Date of Release: May 18, 1995 No. C908539

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

J. DAVID MOONEY) REASONS FOR JUDGMENT

)

PLAINTIFF)

AND:)

) OF

THOMAS FREDERICK ORR, JR.,)

THOMAS FREDERICK ORR, SR.,)

and MARY FRANCES ORR)

) THE HONOURABLE

DEFENDANTS)

)

AND:)

) MADAM JUSTICE HUDDART

3473 INVESTMENTS LTD.)

HAROLD DORFMAN)

)

DEFENDANTS BY COUNTERCLAIM)

No. C916920

Vancouver Registry

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3473 INVESTMENTS LTD.)

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THOMAS FREDERICK ORR, JR.,)

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and MARY FRANCES ORR)

)

DEFENDANTS)

AND:)

)

J. DAVID MOONEY)

HAROLD DORFMAN)

)

DEFENDANTS BY COUNTERCLAIM)

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and Harold Dorfman

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Heard at Vancouver:

1994:

April 18, 19, 20, 21, 22, 26, 27, 28, 29

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1 David Mooney may be his own worst enemy. He is either unwilling or unable to be open, honest and frank with the court, or anyone else. This character trait makes any assessment of his credibility an exercise in speculation. That he should find himself in the centre of a controversy between Harold Dorfman and Thomas Orr, Jr. should not surprise him. Nor should he be surprised that the relationship among them came to this court.

2 But then Thomas Orr, Jr. was beguiled by the prospect of a partnership with the charming and cultured Harold Dorfman. A deal with him would let Mr. Orr play in a different league from that made up of children of inherited wealth in Vancouver. His business instincts were left behind in the negotiations for sale of his family's real estate portfolio. He made a fundamental error: he did not know his purchaser. That carelessness was reflected in his testimony. He tends to remember what he thought, and on some occasions, should have thought, rather than what he heard about relevant events. And he, too, is capable of shaping evidence to suit his purpose. Importantly, he did not like paying income tax and saw dealing with Mr. Mooney and Mr. Dorfman as a means of taking some of his assets offshore to avoid at least some tax. His mother had long wanted the family business sold. His father was very ill. He wanted to move to the United Kingdom. When Mr. Orr approached David Mooney for advice on October 1, 1989, several potential sales had failed for the buyer's want of sufficient equity capital. Several offers would have persuaded him that the portfolio had a fair market value of $38 to $40 million. He had been asking $45 million. He did not know that North American Life Assurance Company ("North American") was willing to pay $40 million for the assets but had been unable to "get in the door."

3 Mr. Dorfman, schooled from youth in wheeling and dealing, doing a deal, to buy 'shoes for baby', has a keen appreciation of the line between dishonest statement and attracting behaviour. He was the ideal purchaser for Mr. Mooney to introduce to Mr. Orr and his real estate adviser, Mr. Richards. He had bought, developed, and sold real estate in London for years. He had a good nose for unrealized value in property. But he suffered from the same deficiency of capital as Mr. Mooney. And Mr. Mooney knew that Mr. Orr was not about to sell to anyone who was not capable of investing equity capital because a fully leveraged deal would suggest that the optimum price was not being obtained.

4 The ultimate question arising from this trial is whether Mr. Dorfman, with or without the knowing help of Mr. Mooney, crossed the line from charm, persuasion, and hard bargaining, to dishonesty. On the route to an answer to that question I am called upon to decide whether a share purchase agreement signed on December 18, 1989, was illusory, and whether Mr. Mooney owed the Orrs any duty beyond that of honesty. My more immediate task is to determine what the parties have proved as more likely than not to have happened between October 1, 1989, when Mr. Mooney met Mr. Orr at the Capilano Golf Club, and April 30, 1990 when McCarthy, TÈtrault wrote a letter terminating the Dorfman/Orr relationship.

5 I propose to begin by setting down those events I find more likely than not to have happened. My task has been difficult because I could not rely on any of the three primary witnesses, Mr. Mooney, Mr. Dorfman and Mr. Orr. The evidence of Mr. Richards, Mr. McKercher, Mr. Moore, Mr. Dwyer, Mr. Beckmann, Mr. Gaster, Mr. Heal and Mr. Jubb has provided the basis for my findings of fact.

I. The Story

The Orrs decide to sell Suburban

6 In late 1988 or early 1989, the Orr family decided to sell all their shares in Suburban Properties Ltd ("Suburban"), probably at the instigation of Mrs. Orr. About March, 1989, Tom Orr, who had the power of attorney of both his parents, hired Dick Richards, a licensed real estate agent, to market the Suburban shares.

7 Mr. Orr did not tell Mr. Richards what price he would accept, but he fixed the price of $45 million for a share deal with a clean balance sheet and no representations or warranties. He required a confidentiality agreement from any potential purchaser to protect the leases.

8 Mr. Richards prepared an Information Package for a 'land bank', to present the opportunity 'for an individual or a group to acquire a well located portfolio of commercial properties, and to handle the re-development over a period of time so as to minimize the additional capital input and the risk involved in producing the ultimate value and return.' He recognized that the Orrs would not be likely to find someone prepared to pay cash from their own funds. Most purchasers would have to finance a portion. Some equity investment would be required because the properties could not service a fully-leveraged purchase.

9 In the late spring North American became aware of the package from Tony Uy. By mid-June, it had prepared an offer to pay $40 million cash for Suburban's assets. It could not "get in the door" and it could not find out why. Through Edgefund Realty Investment Corporation, North American expressed interest in acquiring the position of Pacific Rim International Properties Ltd in the Suburban portfolio. Pacific Rim had made an offer for Suburban that the Orrs had accepted, but its $12 million in available equity investment was insufficient to complete the deal and it withdrew. There was no evidence as to why Pacific Rim did not pursue Edgefund's indication of interest.

10 On July 13, Bentall Development Inc. ("Bentall") signed a Confidentiality Agreement. Its review persuaded it that the properties were over-priced and that a share deal was not worth pursuing without representations or warranties where there were a number of leases.

11 On July 15, Urban Projects Group Ltd offered $46.5 million for Suburban's assets, with an option to pay $45 million for its shares. The Orrs accepted a second offer providing for a larger unrefundable deposit on September 6. Urban surrendered the contract when its due diligence indicated that the properties had a value of only $38 million. Mr. Richards extracted that information from Urban Projects Group Ltd and so advised Mr. Orr. Mr. Orr did not suggest pursuing an asset deal at $38 million. Not until the following

April did Mr. Richards learn that Mr. Orr's floor price for assets was $40 million.

David Mooney

12 When Mr. Orr approached David Mooney on October 1, 1989, he understood that developers had expertise but not the money and that institutions had the money but not the development expertise. He was willing to sell assets, but preferred a share deal. Thirty or forty real estate agents had looked at the properties with potential clients, but he still had no deal. He wanted to sell before December 31, 1989, and to move to the United Kingdom.

13 Mr. Orr knew that Mr. Mooney travelled to England where he did business. He told Mr. Mooney that he wanted to offshore himself quickly because of the change in the inclusion rate for capital gains tax that would apply from December 31. He was interested in finding an offshore buyer for Suburban's shares at $44 million. He had some room for movement. Mr. Mooney told him that he might know some people in England, particularly pension plans, who would be interested in investing in Vancouver. Mr. Orr invited him to meet his real estate adviser, Mr. Richards, the next day at the Vancouver Club.

14 As a result of the discussions during lunch the next day, Mr. Mooney agreed to take copies of the Information Package to London to "test the waters" for any interest there. Mr. Richards told Mr. Mooney that Mr. Orr paid him for his work by negotiating a generous fee after a deal was completed.

15 Mr. Mooney agreed that Mr. Orr wanted him to find a qualified purchaser and to persuade such a person on the merits of a deal. Thus, it was obvious that Mr. Mooney had to familiarize himself with the value and development potential of the properties. Mr. Mooney agrees that it was implicit that in whatever he did to find and convince a purchaser he was not to act contrary to the interest of Mr. Orr and that he was at all times to act in good faith.

16 On October 8 Mr. Mooney arrived in London. He had reviewed the Information Package and come to appreciate the significant development potential of the properties. He did not think that potential was well promoted in the Information Package. He had also told his friend, Alvin Poettcker, the president of Bentall, that he was doing some work for Mr. Orr.

17 In London, Mr. Mooney distributed three of the four copies of the Information Package he took with him. Only Mr. Dorfman expressed interest. Mr. Mooney had met Mr. Dorfman in 1985 when he used his services to arrange £ 7 million to finance a transaction. They had kept in touch. When he saw Mr. Dorfman in London in the summer of 1989, he had learned that Mr. Dorfman was, as always, anxious for a "deal". He understood that Mr. Dorfman's very affluent lifestyle was probably not supported by significant assets. It is less likely that he knew that Mr. Dorfman was having difficulty meeting his obligations on the mortgage on his luxurious Eaton Square residence.

18 Mr. Mooney extolled the virtues of the properties to Mr. Dorfman, told him about the availability of a mechanism to deal with the low cost base and the lack of indexation of capital value in Canada, and provided him with sufficient information to permit Mr. Dorfman to work out the potential profit.

19 Neither Mr. Mooney nor Mr. Dorfman described any discussions they may have had in London about the structure of a proposed transaction. However, after his return to Vancouver on October 17, Mr. Mooney met with Donald Vassos of Coldwell Banker to discuss the value of the portfolio. He visited the properties and did what was necessary to determine their development potential. His technical assistant, Lee Barter, prepared an analysis of that potential. Then he met with Mr. Driol of the Hongkong Bank to discuss acquisition financing.

20 Then he told Mr. Dorfman that financing looked easy, at least for the onshore portion. He mentioned Ron Driol and the Hongkong Bank. He reinforced the positive results coming from the work of Mr. Barter and the discussions with Coldwell Banker. In a second conversation overheard by Donald Nicholson, he told Mr. Dorfman to be sure to give the impression of wealth and to be familiar with the offshore structure being proposed. When Mr. Dorfman expressed concern about his ability to carry off the negotiations, particularly to deal with any question about the source of funds, Mr. Mooney told him to simply say that the money was there, not to worry about it, and to concentrate on showing Mr. Orr and Mr. Richards a good time in London.

21 It is apparent from this statement of the facts that I have accepted the evidence of Donald Nicholson about what he heard during two telephone conversations between Mr. Dorfman and Mr. Mooney during the latter part of October, before Mr. Orr and Mr. Richards went to London on November 6. In deciding to accept Mr. Nicholson's evidence I have been cautious. At the start of his cross-examination he was very evasive. His animosity toward Mr. Mooney is admitted and was demonstrated by his theft of documents from Mr. Mooney and their voluntary delivery to Mr. McAlpine's office. He continues to bear a grudge against Mr. Mooney for what he perceives to be a wrong done to him over another of Mr. Mooney's business ventures. As a result of that continuing animosity and the general tendency of Mr. Nicholson to misread events, I cannot accept any opinion about Mr. Mooney from Mr. Nicholson as valid, or any inference he makes from a basic fact. Nevertheless, I am persuaded that Mr. Nicholson was recalling as accurately as he could what was said during those two telephone conversations.

22 From these conversations it is clear that Mr. Mooney and Mr. Dorfman must have discussed the outlines of a proposed transaction during October, either in London or on the telephone. Mr. Dorfman's letter "indicating his interest" to Mr. Mooney confirms that was so. Mr. Orr and Mr. Richards would have been aware that such discussions had taken place from Mr. Dorfman's letter. He wrote it for them.

23 That proposed transaction must have included an offshore element. It is quite likely that Mr. Mooney was aware, from his first conversation with Mr. Orr, that Mr. Orr would be attracted by an offer that gave him the opportunity to be paid some portion of the purchase price offshore.

24 Mr. Mooney did not mention to Mr. Orr or Mr. Richards his reservations about Mr. Dorfman's current financial situation. Nor did he tell them about his discussions with the Hongkong Bank or Coldwell Banker. He knew that Mr. Orr would not deal with Mr. Dorfman if he knew that Mr. Dorfman did not have substantial equity capital to invest or with which to guarantee an investment.

25 When he and Mr. Nicholson met with Mr. Richards on October 18, Mr. Mooney simply told them about Mr. Dorfman's interest in the properties, and suggested that they should travel to London to meet with Mr. Dorfman and assess what offshoring meant. He described Mr. Dorfman as a very experienced London investor in real estate, who, he had heard, had sold his foreign exchange business for £ 30 million and offshored himself to Switzerland. Mr. Richards confirmed Mr. Orr's practice with regard to fees and told Mr. Mooney that he would be working for Mr. Orr directly.

26 Mr. Orr decided to get some sort of credit reference for Mr. Dorfman to see if he was capable of handling a $45 million transaction. Mr. Mooney provided the name of the Royal Bank of Scotland to Mr. Richards about a week later. The Toronto-Dominion Bank sought a reference from that bank and reported on November 2:

> No financial info on company or Dorfman; Bank involvement is very limited; have seen transactions of this size pass through the company but have no info; think that the company is a 'front' through which deals are put together for groups of investors.

27 An earlier enquiry through Deloitte, Haskin & Sells had produced no information. Mr. Richards duly reported these results to Mr. Orr. They decided that the bank reference was not inconsistent with what Mr. Mooney had told Mr. Richards earlier. Neither he nor Mr. Orr pursued the matter further, with Mr. Mooney, Mr. Dorfman, or anyone else until February, 1990, when concern about Mr. Mooney's duplicity raised concerns about Mr. Dorfman's capacity to complete the transaction.

28 Although Mr. Orr denies having learned anything about Mr. Dorfman from Mr. Richards, I accept Mr. Richards' evidence that he told Mr. Orr everything that he had learned from Mr. Mooney in a telephone conversation before leaving for London and that they discussed Mr. Dorfman further on their overnight trip to London.

Harold Dorfman

29 The man Mr. Orr and Mr. Richards went to meet in London was 60 years old. He had left school at 13 and supported himself by his wits ever since. He made his first real estate purchase in 1952. Five years at the London Auction Mart had taught him to size up a deal on paper quickly. In 1956 he had started Dorfman & Co, a foreign exchange bank with 18 branches when he sold it for just under £ 1 million in 1972. He received £ 150,000 in England, the balance in Switzerland after he became resident there. From 1972 until his return to England in 1985, he supported himself as an art dealer.

30 Mr. Dorfman supported his elegant, affluent lifestyle in Belgravia by turning deals. The extent of his success can be measured by his annual personal expenditures: £ 550,000 in the year ending April 30, 1988, and £ 230,000 in the year ending 1989. He owned and drove a Rolls-Royce, sometimes also driven by a part-time driver. He bought, through a company, 68 Eaton Square and suitable accommodation for his new wife. His long-time solicitor, Seymour Gorman, said that he "...seemed to be specializing in shopping estates and blocks of properties which had inherent but unrealized value." He would buy them, improve them, and sell them. He and Alvin Poettcker recognized Mr. Dorfman as an experienced negotiator. His experience, abilities, and

contacts were the only significant resources he brought to the table when he met Mr. Orr and Mr. Richards in London.

31 Mr. Mooney was canny enough to understand that Mr. Dorfman's resources were probably limited, but he felt no obligation to express his view to Mr. Orr, who had done his own investigation of Mr. Dorfman. Clearly, Mr. Mooney considered that the properties had "inherent but unrealized value" that would attract Mr. Dorfman's interest, and give himself the opportunity, not only to earn a finder's fee, but also to participate in some way in the future development of properties he could not acquire from Mr. Orr on his own. It all depended on whether Mr. Dorfman could negotiate terms that would permit a fully-leveraged deal. Mr. Mooney knew that Mr. Orr did not think such a deal was possible. Mr. Mooney thought that as much as $25 million could be obtained for bridge financing, that some of the properties could be sold immediately after the purchase, and that the rest could be developed, perhaps by joint venture with equity investors, within three to five years. That is the same perspective from which Bentall and North American considered purchasing the portfolio.

32 Mr. Mooney did not know what Mr. Orr would accept in the way of price or terms. Neither did Mr. Richards. Indeed, Mr. Orr never sought Mr. Mooney's advice about the value of the Suburban portfolio or anything else. He never gave Mr. Mooney any authority to bind him in any way. He never gave him any confidential information beyond the leases. Mr. Orr did not trust Mr. Mooney. I am convinced that Mr. Orr saw Mr. Mooney as a convenient tool, to find an offshore buyer who would help him to minimize his income tax. I am equally convinced that Mr. Mooney understood that to be his role. It would be consistent with his character and personality to have encouraged Mr. Orr to believe such a plan could work. I am equally convinced that Mr. Mooney chose Mr. Dorfman as a potential purchaser because he would co-operate in the design that I accept Mr. Mooney thought would benefit all three of them.

33 All three were about to trod a fine line between legality and illegality. The first steps were to be taken in London.

London Meetings (November 6 to 9)

34 Mr. Dorfman introduced himself as "an ex-banker, now wheeling and dealing in companies and properties." During his meetings with Mr. Orr and Mr. Richards they discussed Mr. Mooney's role, Mr. Orr's desire to offshore himself, and the deal. Throughout, Mr. Dorfman presented himself to them exactly as he presented himself to everyone, reticent about his financial situation, but willing to talk in a suitably reserved fashion with his equals about the life he was leading and had led, supremely confident in his judgment of people,*objets d'art*, and deals, especially if they concerned real estate. Charming and witty. Expensively turned out in every way.

35 Very early on the first morning during a meeting at Mr. Dorfman's residence, Mr. Dorfman said something to the effect of "Who is taking care of David?" Mr. Orr responded that he was. Mr. Mooney understood from his earlier discussions that it meant he would be paid a finder's fee by Mr. Orr "to the extent of the generosity of Mr. Orr as described by Mr. Richards" when the transaction closed. He understood that Mr. Orr would expect of him good faith and loyalty. The best expression of the nature of Mr. Orr's changing view of

Mr. Mooney's responsibilities toward him is found in these questions from his examination for discovery (Questions 302 to 310):

Q All right. Prior to the business discussions with Mr. Dorfman beginning, what did you expect that Mr. Mooney's role in these discussions and in the meetings in London was going to be?

A I expected Mr. Mooney -- well, he had the package. He was going to work for me. We had agreed that -- I guess the subject of his compensation came up later, but we agreed he was going to represent me. He knew of some people. He was going to introduce some people to the package. While we were in London the subject -- I mean the subject -- the role changed from the point of view it got more specific. In general terms he started off to find a buyer or he knew of some people that might be interested. Then, you know, the role evolved to something that was larger. He was being represented, you know he was working for me, Mr. Dorfman made that clear, and we all agreed. His role was to do some research, you know, involved in that, his role, okay, which was to Mr. Dorfman's benefit and my benefit. He was going to do some redevelopment proposals, he was looking at leases and potentials. So his role sort of expanded as it went along. But it was all on the basis that it was made clear early on what the relationship between the three of us was.

Q It was understood that Mooney was your man?

A Yes.

Q And that as his role grew as the transaction progressed, is it fair to say that Mooney was to do what was required to make the deal happen?

A He was there to facilitate the transaction, and also about this time it was clear -- made clear to him on the basis that I worked for Mr. Richards and he was working in the same way Mr. Richards and I had worked, and that was acceptable to him.

[. . .]

Q All right. You referred to Mooney's role becoming that of a facilitator. I think on another occasion you said that as the discussions with Mr. Dorfman went on and as the negotiations and finalization of the transaction progressed through the fall of 1989 up until the signing of the contract in December, Mooney acted as a arbiter?

A That is fair.

Q And in acting as an arbiter or in that role is it fair to say that the understanding was that Mooney would help both sides put the deal together?

A I think that's what facilitated the transaction means. There were times when during the negotiations it got, you know, a little bit heated and then helped act as an intermediary to keep -- to get the transactions back on track or get the discussions back on track. I thought that was part of his role was to help facilitate it in that way.

Q All right. Would it be fair to say that the bottom line, as it were, was that you wanted to sell either your shares or the assets of the company, and that whatever Mooney would do to put the deal together between yourself and Mr. Dorfman to make that transaction complete was what you were expecting him to do?

A Yes.

36 So, as the discussions unfolded in London, Mr. Orr gave Mr. Mooney the broad role of doing what he could reasonably to facilitate the completion of the transaction between himself and Mr. Dorfman. He did not restrict Mr. Mooney as to what he could do in assisting Mr. Dorfman. Nor did he tell Mr. Mooney that he should report to him what he was doing. However, Mr. Mooney understood that he could not do anything that might conflict with Mr. Orr's interests and he knew that he had no authority to bind Mr. Orr to anything. He also knew that he could not participate in the downstream development without Mr. Orr's consent.

ï **The Deal**

37 Mr. Dorfman said that he could conveniently make $25 million available from his own resources for the transaction. Without making any enquiries or obtaining any independent assurances about Mr. Dorfman's ability to contribute personal assets to the enterprise, Mr. Orr quickly reached an agreement in principle with him. Mr. Dorfman would purchase 75% of the shares in Suburban for $30 million. Mr. Orr would carry $5 million secured by preference shares in a new company to be owned 25/75 offshore somehow by Mr. Orr and Mr. Dorfman. Subsequently Mr. Dorfman agreed to guarantee the payment of the $5 million personally.

38 Mr. Mooney did not play any role in the negotiation of these business terms. His participation seems to have been confined to discussions about the development potential of the properties and offshoring, including the tax consequences of non-arm's length financing from offshore because of Canada's thin capitalization rules. He did not contradict Mr. Dorfman or express to Mr. Orr any doubts about the truth of Mr. Dorfman's statements or the value of his guarantee.

39 Mr. Orr was convinced by three aspects of Mr. Dorfman's proposal: (i) his contribution of $25 million that would permit (ii) a partnership in redevelopment of the properties, that would result in (iii) the splitting of the total income offshore. He found the proposal sufficiently enticing to agree to defer payment of $5 million. He did not understand that Mr. Dorfman was intending to use the properties to back a loan to finance his investment of $25 million. As he testified "I sort of felt like it was like having my cake and eating it too. I was going to solve all my tax problems and still keep 25 per cent."

40 I do not accept Mr. Orr's argument that he was persuaded to the agreement by the proposal of back-to-back financing. He testified that back-to-back financing was "what was used in the end and what was used after we got into the discussion of thin capitalization." Mr. Richards raised his concern about the thin capitalization rules when he heard Mr. Orr and Mr. Dorfman discussing the potential for bleeding the income out of the Canadian company free of income tax. By then, Mr. Orr had been convinced. The discussion of

back-to-back financing simply confirmed what he had earlier come to believe, that Mr. Dorfman would be funding the transaction with personal assets having a value of $25 million.

41 Despite Mr. Dorfman's evidence to the contrary, I am persuaded that he never told Mr. Orr, then or later, that he was going to borrow the money at arm's length from a third party. Rather he talked about back-to-back financing. Mr. Orr understood that to mean that Mr. Dorfman would use his money to back an offshore loan to the purchasing company, leaving the properties as an unencumbered land bank. In the context of Mr. Dorfman's luxurious lifestyle and discussions about offshore trusts and Mr. Orr's own personal wealth, it seemed believable to Mr. Orr that an individual would invest $25 million personally in the Suburban portfolio. Mr. Dorfman knew his opponents.

42 I am also persuaded that Mr. Orr would never have agreed to sell the properties to Mr. Dorfman if he had understood that they were to be used to finance the purchase without any backing by Mr. Dorfman's assets.

43 In hindsight, Mr. Richards recognizes that he and Mr. Orr should have asked the direct question of what exactly Mr. Dorfman meant when he said that he could make available $25,000,000 from his "own resources". But they did not, Mr. Richards because he would have found it awkward or embarrassing to do so in the lavish surroundings where they found themselves. Mr. Richards inferred from what Mr. Dorfman said that the "resources" were the proceeds of the sale of his bank. Mr. Richards drew that inference from what Mr. Mooney had told him about Mr. Dorfman, his view that the bank reference had not negated that information, and the content of the conversations themselves. Mr. Dorfman talked sociably about his lavish lifestyle, past and present. They had discussed the possibility of "back-to-back" financing. And there had never been any mention of the need for time to arrange financing.

44 Mr. Orr also assumed that the $25 million would be coming from the proceeds of the sale of Mr. Dorfman's banking business that he understood from Mr. Richards had been stowed in offshore trusts, probably in Switzerland. He did not ask Mr. Dorfman to confirm what he had learned from Mr. Richards, that Mr. Dorfman had sold his banking business for £ 50 million. Mr. Dorfman did not say anything about the sale of his business. Although he undoubtedly talked about offshore trusts, as did Mr. Mooney, I am not persuaded that he told them he had offshore trusts or that he had put his assets in an offshore trust. It is more likely that both Mr. Mooney and Mr. Dorfman demonstrated their knowledge of offshore trusts in their conversation in an attempt to familiarize Mr. Orr with the type of arrangements he was seeking. Mr. Dorfman did say at some point that he was going to hold his shares in Suburban in a Swiss trust. But it would be entirely in keeping with Mr. Dorfman's pose that he would not have dissuaded Mr. Orr or Mr. Richards from any inference they may have drawn from his conversation or lifestyle. The ability to impress and attract was a prime asset.

45 Oddly, both Mr. Richards and Mr. Mooney, who were present at most of the discussions, came away from them with the view that Mr. Orr and Mr. Dorfman had agreed that Mr. Orr was selling all the shares of Suburban for $30 million, but would have a 25% interest in future profits offshore. They would persist in that view when Mr. Dorfman came to Vancouver to look at the properties and confirm his intention to buy them and not be dissuaded from it until meetings in Vancouver in December when the terms of the Share Purchase Agreement were settled. That Mr. Richards reached that conclusion is consistent with his

having distanced himself from Mr. Orr whenever Mr. Orr contemplated what Mr. Richards called his "dream", that of not disclosing to Revenue Canada the offshore portion of the proceeds of the sale of the shares. Mr. Mooney knew that money was to be paid offshore but he seems to have preferred to ignore the discussions about that offshore portion.

46 There was considerable discussion during the meetings about the potential for Mr. Orr to receive part of the proceeds from the sale of Suburban in an offshore vehicle to minimize tax liability. Mr. Dorfman was not averse to dealing with Mr. Orr on the same basis he had sold his exchange bank to investors from South Africa in 1972. However, he, like Mr. Richards and Mr. Mooney, urged Mr. Orr to seek independent advice from specialists. Mr. Mooney suggested that he might talk with Ian Ledger of the General Trust Company of Monaco. Mr. Richards subsequently visited Mr. Ledger on Mr. Orr's behalf. Mr. Orr and Mr. Richards met together with a Swiss banker and money manager. All were of the view that Mr. Orr needed Canadian tax advice before he settled on an offshore structure to hold his continuing interest in Suburban.

47 Mr. Richards also raised his concern that the proposed structure to split income offshore would offend the "thin capitalization" rules of Revenue Canada. That remained a concern until Mr. Orr decided in December to keep the deal on shore. Blair Dwyer, whose evidence on all matters I found refreshingly direct when compared with most of the other witnesses in this trial, explained the rules this way at page 3416 of the transcript of the proceedings:

Q So how does back-to-back financing work?

A Well, back-to-back financing works -- say you have a non-resident lender who is non-arm's length with the Canadian corporation. Back-to-back financing means the lender goes to a bank and says, "I have a million dollars that I'd like to place on deposit with you, and I have this subsidiary corporation in Canada that would really like a million-dollar loan. I deposit the money with you, you make the loan to the Canadian corporation, you're arm's length with the Canadian corporation, so the Canadian corporation can deduct the interest. You get the interest free of Canadian withholding tax, and then, of course, you pay interest to me on my deposit.

THE COURT: It comes pretty close to tax evasion, doesn't it? Or is it legal, in your view?

A Well, I don't know if you'd call it tax evasion, but there are -- there's a concern that it's -- it's tax avoidance, and the concern is, is the bank just a conduit? It's a smoke-and-mirrors transaction. And the concern is always that Revenue Canada would just look through that. And you could certainly argue that the bank is acting as the agent of the non-resident so the loan is, in fact, extended by a non-arm's length person. Now, there are variations on that. I'm giving you the most blatant use of it. The variations are that the non-resident would put up security with the bank.

THE COURT: I'm sorry?

A Would put up security with the bank to induce the bank to make the loan, those sorts of variations, and it comes up in a non-resident withholding tax context. It also comes up in connection with the thin capitalization rules. A Canadian corporation is restricted in its ability to deduct debt if its debt-

to-equity ratio is greater than three to one, three dollars' debt for one dollar equity.

48 Mr. Orr understood from his discussions with Mr. Dorfman that Mr. Dorfman's capital would "secure, in some way, shape or form, a loan into the Canadian [purchasing] corporation." He also understood from Mr. Richards that such financing would have to be carefully structured because "it was going to present a problem with regards to deductibility of interest" if it was not arm's length (Transcript at 1623).

Vancouver Meetings (November 20 to 22)

49 In late November Mr. Dorfman came to Vancouver with his wife. After a two to two and a half hour tour of the properties with Mr. Orr and Mr. Richards, he decided to buy them. Meanwhile lunch at the Park Royal Hotel and dinner at a Chinese restaurant was cementing a social relationship between Mr. Orr and Mr. Dorfman and their wives.

50 The next day Mr. Dorfman retained Mr. Gaster of Wolrige, Mahon to advise him on accounting and tax matters, on the referral of his English accountant, Peter Ohrenstein. He retained John McKercher of Russell & DuMoulin as his solicitor, at the suggestion of Mr. Mooney with the approval of Mr. Richards. Mr. McKercher had acted for Mr. Mooney. Mr. Richards thought him efficient.

51 At his first meeting with Mr. Gaster, Mr. Dorfman learned about the mechanism available under section 88(1)(d) of the Income Tax Act to deal with the low cost base of the properties. Mr. Gaster told him that the purchasing company would need an advance tax ruling and a warranty from the vendors with adequate security against the bump being disallowed. Mr. Dorfman knew that Mr. Orr had refused absolutely in London to give such a warranty. They discussed the process for obtaining an advance tax ruling. Mr. Gaster advised that it would take at least three months.

52 Mr. Gaster was told that Mr. Mooney was acting for the Orr family as some kind of facilitator to provide information and make the deal happen. Occasionally, Mr. Gaster called on Mr. Mooney, as well as Mr. Richards, to help get information for his due diligence. And he talked with John McKercher. But he took instructions only from Harold Dorfman.

53 Mr. Gaster learned subsequently that Mr. Mooney had introduced Harold Dorfman to the Orr family. He said "[H]e was kind of the guy on site here that I could refer to rather than, you know, phoning Tom Orr. I didn't really deal with Tom Orr directly. I met him a couple of times and that was it. So I had to have somebody to kind of troubleshoot and make sure that we got what we needed, and David was helpful on a few occasions in that regard."

54 Mr. Dorfman instructed Mr. McKercher to prepare a non-binding Letter of Intent to reflect the agreement reached in London. Mr. Mooney had already spoken with Mr. McKercher about the Letter of Intent and Mr. McKercher had produced a draft based on Mr. Mooney's understanding of that agreement. Mr. Orr and Mr. Dorfman signed it.

55 Neither Mr. Orr nor Mr. Richards nor Mr. Dorfman suggested that the Letter of Intent did not give a fair account of the London agreement. It did not, however, mention Mr. Orr's continuing 25% interest in the acquiring company. This omission gave Mr. Orr the flexibility he needed to arrange the offshore portion of the transaction in a tax-efficient way. Mr. Orr's failure to object to that omission is consistent with his 'dream' of putting the transaction through in Canada at $30 million and sorting out his offshore arrangements with Mr. Dorfman later.

56 Mr. Dorfman told Mr. McKercher to deal with Mr. Orr's solicitors with respect to drafting a share purchase agreement and with Mr. Gaster about tax issues, that John Smiley would be doing the audit, and that Mr. Mooney would be providing information about the properties. Mr. McKercher had learned during a telephone conversation with Mr. Mooney earlier that day that the properties produced an income of about $3 million, that some had development potential, others not, that some could be sold to help pay the purchase price and that some could be joint ventured.

57 Mr. Mooney had also told Mr. McKercher that he had talked to the Hongkong Bank who might finance the purchase for a pledge of shares. Mr. McKercher was not aware of any benefit Mr. Mooney was to receive from anyone, but he considered Mr. Mooney to be a member of the Dorfman team. He understood that Mr. Mooney was interested in participating in the development of the properties and thought that Mr. Mooney would participate with Mr. Dorfman and Mr. Orr in some way in the off-shore company. Mr. Nicholson had the same understanding from Mr. Mooney.

Late November to mid December

58 About a week after his return to London Mr. Dorfman dropped in to see Seymour Gorman. Mr. Gorman was a good source of quick financing because of his position with Albion Trust Holdings Limited. Albion arranged investments under an agreement with the American Express Bank. Mr. Gorman found the deal Mr. Dorfman had negotiated "terribly interesting". He told Mr. Dorfman that if Albion and American Express were to finance the transaction, they would want board control, an absolute veto on any disposals or dealings with any part of the estate, and a twenty per cent equity stake for their efforts. They would take a charge over the shares of the purchasing company. They would stand behind his guarantee of the unpaid $5 million. Mr. Dorfman's credit worthiness was not material.

59 Mr. Dorfman was to get a firm binding contract and to get the tax base up from the historic cost base to a market base, then they would structure the corporate deal between them. Mr. Dorfman would be responsible for ensuring fulfilment of his recommendation. Mr. Gorman explained his understanding of Mr. Dorfman's intentions this way, at 1379-1380:

Q What did he tell you?

A That was crucial to our decision making process. He said that he would identify certain properties which were for immediate sale, he would identify other properties which were to be earmarked for redevelopment value, and he would identify certain other properties which were to be retained as medium to long-term investments.

Q I'm not from your world, sir. What does medium to long term mean?

A In my parlance it's probably anything over a day, but I suppose in Harold's terms it's three to five years.

60 When Mr. Dorfman left "He had the comfort of knowing the money was there. He had to go away and tie up the deal" on behalf of 3473 Investments Limited, a company of which Mr. Gorman understood Mr. Dorfman would be the principal. After Mr. Dorfman left he put the concept to the directors of American Express. They expressed that they were "highly delighted" at it. Mr. Gorman is a supremely confident man. He probably saw things exactly that way in London in late November 1989.

61 On December 7 Mr. Dorfman contacted the Swiss Finance Corporation Ltd about financing. They advised him the next day that they were "in a position to offer low interest finance from the European money market for top rated income producing real estate properties first mortgage" not to exceed 70% of the appraised value of the property. "Subject to final approval" they offered DM47,5 million for five years, with three options to renew for periods of five years each, for a first mortgage on properties "valued at C$44,100,000.00". At the exchange rate suggested this represented a loan of $31,045,750. At the fee indicated, such a loan would net to 3473 a little over $30 million.

62 Meanwhile Mr. Mooney was busy back in Vancouver. On the whole of the evidence, particularly that of Ron Driol, George and Vincent Yen, and John McKercher, I am persuaded that he was continuing to look for acquisition financing, both bridge and long-term. However, Mr. Mooney never represented himself to anyone as representing Suburban or Mr. Orr. He was simply silent about the principals of 3473. At all times he made it clear that no property could be sold until 3473 acquired it.

63 Mr. Mooney testified that his discussions with the Yens, Bernie Slogotski, and Joe Segal, were with a view to the financing of future development, because he had come to realize that the lack of demolition clauses in some of the leases would restrict development capabilities of some properties, thereby requiring more than the usual financing. He probably listened to the proposals with that goal in mind.

64 He also said that he began to look for financing in Vancouver to provide solid evidence to meet any future concern of Revenue Canada about thin capitalization. That may have been a side-interest. But I am convinced that fundamentally, he, like Mr. Dorfman in London, was looking for a means of financing the share purchase. Consistent with that goal, on December 4, his company, Hudson Equities Ltd, commissioned an appraisal from David Wilson of Canadian Springfield Appraisal Consultants Ltd. by way of a letter of opinion. Canadian Springfield estimated the cumulative or gross sellout price of the various properties at $49,720,000, with an estimated current net annual income of $2,726,895.

65 Unfortunately, Mr. Mooney was looking for financing of the deal he thought Mr. Dorfman and Mr. Orr had made. As we shall see, his discussions with Mr. Segal and the Hongkong Bank came to nought when he learned that Mr. Orr and

Mr. Dorfman had made a different deal and that the transaction would be completed wholly on shore and heard which properties Mr. Segal wanted to keep for himself. But by then, as Mr. Dorfman had anticipated from Mr. Gaster's advice as early as November 27 about the availability of the advance tax ruling, the pressure was off the purchaser and on the vendors. No share deal could complete before December 31.

66 The Hongkong Bank/Segal transaction had been in difficulty since December 6. The Bank's offer of that day was unsatisfactory to Mr. Mooney and would have been unsatisfactory to Mr. Dorfman and Mr. Orr because it required a joint debt service agreement executed by Mr. Segal and Mr. Mooney, whom Mr. Driol assumed to be the principal of 3473. Another Bank proposal of the same day seems to have gone nowhere. Nevertheless Mr. Mooney continued his discussions with the Hongkong Bank and on December 11 delivered Mr. Wilson's letter of opinion to it. Subsequently he prepared and signed a proposal of his own which was delivered to Mr. Segal, but apparently not to the Bank. Mr. Driol understood throughout that the Bank and Mr. Segal would be at the table at any closing if an agreement was reached. That was equally obvious to Mr. McKercher and Mr. Karby, who was Mr. Segal's solicitor.

67 The same day Mr. McKercher sent the draft Share Purchase Agreement to Mr. Dorfman. It was his only communication with his client between November 22 and December 13. He had been dealing only with Mr. Mooney, whom he understood to enjoy the complete confidence of Mr. Dorfman, for whom he believed Mr. Mooney was managing the deal. But he understood that only Mr. Dorfman could settle the terms of the agreement or bind 3473 to anything. He also knew that it was in Mr. Mooney's nature to go off and do things on his own. And he understood that Mr. Mooney's involvement with 3473 and the development of the properties was to be agreed after the purchase.

68 By early December, Mr. Dorfman had an excuse for the delay in closing that he wanted. I garner that desire from the evidence of Mr. Gaster about his telephone conversations with Mr. Dorfman in late November and early December, particularly November 27. The bump was at least an $8 million problem. In early December, Mr. Dorfman was also meeting with Brian Cairns of Mount Banking, the bank that held an overdue mortgage on his residence and was pressing for its payment. Ever the optimist, he assured Mr. Cairns that there was a possibility of his receiving CAD One million within weeks of the closing of a Canadian transaction on December 15. As late as the morning of December 14, Mr. Gaster and Mr. McKercher still had some hope for a closing while Mr. Dorfman was in Vancouver. Mr. Dorfman was expressing that same view. Those hopes could only have been fuelled by Mr. Mooney's negotiations with Mr. Segal and the Hongkong Bank. At 1 p.m. that day Mr. Gaster decided finally that an advance tax ruling would be essential.

69 Meanwhile, Mr. Orr was pursuing his need for assistance in structuring the offshore component of the transaction. On the advice of Ian Ledger, Mr Richards invited Dennis Moore to come to Vancouver on December 12. Mr. Dorfman was coming then to settle the terms of the Share Purchase Agreement. Mr. Richards still thought the transaction would close on December 15.

70 Mr. Orr had met earlier with Paul Beckmann of McCarthy, TÈtrault, to request that he act for the Orr family in the sale to Mr. Dorfman. Mr. Orr explained to Mr. Beckmann that a shell company would pay $25 million in cash

and give the Orrs $5 million in preference shares. Other consideration was to be paid to the Orrs in the United Kingdom or some tax-haven jurisdiction.

Vancouver Meetings (December 12 to 15)

71 When Mr. Moore arrived in Vancouver on December 12, Mr. Orr told him what he envisioned. He wanted to sell a company apparently for $30 million, but to keep back, possibly on an undisclosed basis, a 25% interest in the purchasing company. He wanted his interest in that company to be held in an offshore vehicle, protected and dovetailed with domestic tax considerations, with enough flexibility that he would move to the United Kingdom in a year or so without having to undo anything. Mr. Orr had not discussed the offshore portion with his accountants and refused to do so. He was concerned about the lack of privilege for such discussions. However, he was willing to consult McCarthy, TÈtrault. Arrangements were made for him to do that on December 13.

72 After meetings that day and the next, Mr. Orr accepted the advice of his team that what he was envisaging either had adverse Canadian tax consequences or was unlawful and that he should have all his consideration in one share purchase agreement. During those same meetings the concept of a put and call for the preference shares and for additional preference shares to compensate for the offshore portion was developed. It was recognized that this option would affect the value of Mr. Orr's interest significantly. The Orr team worked throughout these three days on the premise that Mr. Dorfman's interest in 3473 would be funded by way of non-arm's length debt.

73 Mr. Dorfman arrived late on December 13. Early the next morning he met with his advisers and Mr. Mooney. Neither Mr. Mooney nor Mr. McKercher mentioned the Hongkong Bank/Segal dealings nor the meeting with the Hongkong Bank that was to take place later that day. Mr. McKercher assumed that Mr. Dorfman knew of those dealings. Mr. Gaster confirmed that the bump was technically disqualified. He obtained Mr. Dorfman's instructions to raise the issue of the bump at the meeting to follow.

74 At that meeting at the McCarthy, TÈtrault offices, Mr. Dorfman learned that Mr. Orr wanted an entirely onshore transaction and a value to be placed on his 25% interest in case Mr. Dorfman "makes a mess of it." Mr. Dorfman agreed to value that 25% interest on the basis that he could take Mr. Orr out at any time. Mr. Gaster raised the problem of an earlier single-winged butterfly transaction that might disqualify Suburban from obtaining a satisfactory advance tax ruling. All those present understood that the closing would have to be deferred.

75 Mr. Moore went home, but not before telling Mr. Mooney about Mr. Orr's understanding of the deal, and then Mr. Orr and Mr. Richards about what he saw as Mr. Mooney's surprising reaction to that information. Mr. Moore had identified quickly the difference between Mr. Orr's and Mr. Richards' view of the deal. When he told Mr. Mooney that Mr. Orr believed he had sold only 3/4 of the Suburban shares for $30 million, Mr. Mooney became upset. Mr. Mooney conveyed to Mr. Moore the sense that he was on Mr. Dorfman's team. That is not surprising since he had earlier conveyed the same message to Mr. McKercher. It is clear that, at the very least, Mr. Mooney was helping Mr. Dorfman to close the deal he thought had been made in London in whatever way he could. But Mr. Orr had "moved the goalposts", as he blurted out to Mr. Moore. Mr. Mooney, like

Mr. Richards, had not understood where Mr. Orr and Mr. Dorfman had placed them in London.

76 The memories of Mr. Moore, Mr. Orr, and Mr. Richards are not sufficiently clear for any certain conclusion to be reached as to exactly what Mr. Moore reported to Mr. Orr and Mr. Richards following a social lunch that day at the Vancouver Club with Mr. Dorfman and Mr. Mooney. The best evidence of that conversation and of his earlier conversation with Mr. Mooney is undoubtedly the notes Mr. Moore made shortly after the meeting, and the notes he dictated from those handwritten notes after his return to London.

77 I am hesitant to rely on Mr. Moore's notes when Mr. Orr denies any such conversation, Mr. Richards is distressed because he cannot remember any such conversation, and Mr. Mooney remembers telling him that he was assisting Mr. Dorfman, not that he was representing him. Mr. Moore concedes that his notes are not an attempt at verbatim record keeping. They are his notes of those matters he considered 'salient' to his task. At the same time, I have found Mr. Mooney and Mr. Orr to be so unreliable as witnesses, that I can accept only those parts of their evidence that are consistent with the evidence I accept and with the general course of events revealed by the documents. Mr. Richards is reliable in that which he remembers clearly, but he is inclined to draw inferences and remember them as accurate even when they are wrong, until they are proved wrong to his satisfaction. Like many very intelligent people, he is also inclined to remember only that which he considers plausible and relevant, discarding the rest. It has been helpful for me that Mr. Richards is willing to admit the failings in his memory. Mr. Moore, like Mr. Dwyer, has the merit of clear sightedness, untroubled by bias.

78 It is more likely than not that Mr. Moore's handwritten notes are accurate and that he did report to Mr. Orr and Mr. Richards that Mr. Mooney had told him that he was representing Mr. Dorfman, that Mr. Mooney understood that the deal was as to 25% of the increment only, that Mr. Mooney took the view that Mr. Orr was "reneging" and "moving the goal posts", that Mr. Mooney appeared to have been involved in the arrangement of the finance and would be expecting Mr. Orr to pick up the costs if the deal fell through, and that Mr. Mooney envisaged that the put and call would be for only $2.5 million.

79 At the afternoon meeting at McCarthy, TÈtrault, Mr. Orr confronted Mr. Dorfman with Mr. Moore's suggestion that Mr. Mooney was acting for or representing Mr. Dorfman. Mr. Dorfman responded that he was acting for himself, that no one was representing him in Canada. Like Mr. Moore, the assembled group understood him to mean that no one was his agent. It was clear that Mr. McKercher was representing him as his solicitor and that Mr. Gaster was representing him with regard to the tax ruling.

80 The only part of the conversation between Mr. Mooney and Mr. Moore that Mr. Orr did not mention during the meeting was that of financing. Mr. Mooney testified that he had spoken to Mr. Orr and Mr. Richards before the meeting about his conversation with Mr. Moore. He said that he assured them that his activities were to facilitate the transaction, that he was doing only that which had been agreed in London. It is likely that Mr. Orr and Mr. Richards were sufficiently satisfied with that explanation that they paid little attention to what Mr. Moore was saying about something that by then did not matter to them. Mr. Richards agreed that might be the case in his testimony. Mr. Orr's concern was about Mr. Moore's view that Mr. Mooney was

acting as a double agent and that Mr. Dorfman had the same view of their deal as he had. He raised those paramount issues.

81 Mr. Orr clarified with Mr. Dorfman the agreement they had reached in London. Mr. Dorfman agreed that he was purchasing only 75% of the shares in Suburban for $30 million in cash or cash equivalent and that Mr. Orr was also to have an offshore interest, the initial value of which would be the extra amount which Mr. Orr would have received, net of Canadian tax, had Mr. Dorfman paid $40 million. That way, Mr. Orr would have had an interest offshore outside the Canadian tax net and Mr. Dorfman would have had the benefit of the Canadian tax saving. Mr. Orr fixed the price for the put and call at $7 million based on Scott Heal's advice that the precise net amount was $6.95 million. The next day Mr. Orr and Mr. Dorfman, with Mr. Mooney's assistance as an arbiter, settled that price at $7.3 million to take account of an additional $600,000 property purchase tax that had been omitted in the calculations the previous day. All present must have understood that agreement meant that Mr. Dorfman could take Mr. Orr out of the purchasing company whenever he wanted, because the additional price would be paid by Class B preference shares which Mr. Dorfman could call at any time. The same call option was to be attached to the Class A preference shares which would be the consideration for the unpaid $5 million. At this point, however much talk there may have been of a future partnership, Mr. Orr had bargained away his right to insist on it, without a comparable immediate put option.

82 However, the day before, Mr. Orr had obtained a guarantee from Mr. Dorfman that he would purchase the Class B preference shares if the company were unable to redeem them. Mr. Orr had asked that they be secured by a mortgage, but did not press the issue when Mr. Dorfman offered his personal guarantee instead. As in London when Mr. Orr accepted Mr. Dorfman's guarantee with regard to the unpaid $5 million, so now no one asked Mr. Dorfman for any particulars of his financial circumstances.

83 Mr. Beckmann did ask, however, in effect, "How good is your guarantee?". Mr. Dorfman agreed that he responded that his guarantee was good. He also agreed that he may have said something to the effect that any obligation that he guaranteed, Tom need not worry about. He says he had sufficient confidence in the transaction itself that there would be sufficient assets for sale or re-mortgaging to enable the company to meet all of the demands on it. Mr. Gorman and Mr. Poettcker agreed with that assessment of the deal Mr. Dorfman had made with Mr. Orr. But Mr. Dorfman did not explain his reasoning to Mr. Orr.

84 Mr. Knox recalls that Mr. Dorfman described his guarantee as "extremely valuable", that "for sum of the size I have ample in England", and something to the effect that Tom need not worry about any obligation he signed. He agreed in cross-examination that Mr. Orr accepted Mr. Dorfman's guarantee on the basis of Mr. Dorfman's own opinion as to its value.

85 Mr. Beckmann saw his primary task to be that of ensuring that the preferred shares would be converted to cash. He recalls that Mr. Dorfman indicated that, although he had a lot of money in offshore trusts out of his name, he still had lots of assets in his own name, that his personal covenant was very valuable. He said that the effect of Mr. Dorfman's words was that he had sufficient U.K. assets to back up the guarantee and make it valuable, that Mr. Orr could rely on it. Mr. Beckmann understood Mr. Dorfman to mean that he

had sufficient personal assets in his own name to give him a net worth capable of sustaining that guarantee.

86 Mr. Richards remembers that Mr. Dorfman made a statement to the effect that he had enough assets in the United Kingdom alone to satisfy the guarantee that he was offering. Mr. McKercher testified in chief (at 4043 of the Transcript):

> I don't recall that he ever gave any specific words to quantify what his wealth was, but the impression that he gave to me and I think gave to everybody else was that it was substantial and the amount of guarantee in consideration was not a material issue in the sense of his financial capabilities.

87 In cross-examination, Mr.McKercher agreed that the sense of what Mr. Dorfman was saying was that Tom Orr need not worry. The sense Mr. McKercher carried away was that Mr. Dorfman was very capable of "undertaking and supporting a guarantee of that nature." He agreed that Mr. Dorfman was stating his opinion as to what he could do or not do in the circumstances of the transaction, rather than a fact. He did not recall that Mr. Dorfman ever said "I have that money", just as he does not recall Mr. Dorfman having ever said more than that he could arrange the financing when talking about the $25 million.

88 I have no doubt that Mr. Dorfman left exactly the impression he wanted to leave, that he had sufficient assets in the United Kingdom to back his guarantee. In his opinion such an impression was true. He required no personal assets to back the guarantee. Whatever assets he had in England would therefore be sufficient. It is highly unlikely, however, that Mr. Dorfman ever said the precise words that Mr. Richards or Mr. Knox recall. The recollections of Mr. Beckmann and of Mr. McKercher are more reliable. That carefully managed impression persuaded Mr. Orr to accept Mr. Dorfman's guarantee instead of the security Mr. Beckmann was advising him to seek, just as the carefully managed impression of great wealth in London had persuaded Mr. Orr to enter negotiations and reach agreement on the fundamental terms of the deal in London without any request for personal financial information.

89 When Mr. McKercher and Mr. Mooney met with Mr. Segal and Mr. Driol at the Hongkong Bank late that afternoon of December 14, Mr. Mooney recognized that Mr. Segal's proposed financing arrangements were no longer of any potential interest to 3473.

90 At a meeting the next day with Mr. Orr, Mr. Richards, and Mr. Dorfman, Mr. Mooney extolled the virtues of the properties, impressing Mr. Richards with his salesmanship, as he took Mr. Orr and Mr. Dorfman through some of the development potential for the properties. It was at that meeting that Mr. Orr and Mr. Dorfman settled the terms and conditions of the Class B shares. By the end of that meeting, Mr. Dorfman had agreed to extend his stay until December 18. They instructed their solicitors to get to work on preparing a share purchase agreement and a shareholders' agreement for signature before Mr. Dorfman left for England and Mr. Orr for Hawaii.

91 Although Mr. Orr cannot remember having dinner with Mr. Mooney at Il Giardino that evening, it is entirely consistent with their practice that he would have done so. There, Mr. Mooney remembers having discussed all Mr. Orr's alternatives to an agreement with Mr. Dorfman. Mr. Orr's response was that he

wanted to proceed to do business with Mr. Dorfman. The two couples had become friends during the negotiations. He dismissed the alternatives. Mr. Mooney did not tell him about having obtained an appraisal from Canadian Springfield, or about any of his discussions with potential purchasers of some properties.

Signing of the agreement: December 18, 1989

92 The solicitors worked over the weekend to prepare the documents for discussion on Monday morning. At a meeting that Monday morning the shareholders' agreement Mr. Beckmann was to draw was discussed. Mr. Beckmann wanted to know how the $25 million would come into 3473. Mr. Dorfman wanted "absolute full control of the company and its assets ... to be able to do exactly what I wanted," or in Mr. Beckmann's words, "full flexibility." Mr. Dorfman did not say how the purchase would be funded. He simply discussed all the possibilities, including third party financing, whenever he was pressed. Mr. Beckmann agreed to prepare a list of the terms for a shareholders' agreement because time was too short to permit him to draft a formal agreement.

93 That afternoon Mr. Orr and Mr. Dorfman met in a Russell & DuMoulin boardroom to review the Share Purchase Agreement. They were in the process of reviewing it line by line when Mr. Beckmann arrived with Schedule K and departed for a meeting of the Executive Committee of the Law Society of which he was Treasurer at the time. Schedule K included a clause restricting the ability of 3473 to use the properties to secure financing.

94 As soon as Mr. Dorfman saw clause 6 of Schedule K, he objected. He read it as restricting his options for financing the company. Mr. McKercher, the only witness who recalled the discussion, has no doubt that Mr. Dorfman said "We cannot accept that paragraph and we have to have the flexibility in arranging our financing, whether by loan or by equity or whatever method we may choose to proceed with." He does not recall Mr. Dorfman having said "We are going to have to encumber the properties." Rather he recalls that secured debt would be one of the possibilities. He also recalls that Mr. Dorfman "was very firm on the fact that if this paragraph was going to remain, there was not likely going to be an agreement" (Transcript, at 4221-4222). Then, Mr. Dorfman asked Mr. Orr to step outside. In a private conversation, Mr. Orr agreed to remove the offending clause.

95 Mr. McKercher saw the removal of this clause as resolving the argument about whether the company could give security for its debt, as is evident from this evidence from his cross-examination by Mr. Manson at 4223:

Q So it's fair to say that prior to the meeting in your boardroom on the afternoon of December 18 you understood it was open to 3473 to borrow the down payment and encumber the properties and nothing happened during the course of the meeting that afternoon to change your mind on that point?

A Well, I think that we -- that we always anticipated that it was -- to borrow the money. I think that that was accepted by the vendors. The arguments really came up on the question of whether that debt could be secured. So there was an argument where they were saying, "We didn't want you to secure -- for the company to give security for your debt", but that argument was then resolved by the removal of that clause.

Q So it was clear by the end of the meeting that it was open to the purchaser to not only borrow the 25 million dollars, but also to encumber the properties to secure the loan?

A In our understanding of it, that's correct.

96 Mr. Beckmann agreed that it had been his advice that 3473 be funded by debt. He wanted to secure priority for the preference shares over that debt. Whether the money was that of Mr. Dorfman or a third party was irrelevant to that purpose. Mr. Orr gave up that security without any objection by Mr. Knox during Mr. Beckmann's absence. One of the fundamental issues in this trial is why Mr. Orr agreed to that deletion.

97 Mr. Orr says he was persuaded because Mr. Dorfman said "...my accountants will kill me if I do not maintain the impression of third party financing ...", but that the financing was going to be "back to back", and that it would be his money. Mr. Dorfman says he asked Mr. Orr "What's that clause doing in this agreement?", that Mr. Orr responded "I don't know", to which he replied "Well, if you leave it in we're finished. I won't sign the agreement and that's the end of it". Then Mr. Orr responded "We will take it out" and Mr. Dorfman replied "If that's okay with you, well what's all the argument about?" Mr. Orr testified that he was not aware that the deletion of Clause 6 meant that Mr. Dorfman was free to raise acquisition financing.

98 I do not accept that either version accurately describes what was said during the 2 or 3 minutes, at most, they were out of the room. Both authors are skilled at dissembling. Mr. Orr is somewhat less artful than Mr. Dorfman. Mr. Dorfman takes much more care with words than does Mr. Orr. But both are accustomed to keeping their own counsel, making their own decisions in their own interests, and saying only that which serves their interests. The transcript is rife with examples of convenient loss of memory. There is little to choose between the two when it comes to their ability to recall less significant events. In their testimony both muddled dates and collapsed meetings into one. After five years that is not surprising.

99 What is surprising is the extent to which both sought to mislead the court, not only by innuendo and ambiguity, but by clear words.

100 Mr. Orr was clearly untruthful when he denied having learned anything about Mr. Dorfman from Mr. Richards before going to London in November. He was also untruthful about what he had told his parents about the transaction and about their knowledge and view of the sale. Most importantly, he denied that a desire not to disclose to Revenue Canada the offshore portion of the transaction was the reason for omitting any reference to it from the Letter of Intent. Clearly that was his reason, a reason of which Mr. Richards, Mr. Mooney, and Mr. Moore were all aware.

101 Mr. Dorfman was untruthful when he insisted that he had been clear from November 7th at the Ritz Hotel in London that the source of the down payment was an arm's-length, third-party lender. He did not make that view clear to Mr. McKercher or to Mr. Beckmann, the two most concerned with his financing arrangements until late April, 1990. Although Mr. McKercher recognized from the structure of the deal that arm's-length lending was a possibility, he considered until quite late in the course of events that non-arm's length funding by equity or debt were also possibilities. Mr. Beckmann

did not consider the possibility of arm's length financing and Mr. Dorfman had to have understood that. There are countless other examples of untruthfulness in the transcript, particularly with regard to Mr. Dorfman. He was well aware of the proposed Hongkong Bank financing of which he denied any knowledge. He was well aware of Mr. Mooney's offer to buy 68 Eaton Square and of the sale of his wife's Newton Court apartment from which he conducted his business, when he swore answers to the Interrogatories. His explanation that he forgot those salient facts at the time is unbelievable.

102 When the only two participants in a conversation are unreliable witnesses, the court must look to evidence about the course of events, to see if one or other version is more likely. Mr. Dorfman's version is more consistent with Mr. McKercher's recollection of what Mr. Dorfman had said at the meeting. It makes sense that Mr. Dorfman would take Mr. Orr out of the room to impress upon him that this clause was in fact a deal-breaker. His version is also consistent with Mr. Orr's claim to a lack of understanding at the time of the consequences of the removal of that clause.

103 Mr. Orr's version is more consistent with his course of dealings with Mr. Dorfman. It is entirely likely that whatever Mr. Dorfman said, it was designed to recall to Mr. Orr their original discussions in London to the effect that he could conveniently make available $25 million from his own resources, but that he did not know exactly how, whether by equity or debt, back-to-back or otherwise. Mr. Dorfman probably did use the term "back-to-back financing" either during the conversation with Mr. Orr or immediately before it at the meeting. He likes to remember that he uses the term "back-to-back financing" in the sense Mr. Gorman explained it, as arm's-length financing from offshore.

104 In the end I am drawn to the conclusion that Mr. Dorfman's version is closer to what was said between them in the circumstances of that Monday afternoon. While I am not persuaded that Mr. Orr's version is more likely, it is possible that Mr. Dorfman crossed the line that day to deliberate dishonesty in his anxiety to hold the deal together. It is also possible that Mr. Orr garnered the impression from Mr. Dorfman's pose that Mr. Dorfman wished to present. In any event, at most, Mr. Dorfman was continuing the same representation he had made in London. Nothing new was added. It is clear that Mr. Dorfman did not dissuade Mr. Orr from the understanding that he knew Mr. Orr had formed in London two months earlier, the understanding that had persuaded Mr. Orr to negotiate with him in the first place, that he was a man of great wealth who was capable of providing $25 million from his ample assets to fund 3473 so that it could purchase 75% of the shares of Suburban. I have no doubt Mr. Dorfman understood exactly what he was doing. The fundamental issue in this trial is whether his deliberate conduct inducing that understanding constitutes deceit such as to vitiate the Share Purchase Agreement and give rise to a claim for damages on the part of Mr. Orr and his parents.

The Aftermath until early February

105 The very evening the deal was signed, Mr. Orr raised with Mr. Mooney his desire to convert the transaction to a sale of assets and offered him a bonus of $50,000 if he were able to persuade Mr. Dorfman to agree. The evidence of Mr. Orr's father persuades me that Mr. Orr raised the issue because of his father's antipathy toward the agreement he had reached with Mr. Dorfman, antipathy that Mr. Orr, Sr. expressed to his son in a telephone conversation that same day, undoubtedly in no uncertain terms.

106 During that same conversation, Mr. Mooney asked Mr. Orr for a release so that he could offer development proposals to Mr. Dorfman. The next day Mr. Orr called Mr. Richards to advise him of what he had asked Mr. Mooney to do and what Mr. Mooney had asked of him. He told Mr. Richards that an asset deal would be in the interests of both him and Mr. Dorfman and could be completed quickly. Mr. Richards knew that Scott Heal, Mr. Orr's accountant, had mentioned the concept of an asset deal at the meeting the day before, but that it had not been pursued. He called Mr. Knox to tell him of Mr. Orr's instructions.

107 Mr. Mooney also called Mr. Richards on December 19 to tell him that a letter would be faxed to his office asking for a release. Mr. McKercher drafted and sent to Mr. Richards the letter asking for a release so that Mr. Mooney might acquire an equity interest in 3473. He recommended this broad wording to Mr. Mooney as the best way to accommodate Mr. Mooney's interest in participating in the downstream redevelopment of the properties. Mr. Mooney did not approve the letter in its final form. It is useful to note the opening words of the request:

> *At your request, I have introduced you to Harold Dorfman who, through a B. C. company, has agreed to purchase all of the shares of Suburban Developments (1980) Ltd.*
>
> [emphasis added]

108 Little did Mr. McKercher know that this letter, unsigned and obviously drafted by him, would cause Mr. Knox and Mr. Richards, and ultimately Mr. Orr, to question whether Mr. Mooney had been acting as a duplicitous double agent from the beginning. To them, this was an "unsettling concern" because such involvement could "lead to the transaction becoming void or voidable."

109 This concern developed although Mr. Richards agreed that there was nothing wrong with Mr. Mooney's putting the proposal. Indeed, it is common ground such a request would be expected from a person in Mr. Mooney's position who wanted to participate in the purchasing company after closing. Mr. Knox raised with Mr. Orr and Mr. Richards his concern that Mr. Mooney might be the principal of 3473. So Mr. Richards enquired of Mr. Dorfman whether he had any agreement with Mr. Mooney to take an interest in 3473. Mr. Dorfman denied any such agreement by fax on December 21. Mr. Orr's faith in Mr. Dorfman was restored.

110 Despite appearances in Mr. McKercher's notes to the contrary, it is now clear that Mr. Mooney never had any interest in acquiring shares or any other interest in 3473. His interest from the beginning was in participating in the development of some of the properties after their acquisition by 3473.

111 Late in December or early in January, Mr. Mooney asked Mr. Poettcker if Bentall would be interested in acquiring the Suburban shares. Mr. Poettcker immediately said yes. It is clear that from that date Mr. Dorfman worked only toward an agreement with Bentall. Hudson Equities paid the balance owing for the Canadian Springfield letter of opinion. Without the permission of its author, Mr. Mooney forwarded a copy of that letter to Mr. Poettcker. By January 9 Mr. Dorfman was telling Mr. Cairns at Mount Banking that he would be receiving between $2 and $5 million from the sale of the Canadian contract.

112 Meanwhile Mr. Richards prepared and sent to Mr. Dorfman a memorandum about the conversion of the share deal to an asset transaction. He sent a copy to Mr. Mooney anticipating that he would help Mr. Dorfman to understand the advantage to him of an asset transaction. Mr. Orr was willing to sell the Suburban assets to 3473 for $38 million. The net proceeds to the Orrs would be something less than the proceeds of the share transaction at $37.3 million. Typically, Mr. Orr left his advisers and Mr. Dorfman to draw their own conclusions as to when and why he had changed his mind.

113 Mr. Orr returned to Vancouver on January 4. He says that he refused Mr. Mooney's request to participate in 3473 by letter on January 5 because he saw a potential conflict of interest as a result of advice he had received, presumably from Mr. Richards or Mr. Knox at a meeting the day before. That advice convinced him that he was "at liberty to take the position" that Mr. Mooney had to "stay on one side of the fence" until the transaction was completed. However, in an addendum to the letter Mr. Knox had drafted, Mr. Orr agreed that Mr. Mooney could put development proposals to 3473.

114 By then Mr. Orr and his solicitors had determined that the transaction would not complete unless Mr. Orr got the changes his solicitors wanted. Mr. Beckmann was convinced that no binding agreement had yet been reached. Mr. Knox and Mr. McKercher had exchanged letters about their differing views on December 21 and 27. Mr. Orr's bottom-line was that he would not complete unless Clause 6 were returned to the agreement or suitable alternative arrangements were agreed to give him the security he wanted.

115 Nevertheless, on January 8, after asking Mr. Dorfman to consult with Mr. Mooney about the conversion of the share deal to an asset deal, and after learning that Mr. Mooney was refusing to discuss the topic with Mr. Dorfman because he was unclear as to his position, Mr. Orr arranged a meeting with Mr. Mooney to smooth things over and persuade him to help sell the asset sale concept. Equity participation by Mr. Mooney in 3473 was not on the table. They disagreed about Mr. Mooney's remuneration for finding Mr. Dorfman. Mr. Orr offered $250,000 to be paid after closing. Mr. Mooney thought $750,000 would be the "handsome return" he had been promised. Mr. Orr suggested there might be another $50,000 if he helped further with the asset transaction. But he did not ask Mr. Mooney to accompany himself and Mr. Richards to meetings in London with Mr. Dorfman scheduled for the following week. Mr. Mooney did not tell them he would be there on another business venture.

116 Mr. Orr and Mr. Richards believed that they reached an agreement in principle with Mr. Dorfman in London to convert the share deal to an asset deal on the same terms. Mr. Dorfman did agree in principle but he thought it was a stall, so he instructed Mr. McKercher to proceed with the share transaction as if they were going to complete it while discussions continued about the asset deal. Mr. Orr instructed Mr. Knox to proceed with the areas common to both deals, but not to focus on the share transaction.

117 Mr. Orr continued to be concerned about Mr. Mooney's role. In a letter of January 22, he reminded Mr. Dorfman that Mr. Mooney was his agent; that Mr. Dorfman could employ Mr. Mooney as an independent contractor to provide advice and other related services respecting the development of the assets; but that Mr. Mooney was prohibited, directly or indirectly, from having any interest in the entity that would develop the assets. On January 24, Mr. Orr wrote to Mr. Mooney to tell him that his remuneration was still open to

negotiation because of the refusal to accept $250,000. He enclosed a copy of the letter to Mr. Dorfman.

118 Mr. Mooney read that letter as excluding him from downstream development of the properties in any way. He replied on January 26:

Our arrangement was very straightforward

First, you wanted to sell your shares in Suburban Developments. I said I could possibly find you a buyer in England. You agreed to pay me a fee if I found a buyer and you stated that I 'would be well taken care of'. There were no other terms. It was very simple.

Thereafter, I introduced you to an English buyer, Harold Dorfman, a ready, willing and able buyer. You and he signed a contract. Upon this introduction my obligation to you was completed. You now owe me a fee which must be a fee comparable to that which is 'usual and customary' in British Columbia for transactions of this type and size. My view is that this exceeds $250,000.

Your writing to Mr. Dorfman outlining limitations on what I may or may not do interferes with my contractual rights to deal with Mr. Dorfman. Your letter implies that I was privy to your strategic planning with your advisors. You never sought my advice as to price or terms nor did I participate in any meetings with your advisors. You and I had no agreement which prohibits my entering into any arrangements with Mr. Dorfman.

119 Mr. Orr did not respond, nor did he advise Mr. McKercher or Mr. Dorfman, that Mr. Mooney should no longer be involved in the transaction and that he anticipated litigation over Mr. Mooney's compensation. Mr. Orr and Mr. Richards considered that Mr. Mooney was taking too narrow a view of the role they had agreed in November. They saw him as Mr. Orr's agent.

120 Mr. Mooney retained Lawrence Page about February 12 to act for him in obtaining compensation from Mr. Orr for having introduced Mr. Dorfman. After that date he was involved in the transaction only as an intermediary between Mr. Dorfman and Mr. Poettcker.

121 Mr. Orr's mercurial attitude throughout this transaction towards Mr. Mooney and his role is perplexing. His ambiguity about Mr. Mooney continued into February. Mr. Richards anticipated as late as February that Mr. Mooney would be assisting Mr. Orr to persuade Mr. Dorfman that the asset transaction would be better for both of them. Mr. Orr agreed that Mr. Dorfman could consult Mr. Mooney without restriction about the conversion of the share deal to an asset deal and that it was essential that Mr. Mooney be familiar with both deals for that purpose. Yet when he learned that Mr. Mooney and Mr. Dorfman were talking and when Mr. Dorfman asked in London for authority to retain Mr. Mooney, presumably on behalf of 3473, to provide advice and services about development proposals after the closing, it scared him.

122 It seems to have been that fear that induced Mr. Orr to write the letter of January 22 to Mr. Dorfman. He did not learn until early February that Mr. Mooney had received a copy of a letter sent January 23 by Mr. Nanson to Mr. Knox about the shareholders' agreement. From this event his advisers concluded that Mr. Mooney might be providing assistance to Mr. Dorfman beyond the scope of his role as they understood it. Unfortunately, Mr. Orr and Mr. Richards had

never set down precisely the terms of Mr. Orr's relationship with Mr. Mooney so that Mr. Orr's solicitors would understand it. As far as Mr. Beckmann was concerned, Mr. Mooney's only task was to find a purchaser and do those things ancillary to that task.

123 That letter and Mr. Mooney's response to it effectively terminated any involvement by Mr. Mooney with 3473 after closing. Mr. Orr claims not to have considered that Mr. Dorfman wanted and needed Mr. Mooney's help and that without it Mr. Dorfman might abandon the deal. It is difficult to believe that Mr. Orr did not consider that possibility. At that time he still believed that Mr. Dorfman had the money to complete the deal. By that time, however, he was also aware of local interest in the purchase of Suburban's assets.

124 So, as January came to an end and Mr. Dorfman was about to arrive in Vancouver, Mr. Orr and Mr. Knox were concentrating their efforts on the asset transaction. For the first time Mr. Orr told Mr. Knox that he had learned during the corridor conversation on December 18 that Mr. Dorfman would be required to show debt for tax reasons, so the agreement would have to permit the purchaser to encumber the assets. Mr. Orr was exploring the possibility of borrowing money from the Toronto-Dominion Bank against the preference shares on a non-recourse basis. Mr. McKercher and Mr. Gaster were concentrating their efforts on completing a share transaction in accordance with Mr. Dorfman's instructions. But they were also co-operating in Mr. Knox' efforts to put together an asset transaction on which their principals could agree.

Vancouver Meetings (February 4 to 9)

125 On February 4, Mr. Mooney introduced Mr. Dorfman to Mr. Poettcker. Bentall seemed the ideal partner for Mr. Dorfman, one on whom he could rely and to which Mr. Orr could not object. The next day Mr. Mooney, Mr. Dorfman, Mr. McKercher, and Mr. Gaster met to compare the share and asset agreements.

126 Meanwhile Mr. Orr, Mr. Richards, and Mr. Knox were discussing Mr. Mooney's conduct and his letter about his role. They discussed the January 23 letter for the first time. As a result of their analysis of Mr. Mooney's conduct, Mr. Knox wrote a letter to Russell & DuMoulin setting down Mr. Orr's concerns about that conduct. Mr. Knox also asked Mr. Orr to provide him with a memorandum of his relationship with Mr. Mooney. Mr. Orr never did that.

127 When Mr. Mooney saw Mr. Knox' letter to Russell & DuMoulin, he read it as an attempt to use his involvement as a facilitator or intermediary to abort the contract. Mr. McKercher responded on February 6 with a request that Mr. Orr set down the basis on which he believed he had retained Mr. Mooney. Mr. Orr did not respond to that request. By then it was clear that the whole Orr team had come to share Mr. Orr's distrust and suspicion of Mr. Mooney. Mr. Beckmann and Mr. Knox had always understood that Mr. Orr did not want Mr. Mooney involved in the transaction "in any way, shape or form."

128 Then on February 7, Mr. Richards, Mr. Orr, and Mr. Dorfman sat down to discuss an asset sale equivalent to the share transaction and an offer by Mr. Orr to sell all the shares for $40 million without any carried interest that he had first put forward in London in January. By then security for the unpaid purchase price had become a greater concern to the Orr team. That greater concern was said to be the result of their view as to Mr. Dorfman's relationship with Mr. Mooney. But Mr. Orr was also introducing the idea of a

Letter of Credit. It is equally possible that he was looking for security that he could assign to the Toronto-Dominion Bank on a non-recourse basis. He was expressing to Mr. Knox that his family was concerned about the deal. His father was concerned about a continuing relationship with Mr. Dorfman. Later, when Mr. Dorfman mentioned the guarantee of a substantial developer, Mr. Orr rejected the idea.

129 The issue of security was still unresolved when Mr. Dorfman left for England on February 9. But he left Vancouver knowing that he would be receiving an offer in the form of a proposed agreement from Bentall.

130 During his Vancouver visit Mr. Dorfman had met Bob Bentall. Mr. Bentall and Mr. Poettcker liked the deal. Bentall's situation had changed from the previous year. It was looking for a project to keep its construction crews busy. Mr. Poettcker suggested that Bentall would take an assignment of the agreement. He and Mr. Dorfman discussed the price: an upfront kicker, an equal sharing of the profits from the sale of some properties, and an equal sharing after a management fee of 20% of the profits from the development of the other properties. Bentall would take Mr. Orr out as soon as possible, seeking a discount for the Class A shares.

Early February to late April

131 On February 12, Mr. Dorfman and Mr. Richards exchanged faxes. Mr. Dorfman made it clear that he was willing to try to negotiate an asset purchase but was determined to complete the share transaction failing agreement. Mr. Richards explained the security Mr. Orr wanted, subordinate to a first charge of $25 million, and requested that Mr. Dorfman provide evidence that his personal covenant was good for $12 to $15 million. He thought the existing good will would translate into agreement because Mr. Dorfman would have come to understand while in Vancouver that Mr. Orr had a problem with the lack of security. Mr. Dorfman's response was to insist that the Share Purchase Agreement be completed.

132 The same day Dale Clark of Nexus Realty wrote Mr. Richards to say that Mr. Orr had said the previous day that it would be a good time to be in touch about acquiring the Suburban portfolio. Clearly Mr. Orr had begun to think that the Share Purchase Agreement was not going to complete.

133 About the same time Mr. Orr directed enquiries in London to try to learn more about Mr. Dorfman's wealth. The only concrete information he obtained was that Mr. Dorfman had borrowed an amount of money sufficient to buy two business-class air tickets to Vancouver in early February, to be repaid by periodic payments. Around the same time, Mr. Richards heard from George Yen that Mr. Mooney had been offering Suburban properties for sale. This information confirmed rumours Mr. Orr had heard. Without talking directly to Mr. Yen or Mr. Mooney, Mr. Knox decided that Mr. Mooney's activities should be disclosed on the application to Revenue Canada for the bump ruling. Mr. Knox and Mr. Nanson began discussing how the Share Purchase Agreement could accommodate Mr. Orr's interests and third party arm's length financing. Mr. Orr determined that he would not close on the basis of the December 18 agreement. His advisers persuaded him to continue with the Share Purchase Agreement if they could get appropriate security or evidence of personal assets.

134 By the end of February the distrust had become mutual. Mr. McKercher and Mr. Dorfman had formed the view that Mr. Orr was trying to get out of the deal. Even modest attempts at open and frank discussion between the solicitors ended. Mr. Orr was consulting counsel at McCarthy, TÈtrault. Repudiation was canvassed for the first time and rejected.

135 Meanwhile Mr. Poettcker had approached Larry Carter of McLeanco with a view to raising financing for the deal with Mr. Dorfman. Mr. Carter approached lenders, among others North American. By March 14, he was able to report to Mr. Poettcker that the concept was acceptable, the transaction was "do-able", and that there was no problem with a $1 million fee to Mr. Dorfman as a "shareholder's advance" against profits. Mr. Poettcker was clear that this "advance" was in addition to the profit-sharing contemplated in their discussions. It is common ground that Bentall could have arranged the financing to complete the Share Purchase Agreement.

136 At the same time David Jubb, of North American, was becoming impatient. He wanted to make the deal for which he had obtained approval from pension funds the previous summer. It had been some time since he had approached Tony Grieve with a view to putting an offer to the Orrs. He had sought Mr. Grieve's help because he had come to believe that a change in agents might help North American to meet the Orrs. Now he was hearing from Mr. Grieve that North American could not get in the door unless they made a serious offer. Mr. Jubb instructed solicitors to prepare an offer for $40 million cash. He forwarded that unsigned offer to Mr. Grieve on March 1. He signed it on March 16.

137 About March 20, Mr. Grieve delivered the offer to Mr. Richards. Mr. Richards told Mr. Orr about it. Mr. Orr knew Mr. Grieve of Macaulay Nicolls from the ski hills. Mr. Richards had told Mr. Grieve earlier, as he had all other interested persons, that Mr. Orr was involved in negotiations with one party and could not consider the offer. Mr. Grieve sent the offer despite that advice.

138 Throughout March, McCarthy, TÈtrault pursued their course of revelation to Revenue Canada of what they construed as Mr. Mooney's activities on behalf of Suburban. They did so well aware that this disclosure put at very serious risk the ability to obtain the advance tax ruling. What they did not know was that Revenue Canada would shortly provide Mr. Gaster with a letter of comfort about an imminent change in the rules making a ruling unnecessary. Then the bump would no longer be the $13.75 million shadow on the December 18 agreement they considered it was.

139 Throughout March and into April, Mr. Page continued to seek payment for Mr. Mooney. Mr. Beckmann told Mr. Page at a meeting on April 3 that it looked unlikely that any agreement would be reached between Mr. Dorfman and Mr. Orr and thus, that any commission would be owing. Mr. Beckmann also told him that the Orrs were concerned about what Mr. Mooney had been doing, whether he had an interest in 3473, or was the driving force or the brains behind the deal. He received no response. He also raised his concern about Mr. Dorfman's ability to fulfill his commitment to fund 3473.

140 The next day Mr. Mooney asked Mr. Orr to lunch to talk about the asset purchase. Two days later Mr. Poettcker faxed a draft agreement to Mr. Dorfman, having received the financing proposal on March 27 from McLeanco. Mr.

Dorfman decided to go to Vancouver during April to finalize an agreement with Bentall. By mid-April he knew he could close without the tax ruling.

Vancouver Meeting (April 23 to 25)

141 Mr. Dorfman arrived in Vancouver on April 21. Two days later he met Mr. Richards and told him for the first time that the substantial developer he had mentioned in March as having a good reputation was Bentall. Mr. Richards reported to Mr. Orr who instructed him to meet with Mr. Poettcker. Mr. Richards did so on April 24. When it became clear that Bentall was not going to put in its own $25 million or any lesser amount, Mr. Orr decided to terminate his relationship with Mr. Dorfman, whether or not that relationship was contractual.

142 On that date it would have been apparent to all members of the Orr team that the Orrs could get $40 million in cash from North American Life in a relatively simple asset transaction. Completion of the Share Purchase Agreement would have produced $37.3 million less a discount for the Class A shares. Because of the immediate call, Mr. Orr's continuing interest had no value.

143 While Bentall was ready to agree to stand behind Mr. Dorfman's guarantee, something on which Mr. Dorfman was insisting, and would take an assignment of the agreement, Mr. Poettcker's negotiating position with Mr. Richards was that Bentall would expect compensation for its covenant. Mr. Richards understood that Mr. Poettcker was proposing a joint venture arrangement. Believing that Mr. Orr preferred an asset deal and preferring one himself, Mr. Poettcker proposed in a draft agreement prepared by Lawrence and Shaw, a sale of assets at $38, $25 million cash with payments on account of the balance annually and on the sale of properties. That offer was not attractive to Mr. Orr, although it was the rough equivalent of the Share Purchase Agreement. He did not learn of the proposed assignment until late in the pre-trial discovery process.

144 After a final meeting on April 25 attended by Mr. Dorfman, Mr. Orr, and their advisers, a very upset Mr. Orr wanted to terminate discussions. His advisers prevailed on him to make a revised offer to Mr. Dorfman the next day to avoid Mr. Dorfman's threatened litigation. Mr. Orr offered to proceed with the share purchase with a cap on the first mortgage of $20 million and a covenant from Bentall or with an asset sale at $40 million with $25 million down and $15 million secured by a second mortgage. Neither offer was acceptable to Mr. Dorfman or Mr. Poettcker.

Termination of the agreement: April 30, 1990

145 Mr. Orr instructed his solicitors to write the letter terminating the transaction on April 30. In his mind Mr. Dorfman and Mr. Mooney had betrayed him. By then his team believed that Mr. Mooney had been a duplicitous agent and that Mr. Dorfman was a man of straw. Mr. Orr understood that he had no other choice. Mr. Dorfman had threatened to take action to enforce the Share Purchase Agreement. Bentall was spending due diligence money. If Mr. Orr's team were wrong in their view that the Orrs had grounds for not completing, at least damages would not be increasing. These proceedings are the result.

The Ending

146 Mr. Richards contacted Mr. Grieve. On May 1 North American Life offered $40.5 million. A few days later Mr. Richards countered with $41 million. Mr. Jubb considers that the deal was made that day, despite some continuing squabbles between solicitors over the final amount. On August 28, Mr. Orr closed the deal. The Orrs received about $3.7 million more than they would have received under the Share Purchase Agreement. Had it not been for the holidays of some pension fund managers in August, the transaction could have closed about one month earlier.

147 From proceeds of $41,010,215.89, Mr. Orr paid Mr. Richards a fee of $615,000. He invested the net proceeds in Treasury Bills on September 10, 1990.

148 Mr. Mooney proceeded to help Mr. Dorfman to try to keep his residence during bankruptcy proceedings in London by making a written offer to buy it for £ 1.65 million. Finally, on April 30, 1991, Mr. Dorfman was declared bankrupt. He blames Mr. Orr for that.

II. The Contract

A. Is the share purchase agreement enforceable?

ï **The Agreement**

149 When Mr. Orr and Mr. Dorfman signed the Share Purchase Agreement in the boardroom of Russell & DuMoulin late in the afternoon of December 18, 1989, they intended that 3473 Investments Ltd. would purchase all the shares of Suburban Developments (1980) Ltd for $37,300,001.00. The transaction would close on May 15, 1990, or within 15 days of the receipt of a tax ruling from Revenue Canada confirming that an increase to the cost amount of all land would be available under section 88(1)(d) of the Income Tax Act.

150 Mr. Dorfman was to contribute $25 million to 3473 to permit it to pay that amount in cash to the Orrs on closing. 3473 was also to deliver Class A preferred shares with a value of $5 million and Class B preferred shares with a value of $7.3 million to Mr. Orr. Mr. Orr was to own 25% of the common shares of 3473, and Mr. Dorfman the remaining 75%. In addition to some unremarkable documents, clause 9.2 provided that the vendors were to deliver:

(j) an agreement executed by the Vendors containing the terms listed in Schedule "K" and such other terms as may be agreed between the Vendors and the Purchaser and in such form as may be approved by the solicitors for the Vendors and the Purchaser, acting reasonably, (the "Shareholders Agreement").

Clause 9.3 provided that the Purchaser was to:

(d) deliver to the Vendors a guarantee executed by Mr. Harold Dorfman, in form satisfactory to the Vendors, acting reasonably, guaranteeing to the Vendors the due redemption by the Purchaser of the Class "A" and Class "B" Preferred Shares issued to the Vendors in accordance with the special rights attached to such shares;

(e) deliver to the Vendors an executed copy of the Shareholders Agreement.

The right of redemption for the Class A shares was contained in Schedule G together with the default provision. These shares were not entitled to dividends:

26.6 Upon the anniversary of the issuance of the Class A Preferred Shares in each of the five years immediately following the year in which the Class A Preferred Shares were issued, the Company shall redeem 1,000 of the Class A Preferred Shares on payment of $1,160 for each Preferred Share to be redeemed. Such redemption shall be made by the Company in each case pro rata among the holders of Class A Preferred Shares.

26.3 If the Company shall at any time fail to redeem Class A Preferred Shares in accordance with the provisions of section 26.6 hereof and if, within 15 days of the date specified for redemption in section 26.6 hereof the Company shall fail to deliver to the holders of the Class A Preferred Shares an offer by a qualified purchaser who is prepared to purchase from such holders at a price of $1,160 for each Preferred Share the 1,000 Class A Preferred Shares then to be redeemed, the holders of the Class A Preferred Shares shall, until such 1,000 Class A Preferred Shares are redeemed or purchased, be entitled to receive notice of, to attend and to cast at all meetings of the members of the Company a number of votes equal to twice the number of votes that may then be cast by the holders of all of the issued Common Shares.

Schedule H included a modified version of 26.6 to the same effect and these two controversial provisions:

2. Entitled to a dividend equal to any dividend paid to any person other than Orr on any shares of the Company other than Common shares and to a dividend calculated on the par value of the Class B Preferred Shares at 70% the amount paid in interest to the Holder of any debt of the Company incurred to fund the Purchase Price of the shares of Suburban. Any dividend payable on the Class B Preferred Shares can be paid by the Company issuing additional Class B Preferred Shares.

3. The Company can redeem the Class B Preferred Shares at any time at par value. The Company shall redeem the Class B Preferred Shares at the time of any redemption of shares or repayment of debt issued or incurred to fund the Purchase Price of the Suburban shares, pro rata. The Holder can demand redemption at par value of the Class B Preferred Shares at any time after one year from the date of issue and before five years from the date of issue.

151 The defendants plead that the agreement was too fraught with uncertainty to be enforced. Specifically, the terms of the guarantee and of the shareholders' agreement were not sufficiently definite to be practically workable.

152 They also plead that the agreement was subject to conditions precedent that were not performed. This argument can be dealt with swiftly. The evidence as a whole does not support any oral agreement that the Agreement would be subject to Mr. Knox' review of Schedules G and H. Mr. Knox testified that he suggested a thorough review of the Agreement for typographical errors and inconsistencies, that he wanted to review Schedules G and H, and that there were tax representations that might not be accurate. Aside from him, no one testified as to any reservations about Schedules G and H. As one of the Orrs' solicitors, he did not have authority to make the deal Mr. Orr signed for

himself and his parents, conditional on a further review of the provisions of the Schedules that had been reviewed during the meeting before the signing.

153 Mr. McKercher testified that the parties did agree there would be an opportunity for Suburban's accountants to ensure that the tax warranties were factually correct. Mr. Orr was of the same view. He said, at page 3011 of the transcript of the proceedings:

> I had to satisfy myself with regards to all of the tax representations to make sure they were correct and Deloitte's was in a better position than I was to deal with the technical side of that issue.

That was the extent of any oral agreement made at the signing of the Agreement. It was a fact-gathering exercise.

154 It was open to the purchaser to waive any of the tax representations and warranties. Thus, any that were incorrect were to be adjusted or deleted. Indeed all the conditions precedent contained in part 6 of the Agreement were "for the exclusive benefit of the Purchaser and may be waived by the Purchaser in writing in whole or in part on or before the Closing Date". Mr. Orr understood that. Mr. Heal testified that the tax representations were accurate. He had been the Orr family's tax advisor for many years and was in the best position to determine their accuracy.

ï **The Guarantee**

155 Mr. McKercher, who acted for 3473, Mr. Beckmann and Mr. Knox who acted for the Orrs, and Mr. Frank Murphy, called by the defendants to give his opinion on the drafting problems inherent in the Agreement, all agreed that the terms to be included in the document required by clause 9.3(d) are not 'boiler plate'. No draft of a guarantee was prepared, circulated or settled by the parties before the termination of the contract by the Orrs.

156 Mr. Murphy testified that there are several potential forms that the document could take and that could be insisted upon by a vendor acting reasonably. They included a restriction on the sale or charging of some or all of the properties and a requirement that Mr. Dorfman put up cash or collateral assets to ensure the company could redeem.

157 Mr. Dorfman at all times intended to execute a guarantee that he would purchase the preferred shares or see that some other qualified purchaser did so. Mr. McKercher considered that was the purpose of the guarantee. Mr. Murphy agreed that such a guarantee would achieve the purpose of clause 9.3 (d), but said, in essence, that such a promise did not guarantee "the due redemption" of the shares by 3473. Given the rights and restrictions attached to the preferred shares, and the fact that the Agreement left 3473 free to encumber all its assets, it is clear that the omission of the "or the purchase" was simply an oversight. The only document that could have satisfied clause 9.3(d) and been consistent with the Agreement is the one Mr. Dorfman was willing to sign.

158 The obvious intention and commercial expectation reflected in clause 9.3 and Schedules "G" and "H" is that Dorfman would ensure that Orr's preference shares were redeemed or purchased for the price and at the times specified in those Schedules. In other words, if the company did not redeem the

shares or find a purchaser willing to purchase them at the redemption price, Dorfman would find a purchaser willing to do so or purchase them himself.

159 At the time the contract was made, had someone asked "What if the company does not redeem or find a purchaser for Orr's preference shares?", the clear answer by Mr. Orr and Mr. Dorfman and their advisers would have been "Mr. Dorfman will find a purchaser or he will buy them. That is the meaning of his guarantee."

ï **Schedule K**

160 The Shareholders' Agreement was necessary to protect Mr. Orr's interest as a minority shareholder and unpaid vendor in the purchasing company. Schedule K was a letter from McCarthy, TÈtrault setting out "the heads of a Shareholders' Agreement to be entered into between Orr and Dorfman with respect to their rights and obligations as shareholders in the Purchaser." No one suggests that it is a Shareholders' Agreement.

161 The defendants say that Schedule K contemplated further negotiations between the parties as to the precise terms of the general provisions called in Schedule K. That may be. But the Agreement provided for the parties to execute an agreement "in such form as may be approved by [their] solicitors, acting reasonably". When the Agreement is read as a whole, that provision can mean only that the parties agreed that their solicitors would put the business terms on which they agreed into appropriate form.

162 Mr. Knox and Mr. McKercher agreed that it would be possible to settle a shareholders' agreement in accordance with the terms of Schedule K. Mr. Murphy said that there were additional terms a competent commercial solicitor would like to see in such an agreement. That may be. But no term essential to a shareholders' agreement was omitted.

163 The defendants argued that the best evidence that a shareholders' agreement could not be developed from Schedule K was the fact that none was settled before the termination of the Agreement on April 30.

164 They pointed to Item 13 to suggest that the parties intended to negotiate further about some terms. That item provided that "[t]he shareholders will agree to provide for a right of first refusal...". The solicitors were able to reach agreement on the precise terms of the right of first refusal although that item contained only a general requirement for a right of first refusal "to ensure that each Shareholder must offer his shares to the other of them before they are sold to any third parties."

165 Similarly, Item 12 provided that "[t]he Shareholders will agree to place all the outstanding Class A and Class B Preferred Shares in a Voting Trust ...." No agreement was reached between the solicitors about the precise terms of a voting trust. It was agreed that the voting trust contemplated by Item 12 was of no use to either shareholder. It could not have been an essential term of the shareholders' agreement and is no impediment to the enforcement of the Agreement.

166 The defendants also point to the lack of a workable definition of "after-tax cost" in Item 11. Mr. Murphy said that solicitors, acting reasonably, might disagree on a formula. They might also agree on one, or agree that after-tax costs could be determined by the company's auditors or by a third party. Mr. Murphy's concern about uncertainty seemed to centre on his view that 3473 would be a holding company without active income. There was no evidence to support that view, either in the Agreement or from the parties.

167 It is well settled that parties to a contract may leave something to be determined so long as that determination does not depend upon their further agreement. The parties agree with the expression of the fundamental rule about uncertainty by Viscount Dunedin in ***May and Butcher Ltd.* v. *The King***, [1934] 2 K.B. 17 (C.A.) at 21:

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. ... As a matter of the general law of contract all the essentials have to be settled.

168 All the essentials were settled. The Agreement Mr. Dorfman and Mr. Orr signed on December 18, 1989 was not illusory. The real issue in this lawsuit is whether that contract was induced by the fraud of Mr. Mooney and Mr. Dorfman or the false misrepresentation of Mr. Dorfman as to his ability to contribute $25 million to the transaction directly, or indirectly by providing security for the full amount of a loan in that amount to an offshore lender.

ï **Purchaser's obligations**

169 Before I turn to that issue, I want to consider the argument of 3473 that as a matter of law it was relieved of its obligation to be ready, willing and able to close the transaction on May 15, 1990 by the defendants' prior wrongful repudiation of the Agreement.

170 In Chitty on Contracts (27th ed., 1994), Vol. 1, General Principles, at para. 24-020, the learned author quotes this statement of Lord Esher, M.R. in ***Johnstone* v. *Milling***, (1886) 16 Q.B.D. 460 about the effect of an anticipatory breach:

> A renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. Where one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract ... The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the

purpose of bringing an action upon it for the damages sustained by him in consequent of such renunciation.

171 It is not disputed that the defendants repudiated the Agreement on April 30, 1990, nor that 3473 accepted the repudiation. Thus, the Plaintiff was relieved of any obligation to take further steps to finalize its financing. The defendants' unequivocal refusal to perform made any further efforts a complete waste of time. As Mr. Poettcker said, no one will buy litigation.

172 Nor is it disputed that Mr. Dorfman was insolvent on April 30, 1990. He agreed that his ability to complete the transaction depended on his coming to an agreement with Bentall. While Bentall and Mr. Dorfman had not reached an agreement on April 30, its president, Alvin Poettcker, persuaded me that Bentall was ready, willing, and able to purchase an assignment of the Agreement. The terms of its agreement with Mr. Dorfman would likely have been very similar to those that had been offered by Mr. Poettcker, because Bentall was likely to have discovered Mr. Dorfman's financial circumstances during its investigation of the value of his guarantee. The likelihood is that Bentall would have paid Mr. Dorfman $1 million for the assignment of the Agreement. Bentall, like David Mooney, knew that Mr. Dorfman had negotiated a good deal. While it might have preferred a clean asset deal, a share purchase was what was available. It would have come to realize that was the only deal available, because Mr. Orr had learned in mid-March, if not before, that North American Life was willing to pay $40 million for the assets of Suburban.

B. Are the defendants entitled to rescission for fraudulent misrepresentation?

173 It is a well-settled general rule that parties are not obliged to disclose material facts not known to the other party in the course of negotiations toward a contract. In this context his counsel argues that Mr. Dorfman did no more than businessmen do every day. He struck the best bargain he could.

174 It is equally well-settled that negotiating parties are obliged to be honest with each other. Thus, a person who enters a contract in reliance on a deliberately misleading statement of the other may terminate that contract when he learns of the dishonesty and recover such damages as he has suffered as the result of the dealings. When dishonesty is involved, it matters not whether the misrepresentation is material, in the sense that it would have affected the judgment of a reasonable person in the same situation.

175 However unrealistic the result, the evidence is persuasive that Mr. Orr believed not only that Mr. Dorfman was capable of providing $25 million from his personal assets to fund the purchase by 3473 of 75% of Mr. Orr's Suburban shares, but that he was ready and willing to do so. It is also clear that Mr. Orr accepted as true Mr. Dorfman's statement to the effect that he had sufficient assets to back his guarantee of the redemption or purchase of the Class B preferred shares.

176 The plaintiffs say that it cannot be fraud or deceit to give a guarantee without sufficient assets to back up your maximum exposure, in this case $37.3 million. That is the effect, they say, of the Orrs' pleading of false misrepresentation in their defence to the two actions.

177 That would be so had Mr. Dorfman done no more than assent to a request for a guarantee. Mere silence about his personal financial situation would not be deliberate misleading, whatever value Mr. Orr may have ascribed to the guarantee he was requesting from whatever information he had garnered from Mr. Mooney or from the surroundings in which he found himself in London or from his credit enquiries or from his conversations with Mr. Dorfman.

178 However, the circumstances on December 14 in the Russell & DuMoulin boardroom were different. There Mr. Dorfman crossed the line to deceit. He did not merely state his opinion as to the value of his guarantee based on his perception of the risk that his guarantee would be called. By his statement and conduct Mr. Dorfman deliberately instilled a false belief in Mr. Orr intended to induce the execution of a contract he knew Mr. Orr would not otherwise sign.

179 Mr. Beckmann asked Mr. Dorfman directly about the value of his guarantee. To all present, including his own solicitor, Mr. Dorfman conveyed the impression that he was offering something of value in place of the security being requested. I have no doubt that he achieved exactly the result he sought to achieve. By his words and conduct Mr. Dorfman deliberately misled everyone in that room into believing that he had assets available to back his guarantee of the additional $7.3 million. In fact on December 14, 1989, Mr. Dorfman was probably insolvent. Without that misrepresentation Mr. Orr would not have signed the Share Purchase Agreement. Mr. Dorfman knew that.

180 Just as Mr. Orr would not have signed the Share Purchase Agreement without the misrepresentation about the value of Mr. Dorfman's assets, so Mr. Orr would not have entered negotiations in London without the carefully-crafted, deliberately misleading statement that Mr. Dorfman could provide conveniently $25 million from his own resources to fund the purchase.

181 The opinion of McGillivray, J.A. in ***Farris*** v. ***The Queen*** (1965), 50 D.L.R. (2d) 689 (Ont. C.A.) is instructive in this regard. At 695, that learned justice, speaking for the Court in an appeal of Mr. Farris' conviction for perjury, and having found the word "share" to be ambiguous, said: " ... the accused may still be found guilty upon this charge if the Crown can establish that he was aware of the sense in which it was used in the question put to him ...."

182 So are the facts in **R. v. Barnard** (1837), 7 C. & P. 784. There the court found a fraud in the obtaining of goods on credit in Oxford by wearing without right an undergraduate's cap and gown.

183 The word "resources" may be capable of more than one meaning, but Mr. Dorfman used it to convey precisely the meaning Mr. Orr took from it. The suggestion by his counsel that he meant only that he had the resources to raise the necessary funds on the security of the Suburban assets smacks of the devious. Even in the context of negotiations between experienced real estate men, the word "resources" must carry its plain, ordinary meaning. Synonyms that come to mind are substance, assets, capital, fortune, riches, wealth, property, money, cash, treasure, possessions, belongings. All suggest concrete measurable wealth, not some ephemeral inner resource or ability. That is the language of the confidence game, not commerce. Mr. Dorfman knew that.

184 It is no answer to say that those in the real estate game play by different rules, that exaggeration and ambiguity are habitually employed as

traps for the unwary, that no one expects to be believed. Nor is it an answer to say that Mr. Dorfman never intended Mr. Orr to suffer any loss or that he believed that the deal he was proposing would benefit Mr. Orr as well as himself and Mr. Mooney.

185 What matters is that Mr. Dorfman knew his statements were untrue, knew Mr. Orr would believe them, knew that Mr. Orr would act on them, and knew that without them, Mr. Orr would not deal with him. This constitutes deceit: **Edgington v. Fitzmaurice** (1885), 29 Ch.D. 459 (C.A.).

186 In reaching the conclusion that Mr. Dorfman set out to deliberately mislead so as to induce negotiations and ultimately the Share Purchase Agreement, I am mindful of the caution one must exercise before finding conduct to be deceitful or fraudulent. This is particularly so when the impugned conduct is said to have produced a preposterous response. I was incredulous throughout the trial that Mr. Orr and Mr. Richards could have been so easily beguiled and that they could draw experienced commercial solicitors to accept their view. Only Mr. McKercher admits to having been somewhat sceptical. It is a measure of Mr. Dorfman's talent that Mr. McKercher was able to entertain even as a possibility that Mr. Dorfman intended to fund 3473 from his personal assets.

187 It defies commercial sense that anyone could believe that an experienced business person, even of immense wealth, would want to put so many of his eggs in one basket, directly or indirectly. Even substantial institutional investors share the risks of investment, as can be seen by the North American arrangements. Even substantial corporate investors borrow money to leverage their assets, as can be seen by the Bentall proposal. For most of the twenty weeks of the trial I looked with scepticism upon Mr. Orr's complaints, considering that he and Mr. Richards had come to their view late in the day to avoid a transaction with rogues when the advantage of dealing with them had long gone and a better deal with nicer people had come along. But careful analyses of the evidence, first by counsel, then by me, have persuaded me that indeed that is what happened. Mr. Orr was beguiled by the artful, charming Harold Dorfman, who crossed the line into dishonesty because of need. Mr. Dorfman had taken the measure of Mr. Orr from Mr. Mooney. Mr. Mooney was convinced that Mr. Dorfman could beguile Mr. Orr with the lure of an offshore payment, the appearance of great wealth, and careful obfuscation. Had Mr. Dorfman left Mr. Orr to draw his own conclusions, there would have been no deceit, but he chose to gild the lily, first, with the line that he had resources conveniently available, then with the proposition about the value of his guarantee. Apparently, he needed to move beyond mere silence to arrive at a deal.

188 In the course of reaching this conclusion, I have also been very much aware that courts may exist to protect the weak from those who freely accept authority or power from them, but it has never been the duty of a court to protect the strong but gullible who choose to enter a world unknown to them for profit, legal or otherwise. They are protected only by the standards of the marketplace, by commercial morality. Commercial morality demanded only honesty of Mr. Dorfman.

189 Mr. Dorfman was under no obligation to reveal his personal financial situation to Mr. Orr, but when he told Mr. Orr and Mr. Richards that he could make available $25 million from his own resources he "misspoke," to use a word favoured by Mr. Orr. Mr. Dorfman had no such resources. He misspoke with the

deliberate intention of inducing Mr. Orr to negotiate a sale of his Suburban shares at a price and on terms and conditions that left room for him to profit, with the investment of only his time and skill. He knew from the beginning that such an investment was not enough to bring Mr. Orr to the table and keep him there until a deal was signed.

190 The Orrs complain about other misrepresentations. All of Mr. Dorfman's subsequent conduct merely continued the fundamental false representation he made in early November, 1989, in London. Without that representation and the representation on December 14 in Vancouver about the value of his guarantee, the other conduct of which they complain would have been unlikely to cause any harm.

191 Mr. Dorfman's statements about a long-term partnership were inconsistent with the call option Mr. Dorfman negotiated on December 15. That was obvious to everyone in the room and must have been obvious to Mr. Orr. In those circumstances any continuing talk of partnership was simply idle chatter to make everyone feel good, not a statement intended to be relied on for some effect, certainly not an inducement to sign a Share Purchase Agreement containing an immediate call option.

192 I appreciate that it was also obvious to anyone who read the Share Purchase Agreement that Mr. Dorfman was free to encumber the assets to fund the purchase of Suburban shares. That is where Mr. Dorfman's subsequent conduct played its role. It supported the misrepresentation about the source of the $25 million. He talked of back-to-back financing from Europe, of advice from his tax accountants, of his need for absolute control and maximum flexibility, of the need for the appearance of arm's length financing, and he offered his guarantee, all to keep the freedom to encumber the properties to secure an arm's length loan, without revealing his intention to do exactly that to Mr. Orr or anyone other than Mr. Mooney and potential sources of finance.

193 It is settled law that to constitute deceit or common law fraud, a representation must have the four characteristics laid down by the House of Lords in ***Bradford Building Society*** v. ***Borders***, [1941] 2 All E.R. 205 (H.L.). Damages are not an essential element: "Even if no loss was suffered by the innocent party, as long as it can be shown that it was a false misrepresentation that induced the making of the contract ... the contract may be avoided for fraud" (Fridman G.H.L., "The Law of Contract in Canada" (3rd ed., 1994) at p. 360); "Damages need not be proven in order to obtain recission" (Brazier M., "Street on Torts" (9th ed., 1993), footnote 13 at p. 121).

194 The two representations I have found to be false were known to be so by Mr. Dorfman. I have found that he made them with the intention that each should be acted upon by Mr. Orr. I have also found that Mr. Orr did act on them. He entered into an agreement he would not otherwise have made as a result of the second misrepresentation. As a result of the first misrepresentation he accepted business terms he would accept only from a person acceptable to him as a potential partner. It follows that he and his parents are entitled to rescission of the Share Purchase Agreement. It also follows that Mr. Mooney is not entitled to any reward for his efforts in bringing the parties together.

195 Before considering whether the Orrs are entitled to damages from Mr. Dorfman, I will consider briefly the defendants' other grounds for relief against him and their claim against Mr. Mooney.

III. Conspiracy

The Allegation

196 The Orrs allege that Mr. Mooney and Mr. Dorfman conspired to obtain the assent of Tom Orr to an agreement that would allow them to acquire the shares in Suburban through 3473 without putting up any of their own money and, thereafter, to sell its assets or to assign the transaction to a third party without regard to the Orrs' interests. They say that Mr. Mooney and Mr. Dorfman acted in concert to achieve this common objective by unlawful means. The unlawful means were fraud by both of them and breach of fiduciary duty by Mr. Mooney with the knowledge of Mr. Dorfman.

The Law

197 For the purposes of these proceedings the law is settled by two relatively recent decisions of the Supreme Court of Canada:**Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate** (1983), 145 D.L.R. (3d), 385 (S.C.C.) and **Hunt v. Carey Canada Inc.**(1990), 74 D.L.R. (4th) 321 (S.C.C.). In **Hunt** at p. 340, Wilson J. adopted this statement of the tort of conspiracy from Fridman's "*The Law of Torts in Canada*" (1990), Vol. 2, at pp. 265-266:

> In modern-day Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the Plaintiff. Second, there will be an actionable conspiracy if the Defendants combine to act lawfully with the predominating purpose of injuring the Plaintiff. Third, an actionable conspiracy will exist if Defendants combine to act unlawfully, their conduct is directed towards the Plaintiff (or the Plaintiff and others), and the likelihood of injury to the Plaintiff is known to the Defendants or should have been known to them in the circumstances.

Then she commented:

> In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is 'good law', it seems to me, it is not for the court to consider in this proceeding ...

There has been no further comment from the Supreme Court of Canada.

198 All counsel agreed that this passage from **Nicholls v. Richmond**, [1984] 3 W.W.R. 719 (B.C.S.C.), McLachlin J., (as she then was) sets down the test for the unlawful means conspiracy the Orrs allege in these actions (at p. 730):

> The requirements of the second type of conspiracy, conspiracy by unlawful means, are an agreement between two or more persons which is effected by

unlawful conduct where the defendants should know in the circumstances that damage to the plaintiff is likely to ensue and such damage does in fact ensue.

...

The Agreement

On either category of conspiracy, the Plaintiff must show more than that the Defendants independently intended to injure the Plaintiff or to commit an unlawful act; an agreement must be established: *Mulcahy v. R.* (1868), L.R. 3 (HL) 306 at 317; *Crofter Handwoven Harris Tweed Co. v. Veitch* [1942] A.C. 435 at 469 (HL).

'Agreement' is not used in the formal sense of a binding contract but rather in the sense of a joint plan or common design: *Humphrey v. Wilson* 25 B.C.L.R. 110, [1917] 3 W.W.R. 529 (BCSC); *Gee v. Freeman* (1958) 26 W.W.R. 546, 16 D.L.R. (2d) 65 (BCSC).

Such an agreement can be proved by direct evidence. But it may also be inferred if the facts justify its inference on the basis of the following test set out by the Lord Chancellor in *Sweeney v. Coote* [1907] A.C. 221 at 222 (HL):

> In such a proceeding [i.e., where civil conspiracy is alleged] it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them.

The Facts

199 The Orrs find convincing direct evidence of an agreement to defraud in the telephone conversations between Mr. Dorfman and Mr. Mooney before Mr. Orr and Mr. Richards visited London in November, 1989. The evidence is persuasive that Mr. Mooney and Mr. Dorfman had a common purpose. They wanted to acquire the Suburban portfolio on a fully-leveraged basis, something Mr. Mooney knew Mr. Orr thought impossible, so that Mr. Dorfman could earn a profit by sale of the contract or resale of the properties in a reasonably short period and Mr. Mooney could earn a profit by redevelopment with others of some of the properties included in that portfolio.

200 I have found that Mr. Dorfman induced Mr. Orr to contract by deceit rather than persuasion or honest bargaining. The evidence indicates that Mr. Mooney intended that attracting behaviour and non-disclosure be used. It is not so clear that Mr. Mooney shared Mr. Dorfman's intention to effect their common purpose by deceit or that either of them knew or should have known in the circumstances that damages would ensue from Mr. Dorfman's deceitful behaviour.

201 Mr. Mooney identified the opportunity for someone other than himself to acquire the portfolio by a leveraged deal. He saw downstream opportunity for himself if that person were someone with whom he could work. But he also intended that the transaction he envisaged and probably explained to Mr. Dorfman, would serve Mr. Orr's purpose of avoiding Canadian income tax on a portion of the proceeds of the sale of that portfolio. Mr. Mooney knew that Mr. Orr would not sell the portfolio or any part of it to him. He also knew that his relationship with Mr. Orr, and the nature of the transaction Mr. Dorfman was proposing to Mr. Orr, meant that he would require Mr. Orr's consent before he could participate in development of the properties by the purchasing company. I am sure he and Mr. Dorfman saw the transaction Mr. Dorfman was proposing as having little or no downside risk for Orr. They trusted their judgment about the inherent unrealized value of real estate. Mr. Orr took advice, but he, too, trusted only his own judgment when it came to making a deal. Mr. Mooney, and therefore Mr. Dorfman, knew that too.

202 So, in furtherance of their plan, Mr. Mooney introduced Mr. Dorfman to Mr. Orr without revealing Mr. Dorfman's relatively strained financial situation in circumstances where he knew that Mr. Orr would draw the conclusion that Mr. Dorfman was still the man of wealth Mr. Mooney had heard he once was. Mr. Mooney and Mr. Dorfman both knew that Mr. Orr was not interested in negotiating with anyone incapable of investing sufficient equity capital to permit the properties to carry the financing. So, Mr. Mooney told him what he had heard about Mr. Dorfman's past success as an owner of an exchange bank. Mr. Dorfman talked about his successful real estate developments.

203 Mr. Mooney did not influence Mr. Orr's decision as to the price or terms of the deal, other than to encourage Mr. Orr's efforts to stow some of the proceeds offshore. At most he advised Mr. Dorfman on what terms Mr. Orr might find attractive based on his knowledge of Mr. Orr's goals and the understanding he had acquired of the development potential and value of the properties.

204 Mr. Dorfman played his part as the wealthy Englishman and induced Mr. Orr by what I have found to be a false misrepresentation to accept a $25 million down-payment with vendor financing for the balance of the purchase price. Mr. Mooney stood by without telling Mr. Orr that he believed that Mr. Dorfman did not have that many resources. He insisted even at the trial that he had considered Mr. Dorfman a wealthy man in November and December, 1989, that it was not until late in these proceedings that he learned that Mr. Dorfman was insolvent. I prefer the evidence of Mr. McKercher and Mr. Nicholson. Mr. Mooney was of the opinion in October, 1989, that Mr. Dorfman did not have much money of his own. He told Mr. Nicholson that. He believed that Mr. Dorfman was in financial difficulty in April, 1990. He told Mr. McKercher that.

205 However, there is no evidence that Mr. Mooney was present at the December 14 meeting where Mr. Dorfman misrepresented the extent of his U.K. assets and the value of his guarantee. There is no evidence that he ever considered that Mr. Orr's economic interest was or could be at risk from Mr. Dorfman's misrepresentation in London.

206 The potential harm to Mr. Orr of the two misrepresentations was that Mr. Orr's security for the unpaid purchase price would be subordinated to first mortgage financing for the down payment. But neither Mr. Dorfman nor Mr. Mooney thought that any harm could come from that fact. As it turned out they were right. It is unlikely any harm would have resulted from the Bentall assignment.

207 The actual harm came about because Mr. Orr would not have entered into negotiations with Mr. Dorfman, had he known that Mr. Dorfman was incapable of putting any substantial resources into the purchasing company. When he learned that Mr. Dorfman was not funding 3473 with his own resources and heard the proposal Bentall was making, he terminated the agreement. When he did that he threw away the costs he had incurred on the transaction with Mr. Dorfman and the five and one half months during which he had dealt exclusively with Mr. Dorfman.

208 That was a reasonable response to deceit, one he was entitled to make. A victim of fraud is never obliged to perform a transaction induced by that fraud. It is unlikely, however, that Mr. Mooney ever anticipated that result or could have, before the deal was made. The most Mr. Mooney could have known is that his silence and Mr. Dorfman's statements could lead Mr. Orr to put his economic interest at more risk than he would have accepted without Mr. Dorfman's assurances of great wealth.

209 Nevertheless, Mr. Mooney permitted a false statement to be made, knowing it was contributing to Mr. Orr's decision to deal with Mr. Dorfman.

210 The ultimate issue on this claim is whether the Orrs have proven the requisite knowledge to constitute the tort of conspiracy. In my view they have not. Mr. Mooney's subjective, reasonably held view that no harm would come to Mr. Orr from that part of Mr. Dorfman's deceit of which he was aware negates an unlawful means conspiracy. Mr. Mooney neither knew nor should have known that injury to Mr. Orr was likely from what Mr. Dorfman said in London. Mr. Dorfman's deceitful behaviour in London induced Mr. Orr to contract with him, but it did not induce better terms. Mr. Orr arrived at business terms with Mr. Dorfman in London that he liked quite independently of the misrepresentation. It was the misrepresentation in Vancouver in December that induced the signing of the Share Purchase Agreement with only a valueless guarantee for security. Mr. Mooney had no knowledge of that misrepresentation, nor could he have anticipated that event.

IV. Mooney's Role

Fiduciary duty

211 Mr. Mooney began as a "finder" entitled to a fee on closing of whatever deal he could arrange. In London he became a facilitator paid by Mr. Orr to assist Mr. Dorfman with a view to closing the deal they had made. Implicit in the agreement he and Mr. Orr made about his services was a duty of loyalty and good faith to Mr. Orr. Mr. Mooney says he never breached those duties, however they are classified. A fiduciary duty is generally described as one that includes duties of honesty, loyalty, and good faith. These duties are said to require full disclosure of any real or potential conflicts of interest. However, it would be to reason backward from duties Mr. Mooney accepted by contract to categorize his relationship with Mr. Orr as fiduciary.

212 Mr. Mooney did not owe Mr. Orr the entire gamut of duties that are implicit in the fiduciary relationship. Mr. Mooney was not Mr. Orr's agent because he had no authority to do anything on behalf of Mr. Orr. Mr. Orr was never "at the mercy of [Mr. Mooney's] discretion" (per Sopinka J. in ***Lac Minerals Ltd* v. *International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, at p. 599). Mr. Orr never sought Mr. Mooney's advice. He did not "repose trust and

confidence" in Mr. Mooney and did not "rely on [Mr. Mooney's] advice in making business decisions" (per LaForest J. in ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377, at pp. 419-420, citing Keenan J. in ***Varcoe v. Sterling***(1992), 7 O.R. (3d) 204 (Gen. Div.), at pp. 234-36 as representing an accurate statement of fiduciary law in the context of independent professional advisory relationships). Mr. Orr reposed neither confidence nor confidences in Mr. Mooney. He contracted Mr. Mooney's services to obtain a qualified buyer for the Suburban portfolio, and subsequently to facilitate the closing of the deal, nothing more. Mr. Mooney failed in that endeavour. In that attempt he breached his contractual obligation of loyalty to Mr. Orr. That is enough to found Mr. Mooney's liability.

Contractual duty

213 The evidence establishes that Mr. Mooney breached his contractual duty of loyalty and good faith when he failed to tell Mr. Orr of his doubts about Mr. Dorfman's financial circumstances when he knew those financial circumstances were material to Mr. Orr's decision-making process, particularly to Mr. Orr's assessment of the risk involved in the transaction he was negotiating.

214 The contractual relationship required Mr. Mooney to disclose information he had that would correct the impression he knew Mr. Orr was under, and particularly required him not to stand by and permit deceit to be perpetrated by Mr. Dorfman. To this breach it is no answer to say that Mr. Mooney did not anticipate harm, that Mr. Mooney intended only benefit to the Orrs, or that Mr. Orr had put him in a delicate position.

215 Thus, not only is Mr. Mooney not entitled to a finders' fee, he is liable to compensate Mr. Orr for whatever damages flowed from his breach of contract.

V. Counter-Claim for Fraudulent misrepresentation

Rule for Assessing Damages

216 The rule for assessing damages for fraudulent misrepresentation was stated in ***Doyle* v. *Olby (Ironmongers), Ltd,*** [1969] 2 All E.R. 119 (C.A.) at 123:

> It appears to me that in a case where there has been a breach of warranty of authority, and still more clearly where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting point for any court called on to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it will be too remote not necessarily because it was not contemplated by the representor but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated on him.

217 The Orrs seek reimbursement for expenses they threw away in negotiating the Share Purchase Agreement with Mr. Dorfman. They also seek compensation for the loss of the opportunity to sell to another purchaser and to invest the proceeds of that sale during the period of time they were dealing with Mr. Dorfman.

Loss of Opportunity

218 It is settled law that damages may be recovered for lost opportunity: ***Houweling Nurseries Ltd.*** **v.** ***Fisons Western Corp.*** (1988), 37 B.C.L.R. (2d) 2 (BCCA); ***Papageorgiou*** **v.** ***Seyl*** (1990), 45 B.C.L.R. (2d) 319 (BCCA); ***Bradshaw Construction Ltd.*** **v.** ***Bank of Nova Scotia***(1992), 73 B.C.L.R. (2d) 213 (BCCA).

219 Mr. Dorfman must compensate the Orrs for the opportunity they lost because they dealt with him after the false misrepresentation in November in London. Mr. Mooney must compensate the Orrs for the opportunity they lost because he breached his contractual duty to provide whatever information he had about Mr. Dorfman's financial circumstances if not at the same time that he told Mr. Orr about the information he had received from one Ronny Aitken some years before, then in London when he heard Mr. Dorfman say what he knew was not true.

220 The assessment of damages for lost opportunity is not a mathematical exercise. In the words of Cumming J.A. in ***Bradshaw***, at 229: "It is, essentially, an exercise in weighing the positive and negative contingencies in order to assess a fair and reasonable amount to compensate for the loss sustained". What the Orrs would have done had the representations not been made is difficult to assess.

221 The evidence of Mr. Jubb persuaded me that North American was ready, willing, and able to purchase the Suburban properties for $41 million whenever it could persuade Mr. Orr to execute an asset agreement. The evidence is not so clear as to when Mr. Orr would have listened to North American's agent or when he would have agreed to sell assets at that price if he had not dealt with Mr. Dorfman. Mr. Orr had accepted asset transactions at significantly higher prices before his initial conversation with Mr. Mooney about an offshore transaction. In September he had declined an opportunity to consider an asset transaction at $38 million. It was not until January 1990, that Mr. Orr proposed a sale to Mr. Dorfman of all the Orrs' shares for $40 million. By then he should have been aware that his carried interest in 3473 was of little value, but he seemed to harbour some belief that the Share Purchase Agreement was not binding, and he was also bargaining for the security he had foregone in December. Moreover, his desire for a share transaction was tied to his desire to be paid some of the proceeds of the sale offshore. I cannot conclude with any certainty when he would have given up that idea had he not gone through the exercise with Mr. Dorfman and received the advice of Mr. Moore and the tax lawyers at McCarthy, TÈtrault.

222 Taking account of the concerns of Mr. Orr and his parents' desire to sell as soon as possible, it seems quite likely that he would have come to an agreement with North American within a short time of receiving an offer from that company. But North American had been trying to get Mr. Orr's attention without success since mid June 1989. It changed its agent only in early 1990. Bentall would have been interested at the same price in early 1990. Other local

interest was being shown by that time. The most probable scenario is that Mr. Orr would have been persuaded to an asset deal at the price that seems to have represented the realistic value of the Suburban portfolio by the end of February. Such a deal would have closed on or about May 31, 1990. The possibility of an earlier sale is offset by the possibility that it would have taken Mr. Orr longer to come to realize that an asset sale at $41 million was the best he could do.

223 I accept Mr. Proctor's evidence that the loss to the Orrs of the opportunity to invest the proceeds of a sale for $41 million on May 31 instead of August 31 is $438,000.00. They are entitled to damages in that amount with interest under the Court Order Interest Act from August 28, 1990.

Special Damages

224 The Orrs are also entitled to special damages. They claim to have spent $196,550.00 for travel, legal, and accounting expenses relating solely to the dealings with Mr. Dorfman and Mr. Mooney. It is difficult to sort out just what time of what lawyers and accountants was spent exclusively on those dealings after the first representation. Those who testified were giving estimates. Undoubtedly there was some personal benefit to Mr. Orr from some of the travel expenses. I have no doubt significant portions of the legal and accounting fees resulted from Mr. Orr's desire to avoid taxes and his affinity for spending time with lawyers. Clearly some of the accounting fees were for work that would have been required in any event. Somewhat arbitrarily I have decided that a fair compensation for expenses reasonably attributable to the deceit or breach of contract is $100,000.00. The Orrs are entitled to interest on that amount from May 31, 1990 under the Court Order Interest Act.

Punitive Damages

225 The Orrs are not entitled to punitive damages in this matter. Mr. Mooney breached a contract. He did not participate in a fraudulent scheme. Rather, he failed in his duty to prevent Mr. Dorfman from deceiving Mr. Orr. Mr. Dorfman's conduct offends community standards of decency. But so does that of Mr. Orr. It is inappropriate for the court to award punitive damages to a person who entered negotiations with a view to secreting a portion of the sale proceeds offshore without advising revenue authorities of that portion of the proceeds. Without Mr. Orr's desire to secrete a portion of the proceeds offshore, I am convinced his relationship with Mr. Mooney and Mr. Dorfman would never have begun.

226 As agreed, counsel may speak to the matter of costs at their convenience.

"C.M. Huddart J."

Vancouver, B.C.

May 18, 1995