of the Secret Profits conduct worthy of denunciation. There are two problems with taking the Secret Profits into account in the punitive damage award.

[166] The first is that the Secret Profits were the foundation of the First Action. In the First Action, Mr. McKnight pled the conduct of Mr. Hutchison was morally reprehensible and committed with callous disregard for the plaintiff for which he claimed an award for punitive damages. Justice Grist, however, made no such award, and Mr. McKnight did not appeal his failure to do so.

[167] When the Second Action was commenced, the claim for punitive damages was limited to Mr. Hutchison's post-dissolution conduct. It did not include the Secret Profits. In the Second Action, Mr. McKnight only sought punitive damages for the taking of the Secret Profits when he filed the Final Pleading on December 11, 2018, long after the second trial, and shortly prior to commencement of the third trial on January 28, 2019. As with the claim for

equitable compensation, the remedy for the Secret Profits was decided by Justice Grist in the First Action and could not be revisited under the guise of punitive damages in the Second Action. It was not open to the Chief Justice in the Second Action to consider the Secret Profits in his award of punitive damages.

- [168] The second problem is closely related to the first. The Chief Justice did not hear the First Action. He was, with respect, not in a position to determine whether the taking of the Secret Profits was high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. Justice Grist, who heard the First Action, made no such finding. Such a conclusion does not automatically follow from a finding that the taking of the Secret Profits was a breach of fiduciary duty. Mr. Hutchison's position throughout was that, under the terms of the partnership agreement, he did not need to account to his partners for any monies paid or benefits provided for acting as director of a company or society, trustee, executor or for their involvement with other boards, commissions, or institutions. As noted by MacEachern C.J.S.C. (as he was then) in *Davis v. Ouellette*, (1981) 27 B.C.L.R. 162 (S.C.) at 174 mala fides is not an essential ingredient to an action for breach of fiduciary duty.
- [169] In the circumstances, the award of punitive damages of \$150,000 must be set aside. That leaves open, however, whether an award for punitive damages can properly be based on Mr. Hutchison's conduct subsequent to the dissolution of the partnership. This conduct was clearly condemned by the Chief Justice. In that regard he said:
- [177] 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.
- [170] Mr. Hutchison is both a lawyer and a fiduciary. His post-dissolution conduct represented a marked departure from ordinary standards of decent behaviour and provides the evidentiary foundation for an award of punitive damages. Absent an award of punitive damages, his misconduct would otherwise go unpunished. The accounting does not achieve the objectives of retribution, deterrence, and denunciation.
- [171] In regard to quantum, the authorities make clear that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. This is particularly so when the award is made against a practising lawyer for conduct in litigation.
- [172] I would vary the award of punitive damages and substitute an award of \$50,000.

G. McKnight Failure to Account

- [173] From the parties' submissions, it appears to be common ground that, subsequent to the dissolution of the firm, Mr. McKnight took some \$30,860.49 from partnership revenues and repaid but \$1,942.76 of this amount, leaving a balance of \$28,917.73 not reimbursed to the partnership. Mr. Hutchison said it was an error for the trial judge to fail to require that Mr. McKnight account for these funds together with interest as part of this determination of the amounts to be accounted for between the partners for the purpose of the wind up of the partnership. Mr. McKnight does not deny the need to account to the partnership for those monies. Indeed, in his prayer for relief in the Final Pleadings he acknowledges that the amounts he owes the partnership must be taken into account, but says this issue was not before the Chief Justice and need not be considered in the context of this appeal.
- [174] I agree that the failure of the Chief Justice to deal specifically with this sum was not an error in the context of the issues he was called upon to decide. It is, however, a number of import in regard to the final accounting, an issue to which I will return once the individual grounds of appeal have been considered.

H. Conversion

- [175] The conversion claim was first raised in the Final Pleading. Paragraph 62 of those pleadings sets out particulars of the conversion claim.
- [176] The Chief Justice dealt with the conversion claim at paras. 166-172 of Hinkson #3. He found various payments totalling \$32,255.66 were wrongly made from partnership funds and that Mr. Hutchison must repay that sum plus interest to the partnership.
- [177] The appellant, on appeal, submits that a segment of the conversion claim concerns items previously accounted for as part the Secret Profits. He submits that he has already accounted for these funds and that the order of the trial judge would constitute a double payment.
- [178] The appellant further submits that, in regard to certain payments, there was no evidence that he, in fact, had received the money. In this regard, the appellant submits that the trial judge misinterpreted a passage from the reasons in Halfyard #3.
- [179] Paragraphs 62(a-o) of the Final Pleading set out the particulars of the conversion claim. The claims at paras. a-k involve \$8,426.10 for seven interest payments on the loan to address the trust fund deficiency discussed at paras. 136-138, \$9,000 paid for the defendant's legal fees, and \$4,000 for accounting fees. Those expenditures took place between December 1999 and April 2002. The evidence supports that those funds were paid from partnership accounts to cover personal expenses of Mr. Hutchison. I would not accede to the appeal in regards to those items.

[180] The balance of the conversion claim, however, is more problematic. As set out in the Final Pleading, it consists of the following particulars:

- l) On May 30, 2003, \$3,363.66 to pay personal accounting fees;
 - m) On a date unknown, but after November 8, 1999, \$1,160 to pay his new firm for legal fees for services rendered to the corporate defendant; and
 - o) On or about one or more dates unknown, but after November 8, 1999, \$6,304.88 for a purpose unknown to the plaintiff. I will deal with each of those claims in turn.
- i. \$3,363.66 To Pay Personal Accounting Fees

[181] This claim relates to a dividend in the amount of \$3,363.66 that Mr. Hutchison received from one of his clients following release of the reasons in Grist #1. The dividend came to light in the course of the reference conducted before Registrar Bouck in 2003. The evidence before Registrar Bouck was that Mr. Hutchison signed over the full amount of the dividend to his accounting firm, which applied the funds to an account issued to the numbered company.

[182] In Halfyard #3, Justice Halfyard described the transaction as follows:

[122] The order pronounced by Mr. Justice Grist in the first action on September 27, 2002, included the order that "further payments attributable to the shares in the company controlled by the T. Family Trust will be treated as partnership revenue" (see paragraph 5 of the order, which was entered February 3, 2003). During his cross examination on the hearing before Registrar Bouck in 2003, the defendant disclosed that a dividend of \$3,363.66 was received by the company which is the present corporate defendant, in 2003. It was shown that the defendant signed over this cheque to Mr. Eade's accounting firm, to pay for accounting services rendered to the (now defendant) company. That cheque represented "partnership revenue" within Grist J.'s order, and should have been held in trust by the defendant. In my view, his actions amounted to a misappropriation of those funds.

[183] With respect, Justice Halfyard's conclusion that Mr. Hutchison's actions amounted to a misappropriation of those funds overlooks the manner in which Justice Grist dealt with this transaction. In Grist #3, the dividend was included in and formed part of \$72,291.66 of the Secret Profits that the court found was received after dissolution of the partnership. Those fees became part of the special referee's report, and in the context of that report, were assigned to Mr. Hutchison with the subsequent reduction of his capital account. Mr. Hutchison has therefore already accounted for those funds, and it would be double accounting for them to be included in the conversion claim.

ii. Legal Fees \$1,160/Unknown Purpose \$6,304.88

[184] I will deal with these items together, as they arise from the same evidentiary foundation. These claims can also be traced back to the decision in Halfyard #3. In 2007, Mr. Hutchison received two further dividends totaling \$29,681.38. Those funds were clearly partnership income for which Mr. Hutchison must account. Mr. McKnight swore an affidavit on July 26, 2010 in which he alleged certain expenses had been paid from those funds. Justice Halfyard set out the facts deposed to in the affidavit:

[126] The facts deposed to by the plaintiff in his affidavit No. 6 sworn July 26, 2010, include the following (my summarizing):

- a) The \$29,681.38 in question was not paid to Trenholme Jackson Eade in trust for the defendant company, but was paid directly to Mr. Hutchison.
- b) Mr. Hutchison rendered two bills for legal services to the defendant company, in the amounts of \$2,397.06 and \$1,160, and paid both of those accounts from the funds in question.
- c) Mr. Hutchison made payments to Trenholme & Company for accounting services rendered to the defendant company, in the amounts of \$2,500, \$5,764.55 and \$4,462.50, and Mr. Hutchison paid those amounts out of the partnership money in question.
- d) Mr. Hutchison made payments to Trenholme & Company on a bill (for \$7,975.35) owed by the plaintiff to Trenholme & Company, in the amounts of \$1,847.15 on May 11, 2010, and \$1,138.59 on May 26, 2010 (which left a balance owing of \$4,989.61 on the plaintiff's debt).
- e) Mr. Hutchison paid the account of the special referee (Mr. Jackson) owed by Smith Hutchison in the amount of \$7,425.80, for the work done in preparing the special referee report.
- f) Mr. Hutchison has paid out of that partnership income (\$29,681.38) \$3,557.06 to himself for legal services and has paid Trenholme & Company \$12,727.05 for accounting services rendered to the defendant company, (making a total of \$16,284.11); and has paid \$2,985.74 on the plaintiff's debt to Trenholme & Company.
- g) All of the payments made by the defendant out of the funds in question were made without the plaintiff's knowledge.

At para. 128 of his reasons, Justice Halfyard analyzed the result if Mr. McKnight's affidavit was accurate:

[128] If Mr. Hutchison made the payments deposed to by the plaintiff, he could only properly anticipate the plaintiff's agreement to the payment of the special referee's account (\$7,425.80), the payment of the plaintiff's accounting bill in the amount of \$7,975.35, and an equivalent amount (\$7,975.35) to be paid on the accounting bills of the defendant company. If only those payments had been made, the sum of \$6,304.88 would be left in trust. The statement issued by Trenholme & Company shows that as at October 31, 2008, the balance of the funds was \$5,971.47. But if the two payments were made in May 2010 on the plaintiff's

accounts (\$2,985.74), that sum would now have to be deducted from that amount. If the plaintiff's evidence as summarized in paragraph [126] hereof is correct, there has been significant misappropriation of partnership income.

[185] As can be seen by paras. 126 and 128, they include reference at para. 126 (b) to the \$1,160 allegedly paid for legal services, and in para. 128 that if the payments have been made as set out in Mr. McKnight's affidavit, \$6,304.88 would be left in trust.

[186] The difficulty is that Mr. Hutchison swore an affidavit in the same proceeding alleging different facts. Justice Halfyard referenced that affidavit at para. 129:

[129] In his affidavit sworn October 21, 2010, Mr. Hutchison deposed (in paragraphs 11 to 13) to the following facts:

- a) The only money he has paid out of the \$29,681.38 was \$2,397.06, which was used to pay his account for services, on December 13, 2007.
- b) After payment of the said account, the amount of \$27,284.32 remained in trust, and he is still holding that amount in trust.
- c) He paid the accounting bills rendered to the defendant company, with his own money.

[187] Justice Halfyard recognized that there was an obvious conflict between the evidence of the plaintiff and the evidence of the defendant on the issues of what payment had been made out of the \$29,681.38. He found at para. 131 that he was unable to resolve this conflict on the affidavit evidence.

[188] Subsequent evidence, however, established that, as set out in Mr. Hutchison's affidavit referenced at para. 129 of Halfyard #3, that of the \$29,681.38, \$27,284.32 remained in trust, and those funds were ultimately paid over to Mr. McKnight's trust account.

[189] Given the above, there is no evidentiary support for the \$1,160 or \$6,304.88 conversion claim.

[190] In summary, therefore, I would allow the appeal in regards to the conversion claim by reducing the conversion claim from \$32,255.56 to \$21,427.02 (\$32,255.56 - \$3,363.66 - \$1,160 - \$6,304.88 = \$21,427.02).

I. Interest

[191] The Chief Justice made various interest awards on the amounts he found that Mr. Hutchison owed to the partnership. He implicitly also acknowledged that Mr. Hutchison was owed interest in relation to the payments he had made on behalf of the partnership from his own resources.

[192] In the circumstances of this accounting, it was not appropriate to order interest on any of the individual amounts that have been determined. The main purpose of this action was to wind up the partnership. This required determination of the rights and obligations of the

partners. At all times the individual partners were "under water" in the sense that they were owed more money than the partnership had to pay them. As will be set out below, as a result of the accounting, one partner owes money to the other. Interest is properly payable on that amount. I would set aside the interest awards made by the Chief Justice other than the interest award on punitive damages.

FINAL ACCOUNTING

- [193] The purpose of the Second Action was to wind up the partnership. The legal framework to wind up a partnership was set out at the commencement of these reasons at paras. 5 -11. Before the winding up of the partnership could be concluded, it was necessary to complete the partnership accounts by incorporating any adjustments which may be required to reflect the respective rights, account entitlements and obligations of each partner. The focus of the litigation has been the finalization of the necessary adjustments.
- [194] The proceedings have now reached the stage that the partnership can be wound up. All necessary adjustments have been made. The parties' creditors have been paid. The partnership has dispersed all its assets and the individual partner's respective rights, entitlements and obligations have been determined. The accounting can now be finalized and the court can determine whether any amounts are due from one partner to the other. Both parties have claims against the partnership, but there are no remaining funds to pay those claims. The only remaining issue is how the loss is to be distributed between them.
- [195] In his submission, Mr. McKnight submits that once the remaining amounts in dispute have been determined, the parties' final position should be determined by a special referee appointed under the Supreme Court Civil Rules and who will report to the Supreme Court of British Columbia.
- [196] With respect, I do not believe such a step is necessary. To quote the words of Justice Southin in *Interclaim Holdings Ltd. v. Down*, 2002 BCCA 632 at para. 27, "these litigants have taken unto themselves, from the pool of judicial resources available in this province, more than can be said to be their fair share." There is no need to return this matter to the Supreme Court. Section 9 of the Court of Appeal Act authorizes this Court to make any order that could have been made or given by the court or tribunal appealed from. As a result of the appeal, the amounts owed to and owing by the parties are now known. This Court is perfectly capable of carrying out the accounting exercise necessary to finalize this matter.
- [197] The final accounting is not complicated. Section 47 of the Act governs the final settlement of the partnership accounts. Losses, including losses and deficiencies of capital must, if necessary, be paid by the partners individually in the proportion to which they are entitled to share profits. In this case, profits were shared equally, and so must be the loss.
- [198] The parties' respective financial position is as follows.

A. Mr. Hutchison

[199] The Chief Justice concluded that Mr. Hutchison was owed \$377,375.51. To that sum must be added \$5,903.03, representing the claim for accounting charges. The total therefore owing to Mr. Hutchison is \$383,278.54 ($\$377,375.51 + \$5,903.03$).

[200] From that sum must be subtracted the following amounts:

- a) \$50,615 (capital account deficit);
- b) \$15,699.60 (untaxed account);
- c) \$65,196.50 (unbilled fees and disbursements); and
- d) \$21,427.02 (conversion claim).

The above amounts total \$152,938.12. Subtracting that from the \$383,278.54 owed to Mr. Hutchison leaves a balance owing to Mr. Hutchison of \$230,340.42.

B. Mr. McKnight

[201] Mr. McKnight's capital account balance following receipt of the payment of \$178,393.63, subsequent to the consent order of August 2019 is \$294,858.37. From that must be subtracted the \$28,917.73 Mr. McKnight has acknowledged for which he must account. In the result, Mr. McKnight is owed \$265,940.64.

C. Reconciliation

[202] Taking the amounts owed to Mr. McKnight and the amounts owed to Mr. Hutchison, the partnership's total loss is \$496,281.06 ($\$265,940.64 + \$230,340.42$). That loss must be divided equally with the result that each partner is responsible for \$248,140.53. To equalize the respective losses, Mr. Hutchison must pay to Mr. McKnight the sum of \$17,800.11. In the result, Mr. McKnight is entitled to judgment against Mr. Hutchison in that amount together with interest on that amount from November 8, 1999 being the date of dissolution of the partnership.

[203] While the said sum may appear small, what must not be lost sight of is the winding up of the partnership involved more than the issue of the Secret Profits. As has been detailed, Mr. Hutchison from his personal funds paid \$383,278.54 in partnership expenses. Further, Mr. McKnight, in addition to the \$17,800.11 judgment, has already received advances of \$207,311.36.

FURTHER SUBMISSIONS

[204] I am aware that the final accounting has been conducted without the benefit of submissions from the parties. If either party takes issue with the accounting, they are at liberty to file written submissions within two weeks of the release of these reasons. Such submissions should be limited to ten pages in length. Any reply submissions must be filed within seven days thereafter. Any reply submissions should not exceed five pages.

[205] In addition, I would request the parties file written submissions, again not exceeding ten pages in length, in regard to the costs of the trial and the appeal. Those submissions are also to be filed within two weeks of the release of these reasons within any reply submissions to be filed within seven days thereafter. Any reply submissions should not exceed five pages.

SUMMARY

[206] In summary therefore, I would allow the appeal as set out above. I would make the following orders:

- a) The award for equitable compensation of \$476,258.59 is set aside;
- b) Mr. Hutchison's claim for expenses is increased by \$5,903.
- c) The punitive damage award is reduced to \$50,000.
- d) The conversion claim is reduced to \$21,427.02.
- e) The interest awards other than the interest award on punitive damages are set aside.
- f) Mr. McKnight is entitled to judgment against Mr. Hutchison in the sum of \$17,800.11 plus prejudgment interest from November 8, 1999.

[207] The final order governing disposition of the appeal will be held in abeyance pending receipt and consideration of the requested written submissions.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Voith"

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