

CITATION: Riva Plumbing Limited v. Ferrari, 2025 ONSC 3219
COURT FILE NO.: CV-13-481063-0000
DATE: 20250529

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Riva Plumbing Limited, MDJL Holdings)
Ltd., and Luca Montanaro)
) **Ralph Cuervo-Lorens and Fernanda Martins,**
) **for the plaintiffs**
Plaintiffs)
)
– and –)
) **W. Ross MacDougall and Anja Perc, for the**
) **defendants Anthony Ferrari a.k.a. Tony**
) **Ferrari and 531302 Ontario Inc.**
)
Anthony Ferrari, a.k.a. Tony Ferrari,)
531302 Ontario Inc., Icon Plumbing and)
Heating Ltd., Mike Ladisa, and Joseph)
Ferrari)
) **Joseph P. Maggisano and Vanessa**
) **Maggisano, for the defendants Icon**
) **Plumbing and Heating Ltd., Mike Ladisa,**
Defendants) **and Joseph Ferrari**
)
AND BETWEEN:)
)
Mike Ladisa and Joseph Ferrari)
) **Joseph P. Maggisano and Vanessa**
) **Maggisano, for the plaintiffs by**
Plaintiffs by counterclaim) **counterclaim Mike Ladisa, and Joseph**
) **Ferrari**
– and –)
)
Riva Plumbing Limited)
) **Ralph Cuervo-Lorens and Fernanda Martins,**
) **for the defendant by counterclaim, Riva**
Defendant by counterclaim) **Plumbing Limited**
)
)
) **HEARD:** February 24, 25, 26, 27, 28, and
March 3, 4, 5, 6, 7, 10, 12, 17, and 18, 2025

2025 ONSC 3219 (CanLII)

ROBERT CENTA J.

1. Overview

[1] In 2008, Luca Montanaro and Tony Ferrari were the two shareholders of Riva Plumbing Limited, which was a large and successful plumbing company that provided services

primarily to new home builders in the Greater Toronto Area. Around that time, Luca began to suspect that Tony was stealing money from the company.¹ Luca accused Tony of misconduct, which placed a significant strain on their relationship. The staff at Riva Plumbing were well aware of the dispute between Tony and Luca. It is fair to say that the dispute poisoned the workplace and that relations between Luca and almost all the staff deteriorated significantly over time.

- [2] In 2010, Luca commenced an oppression application against Tony. They reached a settlement on October 3, 2012. Under the terms of the settlement, Luca would buy Tony's shares in Riva Plumbing for \$4 million. The transaction was scheduled to close one month later. On October 4, 2012, Tony told the staff that the dispute had been resolved and that Luca would be buying him out of the business on November 5, if Luca could come up with the funds.
- [3] Mike Ladisa was the foreman at Riva Plumbing. Mike was shocked and upset to learn that Luca might be taking over the business because he had a terrible relationship with Luca. Mike was certain that Luca would fire him if Tony was no longer an owner. Mike began preparations to leave Riva Plumbing and to start his own plumbing company, which he would eventually name Icon Plumbing. Luca told Mike that he had the funds to buy Tony's shares and Mike pulled the trigger to start his own company. On November 2, 2012, Mike resigned from Riva Plumbing.
- [4] On November 5, 2012, the share sale closed. Tony packed up a few boxes from his office and left Riva Plumbing. First thing the next morning, Luca walked into an office at Riva Plumbing where three employees were standing: Joseph Ferrari (Tony's nephew), Anna Ferrari (Tony's daughter), and Robert Ferrari (Tony's son). Luca immediately fired Anna and Robert for no reason other than that they were Tony's children. Although Robert planned to stay at Riva Plumbing following the share sale, he thought about how Luca treated his cousins and decided he could not put up with Luca any longer. He resigned at noon that same day and went to see his good friend Mike at Icon Plumbing's new location.
- [5] Luca had suspicions about the formation of Icon Plumbing. He arranged for a surveillance operation at the company's business location. Luca became even more suspicious when his new foreman visited Icon Plumbing to get some information and he reported back that Tony was at the Icon Plumbing site. When Luca saw that the surveillance videos captured Mike, Robert, a couple of new-looking vans with Icon Plumbing logos, and Tony riding around on a forklift, Luca concluded that Tony was breaching his fiduciary duties and the non-competition agreement under their shareholders agreement. Luca inferred that Icon Plumbing was Tony's front company and that Tony was competing unlawfully with Riva Plumbing. Luca commenced this action against Tony, Mike, Joseph, and their companies for a remarkably large number of economic torts and breaches of duty.

¹ As many of the witnesses share common surnames, I will refer to all witnesses by their first names. In so doing, I mean no disrespect to any of them.

- [6] Twelve years later, this case came to trial. As I will explain, Luca failed to prove that any of the defendants competed unlawfully or in breach of any duties owed to him or Riva Plumbing. There is no evidence Tony had any economic interest in Icon Plumbing. There is no evidence Tony helped Icon Plumbing compete unfairly with Riva Plumbing. No builder gave evidence that they gave work to Icon Plumbing because they believed Tony stood behind the company. Indeed, the unchallenged evidence of the two builders who testified was that once Tony left Riva Plumbing, they decided that they would never again do business with Luca because they disliked him so strongly. No former employee of Riva Plumbing testified that they were solicited away from working there. There is no evidence that Icon Plumbing or its principals used any of Riva Plumbing's confidential information to start their business. There is no evidence that Tony, Mike, or Joseph breached any duties they owed to Riva Plumbing. All of the evidence is to the contrary.
- [7] Ultimately, Luca could only prove three things: first, that Tony drove a forklift at Icon Plumbing on two occasions, about a year apart; second, that Tony frequently attended Icon Plumbing, where he would drink espresso, smoke cigarettes, and chat with his pals in the plumbing industry; and third, that on July 1, 2014, one of Tony's companies leased space to Icon Plumbing at market rates. None of this conduct, taken separately or together, could make out any of the plaintiffs' claims. Indeed, the plaintiffs conceded that this conduct caused them no damage whatsoever.
- [8] Even if the plaintiffs had proved their case on liability, I would award them nothing more than nominal damages. The plaintiffs did not produce their audited financial statements or the accounting data that supported their claim for damages. The plaintiffs did not obtain an expert report. Instead, the plaintiffs offered opinion evidence through lay witnesses. The evidence was a toxic mixture of hearsay, double-hearsay, unrealistic projections, factual errors, assumptions untethered to the evidence, and research from undisclosed "internet sources."
- [9] The plaintiffs' action is dismissed.
- [10] Finally, Mike and Joseph counterclaimed against Riva Plumbing for unpaid bonuses for the year 2012. I allow the counterclaim and award each of Mike and Joseph damages in the agreed upon amount of \$49,725, plus prejudgment interest running from July 17, 2013. I find that the bonus scheme was a non-discretionary and integral part of their compensation. The bonus amounts related solely to Riva Plumbing's profits and not Mike or Joseph's performance. Riva Plumbing never advised either Mike or Joseph that continuing employment was a condition of receiving the bonus. I find that they are entitled to a *pro-rata* share of their bonus for the fiscal year ending January 31, 2013, even though they resigned in November 2012.

2. The parties and their witnesses

A. *The plaintiffs*

- [11] There are three plaintiffs in this action: Luca Montanaro; MDJL Holdings Ltd.; and Riva Plumbing.
- [12] Luca is a plumber by training. He is 63 years old. Luca worked for many years at Riva Plumbing, and he gradually bought his way into the company. Between 1986 and 1996, his shareholding interest increased from 10 percent to 49 percent. Luca held his shares in Riva Plumbing through his holding company, MDJL Holdings Ltd. Luca and Tony did not enter into a shareholders agreement until 1996.
- [13] Luca testified that his key responsibilities at Riva Plumbing included communicating with customers, dealing with supplies and the timing of deliveries, business development, and collecting money. Luca was a self-taught businessman. He had no training in accounting, finance, business operations, or human resources. It is fair to say that Luca saw himself as the face of the business and the reason for Riva Plumbing's growth and success. He tended to minimize Tony's role in Riva Plumbing's success.

B. *The plaintiffs' witnesses*

- [14] The plaintiffs tendered evidence from eight witnesses. Three witnesses testified at trial: Daniel Montanaro; Frank Biamonte; and Veronica Capitano.
- [15] Daniel Montanaro is Luca's 38-year-old son. He earned a B.A. in urban planning and a master's degree in building science. All of Daniel's relevant work experience is at Riva Plumbing, where he reports to his father. He started work full-time in 2010 and worked in the shop until 2012. In August 2012, he took over the service department. After Tony left the company in November 2012, Daniel started to work on pricing jobs and submitting bids.
- [16] Daniel had two responsibilities that related to the action. First, he swore the plaintiffs' affidavit of documents, and he collected the documents for the answers to undertakings. He stated that the plaintiffs provided all the backup information that they could gather. As I will explain below, that is not true. The plaintiffs declined to produce their audited financial statements or the accounting information that was the source of many of the figures tendered in their evidence on damages.
- [17] Second, Daniel introduced the seven spreadsheets that set out the plaintiffs' claim for damages. The plaintiffs led this evidence through Daniel even though he is not responsible for accounting, bookkeeping, cash flow, budgets, inputting data into the accounting system, or working with Riva Plumbing's external auditors. As emerged on cross-examination, his role in the creation of many of the charts was limited to inputting data given to him by others into the spreadsheets.

- [18] Frank Biamonte's evidence in chief came in the form of a one-page, nine-paragraph will-say statement, which he adopted. Frank testified that since 2013, he has worked full-time at Riva Plumbing as its controller. In his will-say, Frank confirmed that he provided the dollar figures to Daniel for use in the spreadsheets on damages. He stated that the "actuals came from...Riva's accounting system and are audited numbers." In cross-examination, he explained that when he said that the numbers were audited, that meant that Riva Plumbing was audited each year. He explained that the data came from the accounting system, which he checked against the audited financial statements, and then passed along to Daniel. I pause to reiterate that the plaintiffs did not produce either the audited financial statements or the data from the accounting system.
- [19] Veronica Capitano's evidence in chief came in the form of a one-page, seven-paragraph will-say statement, which she adopted. Veronica worked at Riva Plumbing as a service manager from 2008 to 2022. Veronica provided evidence of her recollection of the events of October 4, 2012, including Tony telling the staff about the pending share transaction, Tony's conversation with Mike Ladisa, and her conversation with Joseph Ferrari.
- [20] The plaintiffs filed will-say statements from the following five witnesses, which were marked as exhibits: Nico Altieri, Tony Mauro, Rob Fellin, Carlo Perfetto, and Massoud Ghahremani. The defendants did not require these witnesses to attend at trial for cross-examination. This is not surprising because none of this evidence harmed the defendants' case.
- [21] Nico Altieri worked at Riva Plumbing until 2000, when he started his own plumbing company. While he worked at Riva Plumbing, Nico worked with Mike. Nico's will-say says that Mike once asked Nico to go into business with him. Nico did not indicate when this conversation took place.
- [22] Tony Mauro is the President of Fairgate Homes Inc., which is a related company to Fairpark Homes Inc., where he focuses on land development. Tony Mauro stated that prior to 2012, he primarily dealt with Tony at Riva Plumbing, which received the majority of Fairpark's plumbing work. After Tony left Riva Plumbing, Fairpark stopped doing work with Riva Plumbing. While Tony Mauro did not recall the reason for the switch, "he does recall some antipathy toward Luca at the time."
- [23] Rob Fellin is an employee who has worked for a series of plumbing supply companies that sold supplies to Riva Plumbing and, later, Icon Plumbing. Over the years, he dealt with Luca, Tony, Mike, and Joseph.
- [24] Carlo Perfetto owned Yorkwest Plumbing Supply, which supplied plumbing supplies to both Riva Plumbing and Icon Plumbing. He primarily dealt with Luca at Riva Plumbing. Carlo learned of the relationship breakdown between Tony and Luca from them. Yorkwest began to sell supplies to Icon Plumbing shortly after it opened for business. Yorkwest does not have any records of Yorkwest conducting a credit check on Icon Plumbing or of Mike filing a credit application. Carlo did not indicate whether this practice was typical or unusual.

- [25] Massoud Ghahremani is the president of Tubco Whirlpools Ltd., which supplied bath and shower products to both Riva Plumbing and Icon Plumbing. Massoud dealt with Luca and Tony at Riva Plumbing, and Mike and Joseph at Icon Plumbing. Massoud did not run a credit check on Icon Plumbing because he “did not feel the need to do one because he had experience with Riva which included dealing with Luca Montanaro, Tony Ferrari, Mike Ladisa, and Joseph Ferrari.” Massoud did not indicate whether this practice was typical or unusual.
- [26] Finally, the plaintiffs filed an affidavit from a private investigator to prove the surveillance videos that were tendered into evidence.

C. *The defendants*

- [27] There are five defendants in this action: Tony Ferrari; 531302 Ontario Inc.; Icon Plumbing and Heating Ltd.; Mike Ladisa; and Joseph Ferrari.
- [28] Tony Ferrari is a plumber. He worked at Riva Plumbing and its predecessor companies for almost all his working life. He held his shares in Riva Plumbing through his holding company, the defendant 531302 Ontario Inc.
- [29] Tony testified at trial. He had a range of other business interests, including with members of the Montesano family, who owned Primont Homes. These interests included land development and building and operating commercial buildings. Tony believed that he was primarily responsible for the success of Riva Plumbing. He testified that he was responsible for all the pricing and bids submitted by Riva Plumbing. He would do the calculations and write the bids out by hand and then other staff would type them up because he did not use a computer for this work. He described the process as a relatively straightforward calculation of the cost of materials, labour, a component for overhead, and a standard profit margin of four or five percent. He said that while one needed to be careful, preparing quotes was not difficult. He prepared quotes with no formal training. Tony explained that he was responsible for financial management at Riva Plumbing and that he signed the financial statements and tax returns on behalf of the company. He did not train the plumbers and had fewer interactions with them as time went on. Tony’s daughter, Anna Ferrari, worked as a bookkeeper at Riva Plumbing in the mid 1990s and again between 2005 and 2012. Tony’s son, Robert Ferrari, worked at Riva Plumbing from the mid-1990s until 2012. He worked in the shop but was not a licenced plumber.
- [30] Mike Ladisa was a plumber at Riva Plumbing from 1996 to 2002, when he became the foreman at Riva Plumbing. He worked as foreman from 2002 until he resigned in November 2012. He was responsible for quality control and attended on-site. He took plumbing courses, which included training on how to pick and price materials and put together quotes for jobs. While he did not prepare bids or quotes for Riva Plumbing, he would go to a jobsite and measure exactly how much pipe and how many fittings would be required for various model homes. He provided this information to Tony to help him prepare an accurate bid. Throughout his time at Riva Plumbing, Mike did side jobs for custom homes and businesses on his own account. He did all of the pricing for those jobs

and he found the custom homes to be more challenging to price because of the number of variables at play. Mike incorporated the defendant Icon Plumbing & Heating Ltd. on October 12, 2012. The process leading up to the incorporation of Icon Plumbing will be addressed at length below.

- [31] Joseph Ferrari is Tony's nephew. In 2000, Luca hired him to assist in the shop and to collect paperwork from the jobsites. Joseph previously worked at Primont Homes as an after-sale customer service representative. In 2002, Luca put Joseph in charge of scheduling the plumbers' work on job sites. This required Joseph to have regular contact with the builders' on-site supervisors in order to assign plumbers to the jobs.
- [32] Joseph worked at Riva Plumbing until he resigned on November 6, 2012. The circumstances of his resignation will be discussed below. He then joined Mike at Icon Plumbing, eventually receiving the title of Vice-President in early 2013. He subsequently became a shareholder in Icon Plumbing.

D. *The defendants' witnesses*

- [33] The defendants called two witnesses: Joe Montesano and Emilio Ronco.
- [34] Joe Montesano is the President of Primont. Joe's evidence in chief consisted of a two-page, 11-paragraph will-say statement, which he adopted. Joe's father, John Montesano, is the other owner of Primont. Joe gave evidence regarding Primont's business relationship with Tony, why Primont decided not to give any work to Riva Plumbing after Tony left, and how and why Primont gave work to Icon Plumbing. The crux of Joe's evidence, which will be discussed further below, was that once Joe and John learned that Luca was buying out Tony, they decided they would never again work with Riva Plumbing because of Luca's past behaviour. This evidence was not challenged on cross-examination.
- [35] Emilio Ronco is the President of Fairpark Homes Inc. Emilio's evidence in chief came in the form of a three-page, 11-paragraph will-say statement, which he adopted. Emilio explained that Riva Plumbing was Fairpark's "preferred plumbing subcontractor," which was based on the personal relationship among Emilio, Tony Mauro, and Tony. As will be discussed further below, Emilio decided that Fairpart would not award any more work to Riva Plumbing after Luca bought Tony's shares. Emilio stated that Tony has played no role in any of the business Fairpark has done with Icon Plumbing.

3. Evaluating the evidence and drawing inferences

- [36] It is necessary to approach the evidence at trial in sequence. Although I can only discuss one portion of the evidence at a time, I considered all the evidence before making my findings of fact. Before making those findings of fact, I will describe how I will approach the issues of reliability and credibility and inference drawing.

A. Reliability and credibility of witnesses

- [37] There are several significant factual disputes in this case. Resolving those disputes will require me to assess the reliability and credibility of the fact witnesses at trial.
- [38] It is important to recall that reliability and credibility are different. Credibility has to do with the honesty, sincerity, or veracity of a witness. Reliability describes the other factors that can influence the accuracy of testimony, such as the witness's ability to observe, recall, and recount events in issue.²
- [39] Witnesses can sincerely believe their evidence is true, but that does not mean that what they are saying is reliable. Memory is fallible and becomes increasingly frail over time. Even an apparently convincing, confident, and credible witness may not be an accurate or reliable reporter. There is significant risk in placing too much emphasis on demeanour or the confidence with which a witness speaks where there are contradictions and inconsistencies inherent in their evidence or where that testimony is inconsistent with contemporaneous records.³
- [40] One of the leading decisions on assessing credibility is *Faryna v. Chorny*, where the court explained that:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.⁴

- [41] Taking into account my assessment of reliability and credibility, I will assess the evidence before me according to many factors, including the following:
- a. if the evidence makes sense by being internally consistent, logical, or plausible;

² *R. v. C.(H.)* 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 526; *R. v. Sanichar*, 2012 ONCA 117, 280 C.C.C. (3d) 500, at paras. 36, 69-70, rev'd, 2013 SCC 4, [2013] 1 S.C.R. 54; and *Fitzpatrick v. Orwin*, 2012 ONSC 3492, at paras. 62-68.

³ *Sanichar*, at para. 35; *R. v. McGrath*, [2000] O.J. No. 5735 (Ont. S.C.J.), at paras. 10-14; *R. v. Stewart* (1994), 18 O.R. (3d) 509 (C.A.), at pp. 515-18; *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), at pp. 311-15.

⁴ [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357; *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al.*, [1971] 2 O.R. 637 (C.A.).

- b. if there are inconsistencies or weaknesses in the evidence of the witness, such as internal inconsistencies, prior inconsistent statements, or inconsistencies with the evidence of other witnesses;
- c. if there is independent evidence to confirm or contradict the witness's evidence, or a lack of such evidence;
- d. the witness's demeanour, including their sincerity and use of language, although this must be considered with caution; and
- e. if the witness, particularly one that is a party in a case, may have a motive to fabricate.⁵

B. *Inference-drawing*

[42] As I will explain below, the plaintiffs have marshalled almost no direct evidence in support of their claims. Instead, they ask me to draw a series of inferences from the circumstances surrounding the start-up of Icon Plumbing. It is important to keep in mind the sharp distinction between permissible inferences and impermissible speculation.

[43] An inference must be reasonably and logically drawn from a fact or a group of facts established by evidence. The first step in the inference-drawing process is to prove in evidence the primary facts that provide the basis for the inference.⁶ The trier of fact may then draw factual inferences from the evidence, but only those that can be reasonably and logically drawn from the primary facts.⁷ As Doherty J.A. cautioned, an “inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.”⁸

[44] As I will explain, I am unwilling to draw the inferences urged upon me by the plaintiffs. The plaintiffs are asking me to speculate to fill in the many gaps in their case. In many cases, the inferences they ask me to draw are inconsistent with sworn, uncontradicted evidence to the contrary. In each instance, I prefer the evidence of the witnesses who testified in a straightforward and compelling fashion.

C. *The use of read-ins and cross-examination*

[45] Although the plaintiffs cross-examined the defendants at length, they rarely, if ever, impeached the defendants on prior statements, contradicted their evidence with contemporaneous documents, or directly challenged their evidence.

⁵ *Caroti v. Vuletic*, 2022 ONSC 4695, 38 B.L.R. (6th) 1, at paras. 434-436; *1088558 Ontario Inc. v. Musial*, 2022 ONSC 5239, at para. 83.

⁶ *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, at para. 74, aff'd 2018 ONCA 283.

⁷ *Morrissey*, at p. 530.

⁸ *Morrissey*, at p. 530; *R. v. White* (1994), 89 C.C.C. (3d) 336, at p. 351.

- [46] Instead, the plaintiffs filed a 450-page volume of read-ins, which was marked as an exhibit. The 104 transcript excerpts came from examinations for discovery in 2018 and cross-examinations in 2014 (where the parties agreed that the cross-examination transcripts could be used as discovery transcripts) of Mike, Joseph, and Tony. I reviewed the read-ins. It was frequently difficult to understand the point of the evidence. Part of this difficulty arose because sometimes there were 80 or 90 questions and answers in a single excerpt.
- [47] As part of their closing submissions, the plaintiffs filed a document titled “Defendants’ Evidence Chart.” The plaintiffs did not refer to this chart again during their oral closing argument. There are a number of problems with the plaintiffs’ approach.
- [48] First, it appears that the plaintiffs are attempting to read in the examination for discovery evidence of one defendant against the interests of another defendant. For example, the plaintiffs have read in Mike’s answers on an examination for discovery regarding what Tony knew about Icon Plumbing. That is not permitted by rule 31.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 31.11 provides as follows:
- 31.11 (1) At the trial of an action, a party may read into evidence as part of the party’s own case against an adverse party any part of the evidence given on the examination for discovery of,
- (a) the adverse party; or
- (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,
- if the evidence is otherwise admissible, whether the party or other person has already given evidence or not.
- [49] Rule 31.11 does not permit the plaintiffs to read in the evidence of Mike against Tony.⁹ This significantly undermines the utility of parts of the chart.
- [50] Second, the chart of evidence contains loose summaries of the excerpts from the evidence given on the examination for discovery. This is not particularly helpful if the plaintiffs are attempting to show an inconsistency between the prior statements and the evidence given at trial.
- [51] Third, some of the juxtapositions set out in the chart contrast the evidence of two different witnesses. It is not clear what I am to make of those juxtapositions and the plaintiffs did not present any submissions on that point.

⁹ *Urbacon Building Groups Corp. v. Guelph (City)*, 2013 ONSC 5773, 57 C.P.C. (7th) 392; *Cain v. Peterson*, (2005), 24 C.P.C. (6th) 298, at para. 12.

[52] These challenges significantly undermine the utility of the chart. To the extent that evidence from the 450 pages of read-ins did not even make it in to the chart, I have no idea why the plaintiffs read that evidence in or how they think it advances their case.

[53] I have reviewed and considered all of the plaintiffs' read-ins. With the exception of one issue, I do not think it undermined the defendants' evidence at trial in any significant way or on any material issue and I will not address it further. In one case, Tony's pre-trial evidence regarding whether he drove a forklift at the Icon Plumbing premises is significantly inconsistent with his evidence at trial. I will address that issue below.

4. The plaintiffs' claims

[54] At trial, the plaintiffs delivered an amended amended statement of claim. The defendants did not object to the delivery of this pleading. The plaintiffs sought \$10 million in damages from the defendants. In the latest version of the pleading, the plaintiffs asserted the following causes of action against each of the defendants:

- a. breach of contract;
- b. conversion;
- c. breach of the duty of good faith;
- d. inducing breach of contract;
- e. breach of fiduciary duties;
- f. knowing assistance in the breach of fiduciary duties;
- g. breach of confidence;
- h. civil conspiracy;
- i. unlawful interference with economic relations; and
- j. unjust enrichment.

[55] During closing argument, however, the plaintiffs abandoned many of these claims against all defendants, including the following: conspiracy, conversion, breach of confidence, and unjust enrichment. The plaintiffs also advised that they were not advancing a claim that Mike or Joseph breached their fiduciary duties Joseph. During their reply closing submissions, the plaintiffs also abandoned the unlawful interference with economic relations claim.

[56] I will first make my findings of fact based on the evidence led at trial. Using those findings, I will then consider whether the plaintiffs have made out any of their remaining causes of

action. As I will explain below, the plaintiffs have failed to prove that the defendants breached any obligations or duties that they owed owed to the plaintiffs.

5. This dispute originated between 2005 and October 2012

[57] The roots of this action lie in a dispute between Luca and Tony that started in 2005. Although Luca eventually abandoned his claims against Tony for conduct pre-dating November 5, 2012, one cannot understand the remaining issues in this action without understanding what happened between 2005 and 2012.

[58] From 1996 onward, Tony owned 51 percent of the shares of Riva Plumbing and Luca owned the remaining 49 percent. In 2004, Riva Plumbing had its busiest and most profitable financial year. In 2005, the profits of the business were much smaller. Luca became suspicious that Tony was engaging in misconduct that was responsible for the reduced profitability of the business.

A. In 2008, Luca obtained an *ex parte* order for access to financial records

[59] In 2008, Luca obtained an *ex parte* order to obtain access to the financial records of Riva Plumbing so that he could conduct a forensic audit of the company. Luca admitted that he did not consider the impact of the production order on the office staff who needed to implement the order. He thought that it was an easy process and that there was no need to hire any additional staff to complete it. I accept that this is what Luca believed. However, I think it reflects his naivete with respect to how such an order might affect the staff at Riva Plumbing and how staff might view him because of his role in their increased workload.

[60] Relations between Luca and Tony continued to deteriorate. On March 15, 2010, Tony sent a letter to Luca about his “serious concerns about [Luca’s] conduct and its negative impact on the interests of Riva.” The letter was obviously written by Tony’s lawyer. The letter complained that Luca was giving out quotations and estimates to builders without consulting Tony, retaining and obstructing access to key financial documents, refusing to communicate with office staff or Tony, except to allege that Tony was acting improperly, disclosing to customers Luca’s allegations about Tony, and that Luca was charging inappropriate personal expenses to the firm.

[61] At trial, Luca denied the allegations in the letter. He testified that he had a good relationship with the staff and had a strained relationship only with Tony. Luca said that Tony was the source of any morale problems in the office. I do not accept Luca’s evidence on these points as it is contradicted by the evidence of several witnesses and contemporaneous documents.

[62] First, Mike testified that as early as 2007 or 2008, Luca told him that Tony’s misconduct was responsible for the reduced Riva Plumbing profits. Mike knew that Luca was spreading this same message about Tony throughout the staff at Riva Plumbing and to others outside the office. Mike testified that Luca told him that Tony had shredded evidence and would not let him see the books. I infer that this latter statement had to be before or around the time in 2008 when Luca obtained the *ex parte* order. Mike testified that he initially believed what Luca said to him about Tony because, at that time, Mike was closer to Luca than he

was to Tony. Luca admitted that he spoke to Mike about getting a court order to see the books and “what was going on with Tony,” but Luca did not remember if he told Mike that he thought Tony was stealing money from the company.

- [63] Second, Joseph testified that while he initially had no problems with Luca, in 2008, Luca told him that Tony had been taking money from Riva Plumbing and expressed concerns about the business records. Joseph testified that Luca said things to him like “your uncle is going to jail” and “what people do in the dark comes to light.” Joseph stated that he put his head down and tried to work, but his relationship with Luca was just not the same. Joseph said that Luca’s actions had unsettled the office and made the staff tense and anxious.
- [64] Third, Emilio testified that starting in 2008, Luca told him that he believed that Tony was cheating and stealing money from him. Emilio put it this way in his will-say statement, which he adopted:

6. Starting sometime in 2008, [Luca] began to share with [Emilio] that he was consulting by telephone with psychics in California, and that they were advising Luca that someone close to him was stealing money from him and would be going to jail. Luca made clear to [Emilio] that he believed that Tony was that person, and that Tony cheating and stealing money from him. Although [Emilio] does not recall the dates of the discussions, he recalls Luca communicating this to him on numerous occasions. These communications were unsolicited and caused [Emilio] to feel awkward and uncomfortable in dealing with Luca.

7. While [Emilio] continued to award Fairpark’s work to Riva because of his personal connection to Tony. [Emilio] spoke with Luca less and less and tried to avoid communicating with him altogether.

- [65] Fourth, Tony testified that Tony Mauro told him that during a golf outing, Luca had told him and the other members of the group that Tony was going to jail because he stole \$2 million from Riva Plumbing. Luca denied having made this statement. What Tony Mauro told Tony would be inadmissible hearsay evidence if it was proffered for the truth of the contents. In my view, the statement is admissible because it is being offered for the fact that Tony Mauro made that statement to Tony. Whether or not Tony Mauro was telling the truth, the statement explains why Tony concluded that Luca was telling customers and potential customers about Tony’s alleged misconduct.
- [66] I accept that by early 2010, staff morale was low and that Luca had been telling staff and people outside the company about his belief that Tony was stealing from him. I find that by this time, Luca did not have a good relationship with the staff and that he was responsible for his deteriorating relationship with them.

B. *In 2010, Luca commenced an oppression proceeding against Tony*

- [67] In August 2010, Luca commenced an oppression proceeding against Tony. At trial, Luca testified that he did not recall if his suspicions that Tony was stealing from the company formed the basis of the oppression proceeding. He also could not recall whether he alleged that Tony took money from the company, or even if the dispute was eventually resolved through a mediation/arbitration process. I found Luca's evidence on this point implausible. I do not accept that he could not recall such fundamental components of this critical litigation. Luca seemed deliberately evasive during this portion of his cross-examination.
- [68] Regardless, at some point in that proceeding, Tony's lawyer summonsed several staff members to an out-of-court examination to obtain their evidence for use on an interlocutory motion. There is some dispute in the evidence regarding the identity of the staff members who were examined, but I do not think anything turns on that. Importantly, everyone agrees that Mike provided evidence under summons.
- [69] All the parties and witnesses agree that staff morale got significantly worse after the examinations.
- [70] Luca testified that staff became hostile to him after the examinations because they mistakenly thought that his lawyer required them to give evidence. I do not accept this explanation. Mike testified that he understood that Tony's lawyer summonsed him to give evidence. No other witness suggested that any staff member thought Luca had compelled them to give evidence.
- [71] Mike testified that after he gave his evidence, Luca stopped being as open with him. Mike understood that Luca did not like his evidence, but Luca would never tell him what it was about his evidence that upset Luca. Joseph testified that he observed Luca treating Mike differently after the examinations and that Luca seemed unhappy with the evidence that Mike provided at the examination.
- [72] Luca agreed that his relationship with Mike changed after the examination but denied that he was responsible for the change or that it was connected to displeasure with Mike's evidence. In fact, Luca testified that he did not know that the examinations were being conducted, did not know that his lawyer also questioned the employees, and stated that he neither received a report from his lawyer nor read the transcripts from the examination. I do not accept his evidence. Luca was obviously very invested in the litigation with Tony. I find it difficult to believe that he did not know about the examinations, and it is harder still to believe that he did not read the transcripts or receive a detailed briefing from his lawyer about what the employees said under oath. Such a lack of curiosity seems very inconsistent with Luca's approach to this dispute. In any event, I accept Mike's testimony that his relationship with Luca deteriorated significantly after the out-of-court examinations.
- [73] By September 2010, staff members complained that Luca's failure to communicate with them was causing significant problems and extra work for them. For example, on

September 14, 2010, Marianne Morrison, the Riva Plumbing bookkeeper and controller, sent an email to Luca that she copied to Tony, Anna Ferrari, and another staff member, Laura DiDonato. Marianne's email read as follows:

Luca,

We can see that you and Daniel have been working in inventory for months and months, but you have neglected to inform Riva's employees of what you are doing. This affects all of us, as we are the ones entering extras, giving prices, invoicing and collecting.

We can see that some prices have changed, and are experiencing problems being confused together with builders, as our prices don't match. We assumed you were changing prices for HST but some of the builders are using old prices, some seem to have new prices????? Some don't price their purchase orders so I guess we just have to wait and see what happens when they receive our invoices!?

Also, nobody knows when these prices took effect, and which builders you have notified, If any. We also don't know which products have been changed, and which have not. Do you have copies of the prices before you changed them?? If they disagree with prices, how do we know what the old price was, or what it should be, or what it should have been at the time they were invoiced?

We don't know what to tell people, what to charge, and no doubt we will have to deal with many discrepancies on our invoices over the next few months. This has been causing a considerable amount of grief for all of us, and I think it's safe to assume that it will also cause a lot of extra work for us in the months to follow.

Kindly forward answers a.s.a.p. We need to know what is going on!!

Thank you.

[74] In light of all of this evidence, I do not accept Luca's evidence that he had good relationships with the staff and that Tony was to blame for any morale problems. Luca was responsible for his poor relationship with the staff.

C. *On October 3, 2012, Luca and Tony settled their dispute*

[75] On April 18, 2012, Luca and Tony agreed to refer the oppression proceeding to a mediation/arbitration before Martin Teplitsky.

[76] On October 3, 2012, Luca and Tony signed minutes of settlement resolving the dispute. Luca agreed to pay \$4 million to Tony for his shares in Riva Plumbing on or before

November 5, 2012. If Luca did not come up with the money, Mr. Teplitsky would decide the price at which Tony would be required to purchase Luca's shares.

- [77] Luca testified that he did not consider purchasing Tony's shares before that day and had made no preparation to obtain the funds. He had also not discussed his potential purchase with any of the builders. He made the offer to purchase believing that all the clients would stay with him.
- [78] For his part, Tony testified that he was willing to sell the business because he thought \$4 million was a fair price. In addition, Tony explained that he was 64 years old, had a heart problem, did not have immediate family members to take over the business, and wanted to focus on his other, more lucrative, business ventures.
- [79] The parties agreed that business at Riva Plumbing would continue as usual pending the close of the transaction and that the arbitrator would determine the costs of the application and the arbitration before closing.
- [80] Tony testified that Luca also agreed not to fire any of the staff at Riva Plumbing. I do not accept this evidence. No such promise made its way into the minutes of settlement or the closing documents. Given the low level of trust between Tony and Luca, I think Tony would have reduced that promise to writing, if Luca had made it.
- [81] The minutes of settlement had one other relevant clause that I will discuss below:
- The terms of the Shareholders Agreement made as of Oct 1, 1996, will remain in full force and effect with the terms of the shotgun provisions modified as provided in the paragraphs above.
- [82] On October 4, 2012, Tony summoned the staff members to his office. Joseph and Mike both attended the meeting. Tony told the staff that he had settled the dispute with Luca, who would be buying his shares. Tony told the staff that they should just keep doing their jobs. Joseph testified that he learned from Tony that the transaction was set to close on November 5, 2012, but he was not certain if he learned the date at this meeting or some time later.
- [83] Tony testified that he did not tell any suppliers or builders that he was leaving, but the Montesanos did "know what was going on" with the settlement. I find that Tony did tell the Montesanos about the settlement and his intention to sell his shares. I have no doubt that Tony kept his old friends updated on this very important chapter in his life. As the minutes of settlement did not contain a confidentiality provision, there was nothing wrong with Tony talking to the Montesanos about the deal.
- [84] Mike testified that he was upset when he heard the news because he expected that Tony would eventually buy Luca out of Riva Plumbing. Mike believed that, given the deterioration in their relationship since the examinations, Luca would fire him if Tony was not around. Mike testified that after the meeting, he said to Tony, "what am I supposed to do now?" Mike recalls Tony telling him to stay and do his job and that Luca would not fire

him. Mike recalls telling Tony, “maybe it was time for me to go out on my own.” Mike recalls Tony answering, “maybe it is, you are a smart guy, try it out.” Tony testified that he did not recall speaking to Mike after the meeting.

[85] Veronica Capitano had a different recollection of this conversation. She recalls Mike saying to Tony, “what about me?” to which Tony replied, “Don’t worry, I have a plan.” I do not accept Veronica’s evidence on this point. Veronica’s evidence is contained in her seven-paragraph will-say statement. The three key paragraphs read as follows:

3. Mike Ladisa ... came into the room because he heard what Tony was saying. [Mike] asked Tony: “What about me?”, to which Tony replied: “Don't worry, I have a plan” or something to that effect.

4. Joseph Ferrari ... told Veronica after the above meeting that he was staying with Riva despite Tony’s departure. Joseph said to Veronica “it’s going to be you and me, I’m not going anywhere”, or something to that effect.

5. Veronica then saw Joseph getting a phone call and going to the Mezzanine to answer it. Joseph resigned almost immediately after the call.

[86] There are three reasons that I do not accept Veronica’s evidence. First, paragraph 4 is incorrect. Although Veronica testified that her will-say was accurate, she then acknowledged on cross-examination that paragraph 4 was incorrect. She admitted that it was she who told Joseph “it’s going to be you and me” not the other way around. This is a fairly important point in a very short statement. It is difficult to see how she failed to catch that error before she testified under oath that the statement was accurate. This causes me to have doubts about the reliability of her recollection and the credibility of her evidence.

[87] Second, paragraph 5 is incorrect. Reading the paragraphs 3 to 5 together, the clear implication is that all three events happened close in time on October 4, 2012. The uncontradicted evidence is that Joseph did not resign until a month later, on November 6, 2012. I find that Veronica has significantly misremembered the events of October 4, 2012, which causes me to have further doubts about her reliability and credibility.

[88] Third, the conversation between Tony and Mike did not involve Veronica. It is difficult to believe that she would have an accurate recollection of an innocuous conversation that did not involve her. She offered no explanation for why she remembered such a brief and trivial encounter.

[89] For these reasons, I do not accept Veronica’s evidence. I do accept Mike’s version of his conversation with Tony. I also do not accept the plaintiffs’ submissions that the conversation that took place between Mike and Tony is evidence that they had prior conversations about a “future minus Luca.”

6. Between October 4 and November 2, 2012, Mike established Icon Plumbing and resigned from Riva Plumbing

[90] I think it is helpful to isolate and consider Mike's actions between meeting on the October 4, 2012, where he learned of the share sale, and Friday November 2, 2012, when Mike resigned.

A. *Mike decided he needed a Plan B (October 4, 2012)*

[91] Mike testified that at the staff meeting on October 4, 2012, Tony told him that the share sale would close on November 5, 2012. Mike testified that Tony told him that if Luca came up with the money, Tony would retire. If Luca did not come up with the money, Tony would then buy Luca out.

[92] Luca testified that he asked Mike if he was going to stay at Riva Plumbing and Mike responded, "we'll see." This answer makes sense and is consistent with Mike's evidence that he intended to stay at Riva Plumbing if Luca did not come up with the money but that he expected he would be fired if Luca took over the company.

[93] Mike testified that he went home and told his wife about the developments at Riva Plumbing. He decided that he needed a Plan B, in case Luca came up with the money and bought the company. Mike and his wife talked about Mike starting his own company and possible names for it. Mike testified that his wife came up with the name Icon Plumbing, which they registered the next day.

B. *Joseph and Mike met with John Montesano (October 8, 2012)*

[94] Joseph testified that he did not discuss the October 4 meeting with Mike. On October 8, 2012, Mike recalled being at the Riva Plumbing office with Joseph when John Montesano arrived at the office. Mike recalled John telling Mike and Joseph that he knew that Luca would be buying out Tony and that Primont homes would not be giving any more work to Riva Plumbing once that happened.

[95] Mike testified that he later asked John if he was serious that Primont would not give any more work to Riva Plumbing if Luca owned it. John confirmed that he would never give Riva Plumbing more work because Luca had accused his family of impropriety. Mike testified that he asked whether, if Mike opened his own business, Mike could do some plumbing work for Primont. Mike was close to John because he had done the plumbing on John's prior custom homes. Mike recalled John saying that he would have to check with Joe. Mike heard back from John saying it would be okay and that Joe would give Mike some work if the price was right. Mike then spoke directly with Joe to confirm that Primont would consider bids from Mike. Mike understood that this work would not be available until the end of November 2012, at the earliest.

[96] In his testimony, Joe confirmed the most important features of Mike's testimony. Joe testified that when he and his father heard that Luca would be buying out Tony, they decided that they would never again work with Luca and, by extension, Riva Plumbing.

This did not pose any immediate risk to the operations of Primont since, as of November 2012, there was no outstanding work to be completed by Riva Plumbing on any Primont properties and Primont had no contractual obligation to Riva Plumbing in respect of any future work.

- [97] The Montesanos' reason for cutting ties with Luca traced its roots back to 2008, as discussed above. The Montesano family learned that Luca was accusing Tony of stealing millions of dollars through Riva Plumbing. Joe also learned that Luca was telling people that John had colluded with Tony to steal the money. On cross-examination, Joe confirmed that Luca had accused his family of conspiring with Tony to steal millions of dollars, so the Montesano family was "more than unhappy" with Luca.
- [98] Joe testified about his discussions with Mike about him potentially going out on his own. Joe recalled telling Mike that if he wanted to bid on Primont's work, he had to put together a quote, with a competitive price, and it would be evaluated like any other company.
- [99] I pause here to state that I accept Joe's evidence without reservation. The plaintiffs did not challenge this evidence on cross-examination and there is no other evidence to cast any doubt on it. I find that John and Joe Montesano decided that they would not give one more dollar of work to Riva Plumbing after Tony left, because of Luca's unproven allegations that Tony stole millions of dollars and because Luca implicated John in this misconduct. Primont was perfectly entitled to make this decision. Indeed, Luca should have considered the risk that his unproven allegations could harm Riva Plumbing's future relationship with Primont when he bid \$4 million for Tony's shares. In my view, Riva Plumbing was destined to lose all the Primont work if Luca bought the company. Mike starting Icon Plumbing did not cause Riva Plumbing to lose this business; Luca's unproven allegations about Tony and John did.

C. *The 'Dear Luca' letter and the incorporation of Icon Plumbing (October 12, 2012)*

- [100] On October 12, 2012, eight employees of Riva Plumbing signed a letter to Luca. Mike recalled that Marianne Morrison wrote the letter, but he agreed with every word of it. Mike testified that all parts of the letter reflected his concerns. The letter advised that the employees understood that Luca was likely to become the sole owner of Riva Plumbing. The employees asked for two-year job guarantees and an immediate eight percent raise due to the "turbulence" of the past four years and the future uncertainty.
- [101] Mike and Luca testified that Luca never responded to them about the letter. Luca testified that, although he did not respond in writing, he called and spoke to the employees (except for Mike, Anna Ferrari, and Robert Ferrari) before the share deal closed. I do not accept Luca's evidence.
- [102] Luca's credibility on this point was very effectively undermined through an impeachment on the evidence he provided at the examination for discovery. Luca previously testified that he "did not respond to the letter" because he thought the letter was inappropriate. It was inappropriate, Luca continued, because the employees were "putting a big knife to my

throat to pay more.” He concluded his testimony at the examination for discovery on this point by confirming that he did not have any discussions with the employees until after the share purchase closed. I do not accept Luca’s evidence at trial that he called and spoke to the concerned staff members before the transaction closed.

[103] On October 12, 2012, Mike incorporated Icon Plumbing. Mike testified that he took this step to further his backup plan. Mike testified that he did not tell Tony about his plan to incorporate and there is no evidence to the contrary.

D. *Mike prepared to leave Riva Plumbing and operationalized Icon Plumbing*

[104] Mike testified that sometime after October 12, 2012, Mike realized that Luca had not responded to the letter from the employees. He then spoke to Luca and asked if he was going to have the funds to buy the company. Luca replied that he would have the funds. Mike testified that he then started to turn his Plan B into the reality of Icon Plumbing.

[105] I accept Mike’s evidence that he believed that Luca would fire him once he took over the business. Mike’s conclusion is consistent with the rapid and significant deterioration in his relationship with Luca after Mike gave his evidence in the litigation between Luca and Tony, and Luca’s failure to respond at all to the very serious concerns expressed in the employee letter dated October 12, 2012.

[106] Luca testified that, around this time, he started to hear rumours that Mike would be leaving Riva Plumbing to set up a competing business. Luca admitted that he never raised these rumours with Mike or asked him any questions about the new business. Luca testified that he had no objection to Mike leaving Riva Plumbing and starting up a new competing business.

[107] There was no obligation on Luca to raise the issue with Mike, to try and convince him to stay, or to address Mike’s concerns. However, taking no action to try and address Mike’s underlying concerns, which included his belief that Luca would fire him, seems inconsistent with Luca seeing Mike as a valuable future member of the Riva Plumbing team. Rather, it is additional evidence that supports my conclusion that Luca was indifferent to Mike’s potential departure to set up a competing plumbing business.

1. Mike looked for space for the business

[108] Mike first looked for a suitable space. He testified that he looked for space in Concord, but the real estate agent did not show him any suitable locations. He then called John to see if Primont was still occupying some storage space at 75 West Beaver Creek, which was a commercial building owned by Primont where Riva Plumbing had previously rented space. John told him that Primont was selling the building, but that he thought the units were unoccupied. John put Luca in touch with the new landlord, who was initially reluctant to lease the space to Icon Plumbing because there were other tenants who might have wanted the space. Mike continued to follow up with the landlord to see if this space was available.

2. Mike started to price the work for Primont and buys vans to start work

[109] Mike started to price the potential work available from Primont. He testified that he understood that Primont would be receiving other bids and that his work had to be competitively priced if he was to win the contract. As noted above, he learned to do pricing in school, at his first job with his uncle, and through all the custom home side-projects while he was at Riva Plumbing. He spoke to Carlos at Yorkwest, a supplier, to obtain pricelists for fixtures, fittings, and piping, and he used his years of experience to know how much material he would need. He priced the labour required on a piecework basis, the rates for which are fixed. He took the cost of the materials, the labour, an estimated overhead charge per fixture and a five percent profit component (which became the standard component used at Icon Plumbing in 2012). He testified that he did not use any Riva Plumbing confidential information to prepare this quote and did not ask for or receive any assistance from Tony to prepare this quote. There is no evidence to the contrary.

[110] It is not clear when Mike won the Primont work. Mike indicated that he anticipated that his plumbers would start work on the Primont job around November 20, 2012. Joe Montesano explained that Tony played no role in Primont's decision to award work to Icon Plumbing:

10. The decision to give Primont work to Icon in November 2012 was the result of negotiations directly between Joe on behalf of Primont and Mike on behalf of Icon. Tony was not involved in any of these discussions and negotiations, nor was he responsible for Primont's decision to give the work to Icon.

11. Since November 2012, Tony has not been involved in any way in securing work that Primont has awarded to Icon, nor has he been involved in quoting for such work or negotiating any contracts on behalf of Icon.

[111] I pause here to note that there is no evidence to contradict Joe's evidence on this point. Given the clarity of Joe's evidence that Tony had no role in Primont giving work to Icon Plumbing, there is little room for him to be simply mistaken, to have a faulty recollection, or to be misremembering a peripheral item. If I were not to accept his evidence, it seems to me that I would likely have to conclude that Joe lied to the court. In any event, I do not see anything about the broader circumstances, or the constellation of facts before me, that undermines Joe's evidence on this point. I accept his evidence as reliable and credible.

[112] Between October 22 and 30, Mike purchased four vans that would be essential to get the plumbers out to the jobsites. He arranged for a graphic designer in Richmond Hill to create a logo and place large stickers on the vans. While Luca testified that he did not think it was possible for Mike to have these vans prepared this quickly, I accept Mike's evidence on this point.

3. Mike told Joseph that he is starting his own business and asked for and received a loan

[113] Joseph testified that Mike first told him that he was thinking of moving on and starting his own company on October 28, 2012. Joseph testified that he had not heard anything about Mike's plan from anyone, including Tony. Joseph testified that within the next day or so, Mike asked if he could borrow some money from Joseph to fund the business. Joseph testified that he agreed to help his good friend, Mike. Joseph remained grateful to Mike for negotiating with Riva Plumbing to obtain his five percent profit share in 2008, which will be discussed below in the section dealing with the counterclaim. Joseph did not believe that he would ever have received that bonus without Mike going to bat for him. Joseph had money in his savings account and decided to loan \$100,000 to Mike. Joseph stated that he was not concerned about the terms of the loan, he was content to deal with that later. Joseph gave Mike the cheque on October 30, 2012. Joseph testified that he was still intending to remain an employee of Riva Plumbing when he loaned the money to Mike.

[114] Mike's testimony with respect to the loan corroborated all the important features of Joseph's testimony. Mike believed that Joseph intended to remain at Riva Plumbing. Mike explained that the start-up capital for Icon Plumbing came from a \$100,000 loan on a line of credit secured against his house and the money he borrowed from Joseph. From Mike's perspective, he was personally responsible for the money he borrowed from his friend, Joseph.

4. Mike signed the lease and resigned from Riva Plumbing (November 2, 2012)

[115] Mike testified that on November 1, 2012, the landlord at 75 West Beaver Creek told him that he could rent the space. The landlord sent Mike an offer to lease. On November 2, 2012, Mike met with the landlord at the premises to sign the lease, which he did in the landlord's car. As Mike signed the lease in the car, he noticed that Daniel (Luca's son) was sitting in a nearby car taking pictures of him.

[116] Daniel explained that he and Luca received information in the middle of October that Mike would be opening up his own company. He testified that he drove to the location where the plumbing company would be opening and discovered Mike's pickup at the parking lot, so he "took a few photos." I observe that Luca's response to the rumours of Mike leaving was not to approach Mike to try and convince him to stay at Riva Plumbing. Instead, it appears that he launched a program of covert surveillance on Mike.

[117] Following this incident, Mike decided that it was time to resign from Riva Plumbing. He drove back to the company and told Tony that he was resigning. Tony testified that this was the first time that he learned that Mike intended to resign from Riva Plumbing to go out on his own. Tony was not sure Mike even told him the name of the new business at this time.

[118] Mike then asked Tony to accompany him to Luca's office, where he resigned. He handed in his phone and keys to the company vehicle. Luca did not ask Mike why he was leaving and did not try to persuade him to stay. Since Mike did not have another vehicle in the Riva

Plumbing parking lot, he asked Tony to give him a ride home, which he did. Luca immediately replaced Mike as foreman with Mike Lapadula, another Riva Plumbing plumber.

- [119] Joseph testified that he was not present when Mike resigned. He learned about it from Mike later that day and spoke to Mike again over the weekend. Joseph testified that he intended to remain at Riva Plumbing despite Mike's resignation.
- [120] Mike testified that he did not take any Riva Plumbing documents, confidential information, or property with him when he resigned. There is no evidence to the contrary.
- [121] Mike then turned to ordering materials for Icon Plumbing. Initially, he ordered them from Yorkwest plumbing. Later, Icon Plumbing would order from many different suppliers in the industry. Mike recalled that he was not required to fill out a credit application at Yorkwest, which was confirmed by Yorkwest's then president, Carlo Perfetto.

E. Conclusion

- [122] I find that Tony had nothing to do Mike's decision to create Icon Plumbing or its start-up.
- [123] Mike testified that he did not seek or accept any assistance from Tony regarding the establishment of Icon Plumbing. Mike emphasized that Tony did not even know he was starting the company until the day he resigned from Riva Plumbing. Mike testified that Tony did not help him price the work for Primont and that he did not ask for Tony's help. Mike testified that Tony has no financial interest in Icon Plumbing and that Tony has never been a shareholder, employee, contractor, or creditor of Icon Plumbing.
- [124] For his part, Tony confirmed Mike's evidence. Tony testified that neither Mike nor Joseph asked him for any help setting up Icon Plumbing. He testified that he did not encourage Primont (or any other builder, ever) to stop giving work to Riva Plumbing or to give work to Icon Plumbing. Tony stated that he did not assist with the quote Mike prepared for Primont or any other quote ever prepared by Icon Plumbing. Tony stated that he never urged any suppliers to do business with or offer favourable terms to Icon Plumbing or to encourage the suppliers to provide favourable terms. Tony stated that he never loaned any money to Icon Plumbing and only learned about Joseph's loan to Mike about a month after the transaction. Tony stated that he never invested money in Icon Plumbing and never offered to guarantee any of its debts. Tony testified that he never offered any financial assistance to or owned any shares in Icon Plumbing. Tony testified that he has never received a payment from Icon Plumbing, except under the market terms of a lease signed on July 1, 2014. Tony testified that he played no role in Mike securing the lease for the Icon Plumbing premises and he first heard about the location of the business sometime after the lease was signed.
- [125] There is no direct evidence to contradict the evidence of Mike and Tony. There are no documents that cast doubt on, much less disprove, their evidence. I pause to note that the plaintiffs spent a significant amount of time at trial introducing cell phone bills into

evidence.¹⁰ However, no witness was asked any questions about the content of the bills and the plaintiffs did not refer to them in their closing argument. I have no idea why the plaintiffs introduced the cell phone bills into evidence, and I disregard them.

- [126] No builder testified that they understood that Icon Plumbing was Tony's front company, that Tony represented himself to be associated with Icon Plumbing, or that they only gave work to Icon Plumbing because Tony stood behind it. The only builders who testified that they moved their business from Riva Plumbing to Icon Plumbing convincingly testified that they did so because they did not like or trust Luca. There is no evidence that Tony received any financial benefits from Icon Plumbing. There is no evidence that Tony was involved in the start-up of Icon Plumbing and I find that he was not involved.
- [127] This is not an injunction hearing in December 2012. Over twelve years have passed since Mike started Icon Plumbing. The plaintiffs have tendered no evidence that would cause me to disbelieve the parade of witnesses who gave convincing evidence under oath that Tony had nothing to do with the creation of Icon Plumbing. I accept all the evidence set out above from Mike, Tony, Joseph, and Joe Montesano, except where I have specifically rejected it.
- [128] I do not accept the plaintiffs' submission that Icon Plumbing was the Plan B backup for Tony, Joseph, and Mike. It was not. It was Mike's plan and his alone. Tony did not need a Plan B. He would either retain control of Riva Plumbing and buy out Luca or Tony would be bought out. There is no evidence that Tony wished to remain in the plumbing business after he sold his shares to Luca.
- [129] I accept the plaintiffs' observation that Mike set up Icon Plumbing in secret and without disclosing that fact to Luca. I do not accept the plaintiffs' submission that Mike did so because he knew that Tony would be subject to a non-competition agreement. The plaintiffs' submission requires that I accept the proposition that Tony was to be a part of Icon Plumbing. I do not accept that proposition and have found that Tony was not part of Icon Plumbing. I find that Tony played no role in Mike's decision to not disclose the fact that he was creating Icon Plumbing.
- [130] The plaintiffs submit that Tony was not permitted to do indirectly things that violated the restrictions contained in the non-competition agreement and his fiduciary duties owed to Riva Plumbing. The plaintiffs submit that Tony did do such prohibited things through a network of people, including Mike, Joseph, Icon Plumbing, the Montesanos, Primont, and Fairpark. I do not accept this submission. Tony was not involved directly or indirectly in Icon Plumbing. He did not take any direct or indirect steps to assist Icon Plumbing to secure work or advance its business.

¹⁰ These bills were issued by Rogers to Riva Plumbing and included bills for phones used by Tony Ferrari (October 2012), Robert Ferrari (October 23, November 23, 2012), Mike Ladisa (July 8, August 8, September 8, October 8, 2012, and company-wide bills (October 23, December 23, 2012).

[131] I find as a fact that Tony had nothing to do with Icon Plumbing or Mike's decision to create the company and to resign from Riva Plumbing.

7. The events of November 3 to 6, 2012

[132] The next set of key events happened around the closing of the share transaction.

A. *Luca hired private investigators to conduct surveillance on Mike and Tony*

[133] In response to the rumours that Mike might be starting a competitive business, Luca hired private investigators to conduct surveillance on Mike and Tony. The firm was retained on either November 3 or 4, 2012. It is important to note that Luca hired these investigators after Mike resigned from Riva Plumbing and before Luca closed the transaction.

B. *The deal closed and Tony departed Riva Plumbing*

[134] On November 5, 2012, Luca paid \$4 million to Tony, the share transaction closed, and the parties signed a comprehensive mutual release.

[135] Luca testified that he funded the purchase price using cash on hand at Riva Plumbing, a line of credit on his house, and a line of credit against Riva Plumbing. The bank that loaned against the assets of the business required Riva Plumbing to obtain and deliver annual audited financial statements. Although the defendants requested that the plaintiffs produce these audited statements, the plaintiffs refused to do so. The implications of this refusal will be addressed in the section on damages.

[136] Tony testified that he was not certain that Luca would have the money to close and that he was in a "holding pattern" waiting to see if the money arrived. Once his lawyer advised him that the transaction had closed, Tony finished packing up his office and left the building. Later that day, he told the Montesanos that the transaction had closed. Tony testified that they told him that Riva Plumbing would never work on a Primont site again. He testified that he did not speak with any other builders that day.

[137] Tony testified that he left all of Riva Plumbing's records, documents, and other property at the office. The only things he took with him were some personal mementos and documents related to his personal business interests. He left his computer behind, which he said he rarely used and never used to prepare quotations. Tony denies destroying or removing any Riva Plumbing property.

[138] On cross-examination, Tony admitted that no one took an inventory of his office before or after he left. If Luca thought that taking an inventory of Tony's office was a good idea, he had an entire month to raise that topic with Tony before closing. Similarly, if Luca wanted Tony's assistance to locate documents in his office, he could have asked Tony for that help. There is no evidence that Luca raised any issues about the contents of Tony's office between the signing of the minutes of settlement and the closing. Luca admitted that he had no contact with Tony between November 2012 and May 2013, when he commenced the action. If Luca thought that key documents were missing, he could have asked Tony in

early November 2012 to return the documents or for assistance locating them. Luca did not do so.

[139] I find as a fact that Tony did not remove any documents belonging to Riva Plumbing from the premises.

C. *Luca fired Anna and Robert, which caused Joseph to resign*

[140] On November 6, 2012, Luca arrived at the office first thing in the morning and walked into a room where Anna Ferrari, Robert Ferrari, and Joseph were chatting. Luca immediately fired Anna (who had worked at Riva Plumbing for about ten years in total) and Robert (who had worked at Riva Plumbing since the mid-1990s). The evidence is clear, and I find, that Luca fired Anna and Robert solely because they were related to Tony.

[141] Joseph testified that he intended to stay at Riva Plumbing after the closing of the share transaction. However, seeing Luca fire his relatives with no warning and for no reason shook him to his core. Luca did not talk to Joseph about his decision to terminate Anna and Robert's employment before or after the event took place. For Joseph, this was the breaking point. Although he intended to stay at Riva Plumbing, he realized that he could not continue to work for Luca. Both Tony and Mike testified that they expected Joseph to remain at Riva Plumbing after the share sale. There was no evidence to the contrary and I accept his evidence without reservation.

[142] Joseph testified that he went to Luca's office at about 12:30 p.m. and resigned. Joseph testified that Luca did not ask him why or try to stop him from resigning. Luca testified that he tried to stop Joseph from resigning; however, I do not accept this evidence, as it is contradicted by paragraph 45 of the agreed statement of facts.¹¹

[143] Luca immediately replaced Joseph with Anthony Carlino. Joseph asked Marianne Morrison to drive him home. They went and got some food and eventually decided to go see Mike at the Icon Plumbing shop. Joseph testified that once he got to the Icon Plumbing premises, he told Mike that he had resigned. Joseph testified that he had not discussed leaving Riva Plumbing with Mike before this date because he did not intend to resign.

[144] Joseph testified that he raised with Mike the possibility of working with him at Icon Plumbing. Joseph recalls that Mike said that was fine, but he wanted to take it day-by-day and see how things developed. Joseph testified that Mike clearly stated that he did not want a partner or a co-owner at that time but that as time went on, if things worked out, they could talk about changing that relationship. Mike gave a very similar version of this conversation in his testimony. There was no evidence to the contrary.

¹¹ Exhibit 2, Statement of Agreed Facts, at para. 45 reads, in part: "On November 6, 2012, Joseph resigned from Riva without notice. Luca did not request that Joseph delay or defer his departure."

[145] Joseph testified that he started doing whatever tasks needed to be done: building shelves, cleaning the shop, preparing rough-in boxes, getting material organized for the plumbers.

D. Two other Riva Plumbing plumbers resign

[146] Although the date is unclear, it seems likely that on November 6, 2012, two Riva Plumbing plumbers, Peter Minardi and Scott Thompson, provided two weeks' notice of their resignation. They intended to go work with Mike at Icon Plumbing. Mike testified that, although notice was not required, he thought it was appropriate for the workers to give Riva Plumbing some notice of their intention to move on.

[147] Luca did not accept their two weeks' notice and immediately terminated their employment. Luca agreed that union plumbers were free to resign their employment and to move to another competitor company without notice.

[148] Mike testified that Peter was a good friend who wanted to go work with him. Mike testified that Scott was dissatisfied that Riva Plumbing had moved him from more lucrative piecework to less lucrative hourly work. Mike agreed that he would give Scott piecework for as long as it was available. Mike's evidence on this point stood uncontradicted. It does not appear that Mike took any steps to "poach" plumbers from Riva Plumbing. Moreover, Luca's decision to fire the two employees immediately strongly suggests that Peter and Scott were not providing critical or time-sensitive work for Riva Plumbing.

[149] After they were fired, Peter and Scott went to the Icon Plumbing shop because they needed work. Mike had Peter stick around and help build shelves and move equipment. Because Scott needed to be earning money as a plumber to support his family, Mike realized that he would need to move up his anticipated start date of November 20, 2012, to avoid the risk of losing Scott. He was able to coordinate with Primont to have Scott start work on a Primont project on November 8 and Peter subsequently started work on that site as well.

[150] The plaintiffs suggest that Icon Plumbing went from "0 to 60" when it went into business within a matter of days after the closing of the transaction. I do not accept this submission. Mike coherently explained the steps he took to set up the business. With respect, this was not a complicated operation. Mike needed to buy vans, put stickers on them, and find a place to rent. There is nothing surprising about the steps he took to launch the business. The only reason that Mike started work on the Primont job so quickly is because Luca immediately fired the two plumbers who gave him two weeks' notice of their intention to resign from Riva Plumbing. But for Luca's quick trigger, Icon Plumbing would not have started work so quickly. As set out above, Riva Plumbing lost the Primont work because of Luca's behaviour. The fact that the work went to Icon Plumbing is irrelevant to Riva Plumbing because, as I have found Riva Plumbing would never again get any Primont work. The plaintiffs submit that the plumbing business depends on relationships. If so, then Luca should have considered how he had irreparably damaged the relationships with Primont, Fairpark, and their principals before he purchased the business on the assumption that he would retain all of their work.

[151] Similarly, Riva Plumbing cannot complain that it should have been able to retain this work simply because it was a larger or more mature business than Icon Plumbing. I have accepted the evidence of Mike that the start-up success enjoyed by Icon Plumbing was entirely through his own efforts. I find that Tony was in no way responsible for Icon Plumbing getting any work upon its start-up or thereafter.

8. The video evidence

[152] As mentioned above, Luca retained a private investigation firm to conduct surveillance on the Icon Plumbing building premises, Tony, and Mike. The investigation firm took videos of persons coming and going from the premises on November 6 to 10, and 12 to 16, 2012. The company came back and took further videos on October 28 to 31, and November 4 to 9 and 11, 2013.

[153] The plaintiffs spent three hours at trial playing these videos. Except for Tony appearing on the videos, which I will discuss in the section below, they prove nothing. They are exactly the type of videos one might expect to see at a bustling new business: employees, friends, family, customers, and suppliers milling around, coming and going, having coffee, setting up a new business.

[154] These videos captured little of interest, much less evidence that could make out the plaintiffs' case. I accept that these videos would have caused Luca significant concern in 2012 and 2013, when he believed that Tony had set up Icon Plumbing as a front to compete unlawfully against him. However, when they are viewed in light of my findings above regarding the establishment of Icon Plumbing the videos are innocuous. A. Tony Ferrari's appearances on the videos

[155] The videos prove that Tony was very frequently at the Icon Plumbing business premises.

[156] Tony is captured on video bringing in coffee, parking his car, talking to plumbers who work for Icon Plumbing, chatting with his family members, and going into the Primont building, among other activities. The videos do not capture any of the words being spoken. Tony freely admitted that it was him on the videos and testified that November 6, 2012, was the first time he ever visited the Icon Plumbing premises.

[157] Tony testified that after he left Riva Plumbing, he felt at loose ends. He was not permitted to smoke at his house, so he started going to Icon Plumbing to have a coffee, smoke, and chat with his old friends in the industry. Those friends who used to visit him at Riva Plumbing started dropping in to see him at Icon Plumbing. Mike confirmed that Tony came to the Icon Plumbing office many times, often bringing coffee. Mike felt that Tony was just maintaining a routine of getting out of his house, where he could not smoke, and going somewhere that he could have a coffee and chat with his friends, many of whom were involved in the plumbing industry where he had worked his entire life.

[158] The plaintiffs placed great emphasis on video evidence that captured Tony driving a forklift on November 6, 2012, October 28, 2013, and November 5, 2013. Luca, understandably, submits that this is evidence that Tony is actually an employee or principal of Icon

Plumbing. Tony, on the other hand, submits that he briefly drove the forklift to help Mike and Joseph unload something because he “does not know how to sit still.” Tony testified that these were the only times he did any “work” for Icon Plumbing.

- [159] The plaintiffs fairly point out that during an out-of-court examination, Tony testified that he had not operated a forklift at Icon Plumbing on November 6, 2012. Once the plaintiffs produced the videotape evidence, Tony filed a supplementary affidavit where he admitted that it was him on the video, but that he had “no specific recollection of driving the forklift at Icon’s premises since they have opened.” He allowed that it happened only a few times. In his affidavit, Tony explained that he had seriously injured his thumb a few days before the examination and was on painkillers at the time of the examination. I doubt that there is any connection between the medication and his incorrect answer on the out-of-court examination. When he swore the supplementary affidavit, Tony stated that he still had no recollection of driving the forklift because they were short and infrequent events. If I accept that evidence, and I do, then presumably he would have denied driving the forklift at the first examination regardless of any effects caused by the medication.
- [160] Mike testified that he was driving the forklift unloading pipe from the truck. He got called away to do something and got off the forklift. Mike testified that he turned his head and saw Tony on the forklift finishing the task. Mike said he thought to himself, “What is this guy doing?” Mike knew Tony was not really a forklift operator and wasn’t insured to be doing anything, much less driving a forklift. Mike recalls telling Tony to get off the forklift, that he cannot be doing things like this, and that he did not work there. Tony sheepishly agreed that Mike was unhappy with him driving the forklift. Mike allowed that Tony did not listen to him and that he did not physically pull Tony off the forklift.
- [161] Tony testified that it was “stupid” of him to drive the forklift. I agree. Whether or not driving the forklift indicated that Tony was more deeply involved in Icon Plumbing, the video evidence of Tony driving the forklift was the litigation equivalent of waving a red flag in front of a bull. I am certain the images enraged Luca. Tony’s actions were ill-considered, shortsighted, selfish, and may well have triggered this entire lawsuit. His self-indulgent decision to hop on the forklift may well have dragged Icon Plumbing, Mike, and Joseph in the crosshairs of this litigation.
- [162] However, considering all the evidence, I find that the forklift episodes, as superficially suspicious as they were, are not evidence that Tony had any greater role in Icon Plumbing. I find that Tony essentially used Icon Plumbing as a clubhouse or social club. He used it to maintain his social patterns, to greet and chat with his old friends, to have coffee and cigarettes, and to while away the time until golf or vacation season.
- [163] There is nothing inherently suspicious about any of Tony’s appearances on the videos in the non-forklift category. It is unsurprising that he is recorded going into Primont’s office building: as Tony testified, they were his friends and he had ongoing business dealings with them that were entirely outside of the plumbing business. There is nothing untoward about Tony giving his daughter a box of documents when she was his bookkeeper for his other businesses and kept the business documents with her. There is nothing unusual about

Tony having site plans related to a property development with Primont. It is important to note that this evidence stands entirely uncontradicted. There is no evidence that the box or the rolled-up plans had anything to do with Riva Plumbing or Icon Plumbing.

- [164] Ultimately, considering all the evidence that I heard at trial, I find that the video evidence of Tony does not prove that Tony provided services to Icon Plumbing. Considering the videos alongside all the other evidence, I reach the same conclusion that Tony was not involved in the start-up of Icon Plumbing. Instead, I accept the innocent explanations offered by Tony and confirmed by Mike regarding what Tony was doing on-site. That evidence makes sense and is coherent. There is no direct evidence to the contrary. While I understand that the evidence may have made Luca very suspicious, I reject the submission that the videotape evidence, considered on its own and in the context of all the other evidence, proves that Tony had any role at Icon Plumbing.

9. Icon Plumbing's operations

- [165] As Icon Plumbing started operations, each person took on different responsibilities. Mike was in charge of estimates, quotes, and dealing with suppliers. Joseph was in charge of scheduling. Mike and Joseph shared responsibilities for invoicing, collections, and banking. Mike did the payroll with Anna and, later, Marianne Morrison. Mike added Joseph as an authorized person to sign cheques on behalf of Icon Plumbing so that he could sign cheques to pay plumbers in a timely way to comply with union rules.

A. Business development

- [166] Mike testified that, after the first few days of operation, he and Joseph turned their minds to finding potential clients to whom they could introduce their company and pitch their services. Mike testified that he and Joseph obtained a copy of the BILD directory, which was a list of builders in the GTA. Mike explained that he and his wife wrote an introductory letter that Joseph sent to many of the builders seeking the opportunity to be considered for their future projects. Mike testified that he did not target Riva Plumbing customers.
- [167] Joseph testified that he sent the introductory letter out to the builders by email and placed a checkmark in the directory beside the name of builders to whom he sent the letter. He did not otherwise keep track of the builders to whom he sent a letter. He did not send an introductory letter to Primont or Fairpark. Joseph testified that he followed up on this letter by telephone if the builder did not respond. If a builder responded favourably, Mike and Joseph would go together to meet the builder.
- [168] Mike was adamant that he never used any Riva Plumbing confidential information to obtain any work. As far as Mike understood, Fairpark obtained two or three other bids (including one from Riva Plumbing) for the project that Icon Plumbing won. Mike testified that he never asked Tony for help with identifying potential customers or contacting them, pricing jobs, or negotiating contracts.
- [169] Luca testified that Fairpark Homes told him that Riva Plumbing could complete the houses that they had started working on at a jobsite in Lindsay, but that any future houses would

be completed by Icon Plumbing. Tony testified that he did not believe that Riva Plumbing was doing any work for Fairpark in November 2012. Luca testified that he did not speak to the Fairpark executives about this work and that he was invited to quote on other Fairpark jobs as early as spring 2013. However, Riva Plumbing did not win any of that work.

- [170] Mike testified that Icon Plumbing won work from Fairpark in the summer or fall of 2013 that consisted of 18 townhomes in the Pickering area. He recalled that he had to submit a bid for that work and that Riva Plumbing and another plumbing company also submitted bids.
- [171] Emilio Ronco, the president of Fairpark, gave evidence that was consistent with Mike's recollection. He recalled asking for bids in early 2013 for a townhome project in Whitby and that Icon Plumbing won that competition. That was the first work that he recalled giving to Icon Plumbing. Emilio confirmed that he was not going to give the work to Riva Plumbing because he did not want to deal with Luca anymore. Emilio explained that he was not comfortable with the accusations Luca made against his friend Tony. He felt uneasy that Luca was talking about psychics and what they told him. Emilio felt that Luca was always negative and putting people down, and Emilio did not want to deal with him any longer. He allowed Riva Plumbing to bid on work just to keep everyone honest and ensure that he had a range of quotes to compare.
- [172] On balance, I prefer the evidence of Emilio and Mike to that of Luca. I find that the first work that Icon Plumbing won from Fairpark was in early 2013 for a job completed in the fall of 2013. I find that Fairpark did not move any Riva Plumbing work to Icon Plumbing and that Icon Plumbing won this work without Tony's involvement.
- [173] Over time, Icon Plumbing bid for an increasing number of jobs with a wide range of builders. During Mike's cross-examination, the plaintiffs introduced a number of quotations, bids, or construction contracts that Icon Plumbing submitted to or signed in respect of Fairgate Towns Whitby, Primont Homes Towne Manors, Primont Greensborough, Lebovic Enterprises Pickering Singles, Lebovic Enterprises Pickering Townhomes, Lebovic Enterprises Pickering Semis and Singles, and Lebovic Enterprises Pickering West Side. However, the plaintiffs did not call any evidence to suggest that any of these bids or contracts were based on Riva Plumbing's confidential information or that there was anything about these documents that reflected unlawful or unfair competition.
- [174] Mike testified that Icon Plumbing did plumbing work for Joe Montesano's personal residence, Emilio Ronco's personal house, and Tony Mauro's personal houses and cottages. There was no evidence that Mike made use of any Riva Plumbing confidential information to obtain this work or that Riva Plumbing would have been considered for any of this work after Luca became its sole shareholder.
- [175] Tony testified that he never assisted Icon Plumbing with its business development, preparing quotations, or bidding for work. He testified that he never provided any confidential information to Icon Plumbing or spoke to any builders or suppliers on its behalf.

[176] I do not accept the plaintiffs' submission that any builders gave this work to Icon Plumbing because of its supposed association with Tony, the work it won with Primont and Fairpark, or the "support of Primont," which I understand to mean the \$200,000 personal advance from Joe, which I discuss below. I decline the plaintiffs' invitation to speculate about what a builder might have asked Mike about Tony and what Mike would have said in response. If the plaintiffs wanted me to reach that conclusion, they should have called a witness who said as much. There is absolutely no evidence that any builders were motivated by any of these considerations.

B. *Borrowing money from Joe Montesano*

[177] As discussed above, Icon Plumbing's initial capitalization came from Mike and Joseph each contributing \$100,000.

[178] In late November or early December 2012, Mike was doing work for Joe Montesano on his personal house. Mike testified that he asked Joe to consider waiving the holdback to assist with Icon Plumbing's cash flow. Joe said that he could not do that, but asked if there was another way he could help him. Mike testified that Joe personally agreed to loan Mike \$200,000 as an advance against the work to be done at the home. In response to a question from me, Mike confirmed that he performed \$225,000 of plumbing work on Joe's house. "It was a big house," Mike added in an understated way. Mike testified that he treated the loan as one for which he was personally responsible and that it was not just a corporate debt.

[179] Joe confirmed this arrangement during his evidence. On cross-examination, he stated that it was a personal loan to Mike because it was not the sort of thing for which the Primont credit facilities could be used. Joe confirmed that he did not "negotiate" over the loan. He offered to do it. He explained that giving out goodwill sometimes brings you goodwill. There was no suggestion that Tony was involved in any way in this loan and Tony denied ever discussing this financial support with any member of the Montesano family.

[180] In closing arguments, the plaintiffs submitted that it would have been beneficial to Icon Plumbing to be able to represent to other builders that they had financial backing from Primont and the Montesano family. The difficulty with this submission is that there is no evidence that Mike or Joseph ever told anyone about this loan. Indeed, Mike denied doing so. The plaintiffs are merely speculating about what might have happened. The plaintiffs presented no evidence to back up this submission, which I reject.

C. *Shareholding and financial statements*

[181] Initially, Mike agreed to let Joseph work at the company and "to see where it goes." Mike and Joseph testified that around the summer of 2014, they agreed that they would be partners in the Icon Plumbing business. They did not sign a shareholders agreement until 2021, apparently motivated by a desire to formalize the relationship given the COVID-19 pandemic.

[182] During cross-examination, counsel for the plaintiffs entered the Icon Plumbing financial statements for 2014 and 2015 as exhibits. However, the plaintiffs asked no further questions about these financial statements, and I do not know what, if anything, is significant about their content. I reviewed the statements and they do not seem to assist the plaintiffs in any way. Certainly, the statements do not provide any evidence that Tony had any financial connection to Icon Plumbing at any time.

D. *Icon Plumbing hired additional staff who used to work at Riva Plumbing*

[183] Icon Plumbing hired several plumbers that used to work at Riva Plumbing. Everyone agreed that union plumbers are mobile, and they are free to move from one employer to another.

[184] Both Mike and Joseph testified about the plumbers who previously worked at Riva Plumbing and moved to Icon Plumbing. They identified that each plumber moved for his own reasons, but there were several common themes, including that the plumber wanted to do more piecework than Riva Plumbing could offer him, deteriorating personal relationships with people (often Luca) at Riva Plumbing, and friendships with plumbers who had already moved to Icon Plumbing. In almost every case, Mike and Joseph testified that the plumbers contacted them about whether there was work at Icon Plumbing, and not the other way around.

[185] Tony testified that he never encouraged any plumbers to leave Riva Plumbing and that he never had any input in any of the hiring decisions made by Icon Plumbing.

[186] The plaintiffs did not contradict any of this information or call any of the plumbers to testify. There was no evidence that Mike or Joseph solicited any of the plumbers or engaged in any unfair or unlawful recruitment activities. There was no evidence that Tony was involved in any way with the hiring of these plumbers.

[187] Icon Plumbing also hired several non-plumbers who used to work at Riva Plumbing. Mike testified that Icon Plumbing hired Robert Ferrari after Luka fired him on November 6, 2012. Robert stayed at home for a while, then worked at Primont, but then wanted to get back into plumbing. Mike and Joseph gave Robert some work in the shop while he unsuccessfully pursued some postsecondary education. Icon Plumbing then created an apprentice spot for Robert with the consent of the union. He has continued to work with Icon Plumbing ever since and works about 20 hours each week.

[188] Mike testified that Anna Ferrari also helped out occasionally at Icon Plumbing starting sometime after Luca fired her on November 6, 2012. Mike candidly testified that he did not want Anna around because he did not like her. Joseph, on the other hand, wanted her around. Joseph testified that he would call Anna for help typing quotes and assisting with payroll when he needed help. Unless Joseph called Anna, she did not come into the office. Mike acquiesced in allowing her to help in an unpaid, occasional capacity. Mike and Joseph testified that Anna was neither an employee nor was she ever paid by Icon Plumbing.

[189] Mike testified that after Luca fired Marianne Morrison in December 2012, she joined Icon Plumbing on a part-time basis in the summer of 2014. Luca confirmed that he fired Marianne because he felt she was “being insubordinate” and was complaining about the staff Luca had hired. Luca admitted that he suspected that she was talking to Tony outside of work. Marianne continues to work for Icon Plumbing today, but not on a full-time basis. She has assisted with the accounting and taught Mike how to do the accounting on his own. Mike confirmed that Marianne did not bring any confidential Riva Plumbing information with her when she joined Icon Plumbing.

[190] Mike testified that after Luca fired Aleem Aziz on December 12, 2012, he came to work part-time for Icon Plumbing in the summer of 2014. He continued to work part-time for Icon Plumbing through 2023. In his testimony, Luca complained that Aleem was missing work and that he felt “attacked” by Aleem, who had asked in writing for a pay increase on December 5, 2012. Aleem asked for the pay increase, in part, because he was suffering from prostate cancer and wanted to provide for his family:

I have only had a \$1 per hour increase in the past five years. I have continued to come to work and perform my duties over the past four years having to endure harsh conditions due to the splitting up of the company. You are also aware that I have been diagnosed with prostate cancer. I have still continued to come to work despite being in pain and various requests from my doctor to take time off. I am a family man and have responsibilities and my main concern is to provide for my family.

[191] Luca fired Aleem one week after he wrote that letter. Aleem wrote to Luca to explain what happened from his perspective:

This letter is to confirm that on Monday December 10th 2012 I had booked the day off due to a doctor's appointment, which I had posted the usual way. At approximately 1:30pm on the same day Veronica Capitano my co-worker called me on my cell phone and told me that you had advised her to call me and say “don't bother to show up for work again.”

I was told to pick up my cheque on Wednesday December 12th and that a letter would be prepared for me. I was told by Veronica that the cheque was ready but that the letter was not prepared yet. I had to wait in Richmond Hill for approximately four hours before I went to pick up the cheque as I could not wait all day. I picked up my cheque yesterday but there was no letter enclosed.

I would like a response in writing to advise what your intentions are for my position in the company. It is my understanding that it is “business as usual” and I will continue to get paid my regular forty hours per week.

- [192] Contrary to Aleem's hopes, it was not business as usual, and Luca terminated Aleem's employment.
- [193] I pause here to note that Luca's decisions to terminate Robert, Anna, Marianne, and Aleem, and the manner of those terminations, are not directly before me at this trial. However, Luca's conduct convinces me that he was not a gifted manager of human resources. Luca's decisions make Mike's concern that Luca would fire him once Tony was no longer in the business seem very reasonable. Luca's decisions make Joseph's spontaneous decision to resign seem rational and proportionate. Also, and as I will address below, the plaintiffs' claim for damages arising out of Luca's decision to terminate these employees has no merit.
- [194] Icon Plumbing hired Robert, Anna, Marianne, and Aleem after Luca fired them. In several cases, Icon Plumbing hired these people many months after the termination of their employment at Riva Plumbing. There is no evidence to suggest that Icon Plumbing solicited these employees or engaged in any unfair or unlawful recruitment activities. There is no evidence that Tony was involved in the hiring of these employees.

E. Icon Plumbing's business dealings with Tony

- [195] Mike testified that on July 4, 2013, Icon Plumbing did some plumbing work for Tony. The company invoiced Tony \$12,401 for work renovating the bathrooms and sprinkler system for a tenant in a building owned by Tony. Tony testified that he paid market rates for this work. There was no evidence to the contrary.
- [196] On July 1, 2014, Icon Plumbing signed a lease with a company owned by Tony to lease space at 25 Brodie Drive. Mike explained that Icon Plumbing had started to outgrow the space at West Beaver Creek. They could not park the vehicles inside the shop at night. Mike recalled that Tony had space at Brodie that he could not rent out and offered to rent the space to Icon Plumbing. Mike was interested in obtaining more space, but he had just signed a lease and Tony's space was more expensive. On the other hand, Mike knew the extra space would be helpful, so he discussed the possibility with his existing landlord, who agreed to let Icon Plumbing out of the space without penalty.
- [197] Mike testified that the space at Brodie was bigger, better, and it was not a huge cost to move locations. He confirmed that Icon Plumbing does not have a special deal with Tony and that it pays monthly rent at market to Tony.

F. Suppliers

- [198] The plaintiffs acknowledge that the plumbing suppliers to Icon Plumbing just want to sell goods to plumbers. The plaintiffs then submit that the suppliers wanted to ensure that they will be paid. I do not accept the plaintiffs' submissions that any supplier granted any preferential treatment to Icon Plumbing, Mike, or Joseph on the basis of any connection to Tony or any efforts by Tony to obtain preferential terms. There is no evidence to support this inference.

G. Conclusion

- [199] Considering all of the evidence in this case, I find as a fact that Tony was not involved in the business operations of Icon Plumbing.
- [200] I find as a fact that Tony drove a forklift on a number of occasions at the Icon Plumbing premises. I accept the Mike's that Tony did not have his permission to drive the forklift and that Mike found Tony's dalliances with the forklift annoying and unwanted. I am satisfied that Mike did not seek, want, or accept Tony's help or involvement in the business. I accept that Mike and Joseph could launch a successful plumbing business, and did so, without Tony's assistance. I find as a fact that Tony did not assist them to bid on or obtain any work. I also find that Mike and Joseph did not use or rely on any confidential information belonging to Riva Plumbing to win any of the jobs they obtained.
- [201] I find that Tony had no financial involvement in Icon Plumbing. Twelve years have passed and there is no evidence that Tony ever had any financial interest of any kind in Icon Plumbing. There is no evidence that he is a shareholder (direct or indirect), creditor, or holds any legal or beneficial interest in Icon Plumbing. There is no evidence to suggest that Tony was involved in Joe's decision to advance \$200,000 to Mike as an advance on the plumbing work to be done on his home.
- [202] I find that the financial dealings between Icon Plumbing and Tony are of an extremely limited nature. Tony retained Icon Plumbing to do some plumbing for one of his tenants. Icon Plumbing signed a lease with one of Tony's companies to rent some space. There is no evidence that these transactions were at anything other than market rates.
- [203] I find that Icon Plumbing did not unfairly solicit any plumbers or office staff away from Riva Plumbing. There was no evidence of improper inducements offered by Icon Plumbing or pressure placed on the employees by Icon Plumbing. The evidence from Mike and Joseph that each plumber had his own reason for joining Icon Plumbing (including desire for more piecemeal work, poor relationships at Riva Plumbing, and good relationships with people at Icon Plumbing) was uncontradicted and unchallenged. There is no evidence that Tony had anything to do with any of these hires.
- [204] Other than the instances of Tony driving the forklift, the surveillance evidence revealed nothing untoward at the Icon Plumbing premises. Considering all the evidence, I find that Tony used the premises as a clubhouse to continue fraternizing with some of his lifelong personal friends in the plumbing industry. Tony wanted a place where he could smoke and drink coffee with his friends and maintain some of the social routines of his former life. I do not find that he ever conducted business on behalf of Icon Plumbing or used his social relationships to advance the business interests of Icon Plumbing.
- [205] Icon Plumbing succeeded because of the hard work of Mike, Joseph, and its plumbers. It won work because it provided competitive bids. It won repeat business because it did good work. The success of Icon Plumbing had nothing to do with Tony.

10. The plaintiffs have not proved liability

[206] I will now consider whether the plaintiffs have made out any of the remaining causes of action based on my factual findings set out above.

A. *The fiduciary duty claims*

[207] The plaintiffs submit that Tony breached the fiduciary duties he owed to them and that Mike and Joseph knowingly assisted in Tony's breach of his fiduciary duties. The plaintiffs have not proved any of these allegations on a balance of probabilities and these claims are dismissed.

1. Tony did not breach his fiduciary duties to the plaintiffs

[208] I accept the plaintiffs' submission that Tony owed fiduciary duties to the plaintiffs as a former officer and director of Riva Plumbing and that those duties survived his resignation from his positions with the company.¹² I will also assume, for the sake of argument, that the non-competition agreement in the shareholders agreement remained in force. For this reason, Tony's fiduciary duties would not permit him to compete with Riva Plumbing after his departure.

[209] In my view, the plaintiffs have not proved on a balance of probabilities that Tony breached, directly or indirectly, the fiduciary duties he owed to the plaintiffs. I rely on my findings of fact at paragraphs [122] to [131], [162] to [164], and [199] to [205], above.

[210] The plaintiffs submit that Tony owed them fiduciary duties of good faith, fidelity, care, and confidentiality. Even if I accept that submission, the plaintiffs did not prove that Tony engaged in any of the conduct the plaintiffs suggested would breach those duties.

[211] The plaintiffs did not prove that Tony covertly planned and set up a competing business in the form of Icon Plumbing. Tony and Mike both testified that Tony was not involved in any way in planning Icon Plumbing or setting it up. In closing argument, counsel for the plaintiffs admitted that the only direct evidence of Tony's involvement in planning and setting up Icon Plumbing was Veronica Capitano's evidence that, on October 4, 2012, she heard Mike ask Tony, "what about me?" to which Tony replied, "Don't worry, I have a plan." For the reasons set out above at paragraphs [84] to [89], I do not accept her evidence on this point. Even if I did accept her evidence, and I do not, that alone would not be enough to prove that Tony breached his fiduciary duties to Riva Plumbing. There is no evidence that Tony was involved in the planning and setting up of Icon Plumbing.

[212] The plaintiffs did not prove that Tony provided any direct or indirect assistance to Icon Plumbing. The plaintiffs did not prove that Tony provided financial assistance to Icon Plumbing by way of capital investment, loans, or guarantees. The plaintiffs did not prove that Tony assisted Icon Plumbing to identify potential customers, to price work, to prepare

¹² *Canadian Aero Services Ltd. v. O'Malley*, [1974] S.C.R. 592, at p. 620.

bids, or to negotiate agreements. The plaintiffs did not prove that Tony encouraged any Riva Plumbing customers to stop giving work to Riva Plumbing, or to reduce the amount of work they gave to Riva Plumbing.

- [213] For the reasons set out in paragraphs [136] to [139], the plaintiffs did not prove that Tony took any documents belonging to Riva Plumbing when he left. Counsel for the plaintiffs could not direct me to any evidence that proved that Icon Plumbing misused any Riva Plumbing confidential information, much less that Tony was the source of any such misused confidential information. I do not accept the plaintiffs' theory that Tony misused or passed along any Riva Plumbing confidential information to Mike, Joseph, or Icon Plumbing.
- [214] The plaintiffs did not prove that Tony solicited Riva Plumbing customers to shift their work to Icon Plumbing. The plaintiffs point to the conversation in Joseph's office among John Montesano and Mike and Joseph, which is discussed at paragraphs [94] to [99]. There is no evidence that Tony attended, organized, facilitated, arranged, or even knew about this meeting. Tony cannot be found to have breached his fiduciary duties because three people had a meeting in which he was not involved.
- [215] The plaintiffs did not prove that Tony failed to disclose material facts to Luca that would have caused Luca to alter his position had Tony disclosed those facts to him. The plaintiffs submit that Tony should have told Luca about his conversation with Mike after the staff meeting on October 4, 2012. As discussed above at paragraphs [82] to [89], Mike testified that after the meeting, he said to Tony, "what am I supposed to do now?" Mike recalls Tony telling him to stay and do his job and that Luca would not fire him. Mike recalls telling Tony, "maybe it was time for me to go out on my own." Mike recalls Tony answering, "maybe it is, you are a smart guy, try it out." I do not accept the plaintiffs' submission for two reasons.
- [216] First, counsel for the plaintiffs admitted that he did not ask Luca what he would have done differently if Tony had told him about the conversation. For this reason, the plaintiffs have not proved that disclosure of this conversation would have caused Luca to alter his position.
- [217] Second, Luca admitted that by mid-October, he had heard rumours that Mike was setting up his own business. Luca admitted that, although he knew "something was going on" he did not contact Mike to ask what was going on and did not respond to the "Dear Luca" letter that Mike signed on October 12, 2012. Luca admitted that he did not object to Mike leaving Riva Plumbing and setting up his own company.
- [218] For these reasons, I find that the plaintiffs did not prove that Tony failed to disclose material facts to Luca that would have caused Luca to alter his position had Tony disclosed those facts to him.
- [219] Finally, I do not accept that Tony briefly driving the forklift or maintaining social relationships with his friends in the industry violates any of Tony's fiduciary duties owed to the plaintiffs. Those actions do not implicate Tony's loyalty to the plaintiffs and caused

no harm to the interests of the plaintiffs. In my view, it would trivialize the notion of fiduciary duties to find that Tony breached those duties through such innocuous activity.

[220] For the reasons set out above, I conclude that Tony did not breach his fiduciary duties to the plaintiffs and I dismiss that claim.

2. Mike and Joseph did not knowingly assist Tony in the breach of his fiduciary duties

[221] The plaintiffs submit that Mike and Joseph are liable for the tort of knowingly assisting Tony to breach his fiduciary duties. To establish this tort, the plaintiffs must prove that:

- a. Tony owed a fiduciary duty to the plaintiffs;
- b. Tony breached his fiduciary duty fraudulently and dishonestly;
- c. Mike or Joseph had actual knowledge of both the fiduciary duty and Tony's fraudulent and dishonest conduct; and
- d. Mike or Joseph must have participated in or assisted Tony's fraudulent and dishonest conduct.¹³

[222] For the reasons set out above, the plaintiffs did not prove that Tony breached his fiduciary duties. For that reason, the plaintiffs' claims against Mike and Joseph for knowingly assisting Tony in the breach of his fiduciary duties must also fail and I dismiss those claims.

B. *The breach of contract claims*

[223] The plaintiffs submit that Tony breached his obligations under the non-compete agreement contained in the shareholders agreement and that Mike and Joseph breached their obligations under their employment agreements. I disagree.

1. Tony did not breach the non-compete agreement

[224] The plaintiffs submit that Tony breached the terms of the non-compete agreement. I will assume that the non-compete agreement remained in force after the close of the share transaction.¹⁴ The non-compete agreement is found in s. 12 of the shareholders agreement and provides as follows:

¹³ *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at para. 19; and *Harris v. Leikin Group*, 2011 ONSC 3556, 88 B.L.R. (4th) 1, at para. 294, affirmed in 2011 ONCA 790, at para. 8.

¹⁴ There is a strong argument that the non-compete agreement did not survive the close of the transaction. The minutes of settlement, signed on October 3, 2012, did not contain a non-compete agreement but did say that the shareholders agreement would remain in full force and effect. Section 10 of the shareholders agreement provides that the agreement terminates on the date "upon which there is only one (1) party of the Corporation." The parties

12. Non-competition

(a) Each Shareholder covenants and agrees with the other party hereto that he shall not, for a period of TWO (2) years from the date on which he ceases to be a shareholder of the Corporation;

(i) directly or indirectly, in any manner whatsoever, including, without limitation, either individually or in partnership or jointly, or in conjunction with any other person or persons, firm, principal, agent, shareholder or in any other manner whatsoever, carry on or be engaged in any business within a radius of 50 miles from the Corporation's business premises currently situated at 75 West Beaver Creek Road, Unit 11, Richmond Hill, Ontario L4B 1K6, which is competitive with the business now carried on by the Corporation (a "Competitive Business") or be concerned with or interested in or lend money to guarantee the debts or obligations of or permit his name or any part thereof to be sued [sic] or employed by any person, persons, firm, association, syndicate, company or corporation engaged or concerned with or interested in any Competitive Business;

(ii) divulge to any person, firm or corporation the name of any customer or client of the Corporation;

(iii) directly or indirectly solicit, interfere with or endeavour to direct or entice away from the Corporation any customer, client or any person, firm or corporation in the habit of dealing with the Corporation; and

(iv) interfere with, entice away or otherwise attempt to obtain the withdrawal of any employee of the Corporation.
[Emphasis added.]

[225] The plaintiffs have not proved on a balance of probabilities that Tony breached any of the restrictions contained in s. 12(a)(i). I find that Tony did not carry on or engage in any business that was competitive to Riva Plumbing during the two years after November 5, 2012. Put simply, Tony did not carry on or engage in the business of plumbing through Icon Plumbing.

[226] First, for the reasons set out in paragraphs [122] to [131], [162] to [164], and [201] to [207], above, Tony had no financial involvement or interest in Icon Plumbing. He was not a

agreed that, upon the closing of the share transaction, MJDL was the sole shareholder of the Corporation. There is nothing in the shareholders agreement to suggest that its non-competition obligations survived past the termination date. Nevertheless, I will assume that the non-competition agreement is enforceable.

shareholder (direct or indirect), creditor, and held no other legal or beneficial interest in Icon Plumbing. He did not guarantee the debts or obligations of Icon Plumbing. I found that Tony did not provide the benefit of his experience to Mike, Joseph, and Icon Plumbing.

- [227] Second, I find that Tony did not permit his name to be used or employed by Mike, Joseph, or Icon Plumbing to assist the growth of Icon Plumbing. The plaintiffs submitted that, because it would have been helpful to Mike and Joseph to rely on Tony's name and reputation when talking to builders, I should infer that they did so and did so with Tony's permission. The plaintiffs called no evidence to make out this submission. Tony and Mike expressly denied this suggestion. No builder gave evidence that Tony permitted his name to be used by Mike, Joseph, or Icon Plumbing. No builder gave evidence that they thought Tony was engaged in business with Icon Plumbing or was assisting them in any way. I decline to draw the plaintiffs' suggested inference.
- [228] Third, I do not think that taken individually or together, Tony briefly driving a forklift on one or two occasions or maintaining a social relationship with his long-time friends who also worked in the industry violates s. 12(a)(i). The provision is intended to prevent Tony from competing, directly or indirectly, with Riva Plumbing. I have found that Tony was not providing financial assistance, business development assistance, bidding and pricing assistance, or reputational assistance. Without much more, driving the forklift alone (without the permission of Mike and to his annoyance) does not breach s. 12(a)(i). I do not believe that the intention of the parties, reflected in the words they chose to use in the shareholders agreement, captures Tony briefly driving a forklift.
- [229] The plaintiffs have also not proved that Tony breached s. 12(a)(ii) of the shareholders agreement. I find that Tony did not divulge the name of any of Riva Plumbing's customers or clients to Mike, Joseph, or Icon Plumbing. Mike and Joseph independently knew the names of all of Riva Plumbing's customers and clients given their work at Riva Plumbing and familiarity with the industry.
- [230] The plaintiffs have not proved that Tony breached s. 12(a)(iii) of the shareholders agreement. As noted in paragraph [214], the plaintiffs did not prove that Tony solicited Riva Plumbing customers to shift their work to Icon Plumbing. For the reasons set out in paragraphs [94] to [99], [111], [123] to [126], [169] to [172], Tony did not solicit or direct Primont or Fairpark to stop doing work with Riva Plumbing. The principals of those companies made that decision independently and for their own reasons.
- [231] The plaintiffs have not proved that Tony breached s. 12(a)(iv) of the shareholders agreement. There is no evidence that Tony had anything to do with any plumber leaving Riva Plumbing. The plaintiffs put forward no evidence from any of its former plumbers. Tony denied that he encouraged any employees of Riva Plumbing to stop working there. Neither Mike nor Joseph suggested that Tony had anything to do with any plumbers leaving Riva Plumbing.
- [232] The plaintiffs submit that there was "a right way of doing this and a wrong way of doing this." With respect to Tony, the plaintiffs submit that all Tony had to do to stay on the right

side of the law was to wait out the period of the non-compete and completely remove himself from the plumbing industry for that period of time. This submission fails on the facts of this case. As I have found, Tony did remove himself from the plumbing industry, not only for the period of the non-competition agreement, but he did so until this very day. I find that Tony removed himself from the plumbing industry when he sold his shares, and that he has never again been engaged in that industry. Contrary to the plaintiffs' submissions, this is not a case where Tony attempted to eat his cake and have it too.

2. Tony did not breach the duty of good faith and honest performance

[233] The plaintiffs submit that Tony breached the duty of good faith and honest performance. I disagree.

[234] The parties to the minutes of settlement and the shareholders agreement are bound by the duty of good faith and honest performance. There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.¹⁵ In *Bhasin*, the Supreme Court recognized that there also exists a duty of honest performance, which applies as a general doctrine of contract law, rather than requiring a specific term within a contract. *Bhasin* does not require one contracting party to subrogate its own interests to those of the other party, but it does require a minimum standard of honesty in relation to performing the contract. At para. 86, the Court held:

The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

[235] The plaintiffs submit that Tony breached the duty of good faith and honest performance when he met with the staff on October 4, 2012, to advise them that he and Luca had resolved their dispute and that Luca would likely be buying his shares in one month's time. The plaintiffs were not able to explain exactly how this conversation breached a duty of good faith and honest performance. As I have explained at paragraphs [67] to [74], the dispute between Luca and Tony had significantly harmed the workplace and staff morale. I see nothing dishonest, unreasonable, capricious, or arbitrary about Tony advising the staff that they would have closure on these issues.

[236] Indeed, Tony telling the staff that he and Luca had settled their dispute is consistent with the provision of the minutes of settlement that required the business to be run as usual

¹⁵ *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 63.

pending the closing of the transaction. The parties could have bargained for a provision requiring Tony to stay away from the office pending the closing of the transaction or bargained for a confidentiality and non-disclosure provision pending closing. They did not do so.

[237] I do not accept that Tony breached the duty of good faith and honest performance.

3. Joseph did not breach his employment contract or the duty of good faith and fair dealing

[238] The plaintiffs submit that Joseph breached his employment contract and his duty of good faith and fair dealing. I disagree.

[239] As explained in paragraph [141], I found as a fact that Joseph intended to continue working at Riva Plumbing after the share transaction. He only decided to resign on November 6, 2012, after Luca fired Anna and Robert for no reason other than their relationship to Tony.

[240] Prior to his resignation, Joseph agreed to loan Mike \$100,000. I find as a fact that this was Joseph's only involvement with Icon Plumbing prior to his resignation. The plaintiffs did not explain how making this loan breached Joseph's obligations under his employment contract or the duty of good faith and fair dealing.

[241] I find that plaintiffs did not prove that Joseph breached his employment contract before he resigned from Riva Plumbing.

4. Mike did not breach his employment contract or the duty of good faith and fair dealing

[242] The plaintiffs submit that Mike breached his employment contract and his duty of good faith and fair dealing. I disagree.

[243] The plaintiffs no longer suggest that Mike owed fiduciary duties to Riva Plumbing. That concession was appropriate, although it came very late in the proceeding. Mike was a foreman, an employee, and a member of the union. There is nothing about Mike's role or his responsibilities that suggest he was in a fiduciary relationship with Riva Plumbing.

[244] The plaintiffs submit that Riva Plumbing had an employment contract with Mike.¹⁶ I will assume for the sake of argument that Mike had an individual employment contract with Riva Plumbing.

¹⁶ The plaintiffs did not provide a written contract of employment. It is not clear to me that Riva Plumbing had an individual contract of employment with Mike. It appeared to be common ground that Mike was a licenced plumber and a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46. His terms and conditions of employment may, therefore, have been governed by the Low Rise Residential Collective Agreement between Local 46 and the Independent Plumbing & Heating Contractors Association, which was filed as an exhibit at trial. If so, this could create questions about

- [245] Even non-fiduciary employees owe duties to their employers. Mike owed Riva Plumbing (not the other plaintiffs) a duty of good faith and fidelity.¹⁷ Employees are required to serve their employers faithfully, not compete with the employer, not disclose the employer's confidential information, provide full-time service, and protect their employer's interests.¹⁸ If an employee breaches these duties in a significant way, the employer may be justified in terminating an employee for just cause.
- [246] The plaintiffs submit that between October 4, 2012 (the date Tony advised the staff that Luca was likely to buy out his shares), and November 2, 2012 (the date Mike resigned), Mike competed with Riva Plumbing and did not provide full-time service to Riva Plumbing. I disagree.
- [247] First, the plaintiffs submit that Mike was competing with Riva Plumbing by soliciting the work of Primont following the meeting among John Montesano, Mike, and Joseph that took place in Joseph's office on October 8, 2012. I disagree. As I explained in paragraphs [94] to [99], John told Mike and Joseph that Primont would never again work with Riva Plumbing if Luca bought Tony's shares. Sometime after that, Mike asked the Montesanos if that was the case, and if he could bid on that work. I find that Mike correctly believed that he was not competing with Riva Plumbing when he asked this question. Riva Plumbing had already lost Primont's future work due to Luca's earlier treatment of the Montesanos before Mike ever raised the issue of whether he could bid on the work. The evidence of Joe Montesano on this point was crystal clear: there was nothing Luca could do at this late date to salvage the business relationship. Mike was not competing with his employer, Riva Plumbing.
- [248] I accept the evidence of Joe Montesano that Primont made the decision to give the work to Icon Plumbing in November 2012. Because Mike resigned from Riva Plumbing on November 2, 2012, it is likely that he was no longer at Riva Plumbing when Icon Plumbing won this contract. The plaintiffs did not prove that Icon Plumbing received this work while Mike was still an employee.
- [249] Icon Plumbing performed no plumbing services while Mike was still an employee of Riva Plumbing. This is not a case of an employee making money through a competitive enterprise while remaining an employee of his first employer. Indeed, Mike did not intend to have Icon Plumbing plumbers start doing plumbing work until the end of November. He accelerated that date only when Luca immediately fired the plumbers who provided two weeks' notice to him. This took place after Mike had resigned from Icon Plumbing.
- [250] Finally, the parties agree that Mike was permitted to do plumbing side-jobs through his own company while he was an employee of Riva Plumbing. There was no evidence to

whether the court has jurisdiction over this dispute or whether Riva Plumbing was required to use the grievance and arbitration procedure if it had concerns over Mike's conduct while he was an employee.

¹⁷ *Arora v. ICICI Bank of Canada*, 2024 ONSC 4115, at para. 21.

¹⁸ *Arora*, at para. 21, *GasTOPS Ltd. v. Forsyth et al.*, 2009 CanLII 66153 (Ont. S.C.); and *Ford v. Keegan*, 2014 ONSC 4989, 13 C.C.L.T. (4th) 188, at para. 169.

suggest that Riva Plumbing could not have performed this work on its own account and for its own profit. Riva Plumbing's tolerance of this competition is somewhat at odds with its suggestion that Mike was competing in breach of his employment obligations in the couple of weeks between the time he had decided to resign and the date of his resignation.

- [251] I find that Mike did not compete with Riva Plumbing while he was employed by Riva Plumbing.
- [252] Second, the plaintiffs submit that Mike set up Icon Plumbing "all" or "for the most part" on company time.
- [253] Mike testified that his work at Riva Plumbing did not suffer during the month of October 2012. There is no evidence to the contrary. For example, there is no evidence of any complaints from plumbers or builders that Mike was not on any job sites to act as foreman during normal working hours. There is no evidence that Luca expressed any concern to Mike about his attendance, punctuality, or attention during that month. The plaintiffs did not provide any evidence that Riva Plumbing provided Mike with oral or written reprimands.
- [254] The plaintiffs did not prove how much time Mike spent on setting up the company. The plaintiffs did not provide any timesheets submitted by Mike during this period of time. All parties appear to agree that Mike worked many more hours at Riva Plumbing than those for which he was compensated. Riva Plumbing did not tender any employment policies setting out its expectations regarding hours and permissible time-shifting for employees in Mike's role.
- [255] Given the relatively limited number of tasks undertaken by Mike with respect to Riva Plumbing before his resignation, most, if not all, of the planning could have been accomplished in the evenings and on weekends. Given that Mike routinely worked more hours than Riva Plumbing paid him for, the plaintiffs have not proved that Mike engaged in any time theft from the company.
- [256] The plaintiffs have not proved that Mike breached his contract between October 4, 2012, and the date of his resignation by not providing full-time service.
- [257] Third, even if Mike recruited the first two plumbers to leave Riva Plumbing while he was still an employee of Riva Plumbing, I do not find that this breached any duties owed to Riva Plumbing. Mike was not under a non-solicitation agreement, he did not owe fiduciary duties to Riva Plumbing, the plumbers he recruited were under no obligation to remain at Riva Plumbing and were free to move to another company at any time, and two employees leaving is not a "mass departure."¹⁹ Indeed, the two departing plumbers gave Riva Plumbing two weeks' notice of their intention to resign (which Luca rejected and then immediately fired them).

¹⁹ *RBC Dominion Securities v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at para. 13.

[258] In conclusion, I find that the plaintiffs have not proved on a balance of probabilities that Mike breached his employment contract and his duty of good faith.

C. *The claims for inducing breach of contract*

[259] The plaintiff submits that Tony, Mike, and Joseph are liable for the tort of inducing breach of contract with respect to Riva Plumbing's contracts with Primont and Fairpark. I disagree.

[260] The plaintiffs must prove each of the four elements of the tort with respect to each defendant:

- a. the defendant had knowledge of the contract between the plaintiff and the third party;
- b. the defendant's conduct was intended to cause the third party to breach the contract;
- c. the defendant's conduct caused the third party to breach the contract; and
- d. the plaintiff suffered damages as a result of the breach.²⁰

[261] I will assume for the sake of argument that Riva Plumbing had contracts with Primont and Fairpark that the builders breached in or after November 2012. Regardless, the plaintiffs have not met the second or third prong of the test.

[262] For the reasons set out at paragraphs [94] to [99], I find that Primont decided on its own that it would not work with Riva Plumbing if Luca bought Tony's shares. For the reasons set out at paragraphs [169] to [172], I reached the same conclusions about Fairpark.

[263] The decisions of Primont and Fairpark had nothing to do with the conduct of the defendants and had everything to do with the conduct of Luca over many years.

[264] The defendants' conduct did not cause Primont and Fairpark to breach their contracts with Riva Plumbing. Again, it was Luca's conduct that prompted Primont and Fairpark to stop working with Riva Plumbing.

[265] The plaintiffs have not proved on a balance of probabilities that any of Tony, Mike, or Joseph committed the tort of inducing breach of contract. This claim is dismissed.

²⁰ *Persaud v. Telus Corporation*, 2017 ONCA 479, at para. 26; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, at para. 99; and *1670002 Ontario Limited (Canadian Professional Recruiters) v. Redtree Contract Carriers Ltd.*, 2014 ONCA 501, 323 O.A.C. 128, at para. 14.

11. The plaintiffs did not prove any damages

[266] I have found that the plaintiffs have not proved any of their claims and, therefore, they are not entitled to any damages. In the event I am wrong, I will consider the plaintiffs claims for damages.

[267] The plaintiffs bear the burden of proving the existence of damages and the quantum of damages.²¹ Where damages are by their inherent nature difficult to assess, the court must do the best it can in the circumstances.²²

[268] In response to a question from me, the plaintiffs agreed that Tony’s actions of driving the forklift as revealed on the videos, having coffee with his friends at the Icon Plumbing office, and entering into a market rate lease with Icon Plumbing in 2014, did not cause any compensable damage to the plaintiffs. Therefore, even if I am wrong, and those actions amounted to a breach of fiduciary duty or the non-compete agreement, I would not award the plaintiffs any damages for those actions. I will now consider the balance of the plaintiffs’ claim for damages.

[269] The plaintiffs claimed \$10 million in damages under four headings:

- a. loss of profit at large;
- b. loss of profit on a per job basis;
- c. damage to goodwill; and
- d. damages for loss of employees.

[270] The evidence on damages tendered by the plaintiffs was deeply unsatisfactory. The plaintiffs did not tender any expert evidence. I do not accept the plaintiffs’ submission that this is a case where they have “made every effort to provide source documentation related to a claim for damages.” Far from it. The plaintiffs did not produce their audited financial statements despite requests that they do so. The plaintiffs did not provide access to Riva Plumbing’s books, records, or the accounting data from which they (apparently) took the numbers they put into evidence.

[271] The plaintiffs were obliged to lead evidence to support their claim for damages. The defendants tried to help the plaintiffs by asking for production of the audited financial statements and the documents underpinning the damages claim. The plaintiffs simply refused to meet their basic obligations to produce obviously relevant documents. This is not a case where the business operated in an informal way.²³ Riva Plumbing produced audited annual financial statements to satisfy its lenders. Riva Plumbing ran its own

²¹ *The North West Company LP v. Classic Furs Company Ltd.*, 2025 ONCA 295, at para. 62.

²² *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.), at p. 187, leave to appeal refused, [1998] S.C.C.A. No. 516.

²³ *The North West Company*, at para. 73.

internal accounting system that apparently could produce the underlying data on profit and loss.

- [272] The defendants ask that I draw an adverse inference from the plaintiffs' failure to produce the audited financial statements and the accounting data. The plaintiffs submit that I should not draw an adverse inference. The plaintiffs point out that the defendants did not bring a pre-trial motion under rule 30.06 of the *Rules of Civil Procedure*. I do not accept this submission. The defendants' decision not to pursue a pre-trial motion does not prevent them from seeking an adverse inference at trial.²⁴ The defendants put the plaintiffs on notice about this issue in advance of and during trial. Counsel for Tony cross-examined Daniel and Frank on this issue. They both admitted that the documents existed, and Daniel confirmed that the plaintiffs had not produced them.
- [273] There is no doubt that the audited financial statements and the accounting data exist and remain in the plaintiffs' possession and control. The documents are obviously relevant and material. The failure to produce the documents interfered significantly with the defendants' ability to test the accuracy, reliability, and cogency of the damages evidence tendered by the plaintiffs. In the circumstances, I draw an adverse inference that the audited financial statements and accounting data would not support the plaintiffs' damages claims.
- [274] Where the absence of evidence makes it impossible to assess damages, a plaintiff may be entitled to only nominal damages.²⁵ There is no evidence that satisfies me that the plaintiffs suffered a real loss, even if the defendants breached their contractual obligations and duties in the manner suggested by the plaintiffs. I would, therefore, award only nominal damages in this case, even if the plaintiffs had established the defendants' liability.

A. *Loss of profit at large*

- [275] The plaintiffs seek millions of dollars of damages for lost profits. They submit that Riva Plumbing suffered a drop in sales and profitability that was caused by Icon Plumbing. They do so on the basis of two exhibits.
- [276] First, they rely on Exhibit 28, a "Gross Margin Analysis for years ended 2004 to 2018." This exhibit sets out Riva Plumbing's sales for each year, and the purchases, wages, and subcontractor payments that are subtracted from the sales figure to produce the difference, which is the gross profit. Finally, the chart divides the gross profit by the sales to produce the gross margin.
- [277] Frank testified that he prepared this chart from information from Riva Plumbing's accounting system, which he checked against the audited financial statements.
- [278] The plaintiffs admit that the defendants requested that they produce all of the "foundational documents" that underpinned the damages charts. The plaintiffs further admit that they

²⁴ *Total Meter Services Inc. v. GVM Integration*, 2025 ONCA 321, at para. 14.

²⁵ *Martin*, at p. 187.

produced neither the audited financial statements nor the accounting records that Frank used to prepare Exhibit 28.

- [279] The plaintiffs' approach to their production obligations is entirely unacceptable. Neither the defendants nor the court are required simply to take Frank at his word. The defendants are entitled to test the accuracy of Frank's evidence against the source documents that he relied on to create Exhibit 28. Both the audited financial statements and the accounting data used to prepare Exhibit 28 were obviously relevant and producible. Moreover, they are critical to test or corroborate the plaintiffs' evidence. Failing to produce these documents significantly impaired the ability of the defendants to defend this multi-million-dollar claim. The plaintiffs interfered with the ability of the defendants to test the accuracy of the data (did Frank transpose digits or years?) and whether it fairly represented the state of the company (does the salary line contain a \$2 million salary for Luca or Daniel Montanaro?). The civil justice system cannot tolerate the wilful failure of parties to comply with their production obligations. For these reasons, I give no weight to the information set out in Exhibit 28.
- [280] Second, the plaintiffs rely on Exhibit 31, which sets out Riva Plumbing's "loss of potential profits" for the years 2013 to 2017. The chart suggests that Riva Plumbing had a "loss of potential profit" of \$10.2 million. I place no weight on Exhibit 31 because it has two fatal problems.
- [281] First, Exhibit 31 reproduces the gross revenue numbers from Exhibit 28.²⁶ All of the problems of Exhibit 28, which I discuss above, also infect Exhibit 31. For this reason alone, I would not give any weight to Exhibit 31.
- [282] Second, despite the fact that Exhibit 28 and 31 contain identical revenue figures for the years 2009 to 2016, they report very different profit figures:

Year	Exhibit 31 (Actual Profit)	Exhibit 28 (Gross Profit)
2009	\$1,892,328	\$3,097,985
2010	\$1,203,951	\$2,302,331
2011	\$364,351	\$3,062,506
2012	\$2,199,281	\$3,491,984
2013	\$354,403	\$2,061,643
2014	\$783,481	\$2,743,350
2015	\$172,654	\$1,676,830
2016	\$547,419	\$2,441,816
2017	\$393,516	\$2,247,775

²⁶ Exhibit 28 refers to "Sales" and Exhibit 31 refers to "Gross Revenue," but the numbers are identical for 2009, 2010, 2011, 2012, 2013, 2014, 2015, and 2016. There are differences for the years 2006 to 2008 that were not explained.

- [283] The plaintiffs provided no explanation for this discrepancy. Without access to the underlying accounting data and financial statements, this data is so unreliable as to be useless. I give it no weight.
- [284] Third, in Exhibit 31, Frank purports to provide opinion evidence regarding assumed rates of growth for Riva Plumbing. Frank was not qualified as an expert to provide opinion evidence of this type. I have no idea whether it is reasonable to assume straight-line growth of 11 percent year over year. It is also not acceptable to take a number that may be entirely irrational and cut it in half to make it “conservative.” Business valuations and growth projections are complicated. They require opinion evidence from experts.
- [285] I do not accept that either Exhibit 28 or 31 accurately describe the finances at Riva Plumbing. I am even less confident that the growth projections are a reasonable basis to calculate damages. I give these exhibits no weight and award no damages for loss of profit at large.

B. *Loss of profit on a per job basis*

- [286] In the alternative, the plaintiffs submit that their losses can be calculated on a per job basis. In support of this theory, the plaintiffs tendered Exhibit 30, which they submitted proves their damages. I disagree. There are a number of serious flaws with Exhibit 30.
- [287] First, the methodology in Exhibit 30 is suspect. Luca and Frank both testified that Riva Plumbing did not track its profits and losses on a per job basis and that Riva Plumbing’s accounting system could not produce profit and loss calculations on a per job basis. If Riva Plumbing did not track, and could not prove, profit on a per job basis for jobs that it completed, it is difficult to be confident that they could produce a chart sufficient to prove lost profit on a per job basis for jobs that it did not win or complete.
- [288] Second, the chart on its own does not prove that any amounts described were caused by any of the defendants’ breaches. Even assuming that Riva Plumbing and Icon Plumbing both bid on a job and that Icon Plumbing won the contract, those facts alone are insufficient to prove that any loss to Riva Plumbing was caused by a breach of duty owed by the defendants to the plaintiffs. This is particularly the case for some of the damages claimed for 2016 and 2017, well after the establishment of Icon Plumbing. Exhibit 30, on its own, does not prove causation.
- [289] Third, Exhibit 30 depends on a significant amount of double hearsay. The plaintiffs submit that they are entitled to damages for seven jobs where Riva Plumbing bid, Icon Plumbing submitted a lower bid, and Riva Plumbing then had to lower its bid to win the work.²⁷ Daniel testified about the facts of these cases. However, properly unpacked and assessed, Daniel could only testify that “Luca told [him] that an unnamed person acting on behalf of

²⁷ These jobs included the following: Monarch Corporation – Lexington; Glen Rouge Homes – The Cornerstone; Lebovic Enterprises – Bradshaw; Esquire Homes – Three 7 Condos; Lebovic Enterprises – Aurora Customs; Delpark Homes – Cedar Ridge; and Acorn Homes – Oak Knoll Ph. 3.

a builder told Luca that Riva Plumbing would have to match Icon Plumbing's lower bid if it wanted the work and that Luca told [him] that Riva Plumbing did lower its price." None of this hearsay evidence is admissible and I would exclude all such cases from the damages claim.

[290] Fourth, the key figures in the chart are the "Loss of Actual Profits" for each job. The plaintiffs did not produce the accounting data that would allow these numbers to be tested. Although the plaintiff tendered almost 3,000 pages of documents that it claimed supported Exhibit 30, the plaintiffs could not explain to me how I could calculate the figures set out in the chart in Exhibit 30. The short answer is that it is impossible to do so.

[291] In all the circumstances, I give no weight to Exhibit 30. The plaintiffs have not proved that they are entitled to any damages under a loss per job model and I award no damages to them on this theory of loss.

C. Loss of goodwill

[292] The plaintiffs claim \$2.73 million in damages for lost goodwill. As noted above, the plaintiffs did not tender any expert evidence on the value of lost goodwill or produce its audited financial statements.

[293] Goodwill connotes the positive association that attracts customers towards its owner's wares or services rather than those of its competitors.²⁸ The Supreme Court of Canada has defined goodwill this way:

"Goodwill" is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.*, [1901] A.C. 217, 224, "the attractive force which brings in custom," and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business.²⁹

[294] One way to think about goodwill is that it represents the difference between going concern value and the value of the tangible assets backing the business.³⁰

²⁸ *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824, at para 50.

²⁹ *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, at p. 108, quoting Lord MacDermott L.C.J. in *Ulster Transportation Authority v. James Brown & Sons Ltd.*, [1953] N.I. 79, at pp. 109-110.

³⁰ *1406444 Alberta Ltd v Taylor*, 2020 ABQB 356, at para 114.

[295] I asked the plaintiffs to explain how I should calculate the loss of goodwill, particularly in the absence of any valuation evidence. The plaintiffs answered that Luca paid Tony \$4 million for 51 percent of the shares in Riva Plumbing. Therefore, on November 5, 2012, Riva Plumbing had a value of \$7.8 million. The plaintiffs explained that Riva Plumbing was a business where “goodwill [was] a significant component” of its value because Riva Plumbing did not own any buildings or land and was not an asset-intensive business. The plaintiffs submitted that the value of Riva Plumbing comprised its skilled labour, experience, relationships, and knowledge of how to bid on work. Taking all of this together, the plaintiffs submitted that I should conclude that 70 percent of the value of Riva Plumbing, or \$5.46 million, was goodwill based on “the nature of the business and industry.” Finally, the plaintiffs submitted that the defendants’ breaches impaired the goodwill of the business by 50%. Therefore, the plaintiffs claimed \$2.73 million in damages for loss of goodwill.

[296] With respect, the plaintiffs’ proposed methodology is wholly unsatisfactory and amounts to little more than numbers plucked out of the air. Calculating the loss of goodwill is a complicated process. Goodwill can be calculated and may be documented on audited financial statements, which the plaintiffs did not produce. Calculating goodwill is essentially an accounting and financial valuation exercise that the court should not undertake in the absence of expert evidence. I agree with Richardson J. who held as follows:

Contrary to the plaintiff’s argument that “Calculating fair damages for lost Goodwill should not be too difficult”, the Canadian Institute of Chartered Accountants suggests a six-step approach to valuing goodwill that has been used by several experts and sanctioned by the Courts in jurisprudence. These steps include examining the earnings record, adjusting past earnings to arrive at future maintainable profits, determining the appropriate rate of return that should be realized on an investment in the particular type of business, determining total value by capitalizing the earnings as adjusted by the rate of interest, valuing tangible and intangible assets other than goodwill and then calculating the difference between the value of the assets and the capitalized earnings. (see *Surrey Animal Hospital Ltd. v British Columbia (Minister of Transportation and Highways)* 1993 CarswellBC 2730, 51 L.C.R. 37 at para 60). This is an accounting and financial valuation exercise and is not one that the Court can or should undertake in the absence evidence.³¹

[297] The plaintiffs provided no caselaw to support their suggestion that I could calculate the loss of good will on the state of the record before me. To take only one example, there is no evidence that 70 percent of the value of Riva Plumbing comprises goodwill. The 70

³¹ 1406444 *Alberta Ltd.*, at para. 115.

percent figure was raised for the first time by counsel during the plaintiffs' closing submissions.

[298] I find that the plaintiffs have not proved the loss of any goodwill and I would decline to award any damages for lost goodwill.

D. Damages from departed employees

[299] The plaintiffs claimed damages of \$2,959,230 comprising "hiring costs" of \$741,720 and \$2,217,510 in "replacement costs" for the "employees lost to Riva Plumbing."

[300] In support of this claim, the plaintiffs tendered a series of worksheets that were marked as Exhibit 32, through Daniel's evidence. However, on cross-examination, Daniel admitted that Frank primarily prepared the document and that Daniel only had a hand in formatting the information in the document. For his part, Frank made no reference at all to Exhibit 32 in his will-say statement.

[301] There are three serious flaws with the plaintiffs' damages claim set out in Exhibit 32.

[302] First, the chart appears to claim damages for the hiring costs associated with employees that Luca fired, including Marianne Morrison, Anna Ferrari, and Aleem Aziz. I see no basis in fact or law to permit the plaintiffs to claim any damages in respect of employees that they fired.

[303] Second, the chart does not attempt to describe the actual costs incurred by Riva Plumbing. Instead, the chart is built on a series of untested assumptions for which there is no factual underpinning. For example, the chart asserts that Riva Plumbing had to hire ten plumbers to find one plumber worth keeping. Daniel testified that this figure is based on Luca's experience. I do not recall Luca giving this evidence. Even if that was Luca's opinion, there is no evidence in the record to prove that Riva Plumbing actually hired ten plumbers to replace any single plumber. Almost 13 years have passed since the plumbers began to depart Riva Plumbing for Icon Plumbing. I would have expected to see a precise list of departed employees and the names of the ten plumbers hired to replace each of them. No such evidence was provided. Other than artificially inflating the damage claim by a factor of ten, it is difficult to find any utility in this assumption.

[304] To take another example, the chart asserts that for each plumbing vacancy, the staff at Riva Plumbing spent two hours screening resumes, four hours interviewing candidates, two hours onboarding candidates, and two weeks in orientation and training. Not a single witness testified about this extremely robust recruitment process. Riva Plumbing is only entitled to recover its proved damages, not fantasy damages based on what is little more than a human resources fever dream.

[305] Third, the chart is built on a series of assumptions based on internet research conducted by Frank. According to Daniel, Frank conducted some internet research regarding pre-departure costs and lost productivity for departing employees, vacancy costs, orientation

and training costs, and administrative overhead and hiring costs. This raises two fundamental problems:

- a. Although Daniel admitted that he had reviewed some of the internet sources that Frank consulted and that the documents were on Daniel's computer, the documents were not produced during the course of litigation, despite the defendants' specific request for production of all documents underlying the damages claim. The plaintiffs' intentional disregard to produce the relevant source documents is unacceptable. For this reason alone, I would give no weight to this document.
- b. This exhibit is opinion evidence that can only be tendered by a qualified independent expert. Neither Daniel nor Frank was qualified to give opinion evidence on any topic. Neither one of them is remotely qualified to give opinion evidence on this topic.

[306] The plaintiffs submit that, while this is not the best way or the only way to present the cost of replacing employees, it was a reasonable way to do so. I disagree. The plaintiffs could have proved actual out-of-pocket expenses or provided opinion evidence from a qualified expert to try and quantify their losses based on a series of reasonable, industry standard assumptions. The plaintiffs did neither. I give Exhibit 32 no weight.

[307] The plaintiffs have not proved that they suffered any damages resulting from the departure of employees.

12. Mike and Joseph's counterclaim for the unpaid 2012 bonus

[308] Mike and Joseph brought a counterclaim against Riva Plumbing for not paying a pro-rated share of their 2012 bonus to them. The parties have agreed that if Mike and Joseph can establish that Riva Plumbing is liable, they are each entitled to \$49,725 in damages, plus prejudgment interest.

A. *Evidence of the parties*

[309] Of the witnesses who testified, Mike gave the most detailed evidence about the origin of the bonuses. Mike stated that in 2007, he asked Luca if he could obtain shares in Riva Plumbing and Luca said no. Instead, Luca offered to consider some form of profit-sharing with Mike. Mike testified that Luca never got back to him with any details, so he raised the issue with Tony. Mike testified that Tony agreed to a profit-sharing agreement where Mike and Joseph would each receive five percent of Riva Plumbing's annual profits.

[310] Mike testified that Riva Plumbing made the first payment in July 2008 for the fiscal year ending January 31, 2008, and made payments each year through 2012. No witness explained how this bonus provision interacted with the collective agreement that covered Mike's employment.

[311] Mike testified that Riva Plumbing made the payments to his company that he used for his contracting and consulting work and not to him personally. Mike testified that he never

received a statement setting out the calculation of the bonus. He only received the cheque made payable to his company and was told that it was his bonus. He testified that his company received similar payments in 2009 through 2012.

- [312] Mike testified that the T4 slip he received from Riva Plumbing did not include the bonus payments.³² As noted above, Mike testified that Riva Plumbing paid the bonus to his company. Instead of a T4, Riva Plumbing issued a T5018 slip to Mike that covered his bonus.³³
- [313] Joseph also testified about his bonus. He was not involved with the negotiations over the terms of the bonus as Mike handled the negotiations. Joseph received an annual salary of \$100,000, which had not increased over time. Joseph testified that he and Mike were putting in lots of time beyond 40 hours per week, but that the bonus was not tied in any way to how many hours they worked. Joseph understood that he and Mike were each to get five percent of the profit of the company but did not understand how the bonus was calculated. He just received his cheque and said thank you.
- [314] Based on pay slips entered as exhibits at trial, it appears that Riva Plumbing deducted taxes, employment insurance premiums, and CPP premiums from the bonus amount paid to Joseph.
- [315] Tony testified that he first heard about the bonus issue from Mike in 2007. Tony remembered that Mike told him that Luca was putting him off on the issues. Tony agreed that Riva Plumbing's profits should be shared with each of Mike and Joseph. He recalled that the calculation was as follows. Riva Plumbing's profit would be determined at the fiscal year-end, which was January 31. The dividends paid to Tony and Luca would be deducted from that amount and Mike and Joseph would each receive five percent of the remainder.
- [316] Tony testified that the bonus agreements were never reduced to writing. Importantly, Tony agreed that the parties never discussed payment to Mike and Joseph if they only worked part of a year and did not work the entire year.
- [317] Luca testified that from 2007 onward, Mike and Joseph were each entitled to one-half of five percent of the profit. Luca was the only witness who testified that Joseph and Mike were to split a five percent share of the profits. All the other witnesses testified that each of Joseph and Mike were to receive five percent of the profits. As the parties have agreed on the amount owing to Mike and Joseph if they establish liability, this dispute in the evidence need not be resolved.

³² A T4 slip identifies all of the remuneration paid by an employer to an employee for a calendar year. Bonuses paid to employees are to be reported on a T4 so that appropriate CPP and EI deductions can be recorded and that the amount is properly included in an employee's taxable employment income.

³³ A T5018 slip identifies the total contract payments made to a recipient by a contractor in a calendar year. Contractors issue T5018 slips to resident of Canada subcontractors for construction services performed.

[318] Luca testified that Riva Plumbing did not pay the bonus to Joseph and Mike in 2012 because they resigned and did so abruptly.

[319] I decline to admit the evidence tendered by Mike after the completion of oral submissions. It could have been tendered during trial and would not have affected the result.

B. Legal principles

[320] Mike and Joseph submit that Riva Plumbing breached its contract with each of them when it did not pay out the bonus to them after they resigned their employment at the company. The parties agree that this contract was oral and was not reduced to writing.

[321] The law of Ontario on this issue is set out in *Daniels v. Canadian Tire Corporation*.³⁴ In that decision, McMurtry A.C.J.O.C. (as he then was) held that if a bonus scheme is an integral part of an employee's compensation, and it relates to profits and not the employee's performance, there is no presumption that the employee has to be employed at the end of the fiscal year to be entitled to receive a portion of the bonus for that year. If the employer wishes to include a condition of continuing employment, then it must make the condition known to the employee as a specific term of employment, in order to avoid paying a pro-rated share to an employee who has resigned.³⁵

[322] Based on the evidence at trial, I am satisfied that Mike and Joseph are entitled to damages in respect of the unpaid bonus.

[323] First, I find that the bonus scheme was an integral part of the employees' compensation. Joseph testified that he made \$100,000 per year and that this amount had not increased over time. The unpaid bonus, which the parties agree was worth \$49,725 in 2012, represents a very significant proportion of his overall income.

[324] Second, I find that the bonus was not discretionary. No witness testified that Mike or Joseph's entitlement to the bonus was conditional on an evaluation of the quality of their performance in that year. No witness testified that Riva Plumbing needed to hit a minimum level of profitability to trigger the payment or that any other factors or assessments conditioned its payment. I am satisfied that the bonus was entirely disconnected from Mike and Joseph's performance and had no discretionary features. It was a simple mathematical calculation done after the year-end.

[325] Therefore, according to *Daniels*, there is no presumption that Mike and Joseph had to be employed at the end of the fiscal year to be entitled to the bonus.

³⁴ (1991), 5 O.R. (3d) 773 (O.C.J. Gen. Div.).

³⁵ See also *Malinowski v. Nault Sawmill & Lumber Co. Ltd.* (1985), 65 A.R. 125, at paras. 9-12; *Grace v. Readers' Digest Assn. (Canada) Ltd.* (1995), 14 C.C.E.L. (2d) 109 (Ont. Ct. (Gen. Div.)), at paras. 63-65; *Moore v. Thomas Fuller Construction Co. (1958) Ltd.* (2003), 29 C.C.E.L. (3d) 196 (Ont. C.A.), at para. 9; *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218.

- [326] I find that continuing employment was not a condition of receiving the bonus. Neither Luca nor Tony ever told Mike or Joseph that entitlement to the bonus was conditional on their continuing employment. In these circumstances, Riva Plumbing cannot avoid paying a pro-rated share of the bonus to Mike and Joseph, even though they resigned before the fiscal year-end.
- [327] I raised with the parties whether Mike's entitlement to the bonus was affected by his membership in the union and the provisions of the collective agreement. Ultimately, whether the bonus agreement between Mike and Riva Plumbing violated the collective agreement is not a matter I need to determine. Riva Plumbing happily paid these amounts from 2008 to 2012. I do not think that the collective agreement and its arbitration provisions should allow them to avoid their obligations to Mike.
- [328] I had similar concerns about the fact that Riva Plumbing and Mike structured the bonus payment as a payment to Mike's company and did not report the bonus income on Mike's T4. Again, even if there are potential tax consequences arising from a possible mischaracterization of income, I do not think that should permit Riva Plumbing to avoid its contractual obligation to Mike to pay out a pro-rated share of the bonus.
- [329] Finally, I do not think any of Mike's conduct before he resigned from Riva Plumbing disentitles him to collect this bonus. Luca testified that the reason he did not pay Mike his bonus was because he resigned. He did not testify that Mike's decision to set up Icon Plumbing before resigning caused him to not pay the bonus. Indeed, Luca testified candidly that "it was a free country" and he did not object to Mike leaving Riva Plumbing or setting up Icon Plumbing.
- [330] For these reasons, I allow the counterclaim and order Riva Plumbing to pay \$49,725 in damages to each of Mike and Joseph.
- [331] Mike and Joseph are also entitled to prejudgment interest on these amounts. From Joseph's pay stubs, it appears that the bonus payments were made each year between April and July. Since the 2011 payment was made on July 17, 2012, I will order prejudgment interest on the damages to run from July 17, 2013, to the date of this judgment.

13. Conclusion and costs

- [332] For the reasons set out above, the action is dismissed and the counterclaim is allowed. I order Riva Plumbing to pay \$49,725 in damages to each of Mike and Joseph.
- [333] If the parties are not able to resolve costs of this proceeding, the defendants may email their costs submission of no more than three double-spaced pages to my judicial assistant on or before June 6, 2025. The plaintiffs may deliver their responding submission of no more than three double-spaced pages on or before June 13, 2025. No reply submissions are to be delivered without leave.

Released: May 29, 2025

CITATION: Riva Plumbing Limited v. Ferrari, 2025 ONSC 3219
COURT FILE NO.: CV-13-481063-0000
DATE: 20250529

2025 ONSC 3219 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Riva Plumbing Limited, MDJL Holdings Ltd., and Luca Montanaro

Plaintiffs

– and –

Anthony Ferrari, a.k.a. Tony Ferrari, 531302 Ontario Inc., Icon Plumbing and Heating Ltd., Mike Ladisa, and Joseph Ferrari

Defendants

AND BETWEEN:

Mike Ladisa and Joseph Ferrari

Plaintiffs by counterclaim

– and –

Riva Plumbing Limited

Defendant by counterclaim

REASONS FOR JUDGMENT

R. Centa J.

Released: May 29, 2025