IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Genesis Fertility Centre Inc. v. Yuzpe,* 2019 BCSC 233

Date: 20180225
Docket: S143496
Registry: Vancouver

Between:

Genesis Fertility Centre Inc.,
Dr. Sonya Kashyap and Sonya Kashyap MD Inc.

Plaintiffs

And

Dr. Abraham Albert Yuzpe, Aljen Capital Corporation,
Dr. Elizabeth Lynn Taylor, Dr. Elizabeth L. Taylor Inc.,
Dr. Jason Adolph Hitkari, Dr. J.A. Hitkari Inc., Dr. Gary Samuel Nakhuda,
Olive Fertility Centre Inc., Gyn Wylie and Yvonne St. Pierre

Defendants

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

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Place and Date of Trial:	Vancouver, B.C. February 13-16, 19-23, 26, 28 2018 March 1-2, 2018 April 4-6, 12-13, 16-18, 2018
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Introduction

[1] This case arises from the breakdown in relations among a group of physicians, the plaintiff, Dr. Sonya Kashyap, and the defendants Dr. Abraham Albert Yuzpe, Dr. Elizabeth Taylor and Dr. Jason Hitkari, who practiced reproductive medicine together in the City of Vancouver. In these reasons, I will refer to Dr. Yuzpe, Dr. Taylor and Dr. Hitkari collectively as the Departing Physicians.

[2] The physicians organized and carried on their practice through a corporation, Genesis Fertility Centre Inc. ("Genesis"), which is also a plaintiff in these proceedings. Their relationship was governed by an Amended and Restated Shareholders' Agreement dated August 11, 2010 (the "Shareholders' Agreement").

[3] The Shareholders' Agreement contained a provision pursuant to which any shareholder could give notice to any other shareholder, thereby requiring the other shareholder to elect either to sell his or her shares or purchase the shares of the person giving the notice, commonly referred to as a shotgun clause.

[4] In 2012, the Departing Physicians decided they could no longer practice with Dr. Kashyap. On November 1, 2012, they gave notice pursuant to the provision, which required Dr. Kashyap either to sell her shares to them or purchase all of their shares.

[5] On November 29, 2012, Dr. Kashyap gave notice that she had elected to purchase the shares of the Departing Physicians. Pursuant to the Shareholders' Agreement, the transaction whereby she purchased those shares was to complete 60 days after giving the notice. However, by agreement, the completion date was fixed at January 31, 2013. The period of time between November 29, 2012, and January 31, 2013, was referred to by the parties as the 60 Day Period. In these reasons, I will use that term to refer to the period even though it is slightly longer.

[6] The central issue in this case is the extent to which the Departing Physicians were entitled to take steps during the 60 Day Period to be able continue their practices in competition with Genesis after the 60 Day Period.

[7] Genesis also seeks damages against the defendant, Dr. Gary Samuel Nakhuda, for breach of his employment contract.

The Parties

[8] Genesis is a British Columbia Corporation. Dr. Kashyap is the sole shareholder of the plaintiff Sonya Kashyap MD Inc. ("Sonya Co."), which in turn is the sole shareholder of Genesis. For simplicity, I will refer to Dr. Kashyap as the owner of Genesis unless the context requires me to be more specific.

[9] Prior to January 31, 2013, the Departing Physicians were also shareholders of Genesis through their respective professional corporations, Aljen Capital Corporation, Dr. Elizabeth L. Taylor Inc., and Dr. J.A. Hitkari Inc., which are also named defendants. Up to that time they were also directors of Genesis.

[10] From on or about January 2013, Drs. Taylor and Hitkari were shareholders of the defendant, Olive Fertility Centre Ltd. (Olive), either directly or through their professional corporations. Olive was organized in December 2012 and is the company under which the Departing Physicians have carried on their medical practices since February 1, 2013. Dr. Yuzpe carries on his practice at Olive but he is not a shareholder.

[11] The defendant Dr. Gary Nakhuda is a medical doctor who was employed by Genesis from February 2011 until April 2013 pursuant to an employment contract dated February 28, 2011 (the "Nakhuda Employment Agreement"). In June 2013, he moved his practice to Olive. He is currently a shareholder of Olive.

[12] The defendants Gyn Wylie and Yvonne St. Pierre were formerly senior management employees of Genesis. Ms. Wylie was Operations and Human Resources Director and Ms. St. Pierre was Manager, Finance Department. In these reasons, I will sometimes refer to them collectively as the Senior Managers. On December 1, 2012, they gave notices of resignation to Genesis. At the end of their notice period, they took up positions with Olive performing essentially the same functions for that company that they had formerly performed for Genesis.

Position of the Parties

[13] The plaintiffs' position is that the Departing Physicians and Senior Managers breached their fiduciary duties as directors and senior management to act in the best interests of Genesis during the 60 Day Period. The plaintiffs submit that during that period, the Departing Physicians breached those duties by actively taking steps to set up a competitive business. These steps included hiring the Senior Managers and opening a competing clinic.

[14] The plaintiffs also submit that the Departing Physicians and Senior Managers breached their ongoing duties after they ceased to be directors and officers of Genesis by engaging in unfair competition by enticing many Genesis employees to resign from Genesis and come to work for Olive and by using confidential information belonging to Genesis.

[15] The plaintiffs submit that the actions of the defendants were a deliberate effort to harm Genesis and deprive it of the ability to continue to function as a viable business.

[16] The plaintiffs submit that these were clear breaches of duty by the Departing Physicians and Senior Managers that require the granting of equitable remedies. They say that such remedies are necessary not only to compensate Genesis for any damages it suffered from these breaches, but also to maintain the sanctity of fiduciary relationships by preventing the defendants from benefitting from their breaches of duty.

[17] The plaintiffs submit that requiring the Departing Physicians to refund the purchase price they received for their shares or, alternatively, requiring them to disgorge any profits they earned from Olive for a two year period commencing February 1, 2013, are appropriate remedies in this case.

[18] Genesis submits that Dr. Nakhuda did not give the 90 day notice required in the Nakhuda Employment Agreement before leaving his employment and that it is entitled to damages for the loss of his services during that entire period.

[19] Genesis also submits that Dr. Nakhuda was a fiduciary of Genesis.

[20] The Departing Physicians concede that they were fiduciaries but say that they were entitled to take steps to continue their medical practices immediately upon Dr. Kashyap electing to purchase their shares. They submit that the context of the situation in which they found themselves is critical in determining the extent of their fiduciary duties, both during the 60 Day Period and thereafter. They deny that that steps they took were a breach of any duty they owed to Genesis.

[21] Dr. Nakhuda’s position is that he did not owe any fiduciary duty to Genesis and that he was entitled to resign from Genesis and go to work for Olive. He agrees that he initially did not give 90 days notice of his resignation to Genesis. However, he submits that he was constructively dismissed by Genesis and that, in any event, he subsequently extended the amount of time that he worked for Genesis to the full 90 days required under the Nakhuda Employment Agreement.

[22] Genesis submits that the Senior Managers breached their fiduciary duties to it by assisting the Departing Physicians in setting up Olive during the 60 Day Period and thereafter by competing unfairly with Genesis by recruiting Genesis employees to resign and move to Olive.

[23] The Senior Managers were represented at trial by counsel for the Departing Physicians, who have agreed that they are vicariously liable for any wrongful acts of Ms. Wylie and Ms. St. Pierre. The Departing Physicians have agreed to indemnify Ms. Wylie and Ms. St. Pierre for any liability found against them in this case. Their counsel conceded that they occupied fiduciary positions with Genesis but denies they breached any fiduciary duties to it. They acted throughout for and on behalf of the Departing Physicians and Olive.

[24] For the reasons that follow, I find that Genesis is entitled to equitable compensation for certain breaches of fiduciary duty and breach of confidence by the Departing Physicians and Senior Manager in the amount of $187,000 but that the action against Dr. Nakhuda must be dismissed.

Background

[25] Dr. Yuzpe is an internationally recognised expert in reproductive medicine. In 1995 he and Dr. Margo Fluker established Genesis.

[26] Since its inception, Genesis has provided assisted reproduction treatments and services, including In-Vitro Fertilization (IVF), to patients in British Columbia.

[27] In or about 2007, Dr. Hitkari and Dr. Taylor joined Genesis and became shareholders and directors. They held their shares through their professional corporations, the defendants Dr. Elizabeth L. Taylor Inc., and Dr. J.A. Hitkari Inc. As a result, Dr. Yuzpe, Dr. Fluker, Dr. Hitkari and Dr. Taylor were each 25% shareholders of Genesis through their respective professional corporations.

[28] On or about August 11, 2010, Dr. Kashyap purchased Dr. Fluker's position in Genesis through Sonya Co. and became a shareholder and director. As of August 11, 2010, Genesis was therefore owned by four doctors through their professional corporations.

[29] The Shareholders' Agreement was created by amending a former shareholders agreement to reflect Dr. Kashyap's purchase of Dr. Fluker's interest.

[30] Although Genesis was an incorporated company, in many ways it resembled a partnership of the physicians who owned its shares. The doctors earned income from fertility and reproductive procedures billed through Genesis and personally from medical services that were billed directly by each physician through their professional corporations to the Medical Services Plan of British Columbia (MSP). Although it was not expressly stated in the evidence, I assume that Genesis administered the MSP billings on behalf of each physician.

[31] I agree with the submissions made by Dr. Nakhuda that Genesis was a specialized medical corporation and that the rights and obligations of the shareholders were governed by both legal and ethical responsibilities.

[32] I was not provided with any evidence as to how the profits from Genesis were determined or distributed. I do not know if each of the shareholders was entitled to an equal share of the profits or whether Genesis was simply a vehicle set up to provide the facilities for each physician to run their practice and keep the net revenue they generated after the expenses were paid. The claim advanced in this case appears to be premised on the proposition that Genesis was the entity that was entitled to the profits of the practice. However, there was no evidence that that was the actual agreement of the shareholders.

[33] Tensions began to arise between Dr. Kashyap and the Departing Physicians soon after she became a shareholder. As time passed it became increasingly obvious to the Departing Physicians that they no longer wished to continue to practice with Dr. Kashyap.

[34] In 2012, the Departing Physicians attempted to negotiate a purchase of Dr. Kashyap's shares outside of the compulsory buyout provisions of the Shareholders' Agreement but were unable to conclude an agreement.

[35] On September 11, 2012, Dr. Kashyap wrote to the other directors of Genesis setting out a number of concerns she had about the company's affairs. In a letter dated September 19, 2012, the Departing Physicians responded, rejecting most of the issues raised in Dr. Kashyap's letter.

[36] On November 1, 2012, the Departing Physicians made an offer pursuant to section 13 of the Shareholder's Agreement, thereby triggering an obligation on Dr. Kashyap either to sell her shares to them or purchase all of their shares.

[37] On November 29, 2012, Dr. Kashyap elected to purchase all of the Departing Physicians' shares at a price that the parties agreed represented their fair market value. Although the Shareholders' Agreement stipulated that the purchase of the Departing Physicians shares would close 60 days after the notice, the parties agreed to extend that period slightly to January 31, 2013 (the Closing Date). On that date, the Departing Physicians ceased to be shareholders or directors of Genesis.

[38] On November 30, 2012, there were 5 main departments in Genesis;

a. Yvonne St. Pierre was the Finance Manager.
b. The Nursing Department was supervised by Biddy Collings, the Nurse Manager.
c. The Laboratory had been run on a contract off site by Kathy Miller who acted as Lab Director but Genesis had agreed to hire Dr. Salah Abedelgadir at the end of November 2012. Nadia Ouihbi was the onsite Laboratory Supervisor.
d. Gyn Wylie was the Director of Operations and Human Resources.
e. Drs. Yuzpe, Hitkari, Taylor and Kashyap were the co-medical directors.

[39] The total price paid by Dr. Kashyap to the Departing Physicians was $4,275,150, of which $3,900,000 was paid for the Departing Physicians' shares in Genesis and $375,000 was repayment of shareholders loans. A breakdown of the amounts paid is as follows;

Shareholder	Genesis Shares ($26,000/share)	GFC Shares ($1.00/share)	Outstanding Shareholder Loan	Total Paid
Dr. Yuzpe	$1,300,000	$50.00	$250,000.00	$1,550,050
Dr. Hitkari	$1,300,000	$50.00	$62,500.00	$1,362,550
Dr. Taylor	$1,300,000	$50.00	$62,500.00	$1,362,550
				$4,275,150

[40] $500,000 of the purchase price was paid to each of the Departing Physicians on the Closing Date. The balance was secured by three promissory notes and a General Security Agreement and was payable on the first and second anniversaries of the Closing Date.

[41] The deferred amounts owed to the Departing Physicians have been fully paid.

[42] The Departing Physicians continued to be employees, directors, and officers of Genesis in the 60 Day Period. They initially refused to permit Dr. Kashyap's sister, Savina, to assume a management role in that period, although Savina did begin to assist Dr. Kashyap in management later in December 2012.

[43] The Nakhuda Employment Agreement required Dr. Nakhuda to give Genesis 90 days written notice of termination of his employment. It also contained non-competition and confidentiality clauses. Genesis concedes that the non-competition provisions are not enforceable against Dr. Nakhuda.

[44] From February 1, 2013, to the time Dr. Nakhuda left Genesis on April 19, 2013, he and Dr. Kashyap were the only doctors providing reproductive medical services to patients at Genesis. After Dr. Nakhuda left Genesis, Dr. Kashyap was the sole physician providing such services.

[45] The procedures set out in the Shareholders' Agreement required a number of steps to be taken in the 60 Day Period to complete the sale and purchase of the interest of the Departing Physicians.

[46] There is no indication that the parties did anything to frustrate the completion of the sale transaction and the sale did complete as agreed on January 31, 2013.

[47] The Departing Physicians were taken by surprise when Dr. Kashyap elected to purchase their shares. They had been practising together in relative harmony since 2007. Most of the employees of Genesis had been employed for a fairly long time and I accept that they were generally content to work for a company controlled by the Departing Physicians.

[48] As soon as Dr. Kashyap notified the Departing Physicians that she had elected to buy their shares, they, together with Ms. Wylie and Ms. St. Pierre, began to make plans to establish a new clinic in which they would continue to provide fertility treatments and consultations in the same manner that they had at Genesis.

[49] Ms. Wylie and Ms. St. Pierre had been long time employees of Genesis and felt a great deal of personal loyalty to the Departing Physicians. On December 1, 2012, they gave notices of termination of their employment with Genesis, effective December 31, 2012. It is agreed that this was the required notice period under their employment contracts.

[50] In early December 2012, the defendants took steps to incorporate Olive.

[51] On or about January 1, 2013, Olive opened a temporary office in the same building in which Genesis was located.

[52] On or about January 15, 2013, the Departing Physicians and Dr. Fluker sent out a notice through the British Columbia Medical Association ("BCMA") member announcement mailing service to other members of the BCMA, announcing that they were continuing their clinical practices at Olive's temporary facility and booking patients, effective immediately. However, the Departing Physicians continued to practice at Genesis until the end of January.

[53] On February 1, 2013, Genesis began providing some fertility medicine services from the temporary location.

[54] The Departing Physicians used the services of Ms. Wylie and Ms. St. Pierre, during their notice period in December 2012 to assist them in setting up their new temporary and permanent clinics. However, I am satisfied that the great majority of time spent by Ms. Wylie and Ms. St. Pierre on establishing Olive in that month was done on their own time.

[55] The preponderance of the evidence satisfies me that Ms. Wylie and Ms. St. Pierre were not recruited by the Departing Physicians. I find that they actively declared their intention to continue to work with the Departing Physicians as soon as it became possible for them to do so.

[56] Ten Genesis employees signed employment contracts with Olive or the Departing Physicians on behalf of Olive prior to January 31, 2013. The ten included all of the senior management team at Genesis. Of the ten, 4 commenced employment with Olive before February 1, 2013.

[57] In cross-examination, several of the former employees agreed that they needed employment and that they would have continued to work at Genesis if there had not been the opportunity to work for Olive. However, I did not understand them

to be saying that they had been solicited by the Departing Physicians to leave Genesis. The tenor of their evidence was that they had enjoyed working with the Departing Physicians at Genesis and that their preference was to continue to work with them, if that were possible.

[58] Dr. Nakhuda was bound by the terms of the Nakhuda Employment Agreement. However, I find that he did not wish to continue to work at Genesis after Dr. Kashyap became its sole owner.

[59] On January 16, 2013, Dr. Nakhuda's solicitors wrote to Genesis to the attention of Dr. Kashyap notifying her that Dr. Nakhuda's last day of work at Genesis would be March 15, 2013. After an exchange of correspondence, on February 28, 2013 Dr. Nakhuda extended the date on which he was leaving his employment to April 19, 2013. Dr. Nakhuda left Genesis on that date.

[60] Dr. Nakhuda's situation was also unusual because he was an immigrant from the United States and had limited options for employment. Effectively, he could not leave Genesis without the permission of the College of Physicians and Surgeons of British Columbia (the "College").

[61] On March 26, 2013, Dr. Nakhuda's solicitors wrote to the College requesting its assistance in facilitating Dr. Nakhuda's moving his practice to Olive. On June 20, 2013, the College approved his move to Olive in a letter addressed to Dr. Hitkari. Dr. Nakhuda joined Olive as an employed physician on June 23, 2013.

[62] While I believe Dr. Nakhuda's evidence that he did not make a final decision to join Olive until after January 31, 2013, I also find that he had a strong inclination to do so in December 2012.

[63] In the 60 Day Period, Dr. Nakhuda participated in some meetings to discuss the set-up of Olive. Later, while still employed at Genesis, he reviewed drafts of the Olive Business Plan, provided feedback on the designs for the new permanent clinic and researched electronic medical records systems for Olive.

[64] In January 2013, the temporary office was staffed by Ms. Wylie, Ms. St. Pierre and Brenda Morrice, who had been a medical secretary at Genesis. In January, Olive began booking patients for services to be performed after the 60 Day Period. Michelle Frappier commenced working there as a medical secretary on January 26, 2013.

[65] The Departing Physicians all deny seeing patients at Olive's clinic in January 2013. The only evidence that they did so is from Michelle Frappier. She testified that Drs. Taylor and Hitkari saw patients at Olive on January 28. There is a direct conflict in the evidence on this point.

[66] On balance, I conclude that Ms. Frappier was mistaken when she testified that Drs. Taylor and Hitkari saw patients at Olive on that date. The Departing Physicians were all aware that they were prohibited from providing services at Olive during the 60 Day Period. I think it more likely that their evidence that they did not is accurate. Ms. Frappier was testifying to events that occurred more than 5 years before trial and could easily have been a week out in her recollection as to the start date. In addition, there was no documentary evidence that either Dr. Taylor or Dr. Hitkari saw patients at Olive prior to February 1, 2013. In any event there is no evidence that Dr. Taylor and Hitkari would have been able to do anything other than consultations, which would have been billed directly to the MSP Plan, at Olive at that time.

[67] Starting on February 1, 2013, Olive increased the range of medical services it could provide to its patients. By June or July 2013, it was providing all of the services formerly provided by Genesis.

[68] It is not disputed, and I find, that at all material times the number of patients seeking fertility services was sufficient to keep all of the physicians involved in this litigation fully occupied, with waiting lists.

Credibility

[69] In my view, credibility does not play a central role in this case. The narrative of events is not disputed. What is disputed is the proper interpretation of those events in light of the applicable legal principles.

[70] With one exception, I found that the witnesses who gave evidence honestly related their recollection of events that occurred more than five years ago. However, this does not mean that I found their evidence always to be reliable. At times, some of the parties may have inaccurately reconstructed events in their memories. However, I do not find that they were trying to mislead me.

[71] There is no doubt that the recollection of the parties was less than perfect. There is also no doubt that the Departing Physicians were resentful of Dr. Kashyap's gaining control of Genesis, a company that they considered they had created. At times, the defendants expressed this resentment as well as a personal dislike of Dr. Kashyap in their communications. This may have coloured their memories but, in my view, did not cause them to try to mislead me.

[72] In this regard, the conduct of the defendants in deleting emails with Dr. Nakhuda does them no credit. They were clearly trying to conceal the role that Dr. Nakhuda was playing in the establishment of Olive. However, despite the fact that only Ms. St. Pierre produced these emails, I do not find that the defendants deliberately withheld or destroyed evidence once they had notice that these proceedings would be brought.

[73] It is not uncommon for emails to be deleted or overlooked. The defendants did disclose a number of emails that were damaging to their case. I accept that the failure to produce emails that were first disclosed when Ms. Wylie and Ms. St. Pierre were added as parties was inadvertent and was not done to suppress evidence.

[74] Biddy Collings was the one witness whose evidence I found to be unreliable. As with most of the non party witnesses, she gave her evidence in chief by affidavit. In her case, she swore an affidavit attaching her witness statement and affirmed it to

be true. In her witness statement, she described the working environment at Genesis after January 31, 2013. She stated that she became increasingly concerned about that working environment and eventually decided she could no longer work at Genesis and she resigned and went to work for Olive.

[75] What she did not say was that she had signed an employment agreement with the Departing Physicians on behalf of Olive on December 1, 2012. In addition, she did not mention any of the emails she exchanged with Ms. Wylie, while she was still employed in a managerial position at Genesis, evaluating Genesis employees as possible candidates for positions at Olive.

[76] Finally, in her witness statement she stated that one day Dr. Nakhuda was suddenly gone from Genesis and that this was upsetting to her. The clear implication of this evidence was that the sudden departure of Dr. Nakhuda was one of the reasons she resigned from Genesis. In fact, she gave notice of her resignation prior to Dr. Nakhuda leaving Genesis.

Applicable Legal Principles

[77] The claims against the Departing Physicians and the Senior Managers raise a number of legal issues. The central complaint again them is that they breached their fiduciary duty to Genesis by the manner in which they established Olive.

[78] The theory of the plaintiffs' case is summarized at paragraph 6 of their written argument:

> In the period following Dr. Kashyap's Election to Buy, the Defendants set out on a course of conduct that both undermined the business the Defendant Shareholders had sold, while also moving as much of that business as they could to a new location. They did not just open their own new clinic. They also set out to cause harm to Dr. Kashyap and Genesis, ensuring she did not get what she paid for.

[79] Genesis also submits that the Departing Physicians and Senior Managers made use of its confidential information.

[80] The plaintiffs say that it is imperative that a remedy be found for the wrongful actions of the defendants and suggest various remedies that would achieve that result.

[81] In addition to the central claims of breach of fiduciary duty and breach of confidence, the plaintiffs plead a number of other causes of action. I will address these later in these reasons. However, in my view, they largely duplicate the central claims.

[82] The jurisdictional basis for awarding compensation in cases of breach of confidence was considered in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142. In the course of his reasons, Justice Binnie, at para. 75, recognized that while equity has set a low threshold for determining the types of information that are capable of being protected by a claim for breach of confidence, the nature of the information was relevant to the question of remedy.

[83] The essential question in determining whether information is confidential is that it be otherwise inaccessible to the defendant.

[84] In this case, there is little doubt that some of the information utilized by Olive was confidential because it could have been obtained only from Genesis. As I will discuss later in these reasons, the real issue with respect to confidential information in this case is the value of that information.

[85] The claims of breach of fiduciary duty raise the following issues;

1. What is the nature and extent of the fiduciary duties owed by the Departing Physicians and Senior Managers?
2. Did the Departing Physicians and Senior Managers breach those fiduciary duties?
3. If the Departing Physicians and Senior Managers breached their fiduciary duties, what remedy is appropriate?

[86] These issues requires an examination of the nature and extent of the fiduciary duties owed by the Departing Physicians and Senior Managers in the period after Dr. Kashyap gave notice that she would be purchasing the Departing Physician's shares.

[87] The Departing Physicians and Senior Managers admit that they occupied fiduciary positions with Genesis. The general principles applicable to a person in a fiduciary position are not in doubt. Those principles preclude fiduciaries from acting in their own interest if by so doing they breach their duty to their principal.

[88] These principles have been held to apply to limit the ability of a fiduciary to begin a business competing with that of its principal while still occupying a fiduciary position with the principal. They have also been applied to limit the extent and manner to which a departed fiduciary may compete with the principal after the termination of the fiduciary relationship.

[89] The logical starting point for a consideration of the nature and extent of the fiduciary duty owed is the Supreme Court decision in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. *Canadian Aero Service* was a case in which senior management employees who were pursuing a corporate opportunity on behalf of their employer resigned and subsequently acquired the opportunity for themselves.

[90] Justice Laskin, as he then was, described the duty as follows at p. 607:

> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

[91] Justice Laskin further amplified the governing principle and its rationale at p. 610:

> What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.
>
> (Emphasis added.)

[92] Genesis submits that the Departing Physicians and Senior Managers were subject to the strict application of the rules of avoiding any conflict of interest and duty outlined by Justice Laskin in *Canadian Aero Service.* It says that these defendants were therefore precluded from taking any steps, beyond preliminary planning, to establish a competing business during the 60 Day Period.

[93] Counsel focused much of their arguments in this case on the distinction between a fiduciary who is about to depart taking preparatory planning steps to set up a new business and one who actively pursues such a business while in a fiduciary position.

[94] Therefore, much of the debate before me was over whether particular activities should be characterized as carrying on a business or were merely planning steps taken before the business was commenced.

[95] In my view, however, the nature of the duties owed during the 60 Day Period must be examined in the context of the relationship between the parties. The critical question is the extent of the duties owed by the defendants in the particular circumstances of this case.

[96] The Shareholders' Agreement, the professional responsibilities of the Departing Physicians and the ways in which income was earned and distributed are

all circumstances relevant to the determination of the extent of the permissible activities open to the Departing Physicians.

[97] The case law relied upon by the plaintiffs expressly recognizes that each case is dependant on the nature of the relationship and the expectations of the parties. In *Torcana Valve Services Inc. v. Anderson*, 2007 ABQB 356, this principle is described as follows;

> 49. One of the significant reasons for imposing fiduciary duties upon a key employee is that the fiduciary has heightened obligations beyond the employment relationship. The scope of the fiduciary's duties needs to be analyzed in each individual case and "will depend on the nature of the relationship and the expectations of the parties": *Alberta Care-A-Child Limited v. Payne*, [2005] A.J. No. 917, 2005 ABQB 561 at para. 55….

[98] I am of the view that the contractual relationship between the parties can inform the scope of the fiduciary obligations owed by one party to the other. In *Canadian Aero Service,* Justice Laskin recognized that the issue of whether there had been a breach of fiduciary duty required a contextual analysis at p. 620;

> In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[99] The minority judgment of Chief Justice McLachlin in *Strother v.3464920 Canada Inc.*, 2007 SCC 24, also supports the proposition that the contractual relationship between the parties is relevant to a determination of whether there has been a breach of fiduciary duty;

> 140. Whether an interest is "directly" adverse to the "immediate" interests of another client is determined with reference to the duties imposed on the lawyer by the relevant contracts of retainer. This precision protects the

> clients, while allowing lawyers and law firms to serve a variety of clients in the same field. This is in the public interest. As Binnie J. observed in *Neil*, at para. 15:
>
> > An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue is always to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.
>
> 141. This view of the matter does not conflict with the traditional view of the fiduciary duty owed by lawyer to client. The fiduciary duty between lawyer and client is rooted in the contract between them. It enhances the contract by imposing a duty of loyalty with respect to the obligations undertaken, but it does not change the contract's terms. Rather, it must be molded to those terms. The classic statement of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp*. (1984), 156 C.L.R. 41, at p. 97, has been endorsed by the Privy Council in *Kelly v. Cooper*, [1993] A.C. 205, at p. 215 (*per* Lord Browne-Wilkinson), and in *Hilton*, at para. 30:
>
> > ...the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. [Emphasis added by Chief Justice McLachlan.]
>
> 142. For these reasons, I conclude that the starting point in determining whether a conflict of interest arose in a particular case is the contract of retainer between the lawyer and the complaining party. The question then is whether these duties conflicted with the lawyer's duties to a second client, or with his personal interests. If so, the lawyer's duty of loyalty is violated, and breach of fiduciary duty is established. This is the position on the authorities which the courts must follow. This does not, of course, preclude law societies from imposing additional ethical duties on lawyers. They are better attuned than the courts to the modern realities of legal practice and to the needs of clients. If the obligations of lawyers are to be extended beyond their established bounds, it is for these bodies, not the courts, to do so.
>
> (Emphasis in original.)

[100] In *Cadbury Schweppes Inc.*, Justice Binnie expressed the view of the Court that contractual arrangements can in appropriate circumstances affect equitable duties:

> 36. Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly

> or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C.C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v. The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 27:
>
>> …the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

[101] This makes it necessary to determine the nature of the relationship between the parties to this litigation and, in particular, the nature of the relationship between the physicians who owned Genesis.

[102] The starting point for that determination is the Shareholders' Agreement.

[103] I find that the parties intended their relationship with respect to the conduct of the affairs of Genesis to be governed by the terms of the Shareholders' Agreement. This is evident from its terms;

1. Genesis was a party to the agreement.
2. Recital I provides that the parties to the agreement agreed that the agreement set out the rights and obligations of the parties in respect of the matters set out in the agreement, that is, the nature of the commercial arrangement between them.
3. Section 3.2 obligated the Shareholders to vote their shares to ensure that the Board of Directors of Genesis should consist of four persons, each director being a representative of one of the four Physicians.
4. Section 3.7 of the agreement provided that a large number of matters required the unanimous consent of all of the directors.
5. Section 13 of the agreement set out a Compulsory Buy-Out procedure for the resolution of fundamental disputes among the Shareholders.
6. Section 16 provided for resolution of disputes by mediation and arbitration.
7. Section 17 contained a non-competition Covenant on the part of the Shareholders but Section 17.2 expressly provided that the non-competition covenant would not apply in the event of a compulsory buyout pursuant to Section 13.

8. Section 18.1 expressly provided that Genesis was bound by the provisions of the agreement.
9. Schedule A of the agreement set out a detailed list of matters that required the unanimous consent of the directors of Genesis.

[104] The unanimity provisions of the Shareholders' Agreement significantly limit the power of its directors to act in a manner that could prejudice other shareholders or Genesis itself. Justice Laskin's explanation for the rationale of the strict application of fiduciary duties to directors of a company in *Canadian Aero Service* emphasizes that the reason for the rule lies in the power that fiduciaries have to affect the rights of other stakeholders in the company. In this case, that power is significantly reduced by the terms of the Shareholders' Agreement.

[105] I also consider that the fact that Genesis was a corporation set up to permit the physicians to practice medicine together is relevant because, as practicing physicians, they were subject to a number of express regulations, fiduciary duties and ethical constraints with respect to the provision of medical services to patients. The most important of these was the ethical duty all the physicians to facilitate continuity of care for patients and the right of those patients to receive care from the physician of their choice.

[106] The College has set out the ethical code and standards that all physicians are to follow in B.C. The College is enabled by the *Health Professions Act*, RSBC 1996, c. 183, s. 19 [*HPA*], to enact bylaws consistent with its statutory duties under s. 16. The College also enacts several specific "practice standards" on specific topics or issues expected of all physicians in British Columbia which reflect the College bylaws.

[107] The ethical code and standards stress the importance of the patient-physician relationship and generally oppose the termination of the relationship without "legitimate reasons". The board of the College has adopted the Canadian Medical Association's Code of Ethics, under the power given to it by s. 19(1)(l) of the *HPA*, as the baseline for all conduct of physicians in B.C. One such fundamental

responsibility stated in the Code of Ethics is that a physicians must "consider first the well-being of the patient."

[108] Rule 19 of the Code of Ethics states that a physician must:

> 19. Having accepted professional responsibility for a patient, continue to provide services until they are no longer required or wanted; until another suitable physician has assumed responsibility for the patient; or until the patient has been given reasonable notice that you intend to terminate the relationship.

[109] The College has provided a further practice standard titled "Ending the Patient-Physician Relationship" that expands on the duties that physicians owe to their patients. In the preamble of this practice standard, the College writes:

> The expectations outlined in this practice standard apply only in circumstances when the patient-physician relationship is <u>terminated by the physician as a result of discord with a patient or other legitimate reasons.</u>
>
> It does not apply in situations where the physician's involvement with a patient reaches its natural or expected conclusion, such as consultative care provided by a specialist.
>
> [emphasis mine]

[110] The practice standard goes on to state:

> The patient-physician relationship is a fiduciary relationship based on honesty, respect and trust, where the physician prioritizes the patient's care and well-being, and acknowledges the patient's autonomy with regard to personal choice, including lifestyle or treatment options.

[111] One such personal choice is the ability of patients to choose which physician should treat them. It is also clear that the patient-physician relationship should not be ended by a physician unless there are serious reasons for doing so.

[112] If physicians are to uphold their ethical obligations to their patient and respect patient choice, the patient must have the right to be informed of changes to a medical practice and has the right to choose which physician is to treat them, including the right to change clinics at any time (see *Bacher v. Obar* (1989), 28 C.C.E.L. 160 (Ont. H.C.J.), aff'd in (1993), 38 A.C.W.S. (3d) 813 (Ont. C.A.); *ACT Greenwood Inc. v. Hamilton 810-Enterprises Inc.*, 2015 ONSC 4232 at paras. 12-13; and *Chen v. Kiss* (1995), 15 C.C.E.L. (2d) 126 (Ont. Ct. J. (Gen. Div.))).

[113] The jurisprudence recognizes that the nature of the fiduciary duties owed in a corporation established to deliver professional services must be modified to accommodate the fiduciary and ethical duties owed to patients and clients and the ethical responsibilities of professionals.

[114] In *Loreto v. Little,* 2010 ONSC 755, Justice Belobaba dismissed an action for breach of fiduciary duty against lawyer defendants whom he assumed were fiduciaries. In the reasons, he commented as follows:

> 28. Departing employees, as a general rule, have certain obligations when they leave their employer. At the very least, in the absence of any restrictive contractual provisions, the departing employee has an implied duty of fidelity. She can set up shop in competition with her former employer; she can even contact customers or clients using a public telephone directory, but she cannot take and use customer lists to make these calls.[6]
>
> 29. Where the departing employee is a fiduciary, the rules became more restrictive. He cannot compete with his former employer or solicit clients for at least a reasonable period of time. And he certainly cannot use customer lists belonging to the employer to contact clients and solicit business.[7]
>
> 30. In cases involving lawyers or doctors or other professionals, however, these general rules do not apply. A different approach is taken primarily because of the personal nature of professional services and the client's right to choose. As Potts J. noted in *Goodman v. Newman*, [1986] O.J. No. 922, (aff'd by CA [1988] O.J. No. 298):
>
>> [P]rofessionals such as doctors, dentists and lawyers do not have the same proprietary right to their patients or clients as does a corporation to its customers. Professionals provide a personal service and establish a personal relationship with their clients, regardless of where or how the client or patient arrived at the firm or practice. The client or patient ought no[t] to be "handcuffed" to the business. Clients should have freedom of choice.

[115] A similar conclusion was reached by Justice Lysyk of this court in *Layne v. Michaels*, 46 B.C.L.R. (2d) 375 (S.C.).

> In *Nelford*, Sheppard C.C.J. quoted the above passage from *Canadian Aero* (at B.C.L.R. 384) and went on to make the following observations about the duty of a lawyer to inform a client of his departure from a law firm (at pp. 384-385):
>
>> …
>>
>> If a client chooses to leave with an associate, the associate is obviously taking a business advantage which belonged to the firm. However, as set out above in Can. Aero, there is a way of taking a business advantage which breaches one's fiduciary duty, and a way

> > which does not. *The unique aspect of the associate's simultaneous and overriding fiduciary duty to his client means that it is the client and not the firm who actually sanctions the taking of the business advantage.* This does not, however, eliminate the fiduciary's duty of full disclosure. [my emphasis]
>
> Assuming, as held in Nelford, that an associate stands in a fiduciary relationship to his law firm, then the sentence I have emphasized in the above quoted passage provides a complete answer to Mr. Wolfson's submission. Ultimately, it is for the client to decide who will represent him. And if the client chooses to follow the departing associate, the firm does not have a power of veto.
>
> It would obviously have been preferable to have had agreement upon the manner in which clients for whom Mr. Michaels had been acting were to be informed of his departure from the firm and of the choices open to them. But the parting was not amicable and in the absence of such agreement Mr. Michaels was entitled, if not duty bound, to provide that information himself.
>
> On the assumption that there was a fiduciary as well as a contractual relationship between the parties, I conclude that the evidence does not establish breach of fiduciary duty through failure to secure the plaintiff's prior approval of communication with the clients, or through failure to make full disclosure, or in any other way.
>
> (Emphasis in original.)

[116] I appreciate there are a number of factual differences between these authorities and this case. Genesis is a corporation and the Departing Physicians owed fiduciary duties to it. The solicitation to which the plaintiffs object in this case was not made to patients but to referring physicians. The Departing Physicians left Genesis pursuant to the terms of the Shareholders' Agreement and received a substantial payment for their interest in Genesis.

[117] However, in my view, the underlying principle that giving priority to the duties owed by doctors to their patients takes precedence over some fiduciary duties to their employer that might apply in other circumstances applies in this case.

[118] In their submissions, the plaintiffs expressly stated that they did not object to the defendants communicating with patients. They do, however, say that the notice to the medical profession sent out in January 2013 was a breach of duty. The difficulty I have with that submission is that the Departing Physicians are specialists.

As a general rule in British Columbia, patients must be referred to a specialist by another physician for consultations.

[119] In my view, a restriction on the ability of the Departing Physicians to communicate with referring doctors is also an unacceptable restriction on the right of patients to be treated by the doctor of their choice. I would add that it is also in the public interest that referring physicians be provided with up to date and accurate information as to the professional staff of a clinic to whom they are making referrals.

[120] In addition, the lack of evidence about how entitlement to professional income at Genesis was distributed makes it difficult to apply cases in which the employer was entitled to the profits of any activities undertaken by the fiduciary. The only indication I have as to how income was distributed at Genesis comes from evidence of the incomes earned by the Departing Physicians at Olive. The Agreed Statement of Facts shows that the employment income earned by each of the Departing Physicians was different. I infer from this that the employment income was based to a certain extent on the revenue generated by each physician.

[121] On the evidence before me, I cannot conclude that that was the case at Genesis. However, Genesis did not lead any evidence as to the effect of the complained of conduct on the profitability that it would otherwise have had. Based on the evidence I did hear, I am not satisfied that Genesis suffered any significant loss of revenue as a result of any wrongful conduct on the part of the defendants.

[122] I am also of the view that the provisions of s. 142 of the *Business Corporations Act*, S.B.C. 2002, c. 57, do not affect this question. Those provisions are directed to the internal management of corporations.

[123] The combined effect of the contractual arrangement between the parties and the fiduciary, regulatory and ethical duties owed to patients leads me to conclude that the Departing Physicians were entitled to take significant step to establish a new clinic as soon as they knew they were being bought out of Genesis and would no longer be practising there.

[124] Genesis also relies on the non-competition provisions of the Shareholders' Agreement, which it says preclude any competitive activities within the 60 Day Period. I do not think that it is a reasonable construction of the Shareholders' Agreement to make a shareholder subjected to a compulsory buyout wait until after the 60 Day Period to take steps to be able to continue their practise. If that is correct, no single physician who had been bought out could, for example, arrange a lease for a new office or arrange financing for the new practice within the 60 Day Period. Such an interpretation would put a significant limitation on the right of a physician to compete and would be inconsistent with the express right to compete contained in the Shareholders' Agreement. It could also impair the ability of patients to receive timely care from a physician of their choice.

[125] I find that within the 60 Day Period the Departing Physicians were entitled to secure new premises for their practices, to make arrangements to permit them to provide uninterrupted medical services to their patients and to inform other physicians of the establishment of their new practice. In my view, these step included making staffing arrangements within reasonable limits.

[126] I am also of the view that the Departing Physicians continued to owe a duty of good faith to Genesis in the 60 Day Period and were required to act fairly towards it in that period. That duty precluded the Departing Physicians from treating patients other than through Genesis in the 60 Day Period or from taking steps for the purpose of harming Genesis. It also requires the Departing Physicians to be candid with Genesis about their relocation activities.

[127] Genesis refers to a number of cases in which fiduciaries were found to cross the line between taking preliminary planning steps and engaging in activities that were found to be actual competition against their principals. Each of these cases turns on is own facts. In addition, many of them arise out of circumstances in which the employer had no idea that the fiduciary had decided to leave his or her employment and therefore continued to rely on the fiduciary's skill and experience in the conduct of its affairs.

[128] In *Felker v. Cunningham* (2000), 191 D.L.R. (4th) 734 (Ont. C.A.), leave to appeal to the S.C.C. refused, 28215 (3 May 2001), the issue was whether an employer had grounds to dismiss an employee for breach of fiduciary duty. The Court of Appeal characterized the situation of the parties as follows:

> 16 In my view, given the trial judge's finding that Felker was a key, valuable and trusted employee and taking into account the duties he performed, Felker was a fiduciary employee whose duty of loyalty required that he devote his full time, ability and energy to furthering the best interests of Electro Source. The duty to avoid conflict of interest and self-interest required Felker to avoid putting himself in a position where his own interests, or other commercial interests with which he was aligned, would be paramount to Electro Source's interests or would detract from his ability to work fully and completely for the benefit of Electro Source. Moreover, Felker's duty of good faith required that he be open, honest and forthright with Electro Source and make full disclosure of all material facts that, as his employer, it would be entitled to know to successfully operate its business.

[129] Those facts can be contrasted to the facts of this case, in which Dr. Kashyap could have had no reasonable expectation that the Departing Physicians would not take steps to continue their practice after they were bought out.

[130] I am aware that Dr. Kashyap testified that she did not think that the Departing Physicians would necessarily wish to continue their practice. When pressed on this issue in cross-examination, she stated that Dr. Yuzpe was in his seventies and that Dr. Taylor had young children and a partner with a large income.

[131] I do not accept Dr. Kashyap’s evidence on this issue. It is inconsistent with the attempts of the Departing Physicians to buy her out outside of the provisions of the Shareholders’ Agreement. I also note that Drs. Taylor and Hitkari were relatively young professionals and Dr. Yuzpe was a preeminent physician in this specialty and was actively pursuing his practice. I find that Dr. Kashyap was aware at all material times that the Departing Physicians would continue their practices in competition with Genesis.

[132] It is apparent to me that the relationship between the principals of Genesis had hopelessly broken down by November 2012. The extent of that breakdown is illustrated by Dr. Kashyap’s letter to the shareholders of Genesis on September 11,

2012, and their reply of September 19, 2012. In her letter, Dr. Kashyap expressed very serious concerns about the management of Genesis and about the manner in which she felt at least one other shareholder was treating her.

[133] The parties, therefore, found themselves in a situation in which the trust and confidence that is essential between partners in a professional setting was no longer present. After an unsuccessful attempt to acquire Dr. Kashyap's shares outside of the Shareholders' Agreement, the Departing Physicians triggered the buy out provisions of that agreement. When Dr. Kashyap elected to buy the Departing Physicians shares, she must be taken to have known that the steps would bring about fundamental changes to Genesis. These circumstances were absent in the cases relied upon by the Plaintiffs.

[134] For the forgoing reasons, I find that the Departing Physicians did not breach their fiduciary duties as directors of Genesis by taking immediate steps to set up a new clinic once they were made aware that they could not practice at Genesis, provided that they acted fairly in doing so.

Alleged Breaches of Fiduciary Duty by Departing Physicians

[135] The plaintiffs allege that many steps taken by the defendants damaged Genesis's interests and constituted breaches of fiduciary duty or unauthorized use of confidential information. Some of these allegations overlap. I paraphrase them from the plaintiffs' argument;

1. The Departing Physicians opened a competing fertility clinic on January 2, 2013;
2. Neither Ms. Wylie and Ms. St. Pierre disclosed to Dr. Kashyap directly that they had been hired by Olive or that Olive would be opening upstairs in January 2013;
3. Olive solicited referrals from referring physicians during the 60 Day Period, including by sending out a full-page advertisement through the British Columbia Medical Association (BCMA) email notification service;
4. Olive was accepting referrals and was booking in patients in during the 60 Day Period;

5. Dr. Hitkari and Dr. Taylor saw patients at the temporary clinic during the 60 Day Period;
6. On or about December 1, 2012, and prior to the Senior Managers submitting their resignations to Genesis, the Departing Shareholders gave them verbal assurances of continued employment on comparable terms.
7. The Departing Shareholders used the services of the Senior Managers, while they were still employees of Genesis and being paid by Genesis, to assist them in setting up their temporary and permanent clinics. Ms. Wylie and Ms. St. Pierre both worked on Olive matters during their regular working time at Genesis as did the Departing Shareholders;
8. On November 29, 2012, Ms. Wylie created a "to do" list which she circulated to Drs. Hitkari, Taylor and Yuzpe on November 30, 2012. The "to do" list included "Obtain new LMO (Labour Market Opinion)" for three Genesis employees (Dr. Salah Abdelgadir, Nicola Carrol and Jing Chen) and "Obtain/Notify PNP of change of employer" for Gunam Iyathurai, Dr. Nakhuda and Biddy Collings, further demonstrating the intention to take certain Genesis employees to Olive;
9. Ms. Wylie and Ms. St. Pierre also solicited and/or induced other Genesis employees to leave their employment to work at Olive;
10. In early December, 2012, Dr. Yuzpe had assured Dr. Nakhuda that if he left Genesis he would have a job at Olive. Dr. Yuzpe also initiated the seeking of legal advice regarding the enforceability of the restrictive covenants contained in the Nakhuda Employment Agreement;
11. Dr. Nakhuda contributed to the set-up of Olive, including by participating in "secret meetings" with the other Defendants, reviewing and commenting on the Business Plan, reviewing and commenting on the designs for the new facilities and researching electronic medical records (EMR) systems for Olive;
12. Dr. Yuzpe, Dr. Taylor and Dr. Hitkari were amenable to releasing Dr. Nakhuda from the Nakhuda Contract, freeing him to work at Olive without restriction;
13. Within days of Dr. Kashyap's Election to Buy, Dr. Yuzpe, Dr. Taylor, Dr. Hitkari and Dr. Nakhuda, had signed contracts with Gyn Wylie (Director of Operations and HR), Yvonne St. Pierre (Finance Director), Biddy Collings (Nurse Manager). Dr. Yuzpe also solicited and/or gave assurances of continued employment at their new clinic, to Dr. Salah Abdelgadir, who had just recently been hired as on-site Lab Director at Genesis. Olive's Business Plan confirms that the key employees from each department had been hired. This was particularly damaging as Genesis's off-site Lab Director at the time, Kathy Miller, had already terminated her contract with Genesis in light of the fact that Dr. Abdelgadir had been hired;
14. Several Genesis employees signed contracts in early December 2012, including Michelle Frappier, Biddy Collings, and Brenda Morrice, which were signed by Dr. Hitkari, Dr. Taylor, Dr. Yuzpe and Dr. Nakhuda. Those contracts

expressly referenced a corporation that would be formed between the "four" doctors;

15. By January 31, 2013, Olive had signed employment contracts with ten Genesis employees. Nine out of the ten were offered employment at Olive before they resigned from Genesis;

16. During the 60 Day Period, on account of time spent working on matters related to the set-up of Olive, the Defendant Shareholders all saw fewer patients resulting in lost revenue for Genesis;

17. Dr. Yuzpe, Dr. Taylor and Dr. Hitkari exercised their majority shareholding to interfere with Dr. Kashyap's ability to transition and consolidate the business of Genesis. After Gyn Wylie resigned as Director of Operations and Human Resources, Dr. Kashyap proposed to hire her sister, Savina Kashyap, as the Interim Director of Operations. The Defendant Shareholders were opposed. The Defendant Shareholders also declined to do anything to search for or hire an alternate candidate to replace Ms. Wylie. This was done, in part, in order to "hold" a position for Ms. Wylie in the event that the purchase and sale did not proceed. Dr. Yuzpe advised Dr. Kashyap that the Defendant Shareholders would be prepared to allow Genesis to hire Ms. Kashyap if Dr. Kashyap/Genesis agreed to release Dr. Nakhuda from the Nakhuda Contract. In December 2012, Ms. Kashyap nevertheless commenced working at Genesis. When she arrived at Genesis, Gyn Wylie refused to train her. The Shareholder Defendants also refused to allow Ms. Kashyap to be paid for her work;

18. The Defendants misappropriated and used Genesis's confidential information for their own personal benefit and for the benefit of Olive, including as follows:

    a) Prior to her departure from Genesis, Ms. Wylie took a list of the top 50 referring physicians who had referred patients to Genesis and the number of referrals sent by each physician to Genesis for 2006 and 2010. This list and the data was used in the course of a discussion as to how it would be difficult for Dr. Kashyap to prove damages if the Departing Shareholders disparaged her to referring physicians;

    b) On December 6, 2012, Ms. Wylie sent an email from her Genesis email account to her personal email account attaching a document entitled "vacation notice current salary.xlsx" which contained a list of all Genesis employees, their wages, annual salary increase date, contracted notice period, severance entitlements and vacation days. Ms. Wylie acknowledged in her testimony that this information was confidential to Genesis. She also acknowledged during cross-examination that she used this confidential information in Olive's Business Plan and used it for the purposes of preparing employment contracts for Olive to hire Genesis employees;

19. The Defendants had relationships with the staff at Genesis and by virtue of their roles at Genesis, had specialized knowledge of the skills and experience

of Genesis employees. They made use of their relationships and specialized knowledge in order to plan their staffing and strategic hiring for Olive. This was an intentional plan to hire from Genesis, using confidential information in the Defendants' possession concerning Genesis's employees;

20. In preparation for a mailout to patients, Ms. Wylie created and removed a list of Genesis patient names and addresses from Genesis which was never returned to Genesis or destroyed. The list was produced by Ms. Wylie in the litigation;

21. Ms. Wylie put Genesis employee payroll information on a USB key and removed it from Genesis;

22. Olive's Business Plan contains the following Genesis confidential information:

    a) On page 13 of the Business Plan, there is a graph entitled "Genesis Fertility Centre Referrals." The graph shows the number of referrals received by Genesis over the years 2003–2012. Ms. Wylie acknowledged in cross-examination that this information was confidential to Genesis and that she compiled this information in her role at Genesis;

    b) Page 14 of the Business Plan contains a chart showing the number of consultations by physician over the years 2009–2012. Data for Dr. Hitkari, Dr. Taylor, Dr. Yuzpe and Dr. Nakhuda is included in the chart;

    c) Page 14 of the Business Plan also contains a chart showing the total number of consults at Genesis, the total number of IVF cycles performed each year and a percentage of consults that translated to IVF cycles at Genesis. The data is clearly about Genesis. Dr. Hitkari acknowledged this during his testimony;

    d) Page 15 of the Business Plan contains revenue projections for Olive. The projections are expressly based on Genesis financial data. For example, under the heading "Assumptions" it reads "Based on Genesis Fertility Centre Expenses run at average of 86.5% of Revenue (based on figures from 2009–2011)". The Business Plan contains financial projections which are expressly based on Genesis financial data;

    e) Page 17 of the Business Plan also contains estimates of costs for salaries by department and expenses;

23. The Defendants were generally dishonest about their actions and intentions, and lacked candour in their dealings with Genesis, including as follows:

    a) Although the Defendant Shareholders testified that they spent most of the 60 Day Period hoping that Dr. Kashyap would change her mind regarding purchasing their shares, none of the departing doctors disclosed to Dr. Kashyap that they had already hired all of Genesis's senior management staff;

b) None of the defendants told Dr. Kashyap that they were planning to open a temporary clinic upstairs in January 2013;

c) Ms. Wylie and Ms. St. Pierre did not disclose at the time of resignation that they were leaving to assist the Departing Physicians in setting up their new clinic;

d) The Departing Physicians solicited Genesis employees to work at Olive and engaged in sneaky conduct designed at hiding or otherwise shielding that truth. Ms. Wylie's own email explained her plan to post job advertisements for the purpose of making hiring look "above board";

e) The Defendants tried to cover up their wrongful conduct by deleting relevant emails. In particular, Dr. Hitkari directed the other Defendants to delete all emails to and from Dr. Nakhuda in order to hide his involvement in the set-up of Olive. Although all of the Individual Defendants were copied on that chain of email correspondence, only Yvonne St. Pierre disclosed it after she was added as a party to the action;

24. Olive's temporary clinic was open, accepting referrals and booking patients during the 60 Day Period. Dr. Taylor and Dr. Hitkari saw patients at Olive in January 2013;

25. To the best of their ability, the Defendants attempted to ensure a seamless transition in an effort to avoid the hardship of a "start-up" after their departure. Olive had "started up" before the Departing Physicians had even left Genesis;

26. To the extent that some of the events during the 60 Day Period may be reasonably characterized as planning, because they were done surreptitiously and using confidential information, Genesis submits that they were nevertheless contrary to the fiduciary obligations because they were interwoven with other actionable wrongs. For example, even if hiring employees for a new competing business is not contrary to fiduciary duties, doing so was nevertheless wrongful because they were offering employment to Genesis employees, (which is not in the best interests of Genesis); and

27. The Defendants certainly got a "head start" by breaching their fiduciary duties but they did not just get a head start. By breaching their fiduciary duties to Genesis, they also set Genesis back.

Discussion of Alleged Breaches

[136] Many of these allegations are premised on the proposition that the Departing Physicians were precluded from taking effective steps to continue their practice immediately upon leaving Genesis. I do not accept this premise for the reasons I have already given.

[137] With respect to the first complaint, I have found that the Departing Physicians did not provide any medical services through Olive until after the 60 Day Period.

[138] I find the Departing Physicians merely secured premises in which to continue their practice and that they were entitled to take that step. The Departing Physicians had to have premises from which they could provide medical care to their patients. If Olive was to be open to treat patients on February 1, 2013, it obviously had to have possession of these premises before that date.

[139] I do consider it to be a breach of fiduciary duty on the part of the Senior Managers not to have disclosed to Dr. Kashyap that, in early December, they had signed contracts to work at Olive in January.

[140] The third breach alleged is that Olive solicited referrals from referring physicians by sending out a full page advertisement to members of the BCMA through the BCMA mail notification system. There is no question that Olive did so and did state in the mail out that it was accepting referrals. However, I note that this mailing was not sent out until after January 15, 2013.

[141] This notice should have made it clear that Olive could not provide medical services until after January 31, 2013. However, there is no evidence that Olive was booking in patients to be seen during the 60 Day Period. Given the fact that there were more than enough patients to keep all of the doctors involved in this case fully occupied and my finding that the Departing Physicians were entitled to continue their practice on February 1, I do not consider the sending of this notice to be a breach of fiduciary duty.

[142] I also do not consider it to be a breach of fiduciary duty for the Departing Physicians to accept bookings for appointments during the 60 Day Period as alleged in para. 143(4), provided that the appointments were scheduled at a time after that period. In my view the booking of such future appointments was consistent with the professional responsibilities of the Departing Physicians to provide a continuity of medical care to their patients.

[143] Genesis's fifth complaint is that Drs. Taylor and Hitkari saw patients at Olive in late January 2013. I have already found that Ms. Frappier was mistaken when she testified that she saw these doctors seeing patients at Olive on January 28, 2013.

[144] With regard to Ms. Wylie's removal of a patient list, there is no evidence that any improper use was made of the information contained in the list. This complaint might have been relevant if Genesis had any complaint about soliciting patients, but it has expressly stated that it does not. In my view, the patients being treated at Genesis facility had the right to be informed about the departure of the Departing Physicians and Genesis ought to have made that information available to them.

[145] With respect to the removal of payroll information as well as the information used by Olive in the preparation of its business plan, I agree that it was a breach of confidence and breach of fiduciary duty to use that information without Genesis's consent.

[146] With regards to the allegation of verbal assurances being given to Ms. Wylie and Ms. St. Pierre, I accept Ms. Wylie's evidence as to the sequence of events leading up to the signing of employment agreements.

[147] Ms. Wylie's evidence is that she met with Dr. Kashyap on November 29, shortly after Ms. St. Pierre had told her that Dr. Kashyap had purchased Genesis. She testified that she told Dr. Kashyap that she did not have enough experience to run the company on her own and that she would go bankrupt. She also testified that that same evening she discussed the situation with her husband and concluded that she would give notice of resignation immediately and would continue to work with the Departing Physicians if they would have her. That night, she began the planning process for the new clinic by searching the Internet for possible locations for a temporary office.

[148] That evening, she also had a discussion with her husband about how long she and her husband could get by on his disability pension because she anticipated that there would be a period of time when she would not be receiving any income.

She also testified that Dr. Taylor had said that she was thinking of going back to Nova Scotia and this made her determined to keep the doctors together. I find that she decided to resign from Genesis that evening before having any discussion with the Departing Physicians about accepting a position with them.

[149] The next day, November 30, Ms. Wylie told Dr. Hitkari that she was going to leave Genesis without any assurance of having an income. Dr. Hitkari told her that if the Departing Physicians started a new clinic they would see that she was paid. Later that morning, she told Ms. St. Pierre that she was leaving with a view to trying to set up a new clinic and told her about Dr. Hitkari's statement that she would be paid. Ms. St. Pierre said that if you are leaving, I am leaving. Ms. St. Pierre then said we should get something in writing from the Departing Physicians.

[150] Ms. Wylie submitted her notice of resignation by email to the Directors on December 1 and, on or about that day, prepared employment contracts for herself and Ms. St. Pierre, which were later signed by the Departing Physicians. Dr. Nakhuda also signed these agreements. They were subsequently replaced with contracts with Olive.

[151] Based on this evidence, I find that the Departing Physicians did not recruit Ms. Wylie and Ms. St. Pierre away from Genesis. I find that Ms. Wylie and Ms. St. Pierre took the initiative to create a new clinic to keep the Departing Physicians together.

[152] I accept Ms. Wylie's evidence that she had very little time to train Savina Kashyap in December 2012. She gave her required 30 days notice of resignation on December 1, 2012, but December 18 was her last day of work because she had accrued vacation time owing to her. In that time, she was involved in completing year end matters for Genesis. I accept her evidence that the organisational role she played in setting up Olive did not interfere the discharge of her duties to Genesis.

[153] I find that the management difficulties faced by Genesis in the 60 Day Period and thereafter were primarily attributable to the lack of a transition plan on

Dr. Kashyap's part. This lack of planning included a failure to recognize that senior management was unlikely to remain in place. Dr. Kashyap testified that she had developed a business plan for Genesis, but she did not produce any written plan at trial, nor did she explain the plan in her testimony. I find that was this lack of planning caused management difficulties in the 60 Day Period and that the defendants are not liable any such difficulties.

[154] However, I do consider that it was a breach of fiduciary duty on the part of the Departing Physicians not to inform Dr. Kashyap that they had entered into employment contracts with the Senior Managers and to use the services of the Senior Managers while they were still employed by Genesis.

[155] However, once they were no longer employed by Genesis, I find that the Senior Mangers were entitled to work to prepare the Olive clinic to be able to begin providing patient care on February 1, 2013.

[156] I also agree that there were times when Ms. Wylie and Ms. St. Pierre performed services relating to setting up Olive while they were working in Genesis's office. However, I find that this occurred only rarely and that both Ms. Wylie and Ms. St. Pierre competently carried out their duties for Genesis during December 2012. There is no evidence of any material amount of Olive related services being carried out by either of these defendants when they should have been working for Genesis.

[157] The next complaint made by Genesis is that Ms. Wylie made up a "to do" list of steps to be taken to facilitate the transfer of certain employees from Genesis to Olive. I do not find that making a to do list was a breach of fiduciary duty, as long as it related to actions to be taken in conjunction with employees deciding to work for Olive on their own initiative.

[158] I am satisfied that the employees who were hired by Olive left Genesis because they wanted to continue to work with the Departing Physicians and, in some cases, because they had significant concerns about working for Dr. Kashyap

and the viability of Genesis. At most, the Departing Physicians and Ms. Wylie facilitated the employees' decision to leave Genesis by informing them that there was work for them at Olive if they chose to leave.

[159] The next complaint is that Dr. Yuzpe assured Dr. Nakhuda that if he left Genesis he would have a job at Olive. With respect to Dr. Nakhuda, I consider it relevant that he had a reasonable expectation of becoming an owner of Genesis. He also clearly had a strong desire for personal and professional reasons to continue working with the Departing Physicians.

[160] The change in ownership at Genesis and the loss of the ability to work with his colleagues brought about a significant change in Dr. Nakhuda's employment situation. From being one of five physicians with a reasonable expectation of becoming an owner, Dr. Nakhuda became 1 of only 2 physicians at Genesis. He clearly had no interest in becoming a co-owner with Dr. Kashyap and there is no evidence she ever offered him an opportunity to do so.

[161] In these circumstances, I find that it was permissible for Dr. Yuzpe to discuss Dr. Nakhuda's future with him. There was no evidence that any of the Departing Physicians induced or encouraged Dr. Nakhuda to breach his contract of employment with Genesis. In my view, it would be unfair to invoke the equitable rules relating to fiduciaries to frustrate Dr. Nakhuda's reasonable expectations of career advancement.

[162] Similarly, I do not regard Dr. Nakhuda's involvement in the planning for Olive to be a breach of duty. For the reasons I will set out later in this judgement, I find that Dr. Nakhuda was not a fiduciary of Genesis. There is no evidence that he assisted Olive when he should have been carrying out duties for Genesis or from Genesis's premises. Therefore, I do not find that his involvement in the early planning meetings or the limited assistance he provided to Olive to be actionable against either him or the other defendants.

[163] The next complaint is that the Departing Physicians were amenable to releasing Dr. Nakhuda from the Nakhuda Employment Agreement, even though they admitted in examination for discovery that that would not have been in Genesis's best interest. I do not agree that the Departing Physicians' willingness to release Dr. Nakhuda was in and of itself a breach of duty to Genesis. The Departing Physicians did not take any steps to cause Genesis to release Dr. Nakhuda. As long as they did not take any steps to cause Genesis to release him, they were not in breach of any duty to Genesis.

[164] The signing of employment contracts as alleged in paragraph 136(13), (14) and (15) with other Genesis employees within the 60 Day Period without making full disclosure to Genesis was, in my view, a breach of fiduciary duty on the part of the Departing Physicians.

[165] Genesis alleges that the Departing Physicians saw fewer patients in the 60 Day Period than they had seen in the same period in earlier years. Genesis alleges that this was caused in part by these patients being booked to see doctors at Olive after January 31, 2013. I am not satisfied that any reduction in the number of patients seen at Genesis was caused by the Departing Physicians deferring consultations until after the 60 Day Period or by the Departing Physicians neglecting their professional duties at Genesis.

[166] The statistical evidence put forward by Genesis to support this allegation is inconclusive. All of the Departing Physicians saw a considerable number of patients at Genesis in the 60 Day Period. All of them denied any effort to see fewer patients in that period or that they spent any less time seeing patients in that period than they had formerly.

[167] In addition, this complaint is premised on the assumption that the profits from Genesis were allocated equally among the Shareholders as opposed to being distributed in accordance with the revenue produced by each physician. There is no evidence that this was the case.

[168] The next complaint is that the Departing Physicians interfered with Dr. Kashyap ability to transition and consolidate Genesis's business. The only example of this behaviour cited by the plaintiffs is the refusal of the Departing Physicians to approve the hiring of Savina Kashyap as interim Director of Operations.

[169] I do not regard the opposition of the Departing Doctors to Savina Kashyap being hired as a breach of duty. It must be remembered that their duty was to Genesis and not to Dr. Kashyap. In addition, the hiring of a Director of Operations was a decision that required unanimous consent under the Shareholder Agreement. The shareholders of Genesis were not acting in a fiduciary capacity when they exercised their rights as shareholders under the Shareholders' Agreement.

[170] I also agree that Savina Kashyap was demonstrably unqualified to act as Director of Operations of a specialist fertility clinic. I also accept Gyn Wylie's evidence that she did not have sufficient time to train Savina Kashyap in the month of December because of her other responsibilities.

[171] I accept the allegation that Ms. Wylie removed the list of the top 50 referring physicians. However, there is no evidence that Olive used this information, although it was referred to in a discussion about Dr. Kashyap's ability to prove damages if she alleged that the Departing Physicians disparaged her to referring physicians. There is no evidence that the Departing Physicians did ever in fact disparage Dr. Kashyap to referring physicians.

[172] I also accept that Gyn Wylie used financial information about Genesis's operations in preparing the Olive Business Plan and for the purpose of preparing contracts of employment with Genesis employees. This was a breach of fiduciary duty and an appropriation of Genesis's confidential information. However, I do not agree that this information was of significant importance to Olive or Genesis.

[173] The plaintiffs' written submission that the information at pages 13 and 14 of the Olive business Plan shows the total number of consults at Genesis is not quite

accurate. The figures given are for only the Departing Physicians and Dr. Nakhuda. However, at that time Dr. Nakhuda was still under contract to Genesis.

[174] The plaintiffs allege that the defendants had relationships with staff at Genesis and, by virtue thereof, had knowledge of the skills and experience of Genesis employees. The plaintiffs cited no authority for the proposition that a former fiduciary must not use general knowledge acquired about the skills and abilities of their fellow workers in deciding whether to try to hire them. In principle, it would seem to me to be wrong prevent a qualified person from seeking employment with a former manager of his present employer or for the former manager to use general knowledge about the employee in deciding whether to hire that person.

[175] With regard to Ms. Wylie's removal of a patient list, there is no evidence that any improper use was made of the information contained in the list. This complaint might have been relevant if Genesis had any complaint about Olive soliciting patients, but it has expressly stated that it does not. In my view, the patients being treated at the Genesis facility had the right to be informed about the departure of the Departing Physicians and Genesis ought to have made that information available to them.

[176] With respect to the removal of payroll information as well as the information used by Olive in the preparation of its business plan, I agree that it was a breach of confidence and breach of fiduciary duty to use that information without Genesis's consent.

[177] Genesis complains that the Departing Physicians were generally dishonest about their actions and intentions and lacked candour in their dealings with it. It says that although they testified that they hoped Dr. Kashyap would change her mind about buying them out, they did not disclose that they had hired Genesis's senior management nor did they tell Dr. Kashyap that they were planning to open a temporary clinic upstairs. Genesis also says that neither Ms. Wylie nor Ms. St. Pierre told her that they were resigning to assist Olive in setting up a new clinic.

[178] I am somewhat sceptical about these complaints. I find it difficult to believe that Dr. Kashyap was not aware that Ms. Wylie and Ms. St. Pierre were planning to follow the Departing Physicians to their new practice as soon as she received their notices of resignation. I accept Ms. Wylie's evidence that she told Dr. Kashyap on November 29, 2012, that she would go bankrupt if she purchased Genesis.

[179] Dr. Kashyap was aware that Ms. Wylie and Ms. St. Pierre were resigning on December 1, 2012. There is no evidence that she made enquiries of them about their future employment intentions. Any discussions that the Departing Physicians had with Dr. Kashyap about changing her decision to buy them out did not engage any fiduciary duties to Genesis on their part. The Departing Physicians did not owe any fiduciary duty to Dr. Kashyap with respect to contractual negotiations between them.

[180] However, I do agree that during the 60 Day Period the Departing Physicians did owe a duty to Genesis to inform it of any discussions or agreements they had with Genesis employees about moving to the new clinic. While I do not accept that Dr. Kashyap was not aware that Ms. Wylie and Ms. St. Pierre were committed to moving with the Departing Physicians, I do find that she was not informed of that fact or of the signing of contracts with the other senior managers. Despite my finding that the other managers were not recruited, I am of the view that the duty of good faith owed by the Departing Physicians required them to inform Genesis that they had signed employment contracts with any Genesis employees in the 60 Day Period.

[181] I am satisfied that Biddy Collings acted on behalf of Olive in evaluating staff and keeping Gyn Wylie informed about the mood and morale of Genesis employees. Ms. Collings signed an employment agreement with the Departing Physicians in December 2012 but did not give notice of termination to Genesis until April 16, 2013. She resigned from Genesis on May 16 and started at Olive on May 21, 2013. While she remained at Genesis, she actively discussed with Gyn Wylie what Genesis employees Olive should hire. I am also satisfied that Olive knew how much these employees were being paid and acted on the historical information about Genesis in

evaluating Genesis personnel as potential Olive employees. This was clearly a breach of Ms. Collings duties as an employee and an unauthorized use of confidential information.

[182] Tammy LaFreniere was employed as a switchboard clerk at Genesis until March 12, 2013. While so employed, she forwarded some Genesis referrals on to Olive. Ms. LaFreniere's agreed that she forwarded Preimplantation Genetic Diagnosis (PGD) referrals to Dr. Yuzpe at Olive after January 31, 2013. It was wrong of her to have done so, but I accept her evidence that she did so because historically Dr. Yuzpe had performed the PGD services at Genesis. I do not find that her actions were part of a conspiracy to harm Genesis.

[183] I find that her actions were the result of the general state of uncertainty created by the breakup of the practice formerly carried out by Genesis. I am satisfied that she was not acting surreptitiously in referring the PGD cycles to Dr. Yuzpe. There was no evidence that Dr. Kashyap or her sister ever gave specific and clear instructions to her about how to handle referrals for services that had formerly been performed by one of the Departing Physicians.

[184] I would therefore characterize her actions as a breach of her duties as an employee but reject the submission that she was acting dishonestly.

[185] I do not accept the plaintiffs' allegation that the Departing Physicians "pillaged Genesis" on their way out the door. I find that they continued to carry out their duties at Genesis, including providing patient care, during the 60 Day Period. There is no evidence that they made derogatory comments to patients or staff about Dr. Kashyap on Genesis or disrupted its activities in that period.

[186] While I do not accept that Dr. Kashyap was kept completely in the dark about their activities, I repeat that Genesis was entitled to be kept informed of the Departing Physicians' activities to allow it to manage its own future. As fiduciaries, the Departing Physicians had a duty of candour as well as loyalty. In my view they did not fulfill their duty of candour during the 60 Day Period.

[187] I accept that Genesis did go through a period of uncertainty and disruption after Dr. Kashyap elected to purchase the Departing Physicians shares. However, I conclude that those difficulties were not primarily attributable to any breaches of duty or wrongdoing on the part of the defendants.

[188] Dr. Kashyap undoubtedly had the right to buy out the Departing Physicians. However, it is clear to me that she did not think through the practical consequences of her decision in several important respects.

[189] The first of these was she was purchasing a company whose most valuable assets were the doctors who practised in the clinic. Dr. Kashyap must be taken to have realized that much of the financial success of Genesis was derived from the personal reputations and abilities of the doctors who practiced in it. Her decision to buyout the Departing Physicians resulted in the immediate loss of three of its five Physicians, and the likely departure of a fourth.

[190] The second consideration was that the number of employees, the amount of equipment and the infrastructure associated with Genesis were all designed to support a clinic in which 4 or 5 doctors would be practising. In this regard, I find that the number of doctors practising at Genesis was the limiting factor on both its size and the amount of revenue it could generate.

[191] The third consideration was that the Shareholders' Agreement made it clear that the Departing Doctors had an unrestricted right to immediately begin competing with Genesis as soon as they ceased to be Shareholders.

[192] I appreciate that the Shareholders' Agreement simply states that the contractual non-competition clause contained within it would not apply to a shareholder whose shares had been compulsorily purchased pursuant to s. 13. However, the right to compete, coupled with the ethical responsibility to provide continuous medical care to patients, leads me to conclude that the Shareholders' Agreement was intended to govern the extent of the limitations on competition imposed on the Shareholders.

[193] The fourth consideration was that many of the employees of Genesis would be likely to leave that company and seek work elsewhere as soon as they were in a position to do so. This was so for two reasons. Firstly, Genesis clearly had more staff than it reasonably required to provide support for a one or two physician practice. Secondly, many of the staff had worked closely with the Departing Physicians for many years and would naturally have wished to continue to do so.

[194] Dr. Kashyap lacked a plan for dealing with these difficulties. The lack of such a plan greatly contributed to her difficulties. In addition, some of her decisions further contributed to the operational problems she faced. Genesis became involved in two complaints to the Director of Employment Standards over compensation disputes.

[195] None of these difficulties can be attributed to any wrongful acts on the part of the defendants.

[196] I do find that there is merit in Genesis's complaints that the Departing Physicians did not disclose their plans to it within the 60 Day Period. While I have not agreed with Genesis that many of its complaints about the defendants actions were breaches of duty, I do agree that fairness required the Departing Shareholders to inform Genesis of the actions they were taking in the 60 Day Period.

[197] The plaintiffs submit that the Departing Physicians got a head start from their breaches of confidence. They say that the "Springboard Principle" should be applied in this case.

[198] The Springboard Principle is usually applied in cases of breach of confidence in which a competitor or former employee is able to establish a new business earlier than she or he would otherwise have been able to by misusing confidential information. *Cadbury Schweppes Inc.*, was a case in which the plaintiff wrongfully used a formula for producing a juice. The Court ordered compensation to the plaintiff against the defendant equal to one year's loss of profits that the plaintiff would have earned from the sale of an equivalent amount of product.

[199] However, it is important to note that the evidence in that case established that the defendant would have developed a comparable product within one year without misusing any confidential information. In addition, that was a manufacturing case in which there were no constraints on the plaintiff producing enough product to meet the demand filled by the defendant's product. The judgment also makes it clear that the interest being protected against in that case was not the right to be free of competition but the right to be free of competition made possible by the misuse of confidential information.

[200] In this case, I find that any advantage obtained by the Departing Physicians as a result of their breaches of fiduciary duty and breach of confidence was insignificant.

Post 60 Day Period Breaches

[201] The plaintiffs allege that the defendants breached their fiduciary duties after the 60 Day Period in three ways:

a) By continuing to use confidential information belonging to Genesis;

b) By continuing to covertly gather information about Genesis and its employees from Biddy Collings and using that information to recruit Genesis employees; and

c) By appropriating corporate opportunities, such as the DEB USA contract.

[202] I have already addressed the use of confidential information when discussing the alleged breaches during the 60 Day Period. I repeat that the defendants did make unauthorized use of confidential information but also repeat that, in my view, the information was of no great value to the defendants nor did its use cause any significant harm to Genesis.

[203] The actions of Biddy Collings after the 60 Day Period are the most serious misconduct on the fiduciary defendants' part. Ms. Collings continued to work at Genesis in a managerial role after she had decided to move to Olive. It is clear that she was acting in the interests of Olive in making decisions about staffing matters at

Genesis. Ms. Collings remained at Genesis until May 16, 2013. During that period, she frequently communicated with Gyn Wylie about Genesis employees and made recommendations as to which employees Olive should consider hiring.

[204] An example of this behaviour is an email Ms. Collings sent to Ms. Wylie on March 14, 2013. In that email, Ms. Collings disclosed a good deal of confidential information about Genesis's staffing situation, including looking for guidance as to how many nurses at Genesis should receive training in anticipation of being hired by Olive.

[205] I find that utilizing information obtained from Biddy Collings was a breach of fiduciary duty on the part of the fiduciary defendants. It also constituted improper use of confidential information about Genesis's operations and human resources challenges.

[206] Unlike many of the other breaches complained of, I do find that the actions of Biddy Collings were damaging to Genesis.

[207] The final complaint is that Olive deprived Genesis of corporate opportunities after the 60 Day Period. The only specific opportunity identified was a contract with DEB USA. DEB USA was a supplier of eggs based in the United States, in which it is legal to pay egg donors for their eggs. The acronym DEB stands for Donor Egg Bank. These eggs are made available to Canadians who cannot purchase their own directly from a donor. Utilization of the eggs must of course be facilitated by a qualified fertility physician.

[208] It is clear from the questions read in from Dr. Yuzpe's examination for discovery that he had negotiated an agreement with DEB USA in July 2012 for Genesis to be the exclusive recipient of eggs from DEB USA in British Columbia. It is also clear that in July 2013, DEB USA and Olive entered into an agreement whereby Olive became the exclusive recipient of donor eggs from DEB USA.

[209] I agree with the plaintiffs that Dr. Yuzpe was being disingenuous in his evidence when he testified that no exclusive agreement with Genesis had come into

existence. Moreover, even if there had been no exclusive agreement it is clear that Genesis was obtaining donor eggs from DEB USA during the time that the Departing Physicians were directors of Genesis.

[210] The difficult issue which arises is that it is also clear that the relationship with DEB USA came about solely through Dr. Yuzpe's relationship with the principals of that company. It is also evident that DEB USA at all times considered that it was Dr. Yuzpe with whom it had a relationship.

[211] In assessing this issue I take guidance from the paragraph of Justice Laskin's judgment in *Canadian Aero Service,* quoted at para 99 of these reasons. In the case of the DEB USA contract, I do not find that Olive appropriated a business opportunity that belonged to Genesis. I find that it was open to DEB USA to resume dealing with Dr. Yuzpe in the summer of 2013. This was 6 months after the Departing Physicians had left Genesis. I think it is also relevant that DEB USA was a supplier rather a customer and no evidence was led by Genesis to show that it was ever unable to obtain eggs to meet the needs of its practice. I therefore find that it was not a breach of fiduciary duty for Olive to sign an exclusive agreement with this particular supplier, even though that supplier had formerly had an exclusive supply agreement with Genesis.

Other Alleged Causes of Action

Breach of Contract

[212] The plaintiffs submit that the Departing Physicians breached the non-competition provisions of the Shareholders' Agreement in the 60 Day Period and breached the confidentiality provisions of the Shareholders' Agreement both during and after the 60 Day Period.

[213] However, as the plaintiffs conceded in their argument, these allegations add little to the analysis of the issues in this case because, with the exception of Dr. Nakhuda, the individual defendants owed fiduciary duties to Genesis.

[214] In addition, I do not interpret the non-competition clause in the Shareholders' Agreement as precluding the Departing Physicians from taking reasonable steps in the 60 Day Period to establish a new practice and book patients to be seen after the 60 Day Period. My reasons for this interpretation are essentially the same as the reasons I have given for concluding that the parties intended to modify the strict fiduciary duties they might otherwise have owed once the compulsory buyout provisions were invoked.

[215] Unless the Departing Physicians could book patients in advance, they would be precluded from competing with Genesis for some period of time after the 60 Day Period. This is inconsistent with the right to compete recognized in Section 17.2 of the Shareholders' Agreement. In addition, preventing patients from making future appointments with the Departing Physicians would interfere with the patients' right to receive timely treatment from a physician of their choice, and would thus be inconsistent with the ethical responsibilities of the parties I have outlined above.

[216] In the context of a compulsory buyout, I interpret the non-competition provisions of the Shareholders' Agreement as being limited to precluding the Departing Physicians from actually seeing patients and providing services other than through Genesis during the 60 Day Period.

[217] Section 17(1)(d) of the Shareholders' Agreement does expand the duty of confidentiality beyond that which otherwise apply to the Departing Physicians because it extends the duty to not using information which comes into their possession by virtue of being shareholders of Genesis. Apart from that, the restrictions spelled out in Section 17(1)(d) appear to be the same as the duties they owed as fiduciaries and former fiduciaries.

[218] Similarly, as the defendants have conceded that Ms. Wylie and Ms. St Pierre were fiduciaries of Genesis, the confidentiality obligations they owed as employees would not have been greater than those they owed as fiduciaries.

[219] I will deal with the claims against Dr. Nakhuda later in these reasons.

Breach of the Duty of Honest Performance

[220] The plaintiffs allege that the Departing Physicians breached the underlying duties they owed to perform their contracts honestly and reasonably, as those duties were explained in *Bhasin v. Hrynew,* 2014 SCC 71.

[221] In *Bhasin,* Justice Cromwell identified an organizing principle of good faith in contractual performance;

> 63. The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[222] I have some difficulty in determining what this claim adds to the allegations of breach of fiduciary duty, breach of confidence and conspiracy made against the defendants. In this regard, I note that the facts relied upon in support of this claim essentially duplicate the facts relied upon for the other claims.

[223] In addition the Supreme Court of Canada made it clear in *Bhasin* that the duty of honest performance falls far short of requiring a party to a contract to act in the best interests of the other party:

> 65. The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

[224] Finally, *Bhasin* addresses the manner in which parties perform their duties and exercise their rights under a contract. The chief allegation in *Bhasin* was that Canadian American Financial Corporation (Can Am) acted dishonestly in connection with its right not to renew an agreement with Mr. Bhasin. The trial judge, affirmed by the Supreme Court of Canada, found that Can Am had acted dishonestly by concealing from him its intention not to renew his agreement. Mr. Bhasin accordingly

refused an offer to purchase his business and lost the benefit of that offer when Can Am canceled its agreement with his company. The measure of damages approved by the Supreme Court was the value of Mr. Bhasin's company at the time when he had lost the opportunity to sell it.

[225] In this case, the facts are distinguishable. Dr. Kashyap made her decision to purchase the Departing Physicians shares without any assurance that they would not compete with Genesis. No reasonable person in Dr. Kashyap's position could have concluded that the Departing Physicians would not continue their practices. I therefore can find nothing in the defendants' conduct that would have led Dr. Kashyap or Genesis to conclude the Departing Physicians would not compete with Genesis.

[226] I therefore find that the principles set out in *Bhasin* do not assist the plaintiffs.

Breach of Confidence

[227] Genesis submits that the defendants committed the tort of breach of confidence. As pointed out in *Cadbury Schweppes Inc.,* the true nature of a claim for breach of confidence is somewhat in dispute. For the purposes of these reasons I am content to consider it to be a tort.

[228] I have already reviewed the evidence relevant to the breach of confidence claim in the context of the claims for breach of fiduciary duty and breach of contract. I have identified the information that I regarded as being confidential that the Departing Physicians wrongfully used. This information consisted largely of certain financial information relating to Genesis as well as information about Genesis's employees and their compensation.

[229] There is no doubt that misuse of confidential information may give rise to a restitutionary remedy: *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574. However, there must also be a causal link between the misuse of confidential information and the remedy sought.

[230] I will address this issue when I discuss remedies.

Conversion

[231] Genesis submits that the taking of confidential information belonging to it also constitutes the tort of conversion. It relies on *Cruise Connections Canada v. Cancellieri,* 2012 BCSC 53. However, I find that the facts of *Cruise Connections* are distinguishable from the facts of this case. In *Cruise Connections,* Justice Pearlman found that the defendants removed customer lists and used the information contained in them to market and sell cruise related products.

[232] Justice Pearlman's comments on the tort of conversion were made in the context of his analysis of whether the defendants had committed the tort of civil conspiracy. There was no independent claim for damages for conversion.

[233] The tort of conversion occurs when the defendant wrongfully interferes with the plaintiff's chattels. The damages recoverable for conversion are the value of the goods converted. In *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce,* [1996] 3 S.C.R. 727, the Court summarized the elements of the tort as follows:

> 30. It is a commonly accepted proposition that a bill of exchange is a chattel that can be negotiated from party to party. An individual obtains title to a bill through negotiation. Once an individual has obtained title, that individual has the right to present the bill to the drawee for payment, as well as a right of recovery against the drawer if the bill is dishonoured by the drawee.
>
> 31. The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence….

[234] Damages are an essential element of the tort of conversion.

[235] In *Borden Chemical Co. (Canada) v. J.G. Buekers Ltd.,* (1972) 29 D.L.R. (3d) 337 (B.C.S.C.), Justice McKay stated the law as follows:

> 13. I find that the only conversion established is as to the customer list. The measure of damage is the value of the converted property together with damages for its detention: See Salmond on Torts, 15th Ed., p. 146.

> 14. Counsel for Beukers Limited approached this matter on an all-or-nothing basis and I am left with little or no assistance on the precise problem before me which is - what is the value of the customer list so converted? The evidence of Mr. Miller was that the value of the Beukers Limited business insofar as it related to the product Cling was $70,000.00. I find this evidence of little assistance in determining the value of the customer list. Miller's evidence related to the business as a going concern with the product Cling flowing through the system….

[236] In this case, Genesis led no evidence of the value of the lists wrongly taken. I therefore find that the tort of conversion has not been made out.

Civil Conspiracy

[237] The plaintiffs allege that the conduct of the defendants in this case constitutes the tort of conspiracy. The plaintiffs say that the facts of this case are the same as the facts in *Cruise Connections* in that the defendants wrongfully appropriated confidential information and set out to use that information to cause damage to the business of Genesis.

[238] The principles applicable to a claim for civil conspiracy were succinctly set out by Justice Pearlman in *Cruise Connections:*

> 249. A conspiracy consists of an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means: *Golden Capital Securities Ltd. v. Rempel*, 2004 BCCA 565 at para. 45.
>
> 250. In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-72, the Court set out the elements of the tort of conspiracy:
>
>> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>>
>>> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>>>
>>> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances
>>
>> that injury to the plaintiff is likely to and does result.
>>
>> In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the

> prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.
>
> 251. McEachern C.J.B.C. stated the elements of the tort in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 (B.C.C.A.) at para. 5:
>
> > 1. an agreement between two or more persons;
> > 2. concerted action taken pursuant to the agreement;
> > 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
> >
> >   (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
> > 4. actual damage suffered by the plaintiff.

[239] The plaintiffs say that they do not need to establish that the predominant purpose of the defendants' conduct was to cause injury to Genesis because the defendants should have known that their unlawful conduct would cause injury.

[240] However, in their written argument, the plaintiffs state that the defendants set out together with the objective of causing injury to Genesis and Dr. Kashyap.

[241] I am not satisfied that the purpose of the defendants was to cause damage or injury to Genesis. The plaintiffs refers to certain emails, from Dr. Yuzpe in particular, indicating a strong animus to Dr. Kashyap. However, those emails are general in nature and, in my view, are reflective of Dr. Yuzpe's anger at being bought out of Genesis rather than evidence of a plan to cause injury to the plaintiffs.

[242] It must not be forgotten that the Departing Physicians had the right to compete with Genesis and that they also had an obligation to move as quickly as possible to be able to provide medical services to their patients. I find that the purpose of their actions was to pursue those objectives rather than to cause harm to Genesis or Dr. Kashyap.

[243] I am also of the view that there is no evidence that the unlawful acts I have found were done pursuant to an agreement to carry out unlawful acts. The breaches

of fiduciary duty and breach of confidences appear to me to have been random. Most were of a minor nature and many were done without the knowledge of the other defendants. For example, there is no evidence that any of the Departing Physicians were aware of the confidential information removed by Ms. Wylie nor that those actions were done pursuant to any agreement.

[244] I find that the allegations of conspiracy made in the Notice of Civil Claim have not been made out. The plaintiffs have conceded that Dr. Nakhuda did not remove any confidential information. I have found that Dr. Nakhuda did not do anything unlawful.

[245] On the whole of the evidence, I cannot find either an agreement to commit unlawful acts or that the defendants had constructive knowledge that their actions would cause harm to Genesis or Dr. Kashyap.

[246] I also fail to see how the claims for conspiracy add anything to the principal claims made by the plaintiffs. The claims for breach of fiduciary duty and breach of confidence offer the most flexible remedies to Genesis.

The Claims against Dr. Nakhuda

[247] Genesis is the only plaintiff with a right of action against Dr. Nakhuda.

[248] Dr. Nakhuda was the focus of some of the disagreements leading up to the invoking of the shotgun provisions of the Shareholders' Agreement. Drs. Yuzpe, Taylor and Hitkari wanted to offer Dr. Nakhuda the opportunity to become a shareholder in Genesis, but Dr. Kashyap was opposed to that plan.

[249] Pursuant to the Nakhuda Employment Agreement, Dr. Nakhuda was required to give 90 days written notice of termination of his employment with Genesis.

[250] It is clear that Dr. Nakhuda decided that he no longer wished to remain at Genesis as soon as he learned that Dr. Kashyap would become its sole shareholder.

[251] Although he equivocated about this in his evidence, I am also satisfied that from an early stage, he planned to move his practice to work with the Departing Physicians as soon as possible. I find Dr. Nakhuda's evidence that he had not made up his mind to move at an early stage to be unconvincing. He probably did give consideration to other options, but I find that from mid December 2012 at the latest he had decided to join the Departing Physicians in practice if they established a new clinic and he was able to obtain the necessary regulatory approval to do so.

Was Dr. Nakhuda a Fiduciary?

[252] The plaintiffs submit that Dr. Nakhuda owed fiduciary duties to Genesis. However, they make no claim against him for knowing assistance of the breaches fo fiduciary duty alleged against the Departing Physicians. In support of its claim that Dr Nakhuda was a fiduciary Genesis relies on Section 6.1 of the Nakhuda Employment Agreement;

> 6.1 Confidential Information. The Employee hereby acknowledges and agrees that as a physician of the Centre, a relationship of confidence, trust, and fiduciary obligation is created between the Employee and Genesis, and the Employee shall acquire information about certain matters and things which are confidential to Genesis, and which information is and shall remain the exclusive property of Genesis including without limitation, the following:

[253] But for this contractual provision, I would have had no doubt that Dr. Nakhuda was not a fiduciary of Genesis. As an employed doctor, Dr. Nakhuda met neither the *per se* nor *ad hoc* tests for being a fiduciary.

[254] Dr. Nakhuda did not occupy any *per se* fiduciary positions such as director, agent or senior manager.

[255] The *ad hoc* test is set out in *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24 at para. 27:

> 27. The plaintiff class argues that, in addition to traditionally recognized categories like trustee or solicitor-client relationships, a fiduciary duty more broadly may arise whenever one person exercises power over another "vulnerable" person. They rely on *Frame v. Smith*, [1987] 2 S.C.R. 99, where Wilson J., in dissenting reasons later adopted and applied in *Lac Minerals*

> *Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, outlined the hallmarks of a fiduciary duty:
>
> > Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > > (1) The fiduciary has scope for the exercise of some discretion or power
> > >
> > > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> > >
> > > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[256] Dr. Nakhuda had no scope for the exercise of discretion or power in the affairs of Genesis. He could not unilaterally exercise any power to affect Genesis's legal or practical interests. Given the strict terms of the Nakhuda Employment Agreement, it cannot be seriously argued that Genesis was in any way vulnerable to him.

[257] Therefore, any fiduciary obligations on his part must be contractual. While a person may assume fiduciary obligations by contract, I am of the view that such an assumption must be clearly set out in any such contract. It is also trite to say that the clauses in an agreement must be read in the context of the whole of the agreement and the underlying commercial purpose for that agreement.

[258] I accept the argument of Dr. Nakhuda's counsel that the use of the word fiduciary in section 6.1 of the Nakhuda Employment Agreement was limited to the specific matters listed in that section. As the heading for section 6.1 makes clear, it is concerned with preserving Genesis's confidential information.

[259] I am therefore satisfied that the obligations contained in section 6.1 imposed contractual duties of confidentiality only on Dr. Nakhuda. Apart from any matter relating to confidential information, Dr. Nakhuda owed no fiduciary duties to Genesis.

[260] Genesis concedes that there is no evidence of Dr. Nakuda taking or using any confidential information belonging to it.

Does Genesis have a claim against Dr. Nakhuda for failing to give proper notice of his resignation?

[261] Genesis alleges that Dr. Nakhuda failed to give the notice of termination required by the Nakhuda Employment Agreement. It submits that Dr. Nakhuda never gave an effective notice of termination and that he therefore left his employment on April 19, 2013, without giving any notice and is liable for the damages that Genesis suffered from losing his services for a full 90 days after that date.

[262] The chronology of events relating to this issue is as follows:

1. On January 16, 2013, Dr. Nakhuda's lawyers sent a letter via email to Genesis taking the position that he had been constructively dismissed and informing Genesis that his last day at Genesis would be March 15, 2013. This date was obviously less than 90 days after the date of the letter.

2. On January 22, 2013, Genesis's lawyers responded to the letter, taking the position that Dr. Nakhuda had not given an effective notice of termination and informing him that Genesis would take steps to enforce the non-competition provisions of the Nakhuda Employment Agreement if he attempted to compete with it.

3. Discussions followed about the adequacy of Dr. Nakhuda's notice of termination. In February 2013, Dr. Nakhuda stated that he would continue working at Genesis until April 19, 2013, which is more than 90 days after January 16. He confirmed this intention in an email dated February 27, 2013, in which he stated that the notice given by his lawyer was extended to that date.

4. It is quite apparent from the evidence and emails filed in evidence that the relationship between Dr. Kashyap and her sister, on the one hand, and Dr. Nakhuda, on the other, had become adversarial and tense by March 2013. For example, there was a dispute over Dr. Nakhuda's vacation entitlement. In addition, there were several emails exchanged about whether Dr. Nakhuda had given any effective notice of termination.

5. Dr. Nakhuda's last day of work at Genesis was April 19, 2013.

[263] Counsel for Genesis and Dr. Nakhuda referred to a number of authorities dealing with the nature of the relationship between employer and employee after one or the other has delivered a notice of termination that gives insufficient notice.

[264] These cases establish that, generally, the giving of inadequate notice of termination does not give the other party the right to treat the lack of adequate notice as a breach that entitles it to bring the contract to an end.

[265] Genesis, however, takes the position that a notice of termination that does not give the required length of notice is ineffective for all purposes and that Dr. Nakhuda could not cure the inadequate notice he gave on January 16, 2013, by later agreeing to remain employed at Genesis for 90 days after that date. Thus, Genesis submits that Dr. Nakhuda is liable for damages for failing to give any notice prior to his departure on April 19, 2013. Genesis's position that the damages should be awarded for the 90 day period commencing on that date.

[266] Genesis relies on *Suleman v. British Columbia Research Council* (1990), 52 B.C.L.R. (2d) 138 (C.A.), in support of this proposition.

[267] In *Suleman,* the plaintiff received a notice from her employer informing her that her employment would be terminated in 6 months time. Upon receipt of the notice the plaintiff commenced an action for wrongful dismissal without waiting for the notice period to expire. In the action, the plaintiff took the position that the giving of an inadequate notice constituted a repudiation of the employment contract that she was entitled to accept immediately. She succeeded at trial.

[268] The Court of Appeal reversed the decision, holding that the plaintiff was required to work through the notice period before bringing an action for wrongful dismissal. In my view, *Suleman* supports the position taken by Dr. Nakhuda in this case. Genesis was in the same position is this case as the plaintiff was in *Suleman.* It had received a notice from Dr. Nakhuda that gave less notice of termination than that stipulated in the Nakhuda Employment Agreement.

[269] Based on *Suleman*, it seems to me that the remedy available to Genesis was to wait until Dr. Nakhuda left its employ and then sue for any damages it had incurred as a result of not being given the full 90 days notice. However, the assessment of damages would have to take into account the amount of notice already given. Thus, if Dr. Nakhuda had left his employment on March 15, Genesis could have sued for the remainder of the 90 days notice he was required to give. Genesis would, of course, have only been entitled to such damages if Dr. Nakhuda failed to establish that he had been constructively dismissed.

[270] This result follows from the principle that damages for breach of contract are awarded to put the innocent party in the same positon it would have been in had there been no breach. Assuming that Dr. Nakhuda gave inadequate notice of termination, he provided Genesis with an opportunity to mitigate its damages from that inadequate notice by continuing to work for the full 90 days required under the Nakhuda Employment Agreement. The law allows a party in breach to offer to mitigate the loss of the innocent party. That is the functional effect of what happened in this case.

[271] If I were to accede to Genesis's claim for damages based on a failure to give a fresh 90 days notice, I would be putting Genesis in a better position than it would have been in had Dr. Nakhuda left Genesis in January 2013 without giving any notice. Had that occurred, Genesis would have been entitled to damages based on losing his services for 90 days from January 16. However, Genesis continued to benefit from his services for that full 90 day period. Accordingly, awarding damages for a further 90 days lost services would put Genesis in a substantially better position than it would have been in had Dr. Nakhuda given no notice. Such a result would be inconsistent with the principles on which damages for breach of contract are awarded.

[272] In addition, counsel for Genesis based his argument on the assumption that Dr. Nakhuda's counsel's letter of January 16, 2013, was a notice of termination issued pursuant to the Nakhuda Employment Agreement. However, I do not agree

with that characterization. As I read that letter, Dr. Nakhuda was asserting the position that he had been constructively dismissed but, that out of concern for patients and professional courtesy, he would not leave immediately but would continue to work into March. In the letter, Dr. Nakhuda's lawyer refers to information provided to him by Dr. Kashyap that two new physicians would be joining Genesis by the beginning of March. I therefore interpret the letter as a repudiation of the Nakhuda Employment Agreement coupled with a willingness to facilitate an orderly transition period.

[273] I find that Genesis has not established any damages from Dr. Nakhuda's decision to leave its employ in January. It had the benefit of his services for 90 days after he gave notice he was leaving.

[274] I therefore find that the claims against Dr. Nakhuda must be dismissed.

Election of Remedies

[275] While Dr. Kashyap and her professional corporation are plaintiffs, in this case, I find that Genesis is the only plaintiff that has established any cause of action apart from a breach of the confidentiality provisions of the Shareholders' Agreement.

[276] Genesis has established some breaches of fiduciary duty and some breaches of confidence.

[277] A plaintiff that establishes breaches of fiduciary duty and breach of confidence is entitled to compensation either as damages for losses incurred or by an order requiring the defendant to account for any gains wrongfully obtained.

[278] The defendants submit that Genesis was required to elect what remedy it seeks for the wrongs it alleges were committed against it by the time it closed its case. The defendants rely on the judgement of Justice Myers in *First Majestic Silver Corp. v. Davila,* 2013 BCSC 717 at para. 200, aff'd 2014 BCCA 214, leave to appeal to the S.C.C refused, 35962 (27 November 2014), quoting from *Island Records Ltd v. Tring International Plc.*, [1996] 1 W.L.R. 1256 (H.C.J. ChD. (Eng.));

> 200. He [the Judge in Island Records] then went on to consider the issue before him (where the trial <u>was</u> split):
>
> > 7. Four principles are clear. First whilst a plaintiff can apply in proceedings in the alternative for damages and an account of profits, he cannot obtain judgment for both: he can only obtain judgment for one or the other: see *Neilson v Betts* LR5 HL1 and *De Vitre v Belts* (1873) LR6 HL 319 at 321. Second once judgment has been entered either for damages or an account of profits, any right-of election is lost: any claim to the remedy other than that for which judgment is entered is forever lost: see *United Australia v Barclays Bank* [1941] AC 1 at 30. Third a party should in general not be required to elect or be found to have elected between remedies unless and until he is able to make an informed choice. A right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits. In an analogous situation, it has been held unreasonable to require a plaintiff to speculate whether a payment into Court is sufficient to satisfy his claim for damages for infringement of copyright before he has been afforded inspection of the records of sales in the defendants books: see *Mate & Son v Samuel Stephen Ltd* (1928-1935) Mac CC 257 at 261. Fourth the exercise of the right of election should not be unreasonably delayed to the prejudice of the defendant.

[279] *First Majestic* is distinguishable from this case because in that case the plaintiffs were seeking to defer making an election as to remedy until after the court quantified the relief they would be entitled to under the alternative claims. Justice Myers did not accede to that request and required the plaintiffs to elect the remedy they sought at the end of the trial.

[280] I do not take any of the cases cited by the defendants to stand for the proposition that a plaintiff who has established a wrong and seeks a particular remedy that the court does not consider appropriate should be left with no remedy. The law gives the court a considerable degree of discretion in fashioning an appropriate remedy once it determines that the defendants are liable.

[281] In this case, the plaintiffs have set out the relief they seek in their closing submissions. I see nothing in the authorities that precludes them from seeking

alternative remedies if the court determines that their preferred remedy is unavailable.

[282] In my view, the correct approach to determining the remedy in a case in which either an accounting of profits attributable to a breach of fiduciary duty or damages for loss suffered by the principal as a result of the breach is set out in *Moore International (Canada) Ltd. v. Carter* (1984), 56 B.C.L.R. 207 (C.A.):

> 19. The availability of these remedies was discussed by Mr. Justice Laskin in the *Can. Aero* case at pp. 621-2.
>
> 20. In my opinion the plaintiff is not required to elect one remedy or the other. He may lead evidence of both his own loss and his fiduciary's profit. And the trial judge may then make an award of compensation that is supported by the evidence.
>
> 21. In this case, Mr. Justice Legg made an award of damages. But he did not think that the direct evidence in support of the loss sustained by Moore was as helpful in determining that loss as the indirect evidence of the loss constituted by the evidence of Salton's profit. The decision to adopt that train of reasoning depended on an assessment of the weight to be attached to the testimony of particular witnesses and belongs in the province of the trial judge. It is not wrong in principle.
>
> 22. I have two further general comments.
>
> 23. The first is this. The fiduciary or his accomplice should not be permitted to gain from the breach of the fiduciary's obligation of trust and good faith. So, if their profit is greater than the loss by the former employer, an accounting is a better standard of compensation than damages. But, conversely, the employer should not be penalized for any business ineptitude of the fiduciary or his accomplice. So, if the loss by the employer is greater than the profit of the fiduciary, damages would be the better standard of compensation. It follows that, where the evidence will support a sound assessment based on an accounting of profits and also a sound assessment based on a calculation of loss, and where, in the particular circumstances, both remedies are available and both are supported by the pleadings and the evidence, the compensation awarded should be the higher of the two. I think that this is the principle adopted, even before the fusion of law and equity, in *Wightman v. Helliwell* (1867), 13 Gr. 330 (Upper Canada, Chancery) where, at p. 344, Chancellor VanKoughnet said that: "The principle and the object in every case is to make good the loss caused by the acts of omission or commission of the trustee, or to wrest from him any benefit he has, or is taken to have, derived from the use of the trust moneys."
>
> 24. My second comment is that I consider it the better practice not to make an award of damages to the nearest cent, unless it is intended as compensation for a specific debt or expenditure. Damages are a matter of assessment, not a matter of calculation. The purpose of calculation is not to provide a substitute for an assessment but to anchor the assessment in the

> evidence. In this case, Mr. Justice Legg was assessing Moore's loss and was using Salton's profit as an aid in the assessment of Moore's loss. I do not think that it is an error of law to reach an assessment of damages to the nearest cent in those circumstances, but I think that it gives a misleading appearance of precision to an assessment that ought to transcend mathematics. And it invites attacks based on flaws in the starting figures and imperfections in the arithmetic.

[283] As pointed out by Justice Myers in *First Majestic Silver Corp,* the trial judge in *Moore International* had rejected the plaintiff's submission that it was entitled to elect the more favourable remedy:

> 192 There are two points to note with respect to this passage. First, it must be read in the context of what was before the court from the trial decision, 40 B.C.L.R. 322; [1982] B.C.J. No. 1771 (S.C.). The trial judge rejected the plaintiff's submission that it was entitled to elect the more favourable remedy. After distinguishing the cases relied on by the plaintiff the trial judge said, at para. 151:
>
>> In the case at bar I consider that the Court must weigh the alternative methods and determine which affords the more accurate method of assessing the plaintiff's compensation.
>
> 193 Second, earlier in his judgment Lambert J.A. stated, at para. 20:
>
>> In my opinion the plaintiff is not required to elect one remedy or the other. He may lead evidence of both his own loss and his fiduciary's profit. And the trial judge may then make an award of compensation that is supported by the evidence.

[284] In this case, Genesis has left it up to the court to determine an award of compensation that is supported by the evidence. I find that it was entitled to do so and was not required to elect one remedy or the other.

Appropriate Remedy

[285] Determining an appropriate remedy in this case presents challenges that were not present in many of the cases relied upon by the plaintiffs. Most of those cases involved a central act that was a breach of fiduciary duty. In such cases less serious breaches of duty can be viewed as being done pursuant to an object that was itself a breach.

[286] In *Canadian Aero Service,* the pursuit of the contract was held to be wrongful. In *Strother,* the wrong was pursuing a business opportunity that put Mr. Strother in a

conflict of interest position with his client. In *Cadbury Schweppes Inc.,* the wrong proven was utilizing the plaintiff's confidential formula to manufacture a competing product. In *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377*,* the wrong was failing to disclose a conflict of interest. In each of these cases, the defendants would not have obtained a benefit but for their breach of duty.

[287] In this case, however, I have found that the Departing Physicians had the right to set up a competing clinic within which to practise and that the benefit they obtained came from that lawful activity. I must be careful not to deprive them of that benefit in any remedy I grant.

[288] In addition, the authorities make it clear that any remedy must be restitutionary and the object should be to put the plaintiff in as good a position it would have been in had there been no breach. In *Alers-Hankey v. Teixeira*, 2006 BCCA 224, Justice Huddart expressed the principle as follows:

> 28 Waxman is an example of the application of restitutionary principles enunciated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [*Hodgkinson*] to a situation where shares in a company are held in constructive trust as a result of breach of fiduciary duty. In *Hodgkinson*, La Forest J., for the majority, discussed restitution and damages on a restitutionary basis for breach of a fiduciary duty by an accountant. At 440 he commented:
>
> It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well all consequential losses, minus the amount the appellant saved on income tax due to the investments.

[289] Later in her judgment, Justice Huddart elaborated on her earlier comments:

> **34** As Newbury J.A. noted in *Strother*, at para. 59, this passage reflects the Supreme Court's endorsement of "flexibility" and "common sense" in recent decisions where equity has been called upon to police the conscience of a commercial wrong-doer. Like Melvin J. and both counsel, I see the fundamental question as that posed by Binnie J. in *Cadbury Schweppes*: what, in dollar terms, did the misappropriation of his property cost the plaintiff? The answer will inevitably involve a large element of judgment. It is to be a fair assessment of damages, not a mathematical accounting for a breach of trust.

[290] The court must therefore fashion a remedy that is appropriate to the wrong established.

[291] I have found that the Departing Physicians breached their fiduciary duty to Genesis to act fairly in the following ways:

a) By entering into employment agreements with Ms. Wylie and Ms. St. Pierre and other Genesis employees while the Departing Physicians continued to be directors of Genesis without making proper disclosure of that fact to Genesis

b) By utilizing confidential information of Genesis in the preparation of Olive's business plan

c) By utilizing confidential information of Genesis in connection with hiring Genesis employees

[292] I also find that the Departing Physicians breached the Shareholders' Agreement by utilizing Genesis's financial information.

[293] I have also found that Ms. Wylie wrongfully used confidential information belonging to Genesis and failed to disclose to Dr. Kashyap that she had signed an employment contract with the Departing Physicians. As a fiduciary, Ms. Wylie owed a duty to disclose that fact to Dr. Kashyap. She also breached her fiduciary duty by conferring with Biddy Collings about what Genesis employees Olive should offer employment to while Biddy Collings was employed as head of the nursing department at Genesis.

[294] The only breach of fiduciary duty I find Ms. St. Pierre committed is her failure to disclose to Dr. Kashyap that she had signed an employment agreement with the Departing Physicians. There is no evidence that Ms. St. Pierre removed or misused any confidential information belonging to Genesis.

[295] Genesis was the only entity to which any of the defendants owed a fiduciary duty. The plaintiffs have conflated the various duties owed and thereby seek remedies that are not available to them.

[296] The preferred remedy sought by the plaintiffs is set out at paragraph 258 of their argument:

> In the Plaintiffs' Opening Statement, we indicated that we would seek judgment from this Court equal to the price the Plaintiffs paid to purchase the business of Genesis. As we have indicated, the fundamental factual premise of this prayer for relief is that the Defendants, immediately upon Dr. Kashyap becoming obliged to pay the $4.275 million for their shares, set out to destroy that very business that they had just sold to Dr. Kashyap. This conduct was, by any measure, unconscionable and an equitable remedy must be available. This equitable remedy must also reflect the fact of the Defendants' continuing prevarications throughout these proceedings.

[297] The plaintiffs have failed to establish entitlement to this remedy.

[298] The fundamental obstacle to granting this remedy is that Genesis was not a party to the share purchase agreement. This remedy would therefore be appropriate only if Dr. Kashyap and Sonya Co. established a basis for it. They have not established a breach of the contract pursuant to which the shares were purchased from the Departing Physicians. On this ground alone, the claim for return of the purchase price must fail.

[299] In addition, the plaintiffs have failed to demonstrate that the Departing Physicians set out to destroy the business they had just sold to Dr. Kashyap. I find that the object pursued by the Departing Physicians was to continue to practice medicine together in their area of speciality.

[300] In pursuing that objective, they breached certain duties to Genesis as set out above. They did not destroy Dr. Kashyap's practice or deprive her of the right to utilize the assets of Genesis for that purpose. I reiterate that the wrongful acts of the Departing Physicians were not the reason for most of the difficulties Genesis faced after November 30, 2012.

[301] The purchase price was paid by Sonya Co. for the purchase of the shares of Genesis owned by the Departing Physicians' professional corporations. The claim for the return of the purchase price is tantamount to a claim for rescission of the agreement to purchase the shares. However, Sonya Co. has shown no basis on which rescission could be granted, nor does it offer to restore the *status quo* that existed before the shares were purchased.

[302] Since February 1, 2013 Sonya Co. has been the sole shareholder of Genesis and Dr. Kashyap has carried on her practice through Genesis to the exclusion of the Departing Physicians. There was no evidence led by the plaintiffs to support the conclusion that Sonya Co. was deprived of the benefit of the bargain it made when it purchased the shares of Genesis.

[303] In particular, Sonya Co. has not shown that the value of the shares it purchased were less than the fair market value of those shares. When Dr. Kashyap caused Sonya Co. to purchase all the shares of Genesis she must be taken to have been aware that there was no reasonable prospect of the Departing Physicians continuing to work at Genesis. She was also aware that the Departing Physicians had the right to compete with Genesis.

[304] Genesis did not lead any evidence of its actual financial performance after January 31, 2013. Nor did it present any evidence as to what its business plan was to be once the Departing Physicians had left its employ.

[305] The agreement to purchase and sell the Genesis shares contains no warranties nor many of the usual terms of a share purchase agreement. Given the circumstances under which the agreement came into existence, this is understandable. However, I am was not asked to find that any implied terms should apply to the share sale agreement.

[306] Genesis became a much smaller company after the Departing Physicians left it because it had fewer doctors generating revenue and sharing the overhead costs. These factors were caused not by any breach of duty on the part of the defendants but by Dr. Kashyap's decision to purchase Genesis without any assurance of being able to replace the Departing Physicians.

[307] I can therefore find no breach of the agreement whereby Sonya Co. acquired 100% of the shares of Genesis.

[308] The onus was on Sonya Co. to establish some evidentiary basis for the return of the purchase price it paid for the Departing Shareholders' shares of Genesis. Having led no evidence on this issue, it cannot succeed in this claim.

[309] This claim must accordingly fail.

[310] As an alternative remedy, the plaintiffs seek an order that the Departing Physicians disgorge all benefits earned by the Defendants for a period of two years. They submit that the two-year period is reasonable given the two-year confidentiality covenants contained in the Shareholders' Agreement.

[311] They provided no other rational for choosing a two year period.

[312] I find that such a remedy would be disproportionate to any wrongs done by the defendants.

[313] The first difficulty with it is that it ignores the contractual right of the Departing Physicians to compete with Genesis.

[314] Genesis's claim for a disgorgement of profits also fails to recognize that the defendants are only required to disgorge any benefits they received from their breach of duty. They are not required to disgorge any benefits they obtained from lawful activity on their part.

[315] The law is clear that a fiduciary who has breached a duty must account only for what it acquired in consequence of the breach. The overarching consideration is summarized in *Warman International Ltd. v. Dwyer*, (1995) 128 A.L.R. 201 (H.C.A.) at 214:

> In determining the proper basis for an account of profits, it is of first importance in this, as in other cases, to ascertain precisely what it was that was acquired in consequence of the fiduciary's breach of duty. And, in some situation, it may also be relevant to ascertain what was lost by the plaintiff….

[316] The above passage was quoted with approval in *Strother* by the Court of Appeal and the Supreme Court of Canada. In *Strother* at para. 79, Justice Binnie, speaking for the majority, reiterated that there must be a causal connection between

a breach of fiduciary duty and any benefits obtained by the wrongdoer before the court can order an accounting or disgorgement of the benefits.

> A causal relationship between the breach of fiduciary duty and the profits is required in order for an accounting to be ordered.…

[317] In his reasons, Justice Binnie also reiterated that equitable doctrines should not be used to impose awards out of proportion to the fiduciary's behaviour;

> 88 The Court of Appeal, despite its observation that the accounting remedy itself should not become "an instrument of injustice" (BCCA #1, at para. 52), nevertheless concluded that the "accounting period" should be open-ended:
>
> After much anxious consideration, I have therefore concluded that Mr. Strother must be required to account for and disgorge to Monarch all benefits, profits, interests and advantages he has received or which he may hereafter be entitled to receive, directly or indirectly (i.e., through a corporation, trust, or other vehicle), from or through any of the Sentinel Hill Entities. [Emphasis added.]
>
> (BCCA #1, at para. 61, per Newbury J.A.)
>
> An accounting of profits is an equitable remedy and, as La Forest J. noted in a different context:
>
> ... equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour.
>
> (Hodgkinson v. Simms, at p. 444)
>
> 89 To the same effect, the High Court of Australia noted in Warman International Ltd. v. Dwyer (1995), 128 A.L.R. 201, at pp. 211-12:
>
> ... the stringent rule requiring a fiduciary to account for profits can be carried to extremes and ... in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

[318] In *Strother*, Mr. Strother was found to have breached his duty to act solely in the interests of his client in relation to the structuring of tax shelter investment vehicles. For some years, Strother had advised his client, Monarch, as to how to structure such vehicles. The government amended the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), to put an end to the use of such vehicles.

[319] Initially, Strother was of the opinion that these vehicles were no longer available. He gave that advice to Monarch and it withdrew from the business of promoting these vehicles. However, later, he and a former employee of Monarch developed a way to work around the legislative changes. Instead of informing Monarch that the advice he had previously given was no longer correct, he and the former employee pursued the marketing of the revised vehicles for their own account.

[320] In *Strother,* the Court rejected Mr. Strother's argument that most of the amount of profit he earned came from his own skill and ability. The majority of the Supreme Court held that *Strother* must account for the profits he earned from the new vehicles up to a certain point in time but not thereafter. The majority was of the view that the prophylactic purpose of deterring a lack of faithfulness was adequately addressed by requiring *Strother* to disgorge the profits he earned from the new venture during the time that he or his law firm continued to have a solicitor client relationship with Monarch.

[321] For the minority, Chief Justice McLachlin emphasized the importance of closely examining the nature of the retainer, or contract, between the parties to determine the extent of the duty. Her interpretation of the retainer was that *Strother* was free to compete. She addressed the importance of the terms of the contract as follows:

> 143. Here, the trial judge was correct to begin by asking what the contract obliged Strother to do for Monarch. Whatever he undertook to do, he was bound to do it with complete loyalty in accordance with his fiduciary obligation. He could not acquire other duties to other clients or personal interests that might conflict with his duties to Monarch under the retainer. But by the same token, he was entitled to take on duties to other clients or acquire personal interests that were not directly adverse to his duties to Monarch, as defined by the firm's contract of retainer with Monarch.

[322] I do not understand the majority to have disagreed with this statement of the law as opposed to its application to the particular facts in *Strother.*

[323] The facts of this case can also usefully be compared to the facts of other cases relied upon by the plaintiffs.

[324] In *Hodgkinson*, the facts are summarized in the headnote as follows:

> Appellant, a stock broker who was inexperienced in tax planning, wanted an independent professional to advise him respecting his tax planning and tax sheltering needs. He hired respondent Simms, an accountant, who specialized in providing general tax shelter advice, and specifically, real estate tax shelter investments. Appellant relied heavily on the respondent's advice, a reliance assiduously fostered by the respondent. The relationship was such that the appellant did not really question him about the reasons underlying the advice given. Respondent advised appellant to invest in MURBs, real estate investment projects which, by the conventional wisdom, were safe and conservative. Appellant bought 4 MURBs (income tax sheltered properties) on the accountant's advice and lost heavily when the value of the four MURBs fell during a decline in the real estate market.
>
> The gravamen of appellant's action lay in the fact that respondent was acting for the developers during the relevant period in the "structuring" of each of these MURB projects and did not disclose this.

[325] The plaintiff placed his trust in the defendant, who concealed from him the fact that he was advising the promoters that were selling the investments in question.

[326] The losses suffered by the plaintiff were found to be attributable to the plaintiff entering into a contract he never would have if the defendant had discharged his duty to make full disclosure of his conflict of interest. The losses were therefore caused by the breach of duty.

[327] *Canadian Aero Service* was a case in which senior managers resigned and obtained a contract for themselves which they had been pursuing on behalf of their former employer. They were required to account for the benefits they received from that contract, which was found to belong to the employer.

[328] In *Strother,* the defendant was required to account only for those benefits that resulted from him pursuing a business opportunity that he was precluded from pursuing because of the nature of his representation of the plaintiff. The gains were therefore acquired in consequence of the breach of duty.

[329] In *Cadbury Schweppes Inc.,* the Supreme Court limited the compensable period for which the defendant was required to account to 12 months because it was satisfied that the defendant could have produced its own formula within that time.

[330] The other cases relied upon by the plaintiffs contained similar findings of fact.

[331] The facts of this case are distinguishable. I find that substantially all of the benefits the Departing Shareholders earned from Olive were acquired from their skill, effort and professional standing in the medical profession.

[332] The Departing Physicians had well established practices and reputations before they formed Olive. I am satisfied that it was their professional standing and the excess of demand for the services they were able to provide over the supply of such services in the community that accounted for the incomes they earned through Olive.

[333] The Agreed Statement of Facts shows that the income of all of the Departing Physicians was significantly lower in 2013 than it was in 2014 and 2015. This is consistent with the fact that Olive was a start up operation in 2013. Olive's total revenue for the 7 months ending July 31, 2013, on an annualized basis, was a fraction of the revenue it received in the years ending July 31, 2014 and 2015.

[334] This is consistent with my conclusion that it was the professional standing and effort of the Departing Physicians coupled with the demand for fertility services that are responsible for the benefits received from them through Olive. There is no indication in them that the Departing Physicians received a significant benefit from their breaches of fiduciary duty. I find that the breaches I have found they committed did not make any material contribution to their success.

[335] The remedy sought by Genesis would deprive the Departing Physicians of all of their earnings for a two-year period. In my view, such an award would be out of proportion to any benefits obtained by the defendants from their breaches of fiduciary duty and breaches of confidentiality. The stringent rule requiring a fiduciary

to account for profits should not be carried to extremes and should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

[336] I do find that the defendant's conduct with respect to recruiting Genesis's employees and their failure to be candid with Genesis about their organisational activities in the 60 Day Period, did cause some harm to Genesis. In addition, the conduct of Biddy Collings constituted unfair competition after the 60 Day Period.

[337] As these are breaches of equitable duties, compensation for them must be assessed on equitable principles. In the plaintiff's argument, a number of claims are advanced which are characterized as claims for breach of contract. However, in my view, they are more accurately described as claims for damages or equitable compensation for breach of fiduciary duty and breach of confidence.

[338] In assessing such damages, the courts do not require the same degree of certainty as in cases of breach of contract or tort. Nevertheless, there must still be a connection between the breach and the damages claimed.

[339] The principles were discussed *Canson Enterprises Ltd. v. Boughton & Co.* [1991] 3 S.C.R. 534 at para. 72. Justice La Forest drew a distinction between cases in which a trustee or fiduciary has obtained property that properly belongs to its principal and those in which the fiduciary has acted in breach of its duty and thereby injured its principal:

> The appellants urged us to accept the manner of calculating compensation adopted by the courts in trust cases or situations akin to a trust, and they relied in particular on the Guerin case, supra. I think the courts below were perfectly right to reject that proposition. There is a sharp divide between a situation where a person has control of property which in the view of the court belongs to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on; see Sealy, "Some Principles of Fiduciary Obligation", [1963] Cambridge L.J. 119; Sealy, "Fiduciary Relationships", [1962] Cambridge L.J. 69. In the case of a trust relationship, the trustee's obligation is to hold the res or object of the trust for his cestui que trust, and on breach the concern of equity is that it be restored to the cestui que trust or if that cannot be done to afford compensation for what the object would be worth. <u>In the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting</u>

> from the breach of the particular duty. Where the wrongdoer has received some benefit, that benefit can be disgorged, but the measure of compensation where no such benefit has been obtained by the wrongdoer raises different issues. I turn then specifically to that situation.

(Emphasis added.)

[340] Writing for three members of the Court, Justice McLachlin, as she then was, agreed that there must be a causal link between the equitable breach and the loss for which compensation is awarded;

> 19. The need for a link between the equitable breach and the loss for which compensation is awarded is fair and sound in policy and is supported by Guerin. The trial judge in Guerin did not measure damages as the difference between the lease which was entered into and that which the Band was prepared to authorize, because the golf club would not have entered into a lease at all on the terms sought by the Band, and it could not therefore be said that the breach had caused the Band to lose the opportunity to enter a lease on the authorized terms. Nor did the trial judge simply assess damages as the difference between the value of [page552] the lease actually entered into and the amount that the land was worth at the time of trial, which would be the result if causation were irrelevant. Rather he concluded that had there been no breach the Band would have eventually leased the land for residential development. He allowed for the time which would have been required for planning, tenders and negotiation, and he also discounted for the fact that some of the then current value of the surrounding developments was due to the existence of the golf course. In other words, he assessed, as best he could, the value of the actual opportunity lost as a result of the breach.

[341] In my view, compensation in this case must be assessed by determining the loss suffered by Genesis from the breaches I have found to have occurred.

[342] I will therefore address the appropriate remedy for those established on that basis.

Damage Claims

[343] Genesis advanced a claim for damages ranging from $1,071,949 to $1,278,050 for losses attributable to the defendants' wrongful conduct. The total claim is particularized in a spread sheet marked as Exhibit 174.

	Heads of damage	**Plaintiff Low**	**Plaintiff High**
1	New nurse training cost	$16,165	$16,165

2	Loss of profit from time Dr. Kashyap spent training new nurses	194,752	194,752
3a	Loss of profit from Dr. Nakhuda's wrongful resignation (Scenario 1)	151,060	281,631
3b	Loss of profit from Dr. Nakhuda's wrongful resignation (Scenario 2)	November – December 75,530	Based on production in 2013 144,371
4	Loss of profit from loss of PGD cycles	89,506	89,506
5	Staff wages	61,643	61,643
6	Payroll of shareholder physicians	109,244	109,244
7	US Lab expenses	187,229	187,229
8	Increase in cancellations and decrease in consultations	77,391 92,364	77,391 92,364
9	Decrease in referrals from Kelowna Drs. Pirwany and Tregoning	June – Dec. 2013 193,710	193,710
10	Other direct costs	51,806.41	51,806.41
11	Total (includes line 3a; excludes 3b)	$1,147,479.41	$1,278,050.41
12	Total (includes line 3b, excludes 3a)	$1,071,949.41	$1,140,790.41

New Nurse Training Costs

[344] Genesis claims $16,165 as the cost of training new nurses from June 1, 2013, to October 31, 2013. This is the amount of overtime payments made by Genesis to new nurses in that period.

[345] Genesis's position is that all of these costs were attributable to the need to train new nurses to replace those who left to work for Olive. At November 29, 2012, seventeen nurses worked at Genesis. Two nurses resigned in January 2013, one resigned on February 1, 2013 and the remainder resigned between April and May 2013. Fifteen of the nurses who resigned took positions with Olive. Genesis hired five replacement nurses in that period.

[346] Prior to December 2012, new nurses were trained by senior nurses. However Genesis says that with the departure of the senior nurses the burden of training fell onto Dr. Kashyap and Dr. Kat Lin, a fertility physician from Washington State. Dr. Kashyap testified that given the upheaval at Genesis after the Departing Physicians left it was necessary to have nurses work overtime or on weekends to receive their training.

[347] The defendants submit that there is no connection between any breach of duty on their part and these expenses. They also say that there was no evidence establishing that nurses did in fact work overtime for the purpose of being trained.

[348] With respect to the connection between the costs claimed and any wrongful conduct on their part, the defendants point to evidence that nurses left for a number of reasons unrelated to any breach.

[349] I am satisfied that there is a casual link between additional training time for new nurses and conduct of Biddy Collings on Olive's behalf. However, the evidence as to the actual amount of training time incurred is deficient.

[350] However, I also find that many nurses left Genesis for reasons unrelated to any actions on the part of the defendants. For example, Nora Lee and Jan Flemington were motivated to resign by disputes over pay for statutory holidays and overtime.

[351] Taking into account the basis on which compensation is to be awarded and the state of the evidence, I find that Genesis is entitled to an award of $10,000 for this claim. This award takes into account the fact that it would have been expected

that there would have been significant staffing changes that resulted from the departure of the Departing Physicians and the attendant reduction of the size of its operations.

[352] In addition, I am satisfied that many of the nurses who left Genesis did so because of their long association with the Departing Physicians and unhappiness with the working environment at Genesis and not because of any wrongful recruiting activities. These factors justify a lower assessment of damages for this claim.

Loss of Profit from time Dr. Kashyap spent training new nurses

[353] Dr. Kashyap testified that she recorded 366.75 hours of time in training new nurses and on administrative work from February to November 2013. She kept track of her time, which is summarized at Exhibit 38. A significant portion of the time recorded is described as “Jan did not book consults”. This refers to Jan Da Silva, whose surname at that time was Flemington.

[354] There was little detail about these entries in the evidence. Jan Da Silva was cross examined about her booking practices. She agreed that while she was employed at Genesis, she had referred some patients to Olive, but I accept her evidence that she did so only if the patients were not willing to wait until they could be seen at Genesis. According to her evidence, in the period after the Departing Physicians left the patient waiting list at Genesis increased significantly.

[355] It is also clear that there was considerable friction between Ms. Da Silva and Dr. Kashyap and her sister. Ms. Da Silva testified that she was not paid for overtime until she brought a complaint with the Employment Standards Branch.

[356] I am not satisfied that any of the time spent by Dr. Kashyap attributed to “Jan did not book consults” was attributable to any wrongdoing on the part of the defendants. Just over 35 hours claimed by Genesis relates to this complaint.

[357] Genesis’s claim under this heading appears to be premised on the assumption that the time Dr. Kashyap devoted to transitional issues arising from the

departure of the Departing Physicians was attributable to their wrongful conduct. However, the description given by Dr. Kashyap does not show why this is so. Based on the evidence before me, I am unable to conclude that these costs were not part of the cost of the changes occasioned by the change in the ownership and management of Genesis brought about by Dr. Kashyap's decision to become its sole owner.

[358] I therefore make no award for this head of damages.

Damages from Dr. Nakhuda

[359] I have already decided that Genesis has suffered no loss from Dr. Nakhuda's alleged failure to give adequate notice of his resignation. To repeat, I am of the view that Genesis was put in the same position it would have been in had Dr. Nakhuda given the notice to which Genesis was entitled. I therefore do not award any damages to Genesis in respect of Dr. Nakhuda's departure.

Loss of Profit from PGD Cycles

[360] Genesis claims for lost revenue from PGD cycles that Tammy Lafreniere referred on to Olive while he was employed at Genesis.

[361] Ms. Lafreniere's evidence is that she assumed that Dr. Yuzpe, who had formerly been responsible for all PGD cycles while at Genesis, would continue to do those cycles at his new clinic.

[362] I accept Ms. Lafreniere's evidence that she genuinely believed this to be the case. However, Olive accepted these referrals without seeking or obtaining Genesis's consent.

[363] Olive submits that it is not liable for this claim because Dr. Yuzpe was the recognized expert in performing PGD cycles and most of the cycles would therefore have been referred to him in any event. Olive also submits that this claim duplicates the claim for lost referrals from Drs. Pirwany and Tregoning.

[364] I find that the opportunity to do these cycles was a corporate opportunity belonging to Genesis that Olive had no right to appropriate without Genesis's informed consent or if the patient made an independent decision to choose to use Olive.

[365] I do not find that Ms. Lafreniere was diverting the cycles maliciously or with the intention of harming Genesis and benefitting Olive. However, malice or bad faith are not essential elements of a claim for the wrongful appropriation of a corporate opportunity. To succeed in a claim to require an accounting all that Genesis needs to establish is that it did not give its informed consent.

[366] I therefore find that Genesis has established a claim for the diversion of referrals.

[367] Genesis acknowledges that it cannot establish with precision the actual number of cycles referred on by Ms. Lafreniere. It justifies the quantification of its claim by comparing the number of cycles performed at Genesis from January 2011 to December 2012 to the number performed to the number performed from January to November 2013. In the former period Genesis averaged 25.5 cycles per year whereas in 2013 it performed only 10. Genesis therefore claims for the loss of 12 cycles in 2013.

[368] I do not accept this methodology for assessing this claim. Ms. Lafreniere gave notice of resignation to Genesis on February 3, 2017 and terminated her employment on March 12. Accordingly, it is not reasonable to assess the loss of referrals due to her conduct over the whole of 2013. I find it likely that the principal reason for the drop in referrals as the year went on was attributable to physicians referring them directly to Dr. Yuzpe after it became known that he had moved his practice to Olive.

[369] Based on Genesis's history of PGD cycles in the two years up to December 2012 of just over 2 cycles per month, I find it reasonable to conclude that Genesis lost 5 cycles as a result of wrongful referrals by Ms. Lafreniere.

[370] On this claim, I accept Genesis's evidence that it earned a profit of $7,458 per cycle. I therefore award rounded damages of $40,000 for this claim.

Staff Wages

[371] Genesis advances a claim of $61,643 for wages paid to staff members for December 2012 and January 2013. It submits that these wages are recoverable from the Departing Physicians and Olive as damages or equitable compensation for breach of fiduciary duty.

[372] I do not entirely accept this claim. All of the employees in question continued to fulfill their employment obligations to Genesis in the relevant periods and Genesis accordingly has had the benefit of the services they performed.

[373] I am, however, of the view that Genesis is entitled to some measure of compensation for the time the named staff employees were paid while they were performing services for Olive. It is impossible to determine the value of that time with any degree of certainty. I consider that an award of $15,000, being approximately 25% of the wages paid, to be reasonable. I make this award primarily based on the conduct of Biddy Collings and Ms. Wylie's cooperation in and knowledge of that conduct.

Payroll to Departing Physicians

[374] Genesis claims $109,244, which was the amount paid to the Departing Physicians in December 2012 and January 2013 for salaries, as damages for breach of fiduciary duty. Its positon is that the Departing Physicians should receive no compensation for the work they did in the Genesis clinic in that period.

[375] Genesis has cited no authority for the proposition that the terms of the Shareholders' Agreement can be ignored because the defendants breached some of their fiduciary duties to Genesis. As with the employees, Genesis had the benefit of the efforts of the Departing Physicians in this period. Their efforts generated income to Genesis. In addition, they continued to be Shareholders of Genesis and were entitled to share in its net income in that period.

[376] I am also of the view that this claim overlaps with the claim for diminished productivity from the Departing Physicians in the 60 Day Period. To the extent that the Departing Physicians neglected their duties at Genesis in that period, the proper remedy is to compensate Genesis for the loss of income attributable to that neglect.

[377] To require the Departing Physicians to pay back the salary and benefits they earned through their efforts would be unreasonable and inequitable.

US Lab Expenses

[378] Genesis says that the Defendants breached their duty to it by hiring Dr. Salaheidin Abdelgadir as Laboratory Director at Olive after having recruited him to come to Genesis in the fall of 2012. It is worth noting that Dr. Kashyap had protested the recruiting of Dr. Abdelgadir in her letter of September 11, 2012.

[379] I am satisfied on the evidence that Dr. Abdelgadir was attracted to work for Genesis in the first place by the prospect of being able to work with Dr. Yuzpe. Dr. Abdelgadir never actually worked for Genesis, although it is clear that he would have been hired as lab director had the Departing Physicians remained there. Olive did not hire Dr. Abdelgadir until February 3, 2013, after the 60 Day Period and, therefore, at a time when Olive was entitled to compete with Genesis.

[380] I find that there is not a sufficient connection between the loss of Dr. Abdelgadir's services and any breach of duty on the part of the defendants to warrant an award of damages against them. On a balance of probabilities, I find that Dr. Abdelgadir would not been prepared to work for a Laboratory controlled by Dr. Kashyap. I find that Genesis's inability to obtain his services is attributable to that fact rather than to any breach on the part of the defendants.

[381] Similarly, I find that Dr. Ouhibi resigned from Genesis because she did not want to work for Dr. Kashyap. In cross-examination, she conceded that she would have continued to work at Genesis had she not received an offer from Olive in early February 2013 because she needed a job. However, she also made it clear that she would have sought another position elsewhere.

[382] Dr. Ouhibi also testified that she called Gyn Wylie after seeing an online advertisement for employment at Olive. In cross-examination, she agreed that she had sent an email to Dr. Nakhuda in December 2012 saying that she looked forward to working in a new clinic. However, she also stated that, at that time, she did not know that such a clinic would be established.

[383] While plaintiffs' counsel got Dr. Ouhibi to acknowledge that she did not recall if someone had mentioned the possibility of working at Olive in December 2012, I took her acknowledgement to be nothing more than an acknowledgement that it was possible that an event she did not recall had taken place.

[384] On the whole of her evidence, I am satisfied of two things: the first is that she was not offered employment at Olive until February 2013; the second is that she would not have remained as a long term employee of Genesis even if Olive had not offered her a position.

[385] This claim is for the additional cost of hiring a US laboratory for a period of almost three years, from January 2013 to December 2015. This period goes well beyond any period of time that Dr. Kashyap could have had any reasonable expectation that Genesis employees would not seek other employment.

[386] I therefore find that there was no causal connection between any breach of duty on the part of the defendants and the extra US Lab expenses incurred by Genesis. In this regard, there was no evidence from Dr. Kashyap that she would have hired Dr. Abdelgadir, even if he had been willing to work for her. I infer from her letter to the shareholders of September 11, 2012, that she was not in favour of him becoming the Lab Director at Genesis.

[387] On balance, I conclude that the extra US Lab expenses resulted from Dr. Kashyap's decision to buy out the Departing Physicians and not from any breach of duty on their part.

Increase in Cancellations and Decrease in Consultations

[388] Genesis submits that there was a material increase in the number of cancellations and decrease in the actual consultations of the Departing Physicians in the 60 Day Period. It attributes these to the Departing Physicians devoting time to establishing Olive rather than devoting their full time professional activities to Genesis.

[389] There is a difference in the methodology used by the parties to calculate the revenue lost. The plaintiffs submit that the cancellations in the period should be compared to the rate of cancellations in the prior years' period. The defendants submit that if the claim is to be allowed it should be based on the actual increase in cancellations in the 2012–2013 period from the prior years.

[390] If I were to accept this claim, I would prefer the defendants' approach to assessing its quantum. While it is not entirely clear to me, it appears that Genesis is applying the historical cancellation rate to the actual number of bookings of each of the Departing Physicians and comparing it to the cancellation rate in 2012-2013. Under this methodology, the more bookings a doctor made, the larger the claim would be. If the claim is to be based on lost revenue however, it is the actual number of bookings lost that is important.

[391] I need not address the calculation methodology any further because I am not satisfied that Genesis has established that the increase in cancellations was attributable to any wrongful conduct of the Departing Physicians.

[392] I accept the defendants' argument that there are a number of factors that are just as likely a cause of the cancellations.

[393] The first and most obvious is that the imminent breakup of the clinic would in all likelihood caused patients to cancel rather than embark on a course of treatment in an uncertain situation.

[394] Most importantly, however, there is no evidence that it was the Departing Physicians who cancelled any of these appointments. The evidence is to the contrary. Dr. Taylor testified that cancellations were made by the patients. Dr. Yuzpe's evidence was to the same effect. Dr. Hitkari's cancellation rate actually decreased in this period.

[395] Genesis had the onus of establishing that the Departing Physicians were cancelling consultations. It filed no documentary evidence to support that conclusion. In the absence of such evidence and in the face of the defendants' evidence to the contrary I find that this claim has not been made out.

Loss of Referrals from Drs. Pirwany and Tregoning

[396] Genesis claims that the Departing Physicians obtained an unfair advantage, analogous to the springboard principle, mainly by wrongfully recruiting away Genesis's employees and using Genesis's employees to compete with it. Genesis submits that these wrongful actions allowed Olive to be in a position to offer competition for all of Genesis's services at least six months sooner than it otherwise would have been.

[397] I have already rejected the plaintiffs' argument that the Departing Physicians were precluded from taking immediate steps to continue their practice once they knew that Dr. Kashyap would be purchasing their shares in Genesis. I need not repeat my reasons for that conclusion here. I therefore do not accept the assumption on which this claim is premised.

[398] In addition, there is no evidence before me that Genesis was not working at full capacity throughout 2013. The evidence in this case was all to the effect that there is a shortage of fertility physicians and that Genesis had long waiting lists. Based on the evidence, I have concluded that the limiting factor for Genesis was its inability to find qualified physicians to replace the Departing Physicians and Dr. Nakhuda and not to any wrongful actions of the defendants.

Other Direct Costs Claims

[399] Genesis claims reimbursement of a number of expenses it paid which it alleges should be charged to the Departing Physicians.

[400] The following is a table detailing those claims;

	Vendor	Invoice #	Period	Amount	Description
1	Allistar Photography		09-Dec-10	644.00	Photographs were paid for by Genesis. This was a means of co-opting the brand.
2	Weir	25515	12-Sep-12	3,528.00	Legal fees: Review to sell Sonya Kashyap's shares to Gary Nakhuda
3	Weir	26147A	05-Nov-12	2,072.00	Legal fees: Review to buy Sonya Kashyap's shares
4	Marie Brown	506426	29-Jan-13	693.00	Training Jacqueline Ang
5	Marie Brown	506426	29-Jan-13	798.00	Training Jacqueline Ang
6	Marie Brown	506432	26-Feb-13	756.00	Training Jacqueline Ang
7	Marie Brown	506436	11-Apr-13	728.44	Training Jacqueline Ang
8	Marie Brown	1632	31-Jul-13	669.38	Training Jacqueline Ang
9	Memberships	Chq# 7146	04-Jan-13	2,239.45	BCMA dues Beth Taylor
10	Memberships	Chq# 7147	04-Jan-13	1,918.62	BCMA dues Jason Hitkari
11	Memberships	Chq# 7148	04-Jan-13	1,918.62	BCMA dues Albert Yuzpe
12	Memberships	Chq# 7149	07-jan-13	1,375.00	CPSBC dues Albert Yuzpe
13	Memberships	Chq# 7150	07-Jan-13	1,375.00	CPSBC dues Beth Taylor
14	Memberships	Chq# 7151	08-Jan-13	1,375.00	CPSBC dues Jason Hitkari
15	Memberships	Chq# 7152	08-Jan-13	72.80	SOGC dues Albert Yuzpe
16	Kat Lin	Scotia #696	27-Mar-13	475.01	Nurse training Kathleen Lin
17	Kat Lin	Chq# 715	26-Apr-13	2,020.27	Nurse training Kathleen Lin
18	Kat Lin	LIN001	3-May-13	200.00	Nurse training Kathleen Lin
19	Kat Lin	LIN001	9-May-13	200.00	Nurse training Kathleen Lin
20	Kat Lin	LIN001	31-May-13	470.93	Nurse training Kathleen Lin
21	Kat Lin	LIN001	31-May-13	2,645.00	Nurse training Kathleen Lin
22	Kat Lin	LIN001	30-Jun-13	373.99	Nurse training Kathleen Lin
23	Kat Lin	LIN001	30-Jun-13	2,532.00	Nurse training Kathleen Lin
24	Kat Lin	LIN001	30-Jun-13	2,650.00	Nurse training Kathleen Lin
25	Kat Lin	LIN001	30-Jun-13	719.50	Nurse training Kathleen Lin
26	Medinet	13827	October	3,477.43	Private practices for MSP. $4071.14 for 6 docs Oct 1, 2012 to Sep 30, 2013
27	CFAS for staff		December	1,829.20	membership fees for departed staff
28	CFAS for staff		December	1,100.00	staff membership fees for departed staff
29	CFAS for staff		December	750.00	staff membership fees for departed staff
30	Insurance - Gary		17-Aug-12	7,141.35	Gary Nakhuda life insurance for shareholder agreement
31	MTS logistics		Jan 2013	5,058.42	Paid in December 2013
32	**Total**			**$51,806.41**	

Photographs

[401] Genesis seeks reimbursement for the costs of photographs the Departing Physicians had taken in December 2009. Neither party made any submissions on

this claim. Given the date on which the photographs were taken, which was before Dr. Kashyap was a shareholder, those expenses must have been taken into account in preparing the accounts of Genesis in that year. I can see no connection between this invoice and the conduct complained of in this action.

Weir and Company Tax Advice on Purchase of Dr. Kashyap's Shares $5600

[402] The Departing Physicians retained Weir and Company to provide advice with respect to the tax implications of purchasing Dr. Kashyap's shares in Genesis. Genesis paid these fees.

[403] I find that these expenses should properly have been born by the shareholders who incurred them. I therefore allow this claim.

Invoices to Marie Brown for Training Jacqueline Ang

[404] Dr. Kashyap decided to appoint Jacqueline Ang to the position formerly held by Yvonne St. Pierre. An outside accountant, Marie Brown, was hired to provide training to Ms. Ang.

[405] Genesis made no specific submissions as to why this training should be charged to the defendants. Presumably, the claim is based on the assertion that the manner in which the defendants departed from Genesis made it necessary to enlist outside resources to train a new financial manager or that Ms. St. Pierre refused to train her.

[406] I do not accept that these charges should be borne by the defendants. They were incurred on Dr. Kashyap's initiative. It seems to me that these charges were incurred for two reasons: the first is that Yvonne St. Pierre resigned; the second is that Ms. Ang needed additional training to qualify her to do her new job.

[407] Neither of these facts are attributable to any wrongdoing by the defendants. Ms. St. Pierre gave the notice required of her under her contract of employment. The plaintiffs have not satisfied me that she did not continue to perform her duties at

Genesis during her notice period. In addition, the decision to promote Ms. Ang was made by Dr. Kashyap against the advice of Ms. St. Pierre.

[408] Based on the above circumstances, I find that these costs were the result of the change of control of Genesis and not of any wrongdoing by the defendants. Accordingly, I do not allow this claim.

Professional Organization Dues

[409] Genesis paid dues for the Departing Physicians in January 2013 for the College of Physicians and Surgeons of British Columbia, the British Columbia Medical Association and another professional organization to which Dr. Yuzpe belongs. While there was no direct evidence of this, these dues presumably related to the 2013 calendar year, during which the Departing Physicians worked at Olive for 11 months.

[410] These claims are listed in items 9-15 of the Direct Costs spreadsheet.

[411] I find that Genesis should not have paid for dues which permitted the Departing Physicians to continue their practice at Olive.

[412] Accordingly, the defendants are liable for 11/12 of these items. The total of these items is $10,274.49. 11/12ths of that amount is $9,418.75, which I round to $9,420.

Kat Lin Expenses

[413] Genesis claims for the expenses of Dr. Kat Lin, an American fertility doctor, who Dr. Kashyap said assisted with training new nurses at Genesis. These expenses are listed as items 16-25 in the spreadsheet. Dr. Lin was not licensed to practice in British Columbia and did not charge for her services. However, Genesis covered her expenses of travelling to Vancouver while she assisted at the clinic.

[414] I accept the defendants’ submissions based on Dr. Lin’s own evidence that Dr. Lin’s primary purpose for visiting Genesis was to assess whether she would join

the clinic as a physician. Ultimately, she decided, for a number of reasons unrelated to the defendants, to remain in the United States.

[415] Genesis has made no effort to allocate Dr. Lin's expenses between observation and training. Her evidence was that she spent considerable time observing the operation of the clinic.

[416] I conclude that these expenses were primarily incurred in an effort to recruit Dr. Lin to join Genesis. Dr. Kashyap testified that it was her intention from the outset to recruit new physicians to work at Genesis. I find that these expenses were incurred for that purpose and are not attributable to wrongdoing on the part of the defendants.

MSP Private Practice for Physicians

[417] The defendants concede that these fees, which relate to billings for private practice billings to MSP, are properly chargeable to the Departing Physicians.

[418] Genesis is entitled to judgment in the amount of $3,477 for this claim.

Membership Fees for Departed Staff

[419] Genesis claims $3,679.20 for membership fees paid on behalf of staff that resigned to work for Olive.

[420] The defendants deny that they committed any wrongful act with respect to the departure of staff from Genesis and therefore should not be liable for this claim.

[421] There were very few particulars delivered with respect to this claim. While I agree that many Genesis staff members left it of their own volition after January 31, 2013, I have also found that Biddy Collings was acting improperly in assisting Olive in evaluating Genesis staff as future Olive employees.

[422] These fees were paid in December, presumably for the next year. I infer that Olive obtained a benefit from the prepayment of these fees. I also infer that when the fees were paid, the Departing Physicians had an expectation that many of the

employees on whose behalf they were paid would eventually move to their new clinic.

[423] In these circumstances, I conclude that the defendants failed to make adequate disclosure of their intention to hire these staff members. I find that even if the defendants did not wrongfully recruit these employees they should not have caused Genesis to pay their fees in full without fully informing Dr. Kashyap that they considered it appropriate to offer employment to them.

[424] In these particular circumstances, I allow this claim, which I round up to $3680.00.

Dr. Nakhuda's Life Insurance Premium

[425] In May 2012, Genesis applied to insure Dr. Nakhuda's life for $1,000,000. The application was duly processed and on or about August 2, 2012, Genesis prepaid the first year's premium of $7,141.35 on an insurance policy in that amount with BMO Life Assurance Company.

[426] The defendants testified that this insurance was taken out because it was contemplated that Dr. Nakhuda would become a shareholder of Genesis and the Policy was considered prudent to protect Genesis from the consequences of his untimely death.

[427] While this topic was not extensively canvassed in the evidence, it appears that Dr. Kashyap was not supportive of Dr. Nakhuda becoming a shareholder. In addition, by August 2012, tensions had increased among the existing shareholders. In her letter of September 11, 2012, Dr. Kashyap expressed the concern that the other shareholders were planning to replace her with Dr. Nakhuda, although she did not mention him by name.

[428] Genesis now seeks to recover the premium it paid for the Policy.

[429] It is not clear to me on what basis that claim is made. The Policy premium was paid for at a time when the Departing Physicians were shareholders and directors of Genesis.

[430] Unlike the claim for professional fees incurred with respect to the buyout of Dr. Kashyap, these costs were incurred in the ordinary course of Genesis's business.

[431] The Notice of Civil Claim does not allege any wrongdoing prior to November 29, 2012. I have allowed the claim for professional fees incurred for the purpose of advancing the Departing Physicians' plan to buy out Dr. Kashyap because it clearly relates to the issues raised in this case and cannot be said to have been incurred for any business purpose of Genesis.

[432] The insurance premium was however directly related to ongoing business of Genesis. Dr. Kashyap has not satisfied me that the premium was paid as part of a plan to have Dr. Nakhuda displace her as an owner.

[433] I therefore reject this claim.

MTS Logistics Mail Out

[434] Genesis seeks reimbursement of the cost of what is described in its written argument as a mail out to advise all patients of the departure of the Departing Physicians from Genesis.

[435] I accept the evidence before me that notifying patients of a change of location of a physician was a requirement of the College. It was therefore a necessary expense that was properly payable by Genesis.

Damages for Disruption

[436] Although it was not specifically sought by Genesis, I consider that some award is appropriate for the disruption caused to it by the lack of candour of the Departing Physicians in informing Genesis about their activities during the 60 Day

Period. I also am of the view that the unfair competition engaged in by Olive through Biddy Collings' activities warrants an award of compensation.

[437] The amount of such an award cannot be tied to any specific claim, nor can it be measured with any degree of certainty. Given the size of Genesis's operation, the amounts paid to the Departing Shareholders, the revenue generated by Olive and the fact that Olive did make use of confidential information belonging to Genesis, particularly in preparing its application for Bank financing and from information obtained from Biddy Collings, I consider an award of $100,000 to be appropriate in this regard.

Punitive Damages

[438] Genesis seeks an award of punitive damages.

[439] In *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.,* 2002 SCC 19, the Court upheld a decision of the Alberta Court of Appeal disallowing an award of punitive damages against a defendant who was found to have acted fraudulently. The Court held that an award of punitive damages was only appropriate in exceptional cases in which the conduct of the defendant offends the court's sense of decency;

> 79. Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency". The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: Whiten, supra, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.
>
> 80. The misconduct found against O'Connor was his contemptuous disregard for Bell's rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.
>
> 81. Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour", yet not all fraud cases lead to an award of punitive damages.

[440] In this case, I find that the conduct of the defendants does not rise to the level of a marked departure from the ordinary standards of human decency.

[441] The defendants no doubt exhibited a high level of animosity to Dr. Kashyap. However, the case against them rests principally upon an allegation of breaches of fiduciary duty. The underpinning of Genesis's case was that the defendants who were found to be fiduciaries preferred their own interests over that of the company to which they owed fiduciary duties.

[442] However, I have rejected Genesis's submission that the defendants set out to destroy it or acted maliciously and with a view to injure it.

[443] In the particular context of this case, in which the defendants genuinely felt aggrieved at losing the business they had built up over many years, their conduct, although wrongful in some respects, is not so egregious as to warrant an award of punitive damages.

Summary of Awards

[444] Genesis is awarded damages as equitable compensation against the Departing Physicians as follows;

1.	New nurse training costs	$10,000
2.	PGD cycles referred to Olive	$40,000
3.	Staff Wages	$15,000
4.	Weir and Company billings	$5,600
5.	Professional Dues	$9,420
6.	MSP registration fees	$3,477
7.	Memberships for employees	$3,680

8.	Damages for disruption and breach of confidence	$100,000
	Total	$187,000

[445] The action against Dr. Nakhuda is dismissed.

Costs

[446] Dr. Nakhuda is entitled to the costs of this action against the plaintiffs as a matter of ordinary difficulty.

[447] The parties are at liberty to make submissions with the respect to the costs of the action against the Departing Physicians and Senior Managers.

"Sewell J."