NOVA SCOTIA COURT OF APPEAL

Citation: *Jorna & Craig Inc. v. Chiasson*, 2020 NSCA 42

Date: 20200513
Docket: CA 481699
Registry: Halifax

Between:

Jorna & Craig Inc.

Appellant

v.

David Chiasson, City of Lakes Pharmacy Limited and David Chiasson and Brenda Chiasson in their capacities as the Trustees of the Chiasson Family Trust (2004)

Respondents

Judge: The Honourable Justice Linda Lee Oland

Appeal Heard: December 2, 2019, in Halifax, Nova Scotia

Subject: Restrictive Covenants—Sale of a Business—Expert Evidence—Lay Opinion—Compendious Statement of Facts Exception—Rule in *Browne v. Dunn* —Pre-Judgment Interest — *Judicature Act*, s. 41(i) and (k)—Costs—Damages

Summary: Jorna & Craig Inc. purchased a pharmacy in Halifax from David Chiasson and his wife, trustees of the owner Trust. Mr. Chiasson signed a restrictive covenant prohibiting him from operating a pharmacy for seven years anywhere on peninsular Halifax. He also owns and manages a pharmacy in Dartmouth and did so when the sale of the Halifax pharmacy was negotiated and closed. The last installment of the purchase price was payable five years after the closing.

JCI held back $500,000 from that final payment, alleging Mr. Chiasson and his Dartmouth pharmacy had breached the restrictive covenant by, among other things, delivering prescriptions to residents of peninsular Halifax. Its application for damages included a report by chartered

accountant Steven Goodfellow. The Trust applied for the holdback.

The judge heard the two applications together. He found no breach of the restrictive covenant and ordered JCI to pay the holdback to the Trust. He decided the court did not have the discretion to deny contractual pre-judgment interest, and reduced the costs awarded to the Trust for delay in disclosure. JCI appeals the dismissal of its application; the Trust cross-appeals the costs award.

Issues: Whether the judge erred:

(1) by finding that the restrictive covenant had not been breached;
(2) by failing to admit the Goodfellow Report;
(3) by admitting opinion evidence of a non-expert witness that did not satisfy the compendious statement of facts exception;
(4) by contravening the Rule in *Browne v. Dunn*;
(5) in deciding that the court did not have the jurisdiction to refuse contractual pre-judgment interest; and
(6) in exercising his judicial discretion and reducing the costs award.

Result: Appeal allowed with costs, damages assessed at $1.00; cross-appeal dismissed as moot.

The judge's interpretation of the restrictive covenant failed to consider many of the surrounding circumstances and was contrary to commercial principles and good business sense. Although he did not engage in the admissibility analysis for expert evidence, he did not err by failing to admit the Goodfellow Report. He did not rely on a non-expert's opinion evidence nor act contrary to the Rule in *Browne v. Dunn*. The judge erred in deciding the court lacked jurisdiction to deny contractual pre-judgment interest.

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Appellant

v.

David Chiasson, City of Lakes Pharmacy Limited and David Chiasson and Brenda Chiasson in their capacities as the Trustees of the Chiasson Family Trust (2004)

Respondents

Judges:	Bryson, Oland and Fichaud JJ.A.
Appeal Heard:	December 2, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, cross-appeal dismissed, per reasons for judgment of Oland J.A.; Bryson and Fichaud JJ.A. concurring
Counsel:	Caitlin Regan and Matt Saunders, for the appellant Brian K. Awad QC, for the respondents

Reasons for judgment:

[1] Restrictive covenants and non-competition agreements are a common feature in transactions for the purchase and sale of a business. David Chiasson signed an agreement of purchase and sale and a non-competition agreement containing a restrictive covenant when he and his wife, in their capacities as trustees of the Chiasson Family Trust (2004) (the "Trust"), sold a pharmacy in Halifax, Nova Scotia to Jorna & Craig Inc ("JCI"). Peter Jorna and his wife Jennifer Craig (now Jorna) own JCI.

[2] Mr. Chiasson also owns and manages a pharmacy in Dartmouth, across the harbour from Halifax. According to JCI, Mr. Chiasson breached the restrictive covenant because of how he ran that pharmacy.

[3] JCI withheld part of the final payment of the purchase price for the Halifax pharmacy and brought an application against Mr. Chiasson and his Dartmouth pharmacy for damages arising from the alleged breach. Months later, the Trust brought an application for payment of the holdback.

[4] The two proceedings were heard together. The judge dismissed JCI's application, ordered it to pay the holdback to the Trust and reduced the costs awarded to the Trust on JCI's application. In the Trust's application, he found that the Trust was entitled to the holdback and interest. JCI appeals the dismissal of its application. The Trust cross-appeals the costs award.

[5] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

Background

[6] Both Mr. Chiasson and Mr. Jorna are pharmacists. In 2011, Mr. Chiasson was the beneficial owner and manager of two pharmacies and a practicing pharmacist at both those locations. One was located in Halifax and the other, City of Lakes pharmacy, in Dartmouth.

[7] In December 2011, Mr. Chiasson and his wife as trustees of the Trust sold to JCI all the issued and outstanding shares of Withrow's Pharmacy Halifax (1999) Ltd., which carried on business as Scotia PharmaChoice on Gottingen Street in Halifax. Mr. Chiasson had owned and managed it for over a decade before the sale.

[8] When the parties negotiated the purchase and sale of the Halifax pharmacy, Mr. Jorna was aware of Mr. Chiasson's involvement with City of Lakes. There was no discussion about it during negotiations.

[9] Article 4 of the Agreement of Purchase and Sale ("APS") set out several conditions precedent to closing. That in Article 4.01(g) called for a non-competition agreement:

> David Chiasson agrees to sign a non-competition agreement not to open, operate, invest in, or advise a pharmacy company or company in a related industry for Seven (7) years following the Closing Date … anywhere within the geographic confines of the Halifax peninsula, directly or indirectly, in any manner whatsoever, including, without limitation, either individually or in partnership or jointly, or in conjunction with any other person or persons, firm, association, syndicate, company, or corporation, as principle [*sic*], agent, shareholder, or in any other manner whatsoever, whether for remuneration or otherwise, carry on or be engaged in or concerned with or interested in or lend money to, guarantee the debts or obligations or, permit his name or any part thereof to be used or employed by any person, persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any business which is the same or substantially similar to the Business, without the express written consent of the Purchaser[.]
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> [Emphasis added]

[10] Mr. Chiasson signed a separate non-competition agreement ("NCA") that contained the identical wording of this restrictive covenant. The NCA also included this provision:

> In the event that any of the covenants contained herein are held to be unreasonable by reason of the area, duration of [*sic*] type of scope of service covered by the said covenant, then the said covenant shall be given effect to in its reduced form as may be decided by any Court of competent jurisdiction. The undersigned hereby covenants, acknowledges and agrees that all of the restrictions contained in this Agreement are reasonable and valid and hereby waives any and all defences to the strict enforcement thereof.
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> [Emphasis added]

[11] The restrictive covenant in the APS and the NCA did not expressly refer to City of Lakes.

[12] After the transaction closed in 2011, JCI changed the name of the Halifax pharmacy to Scotia Pharmacy. The purchase price of $2,800,000 was payable in

three installments: $1,200,000 on the closing date; $700,000 after receiving certain financial information for the year ending November 30, 2012; and $900,000 on December 20, 2016.

[13] In 2014, Mr. Jorna became concerned Mr. Chiasson was delivering prescriptions on peninsular Halifax (the "Peninsula") and offering incentives to residents there to fill their prescriptions at his Dartmouth pharmacy, City of Lakes. In response to demands that he stop doing so, Mr. Chiasson denied soliciting business on the Peninsula. He did not deny delivering prescriptions to residents of that area.

[14] On April 18, 2016, some eight months before the final payment under the APS was due, JCI filed an application for an Order declaring that the restrictive covenant in the APS and NCA is valid and enforceable, enjoining Mr. Chiasson and City of Lakes (collectively, the "Chiasson parties") from competing with it in any manner contrary to the APS and NCA and seeking, among other things, damages for loss of profits and goodwill. Later this decision will set out why its application was not heard as originally scheduled for that October.

[15] On August 12, 2016, counsel for JCI wrote opposing counsel that if its application could not be determined before the $900,000 final payment of the purchase price was due, JCI would hold back its estimate of damages against that payment. That September he advised the holdback would be $500,000. On the due date, December 20, 2016, JCI paid $400,000 and confirmed the remainder had been set off for JCI's reasonably estimated damages.

[16] Some three months later, on March 21, 2017, the trustees for the Trust filed an application seeking, among other things, Orders against JCI for the final payment under the APS, against Peter Jorna and Jennifer Craig as joint and several guarantors, and consolidation with the application that JCI had filed.

[17] The affidavits JCI filed in support of its application for damages included ones sworn by Peter Jorna; Jennifer Jorna; K.L., who had prescriptions filled at City of Lakes and delivered to him in the Peninsula; and Bill Burke, a private investigator, who conducted surveillance of deliveries from City of Lakes. JCI also filed an expert's report (the "Report") prepared by Steven Goodfellow, a chartered accountant with Ernst & Young LLP. The Report calculated JCI's theoretical loss of business revenue arising from the alleged activities of Mr. Chiasson and City of Lakes. In response to the JCI application, Mr. Chiasson filed affidavit evidence.

[18] In support of its application for the holdback amount, the Trust filed an affidavit sworn by Mr. Chiasson on September 8, 2017. That affidavit included a General Security Agreement ("GSA") signed by Mr. Jorna as President of Withrow's Pharmacy Halifax (1999) Ltd. as debtor, to the trustees of the Trust as the secured party. Clause 5.02 of the GSA provided that any amounts to be paid by the debtor to the secured party shall be immediately payable with interest at the rate of 10% per annum. In response to the Trust's application, Mr. Jorna filed affidavit evidence.

[19] Justice Glen G. McDougall heard both applications. He dismissed JCI's application for damages and ordered it to pay the holdback to the Trust. In the Trust's application, he found that the Trust was entitled to the holdback and interest.

[20] The judge dealt with the merits of the JCI application in a decision dated September 17, 2018 (2018 NSSC 220) as amended by a corrigendum dated January 30, 2019 (the "Merits Decision"). He found that the NCA had not been breached and the Trust was entitled to the holdback. So concerned was he about unnecessary delay caused by Mr. Chiasson that the judge indicated that, if the court had the discretion to deny contracted interest, he would exercise it in this case. However, he found the court had no such discretion. By an Order dated March 27, 2019, he dismissed JCI's application.

[21] On January 30, 2019, after considering written submissions from the parties, the hearing judge issued his decision on costs (2019 NSSC 103) ("Costs Decision"). He stated that their own delay put the Chiasson parties in a position to collect a substantial amount of interest. In his Costs Decision, he reduced the amount which he would have awarded to them by 30%.

[22] The judge's Order of March 27, 2019 required JCI to pay the Trust the $500,000 holdback, together with $86,896 contractual interest on that amount calculated from December 2011 to the date of his decision, $27,125 in costs and approximately $1,000 in disbursements.

Issues

[23] In its appeal of the Merits Decision, JCI raises the following issues:

> (a) Whether the hearing judge erred in law by finding that a purchaser bears the onus of explicitly including a vendor's existing, competing business activities in an otherwise-inclusive restrictive covenant;

(b) Whether he erred in law by failing to complete the required analysis regarding the admissibility and/or weight of the Goodfellow Report;

(c) Whether he erred in law by failing to complete the required analysis as to whether the Defendant's/Respondent's inferences as a non-expert witness met the compendious statement of facts exception, and further whether failure to give the Applicant's expert witness, Mr. Goodfellow, an opportunity to respond to the lay witness' criticisms of his report was contrary to the principle in *Browne v. Dunn*, (1893) 6 R 67;

(d) Alternatively, should its appeal be denied, whether the hearing judge erred in law in concluding that the court has no authority to decline to award contractual interest, in light of s. 41(k)(i) of the *Judicature Act*, RSNS 1989, c. 240.

[24] In its cross-appeal of the Costs Decision, the Trust presents these issues:

(a) Did the hearing judge commit a reviewable error when he excluded pre-judgment interest from his Tariff "A" analysis?

(b) Did he commit a reviewable error by discounting the costs award on the basis of disclosure-related adjudicative delay?

[25] I will set out the appropriate standard of review for each of these issues as I address them.

Analysis

The Restrictive Covenant

[26] Before the hearing judge, JCI argued the restrictive covenant in the APS and the NCA prohibits Mr. Chiasson from offering incentives to peninsular Halifax customers ("Peninsular Customers") to fill their prescriptions at City of Lakes and from making deliveries to those customers. The Chiasson parties submitted that Mr. Jorna was aware of City of Lakes when the APS was negotiated and that an incentive plan and delivery service to Peninsular Customers was part of the regular conduct of its business. They maintained if JCI had wanted the restrictive covenant to apply to City of Lakes, it should have demanded specific language to that effect.

[27] The judge favoured the position of the Chiasson parties. On appeal, JCI claims he erred in his interpretation of the restrictive covenant.

[28] Contractual interpretation involves the application of legal principles of interpretation to the words of the contract and is a question of mixed fact and law. Unless there is an extricable error of law, the standard of review is palpable and

overriding error. If there is an extricable error of law, the appropriate standard of review is correctness. See *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8–9.

[29] Before addressing the judge's reasons, it is helpful to set out the law on restrictive covenants. Such covenants generally take the form of non-competition or non-solicitation clauses or agreements, and are often found in commercial agreements or contracts of employment.

[30] In *Martin v. ConCreate USL Limited Partnership*, 2013 ONCA 72, the Ontario Court of Appeal explained the concept of restrictive covenants and summarized the common law governing them. It wrote, in part:

> [49] Covenants in restraint of trade are contrary to public policy because they interfere with individual liberty and the exercise of trade: see *Elsley v. J.G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 923. They are *prima facie* unenforceable. A covenant will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade: see *Elsley*, at p. 923.
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> [50] The party that seeks to enforce a restrictive covenant has the onus of demonstrating that the covenants are reasonable as between the parties. The party seeking to avoid enforcement of the covenant bears the onus of demonstrating that it is not reasonable with respect to the public interest: see *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (C.A.), at p. 141.
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> [51] If a covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable: see *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 27, 43; *Mason*, at para. 14. It is therefore unreasonable and unenforceable.
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> [52] The law distinguishes between a restrictive covenant in connection with the sale of a business, and one between an employer and an employee: see *Elsley*, at p. 924. The former may be required to protect the goodwill sold to the purchaser, and does not usually involve the imbalance of power that exists between employer and employee. Accordingly, a less rigorous test is applied in determining the reasonableness of a restrictive covenant given in connection with the sale of a business: see *Shafron*, at para. 23; *Elsley*, at p. 924.
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> [53] Greater deference is given to the freedom of contract of "knowledgeable persons of equal bargaining power": *Elsley*, at p. 923. Nevertheless, the broader restraints on trade justifiable in the context of a sale of a business must be reasonable within such a context. There is a strong public interest "in discouraging restraints on trade and, maintaining free and open competition unencumbered by the fetters of restrictive covenants": *Elsley*, at p. 923; see also *H.L. Staebler Co. v. Allan*, 2008 ONCA 576, 239 O.A.C. 230, at para. 34.

> [54] The factors relevant in determining whether a restrictive covenant is reasonable are the same in the contexts of the sale of a business and an employment agreement: the geographic coverage of the covenant, the period of time that it is in effect and the extent of the activity prohibited: see *Shafron*, at para. 43. And, as the application judge noted, reasonableness is determined in light of the circumstances existing at the time that the covenant was made. Those circumstances include the reasonable expectations of the parties about the future activities and marketplace of the business: see *Tank Lining Co. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.), p. 226.

[31] The Supreme Court of Canada in *Elsley* pointed out the importance of restrictive covenants to the vendor of a business:

> [15] The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
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> [Emphasis added]

Restrictive covenants are, of course, also essential to the purchaser who is looking to protect his investment in an ongoing business and its goodwill for a certain period of time.

[32] Often the issue in cases involving restrictive covenants concern whether their terms such as geographic scope, duration, and so on are reasonable. That was not the situation here. In the NCA, Mr. Chiasson had expressly agreed that all of the restrictions were "reasonable and valid." He never argued they were otherwise.

[33] The issue before the judge was not the reasonableness of the restrictive covenant, but its interpretation.

[34] The judge observed that, in urging him to find that Mr. Chiasson had breached the restrictive covenant, JCI had relied on *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865; *Brouwer Claims Canada & Co. v. Doge*, 2002 BCSC 988; and *Capital Safe & Lock Service Ltd. v. Steeves*, 2000 NBCA 1. However, unlike the case before him, none of those cases involved a pre-existing business. At ¶73 of the Merits Decision, the judge stated: "The facts of this case

appear to be unique." It was his view that the principles of contractual interpretation dictated only one result.

[35] The judge correctly summarized the principles of contractual interpretation in the Merits Decision:

> [46] The legal principles to be applied when interpreting commercial contracts are straightforward. The Ontario Court of Appeal summarized them in *Salah v. Timothy's Coffees of the World Inc*., 2010 ONCA 673, [2010] O.J. No. 4336:
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> > 16 The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. …
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> [47] In *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] S.C.J. No. 53, the Supreme Court of Canada recognized the importance of context in the court's search for intent. Contracts are not made in a vacuum, and "words alone do not have an immutable or absolute meaning": *Sattva*, para. 47. Although "the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract", decision-makers should use the surrounding circumstances to deepen their understanding of the mutual and objective intentions of the parties, as expressed in the words of the contract: *Sattva*, para. 57. The Supreme Court cautioned, however, that the surrounding circumstances must never be allowed to overwhelm the words of the agreement: *Sattva*, para. 57. Rothstein J., for the Court, defined "surrounding circumstances" as follows:
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> > 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the

> language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[36] After reviewing the evidence before him, the judge made factual determinations:

> [72] These are the key facts, as I find them. Prior to the sale of Scotia, City of Lakes offered incentives and prescription-delivery services to all of its clients, regardless of where they lived. Peter Jorna, as president of JCI, knew that David Chiasson would continue to own and operate City of Lakes after the sale. There were no discussions during negotiations as to the impact, if any, of the restrictive covenant on City of Lakes' operations. Following the sale of Scotia, City of Lakes continued to offer incentives and prescription-delivery services to its customers, including a handful of Halifax peninsula residents. There is no evidence that Mr. Chiasson actively solicited Halifax peninsula clients. …

On appeal, JCI does not dispute the finding of no active solicitation of customers residing in the Peninsula. The focus is on the prescription-delivery service.

[37] The affidavit evidence established that, after 2011 when the Trust sold and JCI purchased Scotia Drugs, City of Lakes made prescription deliveries to the Peninsula. K.L. deposed that from late 2015 to the fall of 2016, he used that Dartmouth pharmacy's delivery program to have his prescription medication delivered to his Gottingen Street residence in Halifax. Jennifer Jorna telephoned City of Lakes in mid-October 2015, almost four years after the closing. She was told it offered a free prescription delivery service to patients on the Halifax peninsula. Private investigator Bill Burke monitored what he believed to be prescription deliveries from that pharmacy to addresses in the Peninsula. According to his investigation report, there were several such deliveries on each of three days in February 2016. While he believed there were deliveries made on three other days that month, he was unable to follow the delivery vehicle in traffic.

[38] A document titled "Listing of all City of Lakes customers since 2001 who are (or who have become) residents of Peninsular Halifax" formed part of Mr. Chiasson's documentary disclosure. It listed 138 customers on the Peninsula. City of Lakes made deliveries to 13 of them after 2011. A very few had received deliveries only once or twice after January 1, 2012. Most had had deliveries on a monthly, weekly or even daily basis since that date.

[39] Significantly, Mr. Chiasson never denied that City of Lakes delivered prescription medication to the Peninsula. He knew when he negotiated and sold his Halifax pharmacy for $2,800,000 to JCI that his Dartmouth pharmacy provided a delivery service to the Peninsula.

[40] The judge applied the law to the facts as he found them. He reasoned:

> [74] When David Chiasson signed the APS and the NCA, he agreed that he would not "open, operate, invest in, or advise a pharmacy company or company in a related industry for Seven (7) years following the Closing Date … anywhere within the geographic confines of the Halifax peninsula, directly or indirectly, in any manner whatsoever … without the express written consent of the Purchaser." Although the Court's interpretation of this restrictive covenant must always be grounded in the text, the law recognizes that contracts are not created in a vacuum. The Court must also consider the factual matrix or surrounding circumstances. The factual matrix consists of the background facts that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.
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> [75] During negotiations, Peter Jorna, as president of JCI, was aware that David Chiasson owned and operated a second pharmacy in Dartmouth, and that he intended to continue operating that pharmacy after selling Scotia. Although he denied knowing that City of Lakes had customers living on the Halifax peninsula, Mr. Jorna conceded that he knew it *could* have such customers. The evidence establishes that customer-loyalty programs and delivery services are not only very common in the pharmacy business, but are often critical to a pharmacy's ability to remain competitive. I find that Mr. Jorna knew or reasonably ought to have known, when he agreed to the contract, that City of Lakes had Halifax peninsula clients, and that it had a customer-loyalty program and delivery service. Put differently, when the parties negotiated the language of the restrictive covenant, Mr. Jorna knew, or ought to have known, that City of Lakes might already be making deliveries on the peninsula. If he intended, as he now says he did, that the restrictive covenant prohibit [*sic*] City of Lakes from making deliveries on the peninsula, and from offering incentives to peninsula residents who receive those deliveries, he could have negotiated language to that effect. Notwithstanding that there were no discussions between the parties about the conduct of business at City of Lakes, Mr. Jorna asks this Court to interpret the restrictive covenant in a manner that would require Mr. Chiasson to obtain Mr. Jorna's written consent to continue the regular operations of his existing pharmacy. I cannot accept that interpretation. [Italics of hearing judge]
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> [76] As Mr. Chiasson points out, Mr. Jorna's interpretation would also introduce significant impracticalities into the operation of City of Lakes. It would be unreasonable to interpret the covenant as requiring Mr. Chiasson, at the time of signing the agreements, to have dropped any existing customers who lived on the peninsula and received deliveries, or to drop an existing customer because they

> happened to move to the peninsula at some point thereafter and request delivery. It would be equally unreasonable to interpret the covenant as requiring Mr. Chiasson to refuse delivery to an existing Halifax peninsula customer who usually picks up their prescriptions in Dartmouth, but, for some reason, becomes unable to do so. Pharmacies deliver essential healthcare services and pharmacists have ethical obligations to their clients. For this reason, extensive negotiation and precise drafting would be required where a restrictive covenant is intended to apply to existing pharmacist-client relationships. Even with these safeguards, however, a restrictive covenant of this nature might be ineffective for policy reasons, being contrary to the public interest.
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> [Emphasis added]

[41] It is noteworthy that the judge added:

> [77] If I had found that the restrictive covenant applied to City of Lakes, I would have rejected Mr. Chiasson's alternative arguments that making a handful of deliveries to the Halifax peninsula does not amount to "operating" a pharmacy in the proscribed area, or that it does not rise to some undefined level of "competition" required to trigger the covenant's enforceability. If the covenant applied to City of Lakes, its purpose would be to prevent City of Lakes from servicing clients in the proscribed area. In my view, whether it was servicing three clients or three hundred clients would be relevant to damages, not liability.
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> …

[42] In my view, the hearing judge erred in his application of the principles of contractual interpretation to the facts.

[43] While the judge correctly set out the goal of contractual interpretation, ascertaining the intent of the parties, he failed to take into account many of the surrounding circumstances that would "deepen [their] understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva*, ¶57). His analysis was too narrow.

[44] The restrictive covenant is broadly worded. It reads:

> David Chiasson agrees to sign a non-competition agreement not to open, operate, invest in, or advise a pharmacy company or company in a related industry for Seven (7) years following the Closing Date … anywhere within the geographic confines of the Halifax peninsula, directly or indirectly, in any manner whatsoever, including, without limitation … without the express written consent of the Purchaser[.]

[45] Among other things, the restrictive covenant prohibits Mr. Chiasson from operating a pharmacy company directly or indirectly for a certain period anywhere within the Peninsula. Mr. Chiasson acknowledged the restrictive covenant contained no exceptions. The judge found that if the restrictive covenant applied to City of Lakes, its deliveries would have amounted to "operating" a pharmacy in breach of it.

[46] While his decision set out the principles of contractual interpretation, the judge's interpretation of the restrictive covenant relied almost exclusively on his finding that Mr. Jorna knew or ought to have known "that City of Lakes might already be making deliveries on the peninsula." He failed to take into account much of the factual matrix and surrounding circumstances that would aid in ascertaining "the intent of the parties and the scope of their understanding" (*Sattva*, ¶47). These would include:

- The parties had entered in an agreement for the purchase and sale of an ongoing pharmacy business;
- That business was located in the Peninsula with a customer base in the Peninsula;
- The restrictive covenant was to protect the value of the business and its goodwill, for which JCI would pay $2,800,000;
- The purchase price was payable in instalments over several years;
- The broadly worded restrictive covenant was a condition precedent to the closing of the purchase and sale. If the APS had not contained it and Mr. Chiasson had not signed the separate NCA, the transaction would not have closed;
- The parties agreed the terms of the restrictive covenant were reasonable; and
- According to Mr. Chiasson, the pharmacy business in Halifax and Dartmouth was quite competitive and City of Lakes provided a delivery service so as to maintain a competitive edge.

[47] The restrictive covenant was a critical component not only of JCI's purchase of Scotia Pharmacy, but equally of the Trust's sale of that business. As the Supreme Court of Canada pointed out in *Elsley* at ¶15, an owner might not be able to sell his business if he could not assure the purchaser that the vendor would not later become a competitor. See *Shafron* at ¶20 to similar effect.

[48] As stated in *Salah* at ¶16, the court should interpret a contract "so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity." The judge's determination that a business could escape the confines of a restrictive covenant simply because it is pre-existing is directly contrary to those principles and good business sense. It would mean that:

(a) A purchaser is deemed to know of the existence of the vendor's other business interests, although it is only the vendor who can know of them and their extent;

(b) A broadly worded, all-inclusive restrictive covenant would not capture an existing business;

(c) A vendor is free from any obligation to disclose their other business interests and any burden from ensuring that their activities are excluded from the restrictive covenant; and

(d) Had a vendor started a new business contrary to a restrictive covenant, they would be in breach; yet they would be free to compete with their former business if they did so with their existing business.

[49] Restrictive covenants are intended to provide a material benefit to both the owner of a business and to the purchaser of that business. They enable the owner to sell his business by giving the purchaser the assurance of non-competition. They provide the purchaser with protection from competition by a former owner who knew the business and its customers while it establishes itself.

[50] Exempting a pre-existing business from a restrictive covenant makes no business sense. I agree with JCI when it wrote in its factum:

> 60. With respect, the principle that pre-existing competing businesses are somehow deemed to be excluded from otherwise all-inclusive restrictive covenants leads to a commercial absurdity. It encourages vendors to hide or minimize (or simply never raise) the activities they already conduct <u>which would otherwise be caught by the very protections the purchaser is trying to put in place</u>. And, to accept payment for the goodwill of their (now former) business in the process. Where the vendor possesses all the actual knowledge of the pre-existing activities, there is no rationale in law or equity to not place the burden of protecting those activities squarely on the vendor's shoulders.
>
> [Emphasis in original]

[51] In ¶77 of the Merits Decision, the judge described "significant impracticalities" were City of Lakes required to cease deliveries to customers on the Peninsula. He stated that "Pharmacies deliver essential healthcare services and pharmacists have ethical obligations to their clients." However, Mr. Jorna had no issue with any Peninsular Customer walking into City of Lakes and having a prescription filled there. JCI did not ask that City of Lakes drop existing customers or refuse customers. It simply maintained that the restrictive covenant required Mr. Chiasson to refuse to deliver prescription medication to the Peninsula. It did not call for any breach of professional ethics or obligations, and the question of whether a pharmacy notifying existing customers that it would be ceasing future deliveries is a breach of professional ethics is a matter for determination by the appropriate governing body.

[52] The judge's approach was too narrow, was contrary to commercial principles and good business sense and resulted in commercial absurdity. He erred in his interpretation of the restrictive covenant.

The Report

[53] JCI argues the judge did not address either the admissibility or the weight of the Report prepared by Mr. Goodfellow, which calculated JCI's loss of business revenue. It maintains that, in his Merits Decision, the judge erred by failing to engage in the required analysis regarding admissibility of expert evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. It also argues he erred by accepting inadmissible evidence to exclude the Report.

[54] These arguments allege failure to apply the legal tests for the admissibility and/or weight of an expert report, and for the compendious statement of facts exception. In its second and third issues, JCI claims errors of law that are reviewable on the correctness standard (*Housen* at ¶27 and 33).

[55] I will briefly review the purpose and content of the Report and then consider JCI's submissions.

[56] JCI's application sought as damages the estimated losses suffered as a result of Mr. Chiasson's alleged activities in breach of the restrictive covenant. Mr. Goodfellow's qualifications as an expert in the field of business and intangible asset valuation and quantification of commercial losses and capable of giving opinion evidence on the quantification of such losses were unchallenged.

[57] In his Report, Mr. Goodfellow considered, among other things, certain books and records of JCI since its purchase of Scotia Pharmacy and unaudited financial statements of that business for the previous year. His analysis included a consideration of operating results for the 2010 to 2017 fiscal years, a detailed examination of the prescription revenues over that period and overviews of the pharmaceutical industry and the economies of Nova Scotia and Halifax. Significantly, the Report noted a limitation in its scope of work, namely, that it did not consider any prescription and sales information from City of Lakes. That material was not available because the Chiasson parties had not provided it to JCI before the Report was prepared.

[58] The Report quantified JCI's loss, namely, the amount required to restore it to the same financial position JCI would have been in had there been no breach of the restrictive covenant as alleged. It estimated JCI's loss to be approximately $560,000.

[59] In ¶40–45 of his Merits Decision, the judge summarized the content and methodology of the Report, and its estimate of JCI's theoretical loss of business revenue. After finding Mr. Chiasson had not breached the restrictive covenant, he continued:

> [77] … if I had found that Mr. Chiasson breached the restrictive covenant, I would not have relied on Mr. Goodfellow's report in assessing damages. Cross-examination was not necessary to reveal the report's deficiencies. Its utility was compromised by Mr. Goodfellow's assumption that the alleged competing activities were the sole reason why Scotia's "all other drugs" category was not in line with his proposed historical and future growth rates. Other possible causes would include Scotia's location in an economically depressed neighbourhood, the presence of a nearby needle exchange and methadone clinic, competition from other local pharmacies, and so on. For instance, K.R. testified that he switched pharmacies because he was afraid of being robbed of his medications upon exiting Scotia. The report's failure to consider potential alternative causes of the loss, coupled with the lack of other evidence from JCI on causation, renders the report useless to the Court. I agree with Mr. Chiasson that if JCI had proved that, but for the alleged competing activities, those City of Lakes' customers receiving deliveries on the Halifax peninsula would have obtained their prescriptions at Scotia, the best available measure of damages would be the revenue City of Lakes obtained from these customers during the life of the restrictive covenant.
>
> [Emphasis added]

[60] The principles surrounding the admissibility of expert evidence were established in *R. v. Mohan*, [1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The proper application of the first step in the admissibility inquiry, which relates to the threshold requirements for admissibility, and the second or gate-keeping step, are illustrated in cases such as *R. v. Soni*, 2016 ABCA 231 and *R. v. Vassel*, 2018 ONCA 721.

[61] The Merits Decision does not mention *Mohan*, *White Burgess*, or the requisite two-step analysis for admissibility of expert evidence, or apply that analysis. JCI argues this absence shows the judge erred by failing to admit the Report.

[62] I cannot accept this submission. The judge did more than simply mention the Report in passing. His Merits Decision demonstrates he was aware of its purpose, content and methodology. There is no indication that the Report was excluded on the basis of any of the criteria in the first stage of the analysis, or any "gate-keeping" or cost-benefit analysis in the second stage, or indeed at all. Certainly it would have been preferable if the judge had clearly addressed admissibility. However, in these particular circumstances, I reject JCI's argument that he erred by failing to admit the Report into evidence.

[63] JCI then argues the hearing judge erred by accepting inadmissible evidence of a non-expert witness or lay opinion evidence. It says the reasons the judge gave in ¶77 for not relying on the Report are largely founded on Mr. Chiasson's affidavit, which addressed why he was more optimistic about the prospects of City of Lakes compared to Scotia Pharmacy. Mr. Chiasson deposed that, in his view, the methadone segment of the Halifax pharmacy's business conflicted with "the mainstream segments of the business" and "many mainstream customers were uncomfortable" with the methadone clinic's clientele; the Gottingen Street neighbourhood where Scotia Pharmacy was located appeared "rough and very depressed"; and he had been concerned about "an increase in competition" from pharmacies close to Scotia Pharmacy. JCI also submits the judge erred by relying on the opinion evidence of K.L., who deposed in his affidavit that he switched to City of Lakes because he was afraid of being robbed when leaving Scotia Pharmacy.

[64] Opinion evidence of non-expert witnesses is generally inadmissible. In *R. v. D.D.*, 2000 SCC 43 the Supreme Court of Canada summarized this exclusionary rule and its rationale:

> 49 A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved.

[65] Opinion evidence of non-expert witnesses can be admitted under the compendious statement of facts exception. Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed., 2014 at p. 774 summarized the factors relevant to that exception as set out in *Graat v. R.* [1982] S.C.J. No. 102 as follows:

> 12.14 Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about. [21] But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.[22]

The authors commented at p. 773 with regard to *Graat*:

> 12.12 Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness' perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.

See also *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522 at ¶76.

[66] In my view, JCI's argument relying on the inapplicability of the compendious statement of facts exception is misplaced. While ¶77 includes references to potential alternative causes that would compromise the Report's utility, the judge's real focus was on information not contained in the Report, namely, that "the best available measure of damages" would have been the revenue City of Lakes obtained from the Peninsula clients to whom it made deliveries. It was on that basis the judge rejected the theoretical loss calculated in the Report.

[67] JCI's final argument alleging error pertaining to the Report raises trial fairness and the Rule in *Browne v. Dunn*.

[68] In his brief responding to JCI's application, Mr. Chiasson had argued the Report's utility was reduced because Mr. Goodfellow assumed the conduct of City of Lakes caused the entirety of the loss to be estimated, when other causes were possible. His brief also submitted that City of Lake's gain would be a better estimate of damages than the theoretical loss calculated in the Report.

[69] According to JCI, the judge's refusal to afford Mr. Goodfellow an opportunity to respond to these arguments, Mr. Chiasson's lay opinion regarding other possible causes and Mr. Chiasson's decision not to cross-examine Mr. Goodfellow were contrary to the Rule in *Browne v. Dunn*. It points out that in *R. v. Dim*, 2017 NSCA 80 this Court stated at ¶72 that:

> The rule in *Browne v. Dunn* is a rule of trial fairness. Its purpose is to provide fairness to a witness. In its operation, if counsel proposes to challenge the credibility of a witness … by calling contradictory evidence, that witness must be provided the opportunity to address the contradictory evidence. …

[70] I reject this argument, again on the basis the judge was not persuaded by Mr. Chiasson's arguments or lay opinion. Rather, the Report did not contain the information he sought. Cross-examination could not have made any difference.

[71] I see no errors in the judge's treatment of the Report that would allow appellate intervention.

Contractual Interest

[72] The judge concluded Mr. Chiasson had not breached the restrictive covenant and the Trust was entitled to the $500,000 balance of the final payment under the APS. The GSA executed by the parties called for interest at the rate of 10% per annum on any amounts required to be paid to the Trust.

[73] In his Merits Decision, the judge recounted how Mr. Chiasson had resisted providing documentary disclosure. He expressed serious concerns about the imposition of contractual pre-judgment interest in this case. He wrote::

> [79] Since JCI filed its application in April 2016, obtaining relevant documents from Mr. Chiasson has been an uphill battle. He repeatedly took the position that, since he had not breached the covenant, he had no relevant documents to produce. Litigation would grind to a halt if only those defendants who believed they were liable to the plaintiff were subject to disclosure obligations. …
>
> [80] <u>If this Court had the discretion to deny contracted interest, I would exercise it in this case. The authorities suggest, however, that the Court has no</u>

> jurisdiction in this area. In *Agate Developments Ltd. v. United Gulf Developments Ltd.*, 2009 NSSC 160, [2009] N.S.J. No. 221, Moir J. stated:
>
> > 84 Unlike prejudgment interest under the *Judicature Act*, this court does not have a broad discretion over contracted interest. I do not have the power to refuse contracted interest, unless the contract is contrary to law. …
>
> [81] Similar statements appear in *Scotia Mortgage Corp. v. Manzouri*, 2012 ABQB 395, [2012] A.J. No. 636, at para. 28; and *Greenslade's Construction Co. v. Conception Bay South (Town)*, (2001), 8 C.L.R. (3d) 120, [2001] N.J. No. 24 (Nfld. S.C. (T.D.)), at para. 14.
>
> [82] I agree with Moir J. that this Court has no discretion over contracted interest. The Chiasson Family Trust (2004) is entitled to interest in accordance with JCI's obligations under the GSA. That said, the unnecessary delay that resulted from Mr. Chiasson's unreasonable approach to disclosure and his decision to file his own application is a factor the Court will consider in determining costs. …

[74] His Costs Decision described how Mr. Chiasson's resistance began immediately after the hearing of JCI's application was set for October 12, 2016. Without disclosure, the deadline for discoveries came and went and that hearing could not proceed as scheduled. JCI then held back $500,000 when the final payment came due on December 20, 2016. Even after the Trust applied for the holdback, Mr. Chiasson disclosed relevant materials in a trickle and only after repeated requests from JCI. JCI had to bring a motion for production and the materials ordered to be produced were not disclosed until weeks after the deadline.

[75] In his Costs Decision, the judge stated:

> [19] In my view, if the Chiasson parties had approached their disclosure obligations in a reasonable manner, this proceeding would have been heard and likely decided prior to the due date for the final payment under the agreements. The Chiasson parties' claim against the Jorna parties was the product of their own delay, and that delay put them in the position to collect a substantial interest payment under the agreements when the court's decision was released. While the court lacked jurisdiction to decline to award contractual interest, it can ensure that the Chiasson parties do not profit further from their conduct by having the interest included in the "amount involved" for costs purposes.

[76] According to JCI, the hearing judge erred in law—pursuant to s. 41(k) of the *Judicature Act*, the court has the jurisdiction to decline to award pre-judgment interest even where the parties had a contractual agreement regarding interest. It submits the judge should have exercised his discretion to do so because he found

that Mr. Chiasson had caused unreasonable delay in the litigation. JCI asks this Court to reverse the award of $86,896 in contractual pre-judgment interest pursuant to s. 41(k)(iii) of the *Judicature Act*. The Chiasson parties respond that the judge was correct in deciding he did not have such jurisdiction.

[77] This issue concerns the judge's interpretation of the court's jurisdiction. The applicable standard of review is correctness. See *Bouch v. Penny*, 2009 NSCA 80 at ¶27.

[78] Section 41 of the *Judicature Act* requires the courts to award pre-judgment interest. The courts are given discretion to decline to do so or to reduce the rate or period, in certain circumstances. The relevant portions read:

> Rules of law
>
> 41. In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> …
>
> (i) in any proceeding for the recovery of any debt or damages, the Court shall include the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> …
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.
>
> [Emphasis added]

[79] Pre-judgment interest is not a form of damages. This Court explained the "purpose and intent" of underlying pre-judgment interest legislation in *R. v. D.H.*, 1996 NSCA 121:

> 182 The following is from **Law of Damages**, Waddams, 3rd ed at p. 7-15:

> "Where a defendant has injured the plaintiff and disputed the matter through lengthy litigation, the defendant has done the plaintiff two wrongs: he has caused her personal injuries and has failed to make proper recompense." (Emphasis in original)

And further at p. 7-15-16:

> "Interest is not intended to serve as a form of damages. An award of damages compensates the plaintiff for personal injuries, while an award of interest compensates her for the loss of the use of the money." (Emphasis in original)

183 The Legislature obviously considered these principles in drafting the pre-judgment interest legislation. Section 41(k)(ii) and (iii) of the **Judicature Act** provide that the Court has the discretion to decline to award interest, to reduce the rate of interest, or to reduce the period for which it is awarded, if:

> ".....(ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation."

[80] *Wilson v. K.W. Robb & Associates Ltd.*, 1998 NSCA 117 is often cited for the principles underlying s. 41 of the *Judicature Act*. That case was an appeal from a decision ordering payment of an unpaid sum and pre-judgment interest. With regard to s. 41(i) and (k), Chipman J.A. writing for this Court stated:

> 40 Section 41(i) is an express direction from the Legislature to the courts to award interest as part of a judgment for a debt or for damages at such rate as the court thinks fit for the period of time described in the subsection, that is, from the date the cause of action arose until judgment or subsequent appeal. However, this mandatory direction to award interest is subject to the discretion conferred on the court by s. 41(k) to either decline to award interest under the authority of s. 41(i) or reduce the rate of interest or the period for which it is to be awarded if one or more of the three circumstances described in s. 41(k) exist.
>
> 41 It is difficult to determine what the Legislature intended in enacting s. 41(k)(i). It may be that the subsection was included so as to indicate that if a plaintiff is entitled to interest by agreement or by law, the plaintiff is not also to be awarded pre-judgment interest as mandated in s. 41(i). On the other hand, it may mean that even if interest is payable as of a right or by virtue of an agreement or otherwise by law, the Court may still decline to award interest or may reduce the rate or the interest period. It would seem to me that only if a rate was unconscionable at the time it was agreed upon should a Court refuse to award contractual interest.
>
> 42 Unlike the Nova Scotia legislation, the Ontario legislation is clear. It specifically states that the provisions of the **Courts of Justice Act** dealing with

> the award of pre-judgment interest do not apply where interest is payable by a right other than under the pre-judgment interest section (s. 128(4)).
>
> 43 In view of the conclusion that I have come to with respect to this appeal it is not necessary to resolve this question of interpretation of s. 41(k)(i).
>
> …
>
> 44 Under s. 41(i) the Legislature has given the court an extremely broad discretion to set a rate as it thinks fit. By implication, this should be a reasonable rate for the period in question. …
>
> …
>
> 46 As a general rule, if the parties to the action have expressly agreed to a contractual rate of interest that would be payable on an outstanding account, or if the Court considers it an appropriate case in which to imply a term that interest be paid at a particular rate, the court should not exercise its discretion under s. 41(k)(i) as the creditor would be entitled to interest on a contractual basis.
>
> 47 With respect to the power conferred on the Court by s. 41(k)(ii), it is self-explanatory and this issue would turn on the evidence in any particular case.
>
> 48 With respect to 41(k)(iii), the court may reduce the rate that it would have otherwise deemed fit or reduce the period for which interest is awarded if the claimant has been responsible for undue delay in the litigation. It would seem to me that insofar as the plaintiff in a debt action is entitled to interest at a rate the court thinks fit pursuant to s. 41(i), that the onus would be on the debtor to show that the plaintiff was responsible for undue delay in the litigation. That is not to say that the debtor would necessarily have to advance evidence. It may appear from the record that the only reasonable inference that one could draw, if there has been a lengthy delay in the litigation, is that the plaintiff would be responsible for the undue delay in the absence of some explanation from the plaintiff. For example, in this proceeding there clearly has been an undue delay in the litigation as nine years passed from the time the cause of action arose until the trial commenced.
>
> 49 This appeal on the interest issues is an appeal from the exercise of a discretionary power by a trial judge. It is trite to state that an appeal court will not interfere with the exercise of a discretionary power unless wrong principles of law have been applied or a patent injustice has resulted. …
>
> [Emphasis added]

[81] Courts have exercised their discretion pursuant to s. 42(k)(i) and (iii) to reduce or decline an award of pre-judgment interest because of delay. See, for example: *E. Weyman Construction (1989) Limited v. Tutty*, 2019 NSSC 210; *Purdy Estate v. Morash*, 2010 NSSC 362; *Willis v. Bernard L. Mailman Projects Ltd.*, 2008 NSSC 94; *Tapics v. Dalhousie*, 2018 NSSC 273; and *Smith v. Smith*, 2002

NSCA 78. However, none of these cases had a fact situation with contractual interest.

[82] Contractual interest was a feature in *Nova Scotia (Attorney General) v. Luke*, 2017 NSSC 120. In that case, the defendant had defaulted on a student loan with interest at prime plus 2.5%. Attempts to obtain repayment over 11 years having failed, the Province brought an action for debt. When its motion for summary judgment was heard, the interest component exceeded the principal amount outstanding. Wright J. of the Nova Scotia Supreme Court queried if it would be appropriate to shorten the interest period under s. 41(k) of the *Judicature Act*. He referred to the "general rule" described in ¶46 of *Robb* that if the parties have expressly agreed to a contractual rate of interest, the court should decline to exercise its discretion in s. 41(k)(i). He determined the delay was largely caused by the defendant, and stated at ¶25: "I see no reason to depart from that general rule on the facts of this case."

[83] In ¶46 of *Robb*, Chipman J.A. did not refer to an absolute rule but to a "general rule" with respect to pre-judgment interest on accounts with a contractual rate of interest. In ¶41, he left open the question of when courts may refuse or reduce interest when an agreement or the law provides for interest. He stated only that "it may be" that in those situations the Legislature intended s. 41(k)(i) to preclude pre-judgment interest pursuant to s. 41(i), but continued that "[o]n the other hand, it may mean" that even if there is contractual interest, the court "may still decline to award interest or may reduce the rate or the interest period." He added that "it would seem to [him]" that only if the rate was unconscionable should a court refuse to award contractual interest.

[84] The characterization of the approach to pre-judgment interest where the parties had agreed to a contractual rate of interest as only "a general rule" indicates the rule is not absolute. It allows for occasions where it would be appropriate for a court to depart from the "general rule" and award interest at a rate different from that contracted by the parties or reduce the period during which interest is payable. Such occasions are not limited to those where the rate of contractual interest is unconscionable. They are likely to be infrequent, but would include those with circumstances so compelling as to merit the sanction of the court.

[85] The hearing judge indicated that this case was such an occasion.

[86] In my view, the hearing judge erred in law when he concluded that the court did not have the jurisdiction to refuse contracted interest unless the contract was

contrary to law. The judge determined Mr. Chiasson's unreasonable approach to disclosure had caused unreasonable delay. In ¶80 of his Merits Decision, he stated that had the court had the discretion to deny contracted interest, he would exercise it in this case. In ¶19 of his Costs Decision, he adjusted costs to account for the lack of jurisdiction to decline contractual interest. It is clear that had he recognized he had the discretion, the judge would not have reduced contractual interest but denied it. I would defer to him in that regard. Accordingly, I would allow JCI's ground of appeal that challenges the award of contractual pre-judgment interest to the Chiasson parties.

Cross-Appeal on Costs

[87] Given my ruling that the Chiasson parties committed a breach of the restrictive covenant by deliveries to Peninsular Customers, their cross-appeal on costs is moot. As I will direct later, JCI should receive its costs on the applications.

Damages

[88] In my view, this Court should determine damages rather than remitting the assessment to the hearing judge. I say this for the following reasons.

[89] At the hearing and on appeal in this Court, JCI has claimed damages flowing from various assertions of liability. I have agreed with one of those assertions, namely, liability for deliveries to Peninsular Customers. At the hearing, JCI bore the onus of proving the damages it claimed. Consequently, there is no justification for a new hearing with fresh evidence on damages flowing from those deliveries. Rather, the damages, if any, should be quantified from the record of evidence that was adduced at the hearing.

[90] This Court can assess whether or not JCI has proven a loss from deliveries to Peninsular Customers from the confines of the existing record. Such an assessment does not turn on credibility or weight of evidence. Neither does it involve a reconsideration of the judge's findings. To ensure that it understood the parties' submissions on damages and the portions of the evidentiary record on which each of them relied, this Court asked the parties to provide post-hearing submissions respecting damages, based on certain assumptions. Submissions were received on March 20, 2020 and rebuttal submissions on March 25, 2020.

[91] I begin with guiding principles. The general rule of assessing damages when losses are sustained due to a breach of contract is set out by S.M. Waddams in *The Law of Damages*, loose-leaf ed. (Aurora, ON: Canada Law Book, 1991) at 5.30:

> […] So far as the courts are concerned, the general rule continues to be asserted as the normal rule of contract damages that the promissee is entitled to the full value of the promised performance. In *Robinson v. Harman* [(1848), 1 Ex 850, 154 E.R. 363], Parke B. said: The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[92] Courts should assess damages "on the basis of the plaintiff's loss as opposed to the defendant's gain" (*Brouwer Claims Canada & Co. v. Doge*, *supra* at ¶42, citing *Jostens Canada Ltd. v. Gibsons Studio Ltd.* (1999), 174 D.L.R. (4th) 351 (B.C.C.A.)). In *Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)*, 2013 NSCA 4, Saunders J.A. wrote:

> [25] … It is trite law to say that in order for damages to be recoverable, both their quantification and their causal connection to the wrongdoing must be proved to the civil standard based on a balance of probabilities. *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 330. It is also well-settled that damages may be recovered from a wrongdoer, even if their calculation is difficult, cumbersome or cannot be determined with absolute precision. *Silver Sands Ltd. and Trynor Construction Co. Ltd. v. Minister of Lands and Forest and Attorney General for the Province of Nova Scotia* (1977), 23 N.S.R. (2d) 273 (N.S.C.A.). In such cases where, due to lack of evidence, it is impossible to calculate the loss with "any degree of exactitude" a court must make its "best estimate" of the damages. *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.*, [1976] 1 S.C.R. 267.

[93] JCI argues the Goodfellow Report should govern the quantum of damages. That document estimated damages at $558,699. In the alternative, JCI says damages can be properly assessed based on the amount Mr. Chiasson disclosed as City of Lakes' revenue from Peninsular Customers. The Chiasson parties maintain, as they did before the trial judge, the second approach is the only appropriate method.

[94] The Goodfellow Report is of no utility in assessing damages. It posits various scenarios, but none relate to losses caused only by deliveries to the Peninsula. However, the record contains information about City of Lakes' servicing of Peninsular Customers.

[95] In his affidavit sworn February 15, 2018 (the "Chiasson Affidavit"), Mr. Chiasson discussed City of Lakes' sales to Peninsular Customers and attached as Exhibit 7 a report of those sales from January 2012 to December 2016 (the "Sales Report"). The Sales Report set out the daily total number of fills to those customers and the mark up for each fill. During those five years, 10,966 prescriptions were filled for Peninsular Customers.

[96] JCI's submissions on damages contain numerous slights against the Sales Report and the Chiasson Affidavit. For example, it describes the Sales Report as "hand-collected information initially withheld by the Respondents," disparages certain information as "self-reported" and suggests information provided by Mr. Chiasson "should be suspect given the source."

[97] I cannot accede to these submissions. The Chiasson Affidavit contains the usual provision that the deponent had personal knowledge of the facts as set out in the affidavit and, where not, identified the source and believed it to be true. For privacy reasons, the customers' names were replaced with numbers. The fact the information was not provided promptly does not necessarily mean it is inaccurate. Importantly, JCI never suggested to Mr. Chiasson—either at his examination for discovery or at the hearing below—that the Sales Report was unreliable.

[98] In their submissions on damages, the parties present some common ground:

(a) The Sales Report shows "net total" fees of $128,132.42 and "markup" or profit on the Peninsular Customers' prescriptions of $6,975.00. The total gross profit over those five years is $135,106.98;

(b) The restrictive covenant was to be in force for seven years, from December 2011 to December 2018. Accordingly, that amount should be extrapolated for an additional two years [($135,106.98/5) x 7]. The gross profit is then $189,149.77; and

(c) The average $4 variable cost per prescription filled outlined in the Goodfellow Report should be taken into account. The total number of fills in the five-year Sales Report (10,966) adjusted to seven years is 15,352 so the total variable costs would be $61,408. When the gross profit is reduced by that amount, the net profit from sales to Peninsular Customers over the term of the restrictive covenant is $127,669.80 (the "Net Profit").

[99] Several of the parties' arguments presented factors that might increase or decrease the Net Profit figure to determine damages. However, the Sales Report summarized sales to Peninsular Customers. Mr. Chiasson breached the restrictive covenant not by filling prescriptions for those persons, but by making deliveries to them on the Peninsula.

[100] The Sales Report does not identify which prescriptions for Peninsular Customers were picked up at the City of Lakes location, which were delivered to the Peninsula, and which delivered elsewhere. In assessing damages in this case, I must determine the loss sustained by JCI as a result of the actual deliveries made by the Dartmouth pharmacy to the Peninsula and consider the quality and extent of the evidence available to do so. Consequently, I will address only the arguments that could pertain to that objective. While mention will be made to Net Profit because that is how the parties framed their submissions, it should be remembered the focus is on losses resulting from improper deliveries and not sales, as reported in the Sales Report.

Future Lost Income

[101] According to JCI, the amount of its loss should be increased by a multiplier of 60% to account for future lost income or harm to goodwill. It relies on *Brouwer*, where the plaintiff was awarded an additional 66% of its total damages to account for lost future income. It adds that 60% would be in line with JCI's average profit margin of 59.63% from 2010 to 2017, according to the Goodfellow Report.

[102] In *Brouwer*, Brouwer Claims Canada purchased the adjuster and appraisal business of a former employee, Mr. Doge, who returned to work for Brouwer Claims. The British Columbia Supreme Court found that Mr. Doge breached a restrictive covenant, which prevented him from carrying on business as an independent insurance adjuster for 12 months within a 50 km radius of the corporate head office.

[103] Goepel J. awarded the company $18,000 in damages for the year the restrictive covenant was in effect. He then addressed future lost income:

> [45] The loss suffered in subsequent years cannot be determined with any precision. Although Brouwer Claims may have been able to retain some of that business once the restrictive prohibition expired, Mr. Doge, after one year, would have been entitled to solicit those clients and likely would have been successful in regaining some of the work. One of the results of Mr. Doge's actions has been that

> Brouwer Claims has lost most of the value of the goodwill that they had purchased back in 1994, albeit they did have the value of that business during the five years that Mr. Doge remained in their employment. I would award Brouwer Claims $35,000 for loss of earnings in future years arising from the breach of the restrictive covenant.

[104] How the judge derived damages for lost future income is not clear. In my opinion, *Brouwer* does not stand for the proposition that future lost income should be calculated by a 60% multiplier, as JCI suggests.

[105] JCI also argues such a multiplier takes into account the "steady rise in Mr. Chiasson's peninsular Halifax business." It says the number of prescriptions for Peninsular Customers dramatically increased over time so that by 2014, "the daily numbers are reliably in the double-digits; daily highs reached the mid-20s in September of 2016."

[106] An examination of the Sales Report confirms an increase, but not a steady one nor one as reliably high as JCI submits. The monthly average number of fills for Peninsular Customers in each of 2012 and 2013 was less than 20. A significant jump in mid-2014 resulted in the monthly average for that year being 173. In each of 2015 and 2016, that average was over 320. Only on September 5, 2016 did the daily total exceed 20 prescriptions.

[107] It is difficult to see the correlation JCI draws. The increase did not occur shortly after the sale of the Halifax pharmacy, but two years after. Moreover, this material does not inform which prescriptions were delivered to the Peninsula in contravention of the restrictive covenant.

[108] The Chiasson parties argue JCI has not proven the breach of the restrictive covenant would continue to cause losses from January 2019 forward.

[109] According to the Chiasson Affidavit, between January 2012 and November 2016, City of Lakes had four Peninsular Customers who received prescription deliveries at a frequency of once a month, but only one, identified as #99, was still a customer of City of Lakes. Mr. Chiasson deposed that, of the five Peninsular Customers who received deliveries at a frequency of greater than once a month, three remained City of Lakes' customers. Two of the three told him they had been Scotia Pharmacy customers but become dissatisfied with the service. The third was no longer a resident of the Peninsula.

[110] The Chiasson parties' argument in their rebuttal submissions reads:

> 7. The respondents submit that the evidence supports a conclusion by the court that Customer #99 is the only individual who was a peninsula resident and received deliveries from 2012 to 2016. In view of that, to base an award for future losses, the court must conclude that it is probable that Customer #99 (and/or some other as-yet-unidentified customer) would have (a) ceased to be (or never become) a customer of CLPL had CLPL not delivered fills to the peninsula, (b) opted instead to become a customer of Scotia Pharmacy, **and** (c) remained a customer of Scotia Pharmacy into 2019. The respondents submit that the overall possibility of the above three conditions existing is so low that the court should find that JCI has not proven that the assumed breach continued to cause it losses into 2019.
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> [Emphasis in original]

[111] I agree with this reasoning and attribute no future lost income to JCI. There is no need to consider the Chiasson parties' alternative argument.

The Loss of a Chance

[112] The Chiasson parties submit the Court should apply a large discount against the Net Profit to reflect the low probability that any City of Lakes customer would have actually become a Scotia Pharmacy customer. They suggest when the loss of a chance is assessed, a 75% discount would be appropriate.

[113] Modern jurisprudence on loss of a chance can be traced back to *Chaplin v. Hicks* (1911), 2 K.B. 786. In that case, a theatrical manager published an advertisement offering engagements as actresses to the twelve ladies selected by the readers of the newspaper. When over 6,000 applications were submitted, the criteria were amended. The plaintiff became one of fifty finalists from whom the manager would choose twelve winners. He refused her an interview. She brought an action for damages for breach of contract and loss of a chance for selection for an engagement. The English Court of Appeal held that the manager's breach deprived her of the chance of winning a prize. It rejected the argument that damages were unassessable because they could not be precisely determined. The plaintiff was entitled to have her loss estimated, and that consideration would include her chance of winning being only one out of four.

[114] *Chaplin* directs that damages for loss of chance are to be discounted to account for the odds of the chance not materializing. This holding has been accepted and consistently applied in Canadian law since then. See, for example: *Kinkel v. Hyman*, [1939] S.C.R. 364; *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* [1981] O.J. No. 2872 (C.A.); *Houweling Nurseries Ltd. v. Fisons Western Corp.*

(1988), 49 D.L.R. (4th) 205 (B.C.C.A*); St. Thomas Subdividers Ltd. v. 639373 Ontario Ltd.* (1996), 91 O.A.C. 193 (C.A.); *Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 (N.L.C.A.); *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. C.A.); and *Grant v. Gold Star Realty*, 2011 NSSC 2.

[115] *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [1993] O.J. No. 676 (C.A.), leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 225, is the leading case on loss of chance. Griffiths J.A. stated:

> 32 A second fundamental principle is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed. In those circumstances, rather than refusing to award damages the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis.

He wrote that "in assessing damages the court must discount the value of the chance by the improbability of its occurrence" (¶36). After reviewing the evidence, including that of planning consultants and other experts, the Ontario Court of Appeal awarded only nominal damages, holding at ¶57 that the lost chance of closing the purchase of 147 building lots was "too insubstantial to justify anything more than nominal damages."

[116] Courts assess damages and reduce the quantum in proportion to the contingencies facing the injured party in achieving a successful outcome or benefit. See *Sacks and Seelig v. CMHC*, 2002 BCSC 97. Every case is unique, and a similar environment or aspect will not of itself determine the discount, if any.

[117] I offer two cases as illustrations. In *Kinkel, supra*, the defendant had given the plaintiff an option to repurchase certain shares within nine months, contingent upon the defendant's fulfilling his contractual obligation to call a meeting of shareholders of the company to ratify an earlier transaction. The defendant's failure to call the meeting was a breach of contract but only nominal damages were awarded to the plaintiff. The Supreme Court of Canada concluded at p. 379 that it was a "clear inference" from the evidence the likelihood of a favourable vote was "practically nil" even if the defendant had called the meeting.

[118] *Pharmacie Jean-Sébastien Blais inc. c. Pharmacie Éric Bergeron et André Vincent inc.*, 2018 QCCA 1895 considered loss of a chance in a dispute regarding the pharmacy business. Jacques Lacombe was a pharmacy technician who worked at Pharmacie Blais and held various positions there from 1970 until his resignation in August 2012. He had no written employment contract. Over time, he developed close relationships with the customers. In August 2012, Lacombe resigned and began working at Pharmacie Bergeron et Vincent. Customers quickly switched. Between August 14, 2012 and November 7, 2013, 219 clients asked that their files be transferred from Pharmacie Blais to Pharmacie Bergeron et Vincent.

[119] On appeal, the appellants essentially asked to be compensated for the loss of profits caused by the transfer of customers. The Quebec Court of Appeal noted the reason most customers gave for their departure was a desire to follow Lacombe. The evidence did not show that measures undertaken to secure their retention would likely have been effective, nor how many would have stayed. It concluded the appellants' claim was properly characterized as one of compensation for loss of chance to retain the clientele (¶107). Compensation would flow only if the appellants met the burden of showing that the chance was real, rather than merely hypothetical (¶108–111). It concluded the appellants had failed to demonstrate any real loss of chance and dismissed the appeal.

[120] Usually it is the plaintiff who claims loss of chance of obtaining a benefit had the contract been performed. Here it is the defendants who raise loss of chance, seeking a discount to account for contingencies. There is case law supporting this approach. See, for example, *McDonald's Restaurants of Canada Ltd. v. British Columbia*, [1999] B.C.J. No. 1217.

[121] In urging a 75% discount of the Net Profit, the Chiasson parties argue in their submissions:

> 22. The defendants submit that, had Chiasson understood that CLPL was not permitted to deliver fills to the peninsula as of January 1, 2012, and had he told CLPL's customers that he could not deliver to the peninsula, each affected customer would have had a choice either to remain a customer of CLPL, or to become a customer of another pharmacy. Each such customer would have had the freedom to choose to stay a customer of CLPL, or to use another pharmacy; and, if the latter, a further choice as to which other pharmacy to use.
>
> 23. The record included information showing the existence of customer choice as to alternative pharmacies that is relevant to the court assessing the "improbability of the occurrence" of additional net profit for Scotia Pharmacy. For example, paragraphs 43 to 45 of the Chiasson Affidavit provided the court

> with information regarding the five peninsula-resident individuals who had received fills more than once per month for some time period during the span of January 1, 2012 to December 31, 2017. The court was informed that two of the customers (Customers #105 and #110) had no connection to Scotia Pharmacy. The court was informed that two others had indicated that they were averse to being customers of Scotia Pharmacy (#100 and #127). The fifth – Customer #85 – testified that he had not wanted to use Scotia Pharmacy because he "didn't have transportation to and from that store, so walking home I did not feel safe".
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> 24. Beyond the fact that each CLPL customers [*sic*] would have had a choice to us [*sic*] numerous pharmacies other than CLPL and JCI, it is also relevant to the task of valuing the chance of additional profit for JCI that Chiasson was not obliged to refer CLPL customers to Scotia Pharmacy. If any CLPL customer had opted to cease to be a customer of CLPL, Chiasson could have directed the person away from Scotia Pharmacy and towards any number of other pharmacies.

[122] JCI says to the extent any discount is appropriate, the magnitude should be less than 25%. It makes several arguments.

[123] JCI claims Mr. Chiasson is suggesting that "he would have actively tried to undermine the business he just sold for $2.8 million, for no apparent reason" without any basis in fact, and this is purely self-interested hindsight. I am not persuaded Mr. Chiasson is doing anything more than pointing out, correctly, that he was not contractually required to refer any of City of Lakes' Peninsular Customers to Scotia Pharmacy. There was ample evidence in the record showing the market was "competitive" and customers could freely choose among pharmacies.

[124] Next, JCI puts forward *Unified Freight Services Ltd v. Therriault*, 2006 ABQB 93 to support a lower discount. In that case, which concerned the "fiercely competitive business" of freight forwarding and logistical services, the restrictive covenant prohibited the employee from contacting the employer's customers for a year. The employee was found to have breached the covenant when he wrote customers advising his employment had ended and, if he were ever employed in the same industry again, he would let them know. The court applied only a 25% discount to the damages to account for the chance that the employer may have lost customers in any event (¶96–98).

[125] First, JCI says the breaches of the restrictive covenant in *Unified Freight* were less egregious than those by Mr. Chiasson. It contrasts the employee's letters to customers with what it describes as Mr. Chiasson's active advertising of his breaches. The record shows City of Lakes prominently advertised its delivery

service with a sign across the top of several windows that read: 'Free Delivery Service.'

[126] Second, JCI argues *Unified Freight* is analogous to the case under appeal. In assessing damages, the court observed that during the litigation, the employee failed or refused to produce documentation relevant to damages as ordered; it was "self-serving" to suggest lack of documentation ought to reduce the available damages; and the employee had made his disclosure choices "at his own peril" (¶92 and 94).

[127] *Unified Freight* is distinguishable. Mr. Chiasson ultimately met his disclosure obligations and never refused an order to do so. While the Dartmouth pharmacy's advertisement underscores the breach of restrictive covenant, it does not help with the quantum of damages.

[128] I earlier explained that the damages will depend on the loss caused by deliveries to the Peninsula and not the Net Profit or sales to which the parties referred in their submissions. The Supreme Court of Canada emphasized in *Kinkel* at p. 383 that the plaintiff must prove the opportunity of obtaining a benefit constitutes "some reasonable probability" of realizing "an advantage of some real substantial monetary value."

[129] The Chiasson Affidavit established that City of Lakes had only a handful of Peninsular Customers who received prescription deliveries to the Peninsula more than once a month, most of those would not be patronizing Scotia Pharmacy and the remainder could select from a number of pharmacies. JCI did not present any evidence whatsoever to counter that evidence, to show that it would or could attract those customers, or that it suffered a loss from City of Lakes' deliveries to the Peninsula. It failed to meet the burden of proof on a balance of probabilities that it suffered a loss caused by the breach of the restrictive covenant. There is nothing more than speculation, which is insufficient.

[130] In the circumstances, I would award nominal damages of $1 to acknowledge the breach of contract.

Disposition

[131] I would allow the appeal and award JCI nominal damages of $1. The cross-appeal on costs is moot. The hearing judge erred in his interpretation of the restrictive covenant. City of Lakes' deliveries of prescription medication to

Peninsular Customers during the seven years after the closing of the purchase and sale of the Halifax pharmacy breached that covenant. Moreover, the judge erred in his determination that the court did not have the jurisdiction to decline or reduce pre-judgment interest where the parties had agreed to a contractual rate.

[132] I would set aside the judge's award of costs. As the innocent party to the Chiasson parties' contractual breach, JCI was entitled to the cost of the applications. I would award JCI costs of $38,750 on those applications. I would also set aside the judge's award of contractual interest, which the judge would have denied had he not erred in finding that the court had no discretion to do so. I would award JCI costs on the appeal and cross-appeal of $15,500.

Oland J.A.

Concurred in:

Bryson J.A.

Fichaud J.A.