2012 ONCA 297
Ontario Court of Appeal

Carmen Alfano Family Trust v. Piersanti

2012 CarswellOnt 5668, 2012 ONCA 297, [2012] O.J. No. 2042, 215 A.C.W.S. (3d) 637, 291 O.A.C. 62

Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, Trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano, Trustee of the Ulti Alfano Family Trust, and Ulti Alfano, Plaintiffs (Respondents) and Christian Piersanti, Piersanti and Co. Barristers and Solicitors, Gold Financial Corp., Osler Paving Ltd., 758626 Ontario Limited now known as Diligent Financial Corporation, 1281111 Ontario Limited, 1269906 Ontario Limited, 1281632 Ontario Limited, 1212700 Ontario Limited, Terry Piersanti also known as Terry Scatcherd, 1281038 Ontario Limited, and 3964400 Canada Inc., Defendants (Appellants)

Christian Piersanti, Diligent Financial Corporation, and 1212700 Ontario Limited, Plaintiffs by Counterclaim (Appellant) and Bertina Alfano, Italo Alfano, Ultimino Alfano, Joe Alfano, 815748 Ontario Limited, Power Contracting Limited, Puslinch Investments Inc., and 1026864 Ontario Limited, Defendants by Counterclaim (Respondents)

Gold Financial Corp., Plaintiff (Appellant) Puslinch Inv. Inc., Invar Building Corporation, Invar Aggregates Limited, 1212700 Ontario Limited, 1026864 Ontario Limited, Peter Lamanna, 2016411 Ontario Limited, Steven Bellissimo Barrister and Solicitor, Ontario Power Contracting Limited, 2012746 Ontario Limited, 2026474 Ontario Limited, Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, Trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano, Trustee of the Ulti Alfano Family Trust, and Ulti Alfano, Defendants (Respondents)

D. O'Connor A.C.J.O., H.S. LaForme J.A., J.D. Cunningham A.C.J. Ont. S.C.J. (ad hoc)

Heard: November 8-9, 2011
Judgment: May 9, 2012
Docket: CA C52738

Proceedings: reversing in part *Carmen Alfano Family Trust v. Piersanti* (2010), 2010 ONSC 4853, 2010 CarswellOnt 6769 (Ont. S.C.J. [Commercial List]); additional reasons at *Carmen Alfano Family Trust v. Piersanti* (2012), 2012 ONCA 442, 2012 CarswellOnt 7923 (Ont. C.A.); leave to appeal refused *Carmen Alfano Family Trust v. Piersanti* (2012), 2012 CarswellOnt 13924, 2012 CarswellOnt 13925 (S.C.C.)

Counsel: V. Ross Morrison, Samantha Chapman, for Appellants
Kevin Sherkin, James F. Diamond, for Respondents

Subject: Insolvency; Torts; Contracts; Corporate and Commercial; Civil Practice and Procedure; Evidence; Property

Headnote

Bankruptcy and insolvency --- Assignments in bankruptcy — Miscellaneous

Fraudulent placement of corporation in bankruptcy — Family members were owners of paving company, O Ltd., through

family trusts — Lawyer was guarantor of some loans of company — Lawyer transferred certain property of O Ltd. to numbered company, locked out family members claimed he was owner of O Ltd., and placed O Ltd. in bankruptcy — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief; defendants brought unsuccessful counterclaim; and company of lawyer brought unsuccessful action against family members and others — Lawyer and wife appealed — Appeal allowed in part — There was no basis to interfere with trial judge's findings that lawyer misappropriated monies from O Ltd. and assigned O Ltd. into bankruptcy as part of fraudulent scheme to deprive family trusts of their interests in company — There was ample evidence to support trial judge's conclusion that family trusts owned 87 percent of O Ltd. and that O Ltd. would have continued profitably — However, trial judge's finding that lawyer's wife was liable for damages resulting from bankruptcy could not stand — Trial judge made no finding of conspiracy or linking wife to bankruptcy or to fraudulent scheme.

Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — General principles

Family members were owners of paving company, O Ltd., through family trusts — Lawyer was guarantor of some loans of company — Lawyer transferred certain property of O Ltd. to numbered company, locked out family members claimed he was owner of O Ltd., and placed O Ltd. in bankruptcy — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief; defendants brought unsuccessful counterclaim; and company of lawyer brought unsuccessful action against family members and others — Lawyer and wife appealed — Appeal allowed in part — There was no basis to interfere with trial judge's findings that lawyer misappropriated monies from O Ltd. and assigned O Ltd. into bankruptcy as part of fraudulent scheme to deprive family trusts of their interests in company — There was ample evidence to support trial judge's conclusion that family trusts owned 87 percent of O Ltd. and that O Ltd. would have continued profitably — However, trial judge's finding that lawyer's wife was liable for damages resulting from bankruptcy could not stand — Trial judge made no finding of conspiracy or linking wife to bankruptcy or to fraudulent scheme.

Remedies --- Damages — Practice — Evidence — Miscellaneous

Expert evidence — Family members were owners of paving company, O Ltd., through family trusts — Lawyer transferred certain property of O Ltd. to numbered company, and when sale was challenged, lawyer locked out family members and claimed he was owner of O Ltd. — Lawyer placed company in bankruptcy — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief — After voir dire was held, trial judge refused to admit evidence of lawyer's expert witness on ground that he lacked independence and objectivity — Trial judge concluded that expert based his analysis on theories advanced by lawyer and assumed role of advocate — Lawyer and wife appealed — Appeal allowed in part — There was no basis to interfere with trial judge's decision not to admit expert evidence — There was ample evidence to support conclusion that expert lacked independence — Expert's reports were repetitious, argumentative in tone, opined on matters of law, and read like lawyer's written argument.

Evidence --- Opinion — Experts — Admissibility — Evidence as to credibility

Family members were owners of paving company, O Ltd., through family trusts — Lawyer transferred certain property of O Ltd. to numbered company, and when sale was challenged, lawyer locked out family members and claimed he was owner of O Ltd. — Lawyer placed company in bankruptcy — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief — After voir dire was held, trial judge refused to admit evidence of lawyer's expert witness on ground that he lacked independence and objectivity — Trial judge concluded that expert based his analysis on theories advanced by lawyer and assumed role of advocate — Lawyer and wife appealed — Appeal allowed in part — There was no basis to interfere with trial judge's decision not to admit expert evidence — There was ample evidence to support conclusion that expert lacked independence — Expert's reports were repetitious, argumentative in tone, opined on matters of law, and read like lawyer's written argument.

Torts --- Fraud and misrepresentation — Remedies — Damages — Assessment of damages — Miscellaneous

Family members were owners of paving company, O Ltd., through family trusts — Lawyer was guarantor of some loans of O Ltd. — Lawyer transferred certain property of O Ltd. to numbered company, locked out family members, claimed he was owner of O Ltd., and placed O Ltd. in bankruptcy — Family purchased security interests and assets of O Ltd. through new

corporation — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief — Trial judge awarded family members $20,000,000 in damages for losses and $250,000 in punitive damages — Trial judge held that lawyer acted fraudulently in creating agreement stating he was owner of O Ltd., when in reality he was only 13 per cent owner — Trial judge held that family members lost net cash flow due to lawyer's actions, incurred debt to finance start-up operations after bankruptcy, and lost ownership of interest in certain properties — Lawyer and wife appealed — Appeal allowed in part — Damage award was reduced on basis of adjustments to cash flow, for debt repurchase, and for gravel pit acquisition, to $14,391,807 — Damages claim was not derivative or too remote — There was evidence to support trial judge's conclusion that family mitigated their damages.

Torts --- Fraud and misrepresentation — Remedies — Damages — Assessment of damages — Exemplary or punitive damages

Family members were owners of paving company, O Ltd., through family trusts — Lawyer was guarantor of some loans of O Ltd. — Lawyer transferred certain property of O Ltd. to numbered company, locked out family members, claimed he was owner of O Ltd., and placed O Ltd. in bankruptcy — Family purchased security interests and assets of O Ltd. through new corporation — Family members and others brought successful action against lawyer, lawyer's wife and others for declaration of ownership and other relief — Trial judge awarded family members $20,000,000 in damages for losses and $250,000 in punitive damages — Trial judge held that lawyer acted fraudulently in creating agreement stating he was owner of O Ltd., when in reality he was only 13 per cent owner — Lawyer and wife appealed — Appeal allowed in part — There was no basis to interfere with punitive damages award — Punitive damages, although not pleaded in Fresh as Amended Statement of Claim, were sought at trial — Lawyer had adequate opportunity to respond to claim, as evidence to support punitive damages award was central to family's claims of fraud.

Bankruptcy and insolvency --- Property of bankrupt — Miscellaneous

Table of Authorities

Cases considered by *D. O'Connor A.C.J.O.*:

Bank of Montreal v. Citak (2001), [2001] O.T.C. 192, 2001 CarswellOnt 944 (Ont. S.C.J. [Commercial List]) — considered

Carmen Alfano Family Trust v. Piersanti (2009), 2009 CarswellOnt 1576, 78 C.P.C. (6th) 88 (Ont. S.C.J.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — considered

R. v. Abbey (2009), 68 C.R. (6th) 201, 2009 ONCA 624, 2009 CarswellOnt 5008, 254 O.A.C. 9, 97 O.R. (3d) 330, 246 C.C.C. (3d) 301 (Ont. C.A.) — referred to

R. v. Harris (2005), [2005] EWCA Crim 1980, [2006] 1 Cr. App. R. 5 (Eng. Ct. of Crim. App.) — considered

R. v. Inco Ltd. (2006), 2006 CarswellOnt 2820, 80 O.R. (3d) 594, 21 C.E.L.R. (3d) 240 (Ont. S.C.J.) — referred to

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

Whiten v. Pilot Insurance Co. (2002), 156 O.A.C. 201, 35 C.C.L.I. (3d) 1, [2002] 1 S.C.R. 595, 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, 283 N.R. 1, 20 B.L.R. (3d) 165, [2002] I.L.R. I-4048, 209 D.L.R. (4th) 257 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 40(1) — referred to

s. 67(1) — considered

s. 67(1)(a) — considered

s. 71(2) — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

APPEAL by defendant lawyer and his wife from judgment reported at *Carmen Alfano Family Trust v. Piersanti* (2010), 2010 ONSC 4853, 2010 CarswellOnt 6769 (Ont. S.C.J. [Commercial List]), allowing plaintiff family's claim for damages in fraud and declaration of ownership.

***D. O'Connor A.C.J.O.*:**

1 This is an appeal from the judgment of Ellen M. Macdonald J. of the Superior Court of Justice dated September 3, 2010. The trial judge made a declaration that the respondents, the Alfano Family Trusts (the "Alfano Trusts"), owned 87 percent of the equity in 758626 Ontario Limited ("758"), which owned 100 percent of the shares in Osler Paving and Construction Limited ("Osler").

2 The trial judge also ordered the appellants, Christian and Terry Piersanti, to pay the respondents $20 million in damages for improperly placing Osler in bankruptcy as part of a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler. In addition, she ordered Christian Piersanti to pay the respondents $250,000 in punitive damages.

3 The trial judge further ordered the appellant, 1281632 Ontario Limited ("128"), a Piersanti controlled company, to pay $2.5 million into court to the credit of the respondents. Finally, the trial judge made a declaration that the respondent, Ulti Alfano, had a one-twelfth interest in the 1995 value of certain properties referred to as the "MAP" properties.

4 The overarching issue with respect to liability is whether the trial judge's finding that the Piersantis improperly placed Osler in bankruptcy is supported by the evidence.

5 The appellants raise a number of issues with respect to damages. The most significant issue is whether the trial judge erred in refusing to permit the appellants' expert to testify on the ground that the expert lacked independence.

6 I would not interfere with the trial judge's declarations that the Alfano Trusts indirectly owned 87 percent of the equity in Osler, nor with her finding of liability against the appellant, Christian Piersanti ("Mr. Piersanti"). In my view, the trial judge's finding of liability against Terry Piersanti ("Ms. Piersanti") is not supported by the evidence and must be set aside.

7 I would not interfere with the trial judge's decision to exclude the evidence of the appellants' expert witness. I would, however, make three adjustments to the damages award. I discuss those below.

Facts

8 I will set out a brief overview of the facts. I will discuss the facts in more detail, as required, when I address the various grounds of appeal.

9 For years, the Alfano family owned and operated Ontario Paving Company Ltd. ("Ontario Paving"), a successful paving business. Following the economic downturn in the early 1990s, Ontario Paving declared bankruptcy. Between the years 1993 and 1995, each of the four Alfano brothers involved in the business (Italo, Frank, Carmen and Ulti) declared personal bankruptcy. In time, three of them were discharged. Carmen, who died in 1996, had not been discharged at the time of his death.

10 In early 1993, the Alfanos, with the assistance of their lawyer, Mr. Piersanti, incorporated Osler to continue the paving business. Mr. Piersanti was made president of Osler and was given a 10 percent ownership interest. In 1993, with Mr. Piersanti's assistance, the Alfano brothers established four family trusts, one for each brother's family. The brothers were trustees and their family members were the beneficiaries of the trusts. Each trust held a 22.5 percent interest in Osler.[1]

11 Prior to his death in 1996, Carmen Alfano was primarily responsible for the management of Osler. After Carmen's death, Mr. Piersanti took over the management of Osler's financial affairs. The remaining Alfano brothers were responsible for operations.

12 In 1997, Frank Alfano wished to withdraw from the business. The trial judge found that his family trust transferred its shares of Osler to the others who had interests in Osler. As a result, the remaining three family trusts each held 29 percent of the equity in Osler for a total of 87 percent. Mr. Piersanti owned the remaining 13 percent.

13 In 2001, the relationship between the Alfano family and Mr. Piersanti began to deteriorate. Mr. Piersanti told Ulti and Italo Alfano that Osler was experiencing cash flow difficulties. The Alfano brothers could not understand this given the amount of business that Osler had been generating in recent years.

14 In the first half of 2002, matters came to a head. At a meeting on June 11, 2002, Mr. Piersanti asserted for the first time that he owned all of the businesses in which he was involved with the Alfano family. This included Osler. He said the Alfanos were "just workers". This came as a shock to the Alfanos who believed they owned the majority of the equity in Osler.

15 Mr. Piersanti then locked the Alfanos out of the businesses, including Osler. He listed Osler's premises at 340 Bowes Road, Concord for sale. Mr. Piersanti removed the hard drives and a computer from the Osler business premises.

16 On or about June 17, 2002, the respondents commenced this action seeking, *inter alia*, declarations that the Alfano Trusts owned 87 percent of Osler through their interests in 758. They also sued Mr. and Ms. Piersanti for damages. On June 17, 2002, Mr. Piersanti assigned Osler into bankruptcy without consulting the Alfano family members.

17 On June 18, the respondents brought a motion to set aside the assignment of Osler into bankruptcy. The respondents also sought a Mareva injunction preventing Mr. and Ms. Piersanti from removing assets from Osler and other companies in which the Alfano family claimed an interest. On June 18, Molloy J. granted the Mareva injunction. The injunction remained in force at the time of the trial. One of the grounds of appeal relates to an alleged breach of that injunction.

18 In response to the motions brought by the respondents on June 18, Mr. Piersanti took the position that he was the sole owner of Osler. He appended to his affidavit a unanimous shareholders' agreement (the "Piersanti USA") dated June 17, 1993 relating to the shares of 758, the company that owned Osler. Pursuant to the Piersanti USA, all of the issued shares of Osler were owned by Mr. Piersanti. The Alfano Trusts were given options to purchase 90 percent of the shares at fair market value. The options were exercisable within a period of five years and only upon fulfilling certain conditions, including having Mr. Piersanti released from guarantees of the debts of Osler and 758. Mr. Piersanti took the position that because the Alfano Trusts had not exercised their options, he was the sole owner of Osler.

19 On July 12, 2002, the respondents' efforts to have the bankruptcy stayed were unsuccessful. Their action against the Piersantis proceeded.

20 At the time they commenced the action, the respondents did not have a copy of a unanimous shareholders' agreement relating to 758 or Osler. In the autumn of 2002, the respondents obtained a copy of a different version of the unanimous shareholders agreement ("the Alfano USA") from the lawyer who had acted for Frank Alfano in 1997 when his family trust sold its interest in Osler.

21 The parties to the Alfano USA were the same as the parties to the Piersanti USA. The agreements were both dated June 17, 1993. The signatures were also the same. However, the content of the Alfano USA was different than the Piersanti USA in several important respects. While both agreements contemplated that all of the issued shares of 758 would initially be held in Mr. Piersanti's name, the Alfano USA provided the Alfano Trusts with options to purchase 90 percent of the shares from Mr. Piersanti at a price of $1 per share. In the Piersanti USA, the option price was fair market value. In addition, unlike the Piersanti USA, the Alfano USA did not contain any preconditions to the exercise of the options. Nor did it set out a time limit within which the Alfano Trusts could exercise the options.

22 Between 1993 and 2002, Mr. Piersanti acted as legal counsel to Osler and to the Alfano family members. Significantly, he advised the Alfano family members in the creation of the Alfano Trusts and in preparing a unanimous shareholders agreement with respect to 758 and Osler.

23 From 2002 until October 2008, when the trial of this matter began, Mr. Piersanti refused to take a position in this litigation as to which of the two versions of the USA was valid. Moreover, he did not provide a credible explanation at trial as to why there were two significantly different agreements dealing with the shareholdings of 758 and Osler.

24 At trial, Mr. Piersanti accepted that the Alfano USA was probably the correct version.

25 This case has had a tortuous history. The Piersantis brought many motions before the commencement of trial. The flavour of the pre-trial proceedings can be gleaned from an order made by Spence J. on September 19, 2006. He prohibited the Piersantis from bringing any further motions without first obtaining leave of the court. The trial judge commented on this history saying "in the disposition of these motions [the pre-trial motions], the Piersanti defendants were frequently admonished for the use of delaying tactics".

26 The Piersantis also failed to produce documents in a timely manner. Mr. Piersanti had possession of most of the relevant documents. He managed Osler's financial affairs. The trial judge found that Mr. Piersanti was also Osler's lawyer as well the lawyer for the Alfanos. He removed the hard drive and a computer from Osler's premises in June 2002 when the dispute underlying this action erupted.

27 In her reasons, the trial judge commented that "shortly after the opening of the trial, I was advised that Mr. Piersanti had recently sworn a supplementary affidavit of documents ... [t]here had been ample opportunity to deliver these documents prior to the commencement of trial." Indeed, there had been six years. The newly produced documents comprised approximately 3,000 pages. The trial judge observed:

> This late delivery of this affidavit was one of many episodes throughout the trial wherein there were issues about the quality of disclosure from the Defendants.
>
> . . . . .

The duty to make full disclosure was largely ignored by the Defendants in this case. They chose the documents that they would disclose.

28 The trial lasted nine months with breaks for holidays and health issues. There were 49 witnesses. Ulti Alfano testified for 14 days and Mr. Piersanti for 22 days. During the trial, there were many motions, including a three-day *voir dire* on the admissibility of the evidence of the Piersantis' expert witness on damages and misappropriation.

29 The trial judge reserved judgment for 14 months and then released 41-page reasons for judgment.

The Reasons for Judgment

30 The trial judge made clear and strong findings of credibility adverse to the Piersantis. She rejected the evidence of both Mr. and Ms. Piersanti. She found that as the trial progressed, the Piersantis "were on a path to deliberately confuse the court on relevant issues". She did not believe the evidence of either of them.

31 The trial judge accepted, by and large, the evidence of Ulti and Italo Alfano and their witnesses. She specifically found that "Ulti was a credible and reliable witness".

32 The appellants do not challenge the trial judge's findings of credibility.

33 The relevant findings of the trial judge with respect to liability arising from the bankruptcy of Osler are as follows:

i. the Alfano Trusts owned 87 percent of 758, which owned 100 percent of Osler;

ii. Mr. Piersanti engaged in a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler;

iii. as part of the fraudulent scheme, Mr. Piersanti concocted a unanimous shareholders agreement effectively eliminating the Alfanos' interest in 758 and Osler;

iv. also as part of the scheme, Mr. Piersanti improperly assigned Osler into bankruptcy;

v. prior to the bankruptcy, the Piersantis misappropriated monies from Osler;

vi. as a result of the bankruptcy, the respondents suffered damages; and

vii. Mr. and Ms. Piersanti were liable to the respondents for damages resulting from the Osler bankruptcy.

34 The trial judge fixed damages in the amount of $20 million.

35 The trial judge also ordered Mr. Piersanti to pay $250,000 as punitive damages because of his fraud with respect to the unanimous shareholders agreement.

36 In addition to her findings with respect to the bankruptcy of Osler, the trial judge made two additional orders that are challenged on appeal:

i. she ordered 128, a Piersanti controlled company, to pay $2.5 million into court to the credit of the respondents; and

ii. she made a declaration that Ulti Alfano has a claim to the 1995 value of a one-twelfth interest in the MAP properties.

Issues

37 I have organized the appellants' arguments into seven issues:

1) Did the trial judge err in finding Mr. Piersanti liable for damages resulting from the bankruptcy of Osler?

2) Did the trial judge err in finding Ms. Piersanti liable for damages resulting from the bankruptcy of Osler?

3) Did the trial judge err in excluding the evidence of the appellants' expert witness on damages and misappropriation?

4) Did the trial judge err in awarding $20 million for damages to the respondents caused by the Osler bankruptcy?

5) Did the trial judge err in awarding punitive damages against Mr. Piersanti?

6) Did the trial judge err in ordering 128 to pay $2.5 million into court to the credit of the respondents? and

7) Did the trial judge err in concluding that Ulti Alfano had a claim to the 1995 value of a one-twelfth interest in the MAP properties?

Analysis

38 As indicated above, the trial judge made strong findings of credibility adverse to Mr. and Ms. Piersanti. She also made several findings of fact that go to the heart of the issues raised on appeal. Although trite, it is important to observe that this appeal is not a second trial and this court will interfere with the trial judge's findings of fact only if she has made a palpable and overriding error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

(1) Osler Bankruptcy — Mr. Piersanti

39 I will address Mr. Piersanti's arguments with respect to the trial judge's finding of liability against him under four headings.

(a) Sufficiency of evidence

40 Mr. Piersanti argues that there was insufficient evidence to found liability against him for damages arising from the Osler bankruptcy. I disagree. In my view, there was a strong case that Mr. Piersanti assigned Osler into bankruptcy as part of a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler.

41 The trial judge made a number of findings that are directly relevant to this issue. First and most critically, she found that the Alfano Trusts owned 87 percent of 758 and indirectly of Osler at the time of the bankruptcy in 2002. She made declarations to that effect.

42 This finding was supported by the evidence of the two Alfano brothers, Ulti and Italo, who testified at trial. This trial judge accepted their evidence. This finding was also supported by the Alfano USA, which the trial judge found to be the true version of the agreement. While the agreement is structured in the form of options to the Alfano Trusts to purchase 90 percent of the shares of 758, those options are exercisable on the payment of $1 per share without conditions. There is no time limit within which the Alfano Trusts were required to exercise the options. This structure is consistent with and supports the evidence of Ulti and Italo Alfano that the intention throughout was that the Alfano Trusts were to be the owners of 90 percent of 758 and Osler (87 percent after Frank Alfano's departure).

43 Mr. Piersanti argued that s. 8.05 of the Alfano USA contains preconditions to the exercise of the options. Section 8.05 provides that a person acquiring shares in 758 must endeavour to obtain releases from all guarantees made by the vendor of

the shares. Mr. Piersanti argues that as the Alfano Trusts had not caused the Osler's creditors to release him from loan guarantees, their interests in the shares had not been realized.

44 I do not accept this argument. In my view, a better interpretation of the Alfano USA is that s. 8.05 does not apply to shares acquired by exercising the options. Even if the obligations contained in s. 8.05 do apply to those shares, the section is not a precondition to the exercise of the options.

45 In my view there was ample evidence to support the trial judge's conclusion that the Alfano Trusts owned 87 percent of 758 and therefore Osler in 2002.

46 The trial judge's finding of liability against Mr. Piersanti was founded in an action for fraud. In para. 2 of her reasons, the trial judge framed the claim as follows:

> The Alfanos are claiming damages in excess of $25 million on the basis that Osler failed due to a series of dishonest and deceitful acts by the defendants Christian and Terry Piersanti.

47 Throughout her reasons, the trial judge made a number of findings that taken together reveal a series of fraudulent acts by Mr. Piersanti designed to appropriate for himself the interests of the Alfano Trusts in Osler. These fraudulent acts culminated in Mr. Piersanti voluntarily assigning Osler into bankruptcy without authority or even the knowledge of the Alfano family members.[2]

48 The most telling of Mr. Piersanti's fraudulent acts was relying on the Piersanti USA to assert 100 percent ownership of 758 and therefore Osler. In para. 60 of her reasons, the trial judge found that:

> Mr. Piersanti created the second version of the USA to gain control of the Osler company when he knew that, particularly after Carmen's death, the remaining brothers, Italo, Ulti and Frank had little or no interest in the details of the legal documentations such as the USA.

49 In relying on the Piersanti USA, Mr. Piersanti took advantage of his position as Osler's lawyer and the lawyer for the Alfano family. He abused that position when he asserted that the Alfano Trusts no longer had any interest in 758 and Osler.

50 The trial judge found that Mr. Piersanti locked the Alfanos out of the Osler business premises and listed the Osler building for sale without informing the Alfanos. Moreover, she found that Mr. Piersanti caused Osler to make a voluntary assignment into bankruptcy.

51 When the Alfanos moved to set aside the assignment into bankruptcy, Mr. Piersanti relied upon the Piersanti USA to assert that he was the sole owner of 758 and Osler.

52 In addition, on June 20, 2002, as part of his fraudulent scheme, Mr. Piersanti asked Osler's controller, Chriss Smith, to alter Osler's financial records for April 2002 to show a loss rather than a profit. Mr. Smith refused, considering such a change to be unethical. Notably, Mr. Piersanti solicited Mr. Smith's help after the Alfanos had challenged Piersanti's assignment of Osler into bankruptcy.

53 Mr. Piersanti argues that there was no advantage for him personally from the Osler bankruptcy. The difficulty with this argument is that it depends on what Mr. Piersanti knew or intended at the time he carried out the fraudulent acts described above. He had access to all of Osler's financial records. He was in the best position to determine what might occur in a bankruptcy and whether in the end there would be value for him if he was the sole owner of Osler. He might well have considered that the bankruptcy was an expedient way of getting rid of the interests of the Alfano Trusts. In addition, he was the guarantor of some of Osler's debt. If the Osler assets were to be liquidated for more than the outstanding debt, he stood to gain. All of that said, it is not necessary to decide what Mr. Piersanti considered his upside to be. The facts, as found by the trial judge and supported by the evidence, lead inevitably to the conclusion that Mr. Piersanti placed Osler in bankruptcy as

part of his fraudulent scheme to deprive the Alfanos of their interest in Osler.

54 Mr. Piersanti also argues that Osler would have failed whether or not he placed it in bankruptcy. Thus, he argues his actions did not cause the Alfano Trusts any damages.

55 I do not accept this argument. There is evidence to support the trial judge's conclusion that Osler would have continued as a profitable company if Mr. Piersanti had not placed it in bankruptcy.

56 In May 2002, Mr. Piersanti assured the Royal Bank of Canada (RBC), one of Osler's secured creditors, that Osler's affairs had been improving ahead of schedule for the past two years and that Osler had $6 million work on hand for the coming year.

57 On June 11, 2002, Mr. Piersanti locked the Alfanos out of Osler and to their surprise took the position that he owned all of the company. On June 14, in response to Mr. Piersanti's unilateral action, the Alfanos' counsel wrote RBC informing it of the ownership dispute and directing the bank to only accept cheques signed by the Alfanos.

58 Not surprisingly in these circumstances of disputed ownership, on June 17 RBC called its loan and began the process of appointing a receiver. Later on the same day, Mr. Piersanti voluntarily assigned Osler into bankruptcy.[3]

59 In his evidence, Tom Strezos, the Alfanos' damages expert, opined that, assuming Mr. Piersanti had wrongfully misappropriated funds and assigned the company into bankruptcy, it appeared that Osler would have continued as a profitable going concern but-for Mr. Piersanti's misconduct. In reaching this conclusion, Mr. Strezos considered the history of Osler, its financial statements, and the state of the construction industry in the years following 2002.

60 Mr. Strezos pointed out that Osler had made significant investments in capital assets from 1996 to 2001 as a result of an optimistic outlook for its business. The company was forecasting lower cash outlays for capital expenditures and moderate to high growth in the paving industry after 2001, which would lead to significant annual net cash flows.

61 Moreover, Mr. Strezos said that Osler's financial statements did not present the picture of a failing company. Osler's 2001 financial statements showed a net profit of $216,684. The 2011 statements showed equity of $2,693,800 and an EBITDA[4] of $1,219,313.[5]

62 In 2002, Osler's monthly income statements showed net income increasing from a loss of $1,870 in the year to January 31, 2002 to a profit of $155,377 in the year to March 31, 2002.

63 The trial judge recognized that a number of economic factors could affect the profitability of Osler and that Ulti and Italo Alfano were responsible for the economic risks faced by Osler. However, the trial judge accepted Mr. Strezos' evidence. Her findings of liability and damage were premised on a conclusion that but for the bankruptcy, Osler would have continued as a profitable growing concern. This finding was open to the trial judge on the evidence. I see no basis to interfere.

(b) Misappropriation of Osler Funds

64 At trial, the Alfano Trusts asserted that over the years, Mr. Piersanti had misappropriated funds from Osler. They did not sue for recovery of the misappropriated monies. Rather, they alleged that the misappropriations were part of Mr. Piersanti's fraudulent scheme to appropriate Osler to himself at their expense.

65 The allegations relating to Mr. Piersanti's misappropriations were difficult to run to ground at trial because of the problems the respondents and the court experienced in requiring Mr. Piersanti to make full and timely production of documents. Indeed, he continued to make disclosure as the trial progressed. The result was that allegations of misappropriation evolved as documents were produced.

66 At one point prior to trial, Morawetz J. ordered that the respondents' allegations of misappropriation should be confined to those being made at that point in time. After that order, Mr. Piersanti made further productions, by then long overdue. In these circumstances, it was open to the trial judge to consider all of the evidence with respect to the alleged

misappropriations. Given Mr. Piersanti's disregard for his obligations to produce documents, it would have been unfair to limit the Alfano Trusts to the misappropriations referred to in Morawetz J.'s order.

67 The trial judge found that Mr. Piersanti misappropriated funds. Her reasons on this issue were brief.

68 In addressing the issues of misappropriation, the trial judge referred to one chart which detailed certain alleged misappropriations in the amount of $1,077,438. She also referred to other calculations of alleged misappropriations by the Piersantis for their own purposes to the detriment of the financial stability of Osler. The trial judge accepted these calculations noting "they are supported by the various witnesses who testified on accounting matters".

69 In his evidence, Mr. Piersanti offered explanations for some, or perhaps all, of the transactions relating to the alleged misappropriations. However, the trial judge did not accept any of his evidence. Rather, she found that he had embarked upon a fraudulent scheme to deprive the Alfano Trusts of their interests in Osler. Several of the impugned transactions resulted in a benefit to Mr. Piersanti or a company related to him and did not take into consideration the fact that the Alfano Trusts had an interest through 758 of 87 percent of the equity of Osler.

70 Although the trial judge did not address the impugned transactions individually, it is implicit in her reasons, read as a whole, that she was satisfied that the amount improperly appropriated by Mr. Piersanti exceeded $1 million. I would not interfere with this finding.

71 Finally, it is worth repeating that the trial judge's findings of liability and her damages award are not directed at compensating the respondents for misappropriated funds. Rather, they are directed at Mr. Piersanti's fraud in assigning Osler into bankruptcy. Indeed, even if the trial judge had not found misappropriations, there was ample evidence to support the trial judge's finding of liability with respect to the Osler bankruptcy.

(c) The Order of July 12, 2002

72 On July 12, 2002, Epstein J. refused the respondents' request to set aside the assignment of Osler into bankruptcy. Mr. Piersanti argues that this order operates as a bar based on *res judicata* to the trial judge's finding of liability with respect to the bankruptcy.

73 I do not accept this argument. The order of July 12, 2002 was based on incomplete and incorrect facts. At the time Mr. Piersanti asserted he was the sole owner of Osler. He had produced the fraudulent version of the USA. While the respondents took the position that the Family Trusts were the majority shareholders, they had not yet found what turned out to be the true version of the USA. On July 12, the court was not aware that the assignment into bankruptcy was part of Mr. Piersanti's fraudulent scheme to deprive the Alfanos of their interests in Osler.

74 The order of July 12 cannot operate as a bar to a claim that the bankruptcy was the result of a fraud that had not been exposed at the time.

(d) The Personal Bankruptcies of the Alfanos

75 Mr. Piersanti argues that the Alfano brothers lost their interests in 758 and Osler because they failed to disclose those interests to their trustees in bankruptcy when they declared personal bankruptcy in the 1990s.

76 Osler was incorporated in 1993. Mr. Piersanti was the sole shareholder. Under the Alfano USA, the four Alfano Trusts each had an option to buy 22.5 percent of the shares of 758 for $1 per share. After the transfers from the Frank Alfano Trust in 1997, the three remaining Alfano Trusts each had an interest in 29 percent of 758.

77 Carmen, Ulti and Italo Alfano each declared personal bankruptcy between 1993 and 1995. Ulti and Italo were discharged in 1995 and 1996. Carmen was not discharged at the time of his death in 1996. None of the Alfanos disclosed an interest in 758 or Osler during their personal bankruptcies.

78 Mr. Piersanti's argument is based on the principle that all of the assets of a bankrupt person vest in the trustee whether disclosed or not: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 40(1), 71(2). Thus, the argument goes, the Alfano brothers lost their interests in Osler at the time of their bankruptcies and therefore, had no basis on which to bring this action.

79 I would not give effect to this argument.

80 To start, the argument was not pleaded. Had it been pleaded, the parties may have led evidence and conducted the trial differently.

81 Moreover, it does not appear that the Alfano brothers, in their personal capacities, had an interest in 758 or Osler at the time of their bankruptcies. Their family trusts did. The brothers were trustees of those trusts. Section 67(1) of the *Bankruptcy and Insolvency Act* as it was at the time of the Alfanos' personal bankruptcies provided that "[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person": see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended by S.C. 1992, c. 27. The trial judge did not make findings concerning the identity of the beneficiaries of the Alfano Family Trusts, and I am not prepared to conclude, on this record, that the property held by the trusts did not fall under s. 67(1)(a).

82 In any event, it seems counter-intuitive that if there is a problem, as Mr. Piersanti now asserts, that Mr. Piersanti should be the beneficiary of that problem. If there is a problem, it was the creditors of the Alfano brothers at the time of their bankruptcies who were affected, not Mr. Piersanti.

83 That said, there is one matter with respect to this issue arising from the trial judge's reasons that warrants comment. Throughout her reasons, the trial judge repeatedly held that the Alfano Trusts owned 87 percent of 758 and, therefore, of Osler. She made declarations to that effect. However, in para. 150 of her reasons she makes two comments that could be interpreted as being inconsistent with her core finding about the Alfano Trusts' interests. She said:

> Even if the Piersantis stole monies from the Alfanos through the Osler company, the Alfanos' claims would fail because their interest in Osler and MAP Properties vested in their trustees on bankruptcy. The trustees acquired all legal and equitable rights of the Alfanos.
>
> . . .
>
> The Alfanos' shares in Osler vested in their trustees on the day of bankruptcy.

84 It is important to consider the trial judge's comments in para. 150 in the context in which she made them. The comments were made in a section of the reasons in which the trial judge addressed Ulti and Italo Alfano's claims to an interest in the MAP properties. Those claims were made by Ulti and Italo in their personal capacities, not as trustees. Indeed, the trial judge began the discussion at para. 145 by saying: "These submissions are relevant to the claims of Ulti and Italo in their interest in the MAP properties." Ulti and Italo Alfano did not disclose their interests in the MAP properties to their trustees in bankruptcy. The trial judge found that their interests vested with the trustees.

85 In her reasons, prior to para. 150, the trial judge had clearly decided that the Alfano Trusts owned 87 percent of the shares of 758 and, therefore, of Osler. The trial judge's comments about the Osler shares in para. 150 were made as an aside in the course of a discussion about the Alfano brothers' personal interests in the MAP properties. In para. 150, the trial judge did not analyze the issue of the interests of the Alfano Trusts in Osler. Whatever prompted the trial judge to make the comments in para. 150, it is clear from her reasons, read as a whole, that she did not intend to find that the Alfano Trusts did not own 87 percent of the shares of 758 and Osler because of the personal bankruptcies of the Alfano brothers.

86 In the result, I would not give effect to Mr. Piersanti's argument with regard to the effect of the Alfanos' personal bankruptcies on the claim by the Alfano family trusts against him for fraud.

(2) Terry Piersanti

87 The trial judge found that Ms. Piersanti was liable for damages resulting from the Osler bankruptcy.

88 In my view, this finding cannot stand. The trial judge made no finding linking Ms. Piersanti to the bankruptcy.

89 The respondents argue that the trial judge found Ms. Piersanti liable as a co-conspirator with her husband in the fraudulent scheme to place Osler into bankruptcy.

90 The difficulty is that the trial judge did not find a conspiracy. Nor did she make any factual findings linking Ms. Piersanti to the fraudulent scheme that led to the bankruptcy. She did not find that Ms. Piersanti was involved in concocting the fraudulent USA, in deciding to lock out the Alfanos from the Osler business, in asking the controller to alter the financial statements, or in making the assignment into bankruptcy.

91 The trial judge found that Ms. Piersanti was involved in misappropriating funds from Osler. Accepting for the sake of discussion that there was evidence to support that conclusion, the trial judge does not find that Ms. Piersanti's involvement in the misappropriations was part of a scheme or conspiracy by which Mr. Piersanti would place Osler in bankruptcy in June 2002. Indeed, all but one of the alleged misappropriations took place in the 1990s, at a time well removed from the bankruptcy. There is no evidence to suggest that Mr. Piersanti had formulated his scheme to put Osler in bankruptcy before June 2002.

92 A finding that Ms. Piersanti was involved in misappropriations from Osler at some time prior to the Osler bankruptcy falls short of establishing that she was a co-conspirator in the fraudulent act of placing Osler into bankruptcy.

93 At trial, the respondents alleged that Ms. Piersanti was involved in using mortgage money from the MAP properties in violation of the Mareva injunction (an issue I will discuss below). Even if the trial judge had found that this to be the case that finding had nothing to do with the Osler bankruptcy.

94 In summary, while the trial judge may have been of the view that Ms. Piersanti was liable to the respondents for certain causes of action, she did not make any findings that would link her actions to the bankruptcy of Osler which was the triggering event for the damages award.

95 Thus, I would set aside the trial judge's finding that Ms. Piersanti is liable for damages based on the claim that she was a co-conspirator with her husband in placing Osler into bankruptcy.

(3) The Appellants' Expert Witness

96 The appellants submit that the trial judge erred in her mid-trial ruling refusing to admit the evidence of their expert witness, Ronald Anson-Cartwright, on the basis that Mr. Anson-Cartwright lacked independence and objectivity. The reasons for this ruling are reported at [2009] O.J. No. 1224 (Ont. S.C.J.).

97 The appellants proposed to call Mr. Anson-Cartwright to give expert evidence with respect to issues of forensic accounting and the Alfanos' damages claim. Mr. Anson-Cartwright prepared two reports.

98 Shortly after receiving the first report, counsel for the respondents indicated that they would be objecting to the admissibility of Mr. Anson-Cartwright's evidence. They alleged that Mr. Anson-Cartwright and his associate had assumed the role of advocates and were not acting independently or objectively in preparing the report. When Mr. Anson-Cartwright's second report was delivered approximately four months later, counsel for the respondents raised the same objection.

99 During the course of the trial, counsel for the respondents requested production of certain parts of Mr. Anson-Cartwright's files. The request was refused. After a mid-trial motion, the trial judge ordered the production of email correspondence that had been referred to in Mr. Anson-Cartwright's time dockets. The emails were largely exchanged between Mr. Anson-Cartwright and Mr. Piersanti. After the emails were produced, the trial judge conducted a three-day *voir dire* to determine whether she would admit Mr. Anson-Cartwright's evidence. Mr. Anson-Cartwright was called as a witness

and cross-examined at length. In a written ruling, the trial judge refused to admit his evidence.

100 In her ruling, the trial judge set out the legal principles that guided her decision. She concluded that Mr. Anson-Cartwright "based his analysis of the defense position on the theories advanced by Mr. Piersanti". She said that Mr. Anson-Cartwright "was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate". His role as an independent witness was secondary to the role of "someone who is trying their best for their client to counter the other side". She found that Mr. Anson-Cartwright became a spokesman for Mr. Piersanti. She said Mr. Anson-Cartwright's reports were "tainted by the lack of impartiality that is clearly apparent from the content of the e-mails".

101 The appellants argue that the trial judge erred in not admitting Mr. Anson-Cartwright's evidence. They argue that any lack of independence goes to the weight of the evidence, not its admissibility. They argue that Mr. Anson-Cartwright's reports were impartial and objective. They submit that the reports properly outline the basis and sources on which his opinions were formed.

102 The appellants also argue that the trial judge erred in considering the email exchanges in coming to her conclusion that Mr. Anson-Cartwright's evidence lacked independence. According to the appellants, the trial judge should have confined her analysis to Mr. Anson-Cartwright's reports and his evidence concerning the content of the reports.

103 Expert evidence is an exception to the general rule barring opinion evidence. In *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), the Supreme Court of Canada set out the four criteria for the admissibility of expert evidence: 1) relevance, 2) necessity in assisting the trier of fact, 3) the absence of any exclusionary rule, and 4) proper qualification. The party tendering expert evidence has the burden to satisfy the four *Mohan* criteria on a balance of probabilities.

104 In discussing the second criterion at pp. 23, 24 of *Mohan*, the Supreme Court referred to the concept of helpfulness to a trier of fact. The court concluded that the appropriate test for necessity is whether the expert is capable of assisting the trier by providing information likely to be beyond the trier's knowledge and experience.

105 In determining whether an expert's evidence will be helpful, a court will, as a matter of common sense, look to the question of the expert's independence or objectivity. A biased expert is unlikely to provide useful assistance.

106 Courts have taken a pragmatic approach to the issue of the independence of expert witnesses. They have recognized and accepted that experts are called by one party in an adversarial proceeding and are generally paid by that party to prepare a report and to testify. The alignment of interest of an expert with the retaining party is not, in and of itself, a matter that will necessarily encroach upon the independence or objectivity of the expert's evidence.

107 That said, courts remain concerned that expert witnesses render opinions that are the product of their expertise and experience and, importantly, their independent analysis and assessment. Courts rely on expert witnesses to approach their tasks with objectivity and integrity. As Farley J. said in *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Ont. S.C.J. [Commercial List]), "experts must be neutral and objective [and], to the extent they are not, they are not properly qualified to give expert opinions."

108 When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

109 The report of the Goudge Inquiry, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General: 2008), at p. 503, noted the importance of expert witness independence, quoting the principles described by the Court of Appeal of England and Wales in *R. v. Harris* (2005), [2005] EWCA Crim 1980 (Eng. Ct. of Crim. App.), at para. 271:

(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

. . . . .

110 In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.

111 That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.

112 In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to any relevant matters that bear on the expert's independence. These may include the expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the process by which the expert formed the opinions that will be the basis of the proposed testimony: see *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (Ont. S.C.J.), at p. 607.[6]

113 An appellate court will accord deference to a trial judge's decision to exclude evidence of an expert on the basis that the proposed evidence lacks independence. On reviewing such a decision, an appellate court will look to whether the trial judge applied the proper legal principles and whether the trial judge's conclusion was supported by the evidence. Absent such an error, an appellate court will not interfere.

114 I would not interfere with the trial judge's decision in this case. The trial judge had regard to the appropriate legal principles and there was ample evidence to support her conclusion that Mr. Anson-Cartwright's proposed evidence lacked independence.

115 I have reviewed Mr. Anson-Cartwright's reports. In general terms, they are repetitious and argumentative in tone. Parts of Mr. Anson-Cartwright's reports read like the appellant's counsels' written argument. In places, the reports go beyond the areas in which Mr. Anson-Cartwright is qualified to give expert evidence and address factual issues that properly fell within the purview of the trial judge.

116 In addition, the reports opine on matters of law. By way of example, at p. 19 of his October 3, 2008 report, Mr. Anson-Cartwright concludes that the Alfanos' counsels' letter of June 14, 2002 interfered with contractual relations. He also says, at p. 22, that the Alfanos' claim for damages for loss of profits of Osler was derivative. In addition, he says, at p. 43, that there is no evidence that the Alfanos owned 87 percent of the equity in Osler. This latter conclusion involves questions of fact and law and was a central issue at trial. In offering his opinion on the ownership of Osler, Mr. Anson-Cartwright did not have the benefit of all of the evidence at trial. Indeed, the evidence to which he referred was not only incomplete, but inaccurate in some respects.

117 The trial judge reviewed the reports. She also had the benefit of hearing Mr. Anson-Cartwright testify in the *voir dire* and of reviewing a series of emails between Mr. Piersanti and Mr. Anson-Cartwright that related to the preparation of Mr. Anson-Cartwright's first report. I note that in exchanging emails, Mr. Piersanti was not acting as a lawyer. He was a party and was represented by counsel.

118 The emails reveal a pattern of Mr. Anson-Cartwright attempting to craft his report to achieve Mr. Piersanti's objectives in the litigation. Each draft of Mr. Anson-Cartwright's report was delivered to Mr. Piersanti for review, revision

and approval. A few examples of the emails sent by Mr. Anson-Cartwright show the concern the trial judge had:

> • "Further I wanted the plaintiff to admit that there is no executed lease with Ontario Power to bolster your position that the occupation rent should be a fair market rent not the rent paid by a non-arms length party ... so yes, I'm trying to make them look bad"
>
> • "Could you please explain how the Alfanos rationalize that they had an 87 percent interest in Osler and 87 percent interest in Puslinch? Can you tell me succinctly why they are wrong?"
>
> • "I find the critique of Deloitte's[7] cash flow analysis to be not as powerful as it could be. Try to prioritize the "killer" points, otherwise a judge might be overwhelmed by a series of small technical points. What are the three to five points which destroy or invalidate the Deloitte loss of cash flow estimate?"

119 The purpose of this review is not to pick apart Mr. Anson-Cartwright's reports on an item-by-item basis. Rather, it is to point out the problems with the reports and the flaws in the process that led to their preparation.

120 In my view, there was ample basis for the trial judge to conclude that Mr. Anson-Cartwright's evidence should not be admitted. The trial judge was in the best position to determine the significance of the demonstrated lack of independence and the extent to which the benefit of that evidence was thereby diminished. I would not interfere with her conclusion.

(4) Damages

121 The trial judge awarded the respondents $20 million in damages resulting from the bankruptcy of Osler. The appellants raise a number of arguments with respect to this award.

122 By way of background, after Mr. Piersanti placed Osler in bankruptcy, the respondents, either directly or through a newly incorporated company called Southview, purchased the security interests and assets of Osler from Osler's secured creditors in order to continue in the paving business. In 2003, the respondents began operating the Osler business in Southview. Between June 30, 2002 and June 30, 2008, the respondents and Southview incurred significant debt to purchase the assets and security from Osler's secured creditors and to finance Southview's capital and operating expenditures. The transition of the business from Osler to Southview was expensive. The Osler bankruptcy caused reputational damage to the Alfano family. It was several years before Southview operated at a level of profitability similar to that which Osler would have achieved had it continued. As part of their efforts to finance Southview, the respondents were required to dilute their interests in Southview by 25 percent.

123 The trial judge based her damage award on the report and evidence of Mr. Thomas Strezos, the respondents' damages expert. There is no issue about Mr. Strezos' qualifications as an expert to give opinion evidence on the matters on which he testified. The trial judge accepted Mr. Strezos' report and his evidence, as she was entitled to do.

124 Mr. Strezos calculated the losses arising from the "improper 'winding-up' of Osler by [Mr.] Piersanti, on or about June 30, 2002." The triggering event for Mr. Strezos' damages calculation was the Osler bankruptcy.

125 Mr. Strezos assumed the Alfano Trusts held an 87 percent interest in Osler. He also assumed that Mr. Piersanti had misappropriated $1.25 million from Osler prior to its bankruptcy. He was not asked to comment on or verify the alleged misappropriation.

126 Mr. Strezos was asked to calculate damages for the period from July 1, 2002 (the approximate date of bankruptcy) until June 30, 2008, a date after which Southview was expected to increase its profitability.

127 Mr. Strezos' overall approach to assessing the damages was to use the "lost opportunity" methodology in calculating the losses from the winding-up of Osler. This methodology calculates the losses suffered by the respondents to be the amount that would place them in the same financial position they would have been but for the winding-up.

128 Mr. Strezos calculated the damages under four separate headings:

i. Loss of net cash flows in Osler — the respondents' loss of projected net cash flow in Osler for the period from July 1, 2002 to June 30, 2008.

ii. Additional debt — the debt incurred by the respondents through Southview to finance the Southview operations and to carry the newly incurred debt.

iii. Loss of 25 percent interest in the CN lands — the losses resulting from the respondents' loss of a 25 percent ownership interest in the CN lands. The lands had been owned by Osler and were acquired by Southview after the bankruptcy.

iv. Loss of interest in proceeds from the sale of the Puslinch property — the loss of the Alfanos' share of Osler's 50 percent interest in the Puslinch property. The receiver/manager of this property sold it and allocated Osler's proportionate share of the proceeds to Southview. The proceeds were used to pay down Southview debt. Had Mr. Piersanti not placed Osler into bankruptcy, the respondents would have been entitled to the benefit of 87 percent of these proceeds.

129 Mr. Strezos calculated the economic losses suffered by the respondents as a result of the Osler bankruptcy to be in the range of $18,730,000 and $21,780,000 depending on the assumed projected growth of Osler after the bankruptcy. His medium projected growth rate was 10 percent per annum. The trial judge appeared to accept the medium growth forecast: it seems that her award of $20 million in damages was the result of rounding down Mr. Strezos' medium calculation of $20,210,000. That was reasonable and I will only refer to the medium projections in my discussion below.

130 In his report, Mr. Strezos calculated the components of loss for his medium projection as follows:

- Loss of projected net cash flow in Osler — $6,353,000;
- Additional debt resulting from Osler bankruptcy — $11,180,000;
- Loss of 25 percent in the CN and lands — $1,562,000;
- Loss of share from sale of Puslinch property — $766,000;
- Total losses — $20,210,000.

131 Mr. Strezos pointed out that there should be deducted from the calculated damages the proceeds from the sale of Osler's assets that continue to be held by the receiver/manager.

132 I will address the appellants' arguments with respect to the damages under seven headings.

(a) Derivative Claim

133 Mr. Piersanti argues that the loss of projected net cash flow in Osler is a derivative claim and, as such, could only be asserted by Osler. Thus, the respondents are not in a position to claim recovery of those losses.

134 I reject this argument. First, the respondents' claims were based in fraud. The damages claim results from Mr. Piersanti's fraudulent acts in depriving the Alfano Trusts of ownership interests in Osler. Significantly, Mr. Piersanti's fraud was directed at the Alfano Trusts, not at Osler. His intent was to appropriate to himself the value, present and future, of the Alfano Trusts' 87 percent interest in Osler.

135 The Alfano Trusts are entitled to a damages award that would put them in the financial position they would have been had the fraud not occurred — in this case had the Osler bankruptcy not occurred. In my view, it was open to the trial judge to calculate the loss of value of the Alfano Trusts' interests in Osler by looking to the loss of projected cash flows that Osler would have realized had Mr. Piersanti not put it into bankruptcy.

136 It is also worth noting that if the Alfano Trusts had sought leave to bring a derivative claim in 2002, they would no doubt have encountered exactly the same argument from Mr. Piersanti that they did in this litigation. He would have asserted that the Alfano Trusts did not have an interest in Osler as he, Mr. Piersanti, owned 100 percent of the equity. Thus, in a derivative action, it would have been necessary to litigate the same ownership issue as arose in this litigation.

137 As it turned out, seven years after this litigation began, the court determined that the Alfano Trusts had an 87 percent interest in 758, which owned 100 percent of Osler. By that time, Osler had been in bankruptcy for seven years, all of its assets had been liquidated and its creditors paid. The practical effect was that there was no company left through which the Alfano Trusts could have asserted a derivative claim.

138 Thus, in my view, the respondents were entitled to assert a claim for damages based in part on the projected cash flows of Osler for the period following the bankruptcy. I reject the derivative claim argument.

(ii) Remoteness

139 Mr. Piersanti argues that the trial judge's damage award for additional debts incurred by the respondents resulting from the Osler bankruptcy are too remote from the bankruptcy and, as such, are not properly recoverable as damages resulting from that bankruptcy.

140 The trial judge's finding of liability giving rise to this head of damages is based in fraud. In my view, there is ample evidence to connect these damages to Mr. Piersanti's fraudulent acts of placing Osler in bankruptcy.

141 It was foreseeable that the respondents would take steps to recover the Osler business and continue operating what they considered to be their family business. The Alfano family had a history of continuing their paving business after bankruptcy. It makes sense, as Mr. Strezos pointed out, that given the bankruptcy of Osler, the costs of financing the operations of Southview would be higher than normal because the loss of reputation resulting from the bankruptcy would be a drag on the profitability of the ongoing business.

142 I see no basis to interfere with the trial judge's award of damages with respect to the additional debt other than by making the adjustments that I will discuss below.

(iii) Failure to Mitigate

143 Mr. Piersanti argues that the trial judge erred in not reducing the damage award because the respondents failed to mitigate their losses. The nub of this argument is that some of the losses experienced by Southview after the bankruptcy resulted from poor management by the Alfano family.

144 The appellants made the same argument at trial. This argument is entirely fact based. The issue is whether the respondents took reasonable steps to mitigate their losses. Implicitly, the trial judge concluded that they did.

145 There is evidence to support the trial judge's conclusion. Ulti and Italo Alfano testified at trial. Their evidence explained the difficulty they encountered in operating the Osler business through Southview after the bankruptcy. It was open to the trial judge to accept their evidence. I see no error.

(iv) Adjustments

146 During his testimony, Mr. Strezos made a number of adjustments to the calculations set out in his report. However, in

awarding damages in the amount of $20 million, the trial judge appears to have relied upon the calculations in the report without regard to the adjustments made by Mr. Strezos at trial.

147 After reviewing Mr. Strezos' evidence, I would make the following three adjustments to the trial judge's award of damages:

148 The first adjustment relates to Osler's projected net cash flows. In his report, Mr. Strezos calculated this amount to be $6,700,000 in the medium scenario. In his evidence, he said that this amount should be reduced to $6 million because of a calculating oversight in relation to the projected EBITDA for Osler: see Strezos examination-in-chief, February 9, 2009, at pp. 57-70. I note that this adjustment was made in handwriting to the typed report that was entered as an exhibit at trial.

149 The second adjustment is with respect to the debt resulting from the Osler bankruptcy. In the summary of losses table included as Schedule 1 to his report, Mr. Strezos showed this amount to be $11,180,000. This amount included $3,118,193 in additional debt incurred by the respondents and Southview to purchase the Osler security and assets. Mr. Strezos listed this amount as "debt incurred to purchase bank security and certain assets of Osler" in Schedule 3 of his report. However, in Schedule 3.1 to the report, entitled "summary of the debt and carrying costs incurred by the Alfano family and related parties *as a result of the bankruptcy*" (emphasis added), Mr. Strezos backed out the amount $3,118,193 from the total debt incurred subsequent to the Osler bankruptcy. On cross examination, Mr. Strezos agreed that the security and assets purchased by Southview after the bankruptcy were free and clear of debt. Prior to the Osler bankruptcy, those assets had been encumbered. Thus, the respondents did not incur additional debt for the purchase of those assets that could be reasonably viewed as a loss suffered as a result of the bankruptcy: Strezos cross-examination, February 10, 2009, at pp. 110-112. Mr. Strezos therefore agreed that the Alfanos' recovery for debt incurred after the bankruptcy should be reduced by $3,118,193.

150 The third adjustment also relates to Mr. Strezos' calculation of the debt resulting from the Osler bankruptcy. Mr. Strezos testified that the amount to be awarded for debt incurred after the bankruptcy set out in his report should be reduced by a further $2 million. The basis for this reduction was that the $2 million was incurred to purchase an asset — a gravel pit near Orillia — that Osler had not owned before the bankruptcy. Thus, he said, it is not fair to attribute this debt as a debt resulting from the bankruptcy. This adjustment was reflected in a handwritten entry made to Schedule 3.1 of the typed report entered as an exhibit at trial.

151 On the basis of the above-mentioned adjustments, I would reduce the damage award as follows:

Medium Projection		$20,210,000
Adjustment to cash flow		($700,000)
Adjustment for debt repurchase		($3,118,193)
Adjustment for gravel pit acquisition		($2,000,000)
	TOTAL:	($5,818,193)
Amount of Award		$14,391,807

(v) Credits

152 During the oral argument on appeal, the respondents conceded that the damage award should be credited with the respondents' share of the proceeds from the sale of the Bowes Street property. It appears that the amount of $877,000, being proceeds from the sale of Bowes Street, was paid to the respondents' solicitors as a result of a mid-trial ruling by the trial judge. It is agreed by the parties that the damage award should be credited with that amount.

153 Although it is not entirely clear from the record, it appears that there may be an additional amount being held by the receiver/manager from the sale of Bowes Street. If and when further monies are paid to Southview or the respondents, that amount should also be credited against the amount of the damage award.

154 Crediting these amounts against the damage award is consistent with Mr. Strezos' report. In that report, at p. 23, he indicated that there should be a deduction from any damage award for the "expected proceeds after dissolution of the receiver manager (2016411 Ontario Ltd.)".

155 To the same effect, the trial judge observed at para. 144 of her reasons that "Mr. Strezos pointed out that once the case is decided, the Alfanos may receive money from the receiver. This would be deducted from their losses calculated above."

(vi) CN Lands

156 Mr. Piersanti argues that the trial judge erred in awarding damages to the respondents for loss of interest in the CN lands.

157 Osler leased the CN lands and had an option to purchase for $1. Southview purchased the lease from the secured creditors of Osler after the bankruptcy. Southview then exercised the option. However, because the respondents had to give up 25 percent ownership interest in Southview as part of its financing program after the bankruptcy, the respondents suffered a loss of 25 percent of the value of the CN lands that they would have had had it not been for the bankruptcy. Mr. Strezos opined that this loss amounted to $1,562,000. The trial judge accepted that evidence. I see no basis to interfere.

(vii) Sale of Puslinch Lands

158 Mr. Piersanti argues that the trial judge erred in awarding $766,000 as damages resulting in the loss of the respondents' share in the proceeds from the Puslinch property. The Puslinch property was owned by Osler.

159 The receiver/manager sold the Puslinch property in 2006. The respondents' share of the proceeds of the sale was $766,000. Those proceeds were paid to Southview and used by Southview to pay down its debt. That debt had been incurred by Southview to cover operating and capital losses as well for carrying costs for monies borrowed. Mr. Piersanti argues that Southview and, therefore, the respondents received the benefit of this money and, therefore, this amount should not have been included in the damage calculation.

160 I do not accept this argument. Mr. Strezos testified that the $766,000 was netted out of the loss calculation for additional debt incurred by the respondents and Southview after the Osler bankruptcy: Strezos cross-examination, February 10, 2009, at pp. 115-17. Put another way, had Southview not received the $766,000 and paid down the debt, Mr. Strezos would have increased the recovery for a debt incurred after the bankruptcy by that amount. In the result, I would not give effect to this argument.

(5) Punitive Damages

161 Mr. Piersanti argues that the trial judge erred in awarding the respondents punitive damages in the amount of $250,000. The trial judge made the award as the result of Mr. Piersanti's fraud in altering the unanimous shareholders agreement.

162 Mr. Piersanti's only challenge to the punitive damage award is on the basis that it was not pleaded in the Fresh as Amended Statement of Claim. While that is correct, punitive damages were sought at trial. The issue was joined and argued before the trial judge. The evidence to support the punitive damage award was central to the respondents' claims of fraud and was pleaded with particularity.

163 Mr. Piersanti had adequate notice of the punitive damage claim; there was no surprise. While it would have been preferable if the respondents had sought to amend their pleading to assert the claim when it was raised and argued, I see no prejudice. As the Supreme Court of Canada noted in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.), at para. 88, "[w]hether or not a defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case." In this case, Mr. Piersanti had an adequate opportunity to respond to the claim.

164 I would not interfere with the punitive damage award.

(6) The Payment into Court of $2.5 Million

165 The appellants argue that the trial judge erred in ordering 128 (a Piersanti related company) to pay $2.5 million into court.

166 The respondents sought the payment into court on the basis that Ms. Piersanti had caused 128 to pay out approximately $2.5 million in breach of the Mareva injunction granted on June 18, 2002.

167 I would set aside this order.

168 The trial judge gave very brief reasons for making the order. At para. 105, she said the following:

> I have concluded that $2,500,000 shall be paid into court to the credit of the Plaintiffs within 30 days of the release of the reasons. *This will not cause any hardship to the Piersanti Defendants and will be some security for the Plaintiffs* who will most likely encounter great difficulty in enforcing any judgment given by this court in regard to their damages for losses in Osler.
>
> [Emphasis added.]

169 While it is not entirely clear, it appears that the trial judge made this order to provide security for the damages award she made against the Piersantis in favour of the respondents.

170 Her comment that this will not cause any hardship to the Piersanti defendants suggests that in her mind the $2.5 million is part of, not in addition to, the damages award. The purpose the trial judge made the $2.5 million award was apparently so that that amount would be paid within 30 days, thereby providing some security for the overall damages award.

171 In para. 105, the trial judge did not link the award to the breach of the Mareva injunction. Notably, she did not make any finding of contempt, nor give any indication that the $2.5 million award was being ordered for punitive or denunciatory purposes. On the contrary, she appears to have considered the payment of $2.5 million as a downpayment against her damage award.

172 128, the party ordered to pay the $2.5 million, was not a defendant in the claim for fraud related to the Osler bankruptcy that gave rise to the judgment against Mr. Piersanti. The trial judge did not make any findings that would render 128 liable to pay the damage award for the fraud claim.

173 In the result, I would set aside this order. To be clear, I do not conclude that there was no basis for a finding that the Piersantis breached the Mareva injunction. Rather, I am not satisfied that the trial judge, in her reasons, made that finding. That being the case, the trial judge's reasons and these reasons should not be read as finally disposing of that issue.

(2) Ulti Alfano's One-Twelfth Interest — MAP Properties

174 The trial judge found that Ulti Alfano had a claim to a one-twelfth interest in the MAP properties, limited to the 1995 value of these properties. She directed a reference to determine the value of this interest, which she awarded to Ulti Alfano's personal bankruptcy trustee subject to the assignment agreement between Ulti Alfano and the trustee. Ulti Alfano apparently obtained permission from his trustee to pursue this claim.

175 The Alfanos' interest in the MAP properties was held through a holding company, CIFU safe. The appellants allege that CIFU Safe went bankrupt in 1993. The trial judge did not make any findings to explain why Ulti Alfano (or his trustee in bankruptcy) had a claim to an interest in the MAP properties 14 years later.

176 With respect, I am not able to glean from the trial judge's reasons why she made the order and structured it as she did.

Without more, I do not think that the order can stand. I would set it aside. I would not direct a new trial on this issue. I would, however, say that in the event that there is other litigation that addresses this issue, these reasons should not be read as deciding the merits of this claim relating to the MAP properties.

Disposition

177 I would allow the appeal in part as follows:

a. I would set aside the judgment against Ms. Piersanti (para. 6 of the judgment);

b. I would reduce the damage award to $14,391,807 (para. 6 of the judgment);

c. I would set aside the order that 128 pay $2.5 million into court (para. 8 of the judgment); and

d. I would set aside the order relating to Ulti Alfano's interest in the MAP properties (paras. 9, 10 and 11 of the judgment).

178 The damage award should be credited with the amounts discussed in paras. 151 to 154 of these reasons.

179 In all other respects, I would confirm the judgment below.

180 We are told that the trial judge has not yet made a costs order with respect to the costs of the trial. Apparently, the trial court will address those costs after the release of this judgment. I, therefore, make no comment on the issue of costs of the trial.

181 There has been mixed success in this appeal. I would make no order as to costs.

***H.S. LaForme J.A.*:**
I agree

***J.D. Cunningham A.C.J. Ont. S.C.J.*, (ad hoc):**
I agree

Appeal allowed in part.

Footnotes

[1] The trusts' interests were held by way of options to purchase shares at a price of $1 a share. I will discuss the options structure in paras. 44 to 46 below.

[2] The Alfano family trusts also plead a breach of fiduciary duty, conversion and conspiracy. In addition, they argued at trial that the trial judge could find oppression under the *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, and fashion a remedy under that statute. The trial judge's findings of fact could support a finding of liability for breach of fiduciary duty, conversion and oppression. However, her conclusions seem to focus most directly on a claim in fraud. Accordingly, I will proceed to discuss the case on the basis of the fraud claim.

[3] I do not think that anything turns on the fact that RBC called its loan before the assignment into bankruptcy. RBC called the loan after the Alfanos' lawyer, quite properly as it turns out, put RBC on notice of Mr. Piersanti's improper conduct in attempting to appropriate all of the ownership of Osler to himself.

[4] Earnings before income tax, depreciation and amortization.

5 I note that the financial statements did not take into account any monies Mr. Piersanti had misappropriated from Osler.

6 In making these comments, I do not suggest that matters subject to privilege need be disclosed or considered.

7 Deloitte & Touche LLP was the damages expert for the Alfanos.

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