Court of Queen's Bench of Alberta

Citation: Haack v Secure Energy (Drilling Services) Inc, 2021 ABQB 82

Date:
Docket: 1001 18586
Registry: Calgary

Between:

Robert Bradley Haack

Plaintiff

- and -

Secure Energy (Drilling Services) Inc. (successor by amalgamation to Marquis Alliance Energy Group Inc.), James Anderson, Darryl Deibert, David Rawlyk and George Wadsworth

Defendants

Reasons for Decision
of
Honourable Madam Justice A. Woolley

Introduction

[1] In November 2009, the Marquis Fluids group of companies ("Marquis Fluids") and the Alliance Energy group of companies ("Alliance Energy") merged to form Marquis Alliance Energy Group Inc. ("Marquis Alliance").

[2] While creating great potential for these two privately held drilling services groups, and ultimately leading to a highly profitable acquisition by the Defendant Secure Energy (Drilling Services) Inc. ("Secure"), the merger did not start off smoothly. Marquis Alliance took, for example, months to successfully integrate the Marquis Fluids and Alliance Energy accounting systems, which disrupted internal financial reporting, budgeting and the creation of financial statements. This, along with other problems, led to delays in the completion of its annual audit for the year ending March 31, 2010.

[3] Marquis Alliance's move to shared premises also ran into difficulties. Rushed by the upcoming end of the Alliance Energy lease, it needed to move into its new premises prior to their

completed remodelling. Unfortunately, part of the Marquis Alliance team spent several weeks working in premises under construction.

[4] Marquis Alliance's hope to complete an initial public offering ("IPO") in the fall of 2010 also did not come to pass. In addition to not having timely audited financial statements for the year ending March 31, 2010, it did not have generally accepted accounting principles ("GAAP") compliant financial statements for Marquis Fluids for 2008 and 2009. No steps were taken prior to September 2010 to get GAAP compliant financial statements prepared for Marquis Fluids.

[5] The Defendants in this action, and in particular Marquis Alliance's President, Mr. George Wadsworth, were frustrated by these issues. They also thought they knew who was responsible for them: the Plaintiff Brad Haack, who was Marquis Alliance's Vice President Finance and Accounting. Mr. Haack had previously been the Controller at Marquis Fluids, a position he began full time in March 2009.

[6] Based on Mr. Wadsworth's assessment of Mr. Haack's role in these challenges, and on other issues he identified with Mr. Haack's performance, Marquis Alliance fired Mr. Haack for cause on September 3, 2010. The Marquis Alliance directors also determined that Mr. Haack's conduct constituted cause under the terms of the Unanimous Shareholder Agreement ("USA") to which he was a party as the holder of 1.48% of the common shares in Marquis Alliance. They further decided that Mr. Haack's conduct was sufficient to trigger the penalty clause in the USA, which allowed Marquis Alliance to purchase Mr. Haack's shares for $1.00 on the approval of 100% of the shareholders. The directors recommended to the other 10 shareholders (except Mr. Haack) that they impose this penalty, and the shareholders unanimously agreed to do so. Marquis Alliance, also a party to the USA, accordingly cancelled Mr. Haack's shares and issued him a cheque for $1.00.

[7] Mr. Haack never cashed the cheque. Instead, on December 15, 2010 he commenced an action in this Court claiming that he was wrongfully dismissed by Marquis Alliance. He further claims that Marquis Alliance breached the terms of the USA by cancelling his shares and paying him $1.00. Finally, he claims that the four directors of Marquis Alliance – Mr. Wadsworth, Mr. James Anderson, Mr. Darryl Deibert and Mr. David Rawlyk – acted oppressively, contrary to s. 242 of the *Business Corporations Act*, RSA 2000, c B-9. He seeks compensatory, aggravated and punitive damages.

[8] The Defendants dispute Mr. Haack's claim. They say Marquis Alliance had cause to fire him, and that the cancellation of the shares fell within the terms of the USA. They deny that the directors acted oppressively towards Mr. Haack and dispute his ability to hold the individual Defendants personally liable for what occurred.

[9] For the reasons that follow, I accept Mr. Haack's claim, and find that Marquis Alliance wrongfully terminated his employment, breached its duty of good faith and honest performance, and violated the terms of the USA when purchasing his shares for $1.00. I further find its four directors acted oppressively towards Mr. Haack. I find that Mr. Haack is entitled to compensatory damages from Secure (Marquis Alliance's successor by amalgamation) and (in part) from the four directors personally. I do not, however, make any award of aggravated or punitive damages.

Issues

[10] The issues I must decide are:

(a) Did Marquis Alliance have cause to terminate Mr. Haack's employment?
(b) Did Marquis Alliance breach its duty of good faith and honest performance?
(c) Did Marquis Alliance breach the USA by cancelling Mr. Haack's shares and paying him $1.00 for them?
(d) Did the Defendants act in a manner that was oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, Mr. Haack?
(e) Should the individual Defendants be personally liable?
(f) If Mr. Haack establishes any of the foregoing claims, to what remedy is he entitled?

Background Facts

Marquis Fluids and the Hiring of Mr. Haack

[11] In 1997 Mr. Deibert and Mr. Rawlyk founded what became Marquis Fluids. Although they had little in the way of higher education, and at the beginning the business was not much more than the two of them, by 2009 Marquis Fluid was a successful drilling services business valued at around $60,000,000.

[12] Marquis Fluids was not a single integrated business entity; rather, it was a number of companies with common or related shareholders, working in complimentary aspects of the drilling services industry, primarily in Canada, but with some international operations. The primary companies in Marquis Fluids were Marquis Fluids Partnership, which had two wholly owned subsidiaries, Marquis Fluids Inc. and Marquis Fluids LLC. The significant related companies were Solvex Technologies Inc., a company Mr. Deibert and Mr. Rawlyk created to manufacture chemicals, and Marquis Environmental Ltd., an environmental services company.

[13] Marquis Fluids did not have a well-developed approach to its accounting. Its related companies had different year ends, and their financial statements were reviewed on different bases, with some audited and some subject to less exacting review. In its early years it did not employ a controller or chief financial officer, and it had some difficulty maintaining accurate inventory records. For example, in the 2008 financial statements for Marquis Fluids Partnership, the auditors adjusted its prior year income upwards by $743,924 to reflect "more accurate information on the cost of inventory value on hand". The auditor, Mr. Laberge, testified that the $743,924 adjustment was to correct a material error in the prior year's financial statements.

[14] In its June 9, 2009 report on the March 31, 2009 audited financial statements of Marquis Fluids Partnership, Collins Barrow noted "errors totaling 8.5% of the inventory balance" and recommended that the accounting department review the inventory records "prepared by operations staff for completeness and accuracy". It also recommended formalizing the process of "tracking inventory usage and recording accruals".

[15] In late 2008, Marquis Fluids approached a recruiter about hiring a new controller. One of the people from the recruiting company told Mr. Haack about the opportunity at Marquis Fluids, saying Mr. Haack was well suited for the job. Mr. Haack submitted his resume.

[16] The resume set out Mr. Haack's experience, including his experience in public finance, accounting, and mergers and acquisitions. His resume said that he had "designed and led a $10 million corporate takeover", including through the public reporting process, that he had worked on raising equity and debt, and that he had worked on the preparation of audited financial statements. His resume reflected the fact that Mr. Haack at that time did not have any accounting designations. It also showed that the merger and acquisition activity in which he had been involved in had been relatively modest in scale for the oil and gas industry – a "$10 million corporate takeover" and a "$2 million corporate takeover". No evidence was provided to suggest that Mr. Haack's resume had any inaccuracies or misstatements with respect to his prior experience.

[17] The letters of reference provided for Mr. Haack were generally positive, noting Mr. Haack's skill in raising money and business development. They also emphasized his more relaxed personality, saying he was a "laid back individual and easy to get along with" and "always calm, cool and collected".

[18] Mr. Haack met with Mr. Deibert and Mr. Rawlyk about the position. Mr. Haack recalled that they told him that Marquis Fluids was hiring in part because its prior accountant had made a number of mistakes, and there had been issues with the year-end audit.

[19] Mr. Deibert and Mr. Rawlyk said that they were interested in Mr. Haack because of the nature of his experience and the quality of his references. They felt that Mr. Haack's experience would ensure that the company's finances and accounting were properly looked after.

[20] Mr. Haack, Mr. Deibert and Mr. Rawlyk agreed that Mr. Haack would begin working at Marquis Fluids on a part-time basis in January 2009 and would move to full-time work once he completed consulting contracts on which he was then engaged. Mr. Haack began work at Marquis Fluids on January 16, 2009 and began working there full-time in March 2009.

[21] Mr. Haack did not have an employment contract at Marquis Fluids. The company had prepared one, but Mr. Haack did not sign it because the consulting work he was doing when he started was inconsistent with the terms of the employment contract, and he did not want to sign a contract with which he was not in compliance. A job description produced at trial, and which Mr. Haack agreed was accurate, indicated that as Controller he had broad general responsibility for financial accounting at all of the Marquis Fluids companies. Mr. Haack further testified that in his role he prepared financial statements, worked on budgeting and was the primary liaison for the company's banks and auditors. He also spent considerable time converting the accounting system used by the company from Accpac to SAP Business One.

[22] No issues arose with Mr. Haack's employment at Marquis Fluids. Both Mr. Deibert and Mr. Rawlyk confirmed at trial that they were satisfied with Mr. Haack's work. In June 2009 they increased his salary from $135,000 per year to $160,000. Mr. Haack testified that Mr. Deibert and Mr. Rawlyk told him that they were pleased with his work, particularly with respect to converting the company's accounting system, and ensuring the financial statements were completed. Mr. Deibert and Mr. Rawlyk did not recall this meeting, but Mr. Haack's account is consistent with the tenor of the letter Mr. Deibert send to him dated June 24, 2009, in which Mr. Deibert thanked Mr. Haack for his "efforts in the past months" and said he looked "forward to continued success as we move forward". I accept Mr. Haack's testimony as accurate.

[23] After he joined Marquis Fluids, Mr. Haack and the company entered into an agreement for the company to support him in the completion of his CMA qualification. They signed an agreement dated August 1, 2009 pursuant to which the company agreed to pay his tuition, up to $25,000. Mr. Hack was to complete the program in two years, his doing so was not to interfere with his employment, and he was to reimburse any amounts expended on his behalf if he resigned or was terminated with cause or failed to pass the program.

[24] Mr. Haack successfully completed his CMA in 2011, after he left Marquis Alliance; while at Marquis Alliance he encountered some difficulties in the program, and his study group failed an important assignment in August 2010.

Alliance Energy and the Merger to Create Marquis Alliance

[25] Not long after Mr. Haack joined Marquis Fluids, in the late spring and early summer of 2009, the group began discussing a merger with Alliance Energy.

[26] Alliance Energy was founded by Mr. Darryl Anderson. It was an integrated corporate group, of which Mr. Darryl Anderson was President until he passed away in 2007. Mr. Darryl Anderson had implemented a succession plan for Alliance Energy's shares and management, and under that plan Mr. Wadsworth became President of Alliance Energy. He was one of the significant shareholders in Alliance Energy, along with the Defendant Mr. James Anderson (who I refer to when I say "Mr. Anderson").

[27] The accounting and finance at Alliance Energy were primarily within the responsibility and direction of Ms. Karen Hanson-Parsons, who worked on contract in the role of Vice-President Corporate Development, and of Mr. Jim Lew, who was the Controller.

[28] Ms. Hanson-Parsons is a Chartered Accountant who had significant public accounting experience prior to joining Alliance Energy. She had worked at the company since its inception and had helped Mr. Darryl Anderson to implement his succession plan.

[29] Mr. Lew is (and was in 2009) a Certified Management Accountant with extensive internal accounting expertise but who as of 2009 had no experience in public accounting or finance.

[30] Both Mr. Lew and Ms. Hanson-Parsons had small shareholdings in Alliance Energy which they financed through shareholder loans.

[31] The merger between Marquis Fluids and Alliance Energy concluded on November 27, 2009. The negotiations for the merger took place in the fall of 2009. Mr. Deibert, Mr. Rawlyk and Mr. Haack negotiated on behalf of Marquis Fluids, along with another shareholder and long-time Marquis Fluids employee, Mr. Jay Brockhoff. Mr. Wadsworth, Mr. Anderson and Ms. Hanson-Parsons led the negotiations for Alliance Energy.

[32] The merger had two primary objectives, first, to grow the newly merged company and its businesses and, second, to create a company that would be an effective vehicle for another company's acquisition, a public offering or other profitable exit strategy.

[33] The first objective was what was primarily communicated to the company employees, for example in a presentation dated November 16, 2009. That presentation emphasized the synergy and possibilities for corporate growth and business development, with future plans of expansion. It made no mention of any "exit strategy" for the company.

[34] The second objective was known and discussed amongst the senior corporate management. Most notably, on October 18, 2009 Mr. Wadsworth sent an e-mail to himself of "Sat breakfast meeting notes", which he then forwarded to Mr. Anderson, Mr. Deibert, Mr. Rawlyk and Mr. Michael Grimes. The notes said:

> Ultimate Purpose/Goal of Merger: To position the company for an exit strategy, whether that be direct sale, private Eq or IPO (this goal to remain confidential to the top 3 lines of management only). Goals to help achieve this ultimate goal need to be determined in the form of financial targets, revenue/ebitda and overall market share).

[35] Mr. Rawlyk forwarded this e-mail to Mr. Haack on October 19, 2009.

[36] The Defendants submitted this e-mail as evidence that the primary purpose of the merger was an exit strategy, and to invite the inference that Mr. Haack knew that this was Marquis Alliance's exit strategy and should have had a tight focus on accomplishing that objective in his work as Vice President Finance and Accounting. They emphasize that Mr. Haack agreed in his testimony that he understood that the goal was to sell the business.

[37] While I accept that the corporate leaders of Marquis Alliance aimed to position the new merged entity for sale or public offering, it was not their only goal, and nor was it their primary focus at the outset of the merger. These were two active operating drilling services businesses, and the goals set out in the employee presentation of November 16, 2009 reflected much of what Marquis Alliance hoped to achieve after the merger: growth as one of the largest private integrated drilling fluids, environmental and solids control companies in Canada, and being an innovative leader in all areas. If the merger led to a lucrative takeover or IPO that was all to the good, but the focus in the first instance was on creating a larger, more profitable and successful drilling services, environmental and solids control business.

The Selection and Structure of Senior Management at Marquis Alliance

[38] As part of the merger, the parties had to choose their executive and management team. They chose Mr. Wadsworth to be President of Marquis Alliance. Mr. Rawlyk was the Executive Vice President Canada. Mr. Deibert was the Executive Vice President International. Mr. Anderson was the Vice President Drilling Fluids.

[39] Mr. Haack was selected to be the Vice President Finance and Accounting. He was chosen for this role for several reasons. First, Mr. Deibert and Mr. Rawlyk wanted Mr. Haack to have the job. Mr. Rawlyk testified that he lobbied for Mr. Haack to have the position. They wanted Mr. Haack in the role because they thought his past experience made him better suited to it than the other candidate, Mr. Lew, and because they wanted someone from Marquis Fluids in the position. Mr. Deibert said he thought Mr. Haack would look after their interests.

[40] Second, Ms. Hanson-Parsons, who was by far the most qualified finance and accounting person from either entity, was expecting a child in December 2009 and would not be returning to Marquis Alliance immediately following the merger. Ms. Hanson-Parsons' departure, with the possibility of her ultimate return, meant that the company had two less qualified persons to choose from, Mr. Haack and Mr. Lew, and no driver to look for an external candidate with qualifications more like those of Ms. Hanson-Parsons. Indeed, there is no evidence that anyone at either Marquis Fluids or Alliance Energy considered hiring an external candidate. Rather, they chose between Mr. Lew, who had a CMA but no experience with obtaining financing and

activities associated with a public company, and Mr. Haack who did not have any accounting designation but did have experience with financing and public company activities, albeit on a much smaller scale.

[41] Third, Mr. Haack's financing and public company experience made him the more attractive candidate relative to Mr. Lew. Mr. Deibert, Mr. Rawlyk and Mr. Wadsworth all noted that they viewed this as important for distinguishing Mr. Haack from Mr. Lew and making him more suitable for the Vice President Finance and Accounting role.

[42] Mr. Wadsworth and Mr. Haack gave divergent evidence on whether Mr. Haack approached Mr. Wadsworth for the position, or Mr. Wadsworth approached Mr. Haack. The evidence of Mr. Deibert and Mr. Rawlyk suggests, however, that both these perspectives are truthful if incomplete: the evidence shows that Mr. Deibert and Mr. Rawlyk approached Mr. Wadsworth to advocate for Mr. Haack, and that they asked Mr. Haack to take on the position. They were the people who drove the selection.

[43] Once this was agreed upon, the parties decided that Mr. Lew would be the Controller, and would report to Mr. Haack. At the same time, however, Mr. Lew also had numerous direct reports beneath him. Mr. Haack testified that he understood the reporting relationship as more formal than real; he understood Mr. Lew to in effect report directly to Mr. Wadsworth. Both Mr. Lew and Mr. Wadsworth maintained that that was not the case, and they and other witnesses emphasized the formal reporting relationship between Mr. Haack and Mr. Lew.

[44] I find that while Mr. Lew was functionally under Mr. Haack's supervision within the Marquis Alliance organization, the relationship between them was more one of equals than of supervisor/subordinate. The evidence as a whole does not suggest to me that Mr. Haack had meaningful power over Mr. Lew. Mr. Lew and Mr. Haack were on the same reporting level (both senior management team 3). They had the same shareholdings in the company. They had similar qualifications. Mr. Lew did not go to Mr. Haack when he had issues with his work. Mr. Haack seems never to have been directive or critical of Mr. Lew, even when problems arose with the accounting integration and reporting. Mr. Lew exercised sole power over the front-line accounting functions at Marquis Alliance, having staff reporting directly to him and declining to allow Mr. Haack to have access to the accounting system, even though Mr. Haack asked for that access. Mr. Lew says that Mr. Haack could have insisted on it. I assess this claim below; however, regardless of whether Mr. Haack could have insisted on access, I think it significant for the characterization of their relationship that Mr. Lew saw fit to refuse it in the first instance. That is not the action of a person who views himself as a subordinate. Based on the evidence, I think it highly unlikely that, for example, Mr. Haack could have sanctioned Mr. Lew or terminated his employment, unless Mr. Wadsworth approved him doing so.

[45] Having characterized the working relationship between Mr. Haack and Mr. Lew as one of equals, I nonetheless accept that the division of responsibility for work at Marquis Alliance reflected the different roles they had been given and gave Mr. Haack a supervisory role in relation to the financial and accounting work. When the company completed auditing and financial reporting, for example, Mr. Haack's job was supervisory. Mr. Lew's job was to complete the front-line accounting, either by doing the work himself or supervising it being done by others. That hierarchical division of labour was, though, a method for getting the work done, rather than reflecting a hierarchical relationship between Mr. Haack and Mr. Lew.

[46] In viewing the relationship in this way, I have not accepted in its entirety either the characterization offered by Mr. Haack, or by Mr. Lew and Mr. Wadsworth. Mr. Haack characterized the relationship as one of equals with distinct roles and responsibilities, while Mr. Lew and Mr. Wadsworth characterized it as entirely hierarchical. I have found instead that from a personnel perspective the relationship was one of equals, but from a functional perspective it was hierarchical. My view reflects the substance of what the witnesses, and in particular Mr. Haack and Mr. Lew, said about their work and working relationship, rather than how they characterized it.

[47] I note in this respect that Mr. Haack never received a job description with respect to his work at Marquis Alliance. He did not have an employment contract. At no time did he receive a formal performance review, and no written documentation was provided with respect to reports regarding his performance. Mr. Wadsworth testified as to his expectations of Mr. Haack, as did Mr. Anderson and Mr. Deibert, but those expectations were not communicated to Mr. Haack in any written form produced in this litigation or recalled by witnesses.

Marquis Alliance Shareholders and the Unanimous Shareholders Agreement

[48] The newly merged entity, Marquis Alliance, had 15 shareholders, one of whom was Mr. Haack. Mr. Haack had not held shares in Marquis Fluids; however, to reflect their appreciation of his work during the prior year, Mr. Deibert and Mr. Rawlyk gifted him 14,800 common shares in Marquis Alliance. They did not make him pay for the shares. Instead, they gave them to him in return for the work he had already done, with Mr. Deibert saying in an e-mail "Obviously we have recognized your contribution to Marquis and believe it requires a reward doing forward. Looking fwd to new opportunities for sure", and Mr. Rawlyk adding "Ditto. Giddyup".

[49] The other shareholders, who held their shares either personally or through a holding company, were Mr. Anderson, Mr. Brockhoff, Mr. Corbin Coyes, Mr. Mike Curran, Mr. Deibert, Mr. Randy Foss, Mr. Grimes, Ms. Hanson-Parsons, Mr. Lew, Mr. Rick Manhas, Mr. Dan Mellersh, Mr. Rawlyk, Mr. Wadsworth and Mr. Brad Woods.

[50] All of the shareholders at the time of the merger worked at Marquis Alliance.

[51] At the time of the merger, the shareholders and Marquis Alliance entered into the USA, with an effective date of November 26, 2009. The USA was agreed to by each shareholder personally, a second time by those shareholders who were representatives of a holding company, and by Mr. Wadsworth on behalf of Marquis Alliance.

[52] The specifics of the USA, and the circumstances surrounding its creation, will be discussed below, but six features of it are noted here for context.

[53] First, the USA set out the proportion of the shares held by each shareholder. Mr. Anderson and Mr. Wadsworth each held 9.2466% of the common shares, and 13.1848% of the Class B Series 2 preferred Shares. Mr. Deibert and Mr. Rawlyk (directly and through holding companies), each held 15.19% of the common shares, and 21.97% of the Class B Series 1 preferred shares. Mr. Haack, Mr. Lew and Ms. Hanson-Parsons each held 1.48% of the common shares, and no preferred shares.

[54] Second, the USA said that the shareholders acknowledged the provisions of the *Business Corporations Act* (Alberta) requiring "directors to make certain disclosures and to abstain from voting on certain transactions in which they have an interest" (Clause 4.2).

[55] Third, the USA set out the membership of the board of directors for Marquis Alliance. It required that the board should have at least one and no more than nine members. It required that for the first two years the board would be limited to four people, two of whom would be former Marquis Fluids shareholders and two of whom would be former Alliance Energy shareholders. It said that after two years, the number of directors and the nominees would be "determined by ordinary resolution of the holders of common shares" (Clause 4.3).

[56] Fourth, it placed restrictions on the transfer and sale of shares (Clause 6.12 and 6.13) and gave the company a right of first refusal (Clause 7.1). It provided a mechanism for the determination of the purchase price in those circumstances, either through agreement with the board or valuation (Clause 7.1; Clause 10.3).

[57] Fifth, it created a category of "Withdrawing Shareholder" which included an employee who quit, or an employee who was fired for cause, but did not include an employee who was terminated on notice. This clause specified termination for cause as "a Shareholder…who ceases to be an employee…due to dismissal for cause, as determined by those directors who are independent" (Clause 9.1(a)(ix)).

[58] Sixth, it provided that when a shareholder became a "Withdrawing Shareholder" that would be viewed as a "Withdrawing Event" which would trigger a process for the acquisition of the Withdrawing Shareholder's shares, and further explained what that process would require (Clauses 9.2 and 10.1-10.3). In so doing it imposed discounts to the purchase price if an employee quit within the first three years, a 30% discount to the purchase price where the Withdrawing Shareholder was terminated for cause, and a further punitive discount:

> In the event of dismissal for cause involving or relating in any way to any alleged illegal, fraudulent or criminal act of a serious nature that occurs in connection with the employment of the Shareholder or the Principal Shareholder of a Corporate Shareholder or otherwise causes or is reasonably likely to cause significant damage to the Company, AND one hundred percent (100%) of the Shareholders (other than the Withdrawing Shareholder) shall have unanimously agreed, the aggregate purchase price of the Shares shall be discounted to $1.00 (Clause 10.3(h)(ii)).

Termination of Mr. Haack's Employment

[59] The key events following the merger in relation to Mr. Haack's employment, including those leading up to its termination, are discussed below; here I jump ahead to how the decision to terminate was communicated to Mr. Haack, and key events that occurred at that time.

[60] On August 26, 2010 Mr. Haack was told that Mr. Wadsworth wanted to meet with him the next day to discuss Marquis Alliance's problems obtaining financial and accounting records from its Syria joint venture.

[61] When Mr. Haack got to the meeting, Mr. Wadsworth was there, along with Mr. Anderson and Mr. Rawlyk. They told him that they were not happy with his performance and wanted him to quit. They offered him a package he could receive in the event he quit, and told him that, if he did not accept the proposal, they would be firing him for cause.

[62] The proposal was set out in a letter. Ms. Morgan and Mr. Tosto for the Defendants argued that the letter fell within settlement privilege and ought not to be considered by me. Ms. Osaka countered on behalf of Mr. Haack that the letter did not contain a *bona fide* offer of

settlement but was rather, in combination with the threat to fire him for cause, an attempt to pressure Mr. Haack into quitting and giving up his shares. I allowed the letter to be used to question witnesses at trial but reserved my decision as to its admissibility.

[63] In my view, the letter is admissible as relevant evidence, and does not fall within settlement privilege. It was not part of a *bona fide* attempt to effect a settlement: ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37 at para 24.

[64] Mr. Haack was given a choice between two options, one of which was set out in the letter, but giving him that choice does not make the letter "communications exchanged by parties as they try to settle a dispute": ***Union Carbide Inc v Bombardier Inc***, 2014 SCC 35 at para 31. The letter was given to Mr. Haack with a direction – accept this or be fired for cause; it did not begin, and was not intended to begin, a discussion about how to settle the parties' dispute. It was a take it or leave it proposition: ***Tracey v Grant***, 2015 CanLII 15848 (NLSC) at para 40; ***Toronto Transit Commission v Amalgamated Transit Union, Local 113***, 2019 CanLII 22225 (ON LA) at 16.

[65] Both Mr. Haack and Mr. Wadsworth suggested that one adjustment was made to the proposal in the letter after August 27, that small adjustment (the details of which they recalled differently) did not change the character of the letter or what it was intended to do. Further, that Marquis Alliance put the words "without prejudice" on the document does not change my analysis. The question of settlement privilege must be assessed in light of the contents of the document and the parties' intentions in relation to it. While adding the words "without prejudice" is relevant to understanding those intentions, it cannot change a document's fundamental character: ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd.***, 2013 ABCA 10 at para 25.

[66] Alberta case law that predates ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37, but which provides guidance consistent with that decision, directs the Court to consider "(a) the existence, or contemplation, of a litigious dispute; (b) an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed; and (c) the purpose of the communication must be to attempt to effect a settlement.": ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd.***, 2013 ABCA 10 at para 15.

[67] While I had a vigorous exchange with Ms. Morgan on this point, I accept her submission that, when this letter was provided to Mr. Haack, a litigious dispute was contemplated. For the reasons noted, however, I am not satisfied that this was an attempt to effect a settlement, or an effort to negotiate that either party would have anticipated being kept private and out of proceedings. The point of the letter was to push Mr. Haack to leave on terms acceptable to Marquis Alliance; it was not to negotiate with him about those terms.

[68] I note in respect that the offer contained in the letter was not wholly unreasonable with respect to the amount Mr. Haack could have expected to have been paid in notice. As will be discussed in relation to the share valuation, however, the offer made for the shares represented only a fraction of their value.

[69] There are circumstances in which a "take it or leave it" offer could be understood as part of a *bona fide* settlement process; here, however, both the context in which the offer was made, and its content, support the conclusion that it was not.

[70] Having concluded that the letter was admissible, however, I add that the contents of the letter have relevance primarily for providing a full picture of the events surrounding Mr. Haack'

termination. Ultimately none of my findings of liability against the Defendants depend on the contents of this letter, or the manner of its delivery to Mr. Haack. In particular, as explained below, I do not accept Mr. Haack's argument that this letter forms part of the oppressive conduct by the directors of Marquis Alliance.

[71] The letter began:

> Further to our recent discussions and our meeting today, wherein we discussed your employment with Marquis Alliance Energy Group Inc. ("the Company"), we confirm our advice to you that the Company is prepared to accept your resignation tendered on or before 4:00 p.m. on September 1, 2010, in exchange for the settlement offer set out below, including completion of all required action items by you and the return of an original executed copy of the enclosed release. The settlement offer is intended to bring your employment relationship to a fair and respectful conclusion for both you and the Company.
>
> We further confirm that in the event you do not accept the Company's settlement offer your employment will be terminated for just cause on September 2, 2010.

[72] The letter offered Mr. Haack $50,000 as a retiring allowance and another $50,000 for the purchase of his shares. It also offered him forgiveness of the reimbursement amount in the Tuition Agreement. It said that he would be given a record of employment and a letter of reference. It required Mr. Haack to submit a letter of resignation, return all company property, return all company information and sign a release and acknowledgement of his duty of confidentiality and of his non-compete obligations provided for in the USA.

[73] The letter was prepared by Mr. Wadsworth. Mr. Wadsworth said that in giving Mr. Haack this letter he was trying to give Mr. Haack an opportunity to leave the company with grace. It was better for Mr. Haack, and better for the rest of the employees, then telling people he had been fired with cause. Mr. Wadsworth acknowledged that he knew that if he did not terminate Mr. Haack for cause then there was no mechanism through which the company could purchase his shares. He maintained, however, that he believed as of August 27th that Marquis Alliance both had cause to terminate Mr. Haack and the ability to exercise the power under Clause 10.3(h)(ii) of the USA to take Mr. Haack's shares for $1.00.

[74] Mr. Haack was surprised and upset by the meeting. He did not know that Mr. Wadsworth or others at Marquis Alliance had issues with his employment.

[75] After the meeting Mr. Haack continued working on matters for Marquis Alliance. He was not asked to leave the premises, and none of his executive authority – for example, his signing authority – was removed.

[76] Mr. Wadsworth thought that Mr. Haack would accept the offer. He said in an e-mail to Mr. Perera dated August 28, 2010, "he was shocked, he was sure he was going to be our cfo. Anyways, I think its over unless he had a bad weekend and shows up monday with a gun, so I decided to leave, in london on route to Syria".

[77] Mr. Wadsworth said that the reference to a gun was facetious, and Mr. Perera said the e-mail reflected Mr. Wadsworth's sense of humour.

[78] Mr. Haack considered whether to accept the proposal set out in the August 27, 2010 letter. As part of his process for deciding whether to do so, he e-mailed confidential information

and documents about Marquis Alliance to the personal e-mail account he shared with his wife. His e-mailing of those confidential documents to a personal shared account, and whether it supports Marquis Alliance's termination of his employment, is discussed further below.

[79] Mr. Haack decided not to accept the proposal.

[80] By way of a letter dated September 3, 2010, Marquis Alliance officially terminated Mr. Haack's employment. The letter listed the following performance issues:

> 1. lack of proper management of financial reporting and audits, costing additional fees and delays in the process to complete an IPO;
>
> 2. loss of trust and confidence in your ability to perform the duties required of the position;
>
> 3. absences from the office which caused delays in financial reporting;
>
> 4. loss of trust and confidence in your handling of confidential and personal information;
>
> 5. use of company time to perform non-company work; and
>
> 6. poor leadership skills and judgment in working with subordinates.

[81] Between August 27 and September 3, 2010, the Board initiated the process under the USA for taking Mr. Haack's shares.

[82] First, Mr. Wadsworth prepared a memorandum to the "Independent Directors" of Marquis Alliance which explained Marquis Alliance's reasons for dismissal as follows:

> During Brad Haack's short tenure with the company, he has engaged in the following conduct:
>
> > 1. he has discussed his personal financial issues such as compensation with his direct reports while conducting their performance appraisals, telling his direct reports that they shouldn't be concerned about their own issues, as his are more important;
> >
> > 2. he has disclosed and discussed confidential partner compensation and personal financial information (net worth information) without consent, with employees;
> >
> > 3. he did not disclose to the company that he was engaged to perform consulting work for third parties and he has used company time to perform his consulting work;
> >
> > 4. while in the process for filling for an IPO, he did not discuss the process with the company's audit partners after repeated requests from George Wadsworth to do so, resulting in the audit having to be reconfigured and delayed. Arising from this issue is the concern that Brad does not have full knowledge or understanding of the IPO process and does not have the skill and ability required to properly perform in the role. The work Brad directed to be performed by the auditors was not appropriate for an IPO, which resulted in additional costs to the company. This also

resulted in a different mandate to the auditors and a delay of 2-3 months for the IPO;

5. in the past 6 months, he has spent over 30 business days away from the office on holidays, without discussing his absence in advance with the President or confirming that it would be acceptable for him to be absent at the times he was requesting;

6. the company has been without financial reports for nearly 10 months;

7. as project manager of the office move, he failed to communicate appropriate instructions to the contractors which resulted in our employees being required to work in a demolition zone for over 5 weeks;

8. he often has not put in full 40 hr work weeks but passes down his work to his employees causing some of them to work extremely long hours;

9. he is unable to create a legible budget; his first attempts were inadequate and it was requested that his Controller perform the task;

10. employees have complained about his conduct and performance, indicating that they have a lack of respect and zero trust towards him. The HR Coordinator requested that she report to someone else or she would resign;

11. he held up the RRSP process by leaving the required documents on his desk, and when asked about it, he lied and said the document did not exist and he had signed nothing; yet it was confirmed by our Benefits provider and Sterling Brad had the documents and approved the change in funds. This approval was done without the knowledge of any EVPs or the President. This delay and action delayed the RRSP rollout process to the company by 2 months.

12. Discussions from our audit partner revealed serious concerns with the inability of Brad to conduct the appropriate actions in getting the required reporting complete.

13. Back in February of 2010 it was revealed that Brad was providing outside consulting services without approval. Brad was asked to stop providing these additional services as he was an employee and shareholder of MA.

As a result of the above conduct and issues, which have resulted in costs, delay, loss of trust and confidence and loss of respect, it is recommended that Brad Haack be dismissed for just cause.

[83] Mr. Wadsworth said he investigated the allegations in the memorandum. On being asked "what steps were taken, what investigations were conducted prior to that meeting", Mr. Wadsworth said:

> First of all, I consulted with our human resource consultant, Mr. Perera, we went through, you know the issues that we were having. I then consulted with legal counsel, Mr. Bruce Lawrence and he referred me to their human resource legal counsel, which was Laurie Robson. And we discussed a bit of a plan in terms of, you know, what -- you know what I thought was best for the corporation, whether or not, just remove Brad from his position and he continues on with Marquis Alliance. We went through the conversation process and determined that, you know, myself and other individuals in the organization had lost complete trust in him and that he had caused probably some significant damage to the organization that we needed to -- we needed to fix and we needed to remove him from the organization.

[84] No contemporaneous documentation supports Mr. Wadsworth's claim to have investigated Mr. Haack's conduct. He does not suggest here that he spoke to Mr. Haack about the issues identified in the memorandum. None of the people he said that he did speak with – Mr. Perera, Mr. Lawrence or Ms. Robson – would have had any knowledge of the events giving rise to the allegations against Mr. Haack. Only Mr. Perera had worked with Mr. Haack, and he had done so only in a limited capacity. Speaking to these advisors would have given Mr. Wadsworth guidance with respect to whether the allegations constituted cause in law but would not have helped him discover whether the allegations were true.

[85] As will be discussed below, had an investigation occurred it would have revealed the inaccuracy of a number of the allegations in Mr. Wadsworth's memorandum. For example, contemporaneous documentation shows that to the extent Mr. Haack had any responsibility for the delay in the RSP roll out, his contribution to the delay was one to two weeks, not two months. He did not receive the "required documents" noted at paragraph 11 from the RSP provider until more than two weeks after the planned roll out date had passed, and five weeks after Marquis Alliance had requested them.

[86] Based on the evidence as a whole – other aspects of which I discuss later in assessing the specific allegations against Mr. Haack – I find that Mr. Wadsworth did not investigate prior to preparing the memorandum to the Board. He did not take steps to verify and confirm the accuracy of the allegations it contained.

[87] This memorandum was discussed at a Board meeting on or about September 2, 2010. Mr. Wadsworth presented the memorandum and he and the other directors initialled it. They signed a directors' resolution stating that Clause 10.3(h)(ii) gives Marquis Alliance the power to pay $1.00 for the shares if 100% of the Shareholders agree and "the directors have determined that the actions of the VP have caused or are reasonably likely to cause significant damage to the Corporation". The resolution further stated that the actions of Mr. Haack described in Mr. Wadsworth's memorandum had "caused or are reasonably likely to cause significant damages to the Corporation". The resolution said that the directors agreed to recommend to the shareholders that Mr. Haack's shares be purchased for $1.00 and that they empowered Mr. Wadsworth to take the steps necessary to pursue this course of action.

[88] It is not clear whether all of the directors attended the meeting and signed the documents at the meeting. They all claimed to have done so at trial but during questioning in 2014 Mr. Deibert said he was not at the meeting. I prefer Mr. Deibert's earlier evidence on this point as closer in time, unambiguous and more likely to be accurate; however, whether or not he was at the meeting, he saw the memorandum and signed it, and also signed the resolution.

[89] In general, Mr. Anderson, Mr. Deibert and Mr. Rawlyk did not claim to have personal knowledge with respect to the allegations against Mr. Haack set out in Mr. Wadsworth's memorandum. They had some knowledge of the problems it referenced – for example, Mr. Anderson and Mr. Deibert knew that financial reports had not been prepared, and Mr. Anderson mentioned that often when he looked for Mr. Haack in the office Mr. Haack was not there – but for the most part they relied on the information contained in Mr. Wadsworth's memorandum and provided by him at the meeting.

[90] Mr. Anderson, Mr. Deibert and Mr. Rawlyk also did not conduct any independent investigation of the allegations. Mr. Rawlyk said he did not conduct any investigation; Mr. Deibert referenced having done an informal investigation, but that seemed to consist only of talking to the other directors. Mr. Anderson referenced his own limited information about the various allegations but did not describe any further or broader investigation.

[91] Mr. Wadsworth suggested that the other directors would have had the opportunity to investigate; however, he acknowledged that that opportunity existed prior to them receiving this memorandum, not after.

[92] Based on the evidence, I am satisfied that the directors did not investigate before or after receiving the memorandum.

[93] All four directors suggested that the allegations against Mr. Haack, and how to respond, were discussed at the meeting. None of them could recall the specifics of that discussion, and no notes, minutes or contemporaneous documentation other than the memorandum and directors' resolution, were provided to the Court to confirm what was said. All of the directors acknowledged that they relied on Mr. Wadsworth's memorandum and the information it provided with respect to Mr. Haack's performance. I am satisfied that Mr. Anderson, Mr. Deibert and Mr. Rawlyk made their decision based on Mr. Wadsworth's memorandum and information, or relying on their own limited knowledge. They did not challenge Mr. Wadsworth or meaningfully discuss the accuracy of the allegations made in the memorandum. They did not talk about whether they were sufficient to give Marquis Alliance cause, or to justify appropriating Mr. Haack's shares under Clause 10.3(h)(ii).

[94] After the directors' meeting, a shareholders' meeting was scheduled for September 13, 2020. Most of the shareholders attended; those who did not were approached later to obtain their agreement to the proposed shareholders' resolution. As was the case with the directors' meeting, those who recalled attending the meetings said that there was a discussion of the decision to terminate Mr. Haack's employment.

[95] Ms. Hanson-Parsons said the discussion focused on the provision in the USA and the rationale for a nominal buyback provision. She also recalled the points in Mr. Wadsworth's memorandum being reviewed with the shareholders. Mr. Lew recalled them being told the reasons for dismissing Mr. Haack but did not recall there being a lot of questions or discussion with the shareholders. Mr. Wadsworth said that the shareholders would have received the

memorandum and that they discussed it along with the terms of the USA; he also said he had one-on-one discussions with shareholders who were not at the meeting. Mr. Anderson said that they discussed the topics set out in Mr. Wadsworth's memorandum, and that he shared with the group his grievances with respect to Mr. Haack. Mr. Deibert said there was a discussion, but he could not recall what was said.

[96] No notes, minutes or contemporaneous record with respect to the shareholders' meeting, except the memorandum and resolution, were presented as evidence.

[97] Based on the evidence, I find that, as was the case with the directors' meeting, the shareholders relied on the information they were provided with respect to the basis for Mr. Haack's termination, and did not investigate or question that information. I also find that while it is more likely than not that the shareholders were not provided a copy of Mr. Wadsworth's memorandum, they were told the allegations against Mr. Haack based on the contents of that memorandum and were advised of the directors' recommendation as set out in the directors' resolution.

[98] Fundamentally, the shareholders accepted and relied on the directors' decisions in deciding how to proceed, rather than making their own determination. As the shareholders' resolution explicitly sets out, the shareholders had been informed that the directors had decided they had cause to fire Mr. Haack and the directors had determined that "the actions of the VP have caused or are reasonably likely to cause significant damage to the Corporation". The recitals to the shareholders' resolution indicate that the shareholders knew of and relied on those decisions in resolving that Marquis Alliance ought to purchase Mr. Haack's shares for $1.00. Those recitals are, in my view, an accurate reflection of how the decision by the shareholders was made.

[99] I also find that the shareholders had only a limited understanding of Clause 10.3(h)(ii) and were relying on information provided to them about that clause by the directors and by Ms. Hanson-Parsons. Ms. Hanson-Parsons said she answered questions about Clause 10.3(h)(ii) because, she said, she was one of the more knowledgeable people with respect to the USA.

[100] In testimony the shareholders (including the directors) did not explain their decision in reference to the words in Clause 10.3(h)(ii); they gave varying explanations as to why they cancelled Mr. Haack's shares and none of them demonstrated any real engagement with the language in that clause. Ms. Hanson-Parsons said she signed the resolution because she believed it was in the interests of shareholders, and because Mr. Haack's actions and decisions risked a loss of value for the shareholders. Mr. Rawlyk said he signed the resolution because they needed unanimous agreement to take Mr. Haack's shares. He said that since Mr. Haack had not accepted the original offer for severance, they were going to exercise their right to take the shares for $1.00. Mr. Deibert said he agreed with what was proposed and understood the concern to be with Mr. Haack harming the corporation. He said that he agreed that the grounds identified by Mr. Wadsworth were sufficient to push Mr. Haack out of the business. Mr. Lew said that he signed the resolution because he felt it was in the best interests of the company and he agreed with the dismissal. On being presented with the terms of the resolution, which explicitly refers to the issue of damage to the company, Mr. Lew agreed that damage was a concern; I do not, however, put much weight on that aspect of his testimony.

[101] Unaware of the steps that were being taken to appropriate his shares, on or about September 14, 2010 Mr. Haack wrote to the Board of Marquis Alliance. He said that since no

withdrawing event was triggered, he had the option of continuing to hold his shares. He said, "Alternatively a mutually agreeable negotiation could be done to arrange a voluntary sale of my shares". Mr. Haack suggested in his testimony that he was hoping to keep the shares to sell them as part of any IPO.

[102] Mr. Haack had also written to Marquis Alliance on September 7, 2010, noting that he had earned 17 days of holiday in 2010, had taken 14 days, and was entitled to pay for his unused vacation time. He also asked for an accounting of balances within his corporate RSP account.

[103] Mr. Haack was ultimately paid $1903.86 in owed vacation pay.

[104] On September 23, 2010 Mr. Haack received a letter from Mr. Lawrence at Borden Ladner Gervais ("BLG") advising him that Marquis Alliance was purchasing his shares in the company for $1.00. The letter enclosed a cheque for $1.00, which Mr. Haack never cashed.

[105] On December 15, 2010 Mr. Haack commenced this action.

[106] After he did so, in early 2011, Marquis Alliance issued him a revised T4 adding to his employment income a taxable benefit related to the shares he received in Marquis Alliance in the amount of $144,457. Mr. Haack contested the accuracy of this T4 in a letter to the CRA dated March 20, 2011.

[107] During the course of Mr. Haack's efforts to resolve this problem with the CRA, Marquis Alliance sent out a second amended T4, which included the share amount but categorized it differently.

[108] Revenue Canada ultimately reversed the addition of any share amount to Mr. Haack's T4, by way of a letter dated August 27, 2014.

[109] Secure provided no explanation as to why the adjusted T4 was issued to Mr. Haack. The share value of $144,457 was the same as the amount of Ms. Hanson-Parsons' shareholder loan related to her shares in Marquis Alliance. Ms. Hanson-Parsons held the same number of shares as Mr. Haack. This source of the number suggests that someone at the company specifically decided to make this adjustment to Mr. Haack's T4, and identified the basis on which the adjustment ought to be made. There was, however, no evidence with respect to who that was, or why the adjustment was made.

Analysis

Burden and Standard of Proof

[110] As a general matter, the burden of proof to prove a civil claim lies with the plaintiff: ***Jacobs v PHAT Training Inc.***, 2014 ABQB 100 at para 47. The allocation of the burden is, however, more complicated in wrongful dismissal cases. In wrongful dismissal cases the plaintiff must show that they worked for the employer and were terminated; if the defendant employer alleges cause, the burden of proof for establishing cause lies with the defendant employer. If the plaintiff employee alleges that misconduct occurred but that the employer condoned that misconduct, then the burden of proof lies with the plaintiff employee: ***Foerderer v Nova Chemicals Corporation***, 2007 ABQB 349 at para 63.

[111] The standard of proof, as in all civil cases, is one of proof on the balance of probabilities, which requires determining whether it is "more likely than not that the event occurred": ***FH v***

McDougall, 2008 SCC 53 at para 49. In every case, the evidence must be "scrutinized with care" and must be "sufficiently clear, convincing and cogent to satisfy the balance of probabilities": ***McDougall*** at para 46.

[112] Evidence supporting a claim may be direct or circumstantial; it may on its own support the conclusion that the event occurred (re whether it was raining: "I saw it raining"), or it may do so only because it supports the inference that the event occurred (re whether it was raining: "I saw a person wearing a wet raincoat"): ***R v Villaroman***, 2016 SCC 33 at para 23. Inferences must be reasonable, and they must be based on proven facts, and in considering whether to draw the invited inference the trier of fact must also consider other reasonable or plausible theories "based on logic and experience". The trier of fact must not use speculation either to support or reject the suggested inference: ***Villaroman*** at paras 32-37.

[113] In criminal law, the issue is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty": ***R v Villaroman***, 2016 SCC 33 at para 38.

[114] In civil cases, where there is no presumption of innocence, the issue is less singular and can be articulated as: whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting the inference that it is more likely than not that the event occurred. In assessing the circumstantial evidence, the judge ought to take into account reasonable and plausible theories that support the invited inference, and those that contradict it, but must not use mere speculation to either reject or accept the invited inference. Cases that discuss or mention the use of ***R v Villaroman*** in civil cases include ***R v Precision Drilling Ltd.***, 2016 ABQB 518 at paras 50-51; ***Hutchinson v R L Macdonald Investments Limited***, 2018 NSSC 248 at para 39; ***E. Weyman Construction (1989) Limited v Tutty***, 2018 NSSC 328 at para 203.

[115] The parties did not disagree on the question of burden of proof and did not discuss the issue of standard of proof or the use of circumstantial evidence. I have, however, directed myself to consider these matters because of the nature of the Secure's claim that Marquis Alliance had cause to fire Mr. Haack and, in particular, the nature of the evidence it offers in support of that claim.

[116] Secure says that Marquis Alliance had cause because Mr. Haack was incompetent, that he did not act with diligence in his employment, and that he was responsible for poor or disadvantageous outcomes suffered by Marquis Alliance during his time as Vice-President Finance and Accounting. To support this argument, Secure identifies numerous instances of allegedly poor outcomes suffered by Marquis Alliance during this time period which, it says, are sufficient to show it had cause to fire Mr. Haack. They also identify several instances of Mr. Haack's alleged lack of diligence and effort.

[117] For the most part, however, Secure's evidence does not directly show a connection between Mr. Haack's work and the poor outcome. Also, in general it does not provide direct evidence of Mr. Haack's lack of diligence or effort. Rather, Secure's evidence is largely circumstantial. Secure asks me to infer from the evidence that Mr. Haack was responsible for the poor outcome, and that Mr. Haack did not work hard or diligently. To illustrate by example, Secure asks me to conclude that Mr. Haack took 30 days of vacation over six months, and did not work forty hours a week, based on Mr. Anderson and Mr. Wadsworth's testimony that they went to Mr. Haack's desk and did not find him there.

[118] The questions thus are: at what point, if any, is this circumstantial evidence sufficient to establish that Marquis Alliance suffered a poor outcome for which Mr. Haack ought to be held responsible? At what point, if any, does it show that Mr. Haack lacked diligence and effort in his work? Because it is only once Mr. Haack has been shown to have been responsible for a poor outcome, and to have shown a lack of diligence and effort, that I can assess whether his conduct in this respect was sufficient to give Marquis Alliance cause to have fired him. Again, to illustrate by example, it is only if I conclude that the evidence establishes that Mr. Haack took 30 days of vacation over six months that I can assess whether taking that vacation (along with anything else proven) was sufficient to constitute cause.

[119] The case law on standard of proof and circumstantial evidence directs me to decide whether the evidence, either directly or through reasonably supporting an inference, shows that it is more likely than not that the events occurred, and that Mr. Haack was responsible for them. I may consider reasonably supported contrary inferences in making this assessment, but I must not speculate about what happened during the time of Mr. Haack's employment at Marquis Alliance.

Credibility

[120] For reasons I discuss further below, I have reservations about the truthfulness and credibility of two Defendant witnesses, Mr. Lew and Mr. Wadsworth.

[121] Mr. Lew made serious allegations about Mr. Haack, and in particular, with respect to Mr. Haack's accounting work at Marquis Fluids. He blamed Mr. Haack for the inventory issues at Marquis Fluids that created problems with the accounting integration.

[122] Yet, the contemporaneous record, with which Mr. Lew would be familiar now, and was likely familiar with then, contradicts those allegations. Further, Mr. Lew's own basis for making the allegations was weak. He had not worked with Mr. Haack at Marquis Fluids; he was inferring what Mr. Haack had done without any direct knowledge about what had occurred.

[123] In essence, Mr. Lew had no personal knowledge of Mr. Haack's work at Marquis Fluids, but nonetheless drew an adverse inference that Mr. Haack was responsible for material accounting problems there. Further, he drew the adverse inference despite the contemporaneous records which show that that adverse inference was unfounded. Mr. Lew's willingness to make thinly justified allegations that the contemporaneous record contradicts, along with his barely disguised disdain for Mr. Haack in his testimony, make me doubt the credibility of his evidence as a whole. Where the evidence of Mr. Lew and Mr. Haack conflicts, I prefer the evidence of Mr. Haack.

[124] In 2010, Mr. Wadsworth made several allegations against Mr. Haack which either he had no evidence for, or which were contradicted by the contemporaneous evidence. The clearest examples of this are with respect to the external consulting, the RSP roll out and Mr. Haack's vacation days. Then, in his testimony before me, Mr. Wadsworth did not resile from, and even reiterated, these allegations. I found Mr. Wadsworth's evidence in general to be self-serving. As a result, where the evidence of Mr. Wadsworth and Mr. Haack conflicts, I prefer the evidence of Mr. Haack.

[125] I note in this respect that I generally found Mr. Haack to be a credible witness. His evidence aligned with the documentary record. While some of my findings of fact do not match entirely with his evidence, in those instances the differences are ones of emphasis, not because his evidence was shown to be unreliable.

Wrongful Dismissal

[126] In assessing an employer's claim that it had cause to fire an employee, the Court must consider three things:

> (i) The nature and extent of the employee's conduct;
> (ii) The surrounding circumstances of the employee (e.g., seniority, job description, obligations and responsibilities) and of the employer (e.g., the nature of the business, its policies and practices);
> (iii) Whether the employer's response was proportionate and, in particular, "whether the alleged misconduct is so incompatible with the fundamental terms of the employment relationship that it warrants dismissal"
>
> See: ***Molloy v Epcor Utilities Inc.***, 2015 ABQB 356 at para 142; ***Smith v Vauxhall Co-op Petroleum Limited***, 2017 ABQB 525 at para 15; ***Cicalese v Saipem Canada Inc.***, 2018 ABQB 835 at para 20; ***Motta v Davis Wire Industries Ltd.***, 2019 ABQB 899 at para 15.

[127] This section begins by assessing Marquis Alliance's claims about Mr. Haack's performance, including both those made at the time of his dismissal, and those raised subsequently. It then turns to the issue of how Marquis Alliance responded to Mr. Haack's performance during the time of his employment. Finally, it considers whether, in the totality of the circumstances, and in light of the law governing dismissal of employees, Marquis Alliance had cause to fire Mr. Haack. The subsequent section will consider whether Marquis Alliance's manner of terminating Mr. Haack's performance additionally violated its duty of good faith and honest performance.

The Claims of Deficient Performance

Breach of Confidentiality

[128] At the time of dismissal, Marquis Alliance claimed that Mr. Haack improperly shared confidential information with employees.

[129] Secure offered in support of these claims the contemporaneous memorandum to the directors from Mr. Wadsworth which said:

> 1. he has discussed his personal financial issues such as compensation with his direct reports while conducting their performance appraisals, telling his direct reports that they shouldn't be concerned about their own issues, as his are more important;
>
> 2. he has disclosed and discussed confidential partner compensation and personal financial information (net worth information) without consent, with employees.

[130] Secure also provided the letter Marquis Alliance gave to Mr. Haack at his termination which said Marquis Alliance had a "loss of trust and confidence in your handling of confidential and personal information."

[131] In addition, Ms. Donna Mitchel was called as a witness by Secure. Ms. Mitchel had worked with Mr. Haack at Marquis Fluids and initially reported to him at Marquis Alliance. She

recalled being upset because Mr. Haack did not respect confidentiality. She recalled reporting her concerns to Mr. Wadsworth and asking that she no longer report to Mr. Haack in part for this reason.

[132] Ms. Mitchel could not, however, recall any specifics about what Mr. Haack had done. She could not recall the information he had shared, or to whom.

[133] Mr. Wadsworth confirmed in his testimony that the allegations in the memorandum came from Ms. Mitchel and "other employees", and also that he had moved Ms. Mitchel's reporting from Mr. Haack based on those concerns and allegations. He was uncertain as to when this occurred, but agreed it may have been between February and June, 2010.

[134] In addition, Mr. Wadsworth said that he had investigated the allegations on confidentiality and had spoken to Mr. Haack about them. Mr. Wadsworth could not, however, recall the specifics or results of that investigation or conversation, and did not have any documentation in relation to either.

[135] Mr. Perera testified that he had heard about the issue with respect to Mr. Haack sharing confidential information from other employees, including Ms. Mitchel, but that he did not have any personal knowledge of it nor did he speak to Mr. Haack about it, and he had no documents with respect to those conversations.

[136] Mr. Haack testified that when he received the termination letter from Marquis Alliance stating that it had a "loss of trust and confidence in your handling of confidential and personal information" he did not know what they meant. Mr. Haack said that he had understood Ms. Mitchel to have been removed from reporting to him in about March 2010 in order to assist with his workload.

[137] Based on this evidence, I cannot safely conclude that Mr. Haack improperly shared confidential information. I accept that Ms. Mitchel believed (and believes) that he did so, and that she shared her concerns with Mr. Wadsworth and Mr. Perera. But absent any evidence about the information Mr. Haack allegedly shared, and with whom he shared it, I am not prepared to say that Mr. Haack improperly shared confidential information.

[138] I observe in this respect that the allegations in Mr. Wadsworth's memorandum, which contain the only specifics I have regarding Mr. Haack's alleged improper disclosure, are unsubstantiated hearsay. They are what Mr. Wadsworth says he wrote based on what he says Ms. Mitchel and employees told him at the time but, in her testimony, Ms. Mitchel did not provide evidence sufficient to show the truth of the allegations, and no other employee with direct knowledge of this issue testified.

[139] While these deficiencies in the evidence are sufficient to justify rejecting these allegations against Mr. Haack, additional issues with how Marquis Alliance addressed them at the time reinforce that assessment. While Mr. Wadsworth maintains that he investigated the breaches of confidentiality, and that he spoke with Mr. Haack about them, his evidence in this respect is not credible. His testimony was vague and conditional – saying, he has heard of incidents from "other people" but not who they were; describing his investigation as "I went and talked to people" but again without specifying who they were; saying "I do believe" in relation to what he thinks he did; responding that him talking to Mr. Haack about it "sounds familiar". Mr. Wadsworth acknowledged that he did not provide Mr. Haack with any information about what Mr. Haack was alleged to have said and to whom. Mr. Wadsworth also seemed unclear on the

timing, referring to events "occurring over the summertime", but when asked if it was in springtime saying, "Sounds about right".

[140] In addition, there are no documents or contemporaneous records with respect to any such investigation or conversation. This is troubling both because it means that Mr. Wadsworth's claim to have investigated cannot be gauged against any contemporaneous record and because it seems doubtful that an investigation would have occurred, but that no records – not even an e-mail setting up a meeting – would exist with respect to it. I note that Ms. Mitchel said that she did not investigate these matters, and Mr. Perera said that any investigation of his did not involve conversations with Mr. Haack and was not documented. I am not satisfied based on Mr. Perera's evidence that he in fact did investigate, although I accept that he, like Mr. Wadsworth, had spoken to Ms. Mitchel about her concerns.

[141] I prefer Mr. Haack's evidence that Mr. Wadsworth told him that Ms. Mitchel was being moved for workload reasons, and that he was not aware of concerns about confidentiality prior to receiving his termination letter. To the extent any investigation occurred – which I do not think the evidence establishes – it did not involve obtaining Mr. Haack's response to the allegations against him. Leaving aside the unfairness of not allowing Mr. Haack to respond, asking him about what happened would have allowed Marquis Alliance to test the validity of the claim that he had improperly shared confidential information, and to discover if Mr. Haack plausibly denied it or had an exculpatory explanation. It may be that what Ms. Mitchel or another employee perceived as a breach was in fact authorized or appropriate.

[142] Fundamentally, that Ms. Mitchel subjectively believes (and believed) that Mr. Haack improperly shared confidential information does not demonstrate the objective validity of that belief, particularly when Mr. Haack never had an opportunity to know the specifics of her claim or to respond to it.

[143] In sum, Secure has not shown that it is more likely than not that Mr. Haack disclosed and discussed confidential information with other employees.

[144] Secure also alleges that Mr. Haack breached confidentiality by e-mailing information to his personal e-mail account, to which his wife also had access to, between August 27, 2010 and his termination on September 3, 2010.

[145] Secure has proven this allegation. Mr. Haack admitted that he had e-mailed this information, and the documentary record clearly establishes that he did so. It shows that he used the e-mail address to correspond with his wife, which is sufficient for me to infer that she had access to the account. The information Mr. Haack e-mailed included sensitive and confidential information with respect to the proposal to go public, a bid for a contract and other business opportunities, salary information and information about the calculation of bonuses.

[146] In a letter to BLG dated September 24, 2010, Mr. Haack wrote that he took the documents to evaluate the worth of his common shares. He stated that Mr. Wadsworth had encouraged him to do his own valuation, and that he could not do so without internal information. He said that he had disclosed his possession of the documents to Ms. Mitchel, and that he had "previously destroyed all of the MA documents and no longer have any MA confidential documents in my possession".

[147] In his testimony Mr. Haack reiterated this account of his actions, also stating that he had not shared the documents or information with anyone.

[148] Secure noted that one document that Mr. Haack e-mailed to his home was produced in the litigation; they did not otherwise contradict Mr. Haack's claims that he destroyed the information and did not share it. While counsel for Secure suggested that I infer, from the fact that Mr. Haack disclosed a document in this litigation he had e-mailed to himself that he did not destroy the documents. I am inclined to the opposite conclusion: to infer from his disclosure of the one document that he did not have any others and had destroyed them. In any event, the production of one document is not sufficient to show that Mr. Haack breached confidentiality more generally.

[149] I thus find that Secure has proven that Mr. Haack improperly shared confidential information by e-mailing it to his personal e-mail account, and that his wife could have seen the information there. Secure has not, however proven that he shared the information more broadly or that he retained it after September 2010.

Accounting System Integration Issues

[150] After the merger, Marquis Fluids and Alliance Energy ran into significant difficulties with the integration of the accounting systems of the two companies. Originally Mr. Haack suggested that they not integrate the accounting systems prior to year-end. Mr. Wadsworth disagreed, and directed that the integration occur immediately. In an e-mail dated October 23, 2009, Mr. Wadsworth said, "the quicker we can integrate the accounting systems the better". He further said, "you and Jim can figure [it] out. I think sooner than later you and Jim need to get together and start hashing this out. He will be on board with you and work his ass off for you to get this done as smooth and efficient as possible, he is very useful and talented and will be your key guy for your team."

[151] While Mr. Wadsworth's decision was understandable, and I do not think he could have anticipated what happened next, his hope that it would be "smooth and efficient" did not come to pass. In particular, when Mr. Lew moved the Marquis Fluids information onto the Solomon accounting system used by Alliance Energy, he ran into major problems accounting for Marquis Fluids' inventory. The problems arose from how Marquis Fluids had recorded its inventory and with deficiencies in its records.

[152] The result of these integration problems was to delay for months the newly merged entity's production of financial reports and statements. The delay arose both because the accounting system was not functioning in a way that gave accurate and sufficient information to allow reports to be prepared, and because the accounting team, and particularly Mr. Lew, had to spend so many hours trying to correct and fix the problems with the accounting integration.

[153] The witnesses for Secure, and in particular Mr. Lew, blamed Mr. Haack for the accounting integration problems and resulting delays. They did so based on two propositions. First, because Mr. Haack had been Controller at Marquis Fluids, they said that it was due to his deficient work that the inventory issues – and hence the integration problems – arose. Second, they blamed Mr. Haack for not helping Mr. Lew to fix and address the problems by working directly on the integration.

[154] To support his position that the problems at Marquis Fluids were caused by Mr. Haack's poor work, Mr. Lew suggested that the issues with Marquis Fluids' records dated only back one year prior to the integration. He explicitly claimed that it was in the time period after Mr. Haack started at Marquis Fluids that the issues arose. He said that he could see accounting records that

were in line, with inventory and records that matched, but that, after Mr. Haack started working there, Marquis Fluids no longer had tidy schedules. Further, Mr. Lew said that when he asked Mr. Haack about what happened, Mr. Haack's response would be along the lines of "oops my bad, my mistake".

[155] The problem, however, is that Mr. Lew's claims in this respect are contradicted by contemporaneous records with respect to Marquis Fluids' accounting records. As earlier noted, in 2008 the auditors adjusted Marquis Fluids' 2007 net income upwards by $734,924 to reflect "more accurate information on the cost of inventory value on hand". Further, in its June 9, 2009 report on its audit of Marquis Fluids Partnership, Collins Barrow noted "errors totaling 8.5% of the inventory balance". It noted errors;

> related to inventory costing, quantities related to delivery tickets and usage, or cost information including errors in per unit missing or not calculating correctly. We recommend that accounting staff review year-end inventory listings and spreadsheets prepared by operations staff for completeness and accuracy, agreeing them to the supporting documents and general ledger.

[156] While Mr. Haack was at Marquis Fluids as of the financial year end of March 31, 2009, he only started full time work that month, and the audit would have been based on accounting records and documentation that largely predated his arrival in mid-January 2009. That is, he worked part-time at Marquis Fluids for one and a half months, and full time for one month, prior to the March 31, 2009 year-end. It defies credulity to suggest that in that short period, where he mostly worked part-time, Mr. Haack nonetheless managed to ruin a functional inventory accounting system – particularly given that we know that inventory issues arose in 2007 as well.

[157] In addition, the issues identified by Collins Barrow in its June 9, 2009 report were with respect to how operations staff were recording inventory information; the suggestion by the auditor was for accounting staff to review and check "inventory listings and spreadsheets *prepared by operations staff*" [emphasis added]. The report did not suggest that the accounting staff itself caused the errors. Its recommendation was for the accounting staff to fix the work of other people, not to do better work itself.

[158] I note that in the fall of 2010 Mr. Lew worked with Collins Barrow to create consolidated audited financial statements for the Marquis Fluids companies for the years 2008 and 2009. As such, he would have seen and reviewed these financial statements, and in doing so, would have known that the inventory issues at Marquis Fluids predated Mr. Haack's arrival. Given his role as Controller of the merged entities, he may also have seen those audited financial statements prior to fall 2010.

[159] Mr. Haack did convert the accounting system used by Marquis Fluids from Accpac to SNP Business One after he joined Marquis Fluids. Perhaps Mr. Lew meant to suggest that that is where the problems arose. But it seems most improbable that in doing an accounting system conversion, Mr. Haack could create inventory issues where none had existed before – particularly, again, given that the records reveal that material errors in inventory arose in 2007, and the 2009 issues were connected to the work of operations staff, not the accountants.

[160] I further note that the people who supervised Mr. Haack at Marquis Fluids – Mr. Deibert and Mr. Rawlyk – were pleased with his work, even though they would have seen and been aware of the June 9, 2009 Collins Barrow report noting the errors in the inventory balance. Mr.

Haack's evidence about the issues with Marquis Fluid's prior accountant, while uncontradicted, was hearsay and I do not rely on it. It is the case, however, that the contemporaneous record and the evidence as a whole do not suggest that it was Mr. Haack who caused the inventory issues at Marquis Alliance.

[161] In short Mr. Lew's evidence suggesting that Mr. Haack caused the problems with Marquis Fluids' inventory records amounted to speculation and innuendo. It was not based on any personal observation or knowledge of Mr. Lew about what Mr. Haack had done at Marquis Fluids. The support Mr. Lew offers, of his conversation with Mr. Haack, is hearsay. It is facially inconsistent with the evidentiary record, a record which Mr. Lew would have seen by at least the fall of 2010. I think Mr. Lew's evidence in this regard was untruthful. Indeed, as earlier noted, it makes me question Mr. Lew's general credibility, and to see his evidence as tainted by a degree of animus to Mr. Haack, despite (or in part because of) his claim that he thought Mr. Haack a nice enough guy.

[162] The claim that Mr. Haack ought to have stepped in to help resolve the accounting integration issues is also not supported by the evidence.

[163] Mr. Haack and Mr. Lew both testified that Mr. Haack did not have access to the Solomon accounting system. They also both said that Mr. Haack requested that he be given access, but Mr. Lew told Mr. Haack that he did not need it, that access was expensive, and that Mr. Lew could give Mr. Haack any accounting information he required.

[164] Mr. Lew maintained that as Vice President Finance and Accounting, Mr. Haack could have insisted on being given access to Solomon. I accept, however, that Mr. Haack would not have seen it as appropriate to insist, or consistent with the nature of his relationship with Mr. Lew. As earlier described, while the functional division between Mr. Haack and Mr. Lew was hierarchical, their relationship was one of equals at a personnel level, and I accept that Mr. Haack would have deferred to Mr. Lew's decision making in relation to access to the Solomon system.

[165] Once he had been denied access to Solomon, and in that way given the message that his direct involvement in the accounting work was unwelcome to Mr. Lew, I do not think it is realistic to have expected Mr. Haack to have stepped in to fix or address the accounting integration problems. Mr. Lew made it clear in his testimony that he did not respect Mr. Haack's skills and knowledge, and I suspect would have resented any attempt by Mr. Haack to involve himself in the front-line accounting work. In essence, Mr. Lew constructed a fence around the front-line accounting work. Having done so, neither he nor Mr. Wadsworth can fairly complain about Mr. Haack's decision to stay outside it.

[166] As a result, I reject the inference invited by Secure that Mr. Haack was responsible for causing or not fixing the integration issues. As noted, I do not blame Mr. Wadsworth for refusing Mr. Haack's suggestion that they delay the integration, but I do reject his attempt to blame Mr. Haack for the problems that followed that refusal.

Relationships with Other Employees

[167] Secure claims that Mr. Haack did not have the respect of other employees. It also claims that Mr. Haack improperly delegated his work to other employees. The claim here focuses on Mr. Haack's management of other employees in his position as Vice President Finance and Accounting.

[168] The main evidence presented to support this claim was, first, Mr. Wadsworth's memorandum which stated that "employees have complained about his conduct and performance, indicating that they have a lack of respect and zero trust towards him. The HR Coordinator requested that she report to someone else or she would resign."

[169] The memorandum also said, "he often has not put in full 40 hr work weeks but passes down his work to employees causing some of them to work extremely long hours".

[170] Ms. Mitchel validated the contents of the memorandum in relation to her. She said that she lost confidence in Mr. Haack early on. She confirmed that she had asked not to report to Mr. Haack any longer, and that she had said she would quit unless that change was made. Ms. Mitchel could not recall, however, any specific instances that led to that lack of trust or confidence, other than when (as discussed below) in August 2010, she found partially completed forms related to the RSP on Mr. Haack's desk.

[171] Ms. Mitchel testified that another employee, Ms. Amy Cronk, had complained to Ms. Mitchel that Mr. Haack did not sign off on things in a timely manner. Ms. Mitchel had a general recollection of discussing this complaint with Mr. Haack but could not recall a specific meeting.

[172] Mr. Perera testified that Mr. Haack did not have the level of energy, enthusiasm or anxiety that was normal amongst Marquis Alliance employees at this time.

[173] A memorandum prepared by Ms. Hanson-Parsons in June 2010, to which she also testified, stated that she was "not prepared to represent MAI with Brad Haack leading the charge as CFO". Ms. Hanson-Parsons said in the memorandum that she would not allow her professional reputation to be "somewhat controlled by an individual that I believe does not understand the complexities or has [sic] the experience to anticipate the needs of this process and proactively manage through them". Ms. Hanson-Parsons said this memorandum accurately captured her view of Mr. Haack at that time.

[174] Mr. Wadsworth and Mr. Anderson testified that they observed that Mr. Lew worked excessive hours. In an e-mail dated July 14, 2010, Mr. Wadsworth raised with Mr. Haack a concern that Mr. Lew "is overworked and getting burnt out". Mr. Haack responded that changes were in the works, and that Mr. Lew was "going on a short vacation starting tomorrow". Mr. Wadsworth testified that he did not recall having any further conversations with Mr. Haack on this point, and did not formally investigate his own concerns regarding Mr. Lew, although he maintained that he spoke to a "bunch of people" about it. He did not document any such conversations in writing.

[175] Mr. Wadsworth and Mr. Anderson also testified that sometimes when they went to find Mr. Haack at his desk he was not there.

[176] Mr. Lew testified that he worked very long hours, to the point that he was considering quitting. He said that he never raised the issue with Mr. Haack or asked for his assistance. He said that he internalized his problems, raising them with Mr. Mellarsh, who he viewed as a friend, but not with Mr. Haack.

[177] Mr. Lew acknowledged that Mr. Haack had hired an additional senior accountant in the summer of 2010 to assist him. He further acknowledged that he had a number of people who worked for him, including senior accountants, who could assist with the preparation of financial reports. Mr. Lew said, however, that he felt many of the tasks he had to do could not be delegated.

[178] Mr. Garth Marken, who worked in the accounting department, was called by Mr. Haack to testify. Mr. Marken agreed that Mr. Lew's workload was excessive, but also said the overall workload in the accounting department was not, and that he could have taken on more tasks had Mr. Lew asked him to do so.

[179] Mr. Haack said that he was not sure what they meant when they told him in the termination letter that he had lost the trust and confidence of employees. He said this was not very definitive, and that he had not spoken to Mr. Wadsworth about that kind of issue. He said that Mr. Lew's work was assigned by Mr. Wadsworth, not by himself.

[180] I am satisfied based on the evidence that Mr. Haack had negative working relationships with both Mr. Lew and Ms. Mitchel while he was employed at Marquis Alliance. A reasonable inference could be drawn that Mr. Haack contributed to the existence of those problems.

[181] There are, however, some significant difficulties with concluding that it is more likely than not that Mr. Haack acted improperly at work so as to justify other employees losing trust and confidence in him. In particular, while a reasonable inference could be drawn that Mr. Haack contributed to the existence of those problems, a contrary reasonable inference could be drawn that the problems existed for reasons unrelated to Mr. Haack.

[182] Take the one example cited by Ms. Mitchel, with respect to the RSP forms. As we will see, RSP endorsement forms arrived at Marquis Alliance on July 16, 2010. There would have been over 100 – perhaps as many as 200 – of these forms, each of which needed to be signed by Mr. Haack as Vice President Finance and Accounting. On August 4, 2010, Ms. Mitchel found the partially completed forms on Mr. Haack's desk. Ms. Mitchel says this is an example of why she did not have trust and confidence in Mr. Haack. The problem, however, is that Marquis Alliance moved offices at the end of July, and Mr. Haack had responsibility for overseeing and managing the move. He testified that at that point he had moved to the new offices. Further, while the evidence shows that the forms arrived at Marquis Alliance on July 16th, it is not clear when Mr. Haack received them, particularly as Ms. Mitchel went on holiday starting the 16th. As a result, that Mr. Haack had not finished signing the forms as of August 4th does not justify the conclusion that he was untrustworthy.

[183] It is understandable that Ms. Mitchel was frustrated by the forms issue. The forms had been requested by her on June 11, 2010, with the hope of rolling out the RSP by July 1st. The RSP provider did not return the forms until July 16, 2010. As a result, there were already significant delays in the program she was trying to implement, and delays that were not her fault. But that understandable frustration does not support a finding by me that Mr. Haack caused employees to lose trust and confidence in him.

[184] It may be that Ms. Mitchel experienced other things that better supported her view that Mr. Haack did not warrant trust and confidence, but she did not recall them. That the one example she cited does not justify her position creates, however, the concern that Ms. Mitchel blamed Mr. Haack for problems that existed, but for which he cannot be fairly held responsible.

[185] I am also unprepared to draw any adverse inference against Mr. Haack based on Ms. Mitchel's report of her conversation with Ms. Cronk. Doing so would be to rely on hearsay: the truth of the contents of what Ms. Cronk said to Ms. Mitchel as described by Ms. Mitchel to the Court. No contemporaneous records exist with respect to Ms. Cronk's statements or their validity and relying on them would be unsafe.

[186] I also have concerns about the evidence regarding Mr. Lew's workload. I have no doubt that Mr. Lew did not have trust and confidence in Mr. Haack. I also have considerable sympathy for the frustration Mr. Lew would have felt in managing the problems with the Marquis Fluids accounts and inventory. Finding a person to blame for difficult and frustrating situations in which you find yourself is a human impulse. That it is human does not, however, make it fair or truthful. As noted, Mr. Lew's claims about Mr. Haack's contribution to the problems at Marquis Fluids are contradicted by the evidence, evidence which Mr. Lew would have seen in 2010 when he worked on the historical Marquis Fluids' financial statements. That Mr. Lew nonetheless maintains that the problems were Mr. Haack's fault, and does so this many years later, makes me reluctant to rely on his evidence to draw inferences adverse to Mr. Haack.

[187] Further, based on the interactions with the Solomon system, on Mr. Lew's acknowledgement that he would not talk to Mr. Haack about his workload issues or ask for help, and Mr. Marken's evidence about the workload of the accounting department, it is as reasonable to infer that Mr. Lew's workload problems arose from his refusal to work more closely with Mr. Haack or to communicate with him, rather than that from the conduct of Mr. Haack. In my view, this is the most reasonable inference from the evidence. I note in this respect Mr. Lew's acknowledgement on cross-examination that in the summer of 2010 Mr. Haack had hired a senior accountant to assist him.

[188] In reaching this conclusion about the relationship between Mr. Haack and Mr. Lew, I do not rely on Mr. Haack's claim that Mr. Wadsworth directed Mr. Lew's work. I accept that the functional division of labour between Mr. Haack and Mr. Lew arose from how their roles were conceived at the outset, and that Mr. Wadsworth would have been involved in that. This may have been what Mr. Haack was trying to say. Nonetheless, I think it worth noting that it seems very unlikely that, on a day-to-day basis, Mr. Wadsworth oversaw Mr. Lew's work. Rather, I think Mr. Lew, having been given charge of the accounting team at Marquis Alliance, governed his own work and made his own decisions. Mr. Lew had the qualifications and competence to do so, and asserted his autonomy and authority in relation to the accounting function at Marquis Alliance. That is, I do not think either Mr. Haack or Mr. Wadsworth directed Mr. Lew's work on a day-to-day basis. Mr. Lew did that himself.

[189] I also do not believe that Mr. Wadsworth investigated his concerns about Mr. Lew's workload and Mr. Haack's dealing with it. Mr. Wadsworth did not recall any conversations with Mr. Haack beyond the one e-mail, and his general claim that he had spoken to a number of people was vague and unsubstantiated.

[190] Ms. Hanson-Parsons' concerns about Mr. Haack do not have probative value in relation to Mr. Haack's work at Marquis Alliance. They were identified by Ms. Hanson-Parsons in June 2010, a time when she had yet to return to work and thus had never worked with Mr. Haack at the company. They cannot be used to draw an adverse inference with respect to Mr. Haack's conduct. In addition, Ms. Hanson-Parsons' concern was that Mr. Haack was not a "seasoned CFO" or "seasoned finance veteran in public company markets", something which Mr. Haack had never claimed to be. She did not suggest that Mr. Haack was personally deficient or incompetent in light of his actual qualifications.

[191] Mr. Perera's observation that Mr. Haack did not have the same energy, enthusiasm or anxiety as other executives at Marquis Alliance is consistent with Mr. Haack's references, which noted that he was a calm and laid-back person. It is also consistent with his calm demeanor as a

witness. It does not, however, support the inference that Mr. Haack acted in a way to be undeserving of the trust and confidence of other employees.

[192] Finally, I reject the inference invited by the testimony of Mr. Anderson and Mr. Wadsworth that them not finding Mr. Haack at his desk proves that he did not work a 40 hour work week. That conclusion is speculative, particularly in the absence of any investigation into this issue. I note, for example, that Mr. Haack's responsibility for the move, and his work with the auditors and the banks, meant there were times when he was working but not present at the office.

[193] As was the case with the claim that Mr. Haack breached confidentiality in his conversations with other workers, the lack of a meaningful investigation by Marquis Alliance makes it more difficult for them to prove their case; they could have explored and tested the validity of their claim that Mr. Haack had acted so as to lose the trust and confidence of the employees and, had that claim been born out, been able to prove it now. Instead, they did not properly investigate the claims then, and cannot prove them now.

The Office Move

[194] Secure claims that Mr. Haack mismanaged the office move. In particular, it maintained at trial Marquis Alliance's original allegation that, as a result of Mr. Haack's failure to communicate properly with the contractors, employees had to work in a demolition zone for over 5 weeks. Secure also raised the issue of cost overruns associated with the move, and whether Mr. Haack sought appropriate approvals for changes to the construction and design.

[195] In his memorandum Mr. Wadsworth said that Mr. Haack "failed to communicate appropriate instructions to the contractors which resulted in our employees being required to work in a demolition zone for over 5 weeks".

[196] The background for the move, with respect to which the witnesses agreed, was that Alliance Energy's lease was set to expire a few months after the merger. The Marquis Fluids' space was not large enough to accommodate the Alliance Energy employees. As a result, Marquis Alliance needed to find new space for the merged entity on an urgent basis. Mr. Haack volunteered to manage the project. He did so, working with a property manager, a construction company and a designer. The directors and senior executives were involved in making key decisions, such as which space to occupy, and Mr. Lew gave some assistance to Mr. Haack in managing the move and the contractors. The move of part of the Marquis Alliance team into the new premises took place between July 19 and 26, 2010.

[197] When the team moved into the new premises they were not complete. Witnesses disagreed as to the state they were in.

[198] Mr. Anderson described it as a construction zone, in which there were computers but the internet did not work. He suggested that as a result of the lack of an internet, they were not able to properly monitor wells, and cited a specific incident with a loose manifold cover; Mr. Anderson said, however, that this incident occurred in December or late fall 2010. He initially said December, and on being asked by Mr. Tosto whether he was sure about that date, he said fall. Both of those dates occurred well past the time at which the move took place.

[199] Mr. Lew described the space as having been demolished, and said he had to work with personnel in an inadequate space during construction.

[200] Mr. Haack's evidence on this point was:

> Q. … Can you explain what was going -- what was going to happen in July as far as the move. Like, who was going to go into the space, and what was going on with the construction as well?
>
> A So from memory, you had three things. You had the working units, and you had the office space expiring at Alliance, and you had the new space under construction available. It was decided at that time to -- when the Alliance space could no longer be used anymore, I think we had negotiated a one-month window that allowed them to stay a month longer. And then at that point in time they had to move out, and they moved in -- some of them moved into the Marquis space, and some of them moved into the new Marquis Alliance space, even though it wasn't completed.
>
> Q What do you mean by it wasn't completed? What was the status of the construction?
>
> A Ah, from memory, down on the 17th floor, the walls were up. The electrical was in. The lights were in. It was painted. The carpeting still had to be done. And so on a temporary basis, the solids team and the accounting team moved into that space while they completed their space in another area.
>
> …
>
> Q And what were your conversations with the employees of Marquis Alliance at -- well, I guess further into July when they're moving into this space that's under construction?
>
> A Ah, at that point in time I remember telling them the truth. Here's what's happened. Here is how the timeline has gone. Here's what we're faced with, and this is the best way we can come up to resolve this.

[201] Mr. Wadsworth testified that the plan was for one floor to be completed before the team moved in – that is, for the floors to be remodelled one floor at a time, so that employees would not be affected by the construction. He said that this was the plan decided upon by him, Mr. Deibert, Mr. Rawlyk and Mr. Haack. His testimony was that since that had not happened, Mr. Haack must have given incorrect instructions to the contractors. In cross-examination, however, he acknowledged that he did not know what the contractors had been told and was simply inferring that the contractors had been given the incorrect instructions by the difference between what he said should happen and what in fact happened.

[202] Mr. Lew said that Mr. Haack told him about the "one floor at a time" plan.

[203] In cross-examination, Mr. Haack said that he did not recall that being the plan; he said that the way the move was dealt with, and working in a site under construction, was how they had to deal with a bad situation.

[204] In his pre-trial questioning in 2015 on this point Mr. Haack said:

> The contractor created an error, and he'd gone down and stripped off the carpet from the 17th floor that he wasn't supposed to do; in the end we were stuck having to move into a place with no carpet.

[205] Based on the evidence, I am satisfied that some Marquis Alliance's employees worked for a period of time in a space under construction. Mr. Anderson's recollection of events was too imperfect for me to rely on it to find that serious consequences arose, and I prefer Mr. Haack's evidence that the issues were more aesthetic than functional, but I do accept that working in premises under construction was not ideal.

[206] I am also satisfied that Mr. Haack chose to have the employees move into incomplete premises as in his judgment it was the best way to deal with the problem arising from the need to move and the construction not being completed.

[207] I do not accept the claim that Mr. Haack was directed by the directors to do one floor at a time, and that he simply ignored or failed to implement that direction.

[208] It is not clear that such a plan existed. Neither Mr. Deibert nor Mr. Rawlyk gave evidence saying that they had come up with this plan. No written record indicates such a plan having been made or communicated to Mr. Haack. I have issues with the credibility of both Mr. Wadsworth and Mr. Lew, as previously noted.

[209] Mr. Wadsworth's suggestion that the plan existed, and that it was only not implemented because Mr. Haack failed to speak to the contactors about it, was both speculative and concerning. Mr. Wadsworth acknowledged that he had no information about the conversations between Mr. Haack and the contractors. He did not know what had occurred but was rather inferring that Mr. Haack had failed to properly instruct the contractors as a result of the gap between what Mr. Wadsworth wanted and what actually happened:

> Q. And you're saying that Mr. Haack never communicated that to the contractors. Is that fair?
>
> A That's correct.
>
> Q Okay. But you don't actually know whether Mr. Haack had a conversation with the contractors about that. I mean, you wouldn't -- you didn't necessarily participate in every conversation he had with the contractors. Is that fair?
>
> A Well, ***what I know is that he didn't tell them to not demolish one of the floors or they wouldn't have done that***.
>
> Q Okay. So you're assuming they wouldn't have done it had he told them that?
>
> A Yes.
>
> [emphasis added]

[210] Mr. Wadsworth's willingness to assume that if he gave instructions and they were not implemented then it must have been because Mr. Haack failed to communicate them, suggests to me some bias in his perceptions: a fair-minded person viewing those facts would at least contemplate the possibility that it was the contractors who made a mistake, or one of the sub-contractors or trades, not Mr. Haack. Indeed, in his questioning Mr. Haack said that was what happened. Yet that possibility seemed never to have occurred to Mr. Wadsworth.

[211] In my view the explanation for why the move unfolded as it did flows from Mr. Haack's testimony: the space was not finished, there was no area in the new premises not under construction, but they had to move out of the Alliance Energy premises. Having some of the

employees move into a space under construction was his assessment of the best way to handle a bad situation.

[212] I also find that Mr. Haack's management of the move was outside his role as Vice President Finance and Accounting, and he neither had nor claimed to have any expertise in this respect.

[213] In addition, in an e-mail dated March 26, 2010, Mr. Haack asked Mr. Wadsworth to move the responsibility for the move and construction to someone senior to him. He said that his workload was becoming too heavy, particularly given that he was trying to complete his CMA. Mr. Wadsworth did not take responsibility for the move from Mr. Haack, although he did give Mr. Haack a person who could provide him with some assistance in organizing the move.

[214] With respect to the change orders, I am satisfied that the changes were signed off on by Mr. Haack for the most part, but that he did so in consultation with, or on the direction of, more senior management, including Mr. Wadsworth. Mr. Haack testified that that was the case. Mr. Wadsworth acknowledged that the Board had signed off on all of the major decisions in relation to the new space, including the costs and design. Their involvement in those decisions supports Mr. Haack's evidence that they were also involved in approving changes to the design.

[215] I also do not believe that Mr. Haack would have made any significant change to the design without consultation. Why would he? What motive would he have had to just change the board approved design on his own initiative? Nothing in the evidence suggested Mr. Haack was or is the type of person to simply do his own thing without consultation, and his evidence was that he didn't. Further, a number of the specific changes related to things like the lab on the premises, something about which it seems unlikely Mr. Haack would have known enough to be making decisions independently.

[216] I also note that no evidence was presented to the Court, either direct or circumstantial, suggesting that the changes made were bad or undesirable apart from the issue of what they cost. Mr. Wadsworth said that they increased the cost, and increased costs are undesirable because "it's cash that's leaving the business". However, the mere fact of increased costs does not, without more, show that the expenditures were contrary to Marquis Alliance's interests.

[217] Thus, with respect to the move I am satisfied that Mr. Haack made decisions that led to the Marquis Alliance employees working in premises under construction. I find that he made those decisions based on what he thought was the best solution to a difficult problem. I do not accept that in doing so he ignored or failed to implement instructions from more senior management about how to proceed.

[218] I also find that Mr. Haack's work on the move was outside his regular job requirements, and that he neither had nor represented that he had any particular expertise in this matter. I also find that he asked to be removed from the move supervision because of his workload, but that that did not happen.

[219] Finally, I find that Mr. Haack signed off on the change orders, but that he did so in consultation with or at the direction of more senior management. Further, the evidence does not show the changes to have been contrary to the best interests of the corporation.

Financial Reporting

[220] Secure relies on delays in preparing financial reports to justify Marquis Alliance's termination of Mr. Haack's employment.

[221] In his memorandum, Mr. Wadsworth said, "During Brad Haack's short tenure with the company, he has engaged in the following conduct…the company has been without financial reports for nearly 10 months".

[222] The evidence at trial, including that of Mr. Haack, shows that monthly reports were not prepared and that this created significant operational issues for the company. It also shows that the reason why the reports were not prepared was because of the problems with the accounting system integration. Mr. Lew said that the preparation of reports was at a standstill until the inventory and integration issues could be resolved.

[223] The evidence further shows that the monthly financial reporting was to be prepared by Mr. Lew in the first instance, although Mr. Haack would have reviewed and likely distributed the reports through the organization.

[224] Finally, as earlier discussed, the evidence shows that Mr. Haack was the senior person in the finance and accounting department, and thus ultimately responsible for the work in that department being completed.

[225] Secure wishes for me to infer from this evidence that it was Mr. Haack's fault that the financial reports were not prepared in a timely fashion. I am unprepared to do so. As earlier noted, the accounting integration issues cannot be attributed to Mr. Haack: he did not cause the integration issues and nor was he in a position to address or fix them. That he was the top person in the department does not mean that he could ensure a different outcome.

[226] Mr. Anderson testified that he repeatedly raised the financial reporting issue with Mr. Haack, and that Mr. Haack did not respond, or said that the reports would be coming but then they did not arrive. Mr. Anderson acknowledged that these requests were not made in writing. I accept that Mr. Anderson likely made some requests; however, I do not see the fact of the requests as changing the observation that the lack of financial reports cannot be blamed on Mr. Haack.

[227] I have explained my concerns with Mr. Lew's credibility; however, his competence as an accountant is undisputed. As Mr. Wadsworth said prior to the merger, Mr. Lew was "very useful and talented." Further, it is acknowledged that Mr. Lew was the person with access to the Solomon system and responsible for producing financial reports in the first instance. That he did not produce them suggests to me that they could not be produced.

[228] Moreover, given Mr. Lew's autonomy relative to Mr. Haack, and Mr. Haack's lack of access to the Solomon system, it is not apparent what Secure thinks Mr. Haack could have done other than complain to or about Mr. Lew, which would have been neither fair nor useful given the difficulties associated with the accounting integration. If anything, it is to Mr. Haack's credit, and perhaps a reflection of the more relaxed personality observed by Mr. Perera and by Mr. Haack's references, that he did not criticize Mr. Lew in this way even when he himself received complaints.

[229] To put it slightly differently, there is no logical path that allows me to call Mr. Haack's competence into question in relation to the lack of financial reports without also calling into

question Mr. Lew's. Since no one has suggested I have a basis for doing the latter, they cannot reasonably ask me to infer the former.

Budget

[230] Secure relies on deficiencies in Mr. Haack's budget as one of the justifications for Marquis Alliance terminating his employment.

[231] Mr. Wadsworth stated in his memorandum that Mr. Haack was "unable to create a legible budget; his first attempts were inadequate and it was requested that his controller perform the task."

[232] Mr. Wadsworth testified that the budget prepared by Mr. Haack was not legible. Mr. Wadsworth said he recalled it being "pretty – pretty inadequate, pretty weak; I think it was based on old – old numbers that weren't relevant anymore."

[233] No version of this budget was produced in evidence. Mr. Wadsworth suggested that was because not everything was sent by e-mail.

[234] Mr. Wadsworth said he spoke to Mr. Haack about his concerns, although he could not recall when.

[235] Mr. Lew confirmed that Mr. Wadsworth spoke to him about the budget, and also reported that Mr. Haack's budget was high level and not very detailed.

[236] On June 4, 2010 Mr. Lew sent a budget to Mr. Wadsworth, copied to Mr. Haack. While Mr. Wadsworth's testimony was somewhat inconsistent on this point, it seems based on his evidence, as well as Mr. Lew's and Mr. Haack's, that this budget was prepared by Mr. Lew in the first instance, then reviewed by Mr. Haack before being sent to Mr. Wadsworth.

[237] Mr. Haack testified that he and Ms. Hanson-Parsons worked on preparing a coordinated budget prior to the conclusion of the merger. He said that he also prepared budgets on a regular basis after the merger, including for the purpose of increasing the operating line of credit. He had provided a budget and a cash forecast to the bank for that purpose.

[238] Until the integration was finished, Mr. Haack prepared the budgets in an Excel spreadsheet, since he could not access the information from Solomon. Once the integration was finished, Mr. Lew was able to pull the information directly from Solomon and created a budget document in that way.

[239] Given that I was not provided with a copy of Mr. Haack's budget, and given the accounting integration issues, Secure has not proven on the balance of probabilities that the budget Mr. Haack prepared was deficient or inadequate in the circumstances. While I could draw such an inference, it is just as plausible to infer that Mr. Haack presented the best budget he could given the integration issues and his lack of access to the Solomon data.

[240] I note in this respect that Mr. Lew and Mr. Wadsworth identified different issues with the budget; Mr. Wadsworth said the budget was weak, illegible and based on the wrong numbers, while Mr. Lew said it was high level and lacking in detail. Given this conflicting evidence, the absence of a contemporaneous record and the surrounding circumstances of the integration problems, I am simply not satisfied that Mr. Haack prepared a weak and illegible budget.

The Audit and Preparation for the IPO

[241] Secure says that the most significant issue with Mr. Haack's performance was with respect to the preparation of Marquis Alliance's audited financial statements and, in particular, the sufficiency of those financial statements given its efforts to go public. Secure's account of what Mr. Haack did wrong is in essence:

1. Mr. Haack knew that Marquis Alliance intended to go public, and to complete an IPO.
2. He knew that the desired time period for the IPO was the fall of 2010.
3. He knew, or ought to have known given his experience and credentials, that an IPO required three years of audited financial statements, in the case of Marquis Alliance for the year ending March 31, 2010, but also for Marquis Fluids and Alliance Energy for 2008 and 2009.
4. He knew or ought to have known that Marquis Fluids did not have consolidated financial statements for the Marquis Fluids group of companies, and that a number of the financial statements prepared for the different companies either were not audited or were not fully GAAP compliant.
5. Despite this knowledge, Mr. Haack retained Deloitte Canada ("Deloittes") to complete an audit for the financial year ended March 31, 2010 but did not retain them to prepare an audit that could be used for an IPO.
6. Mr. Haack directed Deloittes to include differential reporting in the financial statements for the year ended March 31, 2010, which precluded their use in an IPO.
7. Mr. Haack failed to tell Deloittes that Marquis Alliance was working towards an IPO until August 2010.
8. Mr. Haack did not take steps to obtain consolidated audited financial statements for Marquis Fluids for 2008 and 2009 prior to his termination.
9. In general, Mr. Haack did not respond with diligence and energy to the information provided to him by BLG and Deloittes in July 2010 about what an IPO required, or take the steps one would expect of a Vice President Finance and Accounting to advance the IPO objective.
10. The audit of the March 31, 2010 financial statements was delayed because Deloittes did not receive the financial statements or items that it needed on a timely basis. Mr. Haack, as Vice President Finance and Accounting, was ultimately responsible for these delays.
11. Mr. Haack consistently misrepresented the state that the audit was in, suggesting it was ready before it was.
12. As a result of Mr. Haack's poor decisions and incompetence in these various respects, the company could not complete its IPO in the fall of 2010 and suffered serious harm.

[242] The evidence supports aspects of this account. Mr. Haack knew that Marquis Alliance wanted to pursue an IPO. Marquis Fluids did not have financial statements suitable for an IPO for the years 2008 and 2009, and Mr. Haack either knew that or ought to have known it. Mr. Haack did not take steps to obtain such statements prior to his termination. Deloittes was not retained to complete an audit that would be suitable for an IPO, and Mr. Haack was actively involved in selecting them as auditors and negotiating the terms of their engagement. Mr. Haack did support the use of differential reporting. Mr. Haack did not respond with urgency to the information given to him by BLG about what was needed to advance the IPO objective. He did not, as Ms. Hanson-Parsons later would, come up with a "100 day plan" to get the company

ready for its IPO. There were significant delays in getting the financial statements and other information to Deloittes.

[243] Other crucial aspects of this account are not, however, born out by the evidence. In addition, even the aspects that are born out have a more complicated story attached to them than the one offered by Secure. Further, and most importantly, the evidence does not support the overarching inference that Secure invites me to draw: that Mr. Haack lacked diligence, effort and competence in the work he did in relation to the preparation of the audit.

[244] The remainder of this section assesses the evidence with respect to the pillars of Secure's case against Mr. Haack's work surrounding the audit and preparation for the IPO.

When did Mr. Haack know about the plan for an IPO?

[245] Secure submits that the plan to go public existed from the time of the merger, that Mr. Haack knew that, and that Mr. Haack should have been making decisions based on the going public plan. It relies in significant part on the e-mail sent by Mr. Wadsworth to himself, and forwarded to Mr. Haack by Mr. Rawlyk, in October, 2009, identifying the "exit strategy" as the ultimate objective of the merger.

[246] As I have already explained, however, and in spite of that e-mail, the focus of the merger was primarily on becoming one of the largest private integrated drilling fluids, environmental and solids control companies in Canada, and an innovative leader in all areas. The goal of going public was secondary.

[247] Further, while the witnesses testified at trial that the ultimate goal was to go public, the contemporaneous evidence suggests that the plan to go public did not become a serious focus of management until several months after the merger was completed. It was not until May 2010 that Marquis Alliance met with its proposed underwriter, and at that time the discussions were still exploratory. The agenda for a May 19, 2010 meeting with the Macquarie Group was:

> Discuss the public markets and opportunity for MA to go public
>
> Why?
>
> Why or why not now? If not when, if at all.
>
> If so how, IPO vs RTO, other etc.
>
> What's the process, timing, cost etc.

This agenda suggests that, as late as May 19, 2010, the parties were still discussing whether to go public ("if at all") and, if they did, whether to pursue an IPO or another option, such as a reverse takeover.

[248] The decision to go public crystallized through May and June, as Marquis Alliance negotiated the terms of a retainer with Macquarie. Macquarie was retained at the end of June 2010.

[249] Marquis Alliance began to pursue going public in earnest in mid-July 2010. It held an "IPO process kick off meeting" with BLG around July 12, 2010, at which time BLG reviewed with senior management the overall process and filing requirements associated with an IPO.

[250] On July 19, 2010 Mr. Lawrence of BLG sent Mr. Haack information about the process for going public. On July 21, 2010 Mr. Haack was sent further information by Ms. Melissa Smith of BLG.

[251] Even at that point, however, Marquis Alliance was still sorting out how it wanted to proceed and had not developed a clear plan with its law firm or underwriters. For example, the checklist Ms. Smith sent to Mr. Haack in her July 21, 2010 e-mail was described as "IPO Critical Dates" but did not have any actual dates identified. Similarly, in an e-mail to Ms. Hanson-Parsons dated August 9, 2010, Mr. Lawrence said, "Part of the issue is that we do not know if we are: combining with another company at the start, buying a company with the proceeds, or not buying a company in the near term. We have also not been able to do any real work on the prospectus at this point as it is not cost effective to draft with a hypothetical structure". These options were, as Mr. Lawrence pointed out in his testimony, all aspects of a public offering, but they were different ways to approach it which would affect how the prospectus was drafted, and with respect to which no decision had yet been made.

[252] This evidence satisfies me that it was not until July 2010 that Marquis Alliance had a firm plan to pursue an IPO and, even then, the details of that plan were still being worked out.

[253] I am also satisfied that it was in the mid-July 2010 timeframe that Mr. Haack could have been expected to take steps as Vice President Finance and Accounting to pursue the IPO. Prior to that time Mr. Haack would have known the IPO was being discussed and thought about, and as of May 2010 that it was being seriously considered, but the plan would not have been clear or concrete enough for him to view himself as having a mandate to take active steps (and incur costs) to advance that objective.

[254] I note in this respect that Mr. Haack does not appear to have been in Mr. Wadsworth's confidence; in particular, Mr. Wadsworth does not seem to have shared with Mr. Haack his thoughts and concerns about going public. The evidence shows, for example, that in May and June 2010 Mr. Wadsworth met with Ms. Hanson-Parsons at her home to discuss the possibility of going public and to obtain her advice about the best way to do so. At one such meeting, on May 27, they met to discuss the current status of the company, and what kind of assistance Mr. Wadsworth was hoping to get from Ms. Hanson-Parsons going forward. They talked about her potential role in looking at acquisition markets; they talked about the concept of an IPO and what that would mean for the company.

[255] Mr. Wadsworth does not appear to have had similar conversations with Mr. Haack; there are records to suggest that they met and discussed the IPO at least once in mid-June 2010, but nothing to suggest that they had conversations of the confidence and frankness Mr. Wadsworth shared with Ms. Hanson-Parsons.

[256] The difference in Mr. Wadsworth's relationship with Mr. Haack versus his relationship with Ms. Hanson-Parsons is illustrated by his communication with each of them with respect to a potential corporate acquisition. In April 2010, Mr. Haack provided some advice and assistance to Mr. Wadsworth with respect to a proposed acquisition of a company called New West. Mr. Wadsworth copied Mr. Haack on an e-mail with respect to the acquisition. In the e-mail Mr. Wadsworth talked about the business and value of the company. Mr. Haack responded by raising a concern that the value of New West seemed much lower than the asking price; he suggested that they obtain a professional valuation before making an offer. Mr. Wadsworth did not mention in the e-mail copied to Mr. Haack that his interest in New West arose from it being a potential

vehicle for a reverse takeover, and because it had some technology the company wanted to acquire.

[257] In an e-mail sent to Ms. Hanson-Parsons about the New West purchase, Mr. Wadsworth was more forthcoming. He forwarded the e-mail he had copied to Mr. Haack but added that he was looking at New West because of the technology it owned and as a vehicle for going public. Mr. Wadsworth told Ms. Hanson-Parsons that Mr. Haack was not aware that he was talking to her and said, "for now lets [sic] keep it that way". He said that Mr. Haack did not give him much, and "is to [sic] busy trying to sort out our finances".

[258] What this evidence suggests is that, to the extent Mr. Wadsworth was thinking about going public prior to late June-mid-July 2010, Mr. Haack was not likely to know or understand that; Mr. Wadsworth shared his thoughts and plans with Ms. Hanson-Parsons, but not with Mr. Haack.

[259] In sum, the evidence shows that it was not until July 2010 that Marquis Alliance had a firm plan to pursue an IPO and, even then, the details of that plan were still being worked out; any earlier plans of Mr. Wadsworth had not been formalized into company policy nor shared with Mr. Haack.

When was the Target Date for the IPO?

[260] Mr. Wadsworth, Ms. Hanson-Parsons and Mr. Lawrence testified that the timing for the IPO was the fall of 2010, largely because of the desirability of that time frame from a public markets' perspective. Mr. Wadsworth and Ms. Hanson-Parsons recalled that being the plan from as early as the initial meeting with Macquarie in May.

[261] Mr. Anderson, Mr. Deibert and Mr. Rawlyk could not recall the target date.

[262] Mr. Haack recalled a number of dates being discussed, including fall 2010 and early 2011. He also recalled both Mr. Deibert and Mr. Rawlyk wanting to ensure the numbers made sense prior to going public, with Mr. Rawlyk having a target of $100M for the IPO. Mr. Wadsworth acknowledged that the 2011 dates may have been mentioned, but only as a back-up plan in the event the fall 2010 timing did not work.

[263] I am satisfied that some people at Marquis Alliance, and in particular Ms. Hanson-Parsons and Mr. Wadsworth, hoped to have an IPO in the fall of 2010. That hope did not, however, take the form of an articulated and communicated plan, the viability of which had been addressed or assessed. The process of pursuing an IPO simply had not advanced to the point to allow such a plan to have been developed. As of July 2010, the underwriter and law firm had only just been retained. Conversations about the IPO and how to advance it remained preliminary and general – focused on the "overall process", rather than a specific plan of action. The documents that spoke to the timing, such as those circulated by BLG on July 21, 2010, had no dates attached, and showed almost nothing had been done by that point to advance the IPO in a concrete way.

[264] In my view Mr. Haack's recollection, that the company was still discussing the IPO timing in the summer of 2010, and that fall 2010 was one amongst a number of options discussed, accords better with the overall evidentiary record than does the claim that the company had a clear objective for fall 2010. I accept his evidence on this point.

[265] What this means is that by mid-July 2010 Mr. Haack knew that the company was pursuing an IPO. He knew that fall 2010 was a possible date for that IPO. He would – or should – have understood that as Vice President Finance and Accounting he needed to take active steps to obtain and prepare the information necessary to complete a prospectus. But he would not have understood that the deadline for completing that process was firm and imminent.

Was the choice of auditor and the scope of the retainer improper?

[266] The evidence shows that Marquis Alliance engaged Deloittes to produce audited financial statements for the year ending March 31, 2010. The engagement contemplated the statements being compliant with Canadian GAAP but did not contemplate the statements being prepared for use in a prospectus or other public document. It imposed restrictions, including the need for prior approval from Deloittes, for including the audited financial statements "in an offering or other document". The auditors at Deloittes did not understand their audit was for the purposes of a public offering at the time they were retained.

[267] The process for selecting an auditor for Marquis Alliance began in December 2009. Prior to the merger, Marquis Fluids and Alliance Energy had different auditors and after the merger had to choose which accounting firm to retain for the new entity. Marquis Alliance issued a request for proposals in January 2010 and received Deloittes' response to that request on or about February 3, 2010. Deloittes was selected as the auditor. The Deloittes' retainer letter, addressed to Mr. Wadsworth and dated May 18, 2010, was signed by Mr. Haack on or about May 31, 2010.

[268] Mr. Haack, Mr. Lew and Mr. Wadsworth all participated in the decision-making process for selecting the auditors. Mr. Wadsworth suggested that he took direction from Mr. Haack on these matters; Mr. Haack said the final decisions were made by Mr. Wadsworth. I accept both of these propositions as true; Mr. Wadsworth was the President and had authority relative to Mr. Haack; if he gave directions, they were going to be followed. I nonetheless believe that he relied on Mr. Haack (and on Mr. Lew) in making the decision about which auditor to use.

[269] Regardless of who decided or how, I am satisfied that the decision to engage Deloittes for a one-year audit based on Canadian GAAP, but without an express agreement to prepare statements for a public offering, was reasonable and appropriate at the time it was made. The company was in the midst of a difficult merger process involving significant problems with the integration of its accounting system. Marquis Alliance had just come into existence and had never been audited or subject to public accountant review. Starting with a basic audit of the consolidated financial statements was the most rational plan in the circumstances. It was an achievable goal which would create a useful baseline for further progress. This was particularly so given that at the time Deloittes was retained there was no clearly articulated plan to go public (recall that the first meeting with Macquarie was May 19, 2010 – one day before the date of the Deloittes engagement letter).

Was the use of differential reporting improper?

[270] I reach a similar conclusion with respect to Mr. Haack's decision to use differential reporting to account for Marquis Alliance's investments in Syria.

[271] Due to the political strife in Syria, Marquis Alliance ran into major problems obtaining accurate financial information with respect to Shamal, its joint venture in Syria. Mr. Haack and others, including Mr. Wadsworth and Ms. Hanson-Parsons, took a number of steps to obtain the

information, including having Mr. Curran travel to Syria for that purpose. At the end of August 2010, just prior to his termination, Mr. Haack was working with Deloittes to retain their Damascus office to obtain and review the necessary information. In the meantime, however, he and Deloittes proposed to have Syria accounted for on a differential basis – that is, not in accordance with GAAP.

[272] Using differential reporting was permissible for Marquis Alliance as a private company; however, financial statements containing differential reporting could not be used for a public offering. Once it became clear that Marquis Alliance was going to go public, Mr. Haack and Deloittes decided to complete the financial statements on a differential basis with the goal, once they had done so, of converting the financial statements to remove the differential reporting.

[273] The shareholders signed a resolution approving the use of differential reporting dated July 15, 2010. The approval stated that differential accounting could be used because Marquis Alliance "is a non-publicly accountable enterprise". As such, all of the shareholders, including the Defendants, knew of that plan and why it was available to Marquis Alliance. They also knew, by inference, that if Marquis Alliance planned to become a publicly accountable enterprise this reporting would not be an option.

[274] Mr. Wadsworth claimed that he was relying on Mr. Haack's advice in signing the resolution; however, I find that given his knowledge of the issues with Shamal, and what the document said, he would have appreciated the nature of the document he was signing.

[275] Ms. Hanson-Parsons asked Mr. Haack about why this resolution was necessary. Mr. Haack responded, copying Mr. Lew, explaining that the differential reporting was necessary to address the problem with Syria, and that it would have to be restated later, regardless of whether the company goes public. Ms. Hanson-Parsons thought this response unsatisfactory but she, along with Mr. Lew and the other shareholders, signed the resolution.

[276] In the end, after Mr. Haack had left the company, Marquis Alliance resolved the Syria problem on the financial statements by treating it as an investment loss of $1,681,249. Ms. Hanson-Parsons said they remained unable to get any books or records out of Syria, and they used the impairment as a strategy to address the problem.

[277] Ms. Chhina, the audit partner from Deloittes, and Ms. Kaus, the manager, confirmed that to include an impairment in audited financial statements would require sufficient accounting information about the Syria investment to support the validity of management's estimate of the investment loss.

[278] Secure suggests that Mr. Haack's pursuit of differential reporting was damaging and contrary to Marquis Alliance's interests. It suggests as well that he took this approach because he did not understand that you could not use differential reporting in financial statements included in an IPO. It bases this suggestion on some answers Mr. Haack gave during questioning that could be interpreted in this way.

[279] Based on his testimony, however, and on his correspondence with Ms. Hanson-Parsons about the differential reporting resolution in the July 22, 2010 e-mail, I am satisfied that Mr. Haack understood that differential reporting was not suitable for public company reporting and was only a temporary work around to solve the problems arising from Syria. I think in his answers in questioning he simply misspoke.

[280] I am also satisfied that the use of differential reporting was known to Marquis Alliance and its shareholders, and that they approved it by virtue of signing the shareholders resolution. While Mr. Wadsworth, Mr. Anderson, Mr. Deibert and Mr. Rawlyk disavowed accounting knowledge, they were all experienced in business and heavily financially invested in Marquis Alliance. They either knew, or should have known by reviewing its language, the nature of the resolution they were signing.

[281] In the totality of the circumstances, I view Mr. Haack's approach to the Syria problem to have been reasonable and appropriate. The difficulties in Syria created a significant problem with no obvious solution. Given that until July 2010 Marquis Alliance was a private company with no set plan or strategy for going public, using differential reporting as a temporary stop-gap made sense. It allowed the audit to progress and created financial statements that could be later adjusted to account for Syria in a GAAP compliant way. This is in fact what happened.

[282] Further, even if Mr. Haack could have immediately taken an impairment on the asset – which is not obvious given Ms. Chhina's testimony about needing sufficient information to verify management's estimate of that loss – I do not think he can be faulted for not putting a $1,681,249 investment loss on the company's financial statements without taking some steps to avoid doing so.

[283] I acknowledge that using differential reporting was not good or desirable, particularly given the company's goal to go public. But Mr. Haack did not cause the problems that made differential reporting necessary, and nor is it obvious that there was another preferable option at the time he took that approach. Syria was in upheaval. Neither he nor anyone else had success in getting information, even when they travelled there. They had to put something in their financial statements, and they needed to get the audit completed, even if it needed adjustment later. Differential reporting solved that problem, and I do not think Mr. Haack can fairly be criticized for using it.

[284] In addition, as Mr. Haack noted in his testimony, and as Ms. Chhina's contemporaneous e-mails confirm, even once the decision to go public was made, it made sense to finish the financial statements on a differential basis, and then adjust them as information became available. This supports the conclusion that Mr. Haack's choice to use differential reporting was not improper.

When did Deloittes learn about the IPO?

[285] As a related concern, the Defendants allege that Mr. Haack did not tell Deloittes that Marquis Alliance was going public until August 2010. Based on the evidence, I find that Mr. Haack told Deloittes about the plan to go public in mid-July 2010. In an e-mail dated July 21, 2010, Ms. Kaus of Deloittes provided Mr. Haack with more information as to what would be necessary to be included in an offering document (IPO) in terms of audited financial statements. From this I infer that Mr. Haack had alerted Deloittes about the decision to go public some time prior to July 21, 2010.

[286] It is possible that Mr. Haack had simply asked Ms. Kaus about what going public required in a general way; however, given the timing of this e-mail, right after the meeting kicking off the IPO process, it is more likely that Mr. Haack told Deloittes that Marquis Alliance was initiating an IPO process, and Ms. Kaus responded accordingly.

[287] Ms. Chhina did not recall learning of the IPO until August 2010; however, her recollection of events related to Marquis Alliance was very limited, and the relevant fact is when Mr. Haack communicated the intention to go public to Deloittes, which he did to Ms. Kaus in July 2010. What Ms. Kaus herself did with this information is not relevant to my assessment of Mr. Haack's conduct.

[288] As such, I reject the Defendants' allegation that Mr. Haack did not tell Deloittes about the plan until August 2010 and find instead that he told Deloittes as soon as the IPO strategy was launched.

Did Mr. Haack act improperly in not obtaining audited financial statements for Marquis Fluids for 2008-2009, and in not doing enough in response to the BLG and Deloittes information?

[289] The next issue is Mr. Haack's failure to take steps to obtain consolidated audited financial statements for Marquis Fluids for 2008 and 2009 once the plan to go public became clear. Related to this is Mr. Haack's response in July 2010 to being given extensive and detailed requirements from BLG and Deloittes about what needed to be done to go public.

[290] When Mr. Haack received the information from BLG on July 19, 2010, he responded a few hours later,

> We have a meeting with the auditor to move along faster the completion of the audited consolidated financial statements for March 31, 2010.
>
> There is nothing in the memo you sent that is not what I expected and it is what we are preparing. In addition to what the memo asks for we are also moving forward with being IFRS ready. I expect the reviewed statements for Ql would be ready for Sept 30, which is after what I would consider is normal timelines but the merger process of MA has delayed initialization of these processes.

[291] Mr. Lawrence testified that he was surprised by this e-mail. He could not recall having sent a six-page memorandum and having such a nonchalant reaction in response. He said that the more usual reaction is for people not to have been aware of what is required, and to be anxious about completing it.

[292] Mr. Haack sent a further e-mail in response asking, "I am assuming they must be audited FS but is an audit of the most current year along with an audit of the comparable year sufficient?" Mr. Lawrence said this e-mail also surprised him because it asked a question that was answered in the memorandum provided earlier that day.

[293] I note that this evidence from Mr. Lawrence veers close to opinion evidence from a person not qualified as an expert; to avoid that concern I consider it only as a generalized observation by Mr. Lawrence from his experience and not as evidence "to draw any conclusion or provide any guidance about what inferences could be drawn": ***R v Dauti***, 2019 ABCA 434 at para 26.

[294] In an e-mail dated July 21, 2010, Ms. Smith of BLG sent Mr. Haack a document listing the requirements for preparation of a prospectus, including a memorandum entitled "Going Public" and setting out the considerations and steps involved in completing an IPO. She also provided a checklist for an IPO, and the documents relating to preparation of a prospectus.

[295] In an e-mail dated July 23, 2010, Mr. Haack forwarded Ms. Smith's e-mail to Mr. Wadsworth. In addition, he had divided the tasks in the checklist (which came from the BLG firm) between himself and Mr. Wadsworth. The division of work made it clear Mr. Haack was responsible for obtaining the proper financial statements for the IPO.

[296] Also, on July 21, 2010, Mr. Haack received the e-mail from Ms. Kaus of Deloittes indicating what would be required for an IPO:

> Spoke to our Securities group here and this is what would most likely be required to be included in an offering document:
>
> Audited Marquis Consolidated:
> Income Statements for the year ended 2010, 2009, 2008 (2010 would include the statements we are currently auditing as Marquis Alliance)
> Balance Sheet as at 2010, 2009
>
> Alliance Consolidated:
> Income Statements for the year ended 2009, 2008, 2007
> Balance Sheet as at 209, 2008
>
> Pro Forma:
> Annual Income Statement for 2010
>
> If you filed prior to the end of June 2011 you could still report under Canadian GAAP, after that date, you would be required to have IFRS financial statements for all.

[297] Mr. Haack forwarded this e-mail to Mr. Wadsworth on August 6, 2010.

[298] In an e-mail dated July 27, 2010, Mr. Haack answered some questions posed by the investment banker. The e-mail asked for "audited financial statements for the past 3 years". Mr. Haack responded, "last 2 years attached this years will be sent in 1 weeks time". Attached to the e-mail were the 2009 audited financial statement for Alliance Energy Capital and for Marquis Fluids Partnership. He did not attach 2008 financial statements, or financial statements for the other companies within Marquis Fluids.

[299] Based on this evidence, I find that Mr. Haack did not respond urgently and expeditiously to the information he was given about what was necessary to go public. He did not make meaningful progress on commencing the work that BLG and Deloittes had told him needed to be done to complete the IPO. In particular, he did not take steps to acquire audited financial statements for Marquis Fluids which Ms. Kaus told him would be required. He did not do what Ms. Hanson-Parsons would ultimately do in the fall of 2010, which was to create a "100 day plan" with a strategy, timeline and process for getting everything in place for an IPO.

[300] My observation in reviewing the e-mails from this time period is that Mr. Haack was not tightly focused on the IPO process. He responded to e-mails quickly (except for the delay in forwarding Ms. Kaus's e-mail to Mr. Wadsworth) and did some work in response, such as allocating tasks between himself and Mr. Wadsworth, and giving some information to the underwriter. But he did not do more extensive or detailed work to advance Marquis Alliance's readiness to complete an IPO.

[301] I am not, however, persuaded that this shows that Mr. Haack lacked diligence and effort in his work.

[302] First, comparisons with Ms. Hanson-Parsons are not fair. She and Mr. Haack were not similarly situated. In addition to her far greater public accounting knowledge and skills, Ms. Hanson-Parsons was close to Mr. Wadsworth and much more aware of and involved in his decision process with respect to going public. She and Mr. Wadsworth were on the same team, in a way that Mr. Haack and Mr. Wadsworth were not. That Mr. Haack did not do what Ms. Hanson-Parsons later did, does not show that he was not working hard.

[303] Second, Mr. Haack's work situation at this time was difficult. The company move occurred between July 19 and 26th and, as has been discussed, occurred under difficult circumstances which created unhappiness. Mr. Haack had to manage that situation. In addition, he was dealing with the problems with the Syria joint venture, working on obtaining an audit from the Damascus office of Deloittes, and managing the differential reporting.

[304] Third, and relatedly, the audit the March 31, 2010 financial statements was delayed and the accounting staff was overworked and under stress. Preparing the financial statements for Marquis Fluids for 2008 and 2009 would require considerable effort and time from the accounting staff. Mr. Lew estimated that it took him several weeks to prepare the financial statements when he turned to it in the fall of 2010. It would have been reasonable for Mr. Haack to have decided not to ask the accounting department to take on this work. Indeed, with this and the other issues ongoing, it would be understandable had Mr. Haack not yet turned his mind to the question of whether Marquis Fluids' 2008 and 2009 financial statements were sufficient, or what to do about them.

[305] Fourth, as earlier explained, Marquis Alliance did not have a firm and committed plan for a fall 2010 IPO, and Mr. Haack understood the date to still be undetermined. Lacking knowledge of an imminent deadline, Mr. Haack would not have had a sense of urgency in relation to the information he was being given about what needed to be done.

[306] Finally, Mr. Haack was fired at the end of August, six weeks after receiving the information from BLG and Deloittes. Given the other issues that arose in that interval, and particularly the move, as well as the lack of specific deadlines and targets having been identified, I am reluctant to assess his work as lacking in diligence and effort based only on what Mr. Haack achieved – or did not achieve – during that short time period.

[307] As a result, I agree that Mr. Haack did not immediately engage with the information provided by BLG and Deloitte, take steps to do the work they told him needed to be done, or come up with a plan to get it done. In particular, I accept that he did not take steps to obtain IPO compliant financial statements for Marquis Fluids. Given, however, everything else that was going on with the move and the preparation of the 2010 audit, the undetermined timing of the IPO and his termination six weeks later, I am not convinced that in the circumstances the failure to take those steps shows him to have lacked diligence or effort.

[308] It also bears mentioning that I am not persuaded that, even had Mr. Haack come up with his own 100 day plan, Marquis Alliance could have completed its IPO for the fall of 2010. The issues with Syria, the delays caused by the accounting integration in the production of the financial statements for 2010, the nature of the Marquis Fluids group financial statements for 2008 and 2009 – none of which are things for which Mr. Haack was responsible – suggest that no one could have got the company where Mr. Wadsworth thinks it should have gone. In addition to being neither clearly articulated nor communicated, the fall 2010 IPO timeline was not realistic.

[309] Secure points out that Mr. Haack took some holidays during this time period and argues that this shows his lack of commitment and work ethic. I do not view that characterization as accurate. Mr. Deibert testified that summer months were the usual time for vacation at Marquis Fluids and, given the seasonal nature of its operations, I would expect that to have also been the case at Marquis Alliance. Other people working on the IPO, including Mr. Wadsworth and Ms. Hanson-Parsons, took vacation during this time period. As a result, I do not view Mr. Haack taking a few days holiday in the summer as unreasonable, likely to have made much of a difference, or evidencing a lack of commitment and work ethic.

[310] Secure also points to the setback Mr. Haack had in the completion of his CMA in August 2010, and suggests that he was upset and distracted as a result. They ask me to infer that his failure led to a lack of diligence and effort with regard to the IPO. I do not, however, have evidence to support an inference that Mr. Haack's work in August 2010 was undermined by his failing the CMA assignment. I have assessed his performance based on the evidence about his performance; his failure of the CMA assignment, including evidence that he was unhappy about it, does not change that assessment.

Who was responsible for the delay in information being received by Deloittes?

[311] As was the case with the financial reporting, there were significant delays in getting information to Deloittes, including the financial statements that Deloittes was to audit. The reasons for this delay were the issues arising with the integration of the accounting system, and Mr. Lew's overall workload. Mr. Lew was the person responsible for preparing the draft financial statements, and for working with the auditors on a day-to-day basis. The auditors testified that Mr. Lew was the person preparing the financial statements and gathering information for the audit, although they also spoke regularly with Mr. Haack.

[312] The delays in providing financial statements and other information to Deloittes significantly disrupted the ability of Deloittes to complete its audit on a timely basis, to the point that the audit was still in progress through August 2010.

[313] For the reasons earlier explained with respect to the accounting integration and financial reporting, however, those delays cannot fairly be blamed on Mr. Haack. Mr. Haack was not responsible for the problems with the accounting integration, was kept out of the accounting work by Mr. Lew and was not consulted by Mr. Lew with respect to his workload issues. Again, Secure wants me to blame Mr. Haack for the delays in the audit, without blaming Mr. Lew for them, which is an inference I cannot accept. There is no doubt that the delays in getting information to Deloittes were unfortunate and materially delayed the completion of the audit, but those delays did not occur because of Mr. Haack.

Did Mr. Haack misrepresent the progress of the audit?

[314] The last issue in relation to the audit was with respect to several instances in which Mr. Haack suggested that the audit was near completion, or the financial statements would be available, and his statements were inaccurate. Secure suggested that I infer from this that Mr. Haack was being deceptive or not taking responsibility, making promises that he could not keep.

[315] While certainly Mr. Haack sent e-mails saying things would be ready that then were not, I do not know why he sent those e-mails or on what basis – I do not know, for example, what information he had been given by Mr. Lew or the auditors. Based on the record before me, I do

not have a basis for finding that Mr. Haack was deceptive, not taking responsibility or making promises that he could not keep. I suspect he may have been guilty of unwarranted optimism, but that is a fairly normal response in circumstances such as those he was dealing with. It does not evince misconduct or incompetence. And, in any event, that is mere speculation; I do not have enough evidence to know why he sent the e-mails he did, or on what basis. Absent that evidence, I cannot make an adverse assessment of Mr. Haack's performance on this basis.

Conclusion on the audit

[316] In sum, I find that Mr. Haack knew that Marquis Alliance had a firm plan to pursue an IPO in early July 2010. He knew that fall of 2010 was a potential timeframe for the IPO to occur, but other times had been discussed, and he had not been given clear instructions that a fall deadline was what he should be trying to achieve. Mr. Haack's decision-making in relation to the March 31, 2010 audit of Marquis Alliance, including the decision to use differential reporting, was reasonable and appropriate. He did not meaningfully advance Marquis Alliance's IPO readiness in July and August 2010 and did not take steps to obtain IPO compliant financial statements for Marquis Fluids, but I do not find that his conduct in that respect reflected a lack of diligence or effort. Mr. Haack was not to blame for the delays in getting information to Deloittes. I also do not find that he was deceptive or wrongful in his communications about the state of the audit.

RSP Roll Out

[317] Secure claims that Mr. Haack's inattention and incompetence delayed the roll out of the Marquis Alliance RSP, causing Marquis Alliance not to meet its promised July 1, 2010 deadline, and undermining its credibility and reputation with its workforce.

[318] Mr. Wadsworth's memorandum to the Board said,

> he held up the RRSP process by leaving the required documents on his desk, and when asked about it, he lied and said the document did not exist and he had signed nothing; yet it was confirmed by our Benefits provider and Sterling Brad had the documents and approved the change in funds. This approval was done without the knowledge of any EVPs or the President. This delay and action delayed the RRSP rollout process to the company by 2 months.

[319] Mr. Wadsworth reiterated this claim in his direct examination:

> Well, the original timeline that we were gonna rollout the RRSP was back in May which we told employees, that didn't happen. So, again, we lost the trust of the employees. When this was presented to Mr. Haack, he basically had passed down the -- passed the buck per se and said that he had never received anything and it was Sterling that had held up the process. But as we looked into it, found out that, no, he had actually had the documents on his desk, everything was moving forward. Just another example of not having -- not having trust in your vice president of finance and accounting.

[320] The evidence shows, however, that Mr. Wadsworth's testimony and earlier statements about Mr. Haack's conduct with respect to the RSP roll out are misleading and, in material part, untrue.

[321] Mr. Haack, Ms. Mitchel and Mr. Perera worked on developing the RSP in the spring of 2010. Who had ultimate responsibility for implementing the program after Ms. Mitchel stopped reporting to Mr. Haack was disputed by the witnesses; however, the witnesses agreed, and the evidence shows, that they all contributed to the implementation of the program, and that Ms. Mitchel was the primary point person in terms of its roll out in June and July 2010.

[322] The evidence also shows that the program was not in place by July 1, 2010, although it could be backdated to that point in time. Further, the delays in the program arose largely because of delays in receiving information from the RSP provider. While on June 11, 2010 Ms. Mitchel confirmed to the RSP provider representative, Mr. Sterling Rempel, that management had signed off on the program, and that enrolment forms and booklets should be sent over, the enrolment forms were not sent over prior to July 1, 2010. Rather, the enrolment forms were received by Ms. Mitchel on July 16, 2010, a Friday, and Ms. Mitchel was advised that the booklets would not be sent until the forms were signed. The company move then happened and Ms. Mitchel went on vacation from July 19-26. On August 4, 2010, she found the partially completed enrolment forms were on Mr. Haack's desk. She completed them and signed them on Mr. Haack's behalf, and sent them in.

[323] This information was clearly laid out by Ms. Mitchel in an e-mail dated August 10, 2010, the accuracy of which she confirmed at trial. The e-mail shows that the RSP provider did not provide the forms prior to the July 1, 2010 RSP roll out date. The forms were not received by Ms. Mitchel until July 16, 2010. The e-mail also shows that Mr. Haack had not completed signing the forms as of August 4, 2010. The e-mail does not show, however, that Mr. Haack not signing the forms during that time was due to indolence or inattention. Consider: 1) the e-mail says when Ms. Mitchel received the forms but does not say when Mr. Haack received them; 2) Ms. Mitchel received the forms on a Friday, the last day of work before a one week holiday, such that it is possible that the forms were not given to Mr. Haack until after her return on July 26, 2010; 3) there were over 100 and may have been as many as 200 forms to be reviewed and signed; and 4) the company was in the middle of moving, the move did not go smoothly, and Mr. Haack was in charge of it.

[324] As such, while the evidence shows that Mr. Haack had not completed the forms by August 4, 2010 and Ms. Mitchel herself ensured they were completed, it does not show that this delay resulted from Mr. Haack's lack of effort and attention. And, certainly, it in no way supports the claim of Mr. Wadsworth that Mr. Haack caused a two month delay in the roll out of the RSP, or that Mr. Haack lied when he said that he had not yet received the forms from Mr. Rempel.

[325] In his cross-examination, Mr. Wadsworth both doubled down on the claims he made in the memorandum, that Mr. Haack left the documents on his desk and lied about doing so, and admitted that he had no real basis for those claims. He said his claim that Mr. Haack had "lied" was because Mr. Haack told him that the forms had not been received, but Mr. Rempel told him that they had been sent. From these inconsistent accounts, Mr. Wadsworth concluded that Mr. Haack had the forms, did not complete them, and was lying about it. Mr. Wadsworth said it was not a mere "assumption" because Mr. Haack said the package had not been received but Mr. Rempel said the package had been sent and not yet returned. Mr. Wadsworth did not recall speaking to Mr. Haack about this, and no documentation suggests that he did so.

[326] That, based only on inconsistent statements, Mr. Wadsworth assumed Mr. Haack lied, and that he maintains this assumption ten years later and in the face of the documentary evidence produced at trial, gives me serious concerns about Mr. Wadsworth's honesty as a witness and at the time of Mr. Haack's termination. Had he spoken to Mr. Haack or to Ms. Mitchel (which Mr. Wadsworth confirmed in cross-examination he did not) he would have learned that it was far more likely that both Mr. Rempel and Mr. Haack were speaking truthfully – the forms were late being received from Mr. Rempel, and there was also a period of time when Marquis Alliance had the forms and had not yet returned them. For Mr. Wadsworth to assume from two inconsistent statements that one person must be lying, and that person was the Marquis Alliance employee, maintaining that assumption with no investigation or inquiry, and then using it as a basis for cause, creates the impression that cause, not the truth, was what Mr. Wadsworth was looking for.

[327] Mr. Wadsworth's memorandum also refers to an approval in the change in funds in the RSP and seems to suggest that this was done "without the knowledge of any EVPs or the President". The Statement of Defence refers to Mr. Haack "failing to provide accurate or any status reports to senior management on the RRSP roll out".

[328] I am not entirely sure what this point refers to, and Secure's argument focused only on the forms issue; however, I do note three e-mail exchanges produced at trial and addressed by witnesses in testimony.

[329] The first, Ms. Mitchel's June 11, 2010 e-mail to Mr. Rempel asking that he send the forms, implies that there were changes made to the fund package prior to June 11. It does not provide any information about those changes or who was involved in deciding to make them.

[330] The second, in July 2010, was with respect to the fund mapping to be used in the RSP, and was between Mr. Haack, Ms. Mitchel, Mr. Perera and Mr. Rempel. In the e-mail, Mr. Rempel provided some information about the investment structure of the RSP. Mr. Haack responded saying that the investment plans and commitments must be flexible and changeable with 30 days' notice. Mr. Rempel replied that that was the case. Mr. Haack then responded, saying "In Dilan's [Mr. Perera's] absence I am providing agreement from MA to proceed with the fund mapping as described…". Mr. Haack copied Mr. Wadsworth on this e-mail. Mr. Perera responded, "Thanks Brad and agreed".

[331] Mr. Wadsworth and Mr. Perera testified as to some confusion regarding what Mr. Haack said in this e-mail given that Mr. Perera did not have signing authority or like power in relation to Marquis Alliance; however, Mr. Haack's phrasing seems simply to reflect the role of Mr. Perera in the implementation of the RSP. Mr. Perera's response is consistent with this interpretation. Mr. Haack was not questioned about this e-mail.

[332] The third e-mail exchange was dated August 18, 2010, in which Mr. Wadsworth asked Mr. Haack about a change in the RSP funds that had purportedly been signed off on by Marquis Alliance. Mr. Haack responded that "There was a recent change to the fund package in the last three months which was Dilan's [Perera's] proposal and I signed it based on Dilan's agreement. I have emails to show that approval trail". Mr. Wadsworth said in response, "this is what I was asking about yesterday, but you mentioned you never saw anything or authorized anything. Good enough." Mr. Haack responded, "The document I signed was to simplify the fund options but it did not put us into anything new. Yesterday when you asked I was thinking about RRSP program commitments".

[333] As noted, it is not entirely clear if these various e-mail threads refer to the same events. Nor am I certain that they relate to the events Mr. Wadsworth had in mind when he referenced Mr. Haack "failing to provide accurate or any status reports to senior management on the RRSP roll out" in the memorandum to the Board. However, given the proximity of the August 18, 2010 e-mail to the termination memorandum, I infer that this is the exchange that led to Mr. Wadsworth making the comments that he did. I also infer from the context that the simplification of the fund options to which Mr. Haack refers in the August e-mail is that discussed in the July e-mail chain, and the change in fund package he references is that implied by the June 11 e-mail.

[334] None of these e-mails, alone or as a whole, are sufficient to support the inference in Mr. Wadsworth's memorandum, that Mr. Haack made changes to the funds without communicating with senior management and which resulted in delays to the RSP roll out. They show that some changes were made, but in the June e-mails there is no evidence about who made the implied earlier changes, and in the July e-mail Mr. Wadsworth is copied on the e-mail from Mr. Haack. Further, there is no evidence to suggest that the emails could be characterized as Mr. Haack making decisions that delayed the roll out of the program. The first changes were completed by June 11, and in the second discussion, Mr. Rempel raised an issue on July 19, and Mr. Haack responded with a question the same day and an answer two days later, on July 21, 2010.

[335] As a result, I find that Mr. Wadsworth's statements about the RSP in his memorandum, and which he repeated at trial, were unsupported by the evidence and, in material respects, untrue.

Vacations and Absenteeism

[336] Secure alleges that Mr. Haack took excess vacation and that he was absent from the office without permission or notice. In Mr. Wadsworth's memorandum to the directors he stated:

> in the past 6 months, he has spent over 30 business days away from the office on holidays, without discussing his absence in advance with the President or confirming that it would be acceptable for him to be absent at the times he was requesting.

[337] In its termination letter to Mr. Haack, Marquis Alliance cited "absences from the office which caused delays in financial reporting".

[338] The substance of this claim was untrue, and review of the Marquis Alliance records from the time would have revealed to Mr. Wadsworth that it was untrue.

[339] E-mails exchanged between Mr. Haack and Ms. Mitchel in January 2010 show that Mr. Haack accrued 2.08 vacation days per month and had 4.61 days that he could carry forward from 2009. At that accrual rate, with the addition of his days carried forward, he would have had just over 17 days of vacation owing. After Mr. Haack's termination, Ms. Mitchel determined that he had unused paid vacation days for 2010, and Marquis Alliance paid him $1903.86 in respect of those days.

[340] Marquis Alliance's own records thus must have showed that Mr. Haack took considerably less than 30 vacation days.

[341] In his letter to Marquis Alliance in September 2010, Mr. Haack also provided the company with that information. He told them about the 17 days vacation, and said he had taken

14 days. This is consistent with the January e-mail and the payment later made by Marquis Alliance.

[342] Further, Secure produced no evidence to show that Mr. Haack was away on other days that the company had not documented. Mr. Wadsworth and Mr. Anderson both testified that from time to time they went to Mr. Haack's desk and did not find him there. Given, however, the many reasons that a person could not be at their desk, and that neither Mr. Wadsworth nor Mr. Anderson documented their observations nor investigated to establish why Mr. Haack was not at his desk, they provide no meaningful proof to support a claim of undocumented additional absences. As earlier noted, Mr. Haack's work on the move, with the bank and with the auditors would have provided numerous occasions for him to be working, but not at the office.

[343] Based on this evidence, I infer that Mr. Wadsworth simply made up the claim that Mr. Haack was away for 30 days on holiday. Nothing in the evidence proves it, or even provides a basis from which to reasonably infer it. It is contradicted by Marquis Alliance's own records and actions. The only evidence offered in support is impressions and speculation on the part of Mr. Wadsworth and Mr. Anderson.

[344] In their Statement of Defence, and in argument, Marquis Alliance emphasized Mr. Haack's failure to ask permission before taking vacation, rather than the number of days he took. They also, however, did not resile from the contents of Mr. Wadsworth's memorandum. He did not acknowledge that he made a mistake. On having that paragraph presented to him during his direct examination, Mr. Wadsworth said, "He was gone over 30 days. Was more or less non-authorized holiday time". I find Mr. Wadsworth's continued suggestion that Mr. Haack did something that the evidence certainly does not support, and that Marquis Alliance's own conduct directly contradicts, troubling. It undermines his credibility and creates the impression that his evidence is self-serving to the point of dishonesty.

[345] In terms of permission, Mr. Haack testified that when he was at Marquis Fluids, he was permitted to take vacation at times chosen by him, without obtaining advance approval; he was told by Mr. Deibert that he simply had to tell them when he was going and ensure that the work was done.

[346] Mr. Haack said that he continued to take this approach at Marquis Alliance. For example, in an e-mail dated December 14, 2009, he told Mr. Rawlyk, Mr. Deibert and Mr. Wadsworth that he was taking the next day off but that if they needed something they should just e-mail or call him.

[347] Similarly, in an e-mail dated January 25, 2010, Mr. Haack advised Mr. Wadsworth he would be away the 27th-29th. The e-mail was also sent to Mr. Deibert and Mr. Rawlyk, and was copied to Mr. Lew, Mr. Marken, Ms. Cronk and Ms. Mitchel.

[348] In an e-mail dated February 11, 2010 Mr. Haack advised Mr. Wadsworth he would be away February 12, 2010.

[349] Mr. Deibert did not recall a conversation with Mr. Haack about vacation planning, or whether Mr. Haack asked for time off at Marquis Fluids. As a general matter, he said that at Marquis Fluids, employees were expected to take time off in the summer and would usually give notice to the human resources department within 60 days of the proposed vacation.

[350] Mr. Deibert's evidence does not contradict Mr. Haack's, and given the e-mails showing Mr. Haack's practice in this respect, I accept that this was Mr. Haack's understanding of what was expected in relation to vacation notification.

[351] I also note that the records do not indicate anyone objecting to Mr. Haack approaching his vacation in this way until August 19, 2010 when, in an e-mail of that date, Mr. Wadsworth said, "can you start letting me know when you would like time off rather than just telling me".

[352] Based on the evidence as a whole on this issue, I accept that Mr. Haack did not seek permission to take time off, and that he gave short notice to the people he worked with when he was planning on taking time off. He did so based on what he had been told by Mr. Deibert, but he was not told that this approach was acceptable by Mr. Wadsworth. Mr. Wadsworth told him it was unacceptable in August, 2010.

External Consulting

[353] Marquis Alliance claimed that Mr. Haack engaged in consulting work for third parties on company time, and without disclosing that work to the company. It said that this was "revealed" in February 2010, and that Mr. Haack was asked to stop providing these additional services because he was an employee and shareholder of Marquis Alliance.

[354] Secure maintained this position at trial; Mr. Wadsworth said in his testimony that the company was aware that Mr. Haack was doing additional consulting work on the side.

[355] Mr. Wadsworth said in cross-examination that his understanding arose from being told that "prior to the merger, he [Mr. Haack] was working with another party and that he was continuing to – to work for that party during the Marquis Alliance entity". But he acknowledged that at the time he wrote the memorandum he did not know who Mr. Hack was consulting with, what days Mr. Haack was doing it on or, indeed, whether Mr. Haack had stopped consulting by that point. He further acknowledged that none of this was in writing.

[356] No documentation from February 2010, or testimony in relation to February and the alleged disclosure of Mr. Haack's consulting, was presented at trial.

[357] Mr. Anderson also testified that he believed that Mr. Haack was doing consulting work.

[358] Mr. Haack testified that when he started at Marquis Fluids he worked for other companies. In fact, the reason why he only worked at Marquis Fluids part-time in the first instance was because of his ongoing obligations to other clients. It was also why he did not sign the employment agreement with Marquis Fluids, because his consulting work meant that he could not comply with the terms of that agreement. He testified that he only did consulting work when he was at Marquis Fluids, he did not do it on Marquis Fluids' time, and he did it with the knowledge of Mr. Deibert.

[359] Mr. Haack's evidence in this respect was uncontradicted and I accept it. That Mr. Wadsworth and Mr. Anderson say that they believed Mr. Haack was doing consulting work, and that Mr. Wadsworth stated it in his memorandum, does nothing to establish that, in fact, Mr. Haack was doing such work. Secure offered no other evidence to do so.

[360] Secure points to evidence from Mr. Haack where he said that for some time after November 2009, his wife was doing work for a company called Crystal Lake and that he acted as a go-between to communicate between his wife and the company. Secure suggests that this evidence supports its position that Mr. Haack did external consulting work because he also

testified that, at the time of his termination, his wife was a stay at home mother with no income. I do not accept Secure's submissions in this respect. Mr. Haack did not testify that the Crystal Lake work was ongoing through to September 2010. Rather, he testified that it went on some time past November 2009. I note in this respect that, in the questioning read-ins provided by the Defendants, Mr. Haack said that the work for Crystal Lake occurred between 2007 and 2008. He also confirmed in the questioning transcript that it was his wife who did the work for Crystal Lake.

[361] Mr. Haack's evidence about his wife being a stay at home mother at the time of termination was part of his testimony about the financial pressure on the family at that point in time. It was not evidence to precisely specify his wife's income or her work related activities. It is not sufficient for me to call the accuracy of the first evidence into doubt. Asking me to believe part of Mr. Haack's evidence (that work was done for Crystal Lake) but not another part of the evidence (who did it) is not a sufficient basis to prove this allegation. Further, the timing does not support the work occurring after February 2010. I note, again, that Secure itself offered no evidence, either new or contemporaneous, to support the allegation set out in Mr. Wadsworth's memorandum with respect to Mr. Haack's consultation.

[362] Based on his uncontradicted testimony, I find that Mr. Haack did not engage in third party consulting work when he was at Marquis Alliance, and that Marquis Alliance's claim that he did so has not been proven.

Supervision of Corporate Reorganization

[363] The remainder of the issues raised by Secure were not identified until after Mr. Haack's termination. The first issue relates to a corporate reorganization begun by Mr. Haack in January 2010 but not completed prior to his termination.

[364] Secure alleges that Mr. Haack led the process through which Marquis Alliance reorganized some of its subsidiary companies. It says that he chose a reorganization structure that did not "ring fence" liability risks in Alliance Energy Services, even though the subsidiary had been specifically designed for that purpose. Mr. Haack also did not complete the reorganization documentation. As a consequence, after his termination, the company undid Mr. Haack's approach, and adopted a different reorganization structure that shielded the parent from the liability risks in Alliance Energy Services. Secure points out that this different reorganization structure (or a version of it) was brought to Mr. Haack's attention in January 2010.

[365] The evidence establishes the factual accuracy of these statements; however, it also shows a broader context that contradicts Secure's claim that they reveal improper or incompetent work by Mr. Haack.

[366] In January 2010, Mr. Haack began the process of winding-up three wholly owned subsidiaries – Marquis Fluids Inc., Alliance Energy Capital Ltd. and Alliance Energy Services Ltd. – into the parent Marquis Alliance. The goal of the reorganization was to achieve a simpler corporate structure.

[367] Mr. Haack received advice regarding the proposed wind-up from Mr. William Fowlis, who had been legal counsel for Marquis Fluids, from Mr. Auger, a tax accountant, and from Mr. Laberge of Collins Barrow. In an e-mail dated January 20, 2010, Mr. Haack wrote to Mr. Wadsworth, Mr. Deibert and Mr. Rawlyk saying:

> Gentlemen,

> I have been discussing and reviewing our corporate structure with our tax and accounting experts. (Bill Fowlis - tax lawyer Miller Thomson; Dennis Auger - tax accountant KPMG; Brian Laberge - accountant Collins Barrow). I am proposing a winding up of the 3 wholly owned subsidiaries (Marquis Fluids, Alliance Energy Capital (AB), Alliance Energy Services (AB)) into the parent Marquis Alliance. The winding up will be done under section 88 and will allow us the flexibility to move items like insurance over as existing policies expire. The windup will be legally started Jan 1, 2010 and the plan is to have all assets moved into MA by March 31, 2010. The actual dissolution of these entities probably would not happen until the fall of 2010. I am recommending this because it will save us accounting, tax and legal expenses and when I discussed this with the experts no one had any objections or reasons why this would be detrimental to MA. This will also provide us with the legal paper to send to our customers which explains our corporate structure and put the MSA's, credit approvals etc into the parent. I would like your approvals to go ahead with this recommendation.

[368] Mr. Wadsworth responded, "Sounds good to me go ahead Brad". In an e-mail dated January 28, 2010, Mr. Fowlis provided information to Mr. Haack on how to achieve the wind-up transactions. Mr. Fowlis also advised Mr. Haack about an "alternative corporate structure". He said the alternative would offer "some asset protection advantages with respect to the capital assets being used in the business operations". Mr. Fowlis noted, however, that this alternative would "result in a more complicated corporate structure as it involves an additional corporation, leasing arrangements and likely more complicated banking arrangements". Mr. Fowlis did not make a recommendation as to which structure was preferable. He did not qualify his earlier advice on the simplified wind-up structure by, for example, suggesting that it could have adverse or harmful effects.

[369] Mr. Haack said that he spoke to Mr. Deibert about Mr. Fowlis's alternative suggestion, and that Mr. Deibert advised him that he would like to do the simplest structure first and, if they needed a more complex structure, they could do that later.

[370] Mr. Deibert could not recall whether he and Mr. Haack had a conversation about the reorganization; however, I find Mr. Haack's account believable. Mr. Haack is not a lawyer or experienced in legal matters, and the issues of corporate reorganization would have fit only loosely within his purview as Vice President Finance and Accounting. It seems unlikely that he would have made a decision such as this without the advice and direction of one or more of the senior corporate executives who had founded these companies and initiated their corporate structure. I note as well that his earlier e-mail of January 20, 2010 had sought direction from the board on this issue, showing that he understood such direction to be necessary. In general, the evidence suggests to me that Mr. Haack passed on the advice he received to the directors and obtained appropriate direction from them.

[371] In his testimony, Mr. Fowlis said that Mr. Haack and he had some conversations about the corporate reorganization before the January 28, 2010 e-mail. His recollection of those conversations was consistent with Mr. Haack's testimony, that Mr. Haack understood achieving a simpler corporate structure to be more important to Marquis Alliance than isolating the capital assets from the operating companies.

[372] Mr. Fowlis also expressed some surprise that Mr. Haack's response to his January 28, 2010 e-mail did not include any questions or exploration of the alternative corporate structure proposed. Mr. Haack simply responded with some questions about next steps in achieving the wind-up structure.

[373] Secure submits that Mr. Haack should have understood the reference to "asset protection advantages" in Mr. Fowlis's e-mail as identifying the risk that one of the companies being wound-up had liabilities that ought to be kept separate from the parent company. Mr. Haack should then have investigated the nature of the companies being wound-up and identified the original goal of ring-fencing Alliance Energy Services. It notes that Mr. Haack acknowledged in cross-examination that he was not familiar with the assets and operations of Alliance Energy Services. Secure suggests that after investigating the history and current liabilities of Alliance Energy Services, Mr. Haack should then have given that information to Mr. Fowlis, and chosen the alternative corporate structure suggested by Mr. Fowlis. At the very least, he should have spoken to Mr. Fowlis further about the alternative structure raised by Mr. Fowlis.

[374] I reject Secure's submission. It does not account for the instructions Mr. Haack received from Mr. Deibert. It does not account for the possibility that Mr. Fowlis, a corporate lawyer, should have ensured he had obtained complete information about the corporations he was dealing with prior to giving advice on a reorganization. It seems unreasonable – as between an in-house finance person and a corporate lawyer – to say it was the in-house finance person who should have asked questions about the legal liabilities of a company proposed to be wound-up. Mr. Haack said that he relied on the experts and trusted their views. That was a reasonable approach.

[375] The submission also does not account for the tenor and tone of Mr. Fowlis's e-mail. It may be that "asset protection advantage with respect to the capital assets being used in the business operations" was intended to communicate, "if you wind up the subsidiary into the parent then any lawsuits or legal problems of the subsidiary will become the problems of the parent, and the parent company's assets will be at risk", but I do not think the average reader would understand it that way. It also may be that identifying one advantage with one structure, and another advantage with the other structure, was intended to say "one of these structures is much better than the other" but, again, I do not think it is reasonable to expect Mr. Haack to have understood the e-mail in that way.

[376] In essence, given that Mr. Fowlis's e-mail did not place any red flags on the wind-up structure, did not suggest that it was necessary to have more information on the companies being wound up, and did not express an opinion that the alternative structure was preferable, and given the direction received by Mr. Haack from Mr. Deibert, I do not draw any adverse inference from Mr. Haack's failure to ask further questions of Mr. Fowlis in response to his January 28, 2010 e-mail.

[377] It should also be noted that the evidence as a whole does not show that one corporate structure was, in fact, objectively better or more desirable than the other. It shows that Ms. Hanson-Parsons later assessed a version of the alternative structure as in the company's best interests, and Marquis Alliance pursued that course of action, but there was nothing to suggest that a reasonable person or corporation could not have chosen the one originally pursued in January 2010.

[378] Secure also raises as an issue that the paperwork associated with the wind-ups was not completed saying, “Although the documents to authorize the windup and conveyances were executed, the Plaintiff failed to take any steps to actually effect the windups”. Secure observes that a Wind-Up Agreement and General Conveyance Indenture were executed effective January 1, 2010; however, the other paperwork necessary to complete the wind-ups was not completed prior to Mr. Haack’s departure.

[379] Again, however, the evidence does not suggest that Mr. Haack acted improperly in this respect. Mr. Haack’s January 20, 2010 e-mail, which sets out the information he has received from the experts, explicitly says that the actual dissolution would not happen until the fall of 2010. In addition, Mr. Fowlis’s January 28, 2010 e-mail said that the articles of dissolution would not be filed until after the completion and assessment of the March 31, 2010 tax returns for the subsidiaries. Based on this evidence, I am not satisfied that Mr. Haack acted improperly or with insufficient diligence with respect to the documentation of the reorganization. It was anticipated from the outset that the paperwork would be completed later.

[380] Ultimately, I am satisfied that Mr. Haack obtained the relevant expert advice in relation to the corporate restructuring in January 2010. He also ensured that he communicated with the Marquis Alliance directors and received instructions as to how to proceed. The evidence does not demonstrate that he acted incompetently or improperly with respect to the selection of the wind-up strategy. The evidence also does not demonstrate that he acted improperly or with insufficient diligence with respect to the paperwork for the wind-up. It was understood that the paperwork would be concluded at a later date.

High Mark Vacuum Payments

[381] Several of the Defendants’ witnesses testified about amounts payable to 876434 Alberta Inc., known as High Mark Vacuum, being redirected to Marquis Environmental Ltd. High Mark Vacuum was not part of the Marquis Fluids group; however, Mr. Rawlyk and Mr. Deibert had invested in the company, and Mr. Haack and Mr. Marken did some work for it. As previously explained, Marquis Environmental Ltd. was a company within the Marquis Fluids group although not a subsidiary of Marquis Fluids partnership.

[382] Evidence at trial showed that two payments, one of $8165 and one of $89930, that were payable to High Mark Vacuum were redirected to Marquis Environmental Ltd. It also showed that Mr. Haack had said that the amounts should be redirected in this way. Further, it showed that High Mark Vacuum became or was at risk of becoming insolvent at some point in time. Finally, it showed that, in the fall of 2010, Ms. Hanson-Parsons was concerned that the payments might constitute an improper preference. As a result of that concern, Marquis Alliance decided to transfer the money that had been paid to Marquis Environmental Ltd. from High Mark Vacuum into a lawyer’s trust account so as to ensure that no issues arose in relation to any other creditors of High Mark Vacuum.

[383] The point of the evidence seemed to be to invite me to infer that the redirection of the payments from High Mark Vacuum to Marquis Environmental Ltd. occurred at Mr. Haack’s direction, were an improper preference and gave rise to legal risks for Marquis Alliance.

[384] While I have attempted to identify the inference Secure wants me to draw from this evidence, the difficulty is that the Statement of Defence to the Amended Statement of Claim does not make any allegations with respect to Mr. Haack’s conduct in redirecting the cheques

from High Mark Vacuum to Marquis Environmental Ltd. Further, Secure did not address this issue in argument. I am thus not satisfied that it is properly before me, or even entirely sure as to the nature of the allegations made against Mr. Haack. Yet, as noted, I heard evidence on this issue from a number of witnesses.

[385] For completeness, and in fairness to Mr. Haack, I observe that the evidence given at trial does not demonstrate that Mr. Haack took action which created an improper preference for Marquis Environmental Ltd. It shows that the payments were made, that Mr. Haack had a role in them being made, and that Ms. Hanson-Parsons was concerned that they might be viewed as an improper preference by other creditors of High Mark Vacuum. It does not demonstrate that the payments constituted an improper preference in law or in fact.

[386] In addition, Mr. Haack testified that he made this decision based on the advice of counsel, and in consultation with Mr. Rawlyk. I accept that he would have done so and believe his uncontradicted evidence on this point.

[387] As such, assuming that the issue is properly before me – which I am not convinced that it is – Secure has not demonstrated that Mr. Haack acted improperly in relation to the payments redirected from High Mark Vacuum to Marquis Environmental Ltd.

[388] Witnesses also testified with respect to other matters related to High Mark Vacuum, but none of that evidence was sufficient to allow me to ascertain what the allegation against Mr. Haack might be in relation to those matters, and I do not consider them. I do consider, as part of the surrounding circumstances of the negotiation of the USA, some of Mr. Deibert and Mr. Rawlyk's experiences as investors in High Mark Vacuum.

Audit Costs

[389] Secure alleged that Mr. Haack assigned unnecessary and inappropriate work "for a company planning to complete an IPO," resulting in additional audit fees. I interpret this to refer to the decision to use differential reporting, since it was the work associated with the 2010 audit that was not appropriate for a company contemplating an IPO. For the reasons set out above, I am satisfied that Mr. Haack's decisions with respect to the differential reporting were reasonable and appropriate in the circumstances.

[390] I am also, however, unpersuaded that the temporary use of differential reporting caused increased audit costs. Certainly, the evidence at trial showed that Deloittes ended up billing far more than the original amount estimated in the May 18, 2010 retainer letter. However, as Ms. Kaus from Deloittes acknowledged in cross-examination, many of those increased costs arose from the change in the scope of the audit, and the addition of other work including strategic tax advice and the review of financial statements for a December 31, 2010 year end. Some increased costs related to the delays in getting information to Deloittes but, as earlier discussed, those delays cannot fairly be attributed to Mr. Haack.

[391] Ultimately, as was the case with the move, the fact that something cost more does not in and of itself prove that the increased costs were improperly incurred or wasted. Based on the evidence overall in relation to the audit, including the scope of the original retainer being selected prior to the plan to go public crystallizing, and the reasons for using differential reporting, I have no grounds to find that the increased audit costs here were wasted or improperly incurred, or that they arose because of improper decisions by Mr. Haack.

Marquis Fluids' Tax Documentation

[392] Secure alleges that Mr. Haack acted improperly by failing to manage tax issues arising in relation to Marquis Fluids for the year ending March 31, 2010.

[393] As explained by Mr. Laberge, as a partnership Marquis Fluids distributed income to its partners, and its partners paid tax on that income. They needed to be issued a T5103, or to be advised of their income in some manner so as to file their tax returns. Mr. Laberge said that he handled the preparation of those forms for all of the partners, except one, Mr. Corbin Coyes. He said that that partner had sought the income information from Ms. Hanson-Parsons.

[394] The documentary evidence shows that the accountant for Mr. Coyes contacted Mr. Haack, and inquired as to the status of the T5013, by way of an e-mail dated August 31, 2010. Ms. Hanson-Parsons responded in an e-mail dated September 26, 2010. The e-mail confirms Mr. Laberge's evidence, stating, "the appropriate allocations were picked up by these partners based on Brian [Laberge]'s knowledge of the windup". Ms. Hanson-Parsons then advised Mr. Coyes of his partnership income and said that the completed T5013 would be forwarded as soon as completed.

[395] This evidence, which shows that Mr. Laberge had dealt with the tax distribution income for all of the partners but one, and that Mr. Haack was not contacted about this issue until August 31, 2010, at the time of his termination, is not sufficient to satisfy me that this matter was within Mr. Haack's responsibility or that he did not handle it appropriately.

[396] As a consequence, I do not accept the accuracy of this allegation against Mr. Haack.

Shareholder Loans

[397] The Statement of Defence alleges that Mr. Haack drafted and provided "inappropriate documentation to employees with respect to an interest free loan resulting in significant unintended income inclusions to the employees". No evidence was provided to substantiate this allegation.

[398] Evidence identified issues with shareholder loan agreements with Mr. Foss and Mr. Woods' companies because the loans said that they were made by virtue of employment when, according to the contemporaneous documentation, they should have been characterized as inter-company loans. In March 2011, the Miller Thomson firm recommended that the loans be amended to correct this issue. However, nothing in the evidence suggested that Mr. Haack drafted the loans. It was not entirely clear who had drafted them: Mr. Fowlis testified that he understood the loans to have been drafted by BLG, but Mr. Lawrence could not recall having done so. Neither witness's testimony suggested, however, that it was Mr. Haack who had drafted the loans.

[399] As a consequence, I do not accept the truth of this allegation against Mr. Haack.

Marquis Alliance's Response to Mr. Haack's Performance

[400] Mr. Wadsworth maintained that he gave significant feedback to Mr. Haack with respect to the issues with his employment. He said that he and Mr. Haack had a number of one-on-one conversations with respect to the various issues that arose. He acknowledged, however, that no written records document that feedback, and that Mr. Haack never received a formal performance review, warnings or directions on how his performance could be improved.

[401] In addition, Mr. Haack never had a job description or employment agreement setting out the responsibilities he had and the duties he was to perform. He had no benchmark against which to measure his own performance.

[402] Mr. Haack testified that prior to the termination letter of September 3, 2010, he was not warned that his job was at risk in relation to his performance. He had been told about some things that needed to be addressed and given constructive advice, but he said he was never advised of any significant issue or the need for material substantive change.

[403] I earlier found Mr. Wadsworth's claim that he had spoken to Mr. Haack about the confidentiality concerns and Mr. Haack's relationship with other employees to be implausible. Given that analysis, my assessment of their relative credibility, and the broader evidentiary record, I accept Mr. Haack's evidence and find that Mr. Wadsworth never provided meaningful feedback to Mr. Haack. No one told Mr. Haack that his job could be at risk because of the concerns people had with his performance. He was not told how to improve. He was given no opportunity to improve.

[404] I am also influenced in making this finding by the fact that, as I have discussed, no meaningful effort was made to ascertain whether Mr. Haack had done the things Marquis Alliance alleged he had done. Having not made that effort, and thus not having discovered what exactly was Mr. Haack's fault, and what was just the unfortunate by-product of the integration or other issues, I find it implausible that they would have spoken to Mr. Haack about his performance and given him an opportunity to explain himself or to do better.

[405] Finally, I note that on April 27, 2010 Marquis Alliance increased Mr. Haack's salary by $5000. Ms. Osaka suggested that this communicated to Mr. Haack that his employment was secure. I do not accept this submission, in part because Mr. Haack's own evidence was that the raise was part of a general adjustment of salaries and was not performance related. I do accept, however, that the raise is inconsistent with Mr. Wadsworth's claim that he had given Mr. Haack feedback with respect to deficiencies in his performance. Giving someone a raise does not communicate that you have concerns with their performance.

[406] Mr. Wadsworth testified in relation to the raise that he told Mr. Haack that "it was pretty – pretty early on. I haven't really had a chance to really assess his activities we just merged the company". Yet according to his September memorandum, Mr. Wadsworth knew of several issues with respect to Mr. Haack's performance by the end of April, when he gave him the raise. I do not accept Mr. Wadsworth's evidence on why he gave Mr. Haack the raise (he suggested that he gave Mr. Haack a raise to "appease him"), but I do view his evidence that he could not give feedback in late April, along with his memorandum identifying issues that had arisen prior to April, as contradicting his claim that he was giving Mr. Haack accurate and appropriate feedback on his performance.

[407] In sum, I find that Mr. Haack was never given notice of the issues Marquis Alliance had with his employment, and never given an opportunity to address, respond to or fix those concerns.

Was Mr. Haack Wrongfully Dismissed?

Law Governing Termination for Cause

[408] An employer need not continue an employee's employment indefinitely. And, of course, an employee need not continue working for an employer. Ordinary employment relationships are

indefinite contracts that either side has the freedom to end when they choose. The termination of that contractual relationship brings with it, however, some basic obligations. For the employer, those obligations include providing an employee with notice that the relationship is ending, either working notice or payment in lieu: ***Honda Canada Inc. v Keays***, 2008 SCC 39 at para 50; ***Merrill Lynch Canada Inc. v Soost***, 2010 ABCA 251 at paras 9-10; ***Molloy v EPCOR Utilities Inc.,*** 2015 ABQB 356 at para 139.

[409] An employer may avoid that obligation, and terminate the employment contract without notice, if the employee gives the employer cause to do so. An employer may terminate the employment without notice where the "employee's alleged misconduct is so serious as to constitute a repudiatory breach of the employment agreement": ***Smith v Vauxhall Co-op Petroleum Limited***, 2017 ABQB 525 at para 12; ***R v Arthurs, Ex p. Port Arthur Shipbuilding Co.***, [1967] 2 OR 49 at para 11, rev'd on other grounds [1969] SCR 85.

[410] Cause must be assessed objectively and contextually, taking into account the nature of the employer's business and the employee's position: ***Foerderer v Nova Chemicals Corporation,*** 2007 ABQB 349 at para 63.

[411] An employer may reasonably expect high standards of performance of an employee in a position of trust and responsibility: ***Molloy v EPCOR Utilities Inc***., 2015 ABQB 356 at para 188.

[412] In general, the Court should take into account the "nature of the employment and the consequences of the act on the employer: ***Whitehouse v RBC Dominion Securities Inc.***, 2006 ABQB 372 at para 25.

[413] Cause may also be assessed over time; something that does not constitute cause on its own, may do so when it is part of a pattern of misconduct contrary to the contract of employment: ***Molloy v EPCOR Utilities Inc.,*** 2015 ABQB 356 at para 219.

[414] Cause may also be proven by an employer based on things the employer learns about the employee's work and conduct after termination: ***HLFN Industry Relations Corporation v Horseman***, 2019 ABQB 564 at paras 36-38.

[415] Things that an employer *learns* about the employee's performance after termination are, however, distinct from things the employee *does* after termination. An employee who has already been terminated is not held to the same standard as an employee who has not been. Once an employer repudiates a contract, they can no longer expect the employee to act in accordance with its terms as they had done before: ***Gillespie v 1200333 Alberta Ltd***., 2012 ABQB 105 at para 29.

[416] Misconduct sufficient to show cause can include incompetence, where the incompetence amounts to a significant breach of the contract by the employee: ***Lowery v Calgary (City of),*** 2002 ABCA 237 at para 3. The issue is whether the failings of the employee are such as to prejudice the conduct of the employer's business: ***Lowery*** at para 3, citing with approval ***Atkinson v Boyd, Phillips and Co Ltd.***, 1979 CanLII 478 (BC CA). Incompetence sufficient to constitute cause may arise where an employee consistently fails "to meet a reasonable standard of performance" and can include a lack of diligence or negligence: ***Radio CJVR Ltd. v Schutte***, 2009 SKCA 92 at paras 17-18.

[417] An employee provides an implied warranty that they are able to do the job for which they have been hired, and the employee who proves incapable of doing the job gives grounds for their

dismissal: ***Jeewa v Med-Chem Laboratories Ltd.***, [1998] OJ No 618 (OCJ) at para 35; ***Matheson v Matheson International Trucks Ltd.***, [1984] OJ No 306 (HCJ) at para 8.

[418] At the same time, the test for incompetence is an objective one; "It is not enough for the employer to dismiss for what he honestly believes to be just cause; the true test is whether just cause existed": ***Matheson v Matheson International Trucks Ltd.***, [1984] OJ No 306 (HCJ) at para 10. Incompetence does not include an employee failing for reasons beyond that employee's control: ***Pelletier v Friesen's Climate Control Ltd.***, 2015 ABQB 531 at para 37.

[419] Further, to dismiss an employee for incompetence, the employer must do more than demonstrate that the employee was careless or indifferent. Rather, they must show:

> 1) The level of job performance that it required and that the level required was communicated to the employee.
>
> 2) That it gave suitable instruction to the employee to enable him to meet the standard.
>
> 3) That the employee was incapable of meeting the standard.
>
> 4) That there had been a warning to the employee that failure to meet the standard would result in his dismissal: ***Bogden v Purolator Courier Ltd.***, (1996) 182 AR 216 (QB) at para 59.

[420] Termination for cause brings with it other obligations with which an employer must comply. The employer must investigate to ensure that its impression of the employee's deficient performance is an accurate one: ***Luan v ADP Canada Co.***, 2020 ABQB 387 at paras 110-11; ***Smith*** at para 76. The investigation of the employee must be fair: ***Molloy v EPCOR Utilities Inc.***, 2015 ABQB 356 at para 248.

[421] As stated by the Ontario Superior Court of Justice:

> While there is no obligation on the employer to conduct a particular type of investigation before deciding to dismiss with cause, the onus is clearly on the employer to have regard to all the facts necessary for a full and fair understanding of what occurred. In other words, the employee has no procedural rights in the employer's investigation, but the employer must make a decision on the basis of all of the relevant facts and considerations: ***Dziecielski v Lighting Dimensions Inc.***, 2012 ONSC 1877 at para 35.

[422] The employer must also ensure that termination is a proportionate response to the employee's misconduct: ***McKinley v BC Tel***, 2001 SCC 38 at para 53; ***Motta v Davis Wire Industries Ltd.***, 2019 ABQB 899 at para 14.

[423] In addition, the employer must not have condoned the employee's conduct: ***Mitran v Guarantee RV Centre Inc.***, 1999 ABQB 276 at para 102. The plaintiff must establish condonation and must show that the employer was fully aware of the details of the conduct: ***Smith v Vauxhall Co-op Petroleum Limited***, 2017 ABQB 525 at para 130.

[424] In general, the Court assessing a claim of wrongful dismissal must be mindful of the nature of the employment relationship, and the importance of work and professional identity to an employee:

> Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal: ***McKinley v BC Tel***, 2001 SCC 38 at para 54.

[425] As Justice Topolinski said, "Work is one of the most fundamental aspects in a person's life and an essential component of one's identity self-worth and emotional being…The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection": ***Molloy v EPCOR Utilities Inc.***, 2015 ABQB 356 at para 138.

Application

[426] Secure alleges that Marquis Alliance had cause because of Mr. Haack's incompetence. It says that Mr. Haack represented that he had experience in taking entities public, and in public finance and accounting, that should have made him capable to do the job as Vice President Finance and Accounting. It submits that Mr. Haack's performance did not match the competence he warranted he had. It submits that he did his work incompetently, and that his incompetence was sufficiently serious to merit dismissal.

[427] The particulars of Mr. Haack's incompetence relied upon by Secure were assessed in the prior section. Most of those allegations have not been substantiated. Secure either failed to establish that the event occurred or failed to establish that the event arose because of deficiencies in Mr. Haack's performance. Only the following allegations have been proven:

(a) Mr. Haack moved the Marquis Alliance employees into premises that were under construction;
(b) Mr. Haack did not respond urgently and expeditiously after the IPO process began in July 2010, particularly in relation to addressing the deficient 2008 and 2009 financial statements of Marquis Fluids;
(c) Mr. Haack took vacation days without seeking permission and with minimal advance notice; and
(d) Mr. Haack e-mailed confidential information to himself after he was advised that his employment was going to be terminated.

[428] None of these allegations, considered alone or cumulatively, constitute the type of repudiatory breach of the employment agreement sufficient to constitute cause. I acknowledge that Mr. Haack was a senior employee at Marquis Alliance, and that the company could expect a high level of performance from him. I agree that he had represented to Marquis Alliance that he had experience working with companies going public, and that the company could expect him to do the job he had been given. I recognize that Mr. Wadsworth and the other Defendants had become unhappy with Mr. Haack and his work for the company.

[429] Nonetheless, in my view the facts do not evidence the type of serious deficiencies in performance necessary to constitute cause.

[430] With respect to the move into premises under construction, the context of the move must be considered. Alliance Energy had to move within a few months of the merger. They had to find new premises, choose a design and construction plan, along with a contractor and designer. They had to complete the design and construction, and they had to move in. The timing did not work, and the premises into which the company moved were under construction and unsatisfactory. But none of those things were shown to arise from deficiencies in Mr. Haack's conduct. They were a situation with which he was confronted, and which he tried to manage, not a situation he created because he did his job incompetently.

[431] In addition, while Mr. Haack did not have a job description or employment agreement, it is clear that his management of the move and construction were not within the normal scope of his job. He did not represent any competency in this regard. He asked to be moved off the project, and he was not. Achieving an imperfect outcome in a difficult situation, in relation to something outside your ordinary job responsibilities, cannot be fairly described as a core violation of the employment agreement.

[432] Mr. Haack's response to the IPO information he received in July 2010 does fall squarely within his job responsibilities. At the same time, for the reasons discussed previously, I cannot view Mr. Haack's conduct in this respect as showing a lack of diligence and effort, or sufficient to warrant terminating his employment. Of particular significance in my view is that, given the difficulties they were completing the financial statements for the 2010 audit, it would have been difficult, and perhaps impossible, to simultaneously produce financial statements suitable for audit for Marquis Fluids in 2008 and 2009. In addition, I am reluctant to view Mr. Haack's efforts harshly given the work he was doing with that audit (especially in respect of Syria), his management of the move from July 19-26th, that there was only a six-week period between the IPO kick off and his termination, the volume of information provided by BLG and Deloittes in July 2010 about what needed to be completed for the IPO, and the lack of a clear target date for the IPO.

[433] The standard for incompetence sufficient to justify termination is an objective one. That requires considering the matter in light of what a person of Mr. Haack's qualifications executing the job he had been given, could reasonably have been expected to accomplish. I am not persuaded that that person would necessarily have made different choices than the ones Mr. Haack did, and I am especially not persuaded that, even if they had, it would have made any difference in the sense of getting the work completed in time for a fall IPO. The accounting department was already overworked, the Marquis Fluids financial statements needed weeks of work to be ready for audit on a consolidated basis (recall the companies had different year ends, only some had been previously audited, and they had never been previously consolidated) and the 2010 audit was still underway. Had Mr. Haack been active and insistent that the work be done faster, and then added more work to it, it is quite probable that while stress would have increased, output would not have. When Ms. Hanson-Parsons came up with her 100 day plan, in the fall of 2010, the situation was quite different simply because the 2010 audit was largely completed, except for adjustments to remove the differential reporting.

[434] With respect to the vacation days, I agree that a company could reasonably expect an employee to provide better notice of when they are taking vacation, and to seek permission. On

the other hand, it is also reasonable for a business to trust more senior employees to make their own decisions in this regard, simply informing the people they work with about their plans.

[435] Here, Marquis Alliance had no vacation policy. The record shows that it knew Mr. Haack's approach to vacations and did not object to it; there were several examples from as early as December 2009 of him approaching his vacation this way, and nothing was said until August 2010. In my view Marquis Alliance condoned this conduct by Mr. Haack. And, in any event, it was inconsequential and easily remedied – they simply had to ask Mr. Haack to handle it differently, as Mr. Wadsworth did in August 2010. Termination is a disproportionate and inappropriate response to any concerns they may have had about Mr. Haack's approach to organizing his days off.

[436] The most substantial allegation made by Secure and proven was Mr. Haack e-mailing himself confidential information. Given that this happened after the August 27th meeting, however, this ought to be assessed as post-termination conduct; Marquis Alliance had announced its decision to end the employment agreement by terminating Mr. Haack with cause unless he accepted their offer. Mr. Haack's e-mailing to himself documentation which he could use to assess the offer made by the company does not seem unreasonable in that context. He did not share the information with others, he destroyed it shortly thereafter, and he told the company that he had done so. In the circumstances this, also, cannot be considered cause. I note as well that Marquis Alliance did not have a confidentiality policy.

[437] Even if I treated this as pre-termination conduct, I am still not satisfied that it would justify Mr. Haack's termination. The contextual factors, and in particular that Mr. Haack needed to assess the offer that had been made, and did not share the documents outside his own home, still exist and make it difficult to view Mr. Haack's conduct as sufficiently culpable to warrant dismissal.

[438] Thus, the majority of the allegations Secure made against Mr. Haack were not proven. The few that were proven are not sufficiently serious to have justified the company's termination of his employment.

[439] Even if I am incorrect in my assessment of what Mr. Haack did and its significance, there are other barriers to Marquis Alliance showing it was justified in terminating his employment. Many of the allegations it made against Mr. Haack were with respect to his competence. And, as set out above, to dismiss an employee for incompetence an employer must show that they gave him suitable instructions to meet the standard, that he was incapable of meeting it, and that there was a warning given to the employee that if he did not meet the standard he would be dismissed.

[440] Here, Marquis Alliance did not have a job description or employment agreement for Mr. Haack. It did not articulate a clear division of responsibilities between Mr. Haack and Mr. Lew. Given this, I am not persuaded that Marquis Alliance gave Mr. Haack suitable instructions as to what was expected of him. Further, they never gave him a warning that his employment was at risk, or an opportunity to correct the deficiencies that Marquis Alliance believed existed.

[441] The law also provides that an employer must investigate to ensure that its impression of an employee's deficiencies is accurate, and that its investigation must be fair. Marquis Alliance did not investigate and, in relation to such cursory inquiries as it undertook, its investigation was not fair. It never asked Mr. Haack about events which he was uniquely positioned to know about – for example, his alleged breach of confidentiality or his alleged external consulting.

[442] As a consequence, based on the absence of cause, its failure to provide notice of its concerns with his performance, and its lack of a fair investigation, I am satisfied that Mr. Haack was wrongfully dismissed.

Duty of Good Faith and Honest Performance

[443] The principle that employment contracts include a duty of good faith and honest performance is a long standing and recently affirmed aspect of the Supreme Court's jurisprudence. An employer must not act dishonestly in its dismissal of an employee and, if it does so, it may be liable for damages apart from any claim arising simply from the fact of dismissal.

[444] As the Supreme Court put it in ***Wallace v United Grain Growers Ltd.***, [1997] 3 SCR 701 at para 103:

> It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself… However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case….

[445] And as it said most recently in ***Matthews v Ocean Nutrition Canada Ltd.***, 2020 SCC 26 at para 44:

> Under rules recognized by this Court in ***Bhasin*** and ***Potter***, an unhappy employee can allege dishonesty in the performance of the contract by the employer … independently of any failure to provide reasonable notice. This Court has also recognized in ***Wallace*** and ***Keays*** that an unhappy employee can allege mistreatment — i.e., conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" — in the manner of dismissal by the employer … A breach of the duty to exercise good faith in the manner of dismissal is also independent of any failure to provide reasonable notice….

[446] Dishonesty includes the full range of misleading and dishonest behaviour, "lies, half-truths, omissions, and even silence, depending on the circumstances": ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45 at 91.

[447] For the most part, the duty of good faith and honest performance focuses on honesty, on whether a contracting party has engaged in dishonest, deceptive or misleading behaviour. It also, though, captures the principle that a contracting party must act "reasonably and not capriciously or arbitrarily": ***Bhasin v Hrynew***, 2014 SCC 71 at para 63. A contracting party is entitled to pursue its own contractual interests, but it must not seek to undermine in bad faith the other side's legitimate contractual interests: ***Bhasin*** at para 65; ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 189 and 192; ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45 at paras 67-68 (discussing the analogous but distinct civil law concept of "abuse of rights").

[448] Application of the principle of good faith is context-specific and must take into account "the reasonable interests of both contracting parties": ***Bhasin v Hrynew***, 2014 SCC 71 at para 69. The focus of the analysis is on the conduct of the contracting party in relation to the terms of

the contract in question; that is, with respect to the rights and obligations that contract creates. The obligation exists within the contract and in relation to its terms, not outside it: ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45 at paras 37, 51 and 57.

[449] When considered as a whole, this law directs me to consider whether Marquis Alliance acted dishonestly in relation to its contractual obligations to Mr. Haack. More particularly, I must consider whether Marquis Alliance made false and misleading comments in relation to its contractual obligations and, further, whether it had the requisite level of knowledge that its comments were false and misleading. That is, was Marquis Alliance dishonest in performing its contractual obligations? I will also consider the related and overlapping question of whether Marquis Alliance took steps to undermine in bad faith Mr. Haack's legitimate contractual interests.

Did Marquis Alliance Make False and Misleading Statements?

[450] I find that Marquis Alliance made false and misleading statements. It did so in two respects. First, it made statements about Mr. Haack's performance that were false or misleading. Second, it did not ensure the truth or accuracy of its claims about Mr. Haack's performance. Then, despite not having substantiated its claims against him, it set out those claims so as to suggest that it had precise knowledge and accurate information about deficiencies in his performance and competence. Doing so was misleading.

[451] With respect to the first point, the contemporaneous record establishes that certain statements made by Mr. Wadsworth about Mr. Haack were false. He did not take 30 days of vacation. He did not delay the RSP roll out for two months. These examples are the most obvious. I would, however, also characterize as misleading his memorandum's statement that Mr. Haack "has engaged in the following conduct… the company has been without financial reports for nearly 10 months…" and "Discussions from our audit partner revealed serious concerns with the inability of Brad to conduct the appropriate actions in getting the required reporting complete."

[452] Given the evidence presented to this Court, and in particular with respect to the integration problems, the history of inventory issues at Marquis Fluids, and the role of Mr. Lew in the financial reporting and the audit, it was misleading to suggest that the lack of financial reports or the delay in getting information to the auditors was attributable to the conduct of Mr. Haack. The reference to the audit partner expressing concern does not change this assessment because it was Marquis Alliance who knew about the integration issues and about the respective responsibilities of Mr. Lew and Mr. Haack; it was Marquis Alliance who knew that it was not because of "the inability of Brad" that the required reporting was incomplete.

[453] In terms of the second type of misleading statement, the evidence at trial shows clearly that Marquis Alliance and its directors did not make a meaningful effort to establish the truth and accuracy of its claims about Mr. Haack. Mr. Wadsworth did not investigate. The other directors did not investigate. They did not ask that an investigation be done. They did not make inquiries of Mr. Haack.

[454] As a result, Mr. Wadsworth cannot reasonably have been confident in the truth or accuracy of the contents of his memorandum. Yet his memorandum makes precise and unqualified assertions of incompetence and wrongdoing by Mr. Haack such as: he took 30 days of unapproved vacation; he delayed the RSP by two months; he often did not work forty hours a

week; it was revealed in February 2010 that he was engaged in external consulting; and, he lied about the RSP. These precise and unqualified assertions create the impression that the allegations against Mr. Haack have a factual basis that they did not then, and do not now. As a result, they are fundamentally misleading.

[455] I am thus satisfied that Marquis Alliance made statements that were false and misleading. It said things that were untrue or misleading, and it made statements in a manner designed to suggest that the statements had a factual foundation which they did not have.

Were the statements in relation to its contractual obligations?

[456] I am also satisfied that Marquis Alliance's false and misleading statements were made in relation to its performance of its contractual obligations. The statements were made as part of the process through which it decided to terminate Mr. Haack's employment, a process to which attached the contractual duties associated with dismissing an employee.

[457] Further, the statements were made in conjunction with the process through which Marquis Alliance purported to acquire Mr. Haack's shares for $1.00 under the terms of the USA. The USA imposed on Marquis Alliance obligations in relation to the acquisition of Mr. Haack's shares; Marquis Alliance made these false and misleading comments in relation to (and as part of its breach of) those obligations.

[458] To put it slightly differently, Marquis Alliance needed to make these claims about Mr. Haack in order to justify terminating his employment and taking his shares – that is, to justify the exercise of its contractual rights. Unfortunately, the claims it made were in material respects false and misleading.

Did it have the requisite knowledge that the statements were false and misleading?

[459] The more complex issue is whether Marquis Alliance had the requisite knowledge that its statements were false and misleading so as to show them to have been dishonest.

[460] The evidence does not provide a sufficient basis to conclude that Marquis Alliance engaged in deliberate or intentional dishonesty towards Mr. Haack – that is, to conclude that they knew what they said was false or deceptive, and they said it anyway. Nor, however, does it show that Marquis Alliance made the statements innocently, with an honest but mistaken belief in their accuracy.

[461] What the evidence shows is that Mr. Wadsworth, acting as President of Marquis Alliance, was careless and indifferent with respect to the truth of what he wrote about Mr. Haack. He did not investigate or inquire, or charge someone with investigating on his behalf. Further, he knew that he had not investigated or taken the steps to establish the accuracy of what he was saying. Then, despite knowing that he had not investigated or done what was needed to establish the truth of the allegations, he nonetheless made the allegations, and did so in a manner that was misleading, suggesting the allegations were established and attributable to Mr. Haack, when neither of those things was the case.

[462] Mr. Anderson, Mr. Deibert and Mr. Rawlyk, the directors of Marquis Alliance, received Mr. Wadsworth's memorandum, and took it at face value. They did not investigate its accuracy. They did not question Mr. Wadsworth as to how the memorandum was prepared. They took their own limited knowledge – that sometimes Mr. Haack was not at his desk, and financial reports

had not been prepared – and accepted that from that knowledge Mr. Haack's competence and integrity were properly impugned. Mr. Anderson, Mr. Deibert and Mr. Rawlyk also acted carelessly and indifferently with respect to ensuring the truth of what was said about Mr. Haack.

[463] In my view this is sufficient knowledge and intention to establish a breach of the duty of good faith and honest performance. To require a contracting party not to make untruthful or misleading statements because of carelessness or indifference is not equivalent to requiring selflessness or altruism, or to imposing an inapplicable fiduciary duty on the contracting party: ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45 at para 82. It is, rather, to reflect the organizing principle of good faith, that a party perform its obligations "honestly and reasonably and not capriciously or arbitrarily": ***Bhasin v Hrynew***, 2014 SCC 71 at para 63. To be reasonable, and to avoid capriciousness and arbitrariness, requires a contracting party not to be careless and indifferent about the truth and accuracy of what they say in the performance of their contractual obligations.

[464] Marquis Alliance was dishonest in the performance of its contractual obligations to Mr. Haack. It made false and misleading statements, and it did so carelessly and with indifference as to the truth of what was being said.

Did Marquis Alliance undermine in bad faith Mr. Haack's legitimate contractual interests?

[465] The findings in the prior section are sufficient to establish that Marquis Alliance breached its duty of good faith and honest performance. Mr. Haack raised, however, other examples of conduct of Marquis Alliance, and in particular of its executive, that raise questions about its honesty in its dealings with him. Here, the concerns are not that Marquis Alliance's President said things that were false or misleading; rather, the concern is that Marquis Alliance's conduct reveals hostility and disregard to Mr. Haack's legitimate contractual interests as an employee that reaches the level of bad faith.

[466] The examples from the evidence raised by Mr. Haack were as follows:

- Mr. Wadsworth was told in June, 2010 that Ms. Hanson-Parsons would not work under Mr. Haack on an IPO, and that Mr. Haack was fundamentally unsuitable to lead an IPO, such that Mr. Wadsworth had a motive to find reason to fire Mr. Haack;
- Mr. Wadsworth misled Mr. Haack about the reason for the August 27th meeting;
- Mr. Wadsworth would not tell Mr. Haack the reasons for dismissing him at the August 27th meeting;
- Mr. Wadsworth made a joke about Mr. Haack bringing a gun to work after the August 27th meeting;
- Marquis Alliance claimed on the one hand that Mr. Haack's actions had done serious damage to the company, but on the other hand allowed him to keep working from August 27 to September 3; and,
- Shortly after Mr. Haack started this litigation Marquis Alliance reissued his T4 to attribute $144,457 in income to him for the shares it had taken from him for $1.00, an adjustment that Revenue Canada reversed.

[467] I understand why Mr. Haack emphasized this evidence. It does raise legitimate questions about the motives and conduct of Marquis Alliance and, in particular of Mr. Wadsworth. For example, while Mr. Wadsworth maintained that he did not decide to terminate Mr. Haack's

employment as a result of Ms. Hanson-Parsons' memorandum, I am not sure why he would not have done so. Ms. Hanson-Parsons tone was direct to the point of being harsh. She made it clear that she did not think Mr. Haack could fulfill the role he had been given. She said,

> I feel compelled to share with you in advance that I am not prepared to represent MAI with Brad Haack leading the charge as CFO….
>
> As your friend, and your advisor I cannot stress to you enough how critical it will be to have the right CFO beside you. In my respectful opinion, MAI needs a well seasoned public markets CFO to take this charge. I can only encourage you to Invest in it now. I have deep concern on your earlier comment to me about not changing it out until the listing is more "guaranteed" or imminent. I don't think that will be in your best interest or the current shareholders. The CFO has to sign off on the prospectus, which means they need to be part of the process and go through it with a fine tooth comb. They need to have some history with the company to feel comfortable signing off certification on the prospectus and the audited FS. This will not work last minute - not to mention the perception on the dog and pony shows…
>
> So I feel compelled to give you a heads up that if you are going to champion me in any way, I professionally need senior management's assurance of an investment in such a CFO. I cannot allow to have my professional reputation's fate somewhat controlled by an individual that I believe does not understand the complexities or has the experience to anticipate the needs of this process and proactively manage through them…[emphasis in original]

[468] Having received this memorandum, it would be natural for Mr. Wadsworth to begin to have serious reservations about Mr. Haack, whether or not those reservations were justified by Mr. Haack's job performance. This memorandum supports Mr. Haack's suggestion that I infer that Marquis Alliance found cause against Mr. Haack because it was looking for it, without regard to whether it was actually there.

[469] Mr. Wadsworth's conduct around the August 27th meeting is also concerning. While I can understand him not telling Mr. Haack what the meeting was for, the decision to lie to Mr. Haack about its purpose is more troubling. Further, I do not understand Mr. Wadsworth's claim that he could not tell Mr. Haack about the issues with his performance, or that he made that decision on the advice of counsel. I do not see the legal justification for not telling Mr. Haack what the issues were, particularly given Marquis Alliance wanted Mr. Haack to sign a settlement offer. In addition, the legitimacy of Marquis Alliance's concerns about Mr. Haack are called into question when it says on the one hand that his conduct put the company at risk of serious damage, while on the other hand it is content to have him work as normal for several more days.

[470] Finally, the first reissued T4 can be interpreted as threatening and malicious. It could have caused Mr. Haack to face a significant tax bill for income he never received. It did cause him to have to spend several years sorting the issue out with Revenue Canada. The timing of the reissuance – right after the filing of the lawsuit – is suspicious. The fact that the amount was taken from Ms. Hanson-Parsons' loan suggests that someone gave some thought to how to do it. We know, from Revenue Canada's determination, that the inclusion was improper. All of this, along with the lack of any explanation from Secure, casts the honesty of Marquis Alliance's

conduct into doubt. It invites the inference that Marquis Alliance issued the revised T4 as retribution for Mr. Haack's decision to sue the company.

[471] Despite these concerns, I am not prepared to rely on these points to find that Marquis Alliance made a bad faith effort to undermine Mr. Haack's legitimate contractual interests. Given my prior analysis about its dishonesty, I do not need to do so to show that Marquis Alliance breached its duty of good faith and honest performance. Further, despite my earlier comments, each of these examples are at least somewhat ambiguous, and cannot reliably be used as proof of dishonest intentions or conduct.

[472] Take the T4 for example. The inference of retribution requires a bridging of a gap – from the fact of the T4 being reissued to the reason for it being reissued – with a single explanation, of maliciousness and misconduct. But the gap is too large for that inference to be reasonable. I do not know what the innocent explanation for the T4 being issued could be, but it is the sort of thing that could happen due to mistakes, excessive caution or oversight. I am not prepared to find a party to have acted maliciously when a more innocent explanation remains a reasonable possibility.

[473] Further, with Ms. Hanson-Parsons' memorandum, the gap between when she raised her concerns with Mr. Wadsworth and when he took steps to terminate Mr. Haack, and the fact that her emphasis was on hiring a CFO not on firing Mr. Haack, makes me reluctant to conclude that Mr. Wadsworth's subsequent conduct was pretextual. I am not sure what his motives were with respect to how he treated Mr. Haack, and I suspect that Ms. Hanson-Parsons' memorandum was not irrelevant to what happened, but it is not sufficient to support a finding of bad faith.

[474] Finally, while Mr. Wadsworth did not handle the termination meeting well, and the decision to allow Mr. Haack to keep working is inconsistent with the claims they made about him, those actions are as consistent with ordinary incompetence as they are with maliciousness. The gun joke was not in good taste, but I do not interpret it as directed at Mr. Haack personally.

[475] Again, I understand why Mr. Haack and his counsel emphasized this evidence. It raises questions about what motivated Marquis Alliance's behaviour towards Mr. Haack, and whether they were out to get him. This is particularly so when viewed in light of the dishonesty previously identified. Nonetheless, the various inferences supported by this evidence, and the reasonable possibility that they do not reveal dishonest or malicious motives, make me unwilling to use them to support my finding that Marquis Alliance breached its duty of good faith and honest performance. None of these issues on their own would be sufficient to demonstrate a bad faith attempt to undermine Mr. Haack's legitimate contractual interests and, here, the whole is not greater than the sum of its parts.

[476] As such, while I find that Marquis Alliance breached its duty of good faith and honest performance of its contractual obligations, that conclusion is based only on its false and misleading statements about Mr. Haack's performance, and its carelessness with and indifference to the truth, not the concerns noted here.

Unanimous Shareholders' Agreement

[477] The process through which Marquis Alliance purchased Mr. Haack's shares was described in my summary of the background facts. To briefly recap, Mr. Wadsworth prepared a memorandum for the other directors describing the deficiencies in Mr. Haack's performance. He and the other directors executed a resolution saying that they had cause to fire Mr. Haack. The

resolution incorporated Mr. Wadsworth's memorandum as an attachment, and the directors initialled that memorandum. The resolution said that Mr. Haack had caused or was likely to cause serious damage to the company and that the directors agreed to recommend to the shareholders that Mr. Haack's shares be purchased for $1.00. The directors then organized a meeting of shareholders, and at that meeting presented to the shareholders their assessment of Mr. Haack's performance and recommended that his shares be purchased for $1.00 under the auspices of Clause 10.3(h)(ii) of the USA. The shareholders so resolved and, based on that resolution, Marquis Alliance cancelled Mr. Haack's shares and issued him a cheque for $1.00, which Mr. Haack never cashed.

[478] The legitimacy of Marquis Alliance's purchase of the shares, and the actions of the directors and shareholders that led up to it, depends on a specific interpretation of the terms of the USA and on the claim that, given the facts, that interpretation justified taking Mr. Haack's shares and paying him $1.00. The parties disagree on the proper interpretation of the USA, and its application to the facts of this case. This section sets out the parties' respective positions. It then, after providing a brief overview of the governing law, interprets the relevant provisions of the USA and applies them to the circumstances of the termination of Mr. Haack's employment at Marquis Alliance.

Secure's Interpretation of the USA

[479] Clause 9.1(a)(ix) includes in the term "Withdrawing Shareholder" a shareholder whose employment is terminated "for cause, as determined by those directors who are independent". Secure submits that this provision means "cause" not as it is defined by the common law, but rather as it is defined "by those directors who are independent". Further, it submits that "directors who are independent" does not mean directors without a material relationship with the company. Rather, a director who is independent is simply one who, as set out in Clause 4.2, respects the *Business Corporations Act* (Alberta) requirement that "directors… make certain disclosures and … abstain from voting on certain transactions in which they have an interest".

[480] In this case, none of the directors of Marquis Alliance had a personal interest at stake in the decision to terminate Mr. Haack; as such, they were "directors who are independent". Those "independent" directors determined that they had cause to terminate Mr. Haack, thereby satisfying the requirements of Clause 9.1(a)(ix) regardless of any assessment based in the common law.

[481] Further, Clause 10.3(h)(ii) applies in these circumstances. Secure says that that clause operates disjunctively, allowing the shareholders to resolve to purchase a shareholder's shares for $1.00 in the event that that shareholder commits "any alleged illegal, fraudulent or criminal act of a serious nature" *or* if it is shown that a shareholder has taken an action that "otherwise causes or is reasonably likely to cause significant damage to the Company". For ease of reference, Clause 10.3(h)(ii) in its entirety states:

> In the event of dismissal for cause involving or relating in any way to any alleged illegal, fraudulent or criminal act of a serious nature that occurs in connection with the employment of the Shareholder or the Principal Shareholder of a Corporate Shareholder or otherwise causes or is reasonably likely to cause significant damage to the Company, AND one hundred percent (100%) of the Shareholders (other than the Withdrawing Shareholder) shall have unanimously agreed, the aggregate purchase price of the Shares shall be discounted to $1.00

[482] Secure says that Mr. Haack's actions in this case caused or were reasonably likely to cause significant damage to the Company. It emphasizes that 100% of the shareholders other than Mr. Haack resolved to purchase his shares on this basis.

[483] As a result, Secure submits, the purchase of Mr. Haack's shares was consistent with the terms of the USA.

Mr. Haack's Interpretation of the USA

[484] Mr. Haack submits that the requirement in Clause 9.1(a)(ix) that directors be independent has a meaning akin to that used in securities law, namely not having a material relationship with the company. He acknowledges that at the time, under the terms of the USA, that would mean that Marquis Alliance had no directors who are independent. For the first two years the USA required that the board only have four members, two from each of Marquis Fluids and Alliance Energy. Mr. Haack observes, however, that after the first two years the number of directors and the nominees is "determined by ordinary resolution of the holders of common shares". As a consequence, it is possible to understand the USA as simply presuming that no shareholder would be treated as a Withdrawing Shareholder on the basis of dismissal for cause within the first two years.

[485] Mr. Haack submits that, given this interpretation, the directors' resolution determining that Mr. Haack had been dismissed for cause is invalid; it was not passed by any directors who are independent but only by four who are not.

[486] In addition, he submits, the word "cause" in Clause 9.1(a)(ix) has no special meaning. It is not defined, and it has an ordinary and prevalent legal meaning that Clause 9.1(a)(ix) intended to incorporate. If the USA wanted to specify a meaning of cause distinct from the common law, the contracting parties would have indicated so explicitly and clearly, which they did not.

[487] As a consequence, even if the directors are independent, they did not have cause to fire Mr. Haack at common law, and as such could not have cause sufficient to treat him as a Withdrawing Shareholder under Clause 9.1(a)(ix).

[488] Further, to invoke Clause 10.3(h)(ii) the dismissal for cause needed to be based on an "alleged illegal, fraudulent or criminal act of a serious nature". The plain and ordinary meaning of Clause 10.3(h)(ii) is that it be read as follows, with the hard returns and letters in square brackets added:

> (ii) In the event of dismissal for cause involving or relating in any way to any alleged illegal, fraudulent or criminal act of a serious nature that
>
> > [a] occurs in connection with the employment of the Shareholder or the Principal Shareholder of a Corporate Shareholder or
> >
> > [b] otherwise causes or is reasonably likely to cause significant damage to the Company
>
> AND one hundred percent (100%) of the Shareholders (other than the Withdrawing Shareholder) shall have unanimously agreed, the aggregate purchase price of the Shares shall be discounted to $1.00.

[489] The disjunctive reading suggested by Marquis Alliance is grammatically impossible. It requires saying "In the event of dismissal for cause involving or relating … or otherwise causes or is reasonably likely to cause significant damage to the Company", which does not make sense.

[490] Finally, even if the disjunctive reading is accepted, the evidence does not show that Mr. Haack's conduct was reasonably likely to cause or did cause significant – or any – damage to Marquis Alliance.

[491] For these reasons, Mr. Haack submits, Marquis Alliance breached the USA when it took his shares for $1.00.

The Law

[492] The parties' arguments must be assessed in light of the law governing contract interpretation. That law directs the Court's focus to the intention of the parties as identified through the language of their agreement, and the circumstances surrounding their entering into it. The task of the judge is to read the agreement, approaching it practically and in light of common sense, and giving the words it contains their "ordinary and grammatical meaning". Each term of the agreement must be understood in the context of the agreement as a whole: ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53 at para 47; ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 65 and 80; ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64.

[493] Contracts should also be interpreted "in a positive and purposive manner, trying to make it work": ***Humphries v Lufkin Industries Canada Ltd.***, 2011 ABCA 366 at para. 15. As the Court in ***Humphries*** further explained:

> The court must not be too quick to find gaps or flaws in a commercial contract's wiring which prevent power from reaching all its operative parts. The parties are presumed not to have been wasting ink on an academic exercise. Therefore, where one possible interpretation will allow the contract to function and meet the commercial objective in view, and the other scarcely will, the former is to be chosen: para 15.

[494] The surrounding circumstances includes background facts which existed when the parties entered into the contract and which they knew or could reasonably be said to have known at that time: ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53 at para 58. The surrounding circumstances also includes the contract's commercial purpose. It may not, however, be used to discount or dismiss the language of the contract itself: ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 88-89.

Application

[495] Applying these principles first to Clause 9.1(a)(ix), I interpret "cause" to refer to cause in the ordinary legal sense of the word, that is, conduct sufficient to permit an employer to fire an employee without notice. While a contract could specify a meaning of cause different from the common law, where the word is not qualified or defined in any way, the logical inference is that the parties meant to incorporate its ordinary legal meaning, not something else. Cause is a legal term of art, and while not defined can nonetheless be understood through the "commonly accepted usage": ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 61.

[496] I do not think the addition "determined by Directors who are independent" changes this conclusion. The language of the Clause gives the Directors decision-making authority, not a discretionary authority. Further, the requirement that the director be independent implies that the determination must be an assessment against a standard, not an analysis specific to the concerns or idiosyncrasies of the company or its shareholders. Finally, the purpose of the USA is to protect the interests of the shareholders collectively but also individually and, within that context, it does not make sense for the shareholders to agree that their rights as shareholders can be changed because the directors have reached their own undefined and unconstrained opinion on what constitutes "cause". The more reasonable interpretation is the one suggested by the USA using the word cause without defining it – that is, that "cause" means cause as defined by the common law.

[497] Having said that, the Clause's reference to "cause as determined by those directors who are independent" gives the directors room for manoeuvre in assessing cause. They must make a reasonable determination that cause exists, but do not need to correctly anticipate how a court would assess cause. A court must give deference to their determination that cause exists.

[498] Thus, Clause 9.1(a)(ix) requires the directors who are independent to make a reasonable assessment of whether cause, as that word is used in law, exists.

[499] The term "those directors who are independent" is more difficult to interpret. The word "independent" in law generally connotes some formal or structural separation so as to ensure that a decision is not corrupted by partiality, interest or bias. It does not mean – although this was the understanding attested to by each of the directors in this litigation – that a person has the ability to make up their own mind. The word "independent" in law normally refers to a structure of decision-making that ensures independence, objectively speaking; it does not describe the subjective capacity any particular person has to be independent.

[500] In line with its ordinary legal meaning, "independent" would normally be interpreted to mean a separation between interests and position sufficient to ensure independence. And, here, it would mean that the decision under Clause 9.1(a)(ix) would only be made by those directors who had some separation of that type.

[501] The problem, however, is that in addition to contemplating that decisions be made by "those directors who are independent", the USA also requires in Clause 4.3(b) that, for the first two years, Marquis Alliance only have four directors and that those four directors be two former Alliance shareholders and two former Marquis shareholders. Since all the shareholders were also employees or contractors of the corporation, this meant that for the first two years there were no "directors who are independent", objectively speaking. The directors were all shareholders and they were all employees.

[502] This apparently leaves two unsatisfactory options: that for the first two years no shareholder could become a Withdrawing Shareholder because they had been terminated for cause (since there were no directors who are independent to make that determination) or that the requirement that directors be independent does not require any structural separation between the directors and the affairs and interests of the company.

[503] The other option submitted by Secure, that "independent" means only that the directors comply with the disclosure requirements and restrictions contained in the *Business Corporations Act* (Alberta), is also unsatisfactory. It denudes the word independent of any meaning beyond the

requirement that the directors comply with obligations with which, by statute, they were already required to comply. That the USA has them acknowledge those obligations does not persuade me that they are intended to inform the word "independent"; I do not see any connection between the acknowledgement in one provision and the meaning of the word "independent" as used in another.

[504] In the context of the USA as a whole, the interpretation of the term "directors who are independent" needs to do three things. First, it needs to give some substance to the requirement that the directors be "independent". Second, it needs to find a way to reconcile the requirement of independence with the fact that the directors in the first two years are not "independent" in the sense of having some separation from the company. And third, it needs to allow Clause 9.1(a)(ix) to be operational.

[505] The interpretation that best accomplishes this is one referenced by Secure during the trial, although not the one advanced in their final argument. Specifically, when a shareholder employee is being fired for cause, the person who promotes that decision – who in a sense prosecutes the shareholder employee – must not vote on or participate in the Board's decision-making process. The directors who decide cannot be independent in the sense of not being employees or shareholders of Marquis Alliance. They can, however, be independent of the assessment of the employee, and in that way be more likely to provide a fair and impartial determination of whether, in fact, legal cause has been established.

[506] Based on this interpretation of "cause" and "directors who are independent", Marquis Alliance did not comply with the requirements of Clause 9.1(a)(ix). The determination by the directors that cause existed was unreasonable. They made the decision based on claims against Mr. Haack that they cannot substantiate and did not investigate, or which were not sufficiently serious to be cause for dismissal. Further, they made no efforts to ensure the decision was made only by those directors who were independent of the assessment of Mr. Haack's performance. Indeed, the record before me shows that the decision of the Board was driven by Mr. Wadsworth who presented the case and whose word and assessment were accepted uncritically by the other directors. Moreover, Mr. Wadsworth voted and signed the resolution. No effort was made to ensure any structural independence. The repeated assertions by each of the directors of their subjective independence, rather than satisfying me that they had acted independently, underscored the absence of any attempt to protect or demonstrate their independence, objectively speaking.

[507] While this is enough to resolve the matter, I think it is important to also interpret Clause 10.3(h)(ii), since the dispute between the parties focuses centrally on the decision by Marquis Alliance, based on the resolution of the shareholders, to pay Mr. Haack $1.00 for his shares.

[508] I agree with Mr. Haack that this Clause on its ordinary grammatical meaning requires that the cause for dismissal include an "alleged illegal, fraudulent or criminal act of a serious nature". The reference to significant damage to the company exists as an alternative to where the imputed act is done in the course of employment. It does not provide an alternative to doing the imputed act. This flows from the grammar of the section, as noted by Mr. Haack. It is difficult, and strains the plain language, to read the provision in the way suggested by Marquis Alliance. By contrast, the interpretation suggested by Mr. Haack flows naturally from the language of the clause, merely gaining added clarity from the addition of the two bulleted letters and hard returns. To reiterate:

> (ii) In the event of dismissal for cause involving or relating in any way to any alleged illegal, fraudulent or criminal act of a serious nature that
>
> > [a] occurs in connection with the employment of the Shareholder or the Principal Shareholder of a Corporate Shareholder or
> >
> > [b] otherwise causes or is reasonably likely to cause significant damage to the Company
>
> AND one hundred percent (100%) of the Shareholders (other than the Withdrawing Shareholder) shall have unanimously agreed, the aggregate purchase price of the Shares shall be discounted to $1.00.

[509] Conversely, again, the disjunctive reading suggested by Marquis Alliance requires the ungrammatical construction "In the event of dismissal for cause involving or relating … or otherwise causes or is reasonably likely to cause significant damage to the Company".

[510] Mr. Haack's interpretation is also supported by the surrounding circumstances. His counsel, Ms. Osaka, objected to the admission of evidence regarding the drafting and negotiating of the USA. I reserved my decision on that matter. Having done so, I note here that I agree with her that the scope of evidence presented by Secure went beyond what was appropriate or necessary to understand the surrounding circumstances. The review of prior drafts of the USA was unhelpful. While it might have been possible to infer something about the intention of the parties from those prior versions, I am not satisfied that doing so was possible or, if it was possible, could be done without risk of distracting from the appropriate focus on the agreement actually reached: ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 85.

[511] I also did not find the evidence showing that Mr. Haack participated in the negotiations, and was aware of the terms of the USA, to be probative. The parties' dispute turns on how to interpret the terms, not on whether Mr. Haack freely assented to them, which he never denied doing.

[512] Having said that, I accept that the testimony about why this provision was included to be relevant and appropriately considered.

[513] Mr. Deibert and Mr. Rawlyk testified that the clause was important to them because a person with whom they had done business with had misappropriated money from High Mark Vacuum to cover personal investment losses. They wanted to ensure that, if something like that happened here, they would have a mechanism to address it.

[514] This testimony suggests that the driving concern behind the clause, which is reflected in the language of Clause 10.3(h)(ii), was to address the problem of someone who engaged in criminal or illegal activity in relation to the company. The issue with High Mark Vacuum was not simply the loss or damage to the activities of that company; it was that someone stole from it, and Mr. Deibert and Mr. Rawlyk needed to extract themselves from being in business with that person. Clause 10.3(h)(ii) created clear authority to allow the shareholders to take that step.

[515] Based on that interpretation, I find that Clause 10.3(h)(ii) could not be applied to Mr. Haack, even if the company had cause such that he could be treated as a Withdrawing Shareholder. None of the cause put forth included an "alleged illegal, fraudulent or criminal act of a serious nature".

[516] Further, and in the alternative, even were I to accept Marquis Alliance's interpretation of Clause 10.3(h)(ii), it still could not be applied to Mr. Haack so as to justify taking his shares for $1.00. For the reasons set out above with respect to whether Mr. Haack was wrongfully dismissed, there is no reasonable argument that Mr. Haack's actions could have caused serious damage to the company. Most of the allegations against him were unproven, and those that were proven were relatively minor. The confidential information he e-mailed to his home was not shared with anyone else. The circumstances of the move caused inconvenience but were not shown to have done damage. Even if he had been extremely diligent after learning the plan to proceed with the IPO, it would not have made any meaningful difference given the issues with the accounting integration and the strain on the accounting staff. And his approach to the vacation notifications was of no real consequence and was condoned by the company.

[517] The existence of the Marquis Alliance shareholders' resolution does not affect this analysis. The shareholders were not given accurate information. They did not understand the purpose or language of Clause 10.3(h)(ii). They, in essence, did what they were told to do by the directors. The intention of the parties was that the requirement for a unanimous shareholders' resolution would be a safeguard against improper and unjustified use of this provision; that intention does not, however, alter the fact that, here, it provided no safeguard against the improper taking of Mr. Haack's shares.

[518] Based on this analysis, I find that Marquis Alliance breached the terms of the USA when they took Mr. Haack's shares for $1.00. The determination that there was cause was unreasonable on the facts. The directors who made the decision were not independent. Further, Mr. Haack had not engaged in an alleged illegal, fraudulent or criminal act of a serious nature so as to justify the appropriation of his shares, and nor had his actions caused, or risked causing, serious damage to the company.

Oppression

Does the conduct of the Defendants fall within the scope of s. 242(2) of the *Business Corporations Act* (Alberta)?

[519] Sections 241 and 242(2) of the *Business Corporations Act* (Alberta) grant this Court jurisdiction to make "any order it thinks fit" where it has been shown that conduct by a corporation or its directors was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, its shareholders.

[520] The Supreme Court of Canada directs the Court exercising that jurisdiction to consider, first, whether the directors or corporation have violated the reasonable expectations of a shareholder and, second, whether the conduct that did so was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the shareholder: ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 68; ***Wilson v Alharayeri***, 2017 SCC 39 at para 24.

[521] To establish his claim Mr. Haack must show "wrongful conduct, causation and compensable injury": ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 90. There must be a causal connection between the impugned conduct and the outcome suffered by the shareholder: ***Clarke v Rossburger***, 2001 ABCA 225 at para 6.

[522] The decision about whether oppression has occurred is fact-specific and discretionary; while the parties provided case law in support of their position, the cases "are only illustrations and this Court must do its own analysis to determine whether oppression, unfair prejudice or

unfair disregarding has occurred": ***McGovern-Burke v Martineau,*** 2016 ABQB 514 at para 56; ***Toor v 1176520 Alberta Ltd.***, 2019 ABCA 334 at para 28.

[523] To identify the reasonable expectations of the shareholder, the Court should consider: "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders:" ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 72.

[524] The inquiry is "objective and contextual" and depends on "the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations". Having said that, a shareholder's reasonable expectations always include both "fair treatment" and that a director will act in the best interests of the corporation: ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at paras 62, 64, and 66.

[525] Numerous cases have held that the obligations imposed by a shareholders' agreement will be considered part of a shareholder's reasonable expectations: ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 79; ***McGovern-Burke v Martineau,*** 2016 ABQB 514 at para 66; ***Linamar Corporation v Wescast Industries Inc***. 2004 CanLII 18045 (ONSC) at para 5-6; ***Main v Declan Group Inc.***, 1999 CanLII 14946 (ONSC) at paras 42and 50.

[526] The second part of the test focuses on the nature of the conduct. Oppressive conduct is that which is coercive and abusive, and suggestive of bad faith. Unfair prejudice is less culpable conduct, but which has unfair consequences. Unfair disregard means that the actor ignored an interest, treating it as of no importance, contrary to the shareholder's reasonable expectations: ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 67; ***McGovern-Burke v Martineau,*** 2016 ABQB 514 at para 60.

[527] The focus is on the conduct, not on the actor's motives. A bad motive may "point to oppression, unfair prejudice or unfair disregarding", but it is not the focus of the inquiry ***McGovern-Burke v Martineau,*** 2016 ABQB 514 at para 58; ***Munter v Gilchrist***, 2020 ABQB 595 at para 32.

[528] A bad faith breach of a unanimous shareholders agreement will generally be viewed as oppressive: ***Linamar v Wescast Industries Inc***., 2004 CanLII 18045 (ONSC) at para 6; ***Main v Declan Group Inc.***, 1999 CanLII 14946 at para 50.

[529] Further, while wrongful dismissal cannot in and of itself ground a claim for oppression, the circumstances in which a party has been terminated may be considered if it forms part of a pattern of oppression, such as "where there is a close connection between an employment contract and a shareholders' agreement": ***Mack v Universal Dental Laboratories Ltd.***, 2020 ABQB 738 at para 161; ***Dalmac Oilfield Services Inc (Re)***, 2020 ABQB 752 at para 35; ***Dubois v Milne***, 2020 BCCA 216 at para 135.

[530] The conduct of the Defendants towards Mr. Haack justifies the granting of relief pursuant to s. 242.

[531] The USA created reasonable expectations about the circumstances in which he would be treated as a Withdrawing Shareholder, and when his shares would be taken on a punitive basis. He could reasonably expect the directors and officers of Marquis Alliance not to take steps that would put the company in breach of the terms of the USA to which it was a party and create the risk of liability for that breach – that is, that the directors and officers would act in Marquis

Alliance's best interests. Further, he could reasonably expect to be treated fairly and honestly – that the directors and officers of Marquis Alliance would endeavour to ensure allegations against him were investigated sufficiently to ensure their accuracy. Finally, he could reasonably expect that Marquis Alliance would not wrongfully terminate his employment and then use that wrongful termination to take his shares on a punitive basis in breach of the USA.

[532] The Defendants breached those expectations. They treated Mr. Haack as a Withdrawing Shareholder when they did not have a basis for doing so given the absence of cause. They made that decision without ensuring that it was made by directors who were independent, despite the requirements of Clause 9.1(a)(ix). They did not investigate allegations against Mr. Haack and made allegations against him that were untrue or unproven. They made those untrue or unproven allegations carelessly and with indifference as to their accuracy. They repeated those allegations to the shareholders and recommended that the shareholders take Mr. Haack's shares on a punitive basis, when the criteria to allow them to do so had not been satisfied, even on their own incorrect interpretation of Clause 10.3(h)(ii). Its directors and officers put Marquis Alliance in breach of its legal obligations to Mr. Haack under the USA and at risk of the very liability which Secure now faces.

[533] Further, the manner in which the Defendants breached those expectations was oppressive and unfairly prejudicial to Mr. Haack, and unfairly disregarded his interests. The false and misleading statements, the carelessness and indifference to the truth, and the recommendation to the shareholders that they direct Marquis Alliance to take Mr. Haack's shares, was abusive and in bad faith. The consequences to Mr. Haack were unfair, breaching his legal interests as an employee and as a party to the USA. And, most of all, throughout the Defendants acted as if Mr. Haack's legal interests, as an employee and as a party to the USA, were of no importance.

[534] Mr. Haack includes in his argument in relation to oppression the offer provided by Marquis Alliance on August 27, 2010. He argues that it was an attempt to bully him into resigning and to pay him an unreasonably low amount for his shares. He notes here as well that the meeting was arranged on false pretenses – Mr. Haack was told the meeting was about discussing the issues with the Syria joint venture. He was not told at the meeting why cause was alleged or given an opportunity to respond.

[535] While I accept this description of the August 27, 2010 meeting as essentially accurate, I do not think it is properly included in the oppression analysis. The oppression – the wrongful conduct that caused the compensable injury – was the directors and officers improperly asserting cause to terminate Mr. Haack and the right to take his shares, the directors recommending that the shareholders instruct Marquis Alliance to take his shares despite the requirements of the USA, and Marquis Alliance taking his shares in breach of the USA. That is the conduct that caused his compensable injury, namely the loss of his shares. The offer did not cause Mr. Haack's injury.

[536] Finally, I note that the directors cannot claim a right to deference from this Court on the basis that their treatment of Mr. Haack was an exercise of business judgment: "the rule shields business decisions from court intervention only where they are made prudently and in good faith": ***Ernst & Young Inc. v. Essar Global Fund Ltd.***, 2017 ONCA 1014 at para 196; ***In the Matter of a Plan of Compromise or Arrangement of Unique Broadband Systems, Inc.***, 2014 ONCA 538 at para 71. Further, the deference offered by the business judgment rule does "not support the abdication of a director's decision making responsibility": ***Pricewaterhouse Coopers***

Inc. v Perpetual Energy Inc., 2021 ABCA 16 at para 157. Here, the directors' decisions were neither prudent nor made in good faith and, particularly with respect to Mr. Anderson, Mr. Deibert and Mr. Rawlyk, involved an abdication of their responsibilities.

[537] In sum, the Defendants breached Mr. Haack's reasonable expectations as a shareholder, and they did so in a manner that was oppressive, unfairly prejudicial to and that unfairly disregarded Mr. Haack's interests.

Can the Directors Be Held Personally Liable?

[538] The next issue is against whom a remedy for oppression should be directed. The individual Defendants challenge Mr. Haack's claim that they ought to be held personally liable for oppression on two bases: first, because the pleadings were not sufficient; and second, because the facts of this case do not fall within the test for personal liability set out by the Supreme Court in ***Wilson v Alharayeri***, 2017 SCC 39.

[539] With respect to pleadings, case law provides that the pleadings must set out the specific acts said to have been oppressive and, as well, plead the facts "which would justify that kind of order": ***Budd v Gentra Inc.*** 1998 CanLII 5811 (ONCA) at para 52; ***TSCC Corporation No 2123 v Times Group Principals*** 2018 ONSC 4799 at para 87.

[540] In terms of personal liability for oppressive conduct, a remedy for oppression may be made against an individual director, the company, or both: ***698828 Alberta Ltd v Elite Homes (1998) Ltd***, 2019 ABQB 393 at para 95; ***Mack v Universal Dental Laboratories Ltd.***, 2020 ABQB 738 at para 250.

[541] In determining whether to order the remedy against an individual director, the Court must apply a two-part test. First, the Court must determine whether the oppressive conduct may be properly attributed to the individual director; that is, whether the director exercised, or failed to exercise, their power "so as to effect the oppressive conduct". Second, the Court must be satisfied that the imposition of liability is "fit in all the circumstances": ***Wilson v Alharayeri***, 2017 SCC 39 at paras 47-48; ***Budd v Gentra***, 1998 Canlii 5811 (ONCA) at para 46.

[542] To determine whether the remedy is fit, the Court must consider, first, whether it is a fair way of dealing with the conduct. This will often turn on whether a director has acted in bad faith, obtained a personal benefit, or both; however, that finding is not necessary for a determination that the remedy is fit: ***Wilson v Alharayeri***, 2017 SCC 39 at paras 49-50; ***Budd v Gentra***, 1998 Canlii 5811 (ONCA) at para 52; ***Zeifmans LLP v. Mitec Technologies Inc.,*** 2019 ONSC 3643 at para 71.

[543] Second, the Court must consider whether, in light of the fact that oppression is intended to correct injustice between the parties, an order against the director personally is necessary to rectify the oppression: ***Wilson v Alharayeri***, 2017 SCC 39 at para 53.

[544] Third, the Court must consider whether a remedy against the directors individually will serve "to vindicate the reasonable expectations" of the shareholder: ***Wilson v Alharayeri***, 2017 SCC 39 at para 54.

[545] Finally, the Court must consider the broader corporate law context, ensuring that oppression does not become "a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances": ***Wilson v Alharayeri***, 2017 SCC 39 at para 55. ***Budd v Gentra***, 1998 Canlii 5811 (ONCA) at para 52.

[546] These four criteria of fitness do not, though, detract from the flexible and discretionary approach to fashioning a remedy for oppression; they are simply "guideposts" to inform the Court's assessment of the case: ***Wilson v Alharayeri***, 2017 SCC 39 at para 57.

[547] Further, as the British Columbia Court of Appeal recently explained, the focus should be on substance, not form. The issue is on what the actual relationships were, where the benefits arose, and the true source of the oppressive conduct:

> Several observations may assist in structuring the analytical framework to be brought to bear in assessing whether a remedy is available for oppressive conduct. First, the remedy is available to address the objective and substantive reality of the manner in which the affairs of a company are conducted. It is not limited by mere formalities of corporate structure. What matters is substance, not form. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the true nature of relationships within and between related companies. Doing so does not displace the importance of legal structures and corporate law principles which inform the analysis. This is the approach the judge took in this case, and rightly so. The judge was entitled to look past corporate formalities to determine who truly controlled the Company, and who benefited from the transactions that were impugned in these proceedings: *BCE* at para. 58. The judge's finding of liability against the personal defendants was rooted in this approach, and does not reflect an error in principle: ***Canex Investment Corporation v. 0799701 B.C. Ltd.,*** 2020 BCCA 231 at para 13.

[548] Applying this law, and considering first the pleadings, I am satisfied that the Amended Statement of Claim is sufficient to bring before the Court the personal liability of the individual Defendants. At paragraph 35, the Amended Statement of Claim sets out the basis for the oppression claim. It alleges that each of the defendants acted oppressively and specifies that this occurred by their "orchestrating the termination in order to cause damage and injury to Haack in order to buy back Haack's shares on a punitive basis". It does not state their names, but the phrase "the Defendants or in the alternative each of them" makes the scope of the application of the claim clear. Further, paragraph 37 sets out the particulars of how each Defendant acted in bad faith towards Mr. Haack. While linked in the pleadings to the duty of good faith and fair dealing, that paragraph sets out the behaviour alleged to have been bad faith and includes "Redeeming Haack's shares on the most punitive basis provided for in the USA, in the absence of just cause; and (f) Striking Haack's shares from the corporate registry". Paragraph 37 told the individual Defendants that the issue of bad faith – relevant to the issue of personal liability – was before the Court, and the behaviour by them alleged to have been done in bad faith.

[549] These paragraphs mean that the individual Defendants would have understood the case they had to meet. They had to respond to Mr. Haack's claim that they had deliberately and wrongfully orchestrated his termination to take his shares on a punitive basis, that they had acted in bad faith in respect of the decision to redeem the shares under Clause 10.3(h)(ii), and that Mr. Haack was seeking to hold them personally liable for oppression.

[550] I note that the individual Defendants did not request particulars, unlike the defendants in ***TSCC Corporation No 2123 v Times Group Principals***, 2018 ONSC 4799. They also did not bring a motion to strike, as was done in ***Budd v Gentra***, 1998 Canlii 5811 (ONCA). Rather, they – and Mr. Haack – have spent a decade working towards a trial of this matter without the

sufficiency of the pleadings being called into question before this Court. This is the case even though the Defendants' read-ins show that, during questioning in March 2015, then counsel for the Defendants asked Mr. Haack about the basis for his claim against the individual Defendants. The questions were not useful for exploring the aspects of Mr. Haack's claim against the individual Defendants as set out above (e.g., "did Mr. Wadsworth, Mr. Deibert, Mr. Rawlyk or Mr. Anderson employ you personally?"); however, the fact of the questions suggests that for at least five years the Defendants have inquired about the validity of Mr. Haack's claims against the individual Defendants but, prior to the trial, did nothing to challenge them in Court or to formally seek particulars.

[551] I have serious concerns with the equity and fairness of allowing a matter to proceed for a decade only to raise at trial the sufficiency of pleadings. I reject the argument on its merits, but I think it important to note my disquiet with the decision to advance this argument at this point in the proceedings. It reflects a lack of regard for the resources and processes of the Court: if this matter was not properly before the Court, that point ought to be made in a timely fashion to avoid wasting Court time and resources. It is also unfair to Mr. Haack. As Justice Kent of the British Columbia Supreme Court put it: "It elected not to seek particulars … but, rather, adopted a tactic of lying in the weeds and raising pleading deficiencies... This is not conduct to be encouraged.": ***Jordan v. Vancouver (City)***, 2016 BCSC 167 at para 177.

[552] With respect to imposing personal liability for oppression, I am satisfied that doing so in this case is appropriate. The four individual defendants were the four directors of Marquis Alliance. Mr. Wadsworth led the process for terminating Mr. Haack's shares, and initiated the process for taking his shares. The other three defendants, Mr. Anderson, Mr. Deibert and Mr. Rawlyk worked with Mr. Wadsworth to this end. They accepted the information he provided. They chose not to investigate. They chose to accept the offered interpretation of the USA. They chose to initial the memorandum, indicating that they had read it and incorporating it into their resolution, and they signed the resolution. They made the recommendation to the shareholders. It was the action of the directors, individually and personally, that drove the breaching of Mr. Haack's reasonable expectations, and that oppressed and unfairly prejudiced him, and unfairly disregarded his interests, as a shareholder of Marquis Alliance.

[553] Further, ordering the remedy against the individual Defendants personally is a fit outcome in the circumstances of this case.

[554] First, the individual Defendants did receive a personal benefit from the cancellation of Mr. Haack's shares. I do not think that personal benefit motivated their conduct. Further, the personal benefit achieved by cancelling Mr. Haack's shares was modest and short-lived (since they reissued the shares to his successor). Nonetheless, the fact remains that by cancelling Mr. Haack's shares the proportionate amount of common shares owned by the individual Defendants increased in a way that could be known and measured. This would not be enough on its own to ground a finding of personal liability for the individual Defendants; however, it is also a fact that accuracy does not permit me to omit in assessing the fitness of personal liability being imposed.

[555] More significant is my finding, as already explained, that the individual Defendants acted dishonestly when they cancelled Mr. Haack's shares. They acted with a careless disregard for the truth and accuracy of the allegations made against him, treating those allegations uncritically and using them to assert they had cause and grounds to cancel his shares on a punitive basis, when they did not.

[556] Corrective justice also supports ordering a remedy against the individual Defendants. This was a closely held corporation, with only fifteen shareholders. Some of those shareholders, including the four individual Defendants, had a significant amount of the common and preferred shares in the company. Others, including Mr. Haack, had a very small amount of common shares and no preferred shares. The four individual Defendants, as the directors, senior officers, and significant shareholders, had personal power and influence that Mr. Haack did not, and they used that power to deprive him of his interest in the company. The wrongs they did were not only wrongs done as a servant of their employer, or as the corporation's fiduciaries. They were wrongs done by them as individuals with economic and legal power, to a person who relatively had none. It was an abuse of power, that resulted in loss to Mr. Haack, and a remedy to correct that abuse is appropriate.

[557] I note that in his evidence, Mr. Rawlyk said that the power in Clause 10.3(h)(ii) was important to him as a shareholder, but he did not anticipate it being used against him given he was a principal of the company. This evidence suggested the difference between the power and entitlements of the individual Defendants, and that of small shareholders like Mr. Haack. It was a power that Mr. Rawlyk correctly observed that he had, and that he and the other individual Defendants abused in relation to Mr. Haack.

[558] The remedy against the individual Defendants will also help to vindicate Mr. Haack's reasonable expectations. The individual Defendants were directors and officers of Marquis Alliance. They were parties to the USA. They were significant shareholders in Marquis Alliance. They knew what the USA provided. Mr. Haack could have expected that they, personally, would ensure that Marquis Alliance did not breach its obligations under the USA and that Mr. Haack would be treated fairly and in accordance with its terms. They did not.

[559] Finally, while any oppression remedy against Secure will be unlikely to give rise to additional compensatory damages given the liability arising from the breach of the USA, the oppression remedy is the only basis against which Mr. Haack can make a claim against the individual Defendants. Yet it is the individual Defendants whose decisions and choices led to the breach of Mr. Haack's reasonable expectations, and that oppressed and unfairly disregarded Mr. Haack's interests as a shareholder. Granting a remedy against them is a fit and proper response to those facts.

Against Whom Should the Oppression Remedy Be Made?

[560] As noted, an oppression remedy can be made against a company, its individual directors or both: ***698828 Alberta Ltd. v Elite Homes (1998) Ltd.***, 2019 ABQB 393 at para 95. In this case, I am satisfied that the remedy should be granted against both.

[561] With respect to the company, the individual Defendants acted in their capacity as Marquis Alliance directors. They were the company's President, its two Executive Vice Presidents, and one of its Vice Presidents. Their conduct cannot be reasonably separated from the corporate entity, now Secure.

[562] With respect to the individual Defendants, I am satisfied, for the reasons set out in the previous section, that their conduct justifies a remedy being made against them. They acted dishonestly and carelessly, and they abused the power they had as a result of their shareholdings, and their roles as directors and officers.

[563] A remedy against both Secure and the individual Defendants is the appropriate way to rectify the wrong Mr. Haack suffered.

What is the Appropriate Remedy?

[564] Mr. Haack asks this Court to make declarations that Marquis Alliance did not have just cause to terminate his employment, and that Marquis Alliance oppressed him as a minority shareholder. He also seeks compensatory damages arising from his termination and the taking of his shares. Finally, he seeks punitive and aggravated damages.

[565] Given the analysis to this point, Mr. Haack is entitled to the declarations he seeks.

[566] Mr. Haack is also entitled to compensatory damages in relation to his termination and the taking of his shares.

[567] With respect to the aggravated damages, while the conduct of Marquis Alliance may have been sufficient to justify such an award, Mr. Haack did not identify any loss associated with his termination other than with respect to the loss of his employment income and benefits. Given that aggravated damages "must be grounded in proof of actual damages", they are not available to Mr. Haack: ***Elgert v Home Hardware Stores Limited.***, 2011 ABCA 112 at para 75.

[568] The remaining issues to be assessed here are, first, what is the appropriate quantum of compensatory damages and, second, do the facts merit an award of punitive damages?

Damages for Dismissal

[569] The entitlement for damages for his dismissal arise both from Marquis Alliance's termination of Mr. Haack's employment without notice, and from their breach of the duty of good faith and honest performance. Both give rise to a potential claim for expectation interest damages; that is, for damages to put Mr. Haack in the position he would have been in had the contract been performed: ***C.M. Callow Inc. v Zollinger***, 2020 SCC 45 at paras 107-109.

[570] Mr. Haack does not identify any grounds for recovery – for example, mental distress – other than the losses associated with the failure of Marquis Alliance to pay him notice. As such, the only issues are with respect to the length of notice, and the amounts apart from lost salary that are payable as part of that notice.

[571] In terms of length of notice, the governing principles remain those set out by the Supreme Court in ***Bardal v Globe and Mail Ltd.***, (1960) 24 DLR (2d) 140 (SCC) at 145, namely, "the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant".

[572] Mr. Haack was 52 at the time of his termination. He occupied a senior position at the company and had worked there or at its predecessor companies for 20 months. He had experience in finance and accounting, but no accounting qualification at that point in time. He found another job five months after leaving Marquis Alliance, commencing work on February 1, 2011.

[573] Mr. Haack says the appropriate period of notice is five months, citing ***Nixdorf v Broadstreet Properties Ltd.*** 2017 ABQB 132; ***Eggers v Rocky Mountain Soap Company Inc.***, 2016 ABPC 202 and ***Burns v Oxford Development Group Inc.***, (1992) 128 AR 345 (ABQB).

Secure says the appropriate period of notice is four months, citing ***Nixdorf*** and also ***Ling v Unity Builders Inc.***, 2008 ABQB 733.

[574] Based on these cases, I accept Secure's submission that the appropriate notice period is four months, from September 6, 2010 to January 7, 2011. In all of the cases cited by Mr. Haack except ***Burns v Oxford Development Group Inc.***, (1992) 128 AR 345 (ABQB), a 50ish senior management employee with short-term employment and professional qualifications received four months' notice. In ***Burns*** the notice period was much higher, but the facts were distinct, with the employee having had an employment contract which contemplated generous notice (even though that contractual notice period was not itself applicable).

[575] The calculation of the amount payable in lieu of notice includes, first, an amount for lost wages. Mr. Haack earned $165,000 per year at the time he was terminated, or $3173.08 per week. Given his notice period of September 6, 2010 to January 7, 2011, which is 18 weeks, Mr. Haack is entitled to $57,115.44 in lost wages.

[576] Second, Mr. Haack is entitled to a payment in respect of his car allowance of $18,000 per year (***Nixdorf*** at para 74). That amount is $6230.77.

[577] Third, Mr. Haack is entitled to a payment in respect of the bonus that he would have received had he been employed through to the end of 2010. The Supreme Court recently confirmed in ***Matthews v Ocean Nutrition Canada Ltd***., 2020 SCC 26 at para 55 that a bonus is payable if the employee would have been entitled to the bonus during the notice period, provided the contract or plan does not remove the right to receive it. Mr. Wadsworth confirmed that bonuses were paid in 2010 and the evidence showed that Mr. Haack's bonus was 30% of his salary. Nothing in the evidence suggested that Mr. Haack would not have been entitled to receive that bonus. The amount Mr. Haack should have received as a bonus was $49,500.

[578] Fourth, Mr. Haack is entitled to an amount payable in lieu of the benefits to which he was entitled in this period. The quantum of that amount, including with respect to group and other benefits, and the RSP programs of Marquis Fluids and Marquis Alliance, has not been specifically established in evidence. I set Mr. Haack's recovery for benefits at $3000.

[579] In total, Mr. Haack is entitled to $115,846.21 as compensatory damages from Secure for Marquis Alliance's wrongful termination of his employment and its breach of the duty of good faith and honest performance.

Damages for the Shares

[580] Mr. Haack is entitled to damages for the loss of the shares arising because of Marquis Alliance's breach of the USA, and because of the oppressive conduct attributable to Marquis Alliance and the individual Defendants.

[581] The quantum of that loss depends on two questions. First, what is the date at which the value of Mr. Haack's shares should be assessed? This turns primarily on the question of whether the evidence shows that Mr. Haack would have sold his shares (either by choice or by compulsion) at the point when he was terminated, or whether he would have held his shares until the Secure transaction. Second, if the answer is that he would have sold his shares at the point he was terminated, what is the value of the shares at that time?

Valuation Date

[582] Under the terms of the USA, the only way to compel Mr. Haack to sell his shares upon the termination of his employment was if he resigned (Clause 9.1(a)(viii)) or was terminated for cause (Clause 9.1(a)(ix)). In those two circumstances, Mr. Haack would become a Withdrawing Shareholder, the cessation of his employment would be a Withdrawing Event and he would be "deemed to have *bona fide* proposed to sell" all of his shares. The USA then set out a procedure to allow the purchase of the shares by Marquis Alliance through an agreement with the directors or, failing such an agreement, based on a valuation procedure. An employee who quit, or was fired for cause, would have the purchase price discounted, the amount of the discount depending on the timing of the event.

[583] These provisions do not apply to Mr. Haack. He did not quit and he was not terminated for cause. What the provisions reveal, however, is the agreement of the shareholders that if an employee left the company in circumstances potentially reflecting a breakdown in the relationship – quitting or the existence of cause – the shareholders would no longer want that former employee as a shareholder. That supports the inference that, had it properly terminated Mr. Haack's employment with notice, Marquis Alliance would have also sought to reach an agreement to acquire his shares. They would not have had the power to force a sale as they did under the USA, but they would have wanted to negotiate one.

[584] I also note that while the offer in the August 27, 2010 letter was not a reasonable reflection of the value of the shares, it does show that Marquis Alliance hoped to purchase Mr. Haack's shares upon the termination of his employment.

[585] Mr. Haack also seems to have been open to this possibility. In his letter of September 14, 2010, he noted that he had the option of holding his shares but said "Alternatively a mutually agreeable negotiation could be done to arrange a voluntary sale of my shares".

[586] We cannot know with certainty what would have occurred had Marquis Alliance complied with its legal obligations. The most likely scenario, however, is that they and Mr. Haack would have negotiated an agreement to purchase the shares for the value they had at the time, if necessary using a third-party valuation procedure to ascertain that value.

[587] I acknowledge Mr. Haack's testimony that he was hoping to keep the shares to sell them as part of an IPO. Given, however, the desire of Marquis Alliance and the shareholders to acquire the shares of a departing employee, I think it more significant that he expressed a willingness to negotiate in 2010. I am satisfied that the most likely scenario is that the parties would have reached an agreement for Marquis Alliance to purchase the shares.

[588] I further find that the valuation date that would have been used for the purposes of that agreement was Mr. Haack's termination date of September 3, 2010. It is possible that another date – for example, the date at which the agreement was concluded – would have been used had Marquis Alliance complied with its obligations and the parties negotiated the sale of the shares. That possibility is, however, speculative. I do not accept the date of September 23, 2010 because that date has significance only as the date at which Marquis Alliance communicated the decision to take the shares to Mr. Haack. The termination of the employment relationship was September 3; the resolutions were effective September 2; the meeting of the directors was on September 2; the meeting of the shareholders was on September 13. September 23 thus does not have legal significance as the point of concluding the employment relationship, making the decision to take

the shares for $1.00 or reflecting the point where the parties would likely have reached an agreement for the sale of the shares. September 3, by contrast, is the date of the wrongful termination of Mr. Haack's employment and one day after the directors had put in motion the process of taking Mr. Haack's shares.

[589] As such, I find that the valuation date for Mr. Haack's shares is September 3, 2010.

Share Valuation

[590] The Defendants and Mr. Haack each presented expert evidence on the proper valuation of the shares. Mr. Jeff Pellarin was the independent expert called by Mr. Haack. Mr. Devin Wagner was the independent expert called by the Defendants.

[591] The qualifications and expertise of each of Mr. Pellarin and Mr. Wagner were accepted as sufficient for them to be qualified as experts; however, Mr. Haack submitted that the evidence of Mr. Wagner should be given less weight due to concerns with his independence. Mr. Wagner had worked for Alliance Energy prior to its merger with Marquis Alliance. He also worked on the 2009 valuations completed for Alliance Energy and Marquis Fluids as part of the merger process. In doing so, he had worked with Mr. Haack, and also had a pre-existing relationship with Alliance Energy. In addition, Mr. Haack argued that Mr. Wagner relied on information provided by management and on his professional judgment, without providing adequate descriptions about the information he was given or the basis for his judgment, and without disclosing the information he relied upon to Mr. Haack or Mr. Pellarin.

[592] An expert's independence and impartiality are of fundamental importance, and their absence can undermine the fair and effective functioning of the justice system: ***White Burgess Langille Inman v. Abbott and Haliburton Co***., 2015 SCC 23 at para 12. I am not, however, prepared to discount Mr. Wagner's evidence on this basis. I do not view his independence as compromised by virtue of his past work for the companies. The work was done nearly a decade ago, and there was nothing in the evidence to suggest that Mr. Wagner had a personal relationship with any of the parties sufficient to impair his objectivity or professional judgment. He, like Mr. Pellarin, was "retained, instructed and paid by one of the adversaries" but these "facts alone do not undermine the expert's independence, impartiality and freedom from bias": ***White Burgess*** at para 32.

[593] Mr. Wagner's report can be assessed on its merits. As such, where a conclusion or analysis is not well supported, either because it does not explain its conclusions or because it is based on his information that has not been disclosed, it can be assessed taking that deficiency into account. But I do not think the evidence supports the application of overarching skepticism to Mr. Wagner's report and testimony.

[594] In this section, I summarize the evidence of each of Mr. Pellarin and Mr. Wagner. I then evaluate that evidence. The result of that analysis is that I accept Mr. Wagner's assessment of the maintainable earnings before interest, income tax, depreciation and amortization ("EBITDA") of Marquis Alliance as of September 3, 2010. Specifically, I accept the "high" end of his calculation of the maintainable EBITDA. I reject, however, two aspects of his derivation of the fair market value of Marquis Alliance. In particular, in my view, the company's specific risk premium has not been justified and I accept Mr. Pellarin's evidence that it ought not to exceed 2-3%. In particular, I find that it ought to be reduced to 2%. Further, based on Mr. Pellarin's critiques and the public company comparables included in Mr. Wagner's report, the debt-equity

ratio in Mr. Wagner's report ought to be adjusted to 50% debt and 50% equity. The result of these adjustments is to value Mr. Haack's shares at $957,994.60.

Evidence of Mr. Pellarin

[595] Mr. Pellarin's report assessed the fair value of Mr. Haack's shares as of September 3, 2010. The assessment was of fair value, rather than fair market value, insofar as he assessed the value of his shares as a percentage of the market value of the corporation, rather than assessing the price at which Mr. Haack could have sold the shares.

[596] Mr. Pellarin used a calculation report approach to assess the value of Mr. Haack's shares. Business valuators use three levels of reports: comprehensive reports, estimate reports and calculation reports. A calculation report uses information, estimates and assumptions that could not be reviewed or tested, or which the valuator could not verify. Mr. Pellarin prepared a calculation report because he did not have access to information sufficient to prepare an estimate or comprehensive report. He acknowledged that his conclusion might have been different had he done a higher level report, and that the USA itself required an estimate level report. He clarified that his valuation was not intended to comply with the USA.

[597] The methodology used by Mr. Pellarin was a comparable sales analysis. It had four steps.

[598] First, he estimated the earnings capacity of Marquis Alliance going forward, identifying both forecast revenue and EBITDA for Marquis Alliance.

[599] Second, he identified appropriate multipliers from analysis of comparable public companies, analysis of companies with comparable publicly reported completed transactions during the relevant time period, and the Secure transaction.

[600] The goal of the first two steps was to take Marquis Alliance's anticipated earnings and apply a growth rate equivalent to those experienced in the industry generally, and from that to identify a value of the company as a whole. The analysis produced a range of values, reflecting the use of both revenue and EBITDA as starting points, and also the multipliers generated by the different comparator groups (public companies, completed transactions and the Secure transaction).

[601] Third, Mr. Pellarin deducted from the valuation the company's debt, and the redemption value of the preferred shares.

[602] Fourth, he attributed to Mr. Haack 1.48% of the remaining value of the company as the fair value of Mr. Haack's shares.

[603] Because of the range of values created by steps one and two, steps three and four also produced a range of results.

[604] The specifics of Mr. Pellarin's four step analysis are as follows.

[605] Mr. Pellarin used a number of documents to estimate the earning capacity of Marquis Alliance. He acknowledged the limitations in the documents he had available to complete his estimate, arising from the fact that Marquis Alliance had existed for a short time, was a private company and he did not have access to its internal records. Mr. Pellarin had available the reports prepared by Grant Thornton in 2009 for Marquis Fluids and Alliance Energy, the March 31, 2010 financial statements, the March 31, 2011 financial statements, the Marquis Alliance fiscal

2011 budget and some internal valuation calculations, and one page of a forecast prepared for Marquis Alliance by Macquarie, who it had retained as its underwriter in respect of the IPO.

[606] For the second step, of identifying the multiplier, he chose his public company comparables based on the list used by Grant Thornton in 2009. He selected the completed transaction comparables from oil and gas equipment and service companies that completed transactions during the relevant time period. With the completed transactions, however, he was able to identify very little useable data.

[607] Mr. Pellarin acknowledged that he did not probe into the public companies or do detailed analysis of any of them. He said that he was looking at a larger data set of 104 companies, and also relying on Grant Thornton's prior determination that they were comparable. He noted that individual companies may have had unusual swings in value over time but said the larger data set adjusted for that through the use of averages and medians.

[608] He also acknowledged that there were too few completed transactions within the relevant time period to provide meaningful information with respect to the EBITDA multiple. He suggested that the data was not useless, but it was harder to use small data sets and get meaningful results.

[609] With respect to the Secure transaction multiple, Mr. Pellarin opined that this was likely to be the most accurate data point insofar as it was based on an assessment of Marquis Alliance rather than the industry as a whole, but he acknowledged that it occurred some months later and may not have reflected the value as of September 2010. His analysis suggested, however, that the growth post-merger largely occurred prior to September 2010, rather than between September 2010 and the date of the Secure transaction, such that the multiple had relevance to the September 2010 timeframe.

[610] Mr. Pellarin's analysis using comparables from public companies produced a value for Marquis Alliance of $156,500,000 to $165,600,000 based on revenue, and $179,600,000 to $219,000,000 based on EBITDA. The value of Mr. Haack's shares was $1,419,868 to $1,554,548 based on revenue, and $1,761,748 to $2,344,868 based on EBITDA.

[611] Mr. Pellarin's analysis using completed transactions produced a value for Marquis Alliance of $160,000,000 to $192,000,000 based on revenue and $186,000,000 to $248,000,000 based on EBITDA. The value of Mr. Haack's shares was $1,471,668 to $1,945,268 based on revenue and $1,856,468 to $2,774,068 based on EBITDA.

[612] Mr. Pellarin's analysis using the multipliers inherent in the Secure transaction produced a value for Marquis Alliance of $138,139,669 to $144,717,166 based on revenue, and $126,963,694 to $141,431,624, based on EBITDA. The value of Mr. Haack's shares was $1,148,136 to $1,245,483 based on revenue and $982,731 to $1,196,857 based on EBITDA.

[613] Mr. Pellarin recognized some issues in his analysis. These included the small number of completed transactions available for assessment, and a brief spike in EBITDA in Q3 2010. These issues meant that the actual value of the company and of Mr. Haack's shares were unlikely to have been at the level generated by the public company or completed transaction multiples. In his view, applying the Secure transaction multiple more accurately reflected how Marquis Alliance would have been valued in September 2010.

[614] Based on his analysis and using his professional judgment, Mr. Pellarin assessed the fair value of Mr. Haack's common shares at the termination date as in the range of $1,000,000 to

$1,500,000. Had he participated in the Secure transaction, Mr. Haack would have received proceeds of about $1,181,637.

Evidence of Mr. Wagner

[615] Mr. Wagner's report used a going concern valuation methodology and, more specifically, a capitalized cash flow methodology, which allowed him to value the company based on its earning potential and earning history. He prepared an estimate valuation level report, which is based on less review and reporting than a comprehensive report, but with more documentation than the calculation report prepared by Mr. Pellarin.

[616] Like Mr. Pellarin, Mr. Wagner assessed the fair value of Mr. Haack's shares, identifying a price for the common shares based on his assessment of the value of Marquis Alliance as of September 3, 2010 and as of September 23, 2010.

[617] The first step in Mr. Wagner's going concern valuation methodology was to prepare a Tangible Asset backing calculation. This calculation identified the minimum value of the business as a going concern. It provided the floor value of the company based on what it contains – that is, its tangible assets. The purpose of the Tangible Asset backing calculation was "to measure the risk associated with the conclusions reached under the earnings/cash flow based valuation techniques". Mr. Wagner showed the Tangible Asset backing of Marquis Alliance to be $40,330,000.

[618] Mr. Wagner then turned to the calculation of the capitalized cash flow. The calculation determines the enterprise value of the business by applying a weighted average cost of capital to the company's earnings stream.

[619] To complete the calculation Mr. Wagner began by determining the historical earning statements of the business and, from that, identifying the normalized EBITDA.

[620] Second, he converted the normalized EBITDA into a maintainable EBITDA.

[621] Third, he converted the maintainable EBITDA into the predicted after-tax cash flows of the business.

[622] Fourth, he applied a weighted average cost of capital to the after-tax cash flows, to calculate the enterprise value of the business.

[623] The specifics of the four steps in Mr. Wager's analysis are as follows.

[624] With respect to the historical earnings, Mr. Wagner's report identified the revenue, costs and profit for each year ending March 31, 2006-2010. For the year ending March 31, 2011, Mr. Wagner derived the revenue and expenses by doubling the results earned from April 1, 2010-September 30, 2010. From these numbers, Mr. Wagner identified the Marquis Alliance earnings before income taxes in each year 2006-2011, again with the doubling calculation to annualize the 2011 numbers.

[625] Having calculated the historical earnings before income taxes, Mr. Wagner did a further calculation and added the depreciation, interest and income taxes to the earnings to determine the reported EBITDA for each year 2006-2011, again with the doubling calculation to annualize 2011.

[626] Mr. Wagner took the reported EBITDA and normalized it. He removed items that were one-time expenses or unusual from the reported EBITDA to determine the normalized EBITDA.

This resulted in some small upward and downward adjustments to the reported EBITDA. These adjustments were based on discussions with management in 2018-19, as well as on discussions with management at the time of the preparation of the prior valuations in 2009.

[627] Having calculated the normalized EBITDA, Mr. Wagner next calculated a maintainable EBITDA. The maintainable EBITDA is the amount of EBITDA the company could forecast itself as consistently able to achieve year to year. He calculated the maintainable EBITDA through creating a series of weighted and simple averages and then applied his professional judgment to assess what, given those averages and the normalized EBITDA from 2006 through 2011, the maintainable EBITDA of the company would be likely to be. To get a sense of this information, the normalized EBITA from the company in 2006 through 2011 was: $16,8673,547 (2006), $20,648,906 (2007), $15,866,175 (2008), $11,620,577 (2007), $6,775,450 (2010), $21,852,671 (2011).

[628] The maintainable EBITDA in Mr. Wagner's opinion was $15,000,000 to $16,500,000.

[629] This took Mr. Wagner to the final stage of his analysis, the identification and application of the weighted average cost of capital.

[630] To identify the cost of capital, using the numbers applicable at September 3, 2010, he first determined the cost of equity by adding together a risk free rate of 3.57%, an equity risk premium of 5.10%, a premium for size of 6.36%, an industry risk premium of 2.14% and a premium for specific company risks of 5-6%. This led to a cost of equity of 22.17%-23.17%. He then determined the weighted average cost of capital taking into account corporate interest rates and income tax rates, and a debt-equity ratio of 30% debt and 70% equity. From these he identified a nominal discount rate of 16.28% to 16.98%. He removed the long-term inflation rate of 2.00% to identify a real discount rate of 14.00% to 14.69%, and made no upward adjustment for real long-term growth, leading to a capitalization rate equal to his discount rate of 14.00% to 14.69%.

[631] I note that to remove the long-term inflation rate of 2.00%, Mr. Wagner used a formula, and that the deduction shown in his report was 2.28-2.29%.

[632] Using the same methodology, but the numbers applicable at September 23, 2010, Mr. Wagner's capitalization rate was 13.89%-14.58%.

[633] Having derived the maintainable EBITDA and the capitalization rate, Mr. Wagner then calculated the discretionary after-tax cash flow. He deducted income taxes from the maintainable EBITDA. He further deducted the sustaining capital reinvestment, which is the amount that needs to be reinvested into the company on an annual basis, taking into account the tax impact of that reinvestment. The amount after these adjustments is the discretionary after-tax cash flow.

[634] Mr. Wagner then applied the capitalization rate to the discretionary after-tax cash flow to derive its capitalized value. He added to that the present value of the tax shield on existing undepreciated capital cost to determine the enterprise value.

[635] The enterprise value calculated in this way is the value of the business as a whole considering the value for debt holders and equity holders. In Mr. Wagner's calculation, as of September 3, 2010, the enterprise value was $69,437,000 to $73,507,000. As of September 23, 2010, the enterprise value was $69,989,000 to $74,064,000.

[636] Mr. Wagner then deducted the amount of the interest-bearing debt, and added back in the redundant assets, to calculate the fair market value for Marquis Alliance (rounded further). The fair market value as of September 3, 2010 was $60,430,000 to $64,500,00. As of September 23, 2010, it was $60,990,000 to $65,060,00.

[637] Mr. Wagner then deducted the redemption value of the preferred shares, to derive the fair market value of the common shares as a whole and on a per share basis.

[638] The fair market values for the common shares as of September 3, 2010 was $8,870,000 to $12,940,000 ($8.87 to $12.94 per share). As of September 23, 2010, it was $9,430,000 to $13,500,000 ($9.43 to $13.50 per share).

[639] To assess the merits of his primary analysis, Mr. Wagner used a secondary analysis of public company comparables and comparable completed transactions. He chose his public company comparables through a database into which he entered a set of parameters to identify appropriate comparable companies. From that he then excluded any companies that were unusual or did not provide sufficient information for inclusion. He ultimately identified 26 public companies to use for comparables.

[640] From these comparables, he then derived a median EBITDA/enterprise value multiple of 7.7 and an average multiple of 9.3. The public companies had a median debt/equity ratio of 41/59, and an average debt/equity ratio of 57/43.

[641] From the comparable transaction analysis, Mr. Wagner derived a median EBITDA/enterprise value multiple of 7.3 and an average multiple of 8.0.

[642] This secondary analysis did not result in any changes to Mr. Wagner's conclusions.

[643] Mr. Wagner's valuation ultimately assessed Mr. Haack's shares as worth $131,276 to $191,512 (based on a share price of $8.87 to $12.94 per share) as of September 3, 2010. He assessed them as worth $139,564 to $199,800 (based on a share price of $9.43 to $13.50 per share) as of September 23, 2010.

Assessment

[644] Mr. Pellarin's expertise and competence were not disputed by the parties and were clear from his testimony to the Court. He provided helpful analysis and explanation about the oil and gas industry, and trends in that industry during the relevant time frame.

[645] The lack of information which Mr. Pellarin had to prepare his report creates, however, some fundamental difficulties in using it to value the shares. His analysis using the public company and comparable transaction multipliers created a value for Mr. Haack's shares from $1,419,868 to $2,774,068. Yet Mr. Pellarin concluded that the shares were worth $1,000,000 to $1,500,000. This creates the impression that Mr. Pellarin himself did not view his analysis as reliable, a point he explicitly acknowledged in certain respects. Further, while Mr. Pellarin maintains that he did not use hindsight analysis because he used the Secure transaction only to assess the reasonableness of his estimate, not as the basis for his estimate, the values he ultimately selected suggest that the Secure transaction drove his analysis in a way that it ought not to have done. This makes me reluctant to base my assessment of Mr. Haack's shares on Mr. Pellarin's report.

[646] By contrast, the information set out in Mr. Wagner's report allows me to value Mr. Haack's shares based on data and analysis with identifiable foundations and descriptors.

Specifically, Mr. Wagner's report provides a clear starting point which can, where the evidence warrants, be adjusted to ensure a fair and accurate valuation of Mr. Haack's shares.

[647] I find that the appropriate starting point is the high end of Mr. Wagner's maintainable EBITDA. I do so to acknowledge that between 2006 and 2011, three years had an EBITDA in excess of the high number. I also agree with Mr. Pellarin that choosing an expected growth only in line with inflation is conservative. Further, I accept Mr. Pellarin's point – which Mr. Wagner acknowledged – that Mr. Wagner's annualization of the 2011 EBITDA used a problematic methodology since the seasonal nature of Marquis Alliance's business meant that simply doubling the low season revenues would understate those revenues. Finally, I note that Mr. Wagner at various points in his calculation of the maintainable EBITDA relied on information provided by management that was not described in his report. I do not adjust Mr. Wagner's calculation of the maintainable EBITDA for any of these concerns but note them to support using the highest of Mr. Wagner's own calculations.

[648] Further, I am satisfied that the specific company discount used by Mr. Wagner was not sufficiently justified or explained.

[649] Mr. Wagner's report said that it was:

> based on our analysis of the Company's specific factors, including earnings history and forecasted results, strength of the balance sheet, management depth, competition, contingencies and commitments, etc. We considered both positive and negative factors in this analysis".

In his testimony he described it as a judgment call.

[650] Mr. Pellarin responded :

> [W]e do not understand the company-specific risk premium. GT [Grant Thornton] only says that this is from an internal analysis. While they describe the nature of the adjustment generally, they do not explain how they applied it to the present case ie what specific factors relating to the company make it more risky than other industry participants. We do note that the premium is high in absolute terms. In our experience and practice, company-specific premia do not usually exceed 2% to 3%

[651] I am persuaded by Mr. Pellarin's response. While I respect Mr. Wagner's professional judgment, it was incumbent on him to provide sufficient information about the basis for that judgment for me to assess it. What were the history and forecasts that influenced it? What were the strengths on which he relied? What were the factors in respect of management that supported the decision? As Mr. Pellarin also suggested, to include a company specific adjustment there has to be a reason why Marquis Alliance represents a higher risk than other oil and gas companies of the same size (since Mr. Wagner has already accounted for industry and size). Mr. Wagner's testimony does not satisfy me that an increase of 5-6% is warranted.

[652] As such, and relying on Mr. Pellarin's opinion that company-specific premia do not usually exceed 2% to 3%, I reduce the specific risk premium to 2%. I acknowledge that Mr. Wagner did not agree with Mr. Pellarin's opinion on the usual high range for company-specific premia, but I am persuaded by Mr. Pellarin's evidence on this point.

[653] Finally, I am satisfied that a debt-equity ratio of 50/50 is more appropriate than the 30/70 ratio used by Mr. Wagner. Mr. Pellarin noted that the 30/70 ratio "represents a very low debt position in relation to the asset base". His analysis of Mr. Wagner's report showed that the company could support a higher level of debt (53%) conservatively, without overextending itself. Further, in Mr. Wagner's report, the public company comparables had a median debt-equity ratio of 41/59 and an average debt-equity ratio of 57/43. Based on this evidence, I find that a 50/50 debt-equity ratio is a more realistic basis for assessing the value of Marquis Alliance.

[654] Mr. Pellarin identified other issues with Mr. Wagner's report. I view his evidence on these points as directionally supportive of the changes I have made here. In particular, while I agree that the Secure transaction cannot be used as hindsight, the disparity between the value it showed Marquis Alliance shares to have, and the value identified by Mr. Wagner, calls the merits of Mr. Wagner's unadjusted report into doubt. As Mr. Pellarin put it:

> The conclusions arrived at are never tested against GT's earlier valuations of the companies, the Secure Transaction (which indicated a significantly higher value, only a short time later), and the industry and economic backdrop (as evidenced by multiples of public companies and completed transactions). GT's findings suggest only modest increase in growth of 6% during the 18 months between March 2009 and September 2010 and rapid growth of 115% in the following 8 months. This seems unlikely, particularly when the overall market suggested that the majority of this growth occurred in the earlier, not the latter, period.

[655] The calculation of Mr. Haack's loss based on these adjustments to Mr. Wagner's report are as follows. I follow here Schedules 5b and 6b of Mr. Wagner's report, and any entry I have not adjusted is taken directly from those schedules. I note that to approximate the formula of Mr. Wagner's removal of inflation, I deduct 2.28.

Calculation of Share Value	
Calculation of Multiple:	
Unadjusted Cost of Equity (23.17-4)	19.17%
Debt-Equity Ratio	50/50
Cost of Debt (corporate interest rate(1-corporate income tax rate)*debt/business enterprise) (.0358*.7125*.5)*	1.28%
Adjusted Cost of Equity (50%)	9.585%
Unadjusted Nominal Discount Rate	10.865%
Inflation adjustment	(2.28%)
Real Discount Rate (After Removal of Inflation)	8.58%
Capitalization Rate (with zero long-term growth)	8.58%
Implied multiple of earnings (=1/WACC)	11.655
Calculation of Fair Market Value	
Discretionary after-tax cash flow	$10,683,000
Applicable Multiplier	11.655
*Capitalized Value of Discretionary after-tax cash flow (multiple*after-tax cash flow)*	$124,510,365
Present value of tax shield	$782,000
Enterprise Value	$125,292,365
Interest bearing debt	($9,214,000)
Redundant assets	$211,000
En bloc FMV of Marquis Alliance	$116,289,365
Deduct preferred shares at market value	($51,560,000)
FMV of common shares	$64,729,365
Value of Mr. Haack's Shares (FMV*.0148)	**$957,994.60**

[656] In sum, I have accepted Mr. Wagner's report as the basis for my valuation of Mr. Haack's shares. I have chosen the high end of his range of maintainable EBITDA, reduced the specific company risk premium to 2% and adjusted the debt-equity ratio to 50/50. Based on those adjustments, and my calculations set out in the prior table, I value Mr. Haack's shares at $957,994.60 as of September 3, 2010. This is the amount that Mr. Haack would have received had Marquis Alliance not breached the Unanimous Shareholders' Agreement, and had it and the individual Defendants not acted oppressively towards him. As such, it is the amount he is entitled to receive to rectify that oppression and as compensatory damages for the breach of the Unanimous Shareholders' Agreement.

[657] I note that I have not applied any adjustment to this amount to reflect the possibility that the parties may, in the course of their negotiations, have agreed for Marquis Alliance to purchase the shares for a higher or lower amount than the value of the shares. I do not have evidence to

support such an adjustment and, in any event, accept that the appropriate assessment here is that the parties would have negotiated an agreement for Marquis Alliance to purchase the shares from Mr. Haack for their fair value as of September 3, 2010.

Punitive Damages

[658] Mr. Haack claims punitive damages. He suggests that punitive damages are recoverable by virtue of Marquis Alliance's breach of the duty of good faith and honest performance, which constitutes an independent actionable wrong.

[659] While the Court of Appeal's decision in ***Elgert v Home Hardware Stores Limited***, 2011 ABCA 112 at para 79 does say that an independent actionable wrong allows punitive damages to be sought, it does not say that such a wrong is sufficient for such damages to be awarded. Rather, to justify an award of punitive damages it must be shown that the employer engaged in "harsh, vindictive, reprehensible, malicious conduct": ***Elgert*** at para 85.

[660] This position is consistent with the Supreme Court's foundational decision in ***Whiten v Pilot Insurance Co.***, 2002 SCC 18 at para 36 where the Court emphasized that punitive damages must be reserved for extraordinary cases, where the defendant's conduct warrants punishment, rather than simply redress through an award of compensatory damages. The Court in ***Whiten*** at para 94 emphasized that such damages ought only to be imposed where there "has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."

[661] As these reasons make clear, I think the Defendants in this case acted badly. They were – and have continued to be – careless with the truth and unfair in their treatment of Mr. Haack. They said things about him that were false and misleading. They continued to say some of those things at trial. They violated their legal and their moral duties: they denied Mr. Haack the respect and fairness we owe to one another.

[662] Wrongful conduct is not, however, sufficient to justify an award of punitive damages. The faults of the Defendants in this case reflected a lack of regard for Mr. Haack, for their legal obligations and for the truth. But they did not rise to the level of vindictiveness or maliciousness. Theirs was an ordinary failing to do what is right, rather than an extraordinary one.

[663] As such, I reject Mr. Haack's claim for punitive damages.

Conclusion

[664] Based on Marquis Alliance's wrongful termination of his employment, its breach of the duty of good faith and honest performance, its breach of the USA and the oppressive conduct of its directors, the individual Defendants, Mr. Haack is entitled to $1,073,840.82 in compensatory damages along with pre-judgment interest.

[665] Secure is liable for the damages related to the wrongful termination and breach of the duty of good faith and honest performance; it and the individual Defendants are jointly and severally liable for the damages related to the taking of Mr. Haack's shares.

[666] In argument, Mr. Haack sought solicitor-client costs. I deferred argument on the question of costs pending my decision on the substance of the party's dispute. The parties may now submit briefs on the issue of costs. Those briefs must not exceed ten pages and must be filed with

the Court within 30 days of receipt of these reasons. If they wish, the parties may additionally appear before me for a hearing, not to exceed one hour, on this issue.

Heard on the of 16th day of November to the 11th day of December, 2020
Dated at the City of Calgary, Alberta this 2nd day of February, 2021.

A. Woolley
J.C.Q.B.A.

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