

Citation: Shah v. Bakken  
2001 BCSC 1467

Date: 20011019  
Docket: C983540  
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**NAVNIT SHAH  
L'ABRI PROJECT FIFTEEN LTD.**

PLAINTIFFS

AND:

**MARK ALFRED BAKKEN, LINDSAY KENNEY, PALADIN  
MANAGEMENT LTD., PATRICIA BAKKEN, RAE-GER  
ENTERPRISES LTD., GERALD A. PETTIT, 431876 B.C. LTD.,  
DETRIMAR REALTY INC. doing business as COLDWELL  
BANKER 1st PIONEER REALTY and the said  
DETRIMAR REALTY INC., 431852 BRITISH COLUMBIA LTD.,  
LINDA CRAIG, and STEWART HENDERSON**

DEFENDANTS

AND

Docket: C946063  
Registry: Vancouver

BETWEEN:

**MARK ALFRED BAKKEN**

PLAINTIFF

AND:

**NAVNIT SHAH and  
L'ABRI PROJECT FIFTEEN LTD.**

DEFENDANTS

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE MR. JUSTICE SCARTH**

Counsel for the Plaintiffs,  
Navnit Shah and L'Abri Project  
Fifteen Ltd.:

Jalal A. Jaffer

Counsel for the Defendants;  
Mark Alfred Bakken, Paladin  
Management Ltd., Patricia Bakken,  
Rae-Ger Enterprises Ltd., Gerald  
A. Petit and 431876 B.C. Ltd.:

Michael D. Tatchell

Counsel for the Defendant,  
Lindsay Kenney:

Angela E. Thiele

Counsel for the Defendant, Linda  
Craig and Stewart Henderson:

David J. Taylor  
and Kimberley H. Beck

Date and Place of Trial:

January 10-14, 17-21,  
24-26, 27 and 31;  
February 1-4, 7-11 and  
14-17; March 27-31; and  
April 10-14, 2000  
Vancouver, BC

[1] In their action [No. C983540], which was commenced on May 25, 1995, Navnit Shah and his family holding company L'Abri Project Fifteen Ltd. allege on the part of the defendant Mark Alfred Bakken deceit, fraud, breach of contract, fraudulent misrepresentation, negligent misrepresentation, breach of duty

of care, breach of duty of good faith, breach of fiduciary duty, misconduct and unprofessional behaviour, amongst other things, in connection with a business venture concerning the acquisition of certain real estate franchises and offices. They also allege that Mr. Bakken's former employer, the law firm of Lindsay Kenney, is vicariously liable for Mr. Bakken's deceit, fraud, breach of duty of care, breach of duty of good faith, breach of fiduciary duty, and misconduct and unprofessional behaviour. They also allege breach of fiduciary duty on the part of the defendants Patricia Bakken, Gerald A. Petit, Linda Craig and Stewart Henderson. They seek general, punitive, aggravated and exemplary damages as well as certain unpaid salaries .

[2] By the order of this Court made on January 18, 2000 the action was dismissed as against the defendants Craig and Henderson.

[3] In his action [No. C946063], which was commenced on November 9, 1994, Mr. Bakken alleges that the defendants Mr. Shah and L'Abri Project Fifteen Ltd., in two letters dated October 25, 1994, published on or about November 1, 1994 words defamatory of him which, in their natural and ordinary meaning, meant that he had deceived and defrauded Mr. Shah and L'Abri, that he was engaged in a conspiracy to defraud them,

that he was guilty of wrongdoing and dishonesty and that he had misappropriated money from a certain company. Mr. Bakken also alleges that in their statement of claim and amended statement of claim filed in Action No. C983540 above Mr. Shah and L'Abri published words defamatory of him which, in their natural and ordinary meaning, meant that he had concocted a scheme, instigated a conspiracy, and engaged in a series of acts and omissions to deceive and defraud Mr. Shah and L'Abri, that he had misled, lied to and concealed facts from Mr. Shah and L'Abri, that he was attempting to stonewall and to cover up his deceit and fraud, that he had misappropriated money from a certain company, and that, whilst acting as a lawyer for, amongst others, Mr. Shah and L'Abri, in connection with the business venture, he had committed fraud and deceit, acted in conflict of interest, was in breach of his fiduciary duty by acts of concealment, non-disclosure, misrepresentation and failure to advise of the need for separate representation, and had acted in bad faith and solely to serve his personal interests. Mr. Bakken seeks general, punitive and aggravated damages.

[4] The two actions arise from essentially the same events and hence, by orders made on August 30, 1999, the two proceedings were directed to be tried at the same time. By

agreement of counsel Mr. Shah and L'Abri presented their case in Action No. C983540 first. The defendants in that action then presented their case which included Mr. Bakken's claims in the libel action.

[5] The facts follow.

[6] Mr. Shah is 65 years of age. He came to Canada from his native Uganda in 1971 and, apart from the first 8 months following his arrival in Canada during which he lived in West Vancouver, has lived in Langley since March, 1972. He and his wife Rekha have a daughter Nina and a son Biren both of whom are in their late thirties.

[7] Mr. Shah obtained in Uganda the equivalent of Grade 12 matriculation, and then went to England. He studied English and met the entrance requirements for Middle Temple, one of the four Inns of Court. He was called to the bar in England on July 20, 1960.

[8] Following his return to Uganda Mr. Shah practised law primarily in the criminal courts for five years, and then, until he left Uganda in 1971, mostly did property management work.

[9] Although in his curriculum vitae Mr. Shah describes himself as "Bar-at-Law (England)", he does not have a

certificate to practise law in this country. At the time he came to Canada his qualification to practise in England was not recognized here because he lacked an undergraduate degree. Secondly, he had to obtain Canadian citizenship before he could be called to the bar and admitted as a solicitor in British Columbia, a requirement which would take five years. So he chose instead to go into the real estate business.

[10] Mr. Shah began by promoting joint ventures in land development with friends through a company he had formed in 1972, L'Abri B.C. Limited. Around 1980-81 he became licensed as a real estate salesman, and then a few months later became licensed as an agent. He continued with his joint venture business, albeit on a smaller scale. He was actively involved in the real estate industry including serving a term as president of the Fraser Valley Real Estate Board and as chairman of several of the Board's committees.

[11] Mr. Shah testified that he became involved with Mr. Bakken in 1992. He had been considering whether he should give up real estate and turn to giving seminars to real estate licensees. Before making his decision he received a telephone call sometime during the summer of 1992 from Deborah Kimberley. Ms. Kimberley is now Ms. Deborah Stephens, but was

referred to by the name Kimberley during the trial. I shall do likewise in these reasons.

[12] According to Mr. Shah Ms. Kimberley wished to meet with him to discuss something in private. Mr. Shah, through his involvement with the Fraser Valley Real Estate Board, knew Ms. Kimberley casually as a real estate salesperson. They arranged to meet in a coffee shop. Mr. Shah testified that she told him that she and a friend wanted to promote a real estate agency business by obtaining a franchise. They were looking for an agent nominee for the new real estate company. She asked Mr. Shah if he would agree to become the agent nominee of the business. Mr. Shah wished time to think over the proposal.

[13] Mr. Shah called Ms. Kimberley in Nanaimo 10 days later. He had decided that he would take the job but wanted to know who were the people involved and secure agreement on his compensation. She told him the person involved was Mark Bakken and that he was a lawyer with Lindsay Kenney, a Vancouver law firm with an office in Langley. At that time Mr. Shah did not know Mr. Bakken. He did know the law firm. Ms. Kimberley arranged an evening meeting between her, Mr. Bakken and Mr. Shah at Lindsay Kenney's offices in Langley.

[14] At the meeting Mr. Shah was told by Mr. Bakken that the franchise they were thinking of taking was Coldwell Banker, and that it was for Langley City. They wanted to have his confirmation that he would agree to act as an agent nominee. Mr. Bakken said the agency would be run by Ms. Kimberley. Mr. Shah had no difficulty with that as long as it related to recruiting salespeople and managing the office and he had control. He wished to be a compulsory signatory to trust cheques. At a subsequent meeting toward the end of August, 1992 with Ms. Kimberley and Mr. Bakken it was agreed Mr. Shah would be paid \$3,000 per month by way of salary, \$500 per month towards promotional and entertaining expenses, and 5 percent of the agency's total gross commission. Although a contract relating to Mr. Shah's employment with a company known as Detrimar Realty Inc. was later prepared and given to Mr. Shah by Mr. Bakken, it never was signed, according to Mr. Shah.

[15] Around that time Mr. Shah, at Mr. Bakken's request, agreed to become president of Mr. Bakken's company on being assured that he did not have to be a director of the company. Mr. Shah was not asked to sign a form of consent to be president. Nor at that time was he aware of the name of the company which was to commence the business operation.

[16] On August 27, 1992 Mr. Shah met with Mr. Bakken, Ms. Kimberley and two representatives of Coldwell Banker in the boardroom of Lindsay Kenney. Following the presentation of a video regarding Coldwell Banker Mr. Shah was asked to sign a bundle of documents which Mr. Bakken described as the "franchise documents" and assured Mr. Shah that he had gone through them and everything was "okay". Mr. Shah signed the Franchise Agreement as president of Detrimar Realty Ltd., the Franchisee under the Agreement. Ms. Kimberley signed the Agreement as Secretary/Treasurer of Detrimar Realty Ltd. The Franchisor was Coldwell Banker.

[17] Mr. Shah also signed as president of Detrimar Realty Inc. a Schedule to the Franchise Agreement which showed that the trade name of Detrimar Realty Inc. was "1st Pioneer Realty" and that Detrimar was owned as to 22.5 percent by Dehtar Investments and as to 77.5 percent by Paladin Management. Other schedules to the Agreement indicate that 100 percent of Dehtar Investments was owned by Deborah Kimberley and that 100 percent of Paladin Management was owned by Mr. Bakken. Those two schedules were signed respectively by Ms. Kimberley and Mr. Bakken in Mr. Shah's presence on August 27, 1992.

[18] In September, 1992, Mr. Shah states, he signed a Statutory Declaration in connection with obtaining a licence

from the Real Estate Council of British Columbia for "Detrimar Realty Inc. doing business as 1st Pioneer Realty". The Statutory Declaration is dated September 21, 1992. He signed the declaration in Mr. Bakken's presence in Mr. Bakken's office at Lindsay Kenney, but does not recall whether Mr. Bakken signed the jurat at that time. The document refers to Exhibit "A" as being attached - "a statement showing the financial situation" of Detrimar as at September 20, 1992 and consisting of 7 pages. They were not attached to the Statutory Declaration when he signed it, Mr. Shah testified, and his initials "NS" appearing on each of the 7 pages were not put on by him.

[19] Under date of June 9, 1995 Mr. Shah received from the Real Estate Council copies of the documents sent to the Council by 1st Pioneer Realty between November 1, 1992 and December 31, 1993. Included was an "Application for Real Estate Licence" dated September 20, 1992. Mr. Shah recognizes Mr. Bakken's signature on behalf of Detrimar Realty Inc. The document indicates Mr. Shah to be "President/Director" of Detrimar. Mr. Shah states that as of that time he had not signed a consent or agreed to be a director of Detrimar. So too with respect to the "Notice of New Directors" dated September 4, 1992, Mr. Shah states that he was "surprised" to

see that he was shown, along with Ms. Kimberley, to be a new director of Detrimar.

[20] According to Mr. Shah Detrimar Realty Inc. operating as Coldwell Banker 1st Pioneer Realty commenced its real estate business operations on November 1, 1992 in a building located at 20526 Fraser Highway, Langley City. The owner of the building was a numbered company, 431852 British Columbia Ltd. A corporate search as of December 14, 1994 shows that Mr. Bakken was director and president/secretary of the company. A three year lease of the property commencing October 1, 1992 was entered into during the month of September, 1992 between 431852 B.C. Ltd. as lessor and Detrimar Realty Inc. as lessee. Mr. Shah told the Court that in the lease he recognizes the signature for 431852 B.C. Ltd. to be that of Mr. Bakken, and the signature for Detrimar Realty Inc. to be that of Ms. Kimberley. Mr. Shah stated extensive renovations to the building were carried out by Mr. Bakken to make it suitable for a small real estate agency office.

[21] It was a difficult time. Mr. Shah was the office manager and Linda Craig was the office secretary and conveyancing secretary. It was hard to attract sales people to the

company. Up to June, 1993, Mr. Shah guesses, there were 8 to 10 sales people.

[22] In April, 1993 David McDonald was employed as sales manager. Mr. Shah was made the general manager and continued as agent nominee of the company.

[23] During the first 9 months the company performed financially very badly, Mr. Shah stated. By the end of July, 1993 the company, according to its financial statements, had accumulated losses amounting to over \$126,000. In the following five months, to the end of December, 1993, the company incurred further losses of over \$15,000. Mr. Shah testified that expenses for both periods would have been much higher

had it not been for the fact that I had agreed to my salary being reduced from \$3,000 per month to \$500.00 per month.

Mr. Shah's belief is that his salary was reduced to \$500 per month from January 16, 1993 to the end of June, 1993 and then increased to \$1,000 per month from July 1 onwards. However, he states, from October 1st to the end of December, 1993 he was not paid anything. By memorandum dated October 1, 1993 Mr. Bakken told him and Mr. McDonald that effective October 1st management salaries were suspended due to expenses of

\$18,000 in September against income of only \$2,500.

Mr. Bakken was desperately trying to sell the agency business, Mr. Shah said. As well, it appeared that Ms. Kimberley wanted to leave the business and live in Florida.

[24] Mr. Shah testified that Mr. Bakken asked him for help. He had developed a fatherly affinity for Mr. Bakken and therefore told him that he would not mind investing some money. Mr. Shah came up with the idea of forming a brand new company composed of Mr. Bakken, Mr. McDonald, himself and various sales people. He asked Mr. Bakken to come up with the figures so that he could take the proposal to the sales people. Mr. Shah did not like Mr. Bakken's proposal, he said, because Mr. Bakken was attempting to recover as much as possible of his capital expenditure. When he put the proposal to the sales people around the end of September or beginning of October neither they nor Mr. McDonald was prepared to make any investment on that basis.

[25] According to Mr. Shah, Mr. Bakken announced that he would close down the business as of December 31, 1993.

[26] On October 12, 1993 Coldwell Banker announced the merger of its real estate operations with those of Canada Trust Financial Services and the sale of the offices owned by Canada Trust.

[27] Mr. Bakken, Mr. Shah testified, broached with him whether he would be willing to participate in the purchase of the Canada Trust office in Willowbrook (Langley). Mr. Shah was not keen, but would if it helped and provided Ms. Kimberley was not a part of the arrangement. Mr. Shah told the Court:

And I told him that it had to be a completely new company, and nothing to do with the existing Caldwell [sic] Banker 1st Pioneer Realty at 20526 Fraser Highway.

[28] On October 28, 1993 Mr. Shah met with a representative of Coldwell Banker and Mr. Bakken at Mr. Bakken's office. He initialled a Confidentiality Agreement regarding the sale of Canada Trust offices which was presented to him and which Mr. Bakken had signed.

[29] In early November, Mr. Shah stated, Mr. Bakken provided him with spread sheets he had prepared which showed projected income and expenses for Coldwell offices in Walnut Grove, Burnaby, Chilliwack, Abbotsford, Surrey, Langley and Port Coquitlam, depending upon the number of sales people in a given office. They did not discuss these spread sheets, Mr. Shah states. Mr. Bakken told him that "he enjoys playing with figures, he enjoys doing this on the computer".

[30] Over the ensuing months, Mr. Shah testified, he had several discussions with Mr. Bakken regarding the proposed

purchase of Canada Trust offices. Mr. Bakken's role was to negotiate with Coldwell Banker in respect of the purchase. Eventually a deal was struck for the purchase of three offices, in Langley, Surrey and Port Coquitlam.

[31] On occasion Mr. McDonald and Stewart Henderson, then manager of Canada Trust's Langley office, participated in the discussions between Mr. Shah and Mr. Bakken. At their first meeting, held in Lindsay Kenney's boardroom and attended by Bakken, Shah, McDonald and Henderson, Mr. Shah states that he expressed the view that in order to succeed in the real estate agency business Mr. Bakken should have shareholders from amongst office managers and producing salespeople. He proposed that he, Mr. Bakken, Mr. McDonald, Mr. Henderson and another office manager should each own 15 percent of the shares, and various salespeople would purchase small parts of the remaining 25 percent. Each percentage would be worth \$3,000. The names of several managers were suggested as being possible participants in the investment. Some declined to participate; Mr. Henderson wished to participate only to the extent of 7.5 percent.

[32] Mr. Shah testified that by the first part of December, 1993 he understood, as a result of his discussions with Mr. Bakken, that he, Shah, would increase his contribution to

\$56,250 in order to take up the slack created by Mr. Henderson's reduced participation, and that Mr. Bakken would increase his cash investment from \$90,000 to \$102,000 in order to take over Mr. McDonald's 5 percent position and the reduction by 1 percent to 24 percent of the salespeople's participation.

[33] Mr. Bakken had undertaken to incorporate a new company. They had agreed that the new company would retain the name "Detrimar Realty Inc." as well as the trade name "Coldwell Banker 1st Pioneer Realty". The name of the existing, or old, Detrimar Realty Inc. would be changed to a numbered company in order to make the name available to the new Detrimar Realty Inc. The existing office on Fraser Highway was closed and the building leased by Mr. Bakken to a firm of solicitors. The new Canada Trust offices would come fully furnished so they would have no need of furnishings from the existing office.

[34] In the new company Mr. Bakken would be the CEO, he, Shah, would be president, and Mr. Henderson, as well as being manager of the Langley office, would be vice president of the company. One of the salesmen, one Allan Evans, was to be manager of the Port Coquitlam office, and one Randy Chreptyk, an agent from Coldwell Banker's office in Surrey, would become the manager of the Surrey office.

[35] Mr. Shah testified that there was no discussion of which he was aware about the new company buying any of the old company's business or accounts receivable, or about the new company assuming any bank liability of the old, or about the new company acquiring the furniture or equipment of the old. There was discussion about the possibility of a fee being payable for the transfer of the franchise agreement to the new company, which Mr. Bakken said he would try to have waived.

[36] In mid-December Mr. Bakken asked Mr. Shah for a cheque in the amount of \$45,000. According to Mr. Shah Mr. Bakken told him at that time that he had returned Mr. Henderson's cheque for \$22,500 to him at his request. Mr. Shah provided Mr. Bakken with a cheque for \$45,060, post dated to December 31, 1993, and drawn on the account of Ronova Project One Ltd., a company owned by Mr. Shah and his family. At Mr. Bakken's request the cheque was made payable to "Coldwell Banker - 1st Pioneer Realty". The cheque was intended to be applied to the purchase of shares worth \$60 in the new company and a shareholder's loan in the amount of \$45,000 in the new company, Mr. Shah stated. Mr. Bakken also told him that he had not yet prepared the incorporation papers for the new company, which concerned Mr. Shah because his family wished him to take them home. Mr. Shah stated that he asked Mr.

Bakken if he had his \$90,000 ready, and Mr. Bakken told him that he did.

[37] At Mr. Bakken's suggestion Mr. Shah, around March 8th, 1994, gave Ms. Craig, the office manager, a cheque for \$11,250, drawn on the account of Ronova Project One Ltd. and representing Mr. Shah's additional investment in the new company. The cheque was payable to "Coldwell Banker - 1st Pioneer Realty". Mr. Bakken told Mr. Shah at that time that now that Mr. McDonald was no longer a participant in the venture he, Bakken, would prepare the corporate documents, tie up the loose ends, and give him, Shah, a binder of documents.

[38] After it was paid Mr. Shah obtained the cancelled cheque for \$11,250 back from the Credit Union upon which it was drawn. The reverse side of the cheque had been endorsed with the words and numbers: "For Deposit Only 614357-020". Mr. Shah testified that he recognizes account 614357-020 as being that of old Detrimar.

[39] The completion date of the sale of the three Canada Trust offices to Detrimar Realty Inc. was changed from December 31, 1993 to January 14, 1994. Mr. Shah states that he signed a Statutory Declaration at Mr. Bakken's request in December, 1993 for the purpose of obtaining a licence for Detrimar Realty Inc. from the Real Estate Council. The Statutory

Declaration refers as being attached as Exhibit "A" a statement showing the financial situation of Detrimar Realty Inc. doing business as 1st Pioneer Realty as at December 30, 1993. Exhibit "A" was not attached to the Statutory Declaration when he signed it, Mr. Shah stated. He questioned the need of providing the Real Estate Council with a year-end accounting report, and Mr. Bakken said he would double check the need for the report and complete the documents. Mr. Shah says that Mr. Bakken did not sign the Statutory Declaration in his presence. However, he later came across a copy of the Statutory Declaration in a file he had at one time kept in his office. It is dated December "30 ST", 1993 and bears Mr. Bakken's signature on the jurat. According to Mr. Shah he recalls signing the document before Christmas.

[40] Mr. Shah states that at the time of the closing of the purchase of the Canada Trust offices he attended at Lindsay Kenney's new office in Langley at Mr. Bakken's request. Mr. Bakken, Mr. McDonald and Ms. Craig also attended. Mr. Bakken handed him the documents and asked him to sign them. Mr. Bakken, in answer to Mr. Shah's question as to whether it was alright to sign the documents, told Mr. Shah that he had checked them out and everything was "okay". "Upon his advice", Mr. Shah testified, he signed them. He signed

the Purchase and Sale Agreement dated as of January 10, 1994 on behalf of Detrimar Realty Inc., as well as a Promissory Note for \$60,000 in favour of Canada Trust Realty Inc., a form of Indemnity, Security Agreement and Subleases for the three offices. However, Mr. Shah testified, he did not initial Appendix 1 to the Head Lease made October 30, 1989 between Truscan Realty Limited and The Canada Trust Company. Mr. Shah certified as correct a Resolution of the "sole Shareholders and Directors" of Detrimar Realty Inc. made on January 14, 1994 which, amongst others things, approved the acquisition and authorized the execution and delivery of the documents.

[41] As well he signed a form of Indemnity on behalf of L'Abri Project Fifteen Ltd. as a shareholder of Detrimar Realty Inc., in which L'Abri guaranteed the performance of Detrimar's Promissory Note and Security Agreement, up to the amount of \$15,800. He did not see the form of Indemnity being signed by Mr. Gerald Petit on behalf of Rae-Ger Enterprises Ltd., but recognizes, he says, Mr. Bakken's signature on a form of Indemnity given by Paladin Management Ltd. and Mr. McDonald's signature on a form of Indemnity given on his own behalf.

[42] According to Mr. Shah his duties with new Detrimar included being its president and overall general manager of the three offices. To give support to the Surrey office,

where the number of salespeople had fallen from 20 to 5 since the time the purchase of the office had been negotiated, Mr. Shah decided to have his licence at that office. He stated that of the 15 or so salespeople at old Detrimar's office, all except one or two had left before or shortly after joining new Detrimar. Mr. Shah said that he attended the weekly sales meetings at each of the offices as well as the monthly meetings of the board of directors of new Detrimar.

[43] Following the completion of the purchase documents relating to the acquisition of the Canada Trust offices, Mr. Shah from time to time spoke with Mr. Bakken regarding, amongst other documents, the incorporation documents and share certificates. Mr. Bakken, Mr. Shah stated, would always say that he had not yet prepared them and that he would do so in due course. Under date of June 19, 1994 Mr. Shah wrote Mr. Bakken on behalf of himself and L'Abri as follows:

Re: Detrimar Realty Inc.

We are one of the substantial shareholders of the above-named company. It has been about six months since the Company was incorporated. However, as to its records and documents, we are totally in the dark. As such, will you please send us copies of the records and documents listed on the attached sheet marked ' SCHEDULE of Records & Documents of DETRIMAR REALTY INC. '

We undertake to pay any reasonable cost thereof.

A handwritten note at the foot of the letter reads:

Mark. Please give me a call when these documents are ready for me to pick up.

[44] According to Mr. Shah several factors prompted him to write that letter. One was Mr. Bakken's "string of excuses" for not providing the corporate records. A second was the negative change in attitude of Ms. Craig and Mr. Henderson toward him after he had given her his second cheque for \$11,250 in March, 1994. A third was his concern that the company seemed to be in a tight financial situation within months of starting although the original concept had involved an injection of cash in the amount of \$300,000.

[45] Mr. Bakken responded to Mr. Shah's letter of June 19, 1994 by way of memorandum dated June 22, 1994 to Mr. Petit and Mr. Henderson with a copy to Mr. Shah as follows:

Attached is a request made by NS and Labri for records and documents.

The corporate records and materials are available to all Directors and Shareholders and are at the company's registered and records office located at #154 - 19653 Willowbrook Drive, Langley, B.C., V2Y 1A5.

It is unusual for any Director or Shareholder to maintain copies of all documents as they are available for inspection at the records and registered office. Likewise, however, there is nothing inappropriate about a Director having copies

of documentation in their capacity as Director or Shareholders having copies of relevant documents for their records.

As a consequence Linda has been requested to gather the information together and, in fairness to all parties, copies of all of the documentation will be given to all Directors and Shareholders.

[46] Mr. Shah told the Court that he received two binders of documents on June 29th along with a handwritten memorandum from Mr. Bakken dated June 28th in which Mr. Bakken asked Mr. Shah to call him, after he had reviewed the documents, to discuss any concerns, and stated that a proposal regarding the Surrey assets and a proposal for the lease of the Coquitlam office must be addressed shortly. Mr. Shah said it took him a long time to review the documents in the binders. He was "profoundly hurt", he testified, to see how the new company was structured. At the beginning of one of the binders, referred to as the "Roll Over Binder", was a "Sequence of Events" which Mr. Shah said he understood "a little bit". He testified:

I found it inconsistent with what I had agreed with Mr. Bakken.

Apart from the last event concerning the purchase of shares by a Mr. Capota, he had no knowledge or understanding of the other steps, he stated.

[47] Although a slightly expanded sequence of events was given to Mr. Shah in February, 1996, the version contained in the Roll Over Binder when Mr. Shah received it on June 29, 1994 was in the following form:

SEQUENCE OF EVENTS - Detrimar Realty  
formerly Debtar.

1. December 1, 1993 Paladin acquires shares and loans of Debtar. All loans are released. Result Debtar shell company of which Paladin owns 100 shares.
2. December 2, 1993 Rae-Ger purchases 100 shares of Debtar from Treasury @ 1 cent each. Result Paladin has 100 shares, Rae-Ger has 100 shares.
3. December 3, 1993 Debtar purchases all assets of Detrimar Realty and Debts of Detrimar, provided however debts are limited to \$40,000.00. Detrimar receives 72,000 Class C preference shares retractable at \$1.00 per share. Total cost to Debtar \$112,000.00. Paladin and Rae-Ger retain approximately \$56,000.00 in shareholder loans that are written off and Detrimar retains liability for the remaining bank debt of approximately \$15,000, which Paladin and Rae-Ger assume liability for, which results in total losses of approximately \$70,000.00.
4. December 4, 1993 Debtar retracts its preferred shares issued to Detrimar and issues two Promissory Notes, on [sic] for SIXTY THOUSAND (\$60,000.00) DOLLARS and one for TWELVE (\$12,000.00) DOLLARS. At the request of Detrimar the SIXTY THOUSAND (\$60,000.00) DOLLAR Promissory Note is payable to Paladin and the TWELVE THOUSAND (\$12,000.00) DOLLAR Promissory Note is payable to Rae-Ger. Result Paladin has 100 shares and loan of \$60,000.00. Rae-Ger has 100 shares and loan of \$12,000.00.

5. December 20, 1993  
Detrimar changes its name to:  
431876 B.C. LTD.  
Debtar changes its name to:  
Detrimar Realty Inc.
6. December 21, 1993  
Debtar, (now Detrimar) issues 7900 shares for  
\$.01 each to Paladin. Debtar (now Detrimar)  
issues 1500 shares for \$.01 each to Rae-Ger.
7. December 31, 1994 [sic 1993]  
Debtar (now Detrimar) issues the following  
shares:

<u>Issue:</u>		<u>Total Shares</u>
Paladin	4000	12000
Rae-Ger	1000	2600
L'Abri 15 Holdings Ltd. ("L'Abri")	6000	6000
Stewart Henderson ("Henderson")	3000	3000

F January 5, 1993 Debtar (now Detrimar)  
receives the following loans:

Paladin	\$30,000.00
Rae-Ger	\$ 7,500.00
L'Abri	\$45,000.00
Henderson	<u>\$22,500.00</u>
	\$105,000.00

8. January 14, 1994  
Debtar (now Detrimar) purchases Langley, Port  
Coquitlam, and Surrey locations of Canada  
Trust.
9. On or about January 30, 1994 Paladin transfers  
200 shares of Debtar (now Detrimar) to L'Abri  
and assigns \$1,500.00 of dollars owed to  
Paladin by Debtar (now Detrimar) to L'Abri.  
Result:

	<u>Loans</u>	<u>Shares</u>
Paladin	88,500.00	11,800
Rae-Ger	19,500.00	2,600
L'Abri	46,500.00	6,200
Henderson	22,500.00	3,000
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	177,000.00	23,600

10. On or about January 30, 1994 McDonald does not buy in - thereafter L'Abri purchases from Paladin 1500 shares and part of the Paladin Loans in the amount of \$11,250.00 for \$11,250.00.  
Result:

	<u>Loans</u>	<u>Shares</u>
Paladin	77,250.00	10,300
Rae-Ger	19,500.00	2,600
L'Abri	57,750.00	7,700
Henderson	22,500.00	3,000
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	177,000.00	23,600

11. On or about February 15, 1994 Petr Capota purchases 600 preference shares for \$6,000.00 dollars.

[48] Mr. Shah testified that he confronted Mr. Bakken at a meeting of Detrimar directors with not making proper, full and comprehensive disclosure statements about the sale of assets and assignment of loans from his old company. Mr. Bakken produced a page from an Acquisition Summary and stated that he had made a full disclosure but no one had asked questions so he did not go into detail. Mr. Shah asked for a refund of his investment.

[49] Mr. Shah stated that because he was not able to unscramble the entire structure which he saw as "deceitful" he wrote the following letter, dated August 21, 1994 and marked "Private and Confidential" to Mr. Bakken:

Dear Mark:

Ever since our last Detrimar directors' meeting, I have been agonizing over the next step I should choose to take with regard to your role in the entire scheme of the purchase of the three Canada Trust offices. My agonizing is all the more profound because of my background in that in 1964 at age 28 I was elected by my peers for three years in succession as the youngest Bencher of the Law Society of Uganda and in that I served as the chairman of the Business Practices Committee and the chairman of the Arbitration Committee of the Fraser Valley Real Estate Board in 1987 and 1988 respectively.

As such, on the one hand I am conditioned to turn in a fellow professional if his/her conduct is unbecoming of a professional; yet on the other hand, as regards your conduct I have been mentally debating what consequences innocent others would suffer if I turned you in to the Law Society of British Columbia. At Lindsay Kenny, I have known Jan for some years and I knew Michael Kale. Though I have never met her, I am also thinking of your good wife Patrice and the children.

Upon reflection and careful scrutiny, I find that your actions constitute a breach of the statutory (sic) law in two ways, a breach of the common law in three ways AND a breach of the conflict of interest guidelines of the Law Society.

At the last meeting when I confronted you with not making properly full and comprehensive disclosure statements about the sale of assets and assignment of loans from your old company, you lost your cool. You brought out a one page document and angrily said

that at one meeting in the past you had slipped in that document proposing such a sale and assignment of loans and as no one had anything to say about it, you thought everyone was agreeable. Still in rage, you went on to warn me that you were not lying. And you repeated the same.

Mark, if it were in my nature to aggravate an already edgy person, I could have easily retorted by saying: "What else do I expect from a person who towards his colleagues in the law firm wants to be secretive about his business venture. And, worse still, he wants his new management team to lie about his involvement."

As to my shares in and loans to Detrimar, I am not prepared to wait until you and Stewart find a purchaser. I expect you personally to refund my monies. In the event I choose to file legal proceedings as well, I have no doubt that the Court would find your conduct so deserving of punishment that I would be granted punitive damages.

As such, to begin with, I serve notice that you send me your payment of \$56,310 (\$45,000 + 11,250 +60) on or before September 12, 1994. As to the damages, I am prepared to sit down and negotiate on a reasonable basis.

Until September 12th you have my word I will not undertake any course of action.

[50] With a letter to Detrimar Realty Inc. dated August 29, 1994 Mr. Bakken enclosed his resignation as a director of the company and stated:

Due to allegations raised by Mr. Shah in his letter of August 21<sup>st</sup>, 1994, all of which are hereby expressly denied, I feel it is in the best interests of the Company to resign pending resolution of the allegations contained in said letter.

[51] The matter was not resolved. Under date of October 29, 1994 Mr. Shah and L'Abri Project Fifteen Ltd. wrote the following letter, marked "Private and Confidential", to the following: Mr. Bakken, care of his solicitors, attention Mr. Brewer; Lindsay Kenney; Ms. Patrice Bakken; Paladin Management, care of Mr. Bakken's solicitors, for the attention of Mr. Brewer; Gerald Petit; Rae-Ger Enterprises Ltd. and 431876 B.C. Ltd., both care of Mr. Bakken's solicitors, for the attention of Mr. Brewer; Detrimar Realty Inc.; John and Jane Doe:

Dear Sirs and Madam:

Re: Detrimar Realty Inc.

In view of all of the facts known to you, we accuse you of a two-fold deceit and fraud, a conspiracy to defraud and a breach of fiduciary duties. As a result of your wrongdoings, we have suffered damage in that we have been deprived of an invincible management shareholding block, we have been transferred shares in a company which was already in deep debt before it commenced its main business and we were induced to give a loan of \$56,250., which money was appropriated by Mark Bakken for purposes other than those of the company.

In the circumstances, we have now instructed our lawyer, Mr. Jalal Jaffer of Peterson Stark in the City of Surrey to institute legal proceedings to claim fair value of the shares as at January 16, 1994 if the twofold deceit and fraud had not taken place, to claim the recovery of the loan of \$56,250 and further to claim damages for both deceit and fraud and for breach of fiduciary duties.

A copy of our letter to Mr. Jaffer is enclosed and is sent to you on a Without Prejudice basis.

[52] The letter to Mr. Jaffer is also dated October 29, 1994. It too is marked "Private and Confidential". The relevant parts read:

Re: Mark Bakken and Detrimar Realty Inc.

This is to instruct you to act for us in the matter of Mark Bakken's fraud. ...

In his third letter, Mr. Brewer has suggested rescission; we reject it outright as a simplistic remedy. His clients would have to do more, a lot more.

As to the share offering, we view it as a perpetuating act of Mark Bakken's fraud. Had he made the actual direct loans proportionate to his shareholding and not by way of roll over from the old Detrimar to the new one, there would be no need for this offering.

...

[53] On November 9, 1994 Mr. Bakken commenced a libel action against Mr. Shah and L'Abri (Action No. C946063). The two letters of October 29 formed the basis of that action.

[54] In his amended statement of claim Mr. Bakken alleges that Mr. Shah and L'Abri have, since May 25, 1995 - the date upon which their statement of claim was filed in Action No. C983540 - "falsely and maliciously printed and published...to third parties a series of false and defamatory statements ..."

concerning the plaintiff (Bakken) in their statement of claim and amended statement of claim. Mr. Bakken alleges:

13. The Statements of Claim contain the following defamatory words.

31. After the third week of January, 1994 had passed, Shah continued to press Bakken for copies of all corporate documents for the new company, copies of cash journal to show shareholder's loans and cash reconciliation statements; however, Bakken continued to make excuses and failed to provide the information and the copies of the documents requested. Finally, Shah made a formal written demand for the documents on or about the 19th of June 1994;

32. On or about the 29th day of June, 1994 Bakken provided two binders of corporate documents and commercial documents which brought to light for the first time the events described in paragraphs 26 (a) to (m). Upon carefully reviewing the documents, analyzing them, counter-checking them and understanding them, the Plaintiffs were shocked and astounded to learn that, contrary to the express agreement with the Plaintiffs, and contrary to the statements/promises/assurances given to the Plaintiffs, Bakken with the support or acquiescence of the other Defendants, had woven a tangled web of deceit and fraud to enrich himself personally, directly or indirectly, and to enrich the other Defendants, directly or indirectly, at the expense of and to the great prejudice of the Plaintiffs;

33. The Plaintiffs state that the following acts or omissions, or any of them, of the Defendants constitute deceit or equitable fraud:-

a) Contrary to the clear understanding of the Plaintiffs and contrary to express and or implied representations/promises/ assurances by Bakken, a brand new company had not been incorporated to purchase the three Canada Trust offices;

- b) Without the knowledge, consent or approval of the Plaintiffs, Bakken, with the knowledge, approval or acquiescence of the other Defendants, used a company owned or controlled by Bakken called Debtar, changed its name to Detrimar (the New Detrimar) to purchase the three Canada Trust offices;
- c) Prior to the New Detrimar purchasing the three Canada Trust offices, Bakken and the other Defendants, arranged for the sale and transfer of the assets/liabilities of 1st Pioneer Realty owned by the Old Detrimar to Debtar (to become the New Detrimar) such that the New Detrimar acquired liabilities of \$112,000.00 plus operating costs, for assets which had virtually no market value;
- d) Bakken and the other Defendants used portions of the cash contributions made by the Plaintiffs to the New Detrimar to pay off in part the liabilities of the Old Detrimar now assumed by the New Detrimar, for the direct and or indirect benefit of Bakken and the other Defendants;
- e) Bakken and the other Defendants diverted the second cheque for \$11,250.00 referred to in paragraphs 28 above to Bakken's numbered company, 431876 to partially pay a Bank loan;
- f) Bakken, contrary to the agreement and his express representations/promises/ assurances failed to contribute his portion of the shareholders' loan by way of cash, and failed to collect shareholders' loans from other shareholders as required, and deliberately misled the Plaintiffs by asserting that such loans had in fact been paid;
- g) Bakken continued to conceal all of the facts, circumstances and particulars described in subparagraphs 26 (a) to (m) and 33 (a) to (f) above for some seven (7) months;
- h) The Plaintiffs were deliberately kept in the dark as to the steps being taken by Bakken and

other Defendants and none of the agreements, corporate resolutions, share transfers and share allotments were ever shown to the Plaintiffs or their approval or consent sought or obtained;

34. The Plaintiffs state that the representations or non-disclosures or acts of concealment, or any of them, described in paragraphs 24 and 27, constituted representations of material facts, which were false and which the Defendant, Bakken, knew to be false, or made recklessly without belief in their truth, or made deliberately with the intention that they be relied upon by the Plaintiffs;

38. The Plaintiffs state that the Defendants, Paladin, Patricia, Rae-Ger, Petit, 431876, the New Detrimar, 431852, Craig and Henderson had actual or constructive knowledge of the dishonest or fraudulent design on the part of the Defendant, Bakken, or with knowledge of the circumstances which would put a reasonable person on enquiry whether a dishonest or fraudulent design was being carried out by Bakken, did fraudulently or negligently participate in the fraudulent misrepresentations of material facts by Bakken or did participate in the breach or breaches of fiduciary duty or duty of good faith owed to the Plaintiffs by the Defendant, Bakken and Lindsay Kenney, in the following manner:-

- a) signing documents, consents, resolutions and agreements which they knew, or ought to have known were part of the fraudulent design to damage the Plaintiffs and enrich the Defendants;
- b) participating in the concealment of all material facts from the Plaintiffs;
- c) failing to pay their pro-rata shareholders' loans in cash;
- d) participating in the purchase of the assets of 1st Pioneer Realty by the New Detrimar at a price of \$112,000.00 plus operating costs for

fifteen (15) days when they knew that the said assets had virtually no value at all;

[55] Mr. Shah and L'Abri admit, in their amended statement of defence, that they sent copies of the letters of October 29th to Mr. Bakken, Lindsay Kenney, Ms. Patrice Bakken, Paladin Management Ltd., Gerald Petit, Rae-Ger Enterprises Ltd., 431876 B.C. Ltd. ("old Detrimar"), and Detrimar Realty Inc. ("new Detrimar").

[56] Mr. Bakken is 40 years of age. He was born in the Township of Langley and, apart from the time he studied law at the University of British Columbia from 1984 to 1987, has lived all his life in the Township of Langley. Mr. Bakken was called to the bar of this province on May 20, 1988 following a period of articles with Lindsay Kenney in 1987 and 1988. As of the date of his call he became an associate with that firm. In December, 1996 Mr. Bakken left Lindsay Kenney in order to accept a position as administrator of the Township of Langley.

[57] Mr. Bakken married Patricia Petit in August, 1983. He and his wife have two sons, aged 12 years and 10 years.

[58] During the time he practised law with Lindsay Kenney Mr. Bakken's focus was on the solicitors' side of the practice. He did residential and commercial real estate and lending work and some corporate work. In the late summer of

1991 the firm opened a branch office in Langley. Mr. Bakken, because of his Langley roots, moved his practice there. Although initially this branch or subsidiary office consisted of only Mr. Bakken and one litigator, it expanded to include two solicitors and three litigators. Mr. Bakken focused on real estate transactions, at first residential and then commercial, lending work, some corporate work, wills and estates, and more generally whatever walked through the office door.

[59] Mr. Bakken met Ms. Kimberley in the fall of 1991 or early spring of 1992. He was introduced to her by a lending representative of one of the banks, a Ms. Marlene Tauber. Ms. Kimberley was a real estate agent in Langley who was experiencing some frustration with her work. The three met socially for lunch on occasion. Ms. Kimberley began to express an interest in setting up her own real estate business in Langley.

[60] Ms. Kimberley did not have the financial resources both to purchase land and a building to house her real estate operation and to set up and operate the business. A plan evolved in which Mr. Bakken and his family would acquire a property as an investment and lease it back to Ms. Kimberley. Ms. Kimberley found suitable property at 20526 Fraser Highway

in early to mid-August and a contract of purchase was entered into. Mr. Bakken formed a company in early September, 1992 - 431852 British Columbia Ltd. - to take title to the property. His wife is the shareholder in that company. Mr. Bakken undertook renovations to the building to adapt it from a medical office to a real estate agency.

[61] At the same time, that is, in early September, 1992, Mr. Bakken formed Ms. Kimberley's personal corporation - Dehtar Investments Ltd. - and a company - Detrimar Realty Inc. - which would own the real estate business. The companies 431852, Dehtar and Detrimar were all incorporated on September 4, 1992. The corporate documents for each company were prepared by Mrs. Bakken who is a highly qualified legal secretary in the field of corporate records, civil litigation and wills and estates.

[62] It became clear to Mr. Bakken in August, 1992, after the property had been acquired and whilst renovations were underway, that Ms. Kimberley lacked the financial resources to finance the entire real estate operation herself. Mr. Bakken's wife owned a holding company, Paladin Management Ltd. Mr. Bakken and Mrs. Bakken decided that the real estate operation was a viable investment and, through Paladin, to become an equity participant in the operation. At the end of

the day, although Mr. Bakken was unfamiliar with how to run a real estate business, Paladin acquired a 77.5 percent interest in the operating company, Detrimar Realty Inc. Ms. Kimberley's company, Debtar Investments Ltd., acquired a 22.5 percent interest. The expectation at that time was that as Ms. Kimberley's situation improved she would acquire the entire interest in the real estate operation. Notwithstanding Paladin was the major investor, the operation of the real estate business was essentially Ms. Kimberley's responsibility. She, however, kept Mr. Bakken informed of developments in the business operation.

[63] Ms. Linda Craig, now Linda Weston, a friend of Ms. Kimberley, became involved in the spring of 1992 in the discussions regarding the real estate operation. Mr. Bakken was at that time introduced to Ms. Craig by Ms. Kimberley.

[64] Ms. Kimberley had need of an agent nominee for Detrimar Realty Inc. Ms. Kimberley and Ms. Craig identified Mr. Shah as being well suited for the position. Ms. Bakken had attended school with Mr. Shah's daughter in 1979-80, and knew of Mr. Shah as a lawyer and real estate developer of some prominence in the Fraser Valley area, as well as past president of the Fraser Valley Real Estate Board.

[65] Ms. Kimberley arranged a meeting between herself, Mr. Shah and Mr. Bakken. The meeting took place during the evening in Lindsay Kenney's boardroom in Langley. It lasted about one hour. Mr. Bakken recalls that amongst other things they discussed whether Mr. Shah would be interested in becoming agent nominee for the business. The meeting adjourned on the basis that Mr. Shah and Ms. Kimberley would reflect on the matter. Although Mr. Bakken was told what was going on and was consulted by Ms. Kimberley, it was she who made the arrangements regarding Mr. Shah's employment and settled the details of his salary and benefits. Mr. Bakken prepared an employment contract between Mr. Shah and Detrimar Realty Inc. based on his discussions with Ms. Kimberley and Mr. Shah. However, the agreement was never executed. Mr. Bakken's belief is that Mr. Shah had difficulty with some of its terms.

[66] In mid-August, Ms. Kimberley selected Coldwell Banker as providing the best franchise for the real estate agency. A Residential Franchise Agreement was executed on August 27, 1992 at Lindsay Kenney's offices in Langley, although the effective date of the agreement is stated to be September 22, 1992. This arrangement, according to Mr. Bakken, was to give the representatives of Coldwell Banker time to have the

agreement signed by its appropriate officers in California and Ontario. The agreement, amongst other things, permitted Detrimar Realty Inc. to use as a part of its trade name, but not as part of its legal or corporate name, the Trade Mark "Coldwell Banker". Thus, Detrimar Realty Inc. came to trade by the name "Coldwell Banker 1st Pioneer Realty". The agreement itself was prepared by Coldwell Banker.

[67] Mr. Shah signed the Franchise Agreement on behalf of Detrimar Realty Inc. as president of the company, albeit Detrimar had not at that point been incorporated. By the time the agreement became effective (September 22, 1992) Detrimar was an incorporated entity.

[68] Mr. Bakken signed a schedule to the agreement as president and secretary-treasurer of Paladin Management, indicating that he was "100%" owner of Paladin and that Paladin had a 77.5 percent interest in the franchisee, Detrimar Realty Inc. Mr. Bakken in his testimony in chief told the Court that the information was incorrect. His wife held the shares in Paladin. He signed the schedule in the form it was presented because the representatives of Coldwell Banker were in a hurry to have the agreement executed and he knew his wife did not want to guarantee performance of the agreement.

[69] Mr. Bakken referred to the Statutory Declaration dated September 21, 1992, signed by Mr. Shah for the purpose of obtaining a licence for Detrimar Realty Inc. and showing the Real Estate Council that the real estate operation would have sufficient working capital for three months. Mr. Bakken does not recall the execution of this Statutory Declaration. He identified his signature in the jurat on the first page and his initials on each of the attached pages marked as Exhibit "A". Mr. Bakken said his practice was that the deponent either had to sign the Statutory Declaration in his presence or affirm the signature and initials were those of the deponent. He would not, he testified, take a signature if an attachment referred to in the Statutory Declaration was not attached.

[70] With reference to the Shareholders' Agreement made September 30, 1992 between Paladin, Debtar, Detrimar and Ms. Kimberley, pursuant to which Paladin and Debtar were required to vote their shares in Detrimar so that Mr. Shah and Ms. Kimberley would be directors of Detrimar, Mr. Bakken stated that Mr. Shah did not actually become a shareholder of Detrimar. At the time the Shareholders' Agreement was prepared Mr. Bakken understood that Mr. Shah would become a director of Detrimar. As it later turned out, Mr. Shah

indicated a reluctance to become a director because of the potential personal liability and ultimately declined to become a director.

[71] So too with the Notice of Directors dated September 4, 1992 which indicates that Mr. Shah, Ms. Kimberley and Mr. Bakken became directors of Detrimar on September 4th. The document was prepared by Mrs. Bakken on the basis of Mr. Bakken's understanding at that time that Mr. Shah was or would become a director of Detrimar.

[72] Mr. Bakken testified that as of mid-October, 1992 his role was to monitor the financial situation on behalf of his wife's company, Paladin Management Ltd. The operation and management of Detrimar Realty Inc. was left to Mr. Shah and Ms. Kimberley who were also the only realtors at the time. Following the completion of the renovations to the building, Detrimar Realty Inc. opened for business on December 1, 1992. Ms. Craig became employed by Detrimar in October, 1992 as the office administrator, responsible for its clerical and management requirements.

[73] During the first five months of the operation of the business, expenses considerably exceeded income. This did not surprise Mr. Bakken. The efforts made by Mr. Shah and Ms. Kimberley to attract realtors to the business were not

successful. By the end of April, 1993 only four to six realtors had been recruited. Ms. Kimberley approached David McDonald. He joined Detrimar as a manager and recruiter in April or May, 1993. During that time frame another realty office in Surrey closed its operations. About twelve realtors from that office joined Detrimar.

[74] Expenses continued to exceed income for the months of May, June and July, 1993. In the middle of June Paladin made a cash injection to Detrimar of \$16,100 and Rae-Ger Enterprises Ltd., a company owned by Mrs. Bakken's father, Gerald Petit, made a further cash injection of \$17,500. Detrimar issued promissory notes to both companies, payable on demand without interest. Ms. Kimberley's company Dehtar was not in a position to inject further cash into the operation.

[75] About this time, according to Mr. Bakken, Ms. Kimberley was rapidly losing interest in the operation. Mr. Bakken was increasingly drawn in to ensure Paladin's interest was represented. Although Mr. Bakken was not personally involved in the recruitment of realtors Mr. Shah and Mr. McDonald continued with their efforts in that regard.

[76] The attempts to recruit further realtors were largely unsuccessful. Although the financial statement for August, 1993 indicated a profit of \$2,800, revenues were below what

had been anticipated and expenses were still being incurred. Under date of October 1, 1993 Mr. Bakken informed Mr. McDonald and Mr. Shah that effective that day management salaries were suspended. Neither Mr. McDonald nor Mr. Shah was enthusiastic about the loss of their salaries but acknowledged it was understandable given the level of expenses. According to Mr. Bakken the matter was left on the basis that they would consider their situation and decide whether or not to remain with the company.

[77] At an extraordinary meeting held on October 5th, Mr. Bakken, by supplementary memorandum given to Mr. McDonald and Mr. Shah, proposed a level of employee ownership of the business as a means of promoting the success of the operation. Mr. Bakken stated that Mr. Shah and Mr. McDonald were expected to reflect upon the concept of employee ownership and to contact other realtors in the organization to determine their level of interest. The feedback from the two managers, Mr. Bakken said, was that the idea was remote but not impossible.

[78] Mr. Bakken testified that at that point in time, October 5, 1993, he had not stated that he intended to close Detrimar Realty Inc. down by the end of the year. There was no discussion about a closure of the operation, he stated,

although there was always discussion about profitability and a concern to show a profit in the long run in order to justify a continuance of the operation.

[79] On October 12, 1993 it was announced by Canada Trust and Coldwell Banker that the two companies would merge their real estate operations. The announcement also stated:

Over the next few months, Canada Trust's 113 corporately-owned real estate offices will be sold to individual owner/brokers, who will also become part of this expanding franchise network.

Mr. Bakken told the Court that through his discussions with one Michael Smith of Coldwell Banker he learned that Canada Trust managers would have first option to acquire the offices and failing that the offices would be offered to Coldwell Banker franchisees and failing that they would be put on the open market.

[80] Mr. Bakken and Mr. Shah attended a meeting with a Coldwell Banker representative on October 28th to discuss details of the Canada Trust offices offered for sale.

Mr. Bakken had asked Mr. Shah to attend the meeting because he was the agent nominee of Detrimar Realty's Langley office and because he valued Mr. Shah's opinion on the information being provided by Coldwell Banker.

[81] Coldwell Banker provided Mr. Bakken and Mr. Shah with Information Circulars pertaining to Canada Trust's offices in Chilliwack, Coquitlam, Surrey, Abbotsford and Langley. Mr. Bakken stated that he took the information contained in the circulars and prepared spreadsheets for the purpose of evaluating the viability of having Detrimar acquire any particular office. The analyses contained in the spreadsheets included a range of values for each of the offices.

[82] Mr. Bakken also prepared proposals for the purchase of three different groups of Canada Trust offices, including those in Langley, Port Coquitlam and Surrey, in the format provided by Canada Trust. These proposals were used to inform Coldwell Banker of the possible basis of purchase rather than to constitute a formal offer. Significantly, they indicate the concept of a percentage ownership by the existing investors, Paladin and Rae-Ger, and the possibility of a percentage ownership by management and employees. What was essential, Mr. Bakken stated, was working capital for the operation and a proper cash flow. In Mr. Bakken's mind with respect to management participation were Mr. Shah, Mr. McDonald and Stewart Henderson, at the time manager of Canada Trust's Willowbrook office. Mr. Henderson had indicated by October 28th that he would not participate in a group or

individually to purchase an office, but that he would be in favour of assuming an equity position.

[83] During November, Mr. Bakken testified, there were group meetings attended by himself, Mr. Shah, Mr. McDonald and Mr. Henderson. Mr. Bakken's recollection is that at the first meeting there was a discussion of concepts, including keeping managers informed of what was happening and utilizing another entity to acquire all of the assets and some of the liabilities of the existing or "old" Detrimar Realty Inc. and to acquire the Canada Trust offices with the managers making their investments after that process had been completed. There was also discussion, Mr. Bakken stated, with respect to the valuation of old Detrimar by reference to the value of the number of realtors.

[84] Also discussed at the group meetings in November, Mr. Bakken said, were the operating or budget analyses done for each office which he prepared from the information contained in the Canada Trust Information Circulars and other information obtained directly from Coldwell Banker representatives. These budget analyses purport to lay out revenues and expenses on a monthly basis in relation to four different scenarios dependent on varying numbers of realtors in a given office. At the group meetings it was also determined,

from the value analyses and budget analyses, which offices were attainable.

[85] Mr. Bakken testified that he also prepared "Acquisition Summaries" which summarize the information contained in the value analyses and budget analyses. The Acquisition Summaries included, Mr. Bakken stated, a combination of the two elements discussed at the meetings: the transactions with Canada Trust and what would be taking place with old Detrimar. New Acquisition Summaries were prepared for each of the weekly meetings, four to six in total, and were always given to Mr. Shah and Mr. Henderson and on occasion to Mr. McDonald. The group discussed the Acquisition Summaries at the meetings, in detail on the first occasion and thereafter by reference to changes in the underlying assumptions.

[86] There is a reference in the Acquisition Summaries under the caption "Expenses" to "LANG \$72,000.00". Mr. Bakken testified that that is a reference to the Old Detrimar valuation based on discussions he had with Mr. Shah and Mr. Henderson "about an appropriate way to value the Langley office essentially as a credit in the new operation which became known as New Detrimar". In the group meetings it was determined that it would not be fair simply to roll over all the assets and liabilities of old Detrimar into new Detrimar

given that the old company had outstanding loans of approximately \$128,000 and a bank debt of approximately \$55,000.

[87] Mr. Bakken stated that the \$72,000 figure comprises two components: the valuation of the realtors at the old Detrimar office ("goodwill"), and the recognition in new Detrimar of the assets and liabilities of old Detrimar. After discussions with Mr. Shah and Mr. Henderson it was decided that the range of values for the realtors on a per realtor basis was between \$4,000 and \$10,000. The lower figure of \$4,000 per realtor for the valuation of old Detrimar in terms of a credit in the new company was chosen because of the recognition to be given to the liabilities of old Detrimar in new Detrimar. The \$72,000 figure represents 18 realtors at \$4,000 per realtor. This credit in the new company was really a transfer of shareholder loans which could be repaid only in conjunction with other shareholder loans and with the approval of the Real Estate Board, Mr. Bakken explained. Mr. Bakken stated that he was satisfied by the affirmative nodding of Mr. Shah and Mr. Henderson at one of their meetings that they agreed with the \$72,000 figure given what it represented.

[88] A separate reference in the Acquisition Summaries under "Expenses" is "L/D \$40,000.00". According to Mr. Bakken "L/D"

represents lease/debt and was the assumption by new Detrimar of a portion of old Detrimar's debts. Thus, \$40,000 of the \$55,000 bank debt would be assumed by new Detrimar and the remaining \$15,000 would remain in old Detrimar with the result that the principals of old Detrimar would have to absorb the \$15,000 as a cash expense.

[89] Balancing the assumption by new Detrimar of \$40,000 of old Detrimar's bank debt was a combination of items of old Detrimar being acquired by new Detrimar: the franchise fee of \$18,000 which would otherwise have been payable to Coldwell Banker, receivables of old Detrimar amounting to approximately \$20,000, and assets such as computers and desks worth \$18,000 on the basis of their acquisition costs less depreciation. These items total approximately \$60,000 and thus, in effect, Mr. Bakken stated, taking into account the fact that some receivables were contingent or conditional, made the assumption of old Detrimar's assets and liabilities "cash neutral". The acquisition of the assets, such as computers and desks, was specifically discussed at their meetings, Mr. Bakken said, but there was little interest in the amount - \$18,000 - because of the cash neutral nature of the transactions involving the roll over of old Detrimar and acquisition of Canada Trust offices.

[90] Mr. Jaffer, on behalf of Mr. Shah, challenges the "cash neutral" nature of the transaction. With respect to the franchise fee of \$18,000 which was purportedly an asset of old Detrimar rolled over to new Detrimar, the agreement was never assigned over to new Detrimar and was never reflected in new Detrimar's financial statements. Moreover, there were not receivables of \$20,000 in old Detrimar, it is said. The total income of old Detrimar from July to December was only \$15,000. As well the accountant's working papers suggest net accounts receivable of \$2,303.17, whilst Ms. Craig indicated the accounts receivable of old Detrimar amounted to \$3,900. The furniture and furnishings of old Detrimar were not required by new Detrimar, Mr. Shah stated, because the three Canada Trust offices came fully equipped. Old Detrimar's furnishings were not worth \$18,000, it is said, and, in fact, Mr. Henderson later sold the tables and chairs from old Detrimar for less than \$1,000.

[91] Mr. Jaffer argues that there is nothing to show how the transaction was cash neutral. New Detrimar received nothing from the roll over. Mr. Bakken, it is said, knew that there were no accounts receivable in old Detrimar, that the furniture and equipment was not worth between \$20,000 and \$45,000, and that the franchise fee had not been assigned.

The idea of a cash neutral transaction is untenable. Mr. Bakken, it is said, took the benefit of \$50,000 from new Detrimar and gave nothing in return.

[92] At the November meetings there was agreement as to the retention of the legal name, Detrimar Realty Inc., and the trade name, Coldwell Banker 1st Pioneer Realty, the acquisition of three Canada Trust offices, Langley, Port Coquitlam and Surrey in order to obtain a more attractive package and better price, and the roles Mr. Henderson, Mr. Shah and Mr. McDonald were to have with regard to each taking control and responsibility of one of the offices. As well, one of the elements of the roll over discussed at their meetings, Mr. Bakken stated, was the utilization of Debtar Investments as a shell corporation once it had been stripped of its assets and liabilities. As early as the end of October there was discussion about a new corporate entity for management participation in the purchase of the offices.

[93] By December 10, 1993, at which point Coldwell Banker set out in a letter to Mr. Bakken the terms of purchase of the three offices for \$75,000, Mr. Shah and Mr. Henderson had verbally committed to participate in acquiring an equity position in new Detrimar. Mr. Shah said he was willing to

invest \$45,000. Mr. McDonald was reluctant to commit himself at that point.

[94] Apart from the group meetings, Mr. Bakken stated that prior to the end of November he met individually with Mr. McDonald, Mr. Henderson, and then Mr. Shah in order to confirm their interest in the venture, get their opinions, reiterate his (Bakken's) role as representative of the investors of his family group, Paladin and Rae-Ger, and determine if there were difficulties between people. His meeting with Mr. Shah took place in Mr. Shah's office at old Detrimar and lasted between one hour and 90 minutes. The discussion, according to Mr. Bakken, was wide ranging and considered amongst other things the concepts of acquiring one or more offices and using a shell company without encumbrances, and his role as representative of his family and not as a lawyer. Mr. Shah expressed no concern with respect to the concepts, and reminded Mr. Bakken that he (Shah) was a lawyer at one time. Mr. Bakken stated that he suggested caution. By the time of his meeting with Mr. Shah the Acquisition Summaries, which formed the backbone of the transactions, had been distributed. They were the focus with respect to the acquisition of the Langley office and the other

offices, and the role of the new entity taking over the assets and liabilities of the old.

[95] By mid-December, Mr. Bakken stated, the terms of acquisition had been determined, Paladin had taken over Ms. Kimberley's interest in old Detrimar and the Debtar shell company was to become new Detrimar. At some point in December the roll over had been completed and the focus was then on acquiring the Canada Trust offices. At an early stage the documents were put into a Roll Over Binder, Mr. Bakken said.

[96] Mr. Bakken stated that he prepared the Sequence of Events contained in the Roll Over Binder received by Mr. Shah on June 29, 1994 for the purpose of ensuring that if Revenue Canada examined the transactions there would be an overview for it as well as for anyone interested. He continuously revised and updated the Sequence of Events, he said.

[97] Under date of December 31, 1993 Mr. Bakken wrote the Real Estate Council on Lindsay Kenney letterhead a letter concerning the application of Detrimar Realty Inc. for a real estate licence which is contained in the Roll Over Binder and includes this paragraph:

To facilitate a Section 85 Rollover pursuant to the Income Tax Act of Canada the assets of Detrimar Realty Inc. are being rolled into a new company which will become a new licensee and which company

will purchase the existing assets of 3 Canada Trust Real Estate offices.

[98] On either December 30 or December 31, he does not recall which, Mr. Bakken attended at the office of old Detrimar. Shortly before lunch Mr. Bakken was at the front counter. Ms. Craig had a form of Statutory Declaration for Mr. Shah to sign. He came to the counter. Mr. Bakken asked Mr. Shah if he swore the Statutory Declaration to be true. Mr. Shah flipped through the document and said it was true. He and Ms. Craig discussed using the firm figure of \$3,922.41 for the receivables from old Detrimar in Schedule 1 to the Declaration. Exhibit "A" was attached at the time he witnessed Mr. Shah sign the document, Mr. Bakken stated. Mr. Bakken completed the jurat and left the Statutory Declaration with Ms. Craig.

[99] Exhibit "A" to the Statutory Declaration is a statement consisting of 7 pages showing the financial situation of Detrimar Realty Inc. doing business as 1st Pioneer Realty as at December 30, 1993. Apart from the reference under Accounts Receivable to "Receivables from 1st Pioneer Realty" in the amount of \$3,922.41, there is reference under Capital Assets - Office Furniture and Equipment to 1st Pioneer office furniture and equipment having a present market value of \$37,204 and the

office equipment and furniture of the three Canada Trust offices of having a total market value of \$96,690.02. As well, Current Assets reflect Cash of \$70,000, and Current Liabilities reflect Directors/Shareholders loans of \$177,000.

[100] The original closing date for the purchase of the Canada Trust offices was December 31, 1993, but was extended to January 14 at Canada Trust's request. In the meantime, prior to the end of December, Mr. Shah tendered his cheque for \$45,000. Mr. Henderson provided his cheque for \$22,500. Mr. Bakken returned it to him pending resolution of an employment agreement, but Mr. Henderson re-tendered the cheque in January. Mr. McDonald did not have the financial ability or interest to participate and thus Paladin and Rae-Ger picked up his share of \$22,500. The total loans of Paladin and Rae-Ger to new Detrimar amounted to \$37,500 rather than \$45,000 which "was a bit of a stretch at that time".

[101] Of that \$37,500 representing Paladin's and Rae-Ger's loans, Mr. Bakken testified, \$30,000 was paid to Coldwell Banker 1st Pioneer Realty by cheque dated January 5, 1994 and drawn on account 614357-020 in the name of Coldwell Banker 1st Pioneer Realty. The cheque was not signed by Mr. Bakken. It bears the signatures of Mr. Shah and Ms. Craig. Mr. Shah says that he signed the cheque in blank at Ms. Craig's request and

returned it to her. It is drawn on the old Detrimar account, he said.

[102] When it became apparent by mid-February, 1994 that Mr. McDonald was not going to invest in the new company, Mr. Bakken said he discussed with Mr. Shah his willingness to assume one-half of Mr. McDonald's position at that point in time. On March 8, 1994 Mr. Shah provided a cheque for \$11,250 drawn on the account of Ronova Project One Ltd. and made payable to Coldwell Banker 1st Pioneer Realty. He delivered the cheque directly to Ms. Craig. The cheque, Mr. Bakken testified, represented half of the McDonald position that had previously been assumed by Paladin and Rae-Ger. Mr. Bakken said that Ms. Craig had instructions at that point in time that when she collected money for the credit of old Detrimar, which still had a bank liability, to apply the money to the line of credit to pay it down. Mr. Bakken states that he indicated to Mr. Shah his monies were going to the benefit or credit of Paladin and Rae-Ger, although he does not believe he told him specifically where the funds were going to go. Mr. Shah says that the deposit of his cheque for \$11,250 to the account of old Detrimar was a "direct misappropriation of funds". His cheque was payable to new Detrimar, he said, and was the purpose the acquiring shares in new Detrimar.

[103] The Purchase and Sale Agreement between Canada Trust Realty Inc. and Detrimar Realty Inc. doing business as 1st Pioneer Realty is dated as of January 10, 1994. It was executed at Lindsay Kenney's office. Mr. Shah, Mr. Henderson, Mr. McDonald and Mr. Bakken were present. The document was provided by Canada Trust. It was signed by Mr. Shah as de facto president of new Detrimar, Mr. Bakken stated.

[104] Mr. Bakken testified that he reviewed the Purchase and Sale Agreement at the time it was executed as agent of Paladin and Rae-Ger. His role in the new entity was unpaid chair of the board. Mr. Bakken stated that he confirmed his role as agent of Paladin and Rae-Ger and that he could not and would not act in a legal capacity.

[105] The financial situation of new Detrimar during the ensuing five months became critical. Although expenses remained within the predicted range, revenues were lower than anticipated. Realtors left the Surrey office thereby reducing the number to five and consequently that office's revenue. By May 2, 1994 Mr. Bakken described the situation thusly in a memorandum to Mr. Shah, Mr. Henderson and Ms. Craig.

... a crisis is looming whereby cash reserves will be exhausted by July 1, 1994 unless immediate action is taken.

Even with the closure of the Surrey office and reduction of the clerical staff by one, Mr. Bakken wrote, they were still left with insufficient cash reserves to proceed much beyond the end of August.

[106] A result of the closure of the Surrey office, which was in part due to the fact that Mr. Shah and Mr. Chreptyk were unable to attract realtors, was that both Mr. Shah and Mr. Chreptyk desired to return to Langley. Mr. Henderson objected to Mr. Shah being manager. Both were critical of each other. A group meeting was called at which their respective duties were defined. Mr. Henderson continued as manager of Langley whilst Mr. Shah had some duties there as resource person and real estate advisor. In May, Mr. Bakken stated, after the meeting was held to resolve the differences between Mr. Shah and Mr. Henderson, Mr. Shah, in a meeting with Mr. Bakken, indicated his desire, for financial reasons, to leave and to have someone purchase his shares.

[107] The company continued not to perform well. Its cash reserves continued to drop. A directors' meeting was convened by Mr. Bakken for June 1, 1994. Mr. Shah was not at the meeting, but Mr. Bakken met with him before it was held so he could review the agenda. Mr. Shah was distraught at the item

regarding the reduction of salaries. Mr. Bakken asked him if he wished the meeting postponed. Mr. Shah said: "No, it should proceed."

[108] Shortly after the meeting was held Mr. Bakken distributed minutes. One item referred to the reduction of the president's salary to \$1 per month commencing July 1. Another item referred to an indication by the directors that the parties they represented lacked the financial ability to buy out Mr. Shah's interest in the company.

[109] Mr. Bakken stated that he received a telephone call from Mr. Shah about the reduction in managers' salaries. Mr. Bakken told him it was the only course open. Mr. Shah responded by saying that that was not his concern, that he wanted his money, and that it put him in a difficult position. Mr. Bakken asked why. Mr. Shah, Mr. Bakken stated, replied: "You'll see, you'll see". Mr. Bakken then left on holidays for the period June 6 to 17.

[110] Upon his return to work from holidays on June 20, Mr. Bakken received a letter dated June 19, 1994 from Mr. Shah in which he stated he was "totally in the dark" with respect to the records and documents of Detrimar Realty Inc. and requested copies of the records and documents specified in a schedule to the letter. Mr. Bakken stated he called Mr. Shah

and asked if he wanted to address the issues. Mr. Shah said: "No." Mr. Bakken indicated copies of the documents were with Ms. Craig. Mr. Shah said he wanted copies. Mr. Bakken arranged with Ms. Craig to have copies prepared for all directors and, with a memorandum to Mr. Shah dated June 28, 1994, provided copies of the "documents, records etc. as requested".

[111] A meeting of directors was held on August 12, 1994 to consider, amongst other matters, Detrimar's financial position. Mr. Bakken, as chairman, Mr. Henderson, Mr. Shah and Mr. Petit attended. One item which made the meeting "memorable", Mr. Bakken stated, was item 1.(c) which is recorded in the minutes as follows:

(c) Financial Injection - motion failed

NS [Navnit Shah] advised L'abri was not agreeable to an injection. NS advised he was unaware that the assets of the old Pioneer were purchased by new Pioneer or that any credit was given for shares or loans in new Pioneer for the assets of old Pioneer. He indicated the present position was unacceptable to L'abri and sought repayment of outstanding shareholder loans and sale of L'abri's shares. CM rejected NS's position and distributed copy of Acquisition Summary originally given to all parties and the matter was left for the parties to consider their position. NS indicated that L'abri's position was that it wished to liquidate it's position and receive \$57,500. NS advised that terms were not acceptable to L'abri, cash was required.

SH [Stewart Henderson] indicated that he had no concerns about the corporate structure. The purchase of L'abri's position by the existing shareholders was discussed. It was agreed that the corporation did not have the funds to repay L'abri's shareholder loans at this time.

Mr. Bakken testified that with respect to the reference to the Acquisition Summary, he found a copy of one from the summer of 1993 which covered off and rebutted Mr. Shah's assertions.

Mr. Shah told those at the meeting that he would not respond to a document that was "slipped in".

[112] Following the meeting of August 12 and the receipt of Mr. Shah's letter dated August 21, 1994 which I set out earlier in these reasons and in which Mr. Shah wrote that Mr. Bakken's actions constituted a breach of the statutory law in two ways, a breach of the common law in three ways, and a breach of the conflict of interest guidelines of the Law Society, and that he, Bakken, had "lost (his) cool" at the August 12 meeting and said that he had "slipped in" a one page document at a previous meeting proposing a sale of assets of old Detrimar and assignment of loans which he thought everyone agreed with, Mr. Bakken retained solicitors.

[113] Under date of September 1, 1994 Mr. Bakken's solicitors wrote to Mr. Shah as follows:

Re: Detrimar Realty Inc.

May we advise that we have been retained by Mr. Mark Bakken, Paladin Management Ltd., Rae-Ger Enterprises Ltd., and 431876 B.C. Ltd. to respond to your letter of August 21, 1994 directed to Mr. Bakken. Any further dealings with regard to any of our clients should be directed to this writer.

We have reviewed the facts with Mr. Bakken and others and have studied all of the documentation and we are able to make the following comments:

1. Your position of eminence in the legal community of your former country, and your experience and proficiency in the real estate practice of this Province, as set out in your letter, were more or less known to our client, and relied upon in your respective dealings.
2. Your instinct to "turn in" Mr. Bakken to the Law Society, and your concern for his partners and family, while proffered in a sincere fashion, would appear to us as being directed to the greater objective of settling in a favourable method, what can best be described as an unhappy business/corporate relationship.
3. Let there be no mistake that in the event you feel that our client is guilty of any offence under our law, or has done anything contrary to the Canons of Legal Ethics of this Province, then you should pursue with vigour those complaints. They are absolutely denied.
4. Without particularizing the several allegations contained the fourth and fifth paragraphs of your letter, our client denies as inaccurate the effect your language attempts to create. In particular though, any suggestion of our client having been untruthful is entirely rejected.

Dealing with the balance of your letter, which appears to come to the true issue between yourself and Detrimar Realty Inc., it is quite clear to our

client and to those involved in Detrimar, that you have become an unhappy participant in that commercial adventure. We understand that the realty office branch under your control has now been closed as a result of its poor financial performance. The shareholders, on behalf of whom our client has spoken, do not wish to perpetuate an unhappy relationship, and consider it germane to a successful continuance of the corporation to deal with your obvious unhappiness.

Clearly the time limit and financial demands set forth in your letter are not attainable, but we have instructions to attempt to resolve these matters on behalf of those corporate shareholders.

Under the circumstances, and particularly in light of your suggested recourse to the courts, we would request that you simply have your counsel contact us so that this dispute can be resolved in an orderly fashion.

[114] No response was received from Mr. Shah to that letter. Mr. Bakken's solicitors again wrote to L'Abri and Mr. Shah on October 21, 1994. They pointed out that it would not, in the opinion of Mr. Bakken, Paladin, Rae-Ger and 431876 B.C. Ltd., be in the best interests of Detrimar for L'Abri to continue to maintain shareholdings in Detrimar "if L'Abri's principal continues to claim that he has been deceived". The letter continues thusly:

You are now in possession of the material facts which you claim were previously unknown to you-- namely, that the assets and liabilities of the old Detrimar Realty Inc. (now known as 431876 B.C. Ltd.) were rolled over into the new Detrimar Realty Inc. You should appreciate that our clients insist and the overwhelming evidence demonstrates that you did

in fact know or at least were furnished with all of the material facts before L'Abri purchased shares.

Nevertheless, given that you are now possessed of the material facts, you have until 5:00 pm on October 31, 1994 to declare L'Abri's intentions to the shareholders: does L'Abri Project Fifteen Ltd. intend to affirm the contract to purchase shares in Detrimar Realty Inc. or does L'Abri now seek rescission?

Although our clients strenuously deny that there is any basis for rescission or that your complaints have any merit, it is in the best interests of the shareholders and the company that further disruption is avoided and that you and L'Abri sever your relationship with Detrimar Realty Inc. Therefore, if L'Abri seeks rescission and if you notify us of this fact, then the shareholders who we represent will immediately and expeditiously work to that end.

If we do not hear from you in writing by October 31, 1994, our clients will assume that L'Abri Project Fifteen Ltd. affirms the contract to purchase shares in Detrimar Realty Inc. and, in reliance upon that assumption, conduct their affairs accordingly. Kindly govern your conduct with this in mind.

We hasten to remind you that nothing contained herein is to be construed as an admission of liability or of any wrongdoing on the part of our clients.

[115] No response was received from L'Abri or Mr. Shah to that letter either.

[116] What next happened was that Mr. Shah's letter to Mr. Bakken and others, dated October 29, 1994, along with his letter to Mr. Jaffer of the same date, which I have previously

set out in these reasons and which form the basis of Mr. Bakken's libel action against Mr. Shah and L'Abri, were received by Mr. Bakken on November 2nd or 3rd.

[117] Under date of November 7, 1994 Mr. Bakken's solicitors wrote L'Abri and Mr. Shah as follows:

Re: Detrimar Realty Inc. and Mark Bakken

Mark Bakken has consulted with us in relation to your letters of October 29, 1994.

In your letters you charge Mark Bakken with deceit, fraud, conspiracy to do fraud, misappropriation of funds, and breach of fiduciary duty. These malicious charges are completely unfounded and are a very grave reflection on the integrity of Mr. Bakken. These charges amount to a very serious libel.

We have to request you to submit immediately to us a draft of a clear and unqualified apology and retraction for distribution to every recipient of your letters.

We are also instructed to demand from you an undertaking not to utter or publish any similar statements of or concerning Mark Bakken.

Further, having regard to our client's position as a lawyer, the gravity of the allegations made, and the deliberately wide circulation of your letters--in particular the circulation of the letters to Mr. Bakken's employer, Mr. Bakken is clearly entitled to substantial compensation as well as an apology. In addition, therefore, to the draft apology we ask you to submit your proposal as to amount.

Failing a satisfactory reply within the next 48 hours our instructions are to issue a Writ against you. In the meantime our client reserves all his rights.

[118] No response was received to that letter from L'Abri or Mr. Shah. Mr. Bakken's libel action was commenced on November 9, 1994.

[119] This recitation of the evidence given by the two principal proponents in these two actions demonstrates the conflict in almost every essential detail between their respective versions of the events. The task of deciding which version, or which portion of a version, to accept is dependent upon a number of factors: the personal demeanour of the witness whilst giving his evidence, the internal consistency of the witness's evidence and its consistency with other evidence which is accepted by the Court, and a determination of where the probabilities lie. Mr. Justice O'Halloran set out the test in the following way in *Faryna v. Chorney* (1951-52) 4 W.W.R. (N.S.) 171 (B.C.C.A.), at p. 174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such

a case must be its harmony with the preponderance of the probabilities which a practical and informed person would easily recognize as reasonable in that place and in those conditions.

[120] The demeanours of both Mr. Shah and Mr. Bakken were convincing in the stand. Both men are articulate and highly intelligent, and spoke knowledgeably with respect to the complex factual substratum upon which these actions are based. Nonetheless, I found instances in Mr. Shah's testimony in which he shifted ground in an apparent attempt to make his version of the events accord with his theory of the case, and in which there is a patent inconsistency not only within his own testimony but also between his version and other credible evidence before the Court. I did not find similar instances in the testimony of Mr. Bakken. In the result I am led to prefer the evidence of Mr. Bakken where there is a conflict between it and the evidence of Mr. Shah.

[121] Thus, Mr. Shah's assertion is that certain documents were created after the face dates shown on the documents and then backdated. The theory is that documents upon which the last three digits of the computer footer number are less than 071 were created before June 22, 1994. In his examination in chief Mr. Shah "questioned" the date of creation of the Sequence of Events contained in the Roll Over Binder he

received on June 29, 1994 because the document, although undated, bears a computer footer number ending in the digits 083. In answer to a question by counsel Mr. Shah agreed that the date of the document would likely be after June of 1994. Reminded that the document was contained within the Roll Over Binder he then agreed that the document "was clearly prepared prior to" June 29th.

[122] Another assertion by Mr. Shah was that he had the same opportunity as Mr. Bakken and Mr. Henderson to purchase the three Canada Trust offices acquired by new Detrimar and thus had no need to participate in a roll over of old Detrimar's liabilities and assets. He testified in chief that within two weeks of the merger announcement on October 12 he found out that preference to purchase Canada Trust offices would be given first to the managers of those offices, secondly, to the sales people of those offices, and then to the owners and managers of the nearest office of Coldwell Banker. In his examination for discovery held on June 6, 1995 he stated that the rights of first refusal on Canada Trust offices went first to the managers of the respective offices or their salespeople and then to the nearby existing Coldwell Banker franchises and failing that to anyone who wanted it. In a later discovery held on April 26, 1996 he agreed that he

understood that the next preference after the managers of Canada Trust offices would be existing franchises, namely, Mr. Bakken in Langley City. In an affidavit sworn to January 5, 2000 and filed in opposition to an application by Mr. Henderson and Ms. Craig for summary judgment dismissing Mr. Shah's action against them Mr. Shah deposed in part that he had "the same opportunity to purchase one or more Canada Trust offices as Bakken had (and indeed the same as Henderson himself had)".

[123] It was put to Mr. Shah in cross-examination that the statement in his affidavit was untrue, and that he could not reconcile his statements on discovery with those he had made in chief or in his affidavit because Mr. Henderson was the manager of one of the offices acquired - the one in Langley - and thus had first preference to purchase it, and Mr. Bakken was an existing Coldwell Banker franchisee and thus had second preference. I found unconvincing Mr. Shah's attempts to reconcile the various statements, and his response that he did not intend to mislead the Court when it was put to him that he was attempting to say in his affidavit that he had the same right to purchase the three Canada Trust offices and therefore had no need to rely on the roll over.

[124] Mr. Shah's assertion, in support of his contention that old Detrimar had no value on the roll over, that Mr. Bakken announced in September or early October 1993 that he would close old Detrimar down by December 31, 1993, is denied by Mr. Bakken and does not accord with the probabilities. Roughly 3 1/2 months prior to the purported announcement by Mr. Bakken to close old Detrimar Paladin had made a cash injection of \$16,100; Rae-Ger had made a further cash injection of \$17,500. Renovations to the office to make it suitable for a real estate agency had been undertaken by Paladin. The low revenues between January and July, 1993 of old Detrimar were directly related to the few number of realtors the company had been able to attract. Nonetheless, in April or May, 1993, Mr. McDonald had joined the company in order to recruit realtors, and twelve realtors had joined the company as the result of the closure of a Sasamat realty office in Surrey. Other high-profile realtors also joined. In August, 1993, less than one month prior to the purported announcement to close old Detrimar, the company showed a profit for the first time. Although I place little weight on Mr. Bakken's testimony that approximately two weeks prior to the merger announcement someone had called him and "expressed a desire to perhaps purchase" the old Detrimar office, I do accept the evidence of Mr. Petit (between June 15 and October

12 he had no discussion with Mr. Bakken about closing down old Detrimar), Mr. McDonald (up to the time of the memorandum dated October 1, 1993 in which Mr. Bakken announced the suspension of management salaries, and indeed up to the time of the merger announcement, Mr. Bakken had not announced the office would be closed), Ms. Kimberley (although there were discussions involving herself, Mr. Bakken, Mrs. Bakken, Mr. McDonald and Mr. Shah about closing the company, she was not in favour of it), and Mrs. Bakken (prior to the merger announcement there was no intention to close the office).

[125] Apart from the Sequence of Events contained in the Roll Over Binder to which I have referred Mr. Shah says that the dates of certain other documents found in Mr. Bakken's Miscellaneous Files with Lindsay Kenney, L2832 and L1002, are "questionable", namely: Mr. Bakken's resignation as an officer/director of Detrimar Realty Inc. dated as of May 29, 1994; consent by Rae-Ger to the transfer of 1700 class A common shares of Detrimar by Paladin to L'Abri dated January 30, 1994; assignment by Paladin of a shareholder loan for \$12,750 in Detrimar to L'Abri dated January 30, 1994; promissory note for \$60,000 by Debtar in favour of Paladin dated December 4, 1993; letter dated December 15, 1993 by Lindsay Kenney per Mr. Bakken to Debtar in which Mr. Bakken

writes that he and the firm have ceased to act as solicitor for Debtar effective December 15, 1994; purchase agreement between Detrimar and Debtar dated the blank day of December, 1993; unsigned modification of purchase agreement between 431876 B.C. Ltd. and Detrimar made as of January 1, 1994; purchase agreement between Detrimar and Debtar dated the blank day of December, 1993; undated extended version of the Sequence of Events; and a promissory note for \$25,000 by Debtar in favour of Ms. Kimberley dated the blank day of September, 1992. The assertion is that these documents were created after the face date indicated on the documents and then back-dated.

[126] The basis of the assertion is that the computer footer numbers shown on the questioned documents do not correlate with the incremental footer numbers of documents found in the Miscellaneous Files the dates of creation of which are known. Mr. Shah called two computer experts, Terence W. Holm and Randall D. Bruce, to provide opinions as to the actual and/or probable electronic dates of creation of ten questioned documents. The underlying assumption is that all the documents in the two Miscellaneous Files (L1002 and L2832) were created under Reference Point document management system. They concluded from their analysis that the following

questioned documents referred to above were created after the face dates shown on the documents; Mr. Holm went on to say that they had been backdated from their actual creation date: Rae-Ger's consent to the transfer of shares; Paladin's assignment of a shareholder loan; Debtar's promissory note for \$60,000; Mr. Bakken's letter dated December 15, 1993; purchase agreement between Detrimar and Debtar; modification of purchase agreement between 431876 and Detrimar; and Debtar's promissory note for \$25,000.

[127] As an explanation of the mechanical processes involved in the sequential numbering of documents stored in a computer the reports of these two experts were helpful. I place little weight however on the opinion that documents were backdated from their actual creation date. The authors of the reports conceded in cross-examination that they proceeded on the assumption the documents in question were created on site at Lindsay Kenney's office and not off site. Moreover, consideration was not given as to whether the document was later modified or revised. As Mr. Holm testified: "When I say created I mean created by Reference Point and not a later revision".

[128] Mr. Bakken testified that the vast majority of the documents in the Roll Over Binder were created at his home

using a home computer. He had no document management system there. Nor did he have Reference Point at home. He utilized WordPerfect. There was no hook-up with the computer at Lindsay Kenney, although he did print out documents at the office and used precedents on their computer which he did not have at home. Moreover, Mr. Bakken testified, the Roll Over Book was in the possession of Ms. Craig by mid December, 1993, "at least the heart of the book", and in the hands of the accountant, Mr. Bublitz, by February or March, 1994.

Mr. Bakken did acknowledge in cross-examination that certain documents, such as an Assignment of Shareholders' Loans dated January 30, 1994, were created after their face dates, "in the February/March time frame". Nonetheless, I discerned nothing "sinister", to use Mr. Tatchell's word, about that action. Nothing in the nature of fraud has been demonstrated by that action.

[129] I find persuasive the evidence of Ronald Scott Hawke, an expert in computers with regard to the Reference Point programme, called on behalf of Mr. Bakken, that a document footer is not necessarily a true indication of the document creation date.

[130] I accept the evidence of Mr. Bakken and find that the attachments referred to in the two Statutory Declarations

signed by Mr. Shah on September 21, 1992 and December 30, 1993 were attached to the Statutory Declarations at the time they were signed by Mr. Shah in the presence of Mr. Bakken. I find as well that Mr. Bakken did not forge Mr. Shah's initials on the 7 pages constituting Exhibit "A" to the Statutory Declaration of September 21, 1992.

[131] Mr. Shah alleges that Ms. Kimberley's signature on certain documents relating to the roll over and purportedly bearing her signature has been forged. Mr. Shah also says that his initials were forged on several other documents.

[132] Mr. Shah called a handwriting expert, Arnold Blueschke, who compared the "questioned" signatures of Ms. Kimberley on 28 documents with her "known" signatures on 20 documents and concluded that Ms. Kimberley "has not been identified as having written the questioned signatures" on the 28 "questioned" documents. Similarly, with respect Mr. Shah's purported initials, Mr. Blueschke compared the "questioned" initials of Mr. Shah on 8 documents with his "known" initials or signature on 6 documents and concluded that Mr. Shah "has not been identified as having written the questioned initials" on the 8 "questioned" documents.

[133] Mr. Blueschke testified that in making his comparisons he looks at essentially three elements: the style

a writer injects into his writing, any variations from certain habits the writer injects into his writing, and the motor movement incorporated by a writer into his writing. Whilst they were consistent in the documents bearing Ms. Kimberley's "known" signature, these basic elements bore "significant differences" in the questioned documents. He conceded in cross-examination that it is easier to "disguise" initials than a complete signature. But nothing in the questioned documents relates to the known initials of Mr. Shah, he said. He agreed that he did not know Ms. Kimberley or her age and, although he was aware that possibly she was ill, he did not know the nature of her illness. He acknowledged that he would want to know in reaching his opinion whether someone had severe cramping in the right hand or had developed carpal tunnel syndrome between the time of signing the known signatures and the questioned signatures. Here, he said, the dates of known documents bearing Ms. Kimberley's signature fell both before and after the dates on the questioned documents.

[134] In his testimony Mr. Bakken "absolutely and categorically denied" as being untrue that he forged any document.

[135] Mr. Bakken called Ms. Kimberley as a witness.

[136] Ms. Kimberley testified that she has had trouble with her hands all her life. As a youngster in the gymnasium she could not put her hands flat. She had to use her fists. As she got older she found she could not crochet, knit or sew. In her early twenties she was diagnosed with carpal tunnel syndrome. She had surgery in 1987 but it was too late - the muscle at the base of her thumb would not come back.

[137] Ms. Kimberley stated she is right handed. The disease affects her ability to open jars - Ms. Craig helped her - and to shift gears in the car. Her ability as a realtor to hand write or type contracts was affected. She did so beforehand or, if her hand hurt, left it for a day or two.

[138] Ms. Kimberley testified that she went through the documents in the Roll Over Binder in preparation for her testimony. All the documents bearing her name bore her signature, she stated. She identified the documents in Mr. Blueschke's report which questioned the authenticity of her signature as being documents which bore her signature.

[139] I accept Ms. Kimberley's evidence as well as that of Mr. Bakken. I find Mr. Bakken did not forge the signature of Ms. Kimberley to any of the questioned documents in these proceedings. Nor did he forge the initials or signature of Mr. Shah.

[140] The crux of Mr. Shah's case is that Mr. Bakken acted fraudulently and deceitfully in connection with the acquisition by new Detrimar of the three Canada Trust offices and the roll over of assets and liabilities from old Detrimar. In doing so, it is said, he acted as solicitor for Mr. Shah and L'Abri, and accordingly, his employer, Lindsay Kenney, is vicariously liable for his wrongful acts.

[141] I conclude on the evidence that neither Mr. Bakken nor Lindsay Kenney acted as solicitors for Mr. Shah or L'Abri in connection with the transactions involving old Detrimar or new.

[142] Mr. Shah testified that prior to his involvement with Mr. Bakken, Lindsay Kenney had acted as his lawyer and, through Mr. Bakken, had continued to act as his lawyer in 1993 and 1994.

[143] Mr. Shah related that in 1990, Lindsay Kenney had represented his insurer in a claim brought by one Robert Burns and another against him and his then employer Homelife Benchmark Realty Ltd. In a motor vehicle case arising out of an accident in 1992, Lindsay Kenney acted for I.C.B.C, the insurer of the defendants, Mr. Shah's company, L'Abri B.C. Ltd., and his brother-in-law. Apart from these matters Mr. Shah said that he instructed Mr. Bakken and Lindsay Kenney to

act quite a few times, including, whilst he was agent nominee of old Detrimar, in a claim against a salesman with the company, one Jim Miller, who owed the company money. He also asked Mr. Bakken, through the firm's search service, to obtain corporate and other searches for him. As well, Mr. Bakken acted as guarantor on his and his wife's passport applications.

[144] Plainly, all these matters were unrelated to the transactions involving Detrimar Realty Inc. in issue here, but no doubt had the effect of instilling confidence in Mr. Shah with respect to the abilities of Lindsay Kenney and Mr. Bakken as lawyers.

[145] Mr. Shah points out that meeting after meeting was held in the firm's offices in Langley; it is where he first met Mr. Bakken. Mr. Bakken undertook the negotiations with Coldwell Banker for the purchase of the Canada Trust offices, and the preparation of the documents, apart from those presented by Coldwell Banker, relating to the acquisition of the Canada Trust offices and roll over of old Detrimar, including incorporation documents and purchase proposals. He signed certain documents, such as the notice changing the address of Debtor's registered office and records office, as solicitor for the company.

[146] However, the evidence is clear, I find, that neither Mr. Bakken nor Lindsay Kenney acted as solicitor for Mr. Shah or L'Abri in connection with the transactions involving Detrimar Realty Inc. Mr. Bakken made it plain at the group meetings in November, 1993 that he was there as representative of the family companies, Paladin and Rae-Ger, and that legal advice had to be sought elsewhere. Mr. Shah cannot plead naivet . He is a lawyer and evidently well versed in what would constitute a solicitor-client relationship. He was not billed by and paid no fees to Mr. Bakken or his firm for work done in connection with Detrimar matters. Nor did he say to Mr. Bakken that he was relying upon him as a lawyer.

[147] Nonetheless, dealing as he was throughout with a member of the Law Society of British Columbia, Mr. Shah was entitled to expect that Mr. Bakken would do nothing dishonourable in their dealings. A higher standard of probity rested upon Mr. Bakken than upon a non-lawyer business venturer.

[148] Mr. Bakken was not that paragon of virtue, the consummate solicitor who dots every *i* and crosses every *t* at least once. Mr. Shah refers to what his counsel, Mr. Jaffer, characterizes as "callousness in a professional sense", because, for instance, Mr. Bakken signed the Franchise

Agreement with Coldwell Banker on behalf of Paladin at a time when he lacked the ostensible authority to do so. As well, Mr. Bakken gave notice to the Real Estate Council under date of September 20, 1992 that Mr. Shah was "President/Director" of Detrimar Realty Inc. At that time Mr. Shah was not a director of Detrimar and in fact declined to act as a director because of the potential for personal liability.

[149] Nonetheless, "fraudulent", "deceitful" and "dishonest" are wholly inappropriate terms to use in relation to Mr. Bakken or his conduct.

[150] It is apparent from the evidence that prior to the merger announcement by Coldwell Banker the fortunes of old Detrimar were declining. It was a company in which Mr. Bakken's family companies, Paladin and Rae-Ger, had invested substantial amounts of money. The opportunity arose to acquire three Canada Trust realty offices in what Mr. Bakken described as a "cash neutral transaction". Mr. Shah invested substantial funds in what seemingly was a promising venture. Unfortunately, it too went on a financial downslide. Mr. Shah wanted out. He had invested money contrary to the wishes of his family. There were indications in August, 1994 that further cash injections were required. His salary had been effectively terminated. The other investors in Detrimar, at

least initially, refused to acquire his shares at cost. And fuelling his anger was the realization that the money he invested was in effect used to reduce the indebtedness of old Detrimar to Paladin and Rae-Ger. He denies that he agreed to the roll over of assets and liabilities from old Detrimar to new or that he agreed to pay a penny for that. As he testified in answer to the question: "would your decision regarding your participation in new Detrimar have been any different and if so, how, if you had known about the roll over of old Detrimar's business into new Detrimar?"

Plain and simple. I would not have invested at all.

[151] The evidence establishes, I find, that Mr. Shah was aware that a core aspect of the acquisition of the Canada Trust offices was the roll over of old Detrimar's assets and liabilities into new Detrimar. Mr. Tatchell concedes that the Acquisitions Summaries presented by Mr. Bakken at the November meetings were probably not on their face very informative regarding the roll over. But they cannot be viewed in isolation so far as Mr. Shah is concerned. They must be considered in context of what Mr. Bakken said to those present, including Mr. Shah, at the meetings, and other documents, such as the Bill of Sale dated the blank day of

December, 1993 between old Detrimar and Dehtar which is contained in the Roll Over Binder. Moreover, the testimony of Mr. Henderson, which I accept, is clear: the roll over of old Detrimar was discussed with Mr. Shah. He took part in the discussions. The roll over was understood by Mr. Henderson.

[152] I am satisfied Mr. Bakken did not conceal or camouflage the fact of the roll over in the Acquisition Summaries. Moreover, I find there was justification, by reference to documents such as the Balance Sheet of old Detrimar as at July 31, 1993, to use the figures he did in the Acquisition Summaries regarding the roll over.

[153] My consideration of the evidence leads me to conclude that there is no basis for the allegations of wrongdoing made by Mr. Shah and that his action as against Mr. Bakken must be dismissed. It follows that his claims against Lindsay Kenney based on vicarious liability must also be dismissed.

[154] I find as well that there is no basis in the evidence for the claims against Mrs. Bakken or Mr. Petit or their respective companies, Paladin and Rae-Ger, and that the actions against them must also be dismissed.

[155] Mr. Bakken sues Mr. Shah and L'Abri for defamation. There can be no justification for the contents of the letters of October 29, 1994. Nor do the defences of privilege, absolute or qualified, avail Mr. Shah or L'Abri.

[156] But what of the statement of claim in his action which Mr. Shah circulated to third parties, such as realtors who were apparently uninvolved as parties to the litigation, in May and June, 1995. It is not in dispute that absolute privilege attaches to a pleading used in the course of court proceedings. But to extend the privilege to the use of document in this way, that is to publish the libel, defies logic. Neither justification nor privilege can be claimed by Mr. Shah or L'Abri in the circumstances.

[157] The question of damages is difficult. This is because the evidence does not provide the Court with Mr. Bakken's level of income before and after the libel by which the Court might conclude a drop in income was the result of the defamatory statements. Here, Mr. Bakken remained with his firm until the end of December, 1996 at which time he was hired by the City as its administrator.

[158] Nonetheless, Mr. Bakken was libelled in his capacity as a solicitor. The evidence establishes that whilst the population in relative terms is not huge, word of Mr. Shah's

assertions spread through members of the community rapidly. In relative terms the Fraser Valley is tightly knit. Not to put too fine a point on it, it is difficult to see why the manager of a financial institution would wish to deal with a lawyer accused of misappropriation of funds. I accept that Mr. Bakken suffered stress, and that his relationship with members of his firm became strained.

[159] Mr. Shah made extremely serious and untrue assertions against a lawyer. Mr. Shah is a lawyer, and knows or ought to know that without a reputation for integrity a lawyer is nought. I conclude that an appropriate award of damages, including exemplary damages, is \$50,000.

[160] I understand the parties wish to speak to the question of costs.

"W.B. Scarth, J."  
The Honourable Mr. Justice W.B. Scarth