

Indexed as:

Prodigy Graphics Group Inc. v. Fitz-Andrews

Between

Prodigy Graphics Group In. and Andy Patel, plaintiffs, and
Kenneth Gregory Derry Fitz-Andrews, Gina Suzanna Fitz-Andrews
and Ampito Investments Inc., defendants

And between

Kenneth Gregory Derry Fitz-Andrews, Gina Suzanna Fitz-Andrews
and Ampito Investments Inc., plaintiffs by counterclaim, and
Prodigy Graphics Group Inc., Andy Patel, Prodigy Printing
Services (1993) Inc. and Sulekha Patel, defendants by
counterclaim

[2000] O.J. No. 1203

Court File No. 94-CQ-58835

Ontario Superior Court of Justice
Cameron J.

Heard: January 24-28, 31, February 1-4, 7-11, 14, March 16,
17 and 20, 2000.

Judgment: April 10, 2000.
(170 paras.)

Professional occupations — Accountants — Compensation — Duty to keep time records — Fraud and misrepresentation — Fraudulent misrepresentation (deceit) — Fraudulent conveyances and preferences — Conveyances and preferences impeachable by creditors or others — Company law — Nature of corporations — Lifting the corporate veil — Injunctions — Remedies — Damages.

Action by Prodigy Graphics Group against Kenneth and Gina Fitz-Andrews for damages of \$180,000 for fraud and conversion. Counterclaim by Kenneth Fitz-Andrews for damages from unpaid accounts for professional services and an improperly-obtained certificate of pending litigation and Mareva injunction. Prodigy operated a printing business. Its principal was Patel. The Fitz-Andrews emigrated to Canada in 1989. Kenneth was hired by Prodigy's accountant, a firm called Savage and Moles, and eventually became a partner. Gina was the sole shareholder of a company named Ampito. Kenneth eventually became a sole practitioner and continued to do accounting work for Prodigy. In November 1992, Patel paid Ampito \$130,000, which Kenneth claimed was payment for an outstanding account. Kenneth was able to produce billing records

totaling 645 hours, although he did not produce any time dockets or computer records. Patel claimed that the money was to be remitted to Revenue Canada to satisfy unpaid employee withholding taxes. Patel did not see Kenneth's billing records before the litigation started, and claimed that the records were prepared after the action began in order to justify Kenneth's appropriation of these funds. Kenneth also received \$25,500 from Prodigy, which were deposited in his account at the Royal Bank. Patel claimed that the funds were for a payroll computer program and to convince the Bank that Prodigy was profitable. Kenneth contended that the money was payment for his services. On March 26, 1993, Kenneth and Gina purchased their rented home as joint tenants. Kenneth transferred his interest to Gina on the same date because he was a defendant in litigation with his former partner. Prodigy claimed that the transfer was a fraudulent conveyance. In 1994, Kenneth had billed Prodigy \$46,000 for unpaid services during the previous three years. To obtain payment, he appropriated to himself two Revenue Canada refund cheques payable to Prodigy totalling \$24,000. He claimed he was permitted to do this by the terms of his retainer, but Patel asserted that the authorization was a forgery. Revenue Canada assessed Prodigy for \$58,000 in unremitted source deductions. Kenneth produced five receipts from Revenue Canada to show that remittances were made, but Patel claimed that these also were forgeries. After the action was commenced in 1994, Prodigy obtained a certificate against Gina's home and an injunction to freeze Kenneth's assets. The certificate and the injunction were in force for six years, until the trial. Prodigy sued Gina to void the conveyance of the home, and to make her personally liable as a director of Ampito for the company's fraud. Kenneth counterclaimed for outstanding fees of \$46,000 and for damages from the continuation of the certificate and injunction.

HELD: Both the action and the counterclaim were allowed in part. Kenneth was ordered to repay the \$130,000. Prodigy's claim for \$25,500 was dismissed. Prodigy was ordered to pay Kenneth \$31,000 for unpaid services. Kenneth was required to repay Prodigy the tax refunds. Kenneth's counterclaim for damages was dismissed. The conveyance to Gina was void. The claim against Gina was dismissed. As a professional, Kenneth was obligated to provide credible evidence to justify his accounts. The Ampito account was not valid and was highly inflated. His back-up records were not credible. The receipts were not genuine. The account was not delivered before Kenneth received the \$130,000. The funds were intended for Revenue Canada. Prodigy did not prove that it was entitled to the \$25,500. The accounts for \$46,000 were inflated and were reduced. Considering Kenneth's lack of credibility, it was likely that the authorization to appropriate the refunds was a forgery. Gina had no knowledge or involvement of the Ampito account, nor did she authorize her husband's activities on behalf of Ampito. It would have been unjust to pierce the corporate veil to make her personally liable. There was no evidence that any of Prodigy's funds were used for the house purchase. Gina was therefore not liable for any of the funds appropriated by Kenneth. However, the conveyance to Gina was intended to defeat creditors, including Prodigy. Title to the home reverted to Kenneth and Gina as joint tenants. Kenneth failed to prove his damages from the imposition of the certificate and the injunction.

Statutes, Regulations and Rules Cited:

Fraudulent Conveyance Act, ss. 2, 3, 4.

Counsel:

Messod Boussidan and James Diamond, for the plaintiffs.
Kenneth Fitz-Andrews, on his own behalf.

INDEX

- I. The Parties
 - 1. The Patels and Prodigy
 - 2. The Fitz-Andrews and Ampito
- II. Outline of the Relationship 1990 - 1994
- III. The Claims and Counterclaims
- IV. The Issues
 - (1) The \$130,000 paid to Ampito
 - (2) The Cheques for \$25,500
 - (3) Mr. Fitz-Andrews' Accounts \$46,233
 - (4) Fraudulent Conveyance
 - (5) Claim on Undertaking to Pay Damages
- V. Burden of Proof
- VI. Assessing Credibility
- VII. The Payroll Scheme and Revenue Canada Assessments
- VIII. Purpose of the Three Personal Cheques: \$130,000
 - (1) The Ampito Account
 - (2) Revenue Canada Receipts
 - (3) Handwriting Expert
- IX. Royal Bank Payments: \$25,500
- X. Mr. Fitz-Andrews' Accounts: \$46,233
- XI. Appropriation of Revenue Canada Refunds
- XII. Claim Against Gina Fitz-Andrews
 - (1) As Director of Ampito
 - (2) Tracing
 - (3) Recipient of a Fraudulent Conveyance
- XIII. Claim for Failure to Disclose on the Motion for Mareva Injunction
- XIV. Summary

1 **CAMERON J.**— The plaintiffs claim damages of \$180,783.04 for fraud and conversion. The counterclaim for damages is based on inadequate disclosure in obtaining injunctive relief and the balance owing on accounts for professional services. Both cases turn on credibility and assessing alleged forgeries.

I. The Parties

1. The Patels and Prodigy

2 Andy Patel is the president, a director and 50% shareholder of Prodigy Graphics Group Inc., a 1995 amalgamation which includes Prodigy Industrial Printers Inc., later called Prodigy Printing Services (1993) Inc. (collectively "Prodigy"). Since 1975 Prodigy has operated a printing business in Mississauga. The business grew and expanded and by December 1992 had 23 employees. Sulekha Patel, Mr. Patel's wife, was and is a director and 50% shareholder of Prodigy. She worked about half of her time in Prodigy's office. Prodigy's accountant from 1986 to 1992 was a firm of chartered accountants in Brampton named Savage and Moles.

2. The Fitz-Andrews and Ampito

3 Kenneth Fitz-Andrews is a chartered accountant who had been with an international accounting firm in Trinidad and Tobago from the mid 1970s until he came to Canada in August 1989, followed shortly by his wife Gina Fitz-Andrews and their four children. They rented a home at 1224 Highgate Place in Mississauga. In October 1989, Mr. Fitz-Andrews was hired by Savage and Moles. Mr. Fitz-Andrews became one of two partners in the firm on May 1, 1990 and borrowed about \$180,000 from Royal Bank to finance the purchase of his capital interest in the firm. His draw cheques were often paid in advance. The partnership agreement required the partners to devote their full time and attention to partnership affairs.

4 Gina Fitz-Andrews is the president, a director and sole shareholder of Ampito Investments Limited ("Ampito"). She is also the registered owner of the family home purchased on March 26, 1993, which she and Mr. Fitz-Andrews had leased since September 1989.

5 Gina Fitz-Andrews purchased the shares of Ampito, an Ontario corporation, on November 16, 1992 to operate a business of selling school uniforms similar to that operated by his sister in the United Kingdom. Gina Fitz-Andrews, Mr. Fitz-Andrews and his sister are the directors of Ampito.

II. Outline of the Relationship 1990 - 1994

6 Mr. Fitz-Andrews started providing consulting services on behalf of Savage and Moles to Prodigy and the Patels in early 1990. These services included work relating to the sale of Mr. Patel's minority interest in another company, the purchase of a Komeri press, the purchase of a larger building on Creekbank Road to house Prodigy's growing operations and consolidation of Prodigy's borrowings with The Royal Bank of Canada ("Royal Bank").

7 In February 1991, Mr. Fitz-Andrews became involved in Prodigy's negotiations of a contract for the purchase from Mitsubishi Litho Press Canada ("MLP") of three large

new presses for \$3 million and the financing of the purchase by Royal Bank. Mr. Fitz-Andrews testified that this involved him in much evening and weekend work in the preparation of business plans, financial projections and proposals on behalf of Prodigy. Savage and Moles rendered accounts for this work in September and December 1991 and October 1992.

8 Mr. Patel testified that he came to regard Mr. Fitz-Andrews as a "partner I didn't have".

9 In March 1992, Mr. Fitz-Andrews gave, and later withdrew, notice to terminate his partnership in Savage and Moles.

10 In April, September, October and November 1992, Prodigy paid to or for Mr. Fitz-Andrews' personal account at Royal Bank amounts of \$10,000, \$7,000, \$7,000 and \$1,500 respectively.

11 In September 1992, Mr. Fitz-Andrews started to withdraw from Savage and Moles and set up his own practice in temporary quarters. He formally registered with the Institute of Chartered Accountants of Ontario as a sole practitioner effective November 10, 1992.

12 In October 1992, Revenue Canada issued assessments against Prodigy for unremitted taxes withheld from employees in 1988 and 1989 plus penalty and interest. Mr. Fitz-Andrews delivered Prodigy's payment to Revenue Canada on October 28, 1992. On November 13, 1992 Revenue Canada issued an assessment against Prodigy in respect of 1990 unremitted employee withholdings for \$26,809.

13 On November 17, 1992, Mr. Patel and his wife wrote cheques from their personal accounts totalling \$130,000 to Ampito, the shares of which Gina Fitz-Andrews had purchased the day before for \$500 for the purpose of establishing a school uniform business.

14 The purpose of this payment is at the centre of this action.

15 In 1992, Mr. Fitz-Andrews and Carrol Meisner his partner in Savage and Moles were sued by a former landlord of the partnership. In December 1992, Mr. Fitz-Andrews commenced an action against Mr. Meisner arising out of the break-up of their partnership.

16 In March 1993, Mr. Fitz-Andrews moved his accounting practice from its initial temporary location to a nearby permanent office.

17 At about the same time Mr. and Mrs. Fitz-Andrews agreed to purchase the house they had been renting for the previous three years for \$300,000 cash. The transaction closed on March 26 with a deed to Gina and Mr. Fitz-Andrews. On the same day Mr. Fitz-Andrews transferred his interest to his wife

18 In May 1993, Mr. Fitz-Andrews rendered an account to Prodigy of \$29,000 for professional services to which Mr. Patel objected without supporting documentation.

19 In July 1993, Revenue Canada issued a Statement of Account showing unpaid amounts in respect of assessments for unremitted withholdings in 1990 and 1991 and an assessment for \$2,700 in respect of 1992. In November 1993 and January 1994 further amounts were assessed respecting 1991.

20 In completing the audit of Prodigy and a related company Prodigy Graphics Inc., Mr. Fitz-Andrews submitted to Mr. Patel in November 1993 audit engagement letters for each of the companies. Two "original" copies were submitted in evidence. The letter from Mr. Fitz-Andrews' file signed by Mr. Patel authorized Mr. Fitz-Andrews to apply rebates received from Revenue Canada to his outstanding accounts. There was no such authorization in Prodigy's copy.

21 In early 1994, Mr. Fitz-Andrews wrote to Mr. Patel respecting his concern with his outstanding accounts, including the May 1993 account which remained unpaid.

22 On March 3, 1994, Mr. Fitz-Andrews wrote to Mr. Patel and Royal Bank withdrawing Prodigy's audited financial statements for the fiscal year ended July 31, 1993 because of Prodigy's failure to include a contingent liability for employee withholdings owing to Revenue Canada in respect of the calendar year 1992.

23 On the same day Mr. Fitz-Andrews wrote to Mr. Patel complaining of the non-payment of his outstanding accounts, explaining the work done and recording his upset at the request for supporting dockets "in view of previous transactions not requiring this". He concluded with a refusal to provide further services until his outstanding accounts were settled.

24 In May 1994, Mr. Fitz-Andrews remitted a statement of account to the Prodigy companies respecting accounts dating back to the disputed May 1993 account and showing payments received. The balance owing was \$46,233, less amounts held in trust of \$25,283.04, leaving a "net balance due" of \$20,946.06. The accounts in trust included the proceeds of two cheques from Revenue Canada payable to Prodigy totalling \$24,181.58 received by Mr. Fitz-Andrews in February 1994 and cashed by him.

25 In June of 1994 Mr. Patel, with his new accountant Joel Levitt, voluntarily disclosed to Revenue Canada Prodigy's failure to remit employee withholdings in the calendar year 1992. Prodigy was assessed for principal amounts owing in respect of 1992, \$19,146 on July 27, 1994 and \$38,679 on November 17, 1994. Additional amounts were assessed for 20% penalty and interest.

26 This action was commenced on November 29, 1994. On December 12, 1994 the plaintiffs filed affidavits in support of an ex parte motion resulting in a certificate of pending litigation against the home registered in Gina Fitz-Andrews' name and a mareva injunction freezing Mr. Fitz-Andrews' assets. The defendants filed responding material on December 21, 1994. On return of the motion the injunction was amended to release \$10,000 to Mr. Fitz-Andrews, otherwise it was to continue pending deposit of security of \$25,000 in cash and a letter of credit for \$50,000. The motion was adjourned to allow for cross-examinations. The cross-examinations were not held until almost six years later in the autumn of 1999. On return of the motion the court continued the injunction and certificate of pending litigation until this trial.

27 There were numerous interlocutory proceedings arising out of the discovery process.

III. The Claims and Counterclaims

28 Mr. Patel has sued the defendants for damages of \$130,000. Prodigy has sued the defendants for \$25,500 and the defendant Mr. Fitz-Andrews for a further \$24,181 based

on fraud and conversion. The plaintiffs have sued Gina Fitz-Andrews to void a fraudulent conveyance to her and to make her personally liable as a director of Ampito for a fraud by Ampito.

29 Mr. Fitz-Andrews counterclaims against Andy and Sulekha Patel and Prodigy for outstanding fees of \$46,233.10.

30 He also claims damages resulting from obtaining ex parte a certificate of pending litigation and an interim mareva injunction, and continuation thereof pending cross-examinations. Mr. Fitz-Andrews claims the affidavits used to obtain the certificate of pending litigation and mareva injunction were materially misleading and lacked material disclosure respecting Mr. Patel's participation in the tax evasion scheme which he blamed on Mr. Fitz-Andrews.

31 Mr. Fitz-Andrews' claims for damages based on allegations of libel by statements contained in the statement of claim and in the affidavits used to obtain the certificate of pending litigation and interim mareva injunction must be dismissed. Statements in pleadings and affidavits in court proceedings are absolutely privileged: *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779. In addition, the libel charged has not been pleaded with sufficient particularity.

32 The claims against Sulekha Patel based on an alleged duty to disclose known shortcomings in the affidavits supporting the motions for interlocutory relief must be dismissed because she was not a party at the time of swearing the affidavits. She can only be liable if her conduct was such as to make her liable in her capacity as a director of Prodigy.

IV. The Issues

33 The five issues in this case turn on credibility.

1. The \$130,000 Paid to Ampito

34 Mr. Patel alleges that Mr. Fitz-Andrews defrauded him of \$130,000 by misappropriating the proceeds of Mr. Patel's personal cheques paid to Ampito, to pay off an account of Ampito of \$130,500 for consulting services allegedly rendered by Mr. Fitz-Andrews in 1991 and 1992. Mr. Patel alleges the purpose of the cheques was to pay Prodigy's tax liabilities to Revenue Canada.

35 Mr. Patel alleges the Ampito account is fabricated. He denies receiving the account and further denies that such work was done. Mr. Patel alleges that Mr. Fitz-Andrews (a) presented to him false receipts of Revenue Canada to hide the misappropriation, (b) allowed him to make a copy of the receipts, and (c) received back from him the original receipts.

36 Mr. Fitz-Andrews asserts that his account is bona fide and based on time spent on evenings and weekends on Prodigy's affairs noted in his calendar diaries. Mr. Fitz-Andrews says he delivered the Ampito account to Mr. Patel. Mr. Fitz-Andrews asserts the payment of the account is in accordance with a private oral agreement between the parties respecting his services performed for Prodigy. Mr. Patel denies any such agreement.

37 Mr. Fitz-Andrews denies he obtained the Revenue Canada receipts or showed them to the Patels. He asserts that the receipts were fabricated by Mr. Patel.

A handwriting expert has opined that there is a "high probability" that the handwriting on the receipts is that of Mr. Fitz-Andrews.

2. Cheques for \$25,500

38 In 1992 Prodigy wrote four cheques totalling \$25,500 payable to Royal Bank, which were given to Mr. Fitz-Andrews, as follows: April 10 - \$10,000; September 1 - \$7,000; October 1 - \$7,000 and November 1 - \$1,500. These were deposited to Mr. Fitz-Andrews' account.

39 Mr. Patel says these were payments for setting up a payroll computer programme and for deferral of payment of taxes withheld from employees for the purpose of making Prodigy's profits look greater so Royal Bank would fulfill its agreement to lend part of the purchase price for new printing presses payable to MLP Canada eleven months after their delivery in January, 1992. Mr. Fitz-Andrews denies participating in any such arrangement and claims the payments were for legitimate consulting services. Mr. Patel says Mr. Fitz-Andrews promised to send him an account for these payments but did not do so.

3. Mr. Fitz-Andrews' Accounts \$46,233

40 Mr. Fitz-Andrews rendered accounts to the Prodigy group of companies for work done in late 1992, 1993 and early 1994 which Mr. Patel disputes. Mr. Fitz-Andrews appropriated to himself in February 1994 two Revenue Canada refund cheques payable to Prodigy totalling \$24,181 alleging that he was authorized to do so by reason of an authorization on page 2 of Prodigy's engagement letter dated November 22, 1993 signed by Mr. Patel which retained Mr. Fitz-Andrews to audit the financial statements for the year ended July 31, 1993.

41 Mr. Patel alleges that Mr. Fitz-Andrews substituted the page 2 containing an authorization for the page which he says he signed which contained no such authorization. Mr. Fitz-Andrews alleges that Mr. Patel fraudulently substituted the page 2 in the letter that Mr. Patel produced for the page containing the authorization which Mr. Fitz-Andrews produced.

4. Fraudulent Conveyance

42 Was the conveyance of the family home by Mr. Fitz-Andrews to his wife made with the intent to defeat or hinder his creditors as contemplated in s. 2 of the Fraudulent Conveyances Act?

5. Claim on Undertaking to Pay damages

43 Mr. Fitz-Andrews alleges that the Patels and Prodigy gave materially misleading evidence in the affidavits used to obtain and continue the certificate of pending litigation and the interlocutory mareva injunction freezing the Fitz-Andrews' house and other assets following commencement of this action in November 1994. Mr. Fitz-Andrews alleges it wrongfully accused him of fraudulent conduct and failed to disclose Mr. Patel's involvement in tax evasion.

V. Burden of Proof

44 In civil cases, where there is an allegation of criminal or morally blameworthy conduct, the civil burden of proof, namely the balance or preponderance of probabilities,

applies. In determining whether it is satisfied, the court may consider the cogency of the evidence and scrutinize the evidence with greater care, bearing in mind the consequences of its decision: J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1998) at p. 156-158 citing *Continental Insurance Company v. Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164; 131 D.L.R. (3d) 559, per Laskin, C.J.C., *Boykovich v. Boykovich*, [1955] S.C.R. 151; [1955] 1 D.L.R. 181; and *Smith v. Smith*, [1952] 2 S.C.R. 312; [1952] 3 D.L.R. 449 per Cartwright J. In this case Mr. Fitz-Andrews' professional licence is clearly at risk.

VI. Assessing Credibility

45 A most difficult task for a finder of fact is to determine the truth. The process is more difficult if both sides may have a motive to offer less than the whole truth or if the events occurred so long ago as to permit human nature and time to work on the recollection of a witness. I call this unconsciously selective hindsight through rose coloured glasses.

46 I have examined and assessed the evidence of each witness and the exhibits presented at trial using, where appropriate, the following traditional criteria:

- 1) Lack of testimonial qualification
- 2) Demeanour of Witness: apparent honesty, forthrightness, openness, spontaneity, firm memory, accuracy, evasiveness
- 3) Bias/Interest in the Outcome (if a party, motive)
- 4) Relationship/Hostility to a party
- 5) Inherent probability in the circumstances i.e. in the context of the other evidence does it have an "air of reality"
- 6) Internal consistency i.e. with other parts of this witness' evidence at trial and on prior occasions.
- 7) External consistency i.e. with other credible witnesses and documents
- 8) Factors applicable to written evidence:
 - (a) Presence or absence of details supporting conclusory assertions
 - (b) Artful drafting which shields equivocation
 - (c) Use of language in an affidavit which is inappropriate to the particular witness
 - (d) Indications that the deponent has not read the affidavit
 - (e) Affidavits which lack the best evidence available
 - (f) Lack of precision and factual errors
 - (g) Omission of significant facts which should be addressed
 - (h) Disguised hearsay

See for example, Alan W. Mewett and Peter J. Sankoff, *Witnesses*, chapter 11, (Toronto: Carswell, Looseleaf).

47 An adverse inference may be drawn against a party for failure, without adequate explanation, to call a relevant witness or submit relevant evidence which would be expected to support the party's case against the other party. The court may infer that the witness was not called out of a fear that he would not have supported that party's case. The inference may be drawn notwithstanding the witnesses' availability to be subpoenaed by either party in the case: *Goldstein v. Davison* (1994), 39 R.P.R. (2d) 61 (Ont.Ct.Gen.Div.) per Ground J., citing *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask.C.A.) and *Clairborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.). See also *Medalist Holdings Ltd. v. General Electric Capital Equipment Finance Inc.*, [1997] O.J. No. 1995 (Ont.Ct.Gen.Div.) per Greer J. and *Telmu v. Victor Projects Ltd.*, [1995] B.C.J. No. 2255 per Lowry J.

48 A proper application of these principles requires that the finder of fact be provided with, or create, a detailed overall chronology of events relevant to the facts in issue in the pleadings and to the facts on collateral issues such as credibility of the evidence. The evidence on each of these issues must also be analyzed in the context of the chronology of the facts relevant to each of the issues. I have attempted to do this.

49 I do not intend to record in this judgment all the evidence offered during 16 days of trial or referred to in three days of argument. The evidence on the numerous collateral issues includes time diaries for three years, purchase, loan and lease agreements on which Mr. Fitz-Andrews worked, accounts rendered to Prodigy or the Patels for accounting and consulting services, inconsistent computer generated payroll records, financial statements, T4 summary reports to Revenue Canada, Revenue Canada notices of assessments for 1988, 1989, 1990, 1991 and 1992 and statements of account over the period September 1992 to November 1994 respecting Prodigy, photocopy of receipts of payments ostensibly issued by Revenue Canada, documents relating to the purchase and mortgages of the Fitz-Andrews' home, the Savage and Moles partnership agreement, a summary of Mr. Fitz-Andrews' docketing, correspondence respecting his withdrawal from his partnership or its cessation, motion records on the application for an interim *mareva* injunction and certificate of pending litigation and the return of the motion for interlocutory relief, two versions of an audit engagement letter, Prodigy cheques payable to Mr. Fitz-Andrews' account at Royal Bank and the purchase or establishment and organization of various companies.

50 In assessing the evidence of Sulekha Patel, I found her to be well prepared on the two issues for which she was called to testify but, considering her share ownership and long involvement with Prodigy, totally unresponsive on cross-examination and on discovery with too many replies such as "I don't remember" to harmless questions on which she should have known the answers. Her lawyer interrupted so frequently in the discovery as to make me wonder what she was hiding. I readily acknowledge that most of his other objections respecting relevance, harassment and repetition by Mr. Fitz-Andrews were quite proper. This assessment of Mrs. Patel raises a question as to the reliability of Mr. Patel's evidence beyond the scrutiny accorded an interested and otherwise open and forthright party.

VII. The Payroll Scheme and Revenue Canada Assessments

51 Mr. Patel testified that Mr. Fitz-Andrews became involved in setting up a computer payroll program and in calculating pay and deductions in early 1992 after Prodigy's part-time payroll clerk Paul Frimpong disappeared, allegedly taking with him most of Prodigy's payroll records.

52 Mr. Fitz-Andrews denies becoming involved in setting up such a program or in calculating Prodigy's payroll and deductions. Mr. Fitz-Andrews testified that as accountant for Prodigy, he only prepared the T-4 slips and T-4 summary following the calendar year end and reviewed the internal monthly statements before they were forwarded to Prodigy's bankers.

53 Mr. Patel alleges that Mr. Fitz-Andrews was party with him in a scheme to mislead the Royal Bank into thinking Prodigy was more profitable than it really was by giving it false statements to ensure advance of a loan. Did Mr. Fitz-Andrews withhold from Prodigy's monthly statements provided to its bankers accrued liabilities for employee remittances to Revenue Canada by showing these employees as employees of Ampito and deferring the monthly payments of the withholdings to Revenue Canada? The evidence on this collateral issue is conflicting and inconclusive. Mr. Patel says the reason for Prodigy paying \$25,500 to Mr. Fitz-Andrews' account at Royal Bank was for his part in developing this scheme and as a bonus for helping Prodigy achieve a profit in the fiscal year ended July 1992. Mr. Fitz-Andrews denies this allegation and asserts the payments were for professional services rendered. Mr. Patel denies liability because it has never been specifically billed.

54 In October 1992, Prodigy received assessments for employee deductions for income tax, unemployment insurance and Canada Pension Plan which had not been remitted in respect of the calendar years 1988 and 1989 totalling \$24,510.03, including penalties and interest. Prodigy gave Mr. Fitz-Andrews a cheque which he delivered to Revenue Canada.

55 Within a few days after November 13, 1992 Prodigy received an assessment for unpaid employee withholdings in 1990 totalling \$26,089.85 including penalty and interest. Mr. Fitz-Andrews said that following discussions with Revenue Canada he told Mr. Patel that Prodigy's file was being reviewed. Prodigy made payments often in the subsequent months.

56 In July 1993 Prodigy received a statement of account from Revenue Canada showing assessments and payments as follows:

	Total Assessed	Total Owing (Including Penalty and Interest)
1990	80,717	21,394
1991	79,652	62,130
1992	2,753	3,152

57 Prodigy continued to make payments on account. In November 1993 and January 1994, a further \$14,506 was assessed in respect of employee withholdings for 1991 and on February 25, 1994 a further \$11,890 plus interest and taxes as assessed in respect of 1990.

58 On July 27, 1994 and November 17, 1994, following self reporting on the advice of its new accountant Joel Levitt, Prodigy was assessed in respect of 1992 a further \$19,146 and \$38,679 which, with penalties and interest, totalled \$71,884.

59 The total withholdings assessed for 1992 were \$60,578.88 plus 10% penalty plus interest from the 15th day of the month following deduction from the employees' pay.

60 Prodigy paid all amounts assessed by Revenue Canada in respect of unpaid payroll deductions by 1995.

61 I am satisfied from the Revenue Canada assessments in October and November 1992 and in 1993 that Mr. Patel caused Prodigy to withhold reporting and payment of employee payroll deductions during the period 1988 to 1993. Contrary to Mr. Patel's allegations, Mr. Fitz-Andrews had nothing to do with these activities until 1992, if at all, following the disappearance of Prodigy's part-time bookkeeper, Paul Frimpong, in late 1991.

XIII. Purpose of the Three Personal Cheques: \$130,000

62 The central issue in this case is the purpose for which Mr. Patel drew three personal cheques in his office in the presence of Sulekha Patel and Mr. Fitz-Andrews. One cheque was drawn by Mr. Patel on a joint account with his wife and two were drawn on Mr. Patel's personal account. The cheques were payable to Ampito in the amounts of \$30,000 dated November 17, 1992, \$50,000 dated November 27, 1992 and \$50,000 dated December 4, 1992. The latter cheques were said to be post dated to coincide with the maturity dates of some personally held guaranteed income certificates. The cheques were handed to Mr. Fitz-Andrews in the presence of both Patels who testified that Mr. Fitz-Andrews said that the proceeds would be paid to Revenue Canada. Mr. Patel testified that the cheques were for the withholding taxes payable on account of Prodigy employees for 1992 which he and Mr. Fitz-Andrews agreed would be transferred to Ampito's payroll, without accruing the liability on Prodigy's books, to reduce the costs and increase the revenues of Prodigy so as not to default on the loan agreement with Royal Bank. Mr. Patel further testified that the amount of the cheques was recommended by Mr. Fitz-Andrews.

63 Mr. Fitz-Andrews denies there was any such agreement between them to transfer Prodigy employees to Ampito or that the proceeds of the cheques were to be used to pay Revenue Canada. Mr. Fitz-Andrews says the purpose of the cheques was to pay the account of Ampito dated November 10, 1992 for \$130,000 for consulting services during evenings and week-ends for Prodigy and the Patels noted in his diaries during 1991 and 1992. Mr. Fitz-Andrews said this work was in accordance with an oral agreement he had with Mr. Patel that such services would be billed by Mr. Fitz-Andrews to Mr. Patel.

64 I heard much evidence concerning Mr. Fitz-Andrews' participation in the negotiations and the agreed terms for the purchase of three printing presses and financing of the purchase through a loan agreement with Royal Bank in 1991 and early 1992.

1. The Ampito Account

65 Mr. Fitz-Andrews says the account was delivered to Mr. Patel on November 11, 1992. The account is headed "Ampito Investments Ltd., 1 Regan Rd., Unit 20, Brampton, Ontario", is addressed to "Narendra and Sulekha Patel" at their home and is dated November 10, 1992. The body of the account reads as follows:

As per private agreement:

For special consulting services and preparation of special feasibility studies, cash flow projections, financial projections for 5 year period re: Prodigy Industrial Printers Inc.

For several consultations and meetings with M.L.P. re: the negotiations and eventual purchase of three (3) printing presses valued at \$4,500,000.00.

Consultation commenced - one-year period - for negotiation with Royal Bank of Canada and the finalization of financing of \$3,090,000.00 - to purchase three (3) printing presses from Royal Bank of Canada.

For drafting and preparation of buy-back agreement re: Royal Bank and M.L.P. to secure equipment loan.

For negotiating three (3) year interest free loan for Prodigy Industrial Printers Inc. in the sum of \$370,000.00 from M.L.P. (Japan).

To visits to several manufacturers in U.S.A. to review equipment and to meet with company officials.

To negotiations and finalization of purchase of two industrial condominium units from Ravpan Investments Limited - Purchase Price \$240,000.00.

To negotiations and finalization of 1 residential condominium unit at Webb Drive, Mississauga.

To several meetings with your solicitors re: the above matters.

TOTAL STAFF HOURS = 645 HOURS

TOTAL MY FEE \$ 145,000.00

COURTESY DISCOUNT \$ 14,500.00

NET FEE \$ 130,500.00

66 Mr. Patel denies seeing this account before the commencement of this litigation. He alleges it was prepared after the commencement of this litigation to justify appropriation of the \$130,000. The account appeared in the defendants' responding materials and motion record filed December 21, 1994 following receipt on December 16, 1994 of the material used on the ex parte injunction motion on December 12, 1994. The responding material included vehement denials of the allegations in the plaintiffs' materials of fraud and participation in the scheme to put Prodigy employees in Ampito.

67 The account is addressed to the individuals and not to Prodigy. It is addressed to the individuals in the names used on two of the cheques and not to "Andy" Patel as he was normally addressed by Mr. Fitz-Andrews.

68 Why would the Patels want the account personally when they could not deduct it as an expense but Prodigy could?

69 The account is dated six days before Mr. Fitz-Andrews purchased the shares of Ampito for \$500. When asked why he billed in the name of a company he did not yet own, Mr. Fitz-Andrews said he was not comfortable billing in his own name because of his uncertainty respecting the break-up of his partnership, this in spite of having letterhead in the name of his accounting practice at the time.

70 He later said he had a one page written agreement to purchase Ampito which was replaced by the formal share purchase agreement of November 16, 1992, the date of closing. No such preliminary agreement was produced. Further, Mr. Fitz-Andrews said he needed the money to start his new practice which was registered with Institute of Chartered Accountants of Ontario in November 10, 1992, and needed a corporation to bill the account for tax postponement purposes. He said he could not wait until his lawyers effected his instructions to incorporate his consulting firm, Fitz-Andrews and Associates Inc. ("Associates"). That company was incorporated December 4, 1992. Mr. Fitz-Andrews testified that Ampito transferred its net assets of \$81,462 to Associates and Associates declared it as income in its fiscal year ending January 31, 1994.

71 The invoice used a typed address, different from the print font on the rest of the document, of "1 Regan Rd." On November 10, 1992, Mr. Fitz-Andrews' new accounting practice was located at 18 Regan Rd., Suites 28 and 29. He did not move to 1 Regan Rd. until February or March 1993. In January and February 1993, he was using stationery for his accounts and fax transmittal sheets on which were printed the address of 18 Regan Rd. However, the Toronto Dominion Bank monthly statements for Ampito for the periods ending November 30, and December 31, 1992 showing the deposits of the Patel's cheques on November 18 and 27, and December 4, 1992 show Ampito's address as 1 Regan Road. During that period Ampito's address was not on its cheques. The Corporations Information Act notice recording the purchase of Ampito was not filed until June 1993. It showed the Fitz-Andrews' home address as the principal place of business and a lawyer's office as the head office.

72 Ampito's income tax returns show no income for the taxation year ended April 30, 1993. Mr. Fitz-Andrews testified that he transferred the net amount remaining, after some expenses and payments to himself, to Associates in its fiscal year ended January 31, 1994 and that the tax was paid on it there.

73 The Ampito invoice charged no GST. Ampito had not registered with GST. Had it applied for and obtained a GST number it would have had to explain the invoice on a GST audit.

74 Mr. Fitz-Andrews testified that he had agreed with Carroll Meisner, his partner, to modifying the partnership agreement so as to permit him to work evenings and weekends or "off hours" on his own account without accounting to the partnership because an employed accountant had also been permitted to do so. Carroll Meisner, who was Mr. Fitz-Andrews' partner until Mr. Fitz-Andrews set up his own practice in the fall of 1992, testified that he never agreed to amend the "whole time and attention" clause in their partnership agreement to allow Mr. Fitz-Andrews to do accounting work on his own time for his own account. While this is a collateral matter, it shows the source of obvious friction between the two former partners and Mr. Fitz-Andrews' unhappiness in the firm.

75 Mr. Meisner explained the Savage and Moles accounts rendered to Prodigy. On September 25, 1991, Savage and Moles billed Prodigy \$2,100 for preparation of a review of annual statements and corporate tax returns. On December 18, 1991, Savage and Moles billed Prodigy \$6,500 in respect of \$3,675 docketed time in Prodigy's fiscal year ended July 31, 1991 for consulting services on the purchase of three presses from MLP and the related financing from Royal Bank. On October 5, 1992, Savage and Moles

billed Prodigy for services in Prodigy's 1992 fiscal year respecting meetings with MLP and Royal Bank to review the financings: \$2,850, application for an FBDB loan: \$1,245; and GST matters and assessments: \$1,150.

76 Mr. Meisner testified that Mr. Fitz-Andrews' hourly billing rates in 1990-1992 were \$130 for accounting work and \$160 for consulting work, that it was firm policy to enter docketed time into the computerized accounting system daily and that bills were sent based on docketed hours at these rates.

77 Mr. Meisner also reviewed a summary of Mr. Fitz-Andrews' billable and non-billable hours docketed in 1992 until about September 15, 1992. If projected to year end Mr. Fitz-Andrews would have docketed about 2240 hours for 1992 compared to 2266 hours docketed in 1991 when he was an employee. None of Mr. Fitz-Andrews' docketed time at Savage and Moles included the 645 hours billed by Ampito to the Patels on November 10, 1992.

78 Mr. Fitz-Andrews produced no dockets or computer records showing time docketed to Prodigy. He did present diaries for January 1, 1991 to December 31, 1993 noting appointments and the names of clients, sometimes with time recorded in tenths of hours. There are comparatively few entries for other clients. The totals of these entries in 1992 for Prodigy do not seem to match the time he docketed at Savage and Moles in May and June 1992. There are many entries, sometimes during normal working hours but generally in the evenings and on holidays and weekends, bracketing off blocks of time often in pencil, with "P.I.P." or "Prodigy" or "Andy" noted generally in ink and frequently with a similar quick hand, or "P.I.P." with a number of hours noted. In virtually all of these cases there is no description whatsoever of the work done. While different pens are used even on the same day, the same pen seems to have been used for "P.I.P." over a period of time, while the bracketed hours are often in pencil. Sometimes time was blocked off in "off hours" when there were gaps in the regular work hours.

79 Mr. Fitz-Andrews suggests no description of the work is required because it was all on the MLP purchase and the Royal Bank financing.

80 I am not persuaded, on the balance of probabilities, that Mr. Fitz-Andrews spent 645 hours, or anything approaching it, on the work described in the Ampito account in addition to the billings by Savage and Moles for that work. In view of the evidence of the scope of Mr. Fitz-Andrews' involvement in the work described in the Ampito account, particularly in respect of projections, analysis and proposals inherently necessary for the contract for the three new presses with MLP and proposals for its financing and settling the Royal Bank financing, he possibly docketed some additional "off hours" work for Prodigy in 1991 and 1992 which was not billed by Savage and Moles. However these records are not credible.

81 Mr. Fitz-Andrews did not present in evidence his files to show details of the work he did, such as telephone memos, correspondence, draft budgets, draft business plans, draft financial projections, etc. He did have a handwritten proposal, apparently to Royal Bank, a handwritten draft "buy back" agreement for execution by MLP to facilitate Royal Bank's financing, some handwritten notes commenting on terms of an agreement, handwritten financial calculations and other handwritten documents.

82 Mr. Fitz-Andrews says he waited so long to bill this "off hours" work, going back to February 1991, because he had an agreement with Mr. Patel that this off hours work would not be billed until Royal Bank advanced the loan to be made under the loan agreement of December 2, 1991 eleven months after delivery of the three new presses from MLP in January, 1992. Mr. Patel denies there was any such agreement and he claims he thought this work was billed by Savage and Moles only.

83 If a professional person renders an account for services he or she must be prepared to justify that account with credible supporting evidence based on not only docketed hours but also other elements such as result achieved, value to client and the client's ability to pay. Mr. Fitz-Andrews' time entries lack an air of reality both in the manner of their entry and the absence of any written description of the work done. In as much as docket entries of a professional are self serving, they must contain sufficient detail of the services performed to give them an air of reality and provide a means of testing their veracity, both by internal comparison and comparison with external events such as the work product. This is equally so when the professional has a contractual, and possibly fiduciary obligation, to account to his employer and to his partner for such work. There is no evidence that Mr. Fitz-Andrews discussed the matter with Mr. Patel before rendering the account, which one might expect with an account of this size for this client.

2. Revenue Canada Receipts

84 A critical piece of evidence in this case is a photocopy of what purports to be five forms of small bilingual preprinted receipts, obviously available to tax payers for payment of taxes, each of which is filled in with handwriting to show Account Number "XXX XXXXXX" and each of which has the impression of a rubber stamp reading in capital letters: [Quicklaw note: Numbers replaced by X's by Quicklaw]

DEPARTMENT OF NATIONAL REVENUE

TAXATION DIVISION

(Date - stamped)

DELIVERED BY HAND

The receipts are unsigned. They contain neither the location of the Revenue Canada office nor a number to identify the location or user of the stamp.

85 The other particulars on each receipt are handwritten as follows:

Date	Deduction Period	Amount	Date on DNR Stamp
20.11.92	1992	29,652	Nov. 22, 1992
9.12.92	1992	14,758.12	Dec. 9, 1992
15.12.92	1992	37,697.14	Dec. 15, 1992
15.1.93	-	23,912.00	Jan. 15, 1993

Mr. Patel and Sulekha Patel testified that they pressed Mr. Fitz-Andrews for evidence that he had applied the proceeds of Mr. Patel's personal cheques to Prodigy's account with Revenue Canada. They said that Mr. Fitz-Andrews showed up at Prodigy's office in early 1993 and, in the presence of the Patels, gave the originals of these receipts to Sulekha

Patel and asked her to photocopy them. She did so. They said Mr. Fitz-Andrews asked that she return the original receipts to him, which she did. The Patels said that Mr. Fitz-Andrews wrote on the bottom of the photocopy of the receipts left with them "128,644.45". The Patels testified that this photocopy was placed in Prodigy's files and that Mr. Fitz-Andrews left the office with the original receipts. The original receipts were not listed in either party's affidavit of documents or produced on discovery.

86 Mr. Patel testified that in July 1993 Revenue Canada assessed Prodigy for 1992 withholdings of \$2,752.99 plus interest and penalties which Mr. Patel thought had been paid in 1992 by Mr. Fitz-Andrews. This, says Mr. Patel, was the first indication that the proceeds of the three cheques might not have been used to pay Prodigy's taxes.

87 In 1994 Mr. Patel, on the advice of his new accountant Joel Levitt, disclosed under Revenue Canada's voluntary disclosure procedure his failure to remit substantial employee withholdings in respect of 1992. Revenue Canada subsequently assessed Prodigy \$57,825.89 plus penalties and interest. Mr. Patel and Mr. Levitt testified that Revenue Canada denied receiving any of the amounts noted on the five receipts. Prodigy paid the subsequently assessed taxes, interest and penalty. Revenue Canada is prevented by statute from disclosing amounts assessed against and paid by other taxpayers without their consent. There was no evidence presented as to the state of Ampito's accounts with Revenue Canada.

88 Prodigy alleges that the receipts were fabricated by Mr. Fitz-Andrews after this litigation was started to support his statement that he had fulfilled his undertaking to pay the proceeds of the three personal cheques totalling \$130,000 to Revenue Canada to cover up the appropriation of the proceeds to himself.

89 Mr. Fitz-Andrews vehemently denies the Patels' allegation. He testified that he has never seen either the original receipts or the photocopy entered as an exhibit. He testified that he first saw the photocopy following the commencement of this litigation. He alleges that Mr. Patel fabricated the receipts to support his story that the proceeds of the cheques were to be paid to Revenue Canada rather than to Ampito for Mr. Fitz-Andrews' services. Mr. Fitz-Andrews notes that the total taxes assessed for 1992 total only \$60,578.88, nothing approaching \$130,000, and there is no set of figures to which the \$130,000 relates except for the Ampito account.

90 Mr. Fitz-Andrews further notes that all payments of taxes for Prodigy were with cheques drawn on Prodigy's account and not on the Mr. Patel's personal accounts.

91 There is no evidence before me as to who or what taxpayer has account number XXX XXXXXX. Prodigy's account number with Revenue Canada was XXX XXXXXX. [Quicklaw note: Numbers replaced with X's by Quicklaw.] There is in evidence a photocopy of an employee copy (No. 3) of a T-4 Supplementary for 1992 for the Patels' son, Kamlesh Patel, which Mr. Patel said he prepared from information dictated to him by Mr. Fitz-Andrews. This shows an employer No. ABQ 9-690 (a different sequence of letters) in the blacked out area of the employee copy. This is unreliable evidence as to whether this sequence of numbers is on the original of this T-4 Supplementary. This document adds nothing to the issue of credibility. The original of this document was not in evidence and Kamlesh Patel did not testify.

92 There was a three-page computer printout of "Ampito Investments Inc. YTD Payroll Journal as at December 31, 1992" showing 13 employees, including Kamlesh Patel, showing the same gross income for him as the T-4 Supplementary. There is also in evidence a copy of a similar printout of seven pages for 23 employees including the 13 employees on the "Ampito" list except that it is headed "Prodigy Industrial Printers Inc. YTD Payroll Journal as at December 31, 1992". The first three pages of the two documents are the same. The last four pages of the latter document contains ten additional names and are separately totalled. These documents are inconclusive of anything except that someone may have been fiddling with Prodigy's computer for conflicting printouts. Mr. Levitt clearly obtained the Ampito list from Mr. Patel in 1994.

93 Mr. Fitz-Andrews points out that total liability for withholdings from the 13 employees common to these printouts would be either \$137,000 or \$139,000 for withholding tax plus the employee portions of CPP and UIC, a further \$18,000. In addition, the employer would be liable for its portion of payments for CPP and UIC. Even at the end of October this liability would have been about 5/6 of the year's total of about \$180,000 or about \$150,000 or slightly more because of CPP usually being paid up before year end. This amount bears no direct relationship to the \$130,000 in the cheques. The same is true for the 1992 withholdings assessed at \$60,000.

3. Handwriting Expert

94 I find the evidence of Ms. Diane Kruger, the handwriting expert called and qualified on behalf of Mr. Patel and Prodigy, to be convincing. She testified as to the methodology of her comparison of the handwriting on the photocopy of the receipts with original and photocopied documents containing known samples of the handwriting of Mr. Fitz-Andrews. These included fax transmittal sheets, two lengthy handwritten memoranda and sheets of accounting paper containing many rough arithmetic calculations. She said this sample size was more than sufficient to form an opinion. She compared each letter, number, bracket, dollar sign and punctuation mark on the receipts with similar writings on the known documents. She acknowledged a number of differences or variations between the receipts and the known handwriting and limitations in working with photocopies. It was Ms. Kruger's opinion that it is "highly probable" that the person who wrote out the originals of the receipts was the writer of the known documents. In cross-examination she explained that she could not be certain but her opinion was stronger than merely probable. She noted none of the hallmarks of forgery, such as tremor, poor line quality, pen lifts or difference in formation. Her evidence was not shaken on cross-examination by Mr. Fitz-Andrews.

95 Mr. Fitz-Andrews offered no expert evidence to contradict that of Ms. Kruger. He argued that the documents used by the expert as known samples of his handwriting were not properly admitted in evidence. However each of these known samples was contained in Exhibit 1 which he agreed to admit as evidence at the beginning of the trial.

96 I am persuaded, on comparing the known examples of copies of Mr. Fitz-Andrews' handwriting with that on the Revenue Canada receipts and with the support of Ms. Kruger's evidence as to the authorship of the receipts, that Mr. Fitz-Andrews produced the receipts for photocopying and that the proceeds of the personal cheques

were to be used by Mr. Fitz-Andrews to pay Prodigy's and Ampito's employee withholding tax liabilities. The cheques were not to pay the Ampito account for services dated November 10, 1992. No other explanation for the false receipts was offered by either Mr. Fitz-Andrews or by Mr. Patel.

97 Mr. Patel's new accountant Mr. Levitt, made some inquiries of Mr. Fitz-Andrews in August 1994 respecting the fate of the proceeds of the three personal cheques drawn by Mr. Patel in November 1992 totalling \$130,000. In a telephone conversation on August 15, 1994, Mr. Fitz-Andrews told Mr. Levitt that the cheque proceeds were used to pay off invoices rendered by Mr. Fitz-Andrews. Mr. Fitz-Andrews undertook to provide copies of the invoices to Mr. Levitt. On August 22, 1994, Mr. Fitz-Andrews met with Mr. Levitt and told him the \$130,000 was used for personal investments on behalf of the Patels and that Mr. Levitt should speak to the Patels to obtain supporting documentation. No supporting documentation was given to Mr. Levitt. Mr. Levitt made a handwritten note on August 22, 1994 of the essence of his conversations on August 15 and August 22.

98 Mr. Fitz-Andrews denied Mr. Levitt's evidence and said that his refusal was based on the fact that this was personal information and he was put off by Mr. Levitt's attitude. I find this a strange attitude in light of this being a conversation between two professionals acting for the same client where Mr. Fitz-Andrews' knowledge was not privileged. At this time Mr. Fitz-Andrews had had his falling out with Mr. Patel.

99 I am satisfied that the Ampito account was highly inflated, if not wholly without foundation. It cannot be justified. I am further satisfied the account was never delivered prior to the cheques being drawn in November 1992. I am satisfied that Mr. Fitz-Andrews had no right to appropriate this money to himself. He is liable to repay it to the Patels.

IX. Royal Bank Payments: \$25,500

100 Prodigy claims recovery of the proceeds of the following cheques payable to Royal Bank in 1992 and deposited to Mr. Fitz-Andrews' Account:

April 10	\$ 10,000
September 1	7,000
October 1	7,000
November 4	1,500

\$ 25,500

101 Mr. Patel said he paid Mr. Fitz-Andrews' account at Mr. Fitz-Andrews' direction after he told Mr. Patel that he was having trouble obtaining draws from his partnership. Mr. Patel said the \$10,000 set by Mr. Fitz-Andrews was paid in April for a payroll computer programme, supervising the payroll in the months following Mr. Frimpong's departure and advising on deductions and was intended to be paid to Savage and Moles and not just Mr. Fitz-Andrews. Prodigy claims recovery because no account had been issued. Mr. Patel said the September payment was for persuading Royal Bank of the profitability of Prodigy in the audit and for a "job well done" in completing the financial statements showing a profit for the fiscal year ended July 31, 1992. He said \$7,000 paid in October was related to the payroll manipulations, successful negotiation of the price of the new presses with MLP Canada and the successful financing with Royal Bank.

102 Mr. Fitz-Andrews acknowledges receipt of the payments but denies the purposes alleged by Mr. Patel. Mr. Fitz-Andrews says the purpose of the payments to him was payment for the incorporation of the four new companies, GST advice and advising Prodigy on the software to bring together the accounts for these four companies. It was not for deferral of payroll deductions payments to Revenue Canada so as to mislead Royal Bank. Mr. Fitz-Andrews denies any part in any payroll deferral. I have found that Mr. Patel was engaged in this activity before Mr. Fitz-Andrews came on the scene.

103 Mr. Fitz-Andrews also stated that he had an arrangement with Mr. Patel to review Prodigy's monthly financial statements before they were forwarded to Royal Bank, as required by Prodigy's borrowing arrangement with Royal Bank. These payments were merely a catch up for previously missed payments.

104 Mr. Patel alleges that the reorganization of Prodigy Industrial Printing in October-November, 1992 was part of Mr. Fitz-Andrews' plan for postponing tax liabilities. The following companies were incorporated on the following dates:

October 29, 1992	Post Prodigy Finishing Inc.
October 29, 1992	Prodigy Colour Systems Inc.
November 9, 1992	Prodigy Printing Services Inc.

Mr. Patel testified that this latter incorporation was supposed to be a change of name of Prodigy Industrial Printers Inc. This was remedied, he says, on July 30, 1993 when the following articles of amendment were filed to effect changes of name:

- 1) Mr. Patel's original company Prodigy Industrial Printers Inc. became Prodigy Printing Services (1993) Inc.
- 2) Prodigy Printing Services Inc. became 1007067 Ontario Inc.

105 Prodigy Graphics Group Inc., the plaintiff in this action, was incorporated in June 1993 and was amalgamated with Prodigy in 1995.

106 I see nothing sinister in dividing Prodigy's original business into separate corporations according to function.

107 Prodigy has not established a right to claim these payments to Royal Bank from Mr. Fitz-Andrews. In view of Mr. Patel's explanation of the reasons for the payments, I see no grounds to support the claim. I dismiss the claim for the \$25,500.

X. Mr. Fitz-Andrews' Accounts: \$46,233

108 On April 30, 1994, Mr. Fitz-Andrews prepared a Statement of Account for Prodigy summarizing statements of account he had rendered to the various companies in the Prodigy Group totalling \$58,609.25 and showing payments in 1993 of \$12,386.15, leaving a balance owing of \$46,233.10. The statement showed a trust balance of \$25,283.04 which was appropriated to reduce the balance due to \$20,940.06.

109 The accounts on the Statement of Account include one to Prodigy Colour dated April 20, 1993 (which was reduced and re-sent on May 5, 1993) for \$27,500 plus GST for a total of \$29,425 for organization in 1992, pro-forma statements, financing of a purchase from Crossfield, a new accounting system, discussions with Royal Bank and the lease of a property. Mr. Patel objected to the account pending a review of Mr. Fitz-Andrews' dockets and refused to pay it. Mr. Fitz-Andrews did not provide supporting evidence sufficient to support the account.

110 In determining Mr. Fitz-Andrews entitlement to the balance of \$46,233.10 owing on his accounts, I am in effect assessing his accounts in the absence of detailed time docketts and on the basis of the notes contained in his appointment book and the description and product of his efforts.

111 Mr. Fitz-Andrews justified these accounts as follows:

1991	Time for Prodigy Printers (noted above)	500 hrs.
1992	Time for all companies 1190.3 hrs.	690 hrs.

Less:

Ampito Account November 10, 1992 645 hrs. Payments in April, September, October and November 1992 totalling \$25,500 say 130 hrs.	775 hrs
---	---------

Unbilled balance	415 hrs.
------------------	----------

Less:

Prodigy Colour May '93 \$27,000, say 218 hrs. Other 1993 accounts approx. \$12,800 say 65 hrs.	283 hrs. 132 hrs.
---	----------------------

Less:

Post Prodigy March '94 - 68 hrs. Prodigy Graphics March '94 - 15 hrs. Prodigy Paper March '94 - 3 hrs	86 hrs.
---	---------

Unbilled	46 hrs.
----------	---------

112 This reasoning is spurious! An account should state the period covered by the account. These don't, lending themselves to this sort of carrying forward of "unbilled work in process" without notice to blindsides the client in the future and to suit the convenience of the person rendering the account.

113 Further, Mr. Fitz-Andrews' reasoning relied on an allegedly docketed 500 hours, in excess of that billed by Savage and Moles and the 645 hours by Ampito which I have rejected.

114 I have considered the accounts, the dates of incorporation of the billed companies, the work described therein, Mr. Fitz-Andrews' evidence, the work product made available to me and Mr. Fitz-Andrews billing rate of \$160 per hour.

115 I have also considered Mr. Patel's evidence on the bills and the circumstances surrounding the date of the bill.

116 The bills, inclusive of GST, are as follows:

Prodigy Colour - May 5, 1993	\$ 29,425.00
Individual Tax returns - April 1993	508.25
Prodigy Printing - December 14, 1993	12,294.30
649337 Ontario Ltd. - January 20, 1994	3,076.25
Post Prodigy - March 3, 1994	10,566.23
Prodigy Paper - March 3, 1994	535.00
Prodigy Graphics - March 3, 1994	2,204.25

Total: 58,609.25

I would allow on these accounts,
including G.S.T. 45,000.00

Less:

Payments	\$12,386.15
Transfer from trust	1,101.46
	13,487.61

Net amount owing: \$ 31,512.39

XI. Appropriation of Revenue Canada Refunds

117 Mr. Patel objects to the appropriation in February 1994 of the proceeds of two cheques totalling \$24,181 from Revenue Canada payable to Prodigy as rebates of over payments. Mr. Fitz-Andrews, as the addressee for service of Prodigy by Revenue Canada, received these cheques payable to Prodigy in February 1994 and persuaded his bank to cash them and deposit the proceeds in Mr. Fitz-Andrews' "trust account". Mr. Patel discovered this appropriation in early May 1994 on receipt of Mr. Fitz-Andrews' statement of account and demanded the proceeds of the cheques.

118 Mr. Fitz-Andrews refused the request saying he was authorized to seize them by a term on page 2 of the audit engagement letter for Prodigy Printing Services (1993) Inc. for its fiscal year ended July 31, 1993 dated November 22, 1993 which stated:

5. It is further understood and agreed that with the filing of all corporate tax returns it is agreed that all corporate tax refunds will be applied in trust against outstanding fees for the Prodigy Group of companies in view of the substantial nature of the services provided and substantial amounts outstanding.

6. It is further understood and agreed that you will be personally responsible for any fees billed and not paid by the group of companies.

Mr. Fitz-Andrews signed at the bottom of page 2 of the letter which requests Mr. Patel to sign a copy of the letter in the space provided and return it to Mr. Fitz-Andrews. The third page contains the agreement signed by Mr. Patel dated December 17, 1993. This document was produced from Mr. Fitz-Andrews' files.

119 Mr. Patel denies signing such a letter. He produced a copy of the letter he says he signed which does not contain paragraphs 5 and 6. It is signed by Mr. Fitz-Andrews on page 2 and there is provision for signing by Mr. Patel on page 3.

120 Each declares the other's version a forgery. Mr. Fitz-Andrews says he gave Mr. Patel four letters on that day. The others did not contain either the authorization to apply tax rebates to accounts or the personal "guarantee". He suggests Mr. Patel has taken the page 2 out of one of the other letters and substituted it for the page 2 which contains the authorization and the guarantee.

121 Mr. Patel accuses Mr. Fitz-Andrews of fabricating his version of page 2, removing the shorter page 2 he says he signed and substituting the longer version with the authorization and guarantee. Mr. Patel produced copies of engagement letters which he signed in previous years which do not contain such provisions.

122 The cross-examination of Mr. Fitz-Andrews straddled a weekend. On the Friday Mr. Fitz-Andrews said he merely inserted the two clauses in his word processor's standard form. On the Monday he acknowledged talking to someone about his evidence and said he must have created a new document by retyping the page without properly justifying the right margin.

123 Clause 5 respecting appropriation of tax refunds payable to the client is highly suspect. It is unlikely Mr. Patel would have signed such a clause in November 1993 in view of his refusal to pay Mr. Fitz-Andrews account of May 5, 1993, which replaced a larger account dated April 20, 1993, until he had received satisfactory evidence of dockets to support the account.

124 The cheques were payable to Prodigy rather than Mr. Fitz-Andrews. Why would either of them expect Mr. Fitz-Andrews to be able to negotiate the cheques with his bank and appropriate them to his own account without endorsement by an authorized signing officer of Prodigy? There is no evidence that Mr. Fitz-Andrews had such an authority.

125 In view of my findings on credibility in respect of the Ampito account, I have greater confidence in Mr. Patel's evidence, generally, than I have in the evidence of Mr. Fitz-Andrews'.

126 On this issue I find that Mr. Fitz-Andrews had no authority to appropriate to himself the \$24,181 represented by cheques payable to Prodigy. He is liable to pay this amount to Prodigy.

XII Claim Against Gina Fitz-Andrews

1. As Director of Ampito

127 There is no evidence that Gina Fitz-Andrews played any part whatsoever in the preparation or rendering of the Ampito account or the receipt or disbursement of the

\$130,000. There is no evidence that she had any knowledge of these events. While she was the sole shareholder, a director and an officer of Ampito, she was unaware of her husband's use of his authority as a director, officer and bank signing authority and did not authorize it. She played no part in the operation of the company. It would be wholly unjust to pierce the corporate veil to make her personally liable or make her an accessory to a breach of trust: see *Transamerica Life v. Canada Life* (1996), 28 O.R. (3d) 423 (Gen.Div.).

2. Tracing

128 There is no evidence that any of the proceeds of the Patels' cheques for \$130,000 can be traced to the payment of any part of the purchase price of the house. The use of the \$75,000 G.I.C. purchased with the proceeds of the \$130,000 and used as a "carrot" for the CIBC mortgage, but which was not in fact used in the purchase, cannot justify making Gina Fitz-Andrews liable for it.

129 Accordingly, I find that Gina Fitz-Andrews is not personally liable to the Patels for any part of the \$130,000 or to Prodigy for the \$25,500 paid to Royal Bank for Mr. Fitz-Andrews'. However, the plaintiffs allege that Gina Fitz-Andrews may be liable for the share of the property transferred to her by her husband in a deed from him to her of his interest by reason of the transaction being void under the Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

3. Recipient of Fraudulent Conveyance

130 On February 25, 1993, Gina and Mr. Fitz-Andrews signed an agreement to purchase for \$300,000 cash the house they had been renting at 1224 Highgate Place since 1989. The purchase price was payable \$10,000 down as a deposit and the balance on closing. It was conditional on the purchaser being approved for mortgage financing by Canadian Imperial Bank of Commerce ("CIBC") within 10 days. The purchase price included "existing appliances". No real estate commission was payable.

131 Gina Fitz-Andrews applied to CIBC for a mortgage of \$225,000 with Mr. Fitz-Andrews to be the guarantor. Their total incomes, all out of Mr. Fitz-Andrews' practice where Gina Fitz-Andrews did some work with payables, was stated to be slightly over \$100,000. Their investments consisted of a \$75,000 GIC with CIBC and \$9,000 with "Royal". They had a bank account of \$15,000, \$10,000 in the house purchase, \$200,000 in Mr. Fitz-Andrews' practice and \$30,000 in two cars. Mr. Fitz-Andrews owed Royal Bank \$71,000 in respect of his practice. The Fitz-Andrews said they would have \$75,000 cash equity in the property.

132 There is no indication whether the \$71,000 indebtedness to Royal Bank was in respect of his old practice or his new practice. Cheques and bank records in late 1993 indicate his new firm was using CIBC.

133 The purchase closed on March 26, 1993 with a deed to Gina and Mr. Fitz-Andrews as joint tenants. The land transfer tax affidavit sworn by Mr. Fitz-Andrews showed the consideration as \$300,000 cash.

134 There was a first mortgage by Gina and Mr. Fitz-Andrews to CIBC of \$225,000. While disclosure was called for in the land transfer tax affidavit, it was not mentioned.

135 The Amended Statement of Adjustments showed:

Sale Price		\$ 300,000.00
Deposit	\$ 10,000.00	
Vendor Mortgage Back	30,945.16	
Last Month's Rent	1,500.00	
Adjustment for Rent		
Payments	33,500.00	
(Tax Adjustment calculation)		945.16
Balance Due on Closing	225,000.00	
	\$ 300,645.16	\$ 300,945.16

The balance due on closing was the proceeds of the CIBC mortgage.

136 The adjustment for rent paid was described by the defendants as a credit for the air conditioner they had installed, a negotiated deduction for unpaid real estate commission, credit for repairs they had made as tenants and credit for appliances they had purchased and were entitled under the lease to take with them. In as much as these adjustments were not required under the agreement, I see no legitimate reason why they were made. If, instead of justifying \$33,500 adjustment the price had been reduced by that amount, their equity and the land transfer tax payable would have been less.

137 The mortgage back, not called for under the agreement, was negotiated by Mr. Fitz-Andrews. He told the vendors he could not close without it. In view of the vendor's intent to move back to India, they were motivated vendors. This explanation by Mr. Fitz-Andrews is credible.

138 The mortgage back to the vendors was for \$30,945.16 at 7.5% per year for 3 years, repayable interest only quarterly. It was from Gina Fitz-Andrews only and was guaranteed by Mr. Fitz-Andrews.

139 On March 25, 1993, Mr. Robert Filkin, solicitor for the Fitz-Andrews, wrote to Mr. Michael Bukovac, solicitor for the vendors, to confirm the terms of the second mortgage and "it not be registered". This is a risky and highly unusual position for any mortgagor to take. No explanation was offered. In fact, this mortgage was registered on August 6, 1993. On maturity in 1996 it was assigned to a corporation owed by the Fitz-Andrews family.

140 On the date of closing, March 26, 1993, Mr. Fitz-Andrews executed a transfer of the property to Gina Fitz-Andrews. The land transfer tax affidavit sworn by Mr. Fitz-Andrews states the consideration is "\$2 and natural love and affection" and "no consideration passing directly or indirectly". In response to a question in the affidavit as to whether the land is subject to any encumbrance it recites only: "Yes (\$225,000)". This deed was registered on April 2, 1993.

141 Mr. Fitz-Andrews testified that this deed was intended to rectify their intent prior to closing that Gina Fitz-Andrews be the registered owner of the property. Gina and Mr. Fitz-Andrews have continued to live in the house with their family.

142 There is no evidence that CIBC would be concerned with subordinate financing but perhaps Mr. Fitz-Andrews thought CIBC would object if his cost was little more than

the amount of its mortgage. First mortgagees generally want a cushion of owner equity in the range of 25 to 35 per cent. The lawyer acting for the Fitz-Andrews on the purchase, Mr. Filkin, was also acting for CIBC.

143 There is no evidence why the "correcting" deed, which was signed on the same date as the deed from the vendors, was not registered until a week later.

144 Neither Mr. Filkin, nor a representative of CIBC nor Mr. Bukovac was called to testify on behalf of the Fitz Andrews.

145 The Fraudulent Conveyance Act provides:

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void (sic) as against such persons and their assigns.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

146 There need only be an intention to defeat or hinder "creditors or others" of their lawful claims. There need not be an intention to defraud.

147 Mr. Fitz-Andrews acknowledged that the reason for putting title in his wife's name was because he was following the advice of his lawyer based on Mr. Fitz-Andrews' advice that he was a defendant in an outstanding lawsuit by a former landlord against Savage and Moles and because he was involved in litigation with his former partner Mr. Meisner. While not necessarily creditors yet, those parties were certainly "others" for the purpose of the Act: *Waterline Products Co. v. Lisaco Investments Ltd.*, [1991] O.J. No. 90 (Ont.Gen.Div.); *Gauthier v. Woollatt*, [1940] 1 D.L.R. 275 (S.C.O.); *Canadian Imperial Bank of Commerce v. Boukalis* (1987), 34 D.L.R. (4th) 481 at 487 (B.C.C.A.).

148 At the time Mr. Fitz-Andrews signed the deed, his creditors included the Patels in respect of the \$130,000.

149 The date on which the intent is to be assessed is the date the transfer was executed: *Bank of Montreal v. Chu* (1994), 17 O.R. (3d) 691.

150 Where proper consideration is lacking, the intent of the transferee is irrelevant; where the intent of the parties to the conveyance is to defraud creditors, the question of consideration is irrelevant: *Son v. Kim*, [1994] O.J. No. 2713 (Ont.Gen.Div.).

151 Accordingly, by reason of s. 2 of the Fraudulent Conveyances Act, the correcting deed was void and the title reverts to Gina and Mr. Fitz-Andrews as joint tenants.

152 Even if Mr. Fitz-Andrews had not stated his intent, a court may infer intent from suspicious circumstances which are referred to as the "badges of fraud", having their origins in *Twyne's Case* (1602), 3 Co. Rep. 80. These include:

- (1) Transfer to a non-arms length person.
- (2) Grossly inadequate consideration.
- (3) The transferor remains in possession on occupation of the property for his own use after the transfer.
- (4) The transferee is holding the property in trust for the transferor.
- (5) There are actual or potential liabilities facing the transferor or he is about to enter upon a risky undertaking.
- (6) The transferor has few remaining assets after the transfer.
- (7) The transfer was effected with unusual haste.
- (8) The transaction was secret.
- (9) The absence of a sound business or tax reason for the transaction.
- (10) Destruction or loss of relevant papers or inaccurate documents supporting the transaction.
- (11) Cash is taken in payment instead of a cheque.
- (12) The deed contains false statements as to the consideration.
- (13) The deed gives the grantor a general power to revoke the conveyance.
- (14) The deed contains the self-serving and unusual provision "that the gift was made honestly, truly and bona fide".

See *Canadian Imperial Bank of Commerce v. Graat*, [1992] O.J. No. 1112, per Granger J.; C.R.B. Dunlop, *Creditor, Debtor Law in Canada*, 2nd ed. (Toronto: Carswell, 1995).

153 The badges of fraud are of evidentiary value in determining the issue of intent but are not conclusive evidence of fraud. Fraudulent intent is a matter of fact to be determined in the circumstances of each case on the basis of the evidence as a whole: *Meeker Cedar Products v. Edge* (1968), 12 C.B.R. (N.S.) 49 (B.C.C.A.).

154 Once the suspicious circumstances raise a *prime facie* presumption of intent to hinder, defeat or defraud a creditor, the court may find the intent unless the presumption is displaced by corroborative evidence of the bona fides of the debtor in the suspect transaction: *Kingsbridge Grand Ltd. v. Vacca*, [1999] O.J. No. 4914 citing *Koop v. Smith* (1915), 51 S.C.R. 554; *Applecrest Investments Ltd. v. Toronto Masonry (1986) Ltd.*, [1997] O.J. No. 436; *Rinaldo v. Rosenfeld*, [1999] O.J. No. 4665.

155 At the time of the correcting deed, Mr. Fitz-Andrews was being sued by a former landlord, was in litigation with a former partner that could result in an adverse

costs order and was jointly liable on the mortgage to CIBC, notwithstanding the agreement that he would be a guarantor only, and was liable to the Patels to repay the \$130,000. He transferred to his wife his interest in the property, on the day he acquired it, for \$2 and natural love and affection. He continued to live in the house. Judging from his mortgage application to CIBC he had few other assets outside his accounting practice, on which he owed a substantial amount. The presumption of intent has been raised.

156 Mr. Fitz-Andrews argues that the deed from the vendors was supposed to be solely to his wife but his lawyer erred. While they both agreed to purchase the house the mortgage application showed Gina Fitz-Andrews would be the borrower and Mr. Fitz-Andrews would be the guarantor. Gina Fitz-Andrews' evidence confirmed that she alone was to be the purchaser but Mr. Fitz-Andrews was to be the guarantor of both mortgages.

157 My response is that a direction by the purchasers, under the agreement to purchase, to the vendors on closing to convey the property to Gina Fitz-Andrews would qualify equally with a subsequent deed to constitute a conveyance for the purpose of s. 2 of the Fraudulent Conveyances Act.

158 The failure of the land transfer tax affidavit to particularize the consideration or note the mortgages, the credits given in the statement of adjustments not called for in the agreement of purchase and the five month delay in registering the mortgage back to the vendors remain unexplained. Mr. Fitz-Andrews could reasonably have been expected to call the vendors, CIBC or his lawyer to provide evidence of his bona fides. He did not call any of them. I am entitled to draw an adverse inference respecting Mr. Fitz-Andrews bona fides and find the conveyance was made with an intent to delay his creditors.

159 Again, the result is the same. The amending deed is void.

XIII. Claims for Failure to Disclose on the Motion for Mareva Injunction

160 Mr. Fitz-Andrews alleged that the evidence in the affidavits used to obtain the certificate of pending litigation on the house and the ex parte mareva injunction freezing his assets, misstated and omitted material facts. It failed to make full and frank disclosure on the ex parte application: *Chitel v. Rothbart* (1989), 39 O.R. (2d) 513 (C.A.). Accordingly he says he is entitled to claim damages based on the plaintiffs' undertaking in the affidavit of Mr. Patel dated November 29, 1994.

161 Generally, if the plaintiff obtaining an injunction is unsuccessful at trial, an inquiry as to damages will result, unless there are special circumstances respecting compliance with the undertaking. Such special circumstances would exist where the plaintiff can make out an equitable defence to the claim for damages based on the defendant's conduct and the plaintiffs' bona fides. The defendant's conduct might raise an issue of estoppel, a delay amounting to laches, other prejudice to the plaintiff, and whether the defendant comes to court with clean hands. The damages are to be assessed on the same basis as damages for breach of contract including causation, remoteness, foreseeability and mitigation: See *Nelson Burns v. Gratham Industries* (1987), 23 C.P.C. (2d) 279 (Ont. C.A.) and the annotation thereto by Paul Bates.

162 Even if there had not been a trial, innocent non-disclosure or the mere omission of a significant single fact will not necessarily warrant dissolving an injunction. The non-

disclosure or misstatement must be such as was material to the decision and either would have made the decision doubtful or may have affected the outcome of the motion: *Waites v. Alltemp Products Co.* (1987), 19 C.P.C. (2d) 185 (Ont. Dist. Ct.); *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1994), 23 C.P.C. (3d) 72 (Alta. C.A.) affirming 23 C.P.C. (3d) 49; *Pulse Microsystems v. Safesoft Systems Inc.* (1996), 47 C.P.C. (3d) 360 (Man. C.A.); *Girsberger v. Kresz* (1998), 19 C.P.C. (4th) 57 (Ont. Gen. Div.).

163 In this case Mr. Patel did not disclose his involvement in the scheme of withholding taxes dating back to 1988 and clearly suggested that Mr. Fitz-Andrews was party to a scheme to do so since 1989. That is information material to the exercise of a judge's discretion in granting the injunction. It may have affected the outcome.

164 Mr. Fitz-Andrews pointed out numerous other omissions or misstatements which I do not think were material. There were numerous other allegations which were consistent with my findings particularly with respect to the misapplication of the \$130,000 and the misappropriation of Revenue Canada cheques.

165 In this case the defendants filed responding affidavits within five days after being notified of the injunction but did not proceed to a timely cross-examination. The injunction was varied in early 1995 to allow payment of \$10,000 to Mr. Fitz-Andrews and substitution for it of a \$50,000 letter of credit and payment into court of the \$25,283 he held in trust. The proceedings were adjourned pending cross-examinations. Mr. Fitz-Andrews parted company with his lawyers and was ill for some time. However bitterly contested interlocutory proceedings continued.

166 In January 1999, Mr. Fitz-Andrews obtained an order permitting cross-examination of Mr. Patel on his November 29, 1994 affidavit.

167 Mr. Fitz-Andrews brought motions on October 25, 1999 and again on January 18, 2000 to set aside the *mareva* injunction and the certificate of pending litigation. Both were denied on the basis of an imminent trial. The latter was also based on the refusal or failure to move "forthwith".

168 Mr. Fitz-Andrews has failed to provide evidence of his damages. He said in opening that (a) he had trouble borrowing money; and (b) could not maintain a bank account personally but had to do his financing through his wife. In closing he said the injunction and litigation damaged his reputation with banks and obtaining client referrals from them. No particulars were offered in evidence. No cross-examination was based on it.

XIII. Summary

169 I order as follows:

- (a) I order Mr. Fitz-Andrews to repay to the Patels the \$130,000 paid in November - December 1992.
- (b) I dismiss Prodigy's claim for the \$25,500 paid to Royal Bank.
- (c) I order Prodigy to pay to Mr. Fitz-Andrews \$31,512.39 on the accounts rendered to Prodigy.
- (d) I order Mr. Fitz-Andrews to repay to Prodigy the proceeds of the tax refunds

(e) I dismiss Mr. Fitz-Andrews counterclaim for damages.

(f) I declare the conveyance of Mr. Fitz-Andrews' interest in the house to Gina Fitz-Andrews on March 26, 1993 void.

(g) I dismiss the claim against Gina Fitz-Andrews.

(h) Interest is payable on all amounts at the rate of 5% per year from the first day of the month following their receipt or the dates of the accounts.

170 Costs may be addressed in written submissions.

CAMERON J.

QL Update: 20000529

cp/d/qlala